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Editorial

This issue of *Ratio Publica* is dedicated to the philosophy of human rights, especially the relationship between them and human dignity. I cannot deny that this is a subject close to my heart. I have always been fascinated by how successful the concept of human rights has been. They represent a crucial part of our legal practice, politics, and moral debates. Contrasted with this are the doubts that surround their theoretical foundations. It is not just the well-known statements like MacIntyre's about unicorns and witches. Every attempt to theoretically grasp these rights seems to raise many compelling objections. No theorist has ever succeeded in convincing a significant part of the professional community of the correctness of his or her approach. But this is what makes human rights an interesting philosophical challenge. One of the most challenging parts is the link between these rights and human dignity, which also faces strong criticism (either for its vagueness or for its substitutability with other concepts).

At this point, one might argue, for example with Richard Rorty, that we should abandon such efforts to find the theoretical foundations of human rights and invest our time and energy in something else, such as developing and strengthening a human rights culture. Intellectual challenges may be interesting, but the world faces more serious problems. Much as I like Rorty's work, I can't entirely agree with him on this point. It is precisely theoretical reasoning that provides us with a platform for evaluating various political projects, such as developing a human rights culture. Rorty emphasized that we should cultivate ourselves by telling sentimental stories. The problem is that *Mein Kampf* can be as suggestive as the novel *To Kill a Mockingbird*. Clarifying the differences between the two is no longer possible on the basis of constructing and promoting political projects. It is a task for theory. Persuasion is undoubtedly essential, but it must be accompanied by justification. This is why the search for the theoretical foundations of human rights and clarification of their links to human dignity makes good sense and is also of considerable importance.

I am pleased, however, not only that this issue contributes to that debate but also that I am able to offer readers the first issue of our journal, which is entirely in English. It features interesting articles by authors working at academic institutions in Japan, Austria, and Czech Republic. It marks the beginning of a new phase in the functioning of the journal, which is intended to be more international. The first issue each year will be in English from this year onwards, while the second issue will remain reserved for texts written in Czech and Slovak. I believe that this will further contribute to the development of debates and the transmission of knowledge in legal and political philosophy, as well as constitutional theory, and will enrich the international debate with new considerations and arguments.



doc. JUDr. Martin Hapla, Ph.D.
Chairman of Editorial Board

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Treatise

How Should Human Dignity be a Ground for Human Rights? A Preliminary Exploration

Kosuke Kiyama

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Abstract

This paper explores the possible relations between human dignity and human rights and identifies the appropriate account of the relations. There are at least three crucial issues concerning human dignity as a ground for human rights. The first is whether dignity is a useful notion for human rights. Some say dignity is a useless or incoherent notion by itself, while others say dignity cannot justify human rights because it cannot demonstrate why people have the rights equally. The paper rejects both of these. The second issue is about the connection between the two notions. Some say that support for dignity does not entail support for human rights, while others say that the support for human rights does not involve support for human dignity. Through examination, the paper supports the statement that the support for human rights entails the support for human dignity (primarily, the article supports the justification that grounds human rights, at least in part, on dignity). The third issue is that of grounding: How does human dignity ground human rights? Some claim capacities are appropriate for understanding dignity, while others claim that we should add vulnerabilities in understanding the notion when it grounds human rights. The paper offers a dualistic view that accommodates both by treating interests concerning agency and equality as grounds for human rights. Finally, the paper elucidates the advantages of dualism compared to the capacity-based pluralism recently posited by Pablo Gilabert.

Keywords: human dignity, human rights, normative agency, equality, dualism, vulnerabilities, Pablo Gilabert

Introduction¹

While there are disagreements on how to envisage the history and roles of human rights,² in our moral, political, and legal world, it is uncontroversial that the language of the rights has been almost accepted as a *lingua franca* that might be claimed worldwide.³

However, in terms of the notion of human dignity, which is often referred to as where human rights are derived (e.g., Preambles of the ICCPR, the ICESCR, and the Vienna Declaration), the convergence is absent. Some thinkers and practitioners claim that we should not use the term human dignity radically, while others more modestly insist that we should avoid treating human rights as grounded in human dignity.⁴

The purpose of this paper is to conduct a preliminary exploration concerning the relations between human dignity and human rights. The investigation focuses on three questions. The first is the question of usefulness: Is human dignity a useful notion for human rights? The second is one of connection: What is the connection (especially entailments) between human dignity and human rights? The third question is of grounding: How does human dignity ground human rights?

Through the exploration, I claim the following. Human dignity is a useful notion for human rights in the sense that human rights partially depend on human dignity. This dependence is to be understood that interests connected with dignity (including interests associated with equality) ground human rights.

¹ I would like to express my gratitude to those who commented on the presentations based on the paper at the IVR workshop at the Dimitrie Cantemir Christian University of Bucharest (July 2022) and MUNI Legal Theory Workshop at Masaryk University (Online) (November 2022), as well as two anonymous referees. I am especially grateful for Dr. Martin Hapla's invitation to the workshops and subsequent support, concern, and care. I also benefited from Editage proofreading. In addition, this paper is supported by the Murata Science Foundation M22 research grant 015 and JSPS KAKENHI Grant Number JP21K12821.

² For example, while some theorists see human rights dating back to the French Revolution (Lynn Hunt, *Inventing Human Rights: A History*, New York, W. W. Norton, 2007) or, in the extreme, ancient Greek and China (Micheline R. Ishay, *The History of Human Rights: From the Ancient Times to the Globalization Era*, Oakland: University of California Press, 2004), other theorists who insist that the defining role of human rights appeared after World War II (Charles Beitz, *The Idea of Human Rights*, Oxford: Oxford University Press, 2009; Allen Buchanan, *The Heart of Human Rights*, Oxford: Oxford University Press, 2013) or in the 1970s (Samuel Moyn, *The Last Utopia: Human Rights in History*, Cambridge: The Belknap Press of Harvard University Press, 2010). In addition, while some theorists of human rights envisage that human rights 'constitute the most urgent demands of basic global justice' (Pablo Gilabert, *Human Dignity & Human Rights*, Oxford: Oxford University Press, 2018, p. 78), others claim that we should not see them as requirements of 'sufficient protections' but as rather 'egalitarian material equality' (Samuel Moyn, *Not Enough: Human Rights in an Unequal World*, Cambridge: The Belknap Press of Harvard University Press, p. 214, et passim).

³ Of course, some thinkers are still sceptical about the desirability of universalising human rights. Gilbert notes the scepticisms (and responses to them). See Gilabert, *Human Dignity*, Ch. 6.

⁴ In this paper, I use *human dignity* and *dignity* interchangeably. Of course, the former may be more restricted because, in history and current usage, the term *dignity* has accommodated a broader meaning beyond *human* dignity, such as dignity possessed by 'many things, all of them ultimately created by God' in Thomas Aquinas's writings (Michael Rosen, *Dignity: Its History and Meaning*, Cambridge: Harvard University Press, 2012, pp. 16–17) or the dignity of animal and nature still sometimes claimed.

1. Usefulness: Whether dignity is a useful notion for human rights

In this section, I investigate the claims of uselessness in invoking the concept of dignity for human rights⁵ (although the claim of usefulness or uselessness can be categorised as a claim of connection, I separate it from other claims of connection to add clarity to types of claims concerning usefulness.) There are several types of claims on usefulness.

(1-1) Uselessness of dignity by itself

According to those who claim this, human dignity by itself is not a useful concept because of the following:

- (a) Replaceability: human dignity can be replaced with other clearer notions (e.g., autonomy,⁶ agency, and respect⁷) or
- (b) Inconsistency: it is inconsistent that dignity is sovereign and can be taken away (as claimed by Justice Clarence Thomas,⁸ Steven Pinker,⁹ and Andrea Sangiovanni¹⁰).

(1-1-1) On the criticism of replaceability

Concerning claim (a), there are perhaps two responses, which are not contradictory. The first accommodates the gap between dignity and other allegedly more explicit notions. Take the path of James Griffin, one of the most influential theorists who ground human rights on dignity, as an example. He claims that dignity interpreted as normative agency is the ground for human rights (together with practicalities, which means the consideration of human

⁵ I believe there are also claims of uselessness in using the concept of human rights for human dignity. For example, the notion of human rights can be thought of as 'rhetorical nonsense' (Jeremy Bentham). Alternatively, some Marxists have thought it is useless or dangerous to use the language of human rights for justifying or envisaging human dignity (Gilbert, *Human Dignity*, sect. 4.2.2.4), while not only other Marxists but Marx himself condemn dignity for taking 'refuge from history in morality' (Marx's statement from 'history in morality', cited by Rosen, *Dignity*, p. 41). I do not touch on these in the paper.

⁶ For example, Michael Rosen's interpretation of normative agency in Griffin's *On Human Rights*, Oxford: Oxford University Press, 2008. See Rosen, *Dignity*, p. 5, cf. p. 25. However, as I point out, it can be misleading if Griffin's final view on autonomy and dignity is shown in the book. In addition, for Griffin, autonomy constitutes only one part of normative agency, which is his interpretation of dignity relevant to human rights. See *On Human Rights*, pp. 151–152.

⁷ Ruth Macklin famously claims that dignity can be replaced by respect for autonomy or person. 'Dignity is a Useless Concept: It Means No More Than Respect for Persons or Their Autonomy', *British Medical Journal*, Vol. 327 (2003), pp. 1419–1420.

⁸ Adam Etinson explains Thomas' position well. 'Dignity in 'the Streets': A Comment on Gilbert', *Journal of Global Ethics*, Vol. 16, No. 3, pp. 288–293, at p. 289.

⁹ Steven Pinker shows this as one of the sources of 'stupidity' of dignity. 'The Stupidity of Dignity', *The New Republic*, 28. May 2008.

¹⁰ Sangiovanni's case: If you are tortured or live in misery, you are said to lose dignity. However, this means that a person in a miserable condition loses dignity because they lose something required to be with dignity. Thus, dignity is not possessed as sovereign because it can be taken away. However, people who use the term dignity believe that dignity is sovereign and dignity is possessed even in miserable conditions. So, there is inconsistency. Andrea Sangiovanni, *Humanity without Dignity: Moral Equality, Respect, and Human Rights*, Cambridge: Harvard University Press, 2017, pp. 24–26.

and social nature in justifying the rights). However, Griffin himself admits that dignity as normative agency is only plausible in the context of human rights and that ‘there are several acceptable uses of “dignity” not relevant to human rights.’¹¹ Thus, he acknowledges the gap between dignity in general, and normative agency as its more specific form, arguing that we should treat the latter as giving a determinate meaning to dignity relevant to human rights.¹²

The second path is related to this: i.e., accepting the replaceability of dignity in some context (e.g., the context of human rights) and other clearer notions. If we take this path, as Griffin does, the clarity of the meaning of dignity should be given according to the context. Nevertheless, critics might say: If the content of dignity is ‘vague’ and the term ‘can be eliminated without any loss of content’¹³, then there is no need to use the term. However, is there really no need? We must acknowledge that even if the notion of dignity in some contexts (such as that of human rights) can be replaced with other notions (such as normative agency), the notion of dignity has already been embedded in our language practice, such as that of human rights. Then, there is a pro tanto reason to continue to use the notion if we should respect people’s usage when they find significant meanings in it.¹⁴ The fact that dignity needs interpretation implies neither that it is a useless concept nor that we should not use the term.¹⁵

If these two paths exist, there is no reason to surrender to the criticism of replaceability.

(1-1-2) On the criticism of inconsistency

Concerning claim (b), it should be emphasised that we can understand human dignity coherently by accommodating ‘dual meanings’ of the term; Dignity is ‘inalienable’ and at

¹¹ Griffin, *On Human Rights*, p. 151.

¹² To put it from the other side, dignity relevant to human rights cannot capture the whole meaning of dignity. For example, a Japanese anthropologist Taichi Uchio emphasises subjective elements of dignity in Fukushima prefecture after the tsunami and nuclear power plant explosion, broader than that articulated in human rights documents. *Dignity after 3.11: An Ethnography of Post-Tsunami Reconstruction in Japan (Fukko to Songen: Shinsaigo wo Ikiru Minami Sanriku Cho no Kiseki)*, Tokyo: The University of Tokyo Press, 2018, p. 89. This includes the dignity of the dead, which is not well explicated in human rights documents or related documents (*Ibid.*, pp. 177ff, 229ff). Rosen also discusses the dignity of the dead. *Dignity*, Ch. 3.

¹³ Macklin, ‘Dignity is a Useless Concept’, p. 1420.

¹⁴ See further Etinson, ‘Dignity in ‘the Streets’’, p. 292. When Macklin presents ‘the diagnosis’ that dignity is a useless concept, she frankly admits that she does not know the reason or ‘aetiology’ of why people appeal to the language of dignity. ‘Dignity is a Useless Concept’, p. 1420. Nevertheless, this aetiology is vital because people use the term developed in our language practice while finding the moral weight of the term.

¹⁵ On this claim, some might claim that people can acquire more (for example, effectiveness in communication) when they use an unambiguous word, such as agency, instead of dignity. However, I think it depends on consequentialist calculus. We can compare the benefits of replacing dignity with a more apparent notion and the costs of losing the power that the former notion has historically possessed. Even though I cannot fully elaborate on this point, it seems that there are pro tanto reasons to continue to cling to the use of dignity: (1) We have already incorporated the notion into our important language practice at the level that it is hard to comport without the notion; (2) As a result of this fact, we lose the motivational power if we stop using the word dignity. I am grateful to Martin Hapla for his question on this point.

the same time ‘precarious and stands in need of social protection’ (Pogge 2014a; 2014b).¹⁶ This dual meaning is to be understood as the former inalienability meaning requiring the realisation of the latter protection-call meaning.¹⁷ This dual meaning is not unique to human dignity, and the structure is also possessed by notions like the Invincible Armada, as I have already pointed out elsewhere.¹⁸ Perhaps people in the Spanish empire assumed that the invincibility of the Armada should be realised, while it was not always invincible. Like the Invincible Armada, inalienable dignity should be realised while it is not always achieved.¹⁹ Then, we can understand the notion of dignity coherently.

In this way, the claim of the uselessness of dignity by itself does not stand. Hereafter, I move to the uselessness of dignity in justifying human rights.

(1-2) Uselessness of dignity in justifying human rights

Critics often present this claim while holding the inability to explain equal possession of human rights as its rationale.²⁰ According to this claim, human dignity depends on human capacities. However, these capacities vary among individuals. If this is so, it is natural to reflect the variation, leading to the conclusion that human dignity is possessed more by some people and less by others. As a corollary, human dignity cannot explain the equal possession of human rights.²¹

To this claim, theorists of human rights who depend on the notion of human dignity, such as James Griffin, have responded while acknowledging the variations in relevant capacities

¹⁶ Thomas Pogge, ‘Dignity and Global Justice’, in Marcus Düwell, Jens Braarvig, Roger Brownsword, and Dietmar Mieth (eds.), *The Cambridge Handbook of Human Dignity*, Cambridge: Cambridge University Press, 2014, pp. 477–483. Thomas Pogge, ‘Explicating Dignity toward a Minimal Conception of Global Justice’, *China Human Rights*.CN, Oct 30. 2014.

¹⁷ Pablo Gilabert offers the distinction of ‘status dignity’ and ‘condition dignity’, which can be understood as an interpretation of the dual meaning. See *Human Dignity & Human Rights*. However, his framework for explicating dignity is more controversial than the one necessary to respond to the criticism of inconsistency, so I avoid deploying Gilabert’s notions.

¹⁸ Kosuke Kiyama, ‘Human Rights Based on Human Dignity: Defence and Elaboration through an Examination of Andrea Sangiovanni’s Critique’, *Journal of Global Studies*, Vol. 8 (2019), pp. 1–24.

¹⁹ Ibid., p. 5.

²⁰ Sangiovanni claims that there are three main traditions of human dignity, i.e., the Aristocratic, the Thomistic, and the Kantian traditions, and they cannot explain the equal possession of human dignity among individuals. According to him, there are ‘variations’ for individuals to carry themselves in dignified ways (the Aristocratic tradition), to have rational or volitional capacities similar to God’s image (the Thomistic tradition), and to choose rationally (the Kantian tradition). See his *Humanity without Dignity*. Allen Buchanan, especially after his book *The Heart of Human Rights*, argues in a similar vein. According to him, if we interpret dignity as a notion from which to ascribe human rights to each individual, it leads us to trouble: How can we explain that ‘those who have that characteristic [that confers a moral standing] to a higher degree do not have a higher moral status?’ (p. 136, cf. p. 74). This trouble is caused because there are variations in interests among individuals. The trouble, together with other reasons, leads Buchanan to propose another interpretation of dignity that depends on the function of the international human rights system.

²¹ This subsection is a developed version of arguments shown in my previous paper. See Kiyama, ‘Human Rights’, pp. 7-8.

among individuals. Griffin claims that we should ignore the variations in the capacities beyond some set *threshold*.²²

To this reply, critics such as Allen Buchanan (2013: pp. 135–137) and Andrea Sangiovanni (2017: pp. 105–106) are not satisfied because they think that the threshold cannot help being arbitrary and there is no reasonable justification for it. Sangiovanni maintains that ‘marking a particular threshold seems arbitrary’ and there is no plausible answer to ‘what might justify putting the threshold *here* rather than *there*?’ (2017: pp. 105–106)

However, I think we can offer the threshold in a non-arbitrary way. This should be understood as three responses to the variation problem: (a) the offer of justification of the threshold and the treatment of variations, (b) *below*, and (c) *above* the threshold.

(1-2-a) Concerning the justification of the threshold

While acknowledging that requirements of capacities are sometimes vague, the best defenders of dignity have tried to demonstrate the determinate threshold. As one of them, Griffin offers two strategies to be combinedly utilised: interpretation of dignity and consideration of practicalities.

The first is to narrow down the interpretation of dignity to restrict its scope to human rights. In Griffin’s case, interests related to normative agency are picked up,²³ and in the dualism that I want to support, interests related to normative agency and equality are highlighted.

Second, to interpret these interests in the relevant social circumstances, practicalities should be consulted. Practicalities are ‘empirical information about ... human nature and human societies’ that contributes ‘to fix[ing] boundaries for the right’ in question.²⁴ For example, interests related to knowledge might take the form of a right to elementary school education in Japan or Romania. However, in some societies, including familial societies in some areas in Brazil, they might take the form of a right to get information from families. In each case, the threshold can be given.²⁵

Of course, the content of the relevant information in practicalities might be disputed, but it does not mean that the justification of the threshold cannot be given. So, then, how can we explain the variations *below* and *above* the threshold?

²² Griffin, *On Human Rights*, p. 44; ‘Human Rights: Questions of Aim and Approach’, *Ethics*, Vol. 120 No. 4 (July 2010), pp. 741–760, at p. 748; ‘Human Rights and the Autonomy of International Law’, Samantha Besson & John Tasioulas (eds.), *The Philosophy of International Law*, Oxford: Oxford University Press, pp. 339–355, at p. 348.

²³ For example, the notion of normative agency has been criticised for its obscurity: Whether it means an ‘austere’ or ‘rich’ interpretation? See John Tasioulas, ‘Taking Rights out of Human Rights’, *Ethics*, Vol. 120, No. 4 (2010), pp. 647–678, at p. 660; Allen Buchanan ‘The Egalitarianism of Human Rights’, Roger Crisp (ed.), *Griffin on Human Rights*, Oxford: Oxford University Press, ([2010] 2014), pp. 77–113. p. 95) For Griffin, the answer is ‘[h]uman rights...are rights to what allows one merely to act as a normative agent’. ‘Human Rights: Questions’, p. 747. That is, he narrows down the interpretation of normative agency (the component of the concept of dignity).

²⁴ Griffin, *On Human Rights*, pp. 38, 73.

²⁵ Kosuke Kiyama, *The Philosophy of Human Rights: The Search for Underlying Values in the Modern World (Jinken no Tetsugaku: Kiteitekikachi no Tankyu to Gendaiseikai)*, Tokyo: The University of Tokyo Press, 2022, Ch. 3.

(1-2-b) Concerning the variations *below* the threshold

The defenders of dignity (interpreted as some capacities) can agree with critics that the variations of capacities *below* the threshold lead to the unequal possession of human rights. For example, assume that some capacities related to human dignity, in Griffin's case, the ones relevant to normative agency, are acquired and lost gradually. For instance, because of the lack of some prudential/rational reasoning capacities, a ten-year-old girl does not have the right to vote. However, a 33-year-old person is usually considered to deserve this right.²⁶ Alternatively, if these capacities are gradually lost because of severe dementia, there is a *prima facie* reason to say that a person with dementia loses the right, at least morally, if not legally.²⁷

(1-2-c) Concerning the variations *above* the threshold

In contrast to the variations *below* the threshold, the defenders of dignity should not allow the variation *above* the threshold to enter the consideration of the possession of human rights. If they do, we cannot avoid the conclusion that some possess the rights more and others possess less, as critics have mentioned. Then, how is it possible to avoid the conclusion?

There are at least two possibilities. The first is to insert egalitarianism in the human rights practice into the consideration of the variation.²⁸ The second is to interpret the notion of dignity as containing the protection of interests or values related to equality.²⁹ For example, psychological interests like *the integral sense of self* (as I interpret it) can be interests of this

²⁶ This is the path taken by Griffin in his *On Human Rights*, Ch. 4.

²⁷ Of course, this can be criticised as not embracing the rights of those with mental disabilities. I think the appropriate response to the criticism is to bite the bullet and point out that the power of the criticism depends on the types of justification that are offered for the threshold. For example, if we follow the view that autonomy with reasoning power is the basis for the right to vote as Griffin does, when a person's ability to choose the candidate in an election with reasoning is lost, the right to vote loses its prescriptive meaning because of the principle of *ought implies can*, while there must be some mechanisms to reflect their other interests. See *On Human Rights*, Ch. 14. However, if we take the dualism that envisages interests related to equality as also grounding for human rights, we can accommodate more people as human rights holders. Besides, if there is a mechanism for engaging in politics to reflect equality even when they lose the mental capacity to choose a candidate, there can be a right to this engagement.

²⁸ This is what Allen Buchanan had once alluded to (in his 'The Egalitarianism of Human Rights' and 'Human Rights') and chose when he elaborated on an international legal conception of human rights (see *The Heart of Human Rights*). James Griffin offers another possible reason for the insertion; that is, the insertion of the fact that '[e]qual respect for persons figures in ethics at a particularly deep level', which 'gestures some form ... of equal moral weight for all persons'. See Griffin 'Human Rights', p. 755; See also Kiyama 'Human Rights Based on Human Dignity', p. 7.

²⁹ I understand that Katherine Eddy has offered this interpretation of dignity. 'On Revaluing the Currency of Human Rights', *Politics, Philosophy & Economics*, Vol. 6, Issue 3 (2007), pp. 307–328. James Nickel who thinks that four claims—'a secure claim to have a life', 'a secure claim to lead one's life', 'a secure claim against severely cruel or degrading treatment', and 'a secure claim against severely unfair treatment'—are the main grounds for human rights also interprets human dignity as requiring protection from 'treatment that is severely degrading or unfair'. James W. Nickel, *Making Sense of Human Rights (Second Edition)*, Oxford: Blackwell Publishing, 2007, pp. 62, 66; See also his 'Griffin on Human Rights to Liberty', in Roger Crisp (ed.), *Griffin on Human Rights*, Oxford: Oxford University Press, 2014, pp. 185–205.

kind.³⁰ Even though some theorists, including Allen Buchanan³¹, think that interests cannot justify equality,³² I think the second possibility can and perhaps should be pursued. This is because the second interpretation can guide us on how to interpret the practice by offering the standards of desirable interpretation when the practice allows plural interpretations. I will touch on this point later. Nevertheless, these possibilities suggest that we can justify equal possession of human rights by individuals while appealing to human dignity for justification.

From the above section, we can conclude that dignity is a useful notion by itself and for human rights.

2. Connection: The connection between dignity and human rights

Now, let us move on to the two main types of scepticism concerning the entailments of the two notions as criticisms of the connection.

(2-1) Support for dignity does not entail support for human rights.

Investigations in Section 1 cover some types of the claim,³³ so I would like to focus on the particular types here.

(2-1-a) Dignity should be achieved without using the term human rights.

The supporters of claim (2-1-a) say that in a world where the language of human rights is often abused for the interests of the powerful states, the dignity of individuals can be achieved better without the language of human rights.³⁴

However, this claim seems to stand only when the statement that *the world without human rights protects individual interests (connected with dignity) better than the world with human rights* is correct. Obviously, this is a claim that is hard to argue for and against in social

³⁰ As I understand, the notion of 'opacity respect' by Ian Carter and developed by Sangiovanni can be seen as a candidate for demonstrating the importance of interests related to equality, even though Sangiovanni would like to show the notion not by the inquiry into psychological interests but by interpreting the typical cases of degradation or misery, such as torture and being sent to slave camps. See *Humanity without Dignity*.

³¹ See Buchanan, 'Human Rights' and *The Heart of Human Rights*.

³² This is part of the reason Buchanan, in his *The Heart of Human Rights*, rejects 'the mirroring view' that sees interests as a ground for human rights, and my argument can be interpreted as saving the view to ground human rights (partially but notably) on interests. See Section 3 of this paper.

³³ I dealt with the criticisms; (2-1-b) dignity cannot justify equal possession of human rights; and (2-1-c) dignity grounds things that are not captured by the language of human rights, hence dignity is too broad for human rights. Looking back, (2-1-b) can be answered by pointing out that we can insert egalitarianism into dignity and explain equal possession of human rights, and (2-1-c) can be answered by narrowing down the interpretation of dignity in the context of human rights and introducing considerations of practicalities.

³⁴ For example, the US supported authoritarian regimes even when it supported 'human rights diplomacy' under Carter's administration. See Noam Chomsky, *The Umbrella of U.S. Power: The Universal Declaration of Human Rights and the Contradictions of U.S. Policy*, 1999, Seven Stories Press.

scientific ways.³⁵ Nevertheless, the claim should be doubted because the language of human rights can be invoked not only by the powerful but also by various agents. For example, the hegemonic double-standard use of human rights by the powerful can be regulated by agents such as NGOs, international organisations, or citizens.³⁶

Then, contrary to claim (2-1), the supporter of dignity should (at least usually) endorse human rights.

However, there is an opposite claim.

(2-2) Support for human rights does not entail support for human dignity.

Claim (2-2) is the position taken by theorists³⁷ such as Charles Beitz. He claims that dignity was just accidentally introduced in human rights documents³⁸ and proposes a type of political conception of human rights that does not depend on the notion of human dignity but takes the human rights practice as a theoretical premise.³⁹

To evaluate this claim, what is needed includes the following:

- (i) The elaboration of the meaning of invoking considerations that are taken by drafters in human rights theories;⁴⁰
- (ii) historical scrutiny of the drafting process;⁴¹ and
- (iii) the comparison of theoretical advantages and disadvantages of Beitz's version of political conception and conceptions that rely on dignity.

I cannot engage in (i) or (ii) here. Yet concerning (iii), the following can be said: If we need to justify human rights practice that has been criticised from the formation period of the

³⁵ This is because the comparison involved needs to incorporate hypothetical speculation in the world (where human rights discourse does not exist), hugely different from our real world.

³⁶ See David Luban 'Human Rights Pragmatism and Human Dignity', in Rowan Cruft, S. Matthew Liao, Massimo Renzo (eds.), *Philosophical Foundations of Human Rights*, Oxford: Oxford University Press, 2015, pp. 263–78; Gilibert, *Human Dignity & Human Rights*, p. 96

³⁷ Sangiovanni's claim that dignity is useless in justifying human rights also falls into this category. See *Humanity without Dignity*. However, as Kiyama argues, the ideas of *the integral sense of self* and the opacity respect based on this sense that Sangiovanni supports are functional equivalents to human dignity, not alternatives to it. See 'Human Rights Based on Human Dignity'.

³⁸ Charles Beitz, 'Human Dignity in the Theory of Human Rights: Nothing but a Phrase?' *Philosophy & Public Affairs*, Vol. 41, No. 3 (2013), pp. 259–290.

³⁹ Beitz, *The Idea of Human Rights*.

⁴⁰ For example, whether this type of originalism should be supported or not.

⁴¹ For example, as Morsink and Glendon pioneered. See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, Philadelphia: University of Pennsylvania Press, 1999; Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York: Random House, 2002.

Universal Declaration of Human Rights (UDHR),⁴² we cannot take the fact that the practice has been formed as a theoretical premise.⁴³

If this is so, we must have a moral locus from which to evaluate the formation, change, and elaboration of the human rights practice. Human dignity is not the only notion that can play this role.⁴⁴ However, in our world, to some degree, the notion of dignity has guided moral reasonings that formulate the human rights practice. For example, when the drafters wrote the UDHR, they incorporated the notion of dignity in human rights documents to demonstrate some remnant of their moral reasoning,⁴⁵ even though they dared not to go deeper into 'speculative' grounding of the notion thinking that the interpretations of dignity might differ between advocates of 'liberal-individualistic', 'communistic', and 'personalistic' types of society.⁴⁶

Alternatively, the reason why the language of human rights can guide citizens' behaviour even when there is no legal remedy and the 'enforcement deficit' exists is that citizens are outraged and put pressure on the violators, typically but not exclusively states, by mobilising shame.⁴⁷ People are not moved by the human rights practice itself, which contains deficits in its operation, but by values that should guide the practice and behaviours therein. If human dignity has played the role, then there is a pro tanto reason to see the supremacy of dignity over other potential moral notions. Human dignity is a notion, perhaps the most reliable one, that can perform this role of evaluating and forming practice.

3. Grounding: How human dignity grounds human rights

Thus far, I have argued for the claim that human dignity grounds human rights. Then, how does it ground them?

⁴² Such criticisms at least include (1) those based on the respect for cultural diversity (See, for example, American Anthropological Association (The Executive Board), 'Statement on Human Rights', *American Anthropologist: New Series*, Volume 49, No. 4 (1947), Part 1, pp. 539–543), (2) the views that the support for the creation of human rights practice was just a politically strategic behaviour, which should not be taken as a premise. The latter is because there was no such agreement to allow some functions of the practice, such as some economic or political sanction based on human rights. See Chandran Kukathas, 'The Mirage of Global Justice', *Social Philosophy and Policy*, Volume 23, Issue 1 (2006), pp. 1–28, at p. 23; David Reidy, 'Political Authority and Human Rights', in Rex Martin and David A. Reidy (eds.), *Rawls's Law of Peoples: A Realistic Utopia?* Oxford: Blackwell Publishing, pp. 169–188, at p. 172; David Miller, *National Responsibility and Global Justice*, Oxford: Oxford University Press, 2006, p. 171; David Miller, 'Personhood versus Human Needs as Grounds for Human Rights', in Roger Crisp (ed.), *Griffin on Human Rights*, Oxford: Oxford University Press, pp. 152–169.

⁴³ Kiyama, *The Philosophy of Human Rights*, sect. 5.3.2.

⁴⁴ *Ibid.*, Ch. 4.

⁴⁵ Matthew S. Liao and Adam Etinson, 'Political and Naturalistic Conceptions of Human Rights: A False Polemic?' *Journal of Moral Philosophy*, Vol. 9, No. 3 (2012), pp. 327–52, at p. 335.

⁴⁶ See Jacques Maritain, *Man and the State (Revised Edition)*, The Catholic University of America Press, p. 107. See also Jacques Maritain, 'Introduction', in UNESCO (ed.), *Human Rights: Comments and Interpretations*, New York: Columbia University Press, 1949, pp. 9–17, at p. 9; Glendon, *A World Made New*, pp. 77–78; Griffin, *On Human Rights*, pp. 22–25.

⁴⁷ Luban, 'Human Rights Pragmatism', pp. 267–269.

Even though the role of dignity, that is, the theoretical position of human dignity in grounding human rights, is an important issue,⁴⁸ I would like to concentrate on the matter of the interpretation: How should we interpret human dignity to ground human rights?

There are several options. The first is the restriction of interests that ground human rights. This includes monism, which treats interests related only to normative agency as relevant to human dignity in the context of human rights (Griffin 2008), and dualism which claims that interests that are related to agency and equality should ground human rights as the requirement of dignity (Eddy 2007⁴⁹). The second option is to accommodate plural interests relating to dignity for grounding human rights. Recently Pablo Gilabert claimed this.

Here, I would like to demonstrate the supremacy of the first way for restricting interests, particularly dualism, to Gilabert's proposal.

In his recent book *Human Dignity & Human Rights*, Gilabert proposes grounding dignity on the *valuable capacities* of human beings, from which human rights are 'derived'.⁵⁰ He says that 'the features making up the basis of dignity must be general, valuable, and important'.⁵¹ As these features, he lists up some capacities, for example, a capacity for 'prudential reasoning'.⁵²

However, there has already been significant criticism. Adam Etinson pointed out that in Gilabert's framework, considerations of vulnerabilities (such as our feeling pain) are just treated as 'instrumental', because the vulnerabilities are considered only when they matter to other capacities (Etinson 2020: p. 290). According to Etinson, however, these vulnerabilities are shared universally (more than capacities) and should be taken intrinsically. Therefore, they should be the ground for human rights.

I agree with Etinson's claim that not only capacities but also vulnerabilities should ground human rights. However, a question must be answered: What kind of features should be included in the ground for human rights to express vulnerabilities? Human beings are so vulnerable to many things, including objects clearly unsuitable for human rights. For instance, the loss of love or the experience of the death of a loved family member might lead a person to depression, but no one thinks that there are human rights to be exempt from them. Then, we must identify vulnerabilities that are suitable for being the ground for human rights.

I propose that we consider the interests of individuals related to equality as identifying these vulnerabilities. For example, we can think that when social cruelty exists, where human rights are violated, the *integral sense of self* is in danger.⁵³ This sense requires the control by

⁴⁸ Theorists have combined some interpretations of (some parts of) dignity with other considerations. For Griffin, as I touched on, a part of dignity combined with practicalities is thought to ground human rights. For John Tasioulas, (some part of) dignity and the burden of (interests related to) dignity on others are considered. See his 'Taking Rights out of Human Rights'.

⁴⁹ Buchanan once suggested this possibility (see 'The Egalitarianism of Human Rights'), even though, afterwards he turned his back on this possibility completely (see his *The Heart of Human Rights*).

⁵⁰ Gilabert, *Human Dignity & Human Rights*, p. 125.

⁵¹ *Ibid.*

⁵² *Ibid.*, p. 137; Gilabert, 'Defending Human Dignity and Human Rights', *Journal of Global Ethics*, Vol. 16, No. 3 (2020), pp. 326–342, at p. 326.

⁵³ I am inspired by Andrea Sangiovanni's argument in his *Humanity without Dignity*.

an agent of the relations with others (regarding what they present to others). And this sense cannot exist when they are treated as inferior. Thus, interests connected with equality (i.e., relations that do not make someone inferior) should ground human rights.

Then, from Gilabert's position, what difference does this way of thinking make? Hereafter, I explain the difference, sometimes taking the human right to democracy as an example. By doing so, I demonstrate the advantages of incorporating interests connected with equality as the ground for human rights.

4. Advantages of dualism against Gilabert's capacity-based pluralism

I argue that there are four advantages of dualism compared to Gilabert's proposal.

The first advantage is that there is no need to worry about creating second-class citizens. I explain this by taking the human right to democracy as an example. Let us assume that creating second-class citizens violates the human right to democracy without going into the precise meaning of this essentially contested concept.

For Gilabert, the wrongness of creating second-class citizens lies in not respecting agents' 'capacities for moral and prudential reasoning'.⁵⁴ By contrast, for dualism (i.e., the supporter of equality as a ground for human rights), the wrongness of creating second-class citizens lies in denying equality in a way that infringes on the interests of maintaining *the integral sense of self*. Here, the difference highlights the already-mentioned contrast between the concentration on capacities and the accommodation of interests concerning equality-related vulnerabilities.

In Gilabert's view, there is a risk that if people are judged not to exercise the capacity for *prudential reasoning*, these people might be considered as being inferior. If this is the case, there might be a solid reason for denying equal standings of citizens, as epistocrats such as Jason Brennan claim. Brennan claims that because in our non-ideal world, many citizens lack 'competence' as decision-makers, we should not support democracy. For example, he maintains that many people cannot 'be aware of' and 'understand' the relevant facts, and they cannot 'reason about those facts in an appropriate way'⁵⁵. Hence, he proposes to adopt epistocracy, where political power is distributed more to the 'competent' citizens. In short, if people are judged not to have the capacity for *prudential reasoning*, they cannot be given equal political rights. Gilabert's view accommodates this danger of creating second-class citizens as long as he clings to capacities for *prudential reasoning* to justify political rights. However, if the unequal standings are a danger to interests related to *the integral sense of self*, the creation of second-class citizens is to be regulated. This is an advantage if we think democracy should be supported, as the human rights practice endorses.

The second advantage of dualism is that it can contribute to identify rankings among interests that ground human rights. For example, we can think that maintaining an integral sense of

⁵⁴ Gilabert, *Human Dignity & Human Rights*, p. 137. Gilabert says that 'people have rights to political participation because they have some of these valuable capacities. Therefore, even if by violating their political rights a government could give people happier lives, it would normally be wrong to do so' (*Ibid.*, p. 137).

⁵⁵ Brennan, Jason, *Against Democracy: With a New Preface by the Author*, Princeton: Princeton University Press, 2017, p. 162.

self is a condition for having flourishing lives. If you are treated inferior, it is usually hard for you to have a life with integrity. For example, as Sangiovanni claims, if you are in fear of oppression, your 'capacity to flourish' and your access to the goods in your life diminish.⁵⁶ Then we can say that equality (founded on the importance of *the integral sense of self*) is 'a constituent ingredient and structural element of a flourishing life.'⁵⁷ Hence for dualism, when interests connected with equality and those connected with normative agency collide, the former has a pro tanto reason to be prioritised. This kind of ranking is hard to achieve for pluralists, including Gilibert, who lists up many capacities horizontally⁵⁸.

Third, as we saw, accommodating equality based on *the integral sense of self* can capture vulnerabilities that significantly matter in human rights violations. This sense is infringed in typical human rights violations, such as rape, torture, and being sent to slave camps.⁵⁹ Hence, dualism can well capture interests that are widely shared.

Lastly, dualism can capture equality in the language of interests. To illustrate, let us see the recent claim by Allen Buchanan. He says that in the human rights practice, the *status egalitarian function* exists. However, he holds a view that this function cannot be captured by the interests of human beings (Buchanan 2013: p. 275), leading him to reject the approach that grounds human rights to human dignity. However, because dualism well captures

⁵⁶ Sangiovanni, *Humanity without Dignity*, p. 241.

⁵⁷ *Ibid.*, p. 82.

⁵⁸ A referee kindly suggested that I should elaborate more on the relation between my interpretations of normative agency and equality in order to elucidate their relations to dignity. I once inquired about this point in my book written in Japanese (Kiyama, *The Philosophy of Human Rights*, Ch. 6), so I would just like to explain the basic arguments shown in the book regarding how we should understand the two notions in the context of human rights.

First, the interpretation of normative agency should not be parochial. Griffin's idea of normative agency possesses parochial and non-parochial aspects. On the one hand, Griffin, in his interpretation of autonomy, says that we should be able to choose our lives. If a traditional community impedes this choice, it constitutes a violation of autonomy and liberty (Griffin, *On Human Rights*, pp. 161, 163). David Miller and Rainer Forst criticise this for being 'parochial' because one can lead a flourishing or decent life without always choosing their lives, such as a person who finds goodness in following his higher calling (David Miller 'Personhood versus Human Needs as Grounds for Human Rights', in Roger Crisp (ed.), *Griffin on Human Rights*, Oxford: Oxford University Press, 2014, pp. 158; Rainer Forst 'The Justification of Human Rights and the Basic Right to Justification: A Reflective approach', in Claudio Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, Springer, 2012, p. 90). On the other hand, Griffin also shows the understanding of a 'worthwhile life', which does not depend on choosing but on identifying the good (Griffin, *On Human Rights*, p. 46). I claim our interpretation of normative agency should be in the second way of Griffin's conception of normative agency if it is the grounding value for human rights. This is because we cannot vindicate that a life with choice is the only worthwhile one

Second, for all sorts of worthwhile lives, the integral sense of self, on which equality relevant to human rights is grounded, should be assumed as a necessary condition. As Sangiovanni suggests, this is because our life can be worthwhile only when the elements of life are integrated, that is, without being fragmented by the attack of others.

Therefore, as grounding values for human rights, equality is necessary for normative agency and should be treated rigorously. This relation should be understood as built in the notion of dignity in the context of human rights because these values are derived as the interpretations of values underlying human rights practice.

⁵⁹ Sangiovanni, *Humanity without Dignity*.

interests related to *the integral sense of self* as interests that are infringed upon when a person is treated as inferior, we can make sense of the egalitarian function of the human rights practice while using the language of interests to ground human rights.

5. Conclusion

Through the paper, I have claimed the following. First, human dignity is a useful notion for human rights, in that human rights partially depend on human dignity. Second, this dependence is to be understood that interests related to dignity (including interests connected with equality) ground human rights.

This suggests that we should still use the notion of human dignity to ground human rights.



Treatise

Human Dignity between Competing Moral Traditions

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Abstract

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

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

Introduction¹

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

The renowned American historian Samuel Moyn devoted one of his books to figuring out the origins of these specific features of post-war legal documents on human rights.⁵ In his view, the centrality of human dignity as well as the post-war human rights discourse as such owed to the change of attitude of the Catholic Church towards human rights⁶ as well as to *personalism*, a distinct tradition of thought which became influential in post-WWII philosophy. Personalists opposed both the collectivism of communists and the individualism of liberals, seeking to secure both the dignity of the human person and her bonds with the broader community. Having ties to the then-dominant Christian Democracy, the German constitutional lawyers who drafted the constitutional texts of the *Bundesländer* and the *Basic Law* itself reasoned in a way similar to prominent personalist philosophers (such as Jacques Maritain).

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

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

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

⁴ KOMMERS. *The Constitutional Jurisprudence*, p. 305.

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

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

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

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

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

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

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

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

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

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

1.1 Traditions and rival versions of moral inquiry

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

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

⁹ MACINTYRE, Alasdair. *After Virtue*. Notre Dame: Notre Dame UP, 2007, p. 222.

¹⁰ MACINTYRE. *After Virtue*, p. 222.

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

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

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

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

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

¹³ MACINTYRE. *Whose Justice? Which Rationality?*, p. 12.

¹⁴ MACINTYRE. *Whose Justice? Which Rationality?*, p. 351.

¹⁵ PORTER. *Tradition in the recent work*, p. 48.

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

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

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

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

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

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

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

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

1.2 The Ancients, the Moderns, and human dignity

In the following, I will thus confront the Aristotelian-Thomistic and liberal traditions, that is, ‘two *most* opposed political philosophies: namely the politics of the Moderns and the politics of the Ancients.’²² In the 20th century political philosophy, the opposition between the *Ancients* and the *Moderns* which corresponds with the distinction between Aristotelian-Thomistic and liberal traditions²³ has been most closely associated with Leo Strauss and his disciples, who see classical political thought (i.e. that of ancient Greeks) an alternative to modern liberal rationalism. Classical political thought has been criticised for its anti-democratic character.²⁴ Because virtue is distributed unequally among people, Ancients believe that the ideal political regime cannot be egalitarian. Offices should be therefore filled according to people’s virtues. In contrast, Moderns claim that society needs to be founded on then ideal of moral and political equality. Moral equality stems from the natural equality of human beings which follows from their equal value. Political equality then stands for equal democratic participation, in the sense that all citizens should have the right to actively partake in public affairs. The contrast between the Ancients and the Moderns can be seen as unqualified: the thought of Ancients then proves irrelevant for the present era, grounded as it is in an egalitarian understanding of the dignity of man.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁰ WALDRON, Jeremy. *Dignity, Rank, and Rights*. Oxford: Oxford UP, 2012.

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

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

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

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

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

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

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

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

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

2.1 Sources of the liberal conception of human dignity

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

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

³⁵ ROSEN. *Dignity Past and Present*, p. 82.

³⁶ SIMMONS. *Human Rights, Natural Rights, and Human Dignity*, p. 141.

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

values. While moral values concern exclusively human suffering, existential values have to do with the recognition of the identity of each human being as well as of the species. Kateb sees human dignity as belonging entirely among existential values. When the identity of a human person or species is at stake, their existence is at stake³⁸ – that is, their status and standing in nature. Kateb argues that this fact cannot be grasped in terms of morality because it encompasses more than just suffering. We can envision a hypothetical society that has erased all suffering but has no place for human liberty (à la Huxley's *Brave New World*). This is why in Kateb's view, human rights cannot be grounded in morality but require human dignity. Ultimately, Kateb founds the uniqueness of human beings and the human species in their capacities for free agency and for moral agency,³⁹ i.e., criteria intimately connected to the liberal tradition.

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

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

³⁸ KATEB. *Human Dignity*, p. 10.

³⁹ KATEB. *Human Dignity*, pp. 134–135.

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

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

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

Kant's conception has influenced the interpretation of human dignity in the jurisprudence of the Federal Constitutional Court which has applied the so-called object theory in several of its landmark decisions. According to this theory, disrespect to human dignity occurs if the individual is treated as a mere instrument of the state. The object formula has been derived from the second formulation of Kant's categorical imperative (the prohibition of instrumentalisation of persons) which states that man must never be treated merely as a means, but always at the same time as an end.⁴³ Michael Rosen has argued that it is not quite clear what it means to treat some people merely as means, as opposed to treating others at the same time as ends.⁴⁴ Does the prohibition on treating others merely as means require that we must take into consideration their interests? Does the imperative to treat others as ends imply respect for these others? If it does, what follows? Rosen thinks that Kant's conception of human nature provides no unambiguous norms for practical decision-making.⁴⁵ Many renowned experts on Kant's work⁴⁶ however concur that one practical implication of Kant's insistence on the capacity for rational volition and rational action is the principle of consent. It is others' consent which constitutes the criterion of whether

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

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

⁴⁴ ROSEN. *Dignity Past and Present*, pp. 80–90.

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

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

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

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

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

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

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

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

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

Despite critical voices from within the Aristotelian-Thomistic tradition,⁵¹ the liberal interpretation of human dignity has been gaining ever greater influence in the theory and practice of constitutional law. For example, the former President of the Israeli Supreme Court Aharon Barak locates the constitutional value of human dignity in the recognition of the fact that 'individual is a free person, who develops his body and spirit, according to his will. The will of a human being is the manifestation of his humanity.'⁵² According to Barak, human freedom is expressed in the freedom of choice and the freedom to plan one's own life and realise oneself. The constitutional value of human dignity is thus grounded in the autonomy of individual will, which means that each individual controls her own life.⁵³ Respected experts in bioethics have views close to those of constitutional lawyers. Some⁵⁴ have found inspiration in Alan Gewirth's earlier conception of man as an agent possessing the capacity for rational, purposive action.⁵⁵ A newer version of the same kind of argument has been recently developed by the British philosopher James Griffin who grounds his justification of human rights in the concept of normative agency.⁵⁶

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

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

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

⁵³ BARAK. *Human Dignity*, p. 129.

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

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

⁵⁶ GRIFFIN, James. *On Human Rights*. Oxford: Oxford UP, 2008.

⁵⁷ GRIFFIN. *On Human Rights*, p. 150.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For all these reasons, other advocates of the Aristotelian-Thomistic tradition have sought to theorise human dignity independently of metaphysical and theological assumptions. Besides Aristotelians such as Martha Nussbaum⁶⁸ who inquires into the various desirable goods necessary for a life worthy of human dignity, this approach includes a number of Thomist authors belonging to the so-called *New Natural Law theory*. According to them, the sole path towards moral truths is ethical reflection. Natural law can be thus discovered and maintained by the very human capacity to deliberate, reflect, and choose. Even those who think there is no God can have good reasons for accepting human dignity and basic human rights,⁶⁹ for rational insight can provide us with fundamental moral truths. One such moral truth is the fact that people have a special kind of dignity, which is why other people must not murder them, must consider their welfare in their actions, and must treat them as they themselves wish to be treated by others.⁷⁰ The grounding of human dignity requires no characteristics other than man's humanity. What makes a person human is his/her rational nature. Thus, the humanity of man can be defined on the basis of the natural human capacity for conceptual thinking, deliberation, and free choice. These traits express our natural ability to shape our own life. All human beings possess them, even though some cannot presently exercise them. What matters is that these capacities are inherent in a certain class of beings possessing rational nature. Put differently, Lee and George locate the criterion of dignity in the fact that a certain being has a substantial nature which carries with it the given capacities. Whether these capacities are indeed developed and to what degree is a contingent matter, which is why it cannot constitute a condition of ascribing equal dignity to this or that being. Only a specific type of substantial nature can provide such a condition.⁷¹

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

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

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

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

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

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

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

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

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

Conclusion: from cultural wars to a potential consensus?

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

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

⁷⁴ WILLIAMS. *Who is My Neighbor?*, p. 156.

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

⁷⁶ SPAEMANN. *Essays in Anthropology*, p. 60.

⁷⁷ WALSHE. *The Primacy of the Common Good*, p. 290.

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

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

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

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

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

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

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

⁸¹ MILBANK. *Dignity Rather than Rights*, p. 205.

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

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

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



Treatise

Democracy as a Social Construction for the Reaching of Recognition and Dignity

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Abstract

Axel Honneth understands that a human being is recognized when she is respected within three patterns: love, law, and solidarity. The reaching of recognition presupposes a new methodology called “normative reconstruction”. Through this methodology, law is interpreted from the perspective of social freedom, whereas the individual, in the pattern of law, enjoy freedom, autonomy, civil cooperation, and responsibility. Normative reconstruction requires democracy. Nevertheless, for Honneth democracy is seen not as a political regime, but more than that as *an attitude and ideal*. Our research question is: is this comprehension of democracy a necessary social construction to the reaching of recognition? We hypothesize that *Democracy as an ideal and attitude* would make possible the reaching of recognition and dignity, especially for societies where *democracy as a political regime* does not exist at all.

Keywords: normative reconstruction, recognition, democracy, social construction, dignity, Axel Honneth

Introduction

Axel Honneth begins his studies on the theory of recognition through the book “*The struggle for recognition: the moral grammar of social conflicts*” (1992 “*Kampf um Anerkennung*”, in the following mentioned as “*Struggle for recognition*”). There, he introduces the three patterns of recognition (*Muster intersubjektiven Anerkennung*): love, rights (law), and solidarity. During his further studies, Honneth avoided emphasizing one of the patterns. A close analysis of one of his most recent and relevant books, “*Freedom’s Right: the social foundations of democratic life*” (2011 “*Das Recht der Freiheit*”, in the following mentioned as “*Freedom’s Right*”), shows that Honneth highlights two patterns for achieving recognition: the pattern of law and the pattern of solidarity. The book cherishes the pattern of law, considering it the key element for protecting and maintaining the dynamics of recognition. Additionally, it values the pattern of solidarity, as it is responsible for implementing struggles to recover recognition.

We intend to clarify the role of law for recognition and discuss how Honneth’s proposed methodology called “normative reconstruction” happens. This will lead us to discussions on the elements of social freedom, solidarity, and democracy, which relate to achieving justice. It will also be relevant to study how the normative reconstruction and the recognition may be affected by offenses. In this context, we will explain what Honneth understands as injustice. Finally, after analyzing how recognition may be denied, we will then study the struggles for the recovery of recognition, bringing the examples that Honneth has proposed in *Freedom’s Right*, namely the struggle for voluntary practices; the struggle for the democracy as an attitude, and an ideal; and the struggle for the emancipation of the family member.

We will highlight the understanding of democracy, as our research question rests on: is Honneth’s comprehension of democracy a necessary social construction to the reaching of recognition? We hypothesize that the Honnethian understanding of *democracy as an ideal and attitude* is a social construction, which makes possible the reaching of recognition and dignity.

1. Law and recognition

Axel Honneth understands that the private relations of recognition expand as soon as they get protection against offenses – for instance, physical violence –. The protection of recognition occurs through the law. “*Today, the intersubjective conditions that enable personal integrity include not only the experience of love but also legal protection against the injuries that can be causally connected with love.*”¹ Law is essential in protecting not just the pattern of love but all the patterns of recognition.

For Honneth, in the pattern of law, the individuals have moral accountability; they are all equally accountable for their actions and consequences. This moral accountability results in the achievement of “self-respect” (*Selbstachtung, Selbstrespekt*) conceptualized by Dillon.²

¹ HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. 177.

² HONNETH, Alex. *Disrespect: the Normative Foundation of Critical Theory*. Cambridge: Polity Press, 2007, p. 136.

According to Dillon, self-respect is a complex entity that holds different emotions. The core of self-respect is a deep appreciation of one's morally significant *worth*.³

The sphere of law, whereas protecting recognition, contributes to the preservation of love and solidarity.⁴ If individuals were not legally responsible for their acts, then it would be hard to reach the elements of recognition in private – the pattern of love – and in public life – the pattern of solidarity –.

Additionally, the law has a relevant role in the processes of struggles for recognition. It was already highlighted in the works of Hegel and Mead:

*Like Hegel, Mead considers the motor of these directed changes to be a struggle in which subjects continually strive to expand the range of their intersubjectively guaranteed rights and, in so doing, to raise the level of their personal autonomy. For both thinkers, the historical liberation of individuality occurs in the form of a long-term struggle for recognition.*⁵

Individuals struggle to expand their rights and, consequently, their personal autonomy. The pattern of law allows a long-term struggle to recover each pattern of recognition, guaranteeing the individuals the achievement of self-confidence, self-respect, and self-esteem.

2. The normative reconstruction

In *Freedom's Right*, Honneth proposes a normative reconstruction to better clarify the role of law in recognition and to comprehend the current societies, their struggles for recognition, and reaching of justice from a dual perspective.

On the one hand, subjects are addressees of rights, and they can enjoy their lives with the certainty that the law assures them freedom and autonomy. On the other hand, they are also authors of rights, being respectful with other subjects in the public space, cooperative, and responsible for the social requirements.⁶ *“In this second, active and cooperative sense, the institution of modern law demands more than purposive-rational rule-following; it also relies on democratic attitudes, practices and convictions, without which the collective impulse to recognize each other's rights would be extinguished.”*⁷

³ DILLON, Robin S. Self-Respect: Moral, Emotional, Political. *Ethics*, 1997, vol. 107, no. 2, p. 228.

⁴ “Modern legal relations have a different influence, however, on conditions of solidarity. Here, they establish normative limitations to which the formation of community-generating value-horizons must generally be subject. The question, therefore, as to whether solidarity is to be included as a further element among the conditions for post-traditional ethical life cannot be settled without some reference to legal principles”. (HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. 177)

⁵ HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. 84.

⁶ HONNETH, Alex. *Freedom's right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, Chapter 4 “Legal Freedom”, para. 3.

⁷ HONNETH, Alex. *Freedom's right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, Chapter 4 “Legal Freedom”, para. 3.

Honneth criticizes a theory of socialization that does not attach to the pattern of law other aspects of an individual's identity.⁸ Honneth assumes that the law should guarantee freedom to individuals and let them build their lives from a more authentic approach. He affirms that:

*The institution of legal freedom should give individuals the chance, regulated by the rule of law, to suspend ethical decisions for a certain period of time in order to assess what it is they desire; the institution of moral freedom grants them the opportunity to reject certain demands on the basis of justifiable reasons. What has also become clear is that both types of freedom feed off a social life-praxis that not only precedes them, but provides the basis for their right to exist in the first place: Only because we have already entered into everyday obligations and have already developed social attachments or find ourselves in particular communities do we need the legal or moral freedom to detach from the associated demands or to examine them reflexively.*⁹

The normative reconstruction must guarantee private autonomy and, as a consequence, collective autonomy as well.

The normative reconstruction must be related not just to the patterns of recognition but also include the categories of freedom discussed in *Freedom's Right*. Honneth affirms that in the pattern of love, people experience individual and moral freedom.¹⁰

In the dimension of law, they experience legal freedom. Whereas legal freedom gives individuals the chance to assess what they desire, moral freedom grants them the opportunity to reject specific demands based on their justifiable reasons.¹¹

Moreover, in the pattern of solidarity, individuals experience social freedom. The pattern of solidarity gains an essential role in the theory of recognition. Honneth affirms that social freedom, located in the pattern of solidarity, is the one to be amplified to all the dimensions of recognition.

Social freedom makes law and love relational, as collaborative practices of people inside their community endorse self-confidence, self-respect, and self-esteem. Solidarity has intentionality, emotional attachment, and a genuine appreciation of the other.

When discussing his concept of solidarity, Honneth is influenced by Dewey's practical involvement, Lukács's engaged praxis, and Heidegger's care.

From Dewey, "practical involvement" should occur when individuals experience interaction with the world. Instead of a self-centered practice, the practical involvement by human

⁸ "The further we proceed in our normative reconstruction, the further we will move away from the merely negative sphere of freedom, and the more we will rely on concepts that stem from social theory and sociology rather than modern law. I am explicitly opposed to the tendency to develop the foundations of a theory of justice solely on the basis of juridical concepts." (HONNETH, Alex. *Freedom's right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, "Part I: Historical Background: The Right to Freedom", "Transition: The Idea of Democratic Ethical Life", para. 6)

⁹ HONNETH, Alex. *Freedom's right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, "Part II: The Possibility of Freedom", "5: Moral Freedom", "5.2. Limitations of Moral Freedom", para. 1.

¹⁰ HONNETH, Alex. *Freedom's right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, "Part I: Historical Background: The Right to Freedom", "Transition: The Idea of Democratic Ethical Life", para. 6.

¹¹ HONNETH, Alex. *Freedom's right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, "Part III: The Reality of Freedom", para. 1.

beings involves them with the world and its various elements, for instance, emotional, cognitive, and volitional aspects.¹²

Lukàcs affirms that “engaged praxis” is necessary for human beings, as a manner to make individuals free of the mere relation subject-object. An individual should experience reality from an existential point of view, giving it a qualitative significance, more than just an objective vision of a subject-object schema.¹³

Heidegger affirms that individuals should adopt a position of a participant, and not just of a mere observer, in experiencing his shared life. Caring for each other means that an individual will look to the other, trying to understand her position, necessities, and feelings, with an empathetic attitude.¹⁴

When employing solidarity, the individual interacts with his world, giving to it a qualitative significance, and actively engaging in the practices of solidarity as a participant, more than just as a mere observer. There, social freedom may be achieved, as a “we” of personal relationships, of the market economy, and of democratic will-formation.¹⁵

2.1. Critics of the Honnethian conception of social freedom and solidarity

Freedom's Right considers that social freedom has a crucial role in all the patterns of recognition, and then the solidarity pattern seems to be highlighted by Honneth.

It is relevant, then, to criticize the Honnethian interpretation of solidarity and to endorse that the pattern of law is the most pertinent for recognition.

Max Pensky criticizes Honneth, affirming that he does not confront situations of offenses to solidarity and that the liberalization of different forms of life, permitting individuals to appreciate themselves and their cultures indiscriminately, could imply a potent offense of solidarity.¹⁶

For Pensky, if solidarity can vary according to different societal values, then we cannot consider a permanent notion of solidarity, but on the contrary, a continuous struggle for recognition, called solidarity:

¹² HONNETH, Alex. Reification: A Recognition-Theoretical View. In *The Tanner Lectures on Human Values*. Delivered at University of California, Berkeley. 2005, p. 110.

¹³ HONNETH, Alex. Reification: A Recognition-Theoretical View. In *The Tanner Lectures on Human Values*. Delivered at University of California, Berkeley. 2005, p. 105

¹⁴ HONNETH, Alex. Reification: A Recognition-Theoretical View. In *The Tanner Lectures on Human Values*. Delivered at University of California, Berkeley. 2005, p. 107.

¹⁵ HONNETH, Alex. *Freedom's right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, “Part III: The Reality of Freedom”.

¹⁶ “It is not entirely clear in *The Struggle for Recognition* what Honneth would suggest as a remedy to a situation of widespread denigration of ways of life, the psychological pathologies of low self-esteem arising from it, and the crisis of recognition that seem to be generated, in turn, by such pathologies. [...] And would such a *success* in the liberalisation of cultural models of self-realisation projects not then precisely undermine the possibility of solidarity by making *any* form of life valuable, simply by definition?” (PENSKEY, Max. *Social Solidarity and Intersubjective Recognition: on Axel Honneth's Struggle for Recognition*. In PETHERBRIDGE, Danielle (ed.). *Axel Honneth: critical essays: with a reply by Axel Honneth*. Leiden: Brill, 2011, p. 148)

Given a hazy and insubstantial set of ethical values, an agonistic field of civil society in which the practical meaning of those values is constantly contested, and persons whose projects of individual self-realisation depend in large measure on winning the esteem of others, then, solidarity is indeed a struggle, with constantly shifting goalposts, rules, players and umpires. The only thing that remains constant - and here in fact Honneth hits on something very close to the disheartening heart of the matter - is the feeling of low self-esteem, of being denigrated or invisible, marginalised and worthless, in cases where one's project of self-realisation, however modest, or conventional, or odd, or grandiose, fails to win the recognition one needs and expects it to.¹⁷

Anderson disagrees with Pensky and affirms that the openness of solidarity is necessary, transforming solidarity into an environment where persons can reach social esteem:

If, for example, homemaking is considered an insignificant contribution to the common good, then homemakers will lack the evaluative resources in terms of which they can acquire a sense of personal accomplishment. In this sense, the social conditions for esteem are determined by the prevailing sense of what is to count as a worthwhile contribution to society. By situating esteem not in the division of labour but in the horizon of values of a particular culture, Honneth opens up the possibility of conceiving of the conditions of self-esteem as a field of contestation and cultural struggle for the recognition of previously denigrated contributors to the common good. 'Solidarity' is the term Honneth uses for the cultural climate in which the acquisition of self-esteem has become broadly possible.¹⁸

For Anderson, then, Honneth makes his point when he understands solidarity as a tool for allowing different practices inside a culture or between different cultures and the possibility of transformations.

If Honneth affirms that solidarity represents whatever each community wants to adopt as social values, then it could incur situations of misrecognition. Solidarity, in some cases, would allow practices of disrespect and offenses of recognition - for instance, societies that practice female genital mutilation. If a community has this practice inside their shared values of respect for the tradition, then people would participate in the ritual of female genital mutilation. They feel they are being solidary in contributing to the maintenance of a traditional value and having worth from the other ones. However, in the end, they are all incurring disrespect. It is relevant, then, to propose some limits to the element of solidarity, to make it coherent with the recognition itself.

Nancy Fraser affirms that recognition should be related to justice and not necessarily to solidarity. She does not interpret recognition in the same way as Honneth does. For Fraser, recognition always relates to a view of the subjects inserted in their community, considering

¹⁷ PENSKEY, Max. Social Solidarity and Intersubjective Recognition: on Axel Honneth's Struggle for Recognition. In PETHERBRIDGE, Danielle (ed.). *Axel Honneth: critical essays: with a reply by Axel Honneth*. Leiden: Brill, 2011, p. 145.

¹⁸ ANDERSON, Joel. Translator's introduction. In HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. XVII.

their cultural values.¹⁹ Nevertheless, she does not believe that recognition has a variety of dimensions, such as economic, moral, and legal ones.

According to her, recognition must include the parity of participation.²⁰ Parity of participation has two conditions. Firstly, the “objective condition” means that the participants should be economically equal and have an equitable distribution of material resources. Societies cannot hold institutions which significant differences in incomes and wealth conditions.²¹

The second condition of parity of participation is the “intersubjective condition,” meaning that all people should have equal opportunities to reach their social esteem without denigration of recognition.²² The institutions should not promote the depreciation of some categories of persons.

Fraser criticizes communitarianism, affirming that it advocates that groups of individuals should stay within their community, adoring and venerating their own culture. Communities would be isolated groups of people, without inclusion and without valorizing the individual's autonomy.

Honneth, in his turn, defends that recognition is not just a question of justice but also a way of self-realization and development of identity, in a way that “*terms of recognition must represent the unified framework for such a project [of justice]*”.²³

For Honneth, social justice should consider integrity and not just equity.²⁴ For him, the tendency nowadays to comprehend social justice from a social-economical perspective should be reviewed. Enough material resources are necessary, but they should be accompanied by immaterial goods, such as education and social esteem. It signifies conditions of equal opportunity. Nevertheless, more than equity, the integrity of social life is also a necessity:

*In view of the growing tendencies towards social exclusion, it will become once again increasingly important to remind ourselves of the original intentions behind this concept of justice. But strangely enough, this way of defining social justice has always remained blind to forms of disadvantage and harm that are not directly linked to the socio-economic class position or to the reality of working class life. For these types of deprivation only come into view, once the criterion for social justice is not defined as equal opportunity in the narrow sense, but as the integrity of the social life form as a whole.*²⁵

¹⁹ Fraser mistakes, as she is not allowed that, for Honneth, solidarity and culture are closely related. Then, it is mistaken to think about culture appreciation without touching solidarity.

²⁰ HONNETH, Alex. FRASER, Nancy. *Redistribution Or Recognition? A Political-Philosophical Exchange*. London: Verso, 2003, p. 36.

²¹ HONNETH, Alex. FRASER, Nancy. *Redistribution Or Recognition? A Political-Philosophical Exchange*. London: Verso, 2003, p. 36.

²² HONNETH, Alex. FRASER, Nancy. *Redistribution Or Recognition? A Political-Philosophical Exchange*. London: Verso, 2003, p. 36.

²³ HONNETH, Alex. FRASER, Nancy. *Redistribution Or Recognition? A Political-Philosophical Exchange*. London: Verso, 2003, p. 111.

²⁴ HONNETH, Alex. *The Political Identity of the Green Movement in Germany: Social- Philosophical Reflections. Critical Horizons*. 2010, Vol. 11, Issue 1.

²⁵ HONNETH, Alex. *The Political Identity of the Green Movement in Germany: Social- Philosophical Reflections. Critical Horizons*. 2010, Vol. 11, Issue 1, p. 14.

Furthermore, Honneth understands that the conception of social justice nowadays should include cultural pluralism and the importance of concern about future generations.²⁶ As a result, social justice means not just positive rights, “*but also in the shape of appropriate attitudes, modes of comportment and behavioural routines.*”²⁷

Recognition promotes the autonomy and self-determination of the individual, and these represent the bond between the individual and her social community, “*The enormous gravitational force exerted by the notion of autonomy derives from the fact that it manages to form a systematic link between the individual subject and the social order.*”²⁸ It is precisely the notion of individual self-determination that Honneth puts in the center of modern conceptions of justice: “*That which is ‘just’ is that which protects, fosters or realizes the autonomy of all members of society.*”²⁹

It is possible to conclude that *Freedom’s Right* connects the theory of recognition and the Honnethian theory of justice.³⁰

We endorse that recognition relates to justice, as justice is more than a compliment of legal norms, living standards, or well-being. Justice also encompasses the certainty of participating in an equal society, having worth inside one’s community, and being free to live with self-confidence, self-esteem, and self-respect. Forst goes straight to the point affirming that “*Justice, according to this view, is not primarily about what you have (or do not have), rather, it is about how you are treated.*”³¹

Another point of discussion between Fraser and Honneth is concerning the capitalist economic order and cultural values. Honneth and Fraser question how capitalism should relate to recognition. Firstly, capitalism could be a social system that differentiates itself from other social systems, disregarding cultural values. On the other hand, capitalism could be a consequence of cultural values, connected to many forms of recognition.³²

Honneth correctly sees capitalism from the second point of view, affirming that capitalism has not just an economic dimension, but also cultural, legal, and moral aspects. Because of that, for Honneth, the experiences of disrespect inside the capitalist system affect not only

²⁶ HONNETH, Alex. The Political Identity of the Green Movement in Germany: Social- Philosophical Reflections. *Critical Horizons*. 2010, Vol. 11, Issue 1, p. 16.

²⁷ HONNETH, Alex. *Freedom’s right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, “Transition: The Idea of Democratic Ethical Life”, para.6.

²⁸ HONNETH, Alex. *Freedom’s right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, “Part I: Historical Background: The Right to Freedom”, para. 2.

²⁹ HONNETH, Alex. *Freedom’s right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, “Part I: Historical Background: The Right to Freedom”, para. 4.

³⁰ For G. Markle, Honneth derives a theory of justice from social theory, following a Hegelian methodology and going beyond, as Honneth recognizes “the potential for transforming and transcending existing social roles within contemporary society.” (MARKLE, Gwynn. Interview with Axel Honneth: From Struggles for Recognition to a Plural Concept of Justice. *Acta Sociologica*, 2004, Vol. 47, No. 4, p. 383. Available at: <https://doi.org/10.1177/0001699304048674>)

³¹ FORST, Rainer. First things first: redistribution, recognition and justification. In PETHERBRIDGE, Danielle (ed.). *Axel Honneth: critical essays: with a reply by Axel Honneth*. Leiden: Brill, 2011, p. 308.

³² HONNETH, Alex. FRASER, Nancy. *Redistribution Or Recognition? A Political-Philosophical Exchange*. London: Verso, 2003, p. 248.

cultural and economic dimensions but also legal and moral perspectives. It also justifies that recognition relates not only to justice but also to moral and legal dimensions.

Nevertheless, Fraser has a separation between the capitalist system and culture. Cultural aspects involve recognition; conversely, economic and capitalist issues involve redistribution claims. In other words, the denial of recognition inside the capitalist system is not necessarily a denial of justice. Situations related to economic affairs, which need to be solved through redistribution, do not involve recognition claims. A condition requiring recognition does not necessarily require redistribution and vice versa.³³

Honneth, on the other hand, affirms that each situation of injustice represents a social disrespect.³⁴ In addition, all social disrespect motivates struggles for recognition. Because of that, if we try to think about a situation exclusively related to a redistribution solution, we are simultaneously dealing with injustice, a social disrespect.

We agree with Honneth and disagree with Fraser. For us, if someone has redistribution's necessities, she is simultaneously experiencing offenses to patterns of recognition. A person in need does not have her pattern of law and solidarity preserved, as she is not inserted in the dynamic of her community; she does not have self-respect and self and social esteem.

It is relevant, then, to inquire what "injustice" means for the theory of recognition.

2.2. The injustice

Honneth affirms that the opposite of recognition is *moral injustice*, defined by "*feelings of social disrespect*."³⁵

Deranty calls "hermeneutics of injustice" all the experiences of suffering, disrespect, and misrecognition in the theory of recognition.³⁶

In the same direction, Petherbridge correctly remembers that, in the theory of recognition, the opposition between justice and injustice, recognition and misrecognition, are necessary tools for the understanding of them:

³³ HONNETH, Alex. FRASER, Nancy. *Redistribution Or Recognition? A Political-Philosophical Exchange*. London: Verso, 2003, p. 217.

³⁴ In this direction, see Forst: 'Approaches like Fraser's thus are doomed to remain bound to conventional paradigms of thinking about justice, especially to "goals that have already been publicly articulated" thereby neglecting "everyday, still unthematized, but no less pressing embryonic forms of social misery and moral injustice".' (FORST, Rainer. First things first: redistribution, recognition and justification. In PETHERBRIDGE, Danielle (ed.). *Axel Honneth: critical essays: with a reply by Axel Honneth*. Leiden: Brill, 2011, p. 306)

³⁵ HONNETH, Alex. *Disrespect: the Normative Foundation of Critical Theory*. Cambridge: Polity Press, 2007, p. 71. See also: "What the term 'disrespect' [Mißachtung] refers to is the specific vulnerability of humans resulting from the internal interdependency of individualization and recognition, which both Hegel and Mead helped to illuminate." (HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. 131)

³⁶ DERANTY, Jean P. Reflective Critical Theory: a Systematic Reconstruction of Axel Honneth's Social Philosophy. In PETHERBRIDGE, Danielle (ed.). *Axel Honneth: critical essays: with a reply by Axel Honneth*. Leiden: Brill, 2011, p. 72.

As Rainer Forst enumerates in his discussion of the debate between Honneth and Fraser, contexts of justice are always primarily contexts of injustice, even though for Forst, they also presume a specific context of justification. For Honneth, social domination can only be adequately critiqued if we begin from the experience of injustice, that is, normativity can only be derived negatively, not on the basis of ideality.³⁷

For Petherbridge, recognition presupposes an undamaged intersubjectivity. The subject-formation during ethical life should be successful, and he calls this phenomenon a “*normative foundation of recognition*.”³⁸

More than paying attention to the damage to the individual, Brincat highlights the importance of considering the harm to individual autonomy, affecting the human vulnerabilities:

Yet whereas the notion of harm has been typically restricted to the protection of negative liberties for the individual's exercise of will, recognition theory shows that we also need to account for the various threats to individual autonomy that occur through damage, distortions or pathologies in the social relations that support individual autonomy.³⁹

In a case of moral injustice and misrecognition, the pattern of law must, then, be recovered through struggles for recognition.

3. The recovery of law: the struggles for recognition

Struggles are necessary when the recognition is affected. In the pattern of law, individuals can achieve self-respect. It is relevant, then, as a first step, to inquire how self-respect can be denied.

Actually, in Honneth's theory, the meaning of self-respect comes from its denials:

The reason why it is so difficult, in the case of self-respect, to demonstrate the reality of the phenomenon is because, to a certain extent, it acquires a perceptible mass only in a negative form - specifically, only when subjects visibly suffer from a lack of it. The actual presence of self-respect can therefore be inferred only indirectly each time, by making

³⁷ PETHERBRIDGE, Danielle (ed.). *Axel Honneth: critical essays: with a reply by Axel Honneth*. Leiden: Brill, 2011, p. 18. In the same direction, see: “According to Honneth (and this is perhaps the point of closest affinity with fellow Hegelian Charles Taylor), it is with our inchoate feelings, and at the margins of traditions, and more generally in the encounter with the conflicted and the unresolved that the needed innovative resources for Critical Theory are to be found”. (Anderson, Joel. Situating Axel Honneth in the Frankfurt School Tradition. In PETHERBRIDGE, Danielle (ed.). *Axel Honneth: critical essays: with a reply by Axel Honneth*. Leiden: Brill, 2011, p. 50)

³⁸ PETHERBRIDGE, Danielle (ed.). *Axel Honneth: critical essays: with a reply by Axel Honneth*. Leiden: Brill, 2011, p. 13.

³⁹ BRINCAT, Shannon. The Harm Principle and Recognition Theory: On the Complementarity between Linklater, Honneth and the Project of Emancipation. *Critical horizons*, 2013, Vol. 14, Issue 2, p. 245. See also Salonia: “This negative experience of the individual indicates, consequently, a normative dimension: the individual perceives its own suffering as a social injustice; it feels the injustice of a society that cannot fulfill its normative expectations of recognition. With respect to this Honneth remarks: If the adjective ‘social’ is to mean anything more than ‘typically found in society’, social suffering and discontent possess a normative core. It is a matter of the disappointment or violation of normative expectations of society considered justified by those concerned. [...]” (SALONIA, Michele. Suffering from Exclusion: On the critical impulse of the theory of recognition. *Civitas Porto Alegre*, 2008, Vol. 8, No. 1, pp. 125-136)

*empirical comparisons involving groups of people, from whose general behaviour one can draw conclusions about the forms in which the experience of disrespect is symbolically represented.*⁴⁰

Van den Brink holds that law's disrespect has two sides in Honnethian's theory: "First, it consists in the legal restriction of one's personal autonomy and moral responsibility. Second, and perhaps even more fundamentally, it consists in comparative inequality with other citizens who do not have their personal autonomy restricted."⁴¹

Honneth affirms that self-respect is denied in cases of deceit, fraud, and legal discrimination against whole groups of people.⁴² Although he does not mention the offenses in the pattern of law from an isolated individual perspective (for instance, a case of domestic violence against a woman), we understand that self-respect may be offended by violations not just against whole groups of people but also against isolated individuals. Self-respect may germinate from situations of disrespect and breaches of the pattern of law, being recovered through struggles for recognition.

Honneth clarifies that, during the time, the pattern of law is getting wider, as the individuals, in each community, expand their capacities as human beings. Nowadays, legal recognition encompasses a social standard of living that guarantees a minimum of cultural education and economic security.⁴³

⁴⁰ HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. 120.

⁴¹ VAN DEN BRINK, Bert. Recognition, pluralism and the expectation of harmony: against the ideal of an ethical life 'free from pain'. In PETHERBRIDGE, Danielle (ed.). *Axel Honneth: critical essays: with a reply by Axel Honneth*. Leiden: Brill, 2011, p. 167.

⁴² "We have initially construed the term 'rights', only roughly, as referring to those individual claims that a person can legitimately expect to have socially met because he or she participates, with equal rights, in the institutional order as a full-fledged member of a community. Should that person now be systematically denied certain rights of this kind, this would imply that he or she is not being accorded the same degree of moral responsibility as other members of society. What is specific to such a form of disrespect, as exemplified by the denial of rights or by ostracism, thus lies not just in the forcible restriction of personal autonomy but also in the combination with the feeling of not enjoying the status of a full-fledged partner to interaction, equally endowed with moral rights." (HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. 133)

⁴³ HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. 117. See also: "In being legally recognized, one is now respected with regard not only to the abstract capacity to orient oneself vis-à-vis moral norms, but also to the concrete human feature that one deserves the social standard of living necessary for this." (HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. 117)

For Honneth: “*It became clear from this that, on its own, legal recognition holds a moral potential, one which can be developed via social struggles in the direction of an increase on both generality and context-sensitivity.*”⁴⁴

Honneth endorses the necessity of changing from the Kantian tradition of an individual’s autonomy to a new conception of autonomy related to an individual’s moral sensitivity to contexts.

In the Kantian tradition, the autonomous individual is capable of obeying the categorical imperative and, in this way, guided by practical, rational principles. Instead of just considering rational principles, the autonomy subject should also be moral sensible to contexts.⁴⁵

Following this, Honneth, in *Struggle for recognition*, affirms that the pattern of law should consider the particularity of each community, as legal recognition presupposes a moral knowledge of the legal obligations, as well as an empirical interpretation of the situation.⁴⁶

In *Freedom’s Right*, Honneth affirms that the current claims of justice must be analyzed from the perspective of struggles to recognize individuals. The analysis of struggles for recognition is fundamental to the study of social justice, to identify what kinds of claims the future generations and societies are going to demand:

*We will only be able to get a clear sense of the future requirements of social justice if we recall, by addressing the struggles that have been fought on the normative foundation of modernity, the claims that have not yet been redeemed in the historical process filled with social demands for the realization of institutional promises of freedom.*⁴⁷

⁴⁴ HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. 176. See also: “Unlike modern legal recognition, social esteem is directed, as we have seen, at the particular qualities that characterize people in their personal difference. Thus, whereas modern law represents a medium of recognition that expresses the universal features of human subjects, this form of recognition demands a social medium that must be able to express the characteristic differences among human subjects in a universal and, more specifically, intersubjectively obligatory way. [...] The cultural self-understanding of a society provides the criteria that orient the social esteem of persons, because their abilities and achievements are judged intersubjectively according to the degree to which they can help to realize culturally defined values. [...] This form of mutual recognition is thus also tied to the presupposition of a context of social life, whose members, through their orientation towards shared conceptions of their goals, form a community of value.” (HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. 122)

⁴⁵ See Honneth: “Kant therefore assumes, just like Hegel, a teleology concerning directed progress; but he does not deliver it over to the anonymous process of an unfolding of spirit. Instead, he takes this teleology as a construction that the subjects acting in the sense of enlightenment must achieve, in order to gain a clear consciousness of the historical place of their own projects. The combination of these two system-bursting elements leads therefore to the consequence that the thought of a learning process spanning generations must be understood as a construction that necessarily shapes the historical self-understanding of the supporters of the Enlightenment: all those who actively side with the moral achievements of the Enlightenment are thus forced to see the history preceding them as a conflict-ridden learning process, which, as heirs of this process, they have to continue in their own time. Such a hermeneutic reduction of the idea of progress, in all probability, represents the only possibility for making Kant’s philosophy of history fruitful again for the present.” (HONNETH, Alex. *The Irreducibility of Progress: Kant’s Account of the Relationship between Morality and History*. *Critical Horizons*, 2007, Vol. 8, Issue 1, p. 16)

⁴⁶ HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. 113.

⁴⁷ HONNETH, Alex. *Freedom’s right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, “Preface”, para. 4.

He endorses that an ethical relation to the idea of freedom requires an analysis of social reality. The institutions that make individuals experience recognition in the interaction with others have relevance for reaching freedom,⁴⁸ such as the law. Honneth asserts that freedom shall be interpreted as the individual's strive for autonomy, whereby justice will be recognized in modern society.⁴⁹

Recognition, from Honneth, does not exist separately from the struggles. He affirms that the concept of struggles should come mainly from the theories of Hegel and Mead. He assumes there are vast discussions on the concept of struggle from Marx to Sorel, and Sartre.⁵⁰ Nevertheless:

*None of the three authors was able to contribute to the further systematic development of the conception founded by Hegel and deepened by Mead. Although, in empirical contexts, they often made virtuoso use of the model of recognition, its normative implication remained too opaque, too alien even, for them to be able to move it to a new level of explication.*⁵¹

Honneth follows the Hegelian tradition of historicism, considering that ethical life is formed from conflicts and struggles for the recovery of human being's recognition: "*In this way the history of an ethical sphere can be thought of as a conflictual process whereby a certain validity surplus initially inherent in every ethical norm is gradually stripped away.*"⁵²

Honneth introduces some elements in *Freedom's Right* to make recognition possible and practical. In our view, he is proposing forms of struggling for recognition. To clarify it, we will then explain each of Honneth's proposals.

3.1. Struggles for Honnethian voluntary practices

In *Freedom's Right*, Honneth endorses the necessity of voluntary practices in the public sphere:

*Therefore, in order to be able to share the freedom of democratic self-legislation at all, citizens must do more than merely switch back and forth between speaker and listener, author and reader. It is crucial that they also be willing to resist the dissolution of the public sphere by dividing up the necessary voluntary services needed for the material preparation and execution of actual events.*⁵³

⁴⁸ HONNETH, Alex. *Freedom's right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, "Part I: Historical Background: The Right to Freedom", "Transition: The Idea of Democratic Ethical Life", para. 4.

⁴⁹ PETHERBRIDGE, Danielle (ed.). *Axel Honneth: critical essays: with a reply by Axel Honneth*. Leiden: Brill, 2011, p. 34.

⁵⁰ HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. 146.

⁵¹ HONNETH, Alex. *The struggle for recognition: the moral grammar of social conflicts*. Cambridge: MIT Press, 1995, p. 159.

⁵² HONNETH, Alex. *Freedom's right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, p. 824.

⁵³ HONNETH, Alex. *Freedom's right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, "6. Social Freedom", "6.3. The 'We' of Democratic Will-Formation", "6.3.1. The Democratic Public Sphere", para. 51.

Honneth also recognizes the role of non-governmental organizations and the internet as tools to increase recognition. For us, they all represent acts of solidarity and struggles for recognition.⁵⁴

These Honnethian proposals relate to a social space, which stimulates people's participation. Nevertheless, it is essential to highlight that not all societies have public spaces that endorse solidarity, debate, and freedom. Democracy and public debate, for instance, are not formally instituted in several non-democratic countries. Honneth tries to solve this issue by considering democracy not just as a political regime, as we will further see below.

3.2. Democracy as an attitude and ideal

Now we come to our research question: is the comprehension of Honneth's democracy a necessary social construction for the reaching of recognition? Coming from all the discussions above, democracy plays a very relevant role for the Honnethian theory, and it embraces an innovative comprehension of this institute by Honneth.

Axel Honneth understands that democracy should be seen beyond a political regime but primarily as a social ideal.⁵⁵

He recognizes the importance of public manifestations, such as vote and general discussions, but he advocates that more than that, democracy should be exercised in the everyday habits of individuals through democratic principles. The democratic principles are moral, preserving respect and equality between individuals.⁵⁶

Nevertheless, Honneth highlights that, nowadays, these practices of democracy are undermined by many factors. Firstly, the economic system compromises social freedom. In this system, people do not exercise role obligations from a mutual and relational perspective but instead as isolated subjects competing with each other.

Furthermore, Honneth affirms that individuals are not focused on the sphere of democratic will-formation because, usually, people do not believe in the freedom guaranteed by institutions. Dewey calls it "apathy" - similar definitions are "privatization" and

⁵⁴ HONNETH, Alex. *Freedom's right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, "6. Social Freedom", "6.3. The 'We' of Democratic Will-Formation", "6.3.1. The Democratic Public Sphere", para. 59.

⁵⁵ HONNETH, Alex. Democracy as reflexive cooperation: John Dewey and the Theory of Democracy Today. *Political Theory*, 1998, Vol. 26, No. 6, p. 780.

⁵⁶ See the interview of Honneth in 2012: "RW: A leading concept in your new book is democratic ethical life (*demokratische Sittlichkeit*). Can you explain what you mean by this concept? AH: This concept, which after all is the subtitle of the book, is one of the theoretical tools I use to try and revitalize Hegel's thought. As is well known, Hegel believed that the social integration of modern societies requires more than legal rules and procedural mechanisms; it needs the development of everyday habits in which the moral principles of modern constitutions are anchored. If we apply this concept to the present, we face the necessity of making the stability and vitality of our democracy dependent on whether the moral attitudes of equality and respect have also taken hold in our everyday practices. My book represents an attempt to examine how far along Western democracies are in this process of anchoring democratic principles in the everyday habits and customs of its citizens." (WILLING, Rasmus. *Grammatology of modern recognition orders: an interview with Axel Honneth*. *Distinktion*, 2012, Vol. 13, Issue 1, p. 146)

“depoliticization.”⁵⁷ People do not trust the institutions and do not believe in public support for increasing democracy.

Honneth has affirmed that the public patterns of politics and law should not be considered as the ones to guarantee social freedom. Such a paradigm nowadays does not work anymore, and the institutional spheres turn to have a secondary role:

*The motor and the medium of the historical process of realizing institutionalized principles of freedom is not the law, at least not in the first instance, but social struggles over the appropriate understanding of these principles and the resulting changes of behaviour. Therefore, the fact that contemporary theories of justice are guided almost exclusively by the legal paradigm is a theoretical folly. We must instead take account of sociology and historiography, as these disciplines are inherently more sensitive to changes in everyday moral behaviour.*⁵⁸

For Honneth, the spheres of personal relationships (love) and the economic market are the ones to include processes that are more democratic.⁵⁹

Besides interpreting democracy as an ideal and attitude, Honneth also endorses it as a political regime. For him and many other scholars of political philosophy, democracy is a premise for the reaching justice.

In the article “*Democracy as Reflexive Cooperation*” (1998), he endorses Dewey’s model of democracy as a good alternative between republican and proceduralist models.

He affirms that, in republicanism, people are seen as citizens who intersubjective negotiate everyday affairs.⁶⁰ Here, the law expresses the solidary citizenry.⁶¹

⁵⁷ According to Honneth: “Whereas we always seek involvement in the other two spheres of social freedom, because our ‘natural’ desires or objective constraints of survival compel us to, we must first resolve to engage in the sphere of democratic will-formation. Therefore, it is only in this last step of our normative reconstruction that a problem arises that we could not have been faced with before: the sheer disinterest in institutionally promised freedoms. The concept Dewey used to describe this threat is ‘apathy’; other terms depicting similar phenomena include ‘privatization’ or ‘depoliticization’. We will repeatedly encounter these concepts in our account of the development of the democratic public up into the present.” (HONNETH, Alex. *Freedom’s right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, “6. Social Freedom”, “6.3. The ‘We’ of Democratic Will-Formation”, “6.3.1. The Democratic Public Sphere”, para. 31)

⁵⁸ HONNETH, Alex. *Freedom’s right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, “6. Social Freedom”, “6.3. The ‘We’ of Democratic Will-Formation”, “6.3.1. The Democratic Public Sphere”, para. 1. See also: “First of all, our historical review has shown how little the state can influence conditions in the other institutional spheres. Neither in personal relationships nor in the economic system, both of which are founded on their own self-referential norms in turn linked to independent forms of social freedom, have political and legal interventions aided in the realization of these underlying principles.” (HONNETH, Alex. *Freedom’s right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, “6. Social Freedom”, “6.3. The ‘We’ of Democratic Will-Formation”, “6.3.1. The Democratic Public Sphere”, para. 1)

⁵⁹ HONNETH, Alex. *Freedom’s right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, “6. Social Freedom”, “6.3. The ‘We’ of Democratic Will-Formation”, “6.3.1. The Democratic Public Sphere”, para. 3.

⁶⁰ HONNETH, Alex. *Democracy as reflexive cooperation: John Dewey and the Theory of Democracy Today*. *Political Theory*, 1998, Vol. 26, No. 6, p. 736.

⁶¹ HONNETH, Alex. *Democracy as reflexive cooperation: John Dewey and the Theory of Democracy Today*. *Political Theory*, 1998, Vol. 26, No. 6, p. 764.

In proceduralism, on the other hand, citizens are not the essential element of democracy – a self-governing political community -. Instead, the most important for democracy is the morally justified procedure.⁶² Here, the law is a state-sanctioned tool which has the function of protecting the democratic procedure.⁶³

The proceduralist model of democracy comes from Jürgen Habermas. He proposes this model in the substitution of republican and liberal models of democracy.

Whereas republican democracy has political rights, on the other hand, citizens' negative rights characterize liberal democracy, as they are protected from the government and free to enjoy their private life.⁶⁴ Citizens are free and equal to reach an understanding.

Coming from these two perspectives, Habermas proposes a proceduralist model of democracy. He defends deliberative politics, in which the discourse is no more political but pragmatic, ethical, and moral. The discourse, now, is represented in different communicative procedures.⁶⁵

In proceduralist democracy, the state is no more the center of society but rather the formation of the public understanding by individuals: "*Discourse theory has the success of deliberative politics depend not on a collectively acting citizenry but on the institutionalization of the corresponding procedures and conditions of communication.*"⁶⁶

Habermas affirms that proceduralist democracy brings solidarity with money and administrative power – the three elements of society's integration.⁶⁷ The difference between proceduralism, republicanism, and liberalism is that politics has other subsystems which exist together and promote the opportunity for individuals to exercise their communication.⁶⁸

Dewey does not adopt republican, liberal, or proceduralist models of democracy. For him, the institute of *social cooperation* is the key to the development of democracy.⁶⁹

Dewey believes in democracy as a social organism in which people exercise their activities and functions, contributing to the maintenance of their society.⁷⁰ Coming from this model,

⁶² HONNETH, Alex. Democracy as reflexive cooperation: John Dewey and the Theory of Democracy Today. *Political Theory*, 1998, Vol. 26, No. 6, p. 763.

⁶³ HONNETH, Alex. Democracy as reflexive cooperation: John Dewey and the Theory of Democracy Today. *Political Theory*, 1998, Vol. 26, No. 6, p. 764

⁶⁴ HABERMAS, Jürgen. Three normative models of democracy. *Democratic and Constitutional Theory Today*, 1994, Vol. 1, No 1, p. 1.

⁶⁵ HABERMAS, Jürgen. Three normative models of democracy. *Democratic and Constitutional Theory Today*, 1994, Vol. 1, No 1, p. 5.

⁶⁶ HABERMAS, Jürgen. Three normative models of democracy. *Democratic and Constitutional Theory Today*, 1994, Vol. 1, No 1, p. 7.

⁶⁷ HABERMAS, Jürgen. Three normative models of democracy. *Democratic and Constitutional Theory Today*, 1994, Vol. 1, No 1, p. 8.

⁶⁸ HABERMAS, Jürgen. Three normative models of democracy. *Democratic and Constitutional Theory Today*, 1994, Vol. 1, No 1, p. 10.

⁶⁹ HONNETH, Alex. Democracy as reflexive cooperation: John Dewey and the Theory of Democracy Today. *Political Theory*, 1998, Vol. 26, No. 6, p. 764.

⁷⁰ HONNETH, Alex. Democracy as reflexive cooperation: John Dewey and the Theory of Democracy Today. *Political Theory*, 1998, Vol. 26, No. 6, p. 767.

Honneth proposes a review of it, considering that the capitalist labor market has been changing the *work society* and, therefore, the way people work and cooperate.⁷¹

As a political regime, Honneth seems more attached to Dewey's model of democracy, as he understands that cooperation is a crucial element for recognition, for the individual's identity's development, coming from private to the public life. In any case, what is critical for Honneth is the element of solidarity, which has been present in the three democratic models – republican, liberal, and proceduralist, in different forms. For us, struggling for a minimum of democratic ideals is a way to struggle for recognition in the pattern of law.

Honneth, in *“The Political Identity of the Green Movement in Germany: Social-Philosophical Reflections,”* has recognized that civic engagement presupposes certain political conditions:

The exclusive emphasis on the civil sphere, in which the citizens' engagement takes place, makes them overlook the fact that a range of social and economic enabling preconditions are required for individuals to participate freely and without shame in active public engagement. The idea of “civil society” tends to overlook the importance of these pre-political conditions of civic activities because they can only be granted through social and political rights guaranteed by a state whose bureaucratic power is precisely to be curbed. On this point again, it is not the place to go into the political-conceptual background that would explain how such a blind spot could have arisen in the conception of “civil society”. For me, what is decisive here is that due to the neglect of social-economic claims this leading concept refers only one-sidedly to the civil sphere of citizens' engagement and consequently cannot provide a bridge that would link up with the two other key themes.

⁷²

The “pre-political” situation makes it possible for the individual to comprehend democratic attitudes and necessities. Nevertheless, as already discussed, some countries do not have enough democratic conditions, instances, or arenas for debate, discussion, and formation of democratic claims.

For Honneth, voluntary practices endorsed by the current use of social media, the internet, and non-profit organizations⁷³ are all useful for reaching recognition and through the participation of people in all instances of recognition. If people understand democracy as an ideal and a set of attitudes, also seeing solidarity as a necessary moral obligation, the struggles for recognition are possible.

⁷¹ HONNETH, Alex. Democracy as reflexive cooperation: John Dewey and the Theory of Democracy Today. *Political Theory*, 1998, Vol. 26, No. 6, p. 780.

⁷² HONNETH, Alex. The Political Identity of the Green Movement in Germany: Social- Philosophical Reflections. *Critical Horizons*. 2010, Vol. 11, Issue 1, p. 11.

⁷³ HONNETH, Alex. *Freedom's right: The Social Foundations of Democratic Life*. Cambridge: Polity Press. 2014, “6. Social Freedom”, “6.3. The ‘We’ of Democratic Will-Formation”, “6.3.1. The Democratic Public Sphere”, para. 59.

Authors such as Okin⁷⁴ and Walzer⁷⁵ recognize the relevance of education for the emancipation of democratic principles. Kymlicka and Raz also foster the role of education.⁷⁶ Furthermore, Walzer highlights the relevance of associational ties as well.⁷⁷

3.3. The emancipation of the family member

In *Freedom's Right*, Honneth affirms that it is essential for a theory of recognition to have emancipated family members. For us, if a family practices recognition inside the home, respecting and allowing the person to make her own decisions and life projects, the tendency is to emancipate their members, forming a deliberative space for discussions, debate, and toleration of differences inside the familiar contexts.

We understand that Honneth's emancipated family member relates to Kymlicka's conception of the open revisability of a culture. Will Kymlicka affirms that individual freedom presupposes the feeling of belonging to a national group, but what is more important is the possibility for the person to question her own societal culture.⁷⁸ Kymlicka's definition of autonomy clarifies it: the individual has autonomy when he can rationally revise her own identity and role in her cultural community.

*The defining feature of liberalism is it that ascribes certain fundamental freedoms to each individual. In particular, it grants people a very wide freedom of choice in terms of how they lead their lives. It allows people to choose a conception of the good life, and then allows them to reconsider that decision, and adopt a new and hopefully better plan of life.*⁷⁹

His definition of rational revisability encompasses an essential interest in identifying and revising one's current beliefs about mistaken values.⁸⁰

⁷⁴ OKIN, Susan M. et al. *Is Multiculturalism bad for women?* Princeton: Princeton University Press, 1999, p. 122.

⁷⁵ WALZER, Michael. *On Toleration. The Castle Lectures in Ethics, Politics, and Economics*. London: Yale University Press, 1997, p. 109.

⁷⁶ "Among typical general measures we could mention providing schooling enabling members of cultural communities to learn their own cultures, languages, or religions, supporting cultural institutions, requiring employers to allow employees time off if this is needed for religious or other cultural purposes, and, most important, enhancing an understanding and acceptance of cultural diversity in the population at large, replacing the attitude of a majority that agrees to tolerate minorities with one of coexistence of various groups within the general framework of one civic and political culture." (RAZ, Joseph. *How Perfect Should One Be? And Whose Culture Is?* In OKIN, Susan M. et al. *Is Multiculturalism bad for women?* Princeton: Princeton University Press, 1999, p. 89)

⁷⁷ WALZER, Michael. *On Toleration. The Castle Lectures in Ethics, Politics, and Economics*. London: Yale University Press, 1997, p. 105.

⁷⁸ "The sort of culture that I will focus on, however, is a societal culture – that is, a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language." (KYMICKA, Will. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press, 1995, p. 76)

⁷⁹ KYMLICKA, Will. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press, 1995, p. 80.

⁸⁰ KYMLICKA, Will. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press, 1995, p. 213.

The revisability of a culture must be a premise for the emancipated family member. Struggling in the pattern of love for the emancipation of individual inside a family requires struggles for the revisability of her culture.

In the pattern of love, it is necessary to struggle in the contexts of family and friendship, requiring the emancipation of the family member and the open revisability of one's culture.

Conclusion

In 1992, Axel Honneth proposed for the first time his theory of recognition, through the book *"The Struggle For Recognition: The Moral Grammar Of Social Conflicts"*. Almost 20 years after, Honneth has proposed a new methodology to comprehend the role of law to recognition. In *"Freedom's Right: the social foundations of democratic life"* (2011), he proposes a normative reconstruction.

Recognition, for Honneth, occurs when an individual experience self-respect, self-esteem, and self-confidence through three modes of existence: love, law, and solidarity. Experiences collected by the individual during her life within love, law, and solidarity's patterns build her self-relation and morality. In other words, recognition guarantees human dignity.

Normative reconstruction, on the other hand, is the comprehension of modern law as not being as dogmatic as in the past, but actually coming from a sociological and social theoretical approach of law. That means, instead of interpreting the law as a formal condition of reaching recognition, we should consider two spheres of freedom-guaranteeing, for the reaching of self-respect and self-worth.

Firstly, individuals should have freedom and autonomy to make choices in their lives. Secondly, they should have civil cooperation and responsibility, adopting democratic attitudes in public spaces. Just if the law is interpreted from this dual perspective, then the pattern of law will work.

The Honnethian normative reconstruction endorses a form of freedom more appropriate to the recognition: the social freedom. Social freedom is reachable only through claims for *democratic attitudes*. The pattern of law guarantees not just democracy as a political regime, but also *democracy as an ideal and attitude*, as a practice in an individual's private and social life. Democracy, then, is a social construction necessary for the reaching of recognition in the three patterns of love, rights, and solidarity.

Coming from this, we understand that the theory of recognition presupposes some social constructions in order to make possible the enjoyment of recognition by the individuals, for instance the democracy as an ideal and attitude. If we take in consideration the societies where democracy is far from being a political regime, for instance authoritarian regimes such as China, *democracy as an ideal and attitude* plays a role for the reaching of recognition.

In these contexts, individuals are not fully addressees of rights yet, they are not able yet to fully enjoy their lives with the certainty that law assures them freedom and autonomy (for instance, through enjoying human rights either is their legal or moral forms). On the other hand, they may be authors of rights, being respectful with other subjects in the public space, being cooperative, having responsibility on the social requirements, and exercising

democracy as an ideal and attitude. It would be a first step for an expansion of democracy to the public instances, being then achievable as a political regime.

Freedom's Right represents the reunion of Honneth's studies on recognition with a theory of justice. The role of law for recognition is clarified. In contrast, through the normative reconstruction, individuals are not just addressees and authors of rights. Still, they are also important agents of recognition, as the law itself, mainly represented through institutions, is not capable of assuring recognition. Honneth calls the individuals for different kinds of struggles, mostly related to solidarity practices. The pattern of solidarity, then, reaches a very relevant role in his theory.

In *Freedom's Right*, he proposes struggles for voluntary practices, for the democracy as an attitude and ideal, and for the emancipation of the family member. Each of these struggles may be better explained and adapted to contexts that are not part of a liberal democratic political regime. Honneth has not done it yet, in a way that his theory still claims for an understanding of law and solidarity within non-democratic contexts.



Treatise

Explicative and Ascriptive Justification of Human Rights

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Abstract

In this article I discuss the so-called ascriptive argument developed by Tomáš Sobek in his text *Explikativní zdůvodnění lidských práv*. Sobek's argument is conceived as an extension of Alexy's explicative-existential justification of human rights. Alexy's justification is based on the idea that whoever denies human rights within a discourse is in fact implicitly acknowledging them through their very participation in the discourse. This can be resisted by refusing to participate in the discourse and rejecting the existential part of Alexy's argument. Sobek's argument is based on the autonomy of choice of moral view, the effective production of which, according to ascriptivism, requires discursive participation. Alexy's argument is thus kept going by the very fact that moral views are ascribed to the agents. Thus, while the human rights denier may refuse to discursively defend his thesis and refuse to make Alexy's existential decision, he is unlikely to deny that he has a moral view of his own. I analyse the ascriptive argument in terms of its connection to Alexy's argument and to discursivism more generally, and then critically contrast it with the possibility of forming one's own moral view within an internal quasi-discourse. I also present a temporal critique of the discursive justification of human rights and reduce the impact of the ascriptive argument by presenting discursive deserters as non-autonomous in terms of their choice of moral view.

Key words: explicative-existential argument, discursive justification of human rights, Alexy, ascriptive argument, formulation of moral opinion, discursivity, commitment theory of assertion, social theory of assertion

Introduction

Alexy's discursive justification of human rights attributes dignity to persons who are recognized as free and equal, and therefore autonomous¹. It is through their dignity that it is then inferred that these persons have human rights. This justification of human rights is discussed in the literature under the label of the explicative-existential argument.

This argument has recently been addressed in scientific community, among others by Tomáš Sobek in his text *Explicativní zdůvodnění lidských práv*.² There he introduced the so-called ascriptive argument, which, in his words, aims to significantly narrow the metaethical scope in which Alexy's argument can be avoided.³ Sobek's article is undoubtedly a valuable contribution to the broader discussion of the implications of the explicative-existential argument, and I believe that the ascriptive argument deserves closer analysis.

The aim of my article is not only such an analysis, but above all a critical response. Indirectly, some of the conclusions of my article can also be used against Alexy's original argument.

In the second section, I briefly summarize Alexy's argument and its well-known, most frequently commented upon weaknesses. This will allow me to build on this ground in the third section to present in more detail Sobek's extension of Alexy's argument, which aims to eliminate some of the problems. I will also point out here the relevant differences and similarities between Alexy's and Sobek's argument. Section four will already be concerned with a critique that will be conducted partly as a direct response to the reasons that should lead to the execution of the ascriptive argument, and partly as an examination of whether there are any escape routes for those who do not wish to be automatically affected by the argument.

1. Alexy's explicative-existential argument

1.1 The explicative part of the argument and typical problems of the argument

Alexy's argument is based on the fact that it puts the sceptic in a corner who is trying to make an argument that human rights do not exist.⁴ The assumption of the sceptic's participation in the argument leads to a meta-argument against him, which is that by the very act of arguing, the sceptic implicitly recognizes the debating partner as free and equal. This sets off an inferential cascade that leads to the conclusion that the sceptic is in fact ultimately recognizing the human rights of the debating partner, as demonstrated by his discursive practice, despite the explicit proclamations he makes within that practice. This contradiction between the content of discourse and its presupposition is referred to as performative

¹ I would like to sincerely thank the reviewers for their suggestions on the paper.

² The article is called *Explicative Justification of Human Rights* in English. SOBEK, Tomáš. *Explicativní zdůvodnění lidských práv*. *Právník*, 2022, roč. 161, č. 8, s. 713-728.

³ *Ibid.*, s. 714.

⁴ It is relevant to mention that when this text talks about the justification of human rights, it is not about human rights granted by a catalogue as a standard source of law, but about rights in the moral sense, that is, the idea of rights that we have, regardless of whether it is written down somewhere or guaranteed by someone.

contradiction. Alexy captures the inferential cascade that leads to the recognition of human rights as follows:

*To recognize another individual as free and equal is to recognize him as autonomous. To recognize him as autonomous is to recognize him as a person. To recognize him as a person is to attribute dignity to him. Attributing dignity to someone is, however, to recognize his human rights.*⁵

Traditionally, several objections have been raised against this conception, some of them anticipated by Alexy himself.⁶ The most important are probably the following two groups:

(i) The inability to conduct a discourse

The discursive conception is challenged by this objection from the position of the universalism that assumes that every human being has human rights.⁷ If the explicative argument is based on the conduct of discourse, which is supposed to imply autonomy, and from there human rights are to be inferred, then the question arises whether individuals who are incapable of conducting discourse, and thus cannot be understood as autonomous according to the explicative argument, also have human rights. The universalist answer is that, trivially, they do, because they are also humans. The answer from a discursivist position should be, at least without further supplementary argumentation, rather negative. However, the pressure of the universalist objection is quite strong, which creates a motivation to seek a discursivist conception that will accommodate universalism. A typology of possible attitudes towards the universalist objection is presented by Sobek in his article, to which I take the liberty of referring in this regard.⁸

(ii) Limitation on discursive commitments

This category includes, on the one hand, objections based on the limitation consisting in varying degrees of recognition of the transferability of discursive commitments to contexts other than discourse, and on the other hand, objections based on varying degrees of participating in discourse.

As far as the recognition of transferability is concerned, the default situation is that the individual in question participates in the discourse and also recognises the freedom and equality of the discourse partner within it. Until then, the explicative argument is unthreatened. But subsequently the question is raised as to why this individual should also recognize the autonomy of the discussion partner outside the discourse?

In the case of limitation on discursive commitments based on varying degrees of participation in discourse, it is useful to further distinguish two subcategories: partial and complete withdrawal from discourse.

Complete withdrawal from discourse consists of the individual simply refusing to participate in discourse altogether. By refusing to argue, he or she naturally blocks the impact of the

⁵ ALEXY, Robert. Law, Morality, and the Existence of Human Rights. *Ratio Juris*, 2012, Vol. 25, No. 1, p. 11.

⁶ Ibid.

⁷ GILBERT, Pablo. *Human Dignity and Human Rights*. Oxford: Oxford University Press, 2018, pp. 181-182.

⁸ SOBEK. *Explikativní...*, s. 720-721. I will not deal with this objection in this text. While it is perhaps the most serious objection raised against the explicative argument, the ascriptive argument is not developed to respond to it directly, but rather to objections falling under the second category.

explicative argument, since for the argument the participation in the discussion is constitutive. If there is no implicit practice, there can be no explicit explication of that practice.

Partial withdrawal from discourse is usually understood as a personal restriction of the circle of argumentative partners to some specific group, where within this group discursive commitments operate in accordance with the explicative argument, but outside this group the effect of granting autonomy no longer occurs.

1.2 The existential part of Alexy's argument and the "solution" of objections

The common denominator in attempting to answer objections related to the limitations of discursive commitments, and in some sense also those related to the inability to conduct a discourse,⁹ is the "existential" part of the explicative-existential argument.

In order for Alexy's explicative-existential argument to work, it is necessary to avoid, as far as possible, limitation of discursive commitments. This, according to Alexy, should be achieved by making an existential decision, which consists in choosing to be discursive being; to consciously develop our discursive potential. Failure to do so would result in the sanction of not recognizing an important aspect of our humanness and losing the possibility of self-knowledge and self-identification.¹⁰

If we evaluate with Alexy the existential part of the argument in terms of its impact on objections related to different kinds of limitations on discursive commitments, it should be said that, according to Alexy, the existential part of the argument works best against the objection of complete withdrawal from discourse. The threat of the sanction mentioned above seems to him so serious that this objection should eliminate so-called true discursive deserters.¹¹

However, it has less impact, in Alexy's eyes, on the objection of partial withdrawal from discourse and in relation to the transferability of discursive human rights commitments to other contexts. In the case of the latter, one can help oneself with additional supporting arguments, namely those from autonomy, consensus and democracy.¹² In the case of partial discourse desertion, however, Alexy considers that the price paid by such a partial discursive

⁹ Indeed, objection connected with the inability to conduct a discourse can also be formulated as a limitation of discursive commitments. The inability to participate in discourse in the optic of some higher degree of generality may not be so different from the individual's unwillingness to participate in discourse. In both cases, however, it seems to me that there is a rather usual tendency among discursivists to approach the universalist position in such a way that neither so-called discursive deserters nor those unable to participate in discourse are excluded from having human rights.

¹⁰ ALEXY. *Law, Morality...*, pp. 12-22.

¹¹ Individuals completely withdrawing from the discourse.

¹² I will not deal with these arguments in detail here and refer the reader to a brief and understandable summary of their dynamics in: HAPLA, Martin. Explicative-existential Justification of Human Rights. Analysis of Robert Alexy's Argument in Context of Is-Ought Problem. *The Age of Human Rights Journal*, 2020, Vol. 8, No. 15, pp. 105-116.; HAPLA, Martin. The Problem of Recognition of Human Rights: Does Explicative-Existential Justification Really Work? *Archiwum Filozofii Prawa i Filozofii Społecznej*, 2021, Vol. 27, No. 2, pp. 5-15.

deserter is not so high as to be a deterrent, since he or she does, after all, realize her or his human potential even in partial discourse.¹³

But the problem Sobek addresses in his article goes a bit further. Sobek asks the question: What if the sceptic does not make the existential decision (despite Alexy's threat)?¹⁴ By asking this question, he brings back into play the genuine discursive deserters and the objection of complete withdrawal from discourse.

On this basis it is possible and, in my opinion, appropriate to look for the motivation of Sobek's text. His ascriptive argument is directed primarily against those who refuse to enter the discourse and refuse to make Alexy's existential decision.

2. Ascriptive argument

So, to recap, we are now in a situation where we have an individual who has at least a reserved relationship to human rights, and who avoids the impact of Alexy's argument by limiting discursive commitments primarily by refusing to enter the discourse. The individuals Sobek targets are mainly sceptics, relativists, and nihilists. In what follows, we will focus only on relativists, but the ascriptive argument should apply *mutatis mutandis* to other groups.

Sobek uses two definitions of relativism. Harman's definition is:

*[...] [M]oral right and wrong (good and bad, justice and injustice, virtue and vice, etc.) are always relative to a choice of moral framework. What is morally right in relation to one moral framework can be morally wrong in relation to a different moral framework. And no moral framework is objectively privileged as the one true morality.*¹⁵

The second is Kelsen's definition:

*[Moral relativism] means that there is not one moral system, but that there are several different ones, and that, consequently, a choice must be made among them. Thus, relativism imposes upon the individual the difficult task of deciding for himself what is right and what is wrong.*¹⁶

At this point, let me point out that the two definitions have in common, above all, that they both, in what is probably their most natural interpretation, refer to concept of choice. This is crucial to the ascriptive argument because, through autonomy of choice, the argument is, as we shall see below, ultimately constructed. However, it should also be noted that this is also perhaps its most serious deficiency. For in defining relativism, we can easily bypass the

¹³ Sobek, *inter alia*, resists this conclusion of Alexy's, i.e. his fear of partial withdrawal from discourse. At the relevant point - when I mention the commitment conception of assertion as the basis of discursivity - I will point this out in more detail.

¹⁴ SOBEK. *Explikativní...*, s. 713.

¹⁵ HARMAN, Gilbert. Moral Relativism. In: HARMAN, Gilbert. THOMSON, Judith J. *Moral Relativism and Moral Objectivity*. Cambridge and Oxford: Blackwell Publishers, 1996, p. 3.

¹⁶ KELSEN, Hans. *What is Justice? Justice Law and Politics in the Mirror of Science*. Berkeley and London: University of California Press, 1971, p. 22.

choice,¹⁷ thereby significantly diminishing the actual impact of the argument itself. We will come more closely to this in section four when criticizing the ascriptive argument.

2.1 Formulation of ascriptive argument

The ascriptive argument is as follows: An individual takes his own moral views seriously only if he also takes seriously the moral views of others.¹⁸

At first glance, it is obvious that the foundations on which the argument is based need some explanation. What does it mean, then, that an individual takes his own as well as others' moral views seriously?

A minimal interpretation might consist in understanding the moral views of others, and our own, as chosen. We would further infer that since I can choose (make an act of choice), and since I infer my own freedom from this, then I must also attribute this freedom to others if I understand their choices as acts of choice. To take others' moral views seriously on this interpretation, then, is to take them as the results of acts of choice.

This alone should be sufficient to trigger Alexy's inferential cascade even for a relativist who is defined, among other things, in terms of choice, as is the case in both Harman's and Kelsen's definitions. On this interpretation, I take it that we could theoretically completely avoid discursivism as the basis of the explicative argument. Sobek, however, does not seem to entirely accept such a straightforward, minimal interpretation.

The ascriptive argument, according to him, is supposed to function as "a hammer against anyone who wants to *discursively* isolate his moral view."¹⁹ An even stronger connection to discursivity than is given by this identification of opponents who should be subject to the "hammer" of the argument is the connection conveyed by the argument from the utility of discourse for the formulation of moral view. Sobek notes, as he develops the ascriptive argument, that he sees the only effective way to take one's own moral views seriously is to compare them with the moral views of others in discursive confrontation.²⁰ I read this statement as indicating that Sobek would like to keep the link to discursivism in some sense in his theory.

In order to fully develop the connection between the possibility of formulating one's own moral views and discursivism, it will be useful to first look briefly at the connection between discursivism and commitment theory of assertion. A brief examination of this connection will also allow us to understand why Sobek believes that Alexy need not worry about the partial discourse withdrawal objection.

¹⁷ After all, at least some of the variants of moral relativism to which Sobek refers in footnote 44 of his article are variants that do not operate with autonomous choice.

¹⁸ SOBEK. *Explicativní...*, s. 713, 725.

¹⁹ Ibid, s. 725. Emphasis added.

²⁰ Ibid, s. 713, 724, 728.

2.2 Discursivism and commitment theory of assertion

The discursive justification of human rights in Alexy's conception rests on the rules of discourse that follow from the so-called commitment theory of assertion.²¹ This consists in an interpretation of the speech act of assertion and the belief that discursive commitments are created by the realization of assertion.

Assertion is conceived as an act that consists in presenting *A* as something objectively true, that is, as being true for all.²² It also means, according to this theory, that the one who asserts *A* is indicating that he or she has adequate reasons to think that *A* is true. And from here the commitment part of the theory is derived, which says that the speaker has a discursive obligation, on the one hand, to present reasons for *A*, and on the other hand, to put up with demands of others to provide reasons for *A*. Commitments are constructed here as universal, since this corresponds to the objectivist presentation of *A* as true. Thus, the obligation to provide reasons for *A* is an obligation that the speaker has in principle towards everyone, and the right to ask critical questions after evidence of *A* belongs in principle to everyone as well. The purpose of these commitments is to seek reasons for the possible correction or retraction of a statement if it turns out not to be true. Such a practice is intended to lead to the public cultivation of truth.

By now it should be obvious why Alexy, when he embraces the commitment theory of assertion as the basis of discursivity, need not worry about the partial limitation of discourse. If the sceptic were to try to restrict discursive commitments to a certain group of people, towards whom he would accept discursive commitments but not towards others, then he would be denying the commitment theory of assertion because he would not be prepared to defend his position against everyone, or he would not allow everyone to ask critical questions on the evidence of his position. Thus, if a discursive theory is built on a commitment theory of assertion, then one cannot restrict discourse to a particular group of people, for this would in fact completely eliminate it.

This conclusion can be further escalated by linking the denial of the commitment theory of assertion to a resignation not only to discursive commitments but also to the interpretive part of the theory that conceptually links assertion to truth. This results in the conclusion

²¹ I note that this is not necessarily a speech act theory of assertion. This is clear from Peter Pagin's famous article *Is Assertion Social?* Cf. PAGIN, Peter. *Is Assertion Social?*. *Journal of Pragmatics*, 2004, Vol. 36, No. 5, pp. 833-859. In this article, Pagin challenges the commitment theory of assertion (whatever social commitments it invokes) in general terms, saying that all social definitions of assertion are too broad, since one can always construct speech acts that, while meeting the conditions for being assertions, will not be ones. It is worth noting that this does not, of course, undermine the core of discursive human rights justification, but it does undermine the connection between discursivity and the speech act of assertion, which should be replaced by some specific act of assuming particular discursive commitments when accepting Pagin's conclusions. In this way, Pagin's result may have a significant negative impact on the attractiveness of evidential support for discursivism. I also note in this context Philip Pegan's critique of Pagin and Pagin's response. PEGAN, Philip. *Why assertion may yet be social*. *Journal of Pragmatics*, 2009, Vol. 41, No. 12, pp. 2557-2562. PAGIN, Peter. *Assertion is not possibly social*. *Journal of Pragmatics*, 2009, Vol. 41, No. 12, pp. 2563-2567.

²² Here we will not explore whether *A* denotes a proposition (or something else) and how this *A* relates to reality, because we would run into the problem of whether moral beliefs are beliefs about "standard" propositions, or about some specific type of proposition, or about something else entirely. This otherwise interesting exploration would unfortunately lead too far from the main topic.

that the one who constrains discourse (and also the one who withdraws from it or does not enter it) supposedly resigns to the concept of truth as such. This escalation seems to be approved, at least in some form, by Sobek, but it does not appear to me to be a fortunate one because it is burdened with the problem of overlooking the irreducibility of truth to discursive justification.²³ Either way, the objection of partial withdrawal from discourse collapses into the objection of genuine discursive desertion, i.e., complete withdrawal from discourse.

2.3 Moral views and the commitment theory of assertion (commitment theory of the electiveness of moral views)

The ascriptive argument was developed to target sceptics, relativists, and nihilists. In order to reach them, it was important, among other things, to deal with the problem of the commitment theory of assertion in its claimed orientation towards objective truth. For discursive deserters typically deny that truth cultivated in discourse is something they care about if it is supposed to lead to a single objective truth.

In addition to modifications leading to address this problem, reconstruction also needs to keep the connection to discursivism in mind. This can be done through the preservation of discursive commitments even in a context in which they are not used to cultivate correctness and generate a supposedly objective discursive truth, but for some other purpose.

The ascriptive argument can achieve these desiderata by embracing what I will call a commitment theory of the electiveness of moral views, which is in certain structural respects resembling a commitment theory of assertion.

The basic scheme of the commitment theory of assertion can be represented as follows:

- (i) If I assert A, I present it as true.
- (ii) If I assert A, I indicate that I have adequate reasons to think that A is true.
- (iii) I have a commitment to provide reasons for A.
- (iv) I have a commitment to put up with demands to provide reasons for A.

By contrast, the basic scheme of a commitment theory of the electiveness of moral views might look something like this:

- (i) If I choose A, I present it as elective as a moral view.
- (ii) If I choose A, I indicate that I have my own reasons to think that A is elective as my moral view.
- (iii) I have a commitment to provide reasons for A.
- (iv) I have a commitment to put up with demands to provide reasons for A.

²³ Although elsewhere in his article Sobek explicitly states that he is aware of this irreducibility. I am unsure whether Sobek conceives of truth strictly as a discursive category. Cf. also SOBEK, Tomáš. Metaethics of Human Rights: An Expressivist Approach. *Rechtstheorie*, 2020, Vol. 50, No. 4, pp. 493-519.; SOBEK, Tomáš. Právní pozitivismus. In: SOBEK, Tomáš. HAPLA, Martin (eds.). *Filosofie práva*. Brno: Nugis Finem Publishing, 2020, s. 51-52.

The structural resemblance is obvious and I think it may mediate the connection of the ascriptive argument to discursivity. The key theoretical concept of electiveness is that:

- a) various choice contents are assumed which satisfy the minimum requirements for what is *prima facie* choice content at all (i.e., if used for an ascriptive argument, these requirements must ensure that it is a moral view)²⁴, and
- b) various reasons are assumed here, which serve the respective contents as evidence.

Given that truth is not the primary goal in the theory of moral electiveness, it is difficult to establish a criterion for evaluating individual justifications. This is also why I drop the word “adequate” from the reconstruction. But why do I replace it with the phrase “my own”?

The dynamics of reasons is important for the ascriptive argument, that is, to ensure that the performer of the act of choice would not choose randomly, but on the basis of reasons relevant to him or her. The relevant reasons proper to the one who makes a choice are those which, from the pleiad offered, he or she accepts as his or her own in an informed way, or those by which he or she has previously supported the content of his or her choice and, in the present case, has informedly corroborated it. Discursive deliberation leading to the adoption of new reasons for a particular choice content, as well as the corroboration of reasons for a particular choice content, results, according to the theory of electiveness of moral views, in an increase in the degree to which a given choice content is the choice-maker’s own moral view.

Possible choice contents and possible justifications for these contents, according to this theory, can be recruited most effectively in discussion with other moral agents and in confronting those agents’ moral views and reasons. This is also consistent with the discursive commitments that are part of the commitment theory of the electiveness of moral views. The purpose here, however, is not to find the best reasons for the public good of discursive truth, but a kind of perfection as to one’s own reasons for accepting a particular elective content of moral view choice.

This kind of perfection is turned into the slogan “to take seriously” in the formulation of the ascriptive argument. To take one’s own moral view seriously, then, is to discursively consider elective contents and the reasons for them, thereby increasing the degree of perfection of one’s own chosen content and reasons for such a choice.

Why should the contents of choices and their justifications be effectively recruited primarily from the moral views of others, from the justifications they offer, and from confrontation with those reasons and contents? In answering this question lies the pragmatic vein of the ascriptive argument, which in turn brings the ascriptive argument closer to the existential vein of Alexy’s argument.

²⁴ Here, we need only stipulate that the contents of the choice meet such minimum requirements, without having to (and wanting to) specify what those minimum requirements are. However, these will probably include at least the requirements for an appropriate semantic category of choice contents, for an appropriate formulation of the content corresponding to its ontology, but they may also theoretically be substantive requirements, e.g. axiological etc.

2.4 Ascriptive argument as an existential argument

I believe that, with not too much misrepresentation, the ascriptive argument can also be seen as an extension of the existential vein of Alexy's original argument. After all, the general structure of the existential argument can be reconstructed in economic language: the price we pay if we do not choose discursivity, namely the loss of an important aspect of humanness, is too high. And it is this potential for intimidation that (usually) leads to the existential decision.

The ascriptive argument can be read similarly. The price for not taking seriously others' moral views along roughly the lines sketched in subsection 3.3 above, and thus not taking seriously one's own moral views, are certain threats, which thus also represent, on a positive level, pragmatic reasons for, for example, the relativist's acceptance of the background of the ascriptive argument.

The locus of attack for the ascriptive argument in relation to the relativist is that he or she has a moral view of his or her own. Indeed, a relativist who actively resists entering a discourse in which Alexy's inferential cascade would be directly activated is more likely not to deny that he has his own moral view. The very ascription²⁵ of a moral view, then, given the mechanisms described in subsection 3.3, and provided with the existential force of the ascriptive argument, is the basis for the belief that the relativist has, or has had in the past, reasons to take other people's moral views seriously, and is thus already steeped, figuratively speaking, in discursivity from the time of the formulation of his own moral view. Even if he or she does not actively enter into discourse, it is still possible to activate Alexy's inferential cascade through the autonomy of the relativist's choice of his or her own moral system, which, according to ascriptivism, is discursive.

Among the deterrent consequences that will occur if we do not take seriously the moral views of others, and thus our own, Sobek includes the following:²⁶

- a) the choice of a moral system will be irrational,
- b) it will be impossible to understand the reasons for one's own (moral) actions,
- c) there will be a resignation to one's own moral autonomy,
- d) there will be a resignation to one's own moral responsibility,
- e) it will be impossible to have one's own moral views.

Prima facie, these are extremely serious reasons, which are indeed to be feared on the part of a relativist. But is this really the case? I will take a closer look at the critique of the ascriptive argument in the next section.

3. Critique of the ascriptive argument

The critique of the ascriptive argument can be developed in several directions, each of which will provide different responses to the deterrent implications listed above. We can challenge

²⁵ Hence the name "ascriptive" argument.

²⁶ It is possible that there are even more in Sobek's article, but I don't think that more reasons would dramatically increase the "existential" price already presented as very high.

the discursive nature of the ascriptive argument, asking in particular whether the same result, i.e., the confrontation of reasons and elective contents, can be achieved with sufficient quality by other means than discursive practices. I will address this possibility in subsection 4.1 below. A second line of critique can be directed directly against autonomy as such. Here, the question is whether the ascriptive argument actually reaches as large a set of persons as it is being presented.

3.1 A critique of discursivity understood as a means for the development of autonomy

In the context of the critique of discursivity, I find it worth recalling the narrow line that can be drawn between argumentation and reasoning. Indeed, this line may be highly relevant here.²⁷ If we understand the relativist's reasoning, which is what the ascriptive argument is aimed at, as a kind of argumentation, that is, ultimately as an excerpt of discourse with the other, it is clear that we will remain more on the side of the ascriptive argument. If, however, we understand reasoning as an activity distinct from argumentation and taking place primarily within the individual sphere of the relativist, nothing in principle prevents us from holding an autoreferential conception of "discursive" commitments.

We can achieve this specifically, for example, by allowing the relativist to engage in internal quasi-argumentation with himself or herself. Such a relativist would make demands on himself or herself to justify hypothetical elective contents (i.e., moral views) and would also meet them. The conclusion of Alexy's cascade, on such a conception, would again involve the relativist alone, but that does not on first sight correspond to the discursive justification of human rights, from which we normally expect at least intersubjective character, universalist qualities, etc.

However, the informedness and choice of one's own reasons for adopting a moral view is not diminished by this conception, since the only mechanisms that are supposed to confer the desirable properties of "one's own" view and "one's own" justification are operative even in the context of hypothetical discourse. Thus, even such a relativist "takes seriously" his own moral view without having to enter the actual discourse.

This, of course, has direct implications for the various threats of an ascriptive argument based primarily on discursivism. I think it is worth a closer look at the deterrent consequence consisting in the irrationality of the choice of a moral system. In formulating this consequence from the position of the ascriptive argument, irrationality is highly likely to be understood as discursive non-justification. If this interpretation of what irrationality consists in is correct, then this conception has several separate difficulties:

(i) If the threat of irrationality is to be used to support discursivism, as required by the ascriptive argument, it should not also be defined in terms of discursive justification, since it is a circular reasoning.

²⁷ For relevant literature on the distinction between argumentation and reasoning, cf. for example the last paragraph of the first section of Catarina Dutilh Novaes' review article on argumentation. NOVAES, Catarina D. Argument and Argumentation. *The Stanford Encyclopedia of Philosophy*, published on 16.7.2021, cited 12.4.2023. Available online: <https://plato.stanford.edu/entries/argument/>.

- (ii) If the relativist is forbidden to rationally falsify discursivism, because any rational argument must by definition be discursive, then this is an immunization of discursivism.
- (iii) In the extreme case, if discursive rationality is understood as a personal quality that the relativist cannot satisfy by definition, and whose lack defames the person in question as insufficient in some respect, the deterrent consequence can also be understood as an *ad hominem* argument.
- (iv) In adopting a self-referential conception of discursive commitments and method of reasoning in quasi-discourse, the relativist still has the option of rationally choosing non-discursively, while preserving the maximum possible (and above all essential) of rationality understood as discursive justification. Thus, the choice of a moral system by the method of reasoning in quasi-discourse will not be irrational, and at the same time will not lead to the execution of an ascriptive argument.

As to the objection that if the relativist does not take seriously the moral views of others and, by implication, his own, he runs the risk of misunderstanding his own moral conduct, and as to the other objections, I leave it to the reader to modify point (iv) above so that it can be directly used against those objections. Such a modification is quite straightforward.

I would also note at this point that the critique of discursivity within the ascriptive argument, but also within Alexy's explicative argument, can also be conducted from a temporal perspective. It is not a complete critique, however, because it does not ultimately call into question the existence of discursive human rights as such. What is contested however is the permanence and thus the practical usability of such rights.

Even if we admit the impact of the ascriptivist argument on relativists, this in itself does not necessarily mean that the resulting theory will lead without further elaboration to the result to which it is intended to lead, i.e. a workable justification of human rights. The fact that for the moment in which the relativist formulates his or her moral view under the conditions of the ascriptive argument, the relativist finds himself or herself in a performative contradiction, and thus momentarily recognizes human rights, does not mean that at the next moment his or her recognition does not automatically cease.²⁸ The possible solutions and connections of discursive justification (whether Alexy's or Sobek's) to related theories, such as some form of institutional theory of rights, are not integral to the theory behind the ascriptive or explicative argument. A closer analysis of this objection is unfortunately beyond the scope of this paper.

3.2 Critique focusing on autonomy in the ascriptive argument

At the beginning of section 3 I gave a transcript of the definitions of relativism used by Sobek. What they had, among other things, in common was that a choice was made between moral systems from the relativist's position. As has been shown, the interplay between the autonomy of this choice and discursivism subsequently forms the background of the ascriptive argument and determines the range of persons on whom the argument applies and

²⁸ Here, in a way, the criticism of the late Kelsen resonates by analogy. In his late theory, it is not clear how norms are maintained in *sollen* if there is no one currently performing the volitional act. Cf. Kelsen, Hans. *Allgemeine Theorie der Normen*. Wien: Manzsche Verlags und Universitätsbuchhandlung, 1979.

thus the extent of the narrowing of the metaethical space in which the explicative argument can be avoided.

However, there is another escape route for relativists, which is to redefine relativism such that it does not depend on the concept of choice of moral system, thereby challenging the relativist's need to make autonomous choices.

If we use the neutral position to define relativism, which focuses on moral views and moral systems rather than on the persons of relativists, we can define relativism by three theses:

- (i) What is evaluated as right or wrong is always evaluated as such in terms of a moral system.
- (ii) There are several such moral systems.
- (iii) None of them is privileged.

In this definition, it is sufficient for the relativist that the point of view of a particular moral system exists and need not be actively chosen as, in Sobek's sense, a his or her "own" point of view. Choice is reinterpreted in this conception as something that happens to the relativist rather than something that he or she does.

Against such a reinterpretation, however, it can be objected that it is merely a technical adjustment motivated solely by the desire to avoid a natural interpretation of how the relevant moral system is activated. But the philosophical motivation behind this conception of relativism may be²⁹ more honest. Scepticism, especially epistemic scepticism, is commonly understood in a rather negative way, but here it may nevertheless be based on a modesty stemming from the possibility that the moral state of affairs (and indeed the ordinary state of affairs) may be different from what the discursive or, if you like, ascriptive moral view presupposes. This can be embodied in a reluctance to make a choice under a state of epistemic scepticism, which, after appropriate generalisation, translates into the idea that autonomy in the ascriptivist sense is not given.

The deterrent consequences of the ascriptive argument are significantly mitigated in this conception of relativism, and the price the relativist must pay is much lower. The irrationality of choice does not bother the non-autonomous relativist because he or she does not seek to discursively justify his or her own position. He or she understands the reasons for his or her moral actions because they are given by the system from which the non-autonomous relativist departs. He or she does indeed resign his or her own moral autonomy, but this does not bother him or her in the least. Again, moral responsibility is given by the default moral system, so the objection that he or she resigns his or her moral responsibility does not fall on him or her. The objection that he or she couldn't have his or her own moral views only applies on the assumption that moral views are necessarily discursive, which the relativist denies. So even this objection is not effective against him or her. The attack on autonomy, then, is primarily a challenge to the pragmatic implications of the existential interpretation of the ascriptive argument.

Sobek, within his article, anticipates the possibility of reinterpreting relativism so that it is not burdened by the choice of a moral system. Within the example where he assumes this reinterpretation, he then makes the relativist demand respect for the choice of his

²⁹ Unless we want to uncharitably suspect relativists of thereby preparing a free ticket to whatever moral views are ordinarily seen as problematic.

moral system and implicitly asks what the relativist's demand for respect is based on. Sobek's example goes like this:

Suppose [a moral relativist] says the following four sentences:

[(1)] I have chosen the moral system MS1.

[(2)] I have not considered any alternative to MS1.

[(3)] I am not interested in any alternative to MS1.

[(4)] Respect my personal choice of MS1.³⁰

Sobek eventually interprets sentence (1), even though it contains the word "choice", to mean that it may be a system not chosen by the relativist, a default. He then interprets sentences (2) and (3) to mean that the relativist is "locked into a moral system MS1 that he has not actually chosen."³¹ And in the context of this reading, he concludes that the demand for respect contained in (4) does not make good sense, because here the relativist is demanding respect for something that, in his own words, does not exist.

I suspect that this conclusion remains halfway there, because Sobek is not following his own reinterpretation of sentence (1). That a relativist cannot want to respectfully protect his own choice, the existence of which he explicitly excludes, is trivial. However, I believe that the relativist can make sense of this example, and especially of his or her demand for respect, at least if he or she is reasoning with an ascriptivist.

Since he or she does not regard any moral system as privileged, he or she is allowed to understand the moral system of the ascriptivist as binding and default for the ascriptivist. Given this position, the relativist can demand respect for his or her person from the ascriptivist because he or she recognizes that the ascriptivist may believe that there is autonomy from which the demand for respect can be derived. Thus, without the relativist having to proceed to his or her own beliefs about autonomy, the relativist is allowed to demand respect from the ascriptivist because the ascriptivist is obligated by his or her own system in which he or she ascribes moral views to the relativist. The operation of the ascriptivist argument here is thus asymmetrical.

If the relativist were to consider a general demand for respect, it would presumably be necessary to interpret sentence (4) in accordance with concepts outside the autonomy of choice, i.e., as a demand for respect for the fact that the relativist has a moral system, and since he or she did not choose it, he or she cannot not have it. Respect here, then, will consist more in a demand that the relativist not be discursively persuaded, since it can have no effect on him or her.

I find it appropriate to note at this point that Sobek presents a more careful elaboration of the variant of relativism, which also loosens the connection between relativism and the autonomy of choice, in section 6 of his article. There he discusses the so-called multimundialism defended by Carol Rovane.³² In a nutshell, this is a relativist position

³⁰ SOBEK. *Explicativní...*, s. 724.

³¹ Ibid.

³² ROVANE, Carol. *The Metaphysics and Ethics of Relativism*. Cambridge and London: Harvard University Press, 2013.

according to which moral worlds are logically separate, so that logical relations between moral views (and reasons) exist only within the same moral world. Thus, two opposing moral views are not understood as inconsistent (or even consistent), even though they would be so if they occurred within the same moral world. The relativist in multimundialism does not choose his or her moral world, but the inhabitation of it is the result of cultural adaptation to the living conditions of a given society. Sobek develops another argument based on his exposition of multimundialism, which he argues complements the ascriptive argument.³³ This argument consists in the execution of Alexy's cascade non-discursively, specifically by refraining from discussion with another person while respecting that person because of his or her inhabitation of a different moral world.³⁴ This argument is reminiscent of what I identified in subsection 3.1 above as the minimal interpretation of the ascriptive argument. Sobek's multimundial argument, then, does revise, at least in part, the connection between the ascriptive argument and discursivism. However, a detailed analysis and the implications of such a revision are beyond the scope of this paper.

Conclusion

In this article I have been concerned with the explicative-existential argument, but especially with Sobek's extension in the form of the ascriptive argument. First, I explained the motivation for seeking to supplement Alexy's argument, namely, the objection consisting in a refusal to participate in the discourse and a refusal to make the existential decision proposed by Alexy. Then, in the analysis of the ascriptive argument, I linked this to autonomy of choice on the one hand, and discursivity on the other.

The connection to autonomy of choice in the analysis was mainly driven by Sobek's definition of relativism, where relativism was chosen to represent groups that actively refuse to participate in Alexy's discourse and refuse to make existential decision.

When analysing discursivity, I started from its original connection with the explicative argument through the commitment theory of assertion. As I hope is evident from my paper, I do not think this connection is the most felicitous, among other reasons, because of the dubious status of the commitment theory of assertion as such. For the ascriptive argument, the starting point of the commitment theory of assertion is also not very suitable, because of the delineation of the range of persons on whom Sobek's argument should operate. This is because these persons do not have a positive relation to moral truth conceived as a public good given by discursive justification and its cumulative refinement. But it is precisely such a tendency toward general intersubjective truth that the commitment theory of assertion is aimed at. Thus, I have taken the liberty of analysing the discursivism in ascriptive argument proposed by Sobek as the only effective way of proceeding in the formulation of moral view in terms of the so-called commitment theory of the electiveness of moral view, which does not connect the choice of moral view with a claim to objective truthfulness, but is content with a certain tendency to perfection of moral view (and its evidence) individually for the

³³ He refers to it as a *multimundial argument*.

³⁴ SOBEK. *Explikativní...*, s. 726-728.

moral agent himself. This has led to an explanation of the conditions under which, according to ascriptivism, it occurs that one takes his or her own moral views seriously.

In the following part of the analysis, I have tried to grasp Sobek's argument as a kind of ascriptive-existential argument and I have presented specific threats as elements that increase the cost of not accepting the idea of a discursive formulation of moral view as it is presupposed by the ascriptive argument.

In the critique section of the paper, I focused on the issue of the conjunction of the ascriptive argument with discursivity and presented an alternative conception of how one can take his or her own moral views seriously without further resulting in the execution of the ascriptive argument, namely the method of hypothetical discourse. In light of this alternative, I have also attempted to deal briefly with the existential threats posed by the ascriptive argument, and I have also, albeit somewhat non-systematically, suggested a possible temporal critique of the ascriptive (as well as the explicative) argument.

In the second part of the critique section of the article, I discuss the issue of the redefinition of relativism and its connection to the autonomy of choice. Some such redefinitions are anticipated in Sobek's text as well and indicate, on the one hand, a mitigation of the impact of the ascriptive argument and thus a reduction of its operational space, and, on the other hand, possible prospects for further development in this area of inquiry. The latter may consist in a detailed analysis of the implications of multimundialism for the ascriptive and explicative argument, which unfortunately goes beyond the scope of this text, but nevertheless holds some promise for the future.

In the light of the critique, Sobek's argument, at least in its original version, can be assessed as successful only to a small extent. But of course, this assessment assumes that the analysis of the argument presented is correct, which may not be completely true: it is of course possible that some parts of the analysis may suffer from simplifications that may ultimately affect the correctness of the reconstruction. However, even if the above assessment is accurate, this does not automatically mean that the ascriptive argument will not be applicable, at least as a step on the way to further developing the justification of human rights through a theory of autonomy.

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