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Human Dignity and the Autonomy of Law

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Volume 7

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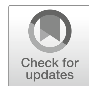
Dignity/Autonomy of the Law/Human Rights/Comparable Personal Autonomies: Introducing an Indispensable *Generating Series* (and Its Productive "Phantoms")



José Manuel Aroso Linhares

Abstract This introductory chapter aims to unveil the generating series which, despite the plurality of the perspectives and approaches developed in the following fourteen chapters, gives the ensemble an effective contextual plausibility. This generative prime series combines the four main themes mentioned in the title: the concepts of human dignity, the problem of autonomy (and limits) of Law and legal thinking, the connections between human rights practices (and foundations) and the issue of human dignity, the role that the consideration of Law's aspirations attributes to the experience of an autonomous subject-person.

1 Introduction

"Wir Neueren haben vor den Griechen zwei Begriffe voraus, die gleichsam als Trostmittel einer durchaus sklavisch sich gebarenden und dabei das Wort 'Sklave' ängstlich scheuenden Welt gegeben sind: wir reden von der 'Würde des Menschen' und von der 'Würde der Arbeit'. (. . .). Die Griechen brauchen solche Begriffs-Halluzinationen (. . .) [and] solche Phantomen (. . .) nicht." (Nietzsche 1872, pp. 275–276). This incisive statement by Nietzsche—with its provocative judgement on dignity-*worth* as being "a compensation" for (if not a hypocritical mask or an insidious lie used in) our world of "slaves" ("behaving thoroughly slavishly" and "yet at the same time anxiously eschewing the word 'slave'")—belongs to the short essay "Der griechische Staat", the third of the "five prefaces to five unwritten books" *(Fünf Vorreden zu fünf ungeschriebenen Büchern)* that he offered Cosima Wagner (as a birthday present) in 1872[1]. . .—a relatively neglected text (most relevant

[1] "Für Frau Cosima Wagner in herzlicher Verehrung und als Antwort auf mündliche und briefliche Fragen, vergnügten Sinnes niedergeschrieben in den Weihnachtstagen 1872" [This is the dedication!]. We should not forget that the happy reunions with Cosima and Richard in Wagner's house in

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certainly for those who follow every detail of the Nietzsche/Wagner saga), with which, however (and certainly not by chance), Michael Rosen, in his indispensable *Dignity*, establishes a brief and vibrant critical dialogue (Rosen 2012, pp. 41–46). Is however the recall of Nietzsche's "Der griechische Staat"—whose brilliant Deconstruction-*Destruktion* does not even spare the acquisition of human rights (treated as "transparent lies"[2])—productive and adequate when we consider human dignity in its juridical context? I can say that it is. If for no other reason, because the consideration of Nietzsche's arguments is also an opportunity to bring into the arena Jeremy Waldron's well-known distinction between *dignity as a ranking status (dignitas)* and *dignity as value or (absolute inner) worth (Würde*)—a distinction we will *return to* throughout this book.[3] As if we were agreeing that ancient Greeks *did not* require (have not needed or autonomized) the *claim to dignity*, whilst simultaneously defending that Roman jurists certainly *did*... and that their unmistakable invention of dignity (albeit experiencing it as a *ranking status*) is certainly inseparable from the specification of *phronesis* and *humanitas* which fed (or have been feeding) Law's *claim to autonomy*...

And yet, this anticipation and the refutation it justifies are very far from being indispensable. An exercise in *Destruktion* as brilliant and corrosive as this preface by Nietzsche is well worth it for its own sake, especially in a context like the one we live in today, with its implacable sequence of cultural crises and limit-situations, multiplying perplexities and paradoxes (*eine andere unselige Zeit?*[4]). In this context, the emergence of a new ensemble of essays on *dignity in the juridical context* can hardly avoid an autonomous exercise *in justification*. The reasons to be summoned here are however far from feeding a linear argumentative path. On the one hand, the celebration of the claim or principle of dignity as an irreversible civilizational acquisition (assumed in the Western Text as a kind of an *historical absolute*) imposes a recurrent *topos*, with paths and places so intensively *frequented* (so invincibly *crowded*) that any new (more or less) celebratory incursion runs the risk of redundancy, pointlessness or banalization. On the other hand, the multiplication of critical approaches—not only addressed to the openness of the *signifier* as such and the instability of the corresponding *contexts of signification* and

Triebschen (less than 3 km away from the place where the workshop that gave rise to this book was held...) had recently come to an end (April 1872), announcing the distance and the tragic rupture (which will not take long to happen) between the "philosopher" ("who was also a musician") and the "musician" ("who was also a philosopher") [These formulations are by Kerstin Decker: Decker 2012, p. 11).

[2] "Jetzt muß dieser sich mit solchen durchsichtigen Lügen von einem Tage zum andern hinhalten, wie sie in der angeblichen 'Gleichberechtigung aller' oder in den sogenannten 'Grundrechten des Menschen', des Menschen als solchen, oder in der Würde der Arbeit für jeden tiefer Blickenden erkennbar sind" (Nietzsche 1872, p. 275).

[3] See *infra*, part III (Ana Gaudêncio's "Merit, Value and Justification...") and part V (Dialogues with Jeremy Waldron). See also Atienza (2022), pp. 117–126.

[4] "Unselige Zeit, in der der Sklave solche Begriffe braucht, in der er zum Nachdenken über sich und über sich hinaus aufgereizt wird!" (Nietzsche 1872, p. 275).

performance but also highlighting the pernicious effects of its proliferation, generating unproductive generalizations, when not empty "shibboleths" (Schopenhauer) [apud Rosen 2012, pp. 1, 41, 163], "phantoms" or "conceptual hallucinations" (Nietzsche 1872, p. 272)—has stabilized (or deployed) an apparently contrary trend, whose dynamic impulse is precisely a "highly shared (. . .) animus against dignity" (Rosen) [apud Waldron 2013, p. 544]—a kind of theoretical and reflexive hostility demanding the productive overcoming or substitution of the concept (if not its rejection). With the aggravating factor that this hostility may appear (and frequently *does*!) under the guise of an argument from *congruence-Kongruenz* (Hans Albert 1975, pp. 77–79, 93 ff., Hans Albert 1978, pp. 171–176, 182–186), involving the cognitive *Aufklärung* that *science* or *scientific practice*—treated as an authentic *world view (Weltbild/Weltauffassung)* or as an autonomous *way of life*, producing a *human world* of "problems", "tentative theories" and "criticism" or "error elimination" (Popper 1976, p. 194)—should (must!) impose on normative choices (its material solutions and its conceptual formulations).[5]

Bearing in mind the difficulties that this web of arguments imposes, these introductory notes will refrain from developing a unitary exercise *in justification*, rather admitting that this burden should be attributed to each of the following fourteen chapters and its specific voices. It is in this sense that I may add that these preliminary words will only map the different routes, on one hand acknowledging the transversal intertwinement of four major *thematic cores* (always present, although sometimes only implicit. . . and certainly assuming different weights and ways of overlapping and balance), on the other hand distributing the different interlocutors (in direct consonance with those weights and their specific modes of equilibrium) through six different parts or stages.

2 The Four Thematic Cores

Two of those thematic cores are already deliberately manifested in the title chosen for this collection of essays: we refer to the concepts of human dignity—explored in their juridical or non-juridical *provenances* and their corresponding impacts or outcomes on contemporary legal thinking and practices—and to the problem of autonomy (and limits) of Law (but also again legal thinking)—this one as a complex *topos*, involving not only the opportunity to discuss real or aspired borders with other arenas of discourse and practice (which may be also with alien civilizational horizons and their responses to the problem of social institutionalization), but also as the possibility of rejecting the autonomy-isolation (and the unproblematic claim to

[5]This argument could use for instance bioethical empirical-explicative informations in order to highlight the "usefulness" and squishiness or even "stupidity" of a specific use of the concept "human dignity" and to defend its productive substitution (the positive candidate would be the principle of personal autonomy): see Macklin 2003; Pinker 2008; Rosen 2012, pp. 119 ff. ("Voluntarism"), Waldron 2013, p. 544, note 4.

universality) justified by legal formalism... and with this the opportunity to rethink Law's specific aspirations (more or less explicitly dynamized through a practical-cultural claim to autonomy) as a decisive manifestation of the Western Text. What about the third and fourth thematic cores? We may say that they are already unavoidable components of the first two, with a degree of relevance, however, that justifies their separate highlighting: we are now considering human rights practices and foundations (in their direct connections with the issue of dignity), as well as the role that the consideration of Law's unmistakable aspirations attributes to the experience of an autonomous subject-person (and the demands that identify his/her position in the dialectical counterpoint with the rethinking of a *commune*).

Once the thematic material is exposed (almost as if it were a generative *prime series*), the parts or steps that follow, in their different combinations and responses—as if they were building unmistakable development exercises—gain an almost "natural" intelligibility.

2.1 Part I. Exploring the "Conceptual Bonds" Between Human Rights and Human Dignity

The three first chapters (Part I) explore the challenge of human rights acquisitions in their conceptual bonds with the representation and experience of dignity.

José de Sousa e Brito's essay ("From Human Rights to Human Dignity and vice versa") draws a significant counterpoint between the *democratic pluralism of reasons* (and *comprehensive doctrines*) and the diverse (prudential and non-prudential) intentional configurations of *overlapping consensus*: so that the transversal argumentative cluster involving the *principle of democracy*, *human rights*, *dignity* and *ethical personal autonomy*—warranting the conclusion-claims that "[d]emocracy is a requirement of ethics in the law" and that "[t]he principle of human dignity", "articulated in the values of liberty and equality" and seriously taken as "the first normative principle of ethics" ("as received by the law of a rule of law state"), "implies equal liberty for all citizens" and human "equal ethical autonomy"—may for once be treated as a plausible resource regarding a productive re-interpretation of Rawls' *political liberalism*; this means in fact defending a concept of public reason as an "ethical reason" with "legal" ("ethically justified") "constraints" ("democratic reason is tantamount both to public reason and to legal reason in a modern constitutional state"), as well as requiring that legal forms of argument incorporate (albeit with limits) the *warrants* and *criteria* of *philosophical ethics* ("[t]here is just one good way of reasoning"), which, regarding Rawls, opens up the possibility of taking his proposal (also in the *Political Liberalism*'s stage) not as "an exercise of political rhetoric", but as an authentic ethical approach ("as a true political philosophy" which is "part of philosophical ethics").

The following chapter, by João Cardoso Rosas ("Models of Consensus and Compromise on Human Rights and Dignity"), goes on to explore the human rights

legacy and "the underlying concept of human dignity" (or humanity tout court) from the perspective of *overlapping consensus*. The interpretive capacity of this consensus (with its demanding of two levels of justification) is now however not only explicitly treated as an abstract model—and as such confronted with two alternatives, respectively identifying *strict consensus* and *incompletely theorized agreements* (the first one demanding a real, full common ground, the second incorporating the constitutive role of silence or restraint, if not avoidance)—but also explicitly experienced or tested (in counterpoint with the other two models) through a transparent reconstitution of the drafting process or the "argumentative set" (1947/1948) from which the Universal Declaration of Human Rights emerged. This contextualised experience allows the Author to acknowledge the limits of *consensus* and to highlight the complementary (and yet decisive) role of *compromise*, as well as (inspired by Rawls, but going decisively *beyond* Rawls) distinguishing two unmistakably different models of compromise: *strategic modus vivendi* and *moral modus vivendi*.

With the essay proposed by Manuel Atienza ("The foundation of human rights: autonomy or dignity?"), the dispute we alluded to *supra* regarding the alternative *dignity/autonomy* gains a new intelligibility: on the one hand thanks to the concentration of its tensions on the problem of the foundation of human rights, and on the other hand through the consideration of specific disputes (if not *différends*) concerning fracturing "bio-ethical" issues (abortion, euthanasia, surrogate pregnancy). The reconstitution of the argumentative webs involved in those theoretical and practical disputes—sustained in a critical-reflexive path that has Kant's "interconnection" between *rationale Universalität*, *Würde* and *Freiheit*, Isaiah Berlin's *evaluative pluralism* and Dworkin's *unity of value* as major (and precious) interlocutors—allows the Author to conclude that here we face false (when not misleading) oppositions. This means actually introducing a third term (equality), whilst defending that it is the unit *dignity/autonomy/equality* (with the diverse combinations and balances it allows) which constitutes the effective foundational core of human rights; this means also and mainly admitting the practical-normative plausibility of "a theory of values" combining "the Kantian and Dworkinian monism" with Berlin's "moral pluralism" (i.e. an experience of practical rationality treating the unity of value as a "regulatory idea", whilst simultaneously "recognizing the existence of tragic cases" and with them a certain "conflicting vision of history and societies" and the critic it allows).

2.2 Part II. Exploring the Problem of the Autonomy of Law in the Trends of Contemporary Legal Discourse(s)

Concerning the explicit thematization of the *series*, with its four announced thematic cores, the second part, as its title instantly reveals, constitutes certainly a *parenthesis*, albeit an indispensable one. The two chapters which comprise it are in fact directly

concerned with the answer to the problem of the autonomy and limits of law (the second component of our series), both of them furthermore developing substantial incursions into contemporary legal thinking—parallel incursions actually (concerned with the counterpoint *positivism/non positivism*), even though privileging opposing fields. The first, by Eduardo Chia ("Revisiting the Puzzle of the Autonomy of Law In H.L.A. Hart's, J. Raz's and H. Kelsen's Legal Theory"), frequents unmistakably different expressions of the positivistic camp (Kelsen's epistemic normativism, as well as Hart's foundational conventionalism and Raz's exclusive positivism), in order to discuss the role that, concerning law's *distinctiveness*, is played by the counterpoint between the formalistic claim to isolation or closure and the possibilities (as well as the limits and ambivalences) of a claim to a relative (or relativized) autonomy (all this whilst introducing the concern for "the proper observance of the Rule of Law" as one of the central components of the puzzle). The second, by Jesús Vega ("Constructivist metaphors and law's autonomy in legal post-positivism"), explores a pair of "practical" and "constructivist metaphors" (Dworkin's "chain novel" and Santiago Nino's "construction of cathedrals") as decisive expressions of *post-positivism*, whilst defending that only the rejection of "value-free neutrality" (taking seriously an effective practical interconnection between legal rulings and "substantive values") will allow us adequately to rethink the issue of the limits of Law today (and this as a decisive step in the consideration of "the autonomy of Law as a matter of value", and as such perfectly compossible with post-positivism).

2.3 Part III. Intertwining the Claim to Autonomy and the Concept of Human Dignity

After this indispensable concentration on the issue of Law's autonomy, the intercrossing of the four leading themes returns in force with the following section (part III).

For Ana Margarida Gaudêncio ("Merit, Value and Justification: Human Dignity vis-à-vis Legal (Inter)subjectivity – The Autonomy of Subjects Within the Autonomy of Law"), the reflexive opportunity that this overlapping stimulates is certainly considering the implications that diverse (when not heterogeneous) conceptual and aspirational experiences of *human dignity* (as *merit*, *value* and *justification*) are supposed to have when we discuss the issue of the foundations of law (in their external-ontological or internal-practical-normative configurations), as well as when we explore the signifier *autonomy* both considering Law's claim to *distinctiveness* (the autonomy of law) and the corresponding specification of *humanitas*, this one with regard to a dimension (or pole) of equal self-determination and free participation (the autonomy of *suum* as a dimension of legally relevant personhood)—a reflexive path which involves an intricate skein, challenged (when not aggravated)

by the unanswered questions posed by the multiplication of subjectivities, the politics of multiculturalism or the emergence of post- and trans-humanisms.

The same intercrossing, privileging the issue of the limits from the perspective of the counterpoint Law/Morals, allows Silvia Niccolai ("Between Principles and Rules. An itinerary around Law's Morality and Human Dignity") to overcome both formalistic isolation and pragmatic instrumentalism, in order (with Dworkin, but very specially with Alessandro Giuliani) to rethink the specificity of legal principles: this means in fact rejecting the methodological treatment of principles as norms—and with it the binomial *norms as principles/ norms as rules* (which highlights 'principles' and 'rules' as functional equivalents of the 'norm')—, whilst assuming their constitutive intrinsic identity as centres of argumentation (decisive "argumentative passages" of a negative logic), giving continuity, in the context of an authentic practical rationality *subject/subject*, to the precious tradition (never truly surpassed) of the *regulae iuris* (the authentic "internal morality of law"). It is the attention paid to these principles of a *negative justice* and to their practical consonance with concrete circumstances (corroborating "the existence of law's constitutive values", as well as developing an effective "logic of the preferable") which gives human dignity its unmistakable juridical sense ("taking human freedom and equality seriously"), whilst recomposing the *subjective dimension* (of human and personal autonomy) which the experience of Law cannot (and should not) reject.

The *prime series* (with its four pillars) is still fully present in António Cortês' chapter ("The Legal Meaning of Human Dignity: Respect for Autonomy and Concern for Vulnerability"), the decisive interlocutor being now Kant and his determination of worth-*Würde* ("raised above all price"), seriously taken as "the starkest, albeit insufficient, 'starting point' for understanding human dignity". Justifiably understood and experienced in its primordial categorical configuration, the principle of dignity is thus significantly explored as "the basis (. . .) in the light of which the whole system" of "human rights" (and "constitutional rights") "should be interpreted", as well as the "cornerstone that defines the limits and frontiers of the law as a whole". The reinvention of two Kantian diverse binominal resources (distinguishing on the one hand *innere* and *äußere Freiheit*, and opposing on the other *homo noumenon* and *homo phaenomenon*) justifies in turn a productive intertwining between dignity and vulnerability and this as an opportunity to rethink some contemporary decisive limit-problems in biolaw, such as voluntary euthanasia and human genetic engineering (which means once again discussing the boundaries of Law).

The following fourth and fifth parts are constructed as explicit dialogues.

2.4 Part IV. Dialogues with Emmanuel Levinas

The fourth part, including the essays by Susan Petrilli ("The Double Sense of the Law-Dignity Relationship in Emmanuel Levinas") and Augusto Ponzio ("Human rights, rights of the other, and preventive peace. A Levinasian perspective"),

develops a *conversation piece* in two rounds with Levinas's *ethics of alterity,* re-read in the light of global semiotics, if not directly from the perspective of *semioethics* (the fruitful research field, combining semiotics and ethics, that both Authors opened up): whereas Petrilli, reconstituting the "dual law-dignity relationship", as well as a productive overlapping between the problems of dignity and singularity, develops a global systematic approach of Levinas' proposal—attentive to the counterpoint between *conditioned* and *unconditioned responsibility*, as well as to the challenges that the "comparison between incomparables" and the "arrival of the third" (whilst involving *thematization*) relentlessly pose, but no less sensible to the abolishment of the "time of the human" that the *digital world* implacably brings ("responsibility for the other cannot be enclosed in a general rule, in an algorithm")—, Ponzio focuses on the issue of human rights, which means not only exploring the expected constitutive counterpoint between *rights of identity* (of the "closed self") and *rights of the other man* (those which demand absolute and infinite otherness as an asymmetric relationship "in the face-to-face position"), but also introducing the decisive (and less well-known) *topos* of *peace*, this time in order to distinguish the *peace which is functional (or intrinsic) to war* and the so-called *preventive peace.* Only the last, certainly because it presupposes the felicitous mediation (the indispensable "way") of "a bad conscience" (a bad conscience which suspends "the rights of identity" and introduces "non-indifference for the other"), allows in fact the "full openness" and the "responsibility without alibis" (the *feeling fear for the other*) that effectively liberate us "from the world of war"—which means treating "primordial peace" (identified with the "original responsibility for the other man") as the "real foundation of the rights of man".

2.5 Part V. Dialogues with Jeremy Waldron

The fifth part brings into the full glare of the spotlight an interlocutor who, regarding the problem of dignity in its legal context, is certainly today an inescapable point of reference: Jeremy Waldron. The first of the two chapters, written by Julie Copley ("No argument: human dignity and the making of legislation") focus on the exercise of legislative *potestas* (and its specific virtues, if not aspirational features) whilst discussing the *empowering* and the *limiting* effects that, concerning that authority-*potestas*, the conceptualization of dignity (not only as the *dignity of legislation*, but also as the dignity of the *citizen-socius* and his/her *equal ranking status*) effectively produces in a modern constitutional state. Aroso Linhares's chapter ("Is Dignity a Non-contingent Autonomously Juridical 'Idea'? A Conversation Piece with Jeremy Waldron") explores in contrast the well-known distinction between *dignity as a ranking status (dignitas)* and *dignity as value or (absolute inner) worth (Würde*), with the avowed purpose of re-reading (if not *misreading*) it, which means highlighting an experience of Law concentrated upon the microscopic invention of *intersubjective comparability*, as well as exploring "the constitutive dialectics between the

endogenous components of Law's project and the contextual and environmental conditions and resources which feed its performance".

2.6 Part VI. Exploring Human Dignity in the Boundaries of Law

The two essays which comprise the sixth and last part have in common the treatment of juridically relevant dignity from a perspective which deliberately *places us* on the borders of Law and legal discourse.

The first of these essays is by Orit Kamir ("Israel's War on the Hegemony of its 'Basic Law: Human Dignity'") and explores the ambivalent connection between the legal consecration of dignity (and human rights) and the issue of Law's autonomy. The leading question ("Does the statutory recognition of dignity promote or undermine Law's autonomy?") is not however considered within the walls of the *academic house*, but rather it mobilizes the experience of a very specific political-social and practical-cultural context (Israeli society in the first two decades of the twenty first century). It is this contextualization, complemented by an eloquent exercise of *law in film* (Noam Kaplan's *Manpower*), which allows us to pay attention to the *différend* at stake as a direct (unequivocal) "clash" between political-ideological agendas (between a "liberal" universalistic *human dignity*-based agenda, and a right-wing national *honour*-based one), whilst acknowledging that this clash also reflects an irreconcilable understanding of the constitutive roles attributable to jurisdictional and legislative powers.

In the concluding chapter, by Brisa Paim Duarte ("Images and Counter-images of *humanitas*: A *Jus*aesthetic Approach to the Problem of Law's Normative Validity - Beyond the Blindness-and-Sightedness Polarity"), the signifier *dignity* is apparently absent. Only apparently, however, since the corresponding plausible *signifieds*, without renouncing their troubling plurality (but rather highlighting their differences and the instability of their contexts), emerge in force under the mask of another signifier: *humanitas*. Certainly not by unjustified whim or contingent chance, but quite simply because the discussion takes now place in another (alternative) border territory, this one illuminated by the conclusions-claims of a certain *jus*aesthetic approach: an approach which for once is not resigned to offering up the expected external perspective, but which rather aims to develop an internal critical alternative, able to assert autonomous law "as a particular experience of sightedness" and as such admitting that "amplifying law's conditions of visibility" means "reinventing *humanitas* as a specific juridical *image* and practical artifact". Isn't this precisely recovering in full the transparency of the *generative series* (with its four thematic cores). whilst involving a plausible *Law & Visual Jurisprudence*'s approach? We can say it is.

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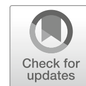
Part I
Exploring the “Conceptual Bonds” Between Human Rights and Human Dignity

From Human Rights to Human Dignity and Vice Versa



José de Sousa e Brito

Abstract It is well known that the Universal Declaration of Human Rights could only be written and agreed upon because their redactors first, and the ratifying states after, did abstract from the reasons why their agreed to the same content. Such a pluralism of reasons is an essential characteristic of international conventions and of democratic states. Rawls speaks here of an "overlapping consensus" on the conclusions of reasonings from premises that are in part different, belonging to different comprehensive doctrines. This applies in Rawls to human rights as part of the constitution as basic structure of a democratic state in his theory of justice.

Now there is a Hobbesian conception of the overlapping consensus as a mere *modus vivendi* that makes it possible for groups of people with an overlapping consensus on human rights to pursue their own good under conditions that are advantageous for them under the circumstances. Such is a prudential political conception. Rawls conception of the overlapping consensus on human rights is not prudential despite being political in the narrow sense, because he has a conception of political philosophy which does not imply universal validity. He thinks that human rights are grounded in public reason, not in universal philosophical reason.

Public reason is ethical reason with legal constraints, particularly the constraints imposed by the sources of law, the legislative procedure and the judicial process. But the legal constraints must be ethically justified, or they are objectionable and reasonings based on them disapproved by ethics. In this way public reason encompasses the differences between the various constitutional laws, as the reasonings developing them have in each case some different premises. But as such premises are at some point ethically validated or invalidated, the reasonings based on them are for the good or for the worst accounted for by ethics.

All human rights derive from the equal dignity of men, i.e., of their equal value as free and autonomous persons, who give themselves their own law. The democratic principle is the constitutional principle of a society on such an ethical basis.

Democratic reason is tantamount both to public reason and to legal reason in a modern constitutional state. It is a requirement of ethics but still not identical with

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ethical reason, since it is possible to accept democratic reason and to argue against it from an ethical point of view. There is just one good way of reasoning, despite the constraints that the sources of law and the rules of procedure impose on legal reasoning, compared with ethics. Such constraints are based on the democratic principle, which is again based on ethical reason, which at last both grounds and limits the constraints that law imposes on reason.

Rawls theory of reflective equilibrium describes however the practice of practical syllogism guided by the Aristotelian virtue of the prudence (*phronesis*), which must be integrated by the acceptance of the equal value of human beings as a condition of the possibility of ethical reason. Rawls has therefore the philosophical instruments needed for a reinterpretation of his political philosophy as a true political philosophy as a part of philosophical ethics. Such an ethical reinterpretation does not impede but reinforces the overlapping consensus on human rights.

It will be difficult to find a moral philosopher who does not embrace the essential goods of human life that the human rights declared in international treaties and in state constitutions pretend to secure. I know of none. They disagree about the philosophical foundation of them and if there is one. Bentham was the first philosopher who wrote "a critical examination of the diverse declarations of rights of man and of citizen". He thought that such declarations, without an effective complete code of laws that establish the obligations that can secure the goods they pretend to achieve, are only means of anarchy and deception. They don't give real rights, only fake ones. Their addressees remain have-nots. If these behave according to them, they are a source of anarchy and revolution. If they behave according to the laws, they are means of deception. But Bentham would not object to a theory of human rights that seeks to bring into a system the corresponding obligations. He envisaged something of the sort when he wrote in his *Project forme* of the Civil Code: "it is true that as long as the principle of utility governs, there can be no obligations without rights [. . .]. So if under any principle, rights need obligations for their efficacy, under the principle of utility obligations must have rights as final cause."(U.C. XXXIII. 8c.)

It is well known that the Universal Declaration of Human Rights could only be written and agreed upon because their redactors first, and the ratifying states after, did abstract from the reasons why their agreed to the same content. I mean the agreement on the matter and not the agreement on the words, which might cover differences of interpretation. Such a pluralism of reasons is an essential characteristic of international conventions and of democratic states. Rawls speaks here of an "overlapping consensus" on the conclusions of reasonings from premises that are in part different, belonging to different comprehensive doctrines. This applies in Rawls theory of justice to human rights as part of the constitution as basic structure of a democratic state. According to Rawls it does not apply to the human rights established by international law, which is grounded simply in the agreement between states. His theory of justice is a political conception. that applies only to states.

However, if we conceive international law as the law of the global society, there would be a global justice and it would apply to it.

Now there is a Hobbesian conception of the overlapping consensus as a mere *modus vivendi* that makes it possible for groups of people with an overlapping consensus on human rights to pursue their own good under conditions that are advantageous for them under the circumstances. Such is a prudential political conception.

Rawls conception of the overlapping consensus on human rights is not prudential, despite being political in the narrow sense, because he has a conception of political philosophy which does not imply universal validity. He thinks that human rights are grounded in public reason, not in universal philosophical reason. Public reason is a Kantian idea that Rawls develops with important differences from Kant. "Public reason"—he writes "is characteristic of a democratic people: it is the reason of its citizens, of those sharing the status of equal citizenship" (Rawls 1993, p. 213). It is easy to observe that Rawls cannot have in mind either the actually communicated reasons among the citizens of any democratic state in the actual process of collective decision making in that state, or the capacities exerted by those reasons. Those citizens will eventually reason and decide badly, because they have no good reason for the contents or the form of their reasoning. Besides they will always reason in a different manner than the citizens of any other democratic state. In fact, explains Rawls, public reason "as an ideal conception of citizenship for a constitutional democratic regime, presents how things might be, taking people as a just and well-ordered society would encourage them to be" (Rawls 1993, p. 213). But can or must the ideal of the citizens of one democratic state diverge from the ideal of the citizens of another one, given the different historical conditions and experiences, the political culture and the peculiar rules of the institutions in each state? Rawls says that he is inclined to think it can and to agree with Dahl (Dahl 1989, p. 192), that, for example, there is no unique and best universal way to solve the problem of how to protect the basic rights and interests. This is valid for this problem—which has to do with the existence or nonexistence of a constitutional court—and for similar questions regarding the political structure of the state. As for the specification of the basic rights and liberties, however, he doesn't admit variations, unless they are rather small. It seems, therefore, that the citizens of a democratic state are not really the authors but, after having been idealized, a criterion of public reason. They have to work out a public basis of justification that all citizens as reasonable and rational can endorse from within their own comprehensive doctrines. It is this condition of reasoned reflection that distinguishes public justification from mere agreement (Rawls 2001, p. 29).

Public reason is ethical reason with legal constraints, particularly the constraints imposed by the sources of law, the legislative procedure and the judicial process. But the legal constraints must be ethically justified, or they are objectionable and reasonings based on them disapproved by ethics. In this way public reason encompasses the differences between the various constitutional laws, as the reasonings developing them have in each case some different premises. But as such premises are

at some point ethically validated or invalidated, the reasonings based on them are for the good or for the worst accounted for by ethics.

Democracy is a requirement of ethics in the law. The principle of human dignity is articulated in the values of liberty and equality and implies equal liberty for all citizens. From the equal ethical autonomy of men is derived the principle of the government of the people by the people. Equal liberty implies equal participation by all in the formation of the collective will, by means of equal rights to vote and to be elected and to have access to public offices and of the complementary liberties of expression, of information, of reunion and of association. Also, the principle of majority decision is implied, as the only way to give equal value to the free participation of each person in a decision which is binding for all.

If one requires less, than the members of the majority who are against the decision will be devalued. If one requires more, then the members of the majority who are in favour will be devalued only if the absence of decision will have the same effect as a contrary decision. If no such effect is present, then the requirement of qualified majority or of unanimity is compatible with equality, namely equality in the need of a certain level of consensus for obtaining a collective action. A majority decision is therefore an ethical requirement whenever a new decision is the result of collective action. It is the regular procedure for taking decisions by collective organs. The democratic principle would be denied if there were power which was not constituted and exercised by the people, even if such exercise were not more than indirect intervention of the elected representatives of the people by designating those entitled to power. This applies also to the designation of the judges of the constitutional court. They also derive their democratic legitimacy from universal suffrage, however indirectly, by means of the intervention of those directly elected in the designation of the judges.

Universal suffrage is therefore at the origin of all democratic decision, but it does not ensure the democratic character of a decision. Otherwise, all decisions by the people or by the organs designated by the people would be democratic, independently from their contents. The democratic character of a decision depends first on its direct or indirect acceptance by the majority, but it also depends on its conformity with the reasons on which the democratic principle is based, i.e., of democracy as a system of principles.

Democratic reason is tantamount both to public reason and to legal reason in a modern constitutional state. It is a requirement of ethics but still not identical with ethical reason, since it is possible to accept democratic reason and to argue against it from an ethical point of view. There is just one good way of reasoning, in spite of the constraints that the sources of law and the rules of procedure impose on legal reasoning, compared with ethics. Such constraints are based on the democratic principle, which is again based on ethical reason, which at last both grounds and limits the constraints that law imposes on reason.

The theory of justice of Rawls must be reinterpreted as a part of ethics, or it is an exercise of political rhetoric. The argument for a non-ethical but rhetorical interpretation of Rawls derives from a false interpretation of ethics as a deductive system. Rawls theory of reflective equilibrium describes however the practice of practical

syllogism guided by the Aristotelian virtue of the prudence (*phronesis*), which must be integrated by the acceptance of the equal value of human beings as a condition of the possibility of ethical reason. Aristotle does not seek a general premise of every action—of the kind of the principle of utility—, which is the foundation of a body of rules like almost an axiomatic system. He is clearly aware of the difficulty to live a coherent life and to make compatible—or to prefer among—the diverse ends of practice, which have to be weighted in the deliberation giving cause to action (see *Nicomachean Ethics*, VI, 1139a 31–34). In fact, what is good for one end, can be bad for another. This is even true of the virtues, which have their siege in the character, and are habitual states or capacities also causing action: it is well known how the courage of Achilles was equally good for war and bad for piety. The same difficulty applies to the law. The only example that Aristotle gives of that part of the law that is determined by reason (and therefore natural to man) and not by convention, is the constitution of a rule of law state. He says that the laws are not everywhere the same, since constitutions also are not the same, though there is one that is everywhere by nature the best" (1135 a 3–5). Aristotle does not say here if there is only one best constitution everywhere or if everywhere there is one best constitution for such a place. However, the last interpretation fits best to his clear doctrine that natural (or rational) law is variable, as much as conventional law (1134b 24–33). Now, Aristotelian ethics is constructed similarly to life, with the logical difficulties of deliberation, proceeding from below and not from above.

Rawls, through his Aristotelian theory of the reflective equilibrium, has therefore the philosophical instruments needed for a reinterpretation of his political philosophy as a true political philosophy as a part of philosophical ethics. Such an ethical reinterpretation does not impede but reinforces the overlapping consensus on human rights.

All human rights derive from the equal dignity of men, i.e., of their equal value as free and autonomous persons, who give themselves their own law. I mean here legal human rights that are the content of constitutions and of international declarations of human rights. They are the result of collective deliberations about them, in accordance with the norms about sources of law recognized by the law applying agents. There is an overlapping consensus about them, in the sense of an ideal agreement of citizens that exert public reason. Public reason is here reinforced by ethical reason, or moral theory (as Rawls would say), because they are derived from human dignity, which is the first normative principle of ethics, as received by the law of a rule of law state. Derived does mean here only that human dignity is a necessary condition and therefore a premise of the rational justification of the right in question. There are other premises related with the collective historical experience of the good of man in the political community in question.

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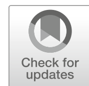
Models of Consensus and Compromise on Human Rights and Dignity



João Cardoso Rosas

Abstract The theorization of the possibility of a world consensus on human rights and dignity (in connection with human rights) has given rise to different normative models. In this chapter, I take these models as interpretive—rather than normative—and I apply them to a specific argumentative setting: the drafting of the Universal Declaration of Human Rights. Since none of the models examined—*strict consensus*, *incompletely theorized agreements*, and *overlapping consensus*—proves to be fully satisfactory in the interpretation of what happened in that particular historical moment, I also consider two complementary models, which emphasise the role of compromise over the idea of consensus, namely *modus vivendi* and *moral modus vivendi*.

The debates on the possibility of a world agreement on human rights and the underlying concept of human dignity tend to concentrate on abstract models of consensus. These models include moral minimum views, overlapping consensus, and many others with variable meanings depending on the argumentational context in which they appear. Unavoidably these models are normative and they are attempts to rationally anchor our hope, in a Kantian sense, on a moral and universal endorsement of human rights.

There is nothing wrong with this kind of philosophical inquiry. On the contrary, I believe it is intellectually relevant and important for our common future. But in this chapter, I would like to propose a slightly different methodology. Instead of focusing on the merits and shortcomings of these models as normative projects, I want to examine the interpretative capacity that at least some of them may show to make sense of a specific historical and argumentative context. This context is the drafting process of the Universal Declaration of Human Rights, taking place in the framework of the United Nations (UN), roughly between January 1947 and December 1948.

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The drafting process of the Universal Declaration of Human Rights has received great attention from historians over the last two decades. Among others, Johannes Morsink has reconstituted the drafting process within the UN different bodies drawing on the official proceedings (Morsink 1999). Mary Ann Glendon has contributed with a probing description of the workings of the Human Rights Commission, drawing on the personal archive of Eleanor Roosevelt, the Chairwoman of the Commission (Glendon 2002). Harvard historian Samuel Moyin has revised our understanding of the drafting process and also of the fate of human rights law and discourse after 1948 (Moyin 2010). Philosophers can now benefit from these and other contributions to test their agreement theories on human rights in this particular context.[1]

In the following pages, I will briefly describe the context and the main lines of dispute within the United Nations different bodies, with special attention to two settings: the Human Rights Commission and the Committee on the Theoretical Basis of Human Rights.

Against this background, I will test some models of consensus, including those suggested by John Rawls, Charles Taylor, and Cass Sunstein to make sense of what happened in those founding moments for the definition of human rights and dignity in the context of human rights law. In the end, I will introduce two other interpretive models, which may be better described as forms of compromise (rather than consensus).

1 The Main Setting

When the delegates of fifty states met in San Francisco, in 1945, to create the United Nations, human rights were not at the centre of the enterprise. Human rights had not been relevant in the framework of the Society of Nations created after the Great War and the prevailing powers at the end of World War II, the United States, the United Kingdom, and the Soviet Union were not particularly keen on giving human rights a predominant role because these rights would create limitations on their sovereignty, both at home and abroad, including in their colonies or other territories under their jurisdiction.

Nevertheless, smaller or less powerful states, together with civil society organizations and the academic community, insisted on the idea of giving a special place to human rights in the United Nations Charter. As a consequence, the document includes references to the “faith in fundamental human rights” and, what is more, “in the dignity and worth of the human person”.[2] Within the UN structure, the

[1] Glendon’s account of the process was particularly useful for the writing of this chapter.

[2] According to Charles Beitz, the introduction of this reference to dignity was the proposal of an American delegate and dean of Barnard College, Virginia Gildersleeve. See Beitz (2013, p. 266). See also Moyin (2013).

promotion of human rights is entrusted to the Social and Economic Council, which ended up creating a Human Rights Commission, in 1946, whose first task was to draft an International Bill of Human Rights. Eleanor Roosevelt, one of the American delegates at the UN, appointed by President Truman, was elected Chair of this Commission, composed of delegates of eighteen countries from different continents and with distinct religious and philosophical traditions.

In the first meeting of the Human Rights Commission, held at Lake Success, New York, from January 27 to February 10, 1947, the French delegate René Cassin set the tone of the discussion by insisting that a Human Rights bill required "the affirmation of the common human nature and the fundamental unity of the human race" (Glendon 2002, p. 39). Cassin's position engaged in particular one of the most influential members of the Human Rights Commission throughout the drafting process, the Lebanese delegate Charles Malick, who said: "we are raising the fundamental question, 'what is man?.' When we disagree about human rights we are really disagreeing about the nature of the person. Is man merely a social being? Is he merely an animal? Is he merely an economic being?" (ibid.).

Notice that the question about the nature of man is posed by both Cassin and Malick as a previous and necessary issue in order to write a Human Rights declaration. Cassin, a learned and experienced lawyer, and Malik, a professor of philosophy trained at Heidelberg and Harvard, both agreed that some kind of doctrinal foundation, i.e., some answer to the question "what is man?" was a *sine qua non* condition for the definition of the content of the declaration. Disagreement about rights, then, could only be solved by a more fundamental agreement on the nature of the subject of those rights.

This debate went on not just during the first plenary meeting of the Commission but also in the private meetings of the so-called "triumvirate", which coordinated the task of the Commission for some months and was composed by Charles Malik himself, the Chinese delegate P. C. Chang (from Nationalist China), and the President of the Commission and widower of the former President of the United States, Eleanor Roosevelt.

The terms of the debate may be summarized as follows:

On the one side, stood those whose view was influenced by European modernity, stressing the individual human being as a subject of pre-political rights, as a moral being, not just an animal being and not a social being only. This view was represented by Malik in the triumvirate, but also by Cassin and others.

For the sake of simplicity, one may call this "the Western" view.

On the other side, stood those whose view was that of the nature of man as a social being in the first place, against the individualism of the western approach. The defenders of this view were of two completely different kinds.

Firstly, there were the Marxists, representing not just the Soviet Union but also other socialist countries, who stressed the pre-eminence of society and even the state over the individual. For instance, the delegate from Yugoslavia, Vladislav Ribnikar, said that "the common interest, as embodied in the state, takes priority over individual claims". And he further suggested that the individualist view is an instrument of capitalist exploitation. "The psychology of individualism – he said - has been used

by the ruling class in most countries to preserve its own privileges" (Glendon 2002, ibid.).

Second, there were the Asian representatives who voiced a very different world-view, but who coincided with the Marxists in their critique of the individualism of the Enlightenment perspective. The Asian view was usually supported by Confucianism and one of the people who presented it was P.C. Chang, the representative from China and also a member of the triumvirate. Chang was well known for citing old Chinese proverbs and Confucian philosophers stressing the relevance of the sense of community. Nevertheless, his vote was more often aligned with the Western powers, although he would also abstain when there were strong divisions between the United States and the Soviet Union.

Several delegates in the Human Rights Commission were imbued with a practical spirit and they abhorred these kinds of philosophical disputes that so thrilled some of its most influential members. One of the practically-orientated delegates was the President, Eleanor Roosevelt. When the triumvirate met on private terms she would let Malik and Chang discuss their conflictual conceptions of human nature in heated terms, while she remained silent. Then, she would take practical decisions to advance the drafting process. In the plenary meetings of the Commission, Eleanor Roosevelt tried to appease the disputing parties. After listening to the disputes for hours in the first plenary meeting she said: "It seems to me that in much that is before us, the rights of the individual are extremely important. It is not exactly that you set the individual apart from his society, but you recognize that within any society the individual must have rights that are guarded." (Glendon 2002, p. 40).

Eleanor Roosevelt's personal convictions were aligned with the Western view, but she was clearly interested first and foremost in getting her job done, i.e., in reaching a draft of a Human Rights bill to submit to the other bodies of the UN and, finally, to be voted on by the General Assembly. Her approach was practical, not doctrinal, and she acted accordingly.

In view of deep doctrinal disagreement regarding human nature, instead of continuing the debate to reach some kind of substantive consensus, Mrs. Roosevelt opted for circumventing disagreement and proceeding immediately to the first draft of a list of rights to be included in the Human Rights bill. This task was committed not to members of the Commission but to an important member of the UN Human Rights staff, the Canadian constitutional lawyer John Humphrey.

Humphrey and his aides worked tirelessly to synthesize previous declarations in the different constitutional traditions around the world, pre-existing human rights instruments, and proposals from civil society. The result of their work was impressive because they listed not only the rights but also all the sources that could be considered in the different constitutional traditions. The draft prepared by Humphrey contained a tentative Preamble and forty-eight articles without a special place for the notion of dignity, but with an extensive list of rights. The full text, with the sources for those articles, was massive. The drafting committee—composed of the triumvirate representing the United States, Lebanon, and China, plus the representatives of Australia, Chile, France, the United Kingdom, and the Soviet Union—and the full Commission had plenty to read and to work on.

2 Expectations of Consensus

Let us pause to consider the interpretive model that may account for what happened in the inaugural months of the Human Rights Commission as described above. Its most outspoken members involved in doctrinal disputes started with a firm belief in what may be called a **strict consensus model**. In other words, they believed that a consensus on the same doctrinal basis was required to reach a consensus on a list of rights and the underlying concept of humanity. Remember that, despite their doctrinal disagreements, the members of the Commission insisted on the idea that a consensus on the nature of man was needed in order to establish a bill of rights.

It is not difficult to understand that this approach blocked the advancement of the process. In doctrinal matters, the more we discuss, the more we tend to disagree.[3] Therefore, no agreement on rights and the idea of man would be feasible this way. The Chairwoman of the Commission, Eleanor Roosevelt, understood this intuitively and her decision to move swiftly to the completion of a first draft list of rights and general principles inaugurated an altogether different approach. Instead of seeking a basic doctrinal consensus, she favoured an *époché* of sorts regarding doctrinal matters, or what could be called, in Rawlsian terms, "a method of avoidance".

To fully understand the new model that is emerging here one has to consider the work of a parallel United Nations body that was convening also at the beginning of 1947 to discuss the doctrinal foundations of human rights specifically. The initiative came from the United Nations Education, Science and Culture Organization (UNESCO) director, Julian Huxley. UNESCO created the Committee on the Theoretical Basis of Human Rights chaired by the Cambridge historian E.H. Carr, including as its most influential member the French Thomist philosopher Jacques Maritain. The idea of the Committee was to work in parallel with the Human Rights Commission with a view to examining the philosophical foundations of the bill that was being drafted mainly in New York.[4]

The "UNESCO philosophers' Committee", as it became known, sent a written questionnaire to several relevant thinkers around the world, including the brother of the Director of UNESCO, Aldous Huxley, the French Jesuit philosopher Teilhard de Chardin, the Italian philosopher Benedetto Croce, the Mahatma Gandhi, the Confucian philosopher Chung-Shu Lo, the Bengali Muslim poet Humayun Kabir, and several others. The idea was to establish whether or not there was a common understanding of the doctrine behind an international bill of rights and also of the specific rights that should be included in that bill.

The questionnaire was sent all over the world in March 1947 and the answers didn't take long to arrive. The views expressed by the world philosophers confirmed the strategy followed by Eleanor Roosevelt in the drafting committee. The philosophers could not agree on the same doctrinal foundation—thus refuting in practical

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[3] For a critique of strict consensus as unrealistic in a pluralist context, see Rawls (1993, pp. xiii–xviii and 36–39).

[4] For the workings and final report of this Committee, see UNESCO (1949).