

Law and Visual Jurisprudence 7

Series Editors: Sarah Marusek · Anne Wagner

José Manuel Aroso Linhares
Manuel Atienza *Editors*

Human Dignity and the Autonomy of Law



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Law and Visual Jurisprudence

Volume 7

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Coimbra, Portugal
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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 1872¹...—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

Triebischen (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).

³See *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

⁵This 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 composable 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 starker, 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 *semoethics* (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”—, Ponzo 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 *differend* 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 Jusaesthetic 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 *jusaesthetic* 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 they 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 they 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



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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

¹Glendon's account of the process was particularly useful for the writing of this chapter.

²According 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 *époque* 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

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

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

terms the strict consensus model—but this fact did not affect their adherence to a common list or rights. In this respect, what happened in the Human Rights Commission and the Philosophers Committee was remarkably similar. Agreement on a common list of rights emerged—slowly and through diplomatic negotiation in the Human Rights Commission, more quickly in the UNESCO Committee—, while disagreement on the doctrinal bases of such a list remained and was reaffirmed. But it was difficult to make sense of the apparent paradox of agreeing on a list of rights while recognizing the ever deeper disagreement on its doctrinal foundations.

Perhaps the best way to capture this apparent paradox is the idea, advanced by Cass Sunstein, of **incompletely theorized agreements**, and the way Sunstein developed this idea in the framework of Constitutional Theory (see Sunstein 2007). His central point of concern is how members of societies where people disagree about “the largest issues in social life” can live together in mutual respect under the same Constitution. The same kind of disagreement arose, on a global scale, in the drafting process of the Universal Declaration of Human Rights. Thus, it makes sense for Sunstein to use this drafting process as an example of incompletely theorized agreements.

Sunstein suggests that sometimes people can agree on abstract formulations—for instance, the general formulation of a right—while disagreeing on their particular meaning. Other times people agree on particular outcomes or practices but maintaining their disagreement on general issues regarding the right and the good. In this respect, Sunstein believes in the importance of the role of silence as a constructive force (instead of silence one could talk, in Rawlsian terms, of suspension of judgement, avoidance, abstention, or restraint). Something like this was going on in the drafting process of the Universal Declaration. The agreement on a list of rights, which occurred both on the UN Commission and on the UNESCO Philosophers Committee, referred to abstract principles—the rights themselves and other general principles, such as “human dignity”—and some outcomes of those rights, but not on a full meaning of those rights nor on their doctrinal foundation on a given conception of man. Silence over this was the only way to achieve agreements. These agreements were not completely theorized—“we agree on a list of rights - as reported by Maritain - but on condition that nobody asks us why” (UNESCO 1949, p. 9).

This model of incompletely theorized agreements works at least to interpret part of what happened between 1947 and 1948. It is certainly more satisfactory than the strict consensus model, but it is not fully satisfactory, as I will try to suggest now. The diplomats at the UN Commission were certainly able to appreciate the role of silence, or restraint, to reach agreements on specific rights and their interrelations. This is, after all, the business of diplomacy. But the UNESCO philosophers, despite what Maritan said, as a witticism, about “not asking why”, did not give up the “why” question. This was *their* business. As a result, the final report of UNESCO, written towards the end of 1948, took into consideration not just the general agreement on a list of rights but also the very diverse responses providing doctrinal foundations to the international bill of rights. According to the report,

the Committee is convinced that the philosophic problem involved in a declaration of human rights is not to achieve doctrinal consensus but rather to achieve agreement concerning rights, and also concerning action in the realisation and defence of rights, which may be justified on highly divergent doctrinal grounds. The Committee's discussion, therefore, of both the evolution of human rights and of the theoretic differences concerning their nature and interrelations, was intended, not to set up an intellectual structure to reduce them to a single formulation, but rather to discover the intellectual means to secure agreement concerning fundamental rights and to remove difficulties in their implementation such as might stem from intellectual differences. (UNESCO 1949, p. 263)

It is clear from this passage that the Committee accepts some kinds of incompletely theorized agreements (concerning both rights and their implementation), but it adds: "which may be justified on highly divergent grounds". The philosophers who responded to the UNESCO questionnaire were adamant in emphasizing their support for a human rights bill, although the reasons that each one of them invoked were clearly different and even at odds with the reasons invoked by others. Accordingly, the Committee points here to a very different model from the one advanced by Sunstein. The model proposed here is a form of **overlapping consensus**, in the sense of Rawls.⁵

Now an overlapping consensus is much more demanding than incompletely theorized agreements. In an overlapping consensus there is no giving up about full and deep justifications. These justifications exist and are central to the model, but they are plural rather than exclusive. An overlapping consensus requires two levels of justification. The first level concerns the freestandingness of the agreed principles. At this level, the principles are justified independently from philosophical or religious comprehensive doctrines, only in terms of (international) public reason and from ideas available in public culture. The second level of justification, though, is deeper and requires that the same principles are supported by different and even incompatible comprehensive doctrines, but each one from its own and particular outlook, with reasons that are exclusive and not necessarily shared or even accepted by other philosophical or religious doctrines.

The work of the UNESCO Committee suggests that an overlapping consensus regarding human rights was emerging in the world. One could perhaps say that the UN drafting body was operating at the level of international public reason, circumventing doctrinal disputes, whereas the Philosophers' Committee was building the remaining part of the overlapping consensus by providing the deeper doctrinal justifications from the vantage point of each one of the major philosophical and religious traditions of the world.

However, the real international situation in 1948 and afterwards did not match the idea of an overlapping consensus. In 1947, the American Anthropological Association (AAA) issued an official statement in which it said that the concept of human rights was distinguishably Western rather than shared by the cultures of the world. Many cultures do not possess the vocabulary nor the conceptual means to make

⁵For the idea of an overlapping consensus, see Rawls (1993, Lecture IV).

sense of the very idea of an individual human right (see American Anthropological Association 1947).

Although the AAA later issued another statement that tried to make the kind of cultural relativism that is usually found among Anthropologists—and, particularly, in the mid-twentieth century—compatible with the existence of international human rights, the doctrinal and diplomatic disputes around the Western bias of the Universal Declaration and the treaties and declarations that followed it has never really stopped. Firstly, during the cold war and until 1989, there was the dispute between capitalist and socialist states regarding the relative importance and priority between first-generation and second-generation rights. Secondly, there are ongoing disputes regarding the incompatibility of the rights proclaimed in 1948—particularly first-generation rights—with Asian Values, or with Islamic Values. Finally, philosophical doctrines in the West, such as anti-foundationalism (e.g. Rorty 1993), have continued to dispute the possibility of doctrinal foundations for human rights. I cannot address these issues here, but to mention them is enough to suggest that a *de facto* overlapping consensus does not exist today and it did not exist in 1948.

This being said, the overlapping consensus may subsist as an ideal, rather than as an interpretive idea or a shared view.

Notice that the idea of an overlapping consensus was applied by Rawls to constitutional essentials and matters of basic justice in domestic settings. It was the merit of Charles Taylor to suggest that it could also be applied to a world consensus on human rights. However, when Taylor suggests this he is pointing to the ideal aspect of an overlapping consensus rather than to its supposed current existence. For instance, when he deals with a specific brand of Buddhism in Thailand, Taylor admits that even the notion of a human right is absent in that context, but then he proceeds by trying to find other notions that may be used to build doctrinal support for human rights from the vantage point of Thai Buddhism (cf. Taylor 1992).

3 Modalities of Compromise

While the UNESCO philosophers were exchanging their views, the UN Human Rights Commission proceeded with its task. The work of the Philosophers' Committee, important as is for philosophical reflection, was perhaps not very representative in its idealism, or utopian character, and did not have much impact on the Commission, which was engaged in the job of reaching a final text to be submitted to the General Assembly.

In June 1947, the Commission entrusted the French delegate René Cassin with the task of rewriting the extensive list of rights prepared by John Humphrey and presenting a coherent bill of rights. The “Cassin draft”⁶ systematized the Humphrey

⁶For this draft and other drafts of the Universal Declaration, see Glendon (2002, pp. 271–309).

document in a clear and ordained form. It already contained a Preamble and a Proclamation, and the articles were divided into 46 items (instead of the 30 items of the final text). The idea of “dignity” or “equal dignity” of men was mentioned in the Preamble and article 1, but it had no special role in the text. The Cassin draft became the working document for the Human Rights Commission, but the work was still far from completion.

In November 1947 the plenary of the Human Rights Commission met again, this time in Geneva, where a new and shorter draft was approved, amidst bitter disputes between the western block and the block led by the Soviet Union. Nevertheless, the process did not stop and the full Commission met again in New York, in June 1948, to prepare the final text to be sent to the other United Nations commissions and all the countries represented in the General Assembly. In this process, the Declaration saw further changes to accommodate demands from different countries and political sensibilities. In this complex procedure, it was the personal engagement of Eleanor Roosevelt, together with the diplomatic talent of the most influential members of the Commission, such as Malik, that allowed the document not to lose its coherence and remain faithful in its substantive content to the Cassin draft.

During this long and tortuous negotiation process, the idea of human dignity became central only at a late stage, when it was placed in the first sentence of the Preamble as “the inherent dignity” of “all members of the human family”, besides continuing to be mentioned in other passages, in the Preamble and article 1. These latter mentions of “dignity” may be seen as mirroring the reference to dignity in the text of the 1945 UN Charter introduced by Virginia Gildersleeve (see note 2 above), and they do not play any relevant role in the Declaration. However, the idea of “*inherent* dignity” (emphasis added) seems to be more relevant and, for some, it is interpreted as having a foundational role for human rights. In any case, the kind of foundational role this idea may have was not established by the framers of the declaration. It would be abusive to establish that this particular idea has a specific meaning, whether it is the Kantian conception of dignity, the Catholic conception, or any other.

When the final document, now entitled the “Universal Declaration of Human Rights”, was set to be voted on in the General Assembly meeting in Paris on December 10, 1948, many doubts remained about its fate. The international situation was complex, with the United States and the Soviet Union clashing on several fronts around the world. The international appeasement brought by the allied victory in 1945, which had allowed for the creation of the United Nations and the initiative to draft an international bill of human rights, was past. The delegates involved in the Human Rights Commission sensed the last opportunity before the world would be engulfed in the Cold War and the Nuclear Threat. According to Glendon (2002, p. 163), when Eleanor Roosevelt was entering the Palais de Chaillot, for the voting session of the General Assembly, she was still doubtful about whether the Declaration would gain approval, or at least about the number of votes against it would attract, which might have diminished the value of the document in the years to come.

The final vote came as a surprise. When the articles of the Declaration were voted on separately, there were few abstentions and only three articles got votes against:

the article on non-discrimination, the article on the family, and the article on freedom of opinion and expression. When, finally, the Declaration was submitted to vote as a whole, there were no votes against and only eight abstentions (from the USSR, Ukraine, Byelorussia, Yugoslavia, Czechoslovakia, Poland, South Africa, and Saudi Arabia). The socialist countries were still uncomfortable with the role of first-generation rights, directly connected with the conception defended by the western countries, and the limits they implied for state action. However, at the same time, those countries wanted to use the language of human rights to repudiate Nazism and fascism, and so they decided to abstain, rather than to vote against the Declaration. The common enmity towards Nazism and fascism was still able to unite socialist and western countries at the end of 1948. South Africa had problems with the principle of anti-discrimination, as it was at the time implementing the apartheid system. Saudi Arabia opposed the right to change religion and, in particular, equal rights in marriage. But these two latter countries decided to abstain since they would be isolated if voting against.

What sense can we make of all this uncertainty till the very end, on the night of December 10, 1948, in Paris? How can we make sense of the fact that the Declaration was approved with no votes against, although at the same time there was no strict doctrinal agreement, maybe some incompletely theorized agreements, or even the ideal of an overlapping consensus looming in some philosopher's heads, but apparently not among the diplomats who wrote the document?

I want to suggest that, to fully understand the process, one should complement consensus models with models of compromise. When no *doctrinal* consensus was obtained or perhaps could have been obtained on human rights and dignity, then only compromise can account for the fact that the Universal Declaration was approved in 1948 and has since then managed to become a central plank of the international legal system.

As distinguished from different forms of consensus, I take compromise here as synonymous with what Rawls calls “**modus vivendi**”.⁷ A modus vivendi is a strategic or political compromise. The example of a modus vivendi is a treaty between two states in which they reach an “equilibrium point”. It is in the interest of both states to honour the treaty since its denunciation would be worse for the interests of each of the two states. Thus, a modus vivendi is not a moral agreement. Moreover, a modus vivendi is also less stable than a moral agreement. Following the same example, an international treaty may be broken by any of the parties once this turns out to be better for that party. A modus vivendi, then, amounts to a contextual convergence of interests.

The application of this model of compromise to an international negotiation such as the one that led to the approval of the Universal Declaration of Human Rights seems natural. After all, modus vivendi is the standard approach in (realist) International Relations Theory and it looks like a convincing account of at least part of what happened particularly in the UN Commission on Human Rights and, *a fortiori*, in the

⁷On compromise as modus vivendi, see Rawls (1993, pp. 147–149 and 158–163).

other sections of the UN where the draft prepared by this Commission was discussed, including the so-called Third Committee, the Economic and Social Council (or ECOSOC), and the General Assembly, both in special committees and in the plenary. In all these instances, the delegates of the different countries tried to defend the best interests of their states.

A reading of the proceedings of the Commission and the personal accounts of some of its members reveals that the discussions and voting were often guided by the manoeuvrings of the main powers, and also of some minor powers, understandable in terms of state interest, rather than by moral concerns, whether incompletely theorized or overlapping.

However, even if the consensus models are not fully convincing both as interpretations of what happened in 1947–1948 and perhaps also as solutions to the problem of disagreement regarding rights and doctrines, the idea of a pure modus vivendi is not the only alternative. One should not reduce the alternatives to a logical disjunction. The question is not about choosing between moral consensus and political or strategic compromise. Rawls makes too sharp a distinction between consensus and compromise by stating that consensus is moral, or perhaps political for the right reasons, whereas compromise or modus vivendi is strategic, or political for the wrong reasons. The problem with this distinction in Rawls is that he does not consider the possibility of a compromise or modus vivendi that is morally motivated. So, I will now briefly consider this model as a necessary and complementary interpretive grid for the agreement on human rights and dignity in the moment of their positivization in the international legal system, in 1948.

A moral modus vivendi—as I call it—is a model of compromise that does not imply substantive moral agreement regarding rights or doctrines, but requires moral commitment on the part of at least the main agents in the agreement. In a moral modus vivendi the parties cannot limit themselves to make strategic calculations. They must also be morally driven to reach some kind of understanding, even if they cannot agree on the precise and substantive content of the understanding.

Despite all the diplomatic manoeuvring in the Human Rights Commission and the United Nations at large, some of the key members of the drafting committee and even of the plenary Commission—including Roosevelt, Malik, Chang, Cassin, and several others—were extremely engaged in reaching a final bill of rights and affirming something like the idea of the dignity of man. As it became clear in the discussions, they would strongly disagree about the conception of man and society that lay below a list of human rights, or even about the true meaning and consequences of “inherent dignity”. Moreover, they would also disagree on the meaning and relative importance of those rights. Nevertheless, driven by their distinct moral convictions—of a religious nature in many cases, philosophical and political in other cases—they were able to face the challenges of disagreement and the demands of the “raison d’état” and reach a final text to be submitted and voted on in the General Assembly of the United Nations.

This kind of morally motivated modus vivendi was also part of the game.

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The Foundations of Human Rights, Dignity or Autonomy?



Manuel Atienza

Abstract What I defend here is the thesis that these two values—dignity and autonomy—, together with a third, that of equality, form a unit; as a consequence, the foundation of rights should be found in a certain combination of all three, which constitutes a complex unit presided over, in a sense, by the idea of dignity. All of this leads me to consider, on the one hand, the Kantian and Dworkinian thesis of the unity of value, and, on the other, what seems to be its negation: the axiological pluralism exemplified in several writings by Isaiah Berlin. In my opinion, the differences between these two thesis are significantly smaller than one may initially think: Berlin's pluralism does not mean moral relativism and his conflictualist vision of society could contribute to the avoiding of an excessive moralization of law frequently observed among certain defenders of legal postpositivism.

1 An Example of False Opposition

The question of whether the ultimate foundation of human rights lies in human dignity or, conversely, in autonomy, in freedom, could be said to have a dual dimension, that is, it is both theoretical and practical.

Thus, from a theoretical perspective, it would appear that there are conceptions of ethics based on the first of those values, that is, Kantism or Catholic morality are the examples that tend to be given; hence, from that influence comes the reference to human dignity as the foundation of rights that can be found in almost all contemporary Declarations. Whereas others, the ethics inspired by liberalism, would place emphasis on the second of these values, which explains to some extent the recent crusade of “liberals” such as Macklin or Pinker against a notion of dignity, that according to them makes no sense, in that it is either of no use, (because it can be advantageously replaced by autonomy, by the value that is required to recognise the

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freedom of persons to choose how they wish to live), or either (worse still), it would play more of an ideological role, operating as an instrument of deceit and confusion.

The practical dimension refers to the use made of arguments based on dignity and autonomy in relation to many of the issues which, latterly, have been prominent and come under the general umbrella of bioethics. Thus, those in favour of abortion (legalising it in certain cases) or euthanasia (allowing people to die to release them from tremendous suffering), would appear to base their views on the value of autonomy (the right of women or each individual to freely choose whether or not to have a child, or if an individual no longer wishes to live when life has become devoid of all value); whereas opponents would above all outline the sacred value—dignity—of human life: life from the moment of conception, or life also when it is lived with tremendous suffering. And more recently, in respect of surrogate pregnancy, it would also seem that those who advocate legalising that practice would support the value of autonomy (of the prospective parents and the gestating mother), whereas enemies of the practice would instead emphasise the value of human dignity (of the pregnant mother and—at times they might add—the child), which is more important than what any others might decide (even accepting the assumption that the pregnant mother's decision is also an exercise of free will).

However, in order to realise that this conflict (both theoretical and in practice) is not quite as clearly defined as it might seem initially (hence use of the conditional verb), it is sufficient to recall a detail that many participants in the most recent of discussions mentioned—that of surrogate pregnancy—have highlighted. It is a question of fact, and certainly a surprising phenomenon, that the most radical feminists may well coincide on this issue with the doctrine of the Catholic church (not just in opposing this practice, but also in defending the fact that dignity should prevail over autonomy) which, as is well known, is not the case with abortion, where the women's right to choose would be considered the paramount argument (although not the only one) to justify their permissiveness (legal and in general, also—moral). And finally, another reason to doubt the pertinence of this contrast is that it aligns them in the same boat, if one could call it that, of conceptions of ethics which until relatively recently were considered anti-ethical, namely that of the Catholic church and Kant.

What I propose to defend here is that this is effectively a false opposition. More precisely, not only the fact that it is erroneous to present the values of dignity and autonomy as if they were opposing concepts, but that these two values, together with a third, namely equality, to some extent form a unit, and therefore human rights are based rather on a combination of those values. With this in mind, I propose to recall firstly, the Kantian thesis of the unity of value. Later I propose to refer to what would seem to be its negation, the plurality of values as has been defended by Isaiah Berlin in several widely disseminated works. I shall then go on to address a recent and influential vindicator of the thesis of unity of value: namely, Ronald Dworkin. And I will end by indicating some conclusions that I consider pertinent to the theory of law in general, as well as to the problem of concept and foundation of human rights, and weighing up the balance between those rights.

2 The Unity of Value in Kant

I am not trying here to explain the synthetic mode of Kant's moral philosophy but rather confining myself to underlining a feature of it, which I believe, is not always taken into consideration (or at least it is not sufficiently highlighted), and which may contribute to avoiding what I have called a false opposition between the values of dignity and autonomy and, more generally, to raise in a more adequate manner the issue in question, which is that of the foundation and basis of human rights.

As is well known, the categorical imperative on which, according to Kant, moral law is based—at least when our analysis is circumscribed by the philosopher's writings in his *Foundation of the Metaphysic of Morals* (Kant 2002)—allows three formulas: that of universality—“*Act only according to that maxim by which you can at the same time will that it should become a universal law*” [p. 72]; that of the purposes or of human dignity—“*Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.*” [p. 84]; and that of autonomy of will—“*Act only according to that maxim whereby you can at the same time will that it should become a universal law*” that is, “*act as if the maxims of your action were to become through your will a universal law of nature*” [p. 87]. Thus clearly, the categorical imperative contains the three great values of the rationalist ethic and of the Illustration: equality (universality), dignity and freedom. But Kant also highlights the fact that those three notions are interconnected to the point where to some degree, they become confused, or rather they merge into a single idea. And this unitary nature is demonstrated, at least, in these two forms.

On one hand, Kant uses some examples to illustrate how those formulas would work, that is, how would they adapt to the demands of the idea of a categorical imperative, and also therefore to the unicity of the ethic. Specifically, he takes four examples of duties, crossing a dual classification of these: duties for ourselves and for others; duties that are perfect and imperfect.¹ These are respectively, the duty to stay alive (not to commit suicide) fulfil promises (not to make false promises), develop one's own abilities and contribute to the happiness of others. In relation to these, Kant shows in detail how the principle of universality and that of the purposes (that of dignity) lead to the same result: justifying those duties; and in relation to the imperative of autonomy of will, he does not carry out that exercise because, as he explains in a footnote, explains—he does not consider it necessary.²

¹Kant considers imperfect duties (as opposed to perfect ones) those which allow diverse modes of fulfilment. For example, helping someone in need is imperfect, as I can fulfil this duty by helping a sick or hungry person etc. and choose which sick or hungry people I help. Whereas the duty to fulfil promises is perfect: I can choose which promises to honour. See “Duty” in Audi (1999).

²“I can be exempted here from providing examples to elucidate this principle, since those that first elucidated the categorical imperative and its formula can all serve here for precisely that end” (Kant 2002, p. 50).

And on the other hand, and this is something which—I believe—is not highlighted—or at least not sufficiently—, Kant emphasises that the three formulations are simply ways of representing the same moral law and that each one effectively contains the other two. I cite here a passage (from the *Foundations of the Metaphysics of Morals*) at length, because I think it is key to my thesis.

The three ways mentioned of representing the principle of morality are, however, fundamentally only so many formulas of precisely the same law, one of which unites the other two in itself. Nonetheless, there is a variety among them, which is to be sure more subjectively than objectively practical, (85) namely that of bringing an idea of reason nearer to intuition (in accordance with a certain analogy) and, through this, nearer to feeling. All maxims have, namely, (1) a form, which consists in universality, and then the formula of the moral imperative is expressed thus: ‘That the maxims must be chosen as if they are supposed to be valid as universal laws of nature’; (2) a matter, namely an end, and then the formula says: ‘That the rational being, as an end in accordance with its nature, hence as an end in itself, must serve for every maxim as a limiting condition of all merely relative and arbitrary ends’; (3) a complete determination of all maxims through that formula, namely ‘That all maxims ought to harmonize from one’s own legislation into a possible realm of ends as a realm of nature’. A progression happens here, as through the categories of the unity of the form of the will (its universality), the plurality of the matter (the objects, i.e., the ends), and the allness or totality of the system of them. But one does better in moral judging always to proceed in accordance with the strict method and take as ground the universal formula of the categorical imperative: Act in accordance with that maxim which can at the same time make itself into a universal law. But if one wants at the same time to obtain access for the moral law, then it is very useful to take one and the same action through the three named concepts and thus, as far as may be done, to bring the action nearer to intuition (p. 94–96)

So that it could be concluded from the foregoing that if the moral law contains those three values, it would appear that the foundation of human rights (which can only be a moral foundation) would also have to reside in those three values (or in a single one which in some way contains all three), and the determination of what those human or fundamental rights actually are (even though there is no reason to assume that they exhaust the ethic: in fact, this is not the case, as there are ethical requirements that cannot be transformed into rights) it would also require considering those three dimensions that is, it could not be that a human right, an ethical requirement—were justified in accordance with one of those formulations’, if it contradicted one of the other two or both of them.

3 Isaiah Berlin: Axiological Pluralism and Moral Objectivism

As mentioned earlier, the antithesis of evaluative monism would appear to be evaluative pluralism. And whenever evaluative pluralism is mentioned, the name that immediately comes to mind is Isaiah Berlin.

In the (magnificent) entry that the Stanford *Encyclopedia of Philosophy* dedicates to Berlin, the authors (Joshua Cherniss and Henry Hardy) underline the fact that from the early nineties of the past century that idea was the most widely discussed,

appreciated and controversial of this great thinker's writings, and they also indicate that the articulation offered by evaluative pluralism contains many ambiguities and even some obscure areas. This is most probably due to the fact that Berlin never tried to formulate that concept in a systematic way, but rather he introduced it in the context of his writings on the history of ideas. However, regardless of this fact, it is certainly true that it is no easy task to define precisely of what this ethical position consists. In my opinion, it would be summarised in the defence of these five theses (without any claim that they are independent of each other), which I will firstly propose in a synthesised manner, and subsequently address in greater detail:

- (1) Superior values, for ultimate ends (and not means for other ends), on a cultural and individual plane are plural, they frequently come into conflict and cannot be reconciled in any kind of final synthesis.
- (2) Evaluative pluralism does not presuppose moral relativism.
- (3) Evaluative pluralism is a type of moral objectivism.
- (4) (Practical) reason plays a role in relation to the (resolution of) conflicts between values.
- (5) Although it is possible to aspire to a precarious balance, there cannot be a final solution for conflicts between values; evaluative pluralism presupposes acceptance of the inevitability of the decision and the need for those decisions to be sensible (conciliatory) and avoid moral perfectionism.

(1) In the text that is usually considered to be the "most eloquent and concentrated summary of pluralism", *Pursuit of the ideal*,³ Isaiah Berlin presents us with the concept of evaluative pluralism as exceeding what is called "the platonic ideal," which he reached following a reading of authors such as Machiavelli, Vico and Herder. The Platonic ideal, according to Berlin, is that subscribed to by those who think:

At some point I realised that what all these views had in common was a Platonic ideal: in the first place that, as in the sciences, all genuine questions must have one true answer and one only, all the rest being necessarily errors; in the second place that there must be a dependable path towards the discovery of these truths; in the third place that the true answers, when found, must necessarily be compatible with one another and form a single whole (...). In the case of morals, we could then conceive what the perfect life must be, founded as it would be on a correct understanding of the rules that governed the universe (Berlin 2013, p. 25).

And in opposition to this, what Berlin finds in his reading of Machiavelli (leaving aside here Vico and Herder; but the conclusion reached is the same), is the recognition according to the Florentine author, of the compatibility between, on the one hand, the patriotic and citizens' virtues ("epitomes of manly, pagan virtues") required to be able to restore society to something resembling the Roman Republic to which he aspired and on the other, Christian values, (humility, acceptance of suffering etc.) which however, Machiavelli fails to condemn:

³The statement appears in the *Stanford Encyclopedia of Philosophy* (p. 12). And that article includes the first chapter of the compilation curated by Henry Hardy entitled *The crooked timber of humanity: Chapters in the history of ideas*. It is a work written by Berlin in 1988 and which is published with a few alterations shortly after.

The idea that this planted in my mind was the realisation, which came as something of a shock, that not all the supreme values pursued by mankind now and in the past were necessarily compatible with one another. It undermined my earlier assumption, based on the *philosophia perennis*, that there could be no conflict between true ends, true answers to the central problems of life (pp. 26–27).

Machiavelli conveyed the idea of two incompatible outlooks; and here were societies the cultures of which were shaped by values, not means to ends but ultimate ends, ends in themselves, which differed, not in all respects – for they were all human – but in some profound, irreconcilable ways, not combinable in any final synthesis (pp. 28–29).

(2) Axiologic pluralism presupposes recognising that “There is a world of objective values. By this I mean those ends that men pursue for their own sakes, to which other things are means” (p. 30). These values define every way of life, every civilisation and although they may be incompatible that does not mean there cannot be moral intercommunication and that men “realise themselves fully” (p. 29). In contrast, relativism for Berlin is identified with emotivism and moral subjectivity and prevents that human communication and realisation:

I prefer coffee, you prefer champagne. We have different tastes. There is no more to be said.’ That is relativism. But Herder’s view, and Vico’s, is not that: it is what I should describe as pluralism. – that is, the conception that there are many different ends that men may seek and still be fully rational, fully men, capable of understanding each other and sympathising and deriving light from each other, as we derive it from reading Plato or the novels of medieval Japan – worlds, outlooks, very remote from our own. Of course, if we did not have any values in common with these distant figures, each civilisation would be enclosed in its own impenetrable bubble, and we could not understand them at all (...) Intercommunication between cultures in time and space is possible only because what makes men human is common to them, and acts as a bridge between them. But our values are ours, and theirs are theirs. (p. 29–30).

(3) if Berlin’s evaluative pluralism can be qualified as objectivist (it would not be a case of simple relativism) this is due, in my opinion (and here perhaps is where his approach appears to be most obscure or imprecise) to the fact that not all the ultimate ends proposed and pursued by a culture or an individual can be considered valid. Not everything is valid, but rather there are criteria that define limits. One of those criteria (of those limits) arises, as we have just seen, from the need for intercommunication. However for Berlin: “Ends, moral principles, are many. But not infinitely many: they must be within the human horizon.” (p. 30). There are some values such as freedom which cannot be dispensed with: “without some modicum of which [freedom] there is no choice and therefore no possibility of remaining human as we understand the word” (p. 31). In the case of some principles, as formulated by Berlin, it would appear that they would need to be considered as inalienable; as in “The first public obligation is to avoid extremes of suffering.” (p. 35); and therefore it is not possible to accept (his source of inspiration here is Alexander Herzen) sacrifice “of living human beings on the altars of abstractions –nation, Church, party, class, progress, the forces of history” (p. 34). And ultimately, there are in his opinion, “if not universal values, at any rate a minimum without which societies could scarcely survive.” (p. 36); and as examples of this, which would presuppose violation of those minimum values, he cites slavery, ritual murder, the Nazi gas chambers “the torture

of human beings for the sake of pleasure or profit or even political good” or “mindless killing” (p. 36).

(4) The fact that conflicts between values exist does not mean that in this regard reason cannot play a role in addressing them. Values (the ultimate ends) can be, and they frequently are, incompatible with each other but Berlin’s position in this regard is far removed for example, from the irrationality of a Nietzsche. Thus, among other things, Berlin warns that “we must not dramatise the incompatibility of values”: “there is a great deal of broad agreement among people in different societies over long stretches of time about what is right and wrong, good and evil”. (p. 36); and as a result precisely the possibility of reaching agreements and making “mutual concessions” (p. 36). What Berlin rejects (and I believe this is particularly clear in his reply written jointly with Bernard Williams to a work by Crowder on pluralism and liberalism) is simply that conflicts between values can always be resolved by appealing to a rule (for example, the utilitarian rule or the lexicographic priority that Rawls gives in terms of freedom and equality,) that is, to some value that should always prevail over others. Values are incommensurable, in that there is no measurement of common comparison, such as that suggested by utilitarianism and which therefore has no algorithmic procedure for resolving conflicts. But it does not follow from this that the judgement made regarding a conflict between values in a particular context, would establish the priority of one value over another has to be considered “as non-rational or subjective or a matter of taste” (Berlin and Williams 1994, p. 2). And this leads to Berlin and Williams’ comments regarding Crowder’s approach:

In his talk of ‘underdetermination by reason’, Crowder seems unsure which of two quite different views about potentially conflicting values he is ascribing to the pluralist: that it is not a requirement of reason that there should be one value which in all cases prevails over the other; or that in each particular case, reason has nothing to say (i.e. there is nothing reasonable to be said) about which should prevail over the other. Pluralists – we pluralists, at any rate – see the first of these views as obviously true, and the second as obviously false (p. 3).

(5) In my view, there are several practical consequences of all the foregoing (the “normative” aspects of Berlin’s thesis), although they are linked, and perhaps can be synthesised in the idea of political liberalism. A consequence is that what could be termed as the assumption of inevitability of the conflict and the need for choice (but choice with rational criteria): “The notion of the perfect whole, the ultimate solution, in which all good things coexist, seems to me to be not merely unattainable – that is a truism – but conceptually incoherent; I do not know what is meant by a harmony of this kind. Some among the Great Goods cannot live together. That is a conceptual truth. We are doomed to choose, and every choice may entail an irreparable loss” (Berlin 2013, p. 13). Another consequence (deriving largely from the foregoing) is given by what could be called prudentialism or a prudential attitude “the best that one can do is to try to promote some kind of equilibrium, necessarily unstable” (p. 47). And the third is the rejection of moral perfectionism. This last does not presuppose that Berlin is against any type of utopian thought (see p. 33), but we could call it a certain way of understanding utopias: “Utopias have their value – nothing so wonderfully expands the imaginative horizons of human potentialities –

but as guides to conduct they can prove literally fatal. Heraclitus was right, things cannot stand still". (p. 33). Thus, what he rejects is political and moral perfectionism which goes against certain features of human nature: "the search for perfection does seem to me a recipe for bloodshed, no better even if it is demanded by the sincerest of idealists, the purest of heart. No more rigorous moralist than Immanuel Kant has ever lived, but even he said, in a moment of illumination, 'Out of the crooked timber of humanity no straight thing was ever made.' To force people into the neat uniforms demanded by dogmatically believed-in schemes is almost always the road to inhumanity." (p. 37). Therefore, in what way is a conception such as Berlin's incompatible with the thesis of a unity of value? Of course, Berlin's vision of Ethics is not the same as that of Kant, yet nor would it be meaningful to present them as if they were totally incompatible with each other; that is as if one was the counterfigure of the other. Not by any means. The reference (obviously, in an approving tone) to the Kantian phrase reproduced above is not a rarity in Berlin's work; for example in *Appendix to political ideas in the romantic age. The rise and influence in modern thought*, Berlin considers that Kant did understand something ("he had a glimpse of this") to which he attaches considerable importance in relation to objectiveness and moral relativism: that the notion of objectivity in ethics cannot be the same as that used in the empirical sciences or in mathematics.⁴ The two notions of freedom famously distinguished by Berlin can easily be found in Kant's work although it is perhaps true that Kant never actually distinguished them clearly; in accordance with Bobbio, although the explicit definition that Kant gives of freedom is Rousseau-esque, namely freedom as autonomy (that which appears in the third formulation of the categorical imperative), however, what he invokes and raises to the condition of the end of political coexistence would be freedom as a non-impediment, negative freedom (see Bobbio 1985 p. 201). And finally, it would seem that both Kant's thought and that of Berlin unquestionably fall within the scope of political liberalism.

Furthermore, it is also obvious that between the two authors there are contrasting elements that are obvious at first sight. Thus, Kantian rigour the "fiat justitia et pereat mundus", would seem the antithesis of what was previously known as the "prudential attitude", of the need to make mutual concessions and achieve a precarious equilibrium between values in conflict; and Kant's wholesale rejection of any form of moral consequentiality would also seem to radically conflict with the open attitude that Berlin shows towards utilitarianism (although he does not accept it en masse) as is clear for example, when underlining the importance of the principle of avoiding extreme suffering.

⁴"Kant and some among the German Idealists had a glimpse of this in supposing normative statements to be not statements of fact at all, but orders, commands, 'imperatives', deriving neither from an artificial convention, like mathematics, nor from the observation of the world, like empirical statements. And if we follow this line of thought, it becomes clear that normative statements fail to be subjective not in the sense that they might have been objective, but in the sense that they are wholly different from the kind of statements (or beliefs or thoughts) to which the distinction between subjective and objective applies" (Berlin 2014, p. 329).

But it seems to me that many of those contractions are eliminated or considerably weakened when passing from individual ethics (which Kant seems to be thinking of when formulating his categorical imperative) to political ethics (which is above all what interests Berlin). And furthermore, it seems to me that the coincidences between the two authors are even greater if one considers the legal perspective in particular, that of fundamental rights. That is, I do not believe that the responses to questions that I now propose to formulate would have to differ greatly depending on whether they were addressed to a Kantian, or to someone who assumed a conception of evaluative pluralism like Berlin: (1) What is the foundation of human rights? (2) Which fundamental rights should be included in a constitution? and (3) How should the conflicts between these rights be resolved?

(1) Therefore, I do not see why being a party to evaluative pluralism has to be against considering (something which—as he says—in recent times is normal) that human dignity in the Kantian sense (the prohibition on instrumentalising a human being) is the foundation of rights as proclaimed in international declarations, or in our constitutions. Rather it seems to me that everything that Berlin writes on the need for intercommunication between cultures, for human realisation, for recognising certain “minimums” (some requirements that should be based on minimum shared values—which means universal—) may without great difficulty be interpreted in terms of human dignity. Both Kant’s conception and that of Berlin fall within what could be called a humanist ethic, based on the principle that “the explanation and justification of good or evil of anything depends ultimately on its construction, actual or possible to human life and its quality”.⁵ The appellations that with more or less frequency Berlin’s work makes to human nature (see Encyclopaedia) certainly recall Hart’s doctrine of the “minimum content of natural law”. And Lon Fuller held that maintenance of communication between mankind was the basic principle of natural substantive law.⁶ And as a result, perhaps, in short, it is hardly surprising that Berlin would qualify his position as objectivist and not relativist from a moral perspective.

(2) Nor is there any reason to think that some fundamental rights would have to be ruled out (as unjustified) in respect of evaluative pluralism, of the kind included in international declarations and in our constitutions and which—we reiterate—are understood to have their ultimate foundation in human dignity. This idea coexists,

⁵ See Rosen (2012), p. 130. Rosen takes the formulation of this principle from Raz.

⁶ As is well known Hart and Berlin *coincided* for many years at Oxford and it may be assumed that they were familiar with each other’s work. Regarding the American Fuller (Hart’s rival in a famous polemic of half the twentieth century regarding natural law and legal positivism), it is worth recalling here some paragraphs of his work about the morality of Law: “I believe that if we were forced [he’s commenting on Hart’s famous chapter on “the Minimum Content of Natural Law”] to select the principle that supports and infuses all human aspiration we would find it in the objective of maintaining communication with our fellows” (Fuller 1964–1969, p. 185). And a little later: “If I were asked, then, to discern one central indisputable principle of what may be called substantive natural law – Natural Law with capital letters – I would find it in the injunction: Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel and desire” (p. 186).

without apparently being rejected, with that which holds that in constitutions (or in any other texts containing human rights) there is not a *unique* supreme value to which all others are subordinate (there would be a plurality of ultimate values), and so it is commonly affirmed that nor is there any right that is absolute, that is, one that never has to give way to the preponderance of another right (or a set of rights). The existence of conflicts of rights (between fundamental rights or within a fundamental right itself) is something that hardly anyone would question (although a greater or lesser emphasis could be placed on the relevance of those conflicts), so that the dispute is more concerned with how to resolve those conflicts, and what role reason plays when a decision is needed in this respect.

(3) Recently, Bruno Celano, based on a conception of conflictualism of values that was to a considerable extent inspired by Berlin, (but also by Nietzsche and Weber), has defended the need to carry out some kind of weighting (when fundamental rights conflict with each other) based on a model which he calls “particularist” and which he believes contrasts with the “minimalist” or “irenist” models. The basic idea is that given that “rights, principles, values and interests that constitute the substantive ethical dimension of the constitutional Rule of Law are truly in conflict, they are truly antinomian, indeterminate, heterogeneous, often immeasurable” (Celano 2013, p. 46), the weighting that occurs in a specific case in favour of one of the two rights (values, etc.) that are in conflict cannot give rise to a rule in the strict sense, that is, a conditional pronouncement universally quantified and which cannot be revised.

I believe that Celano is mistaken on this point basically because the rules can have exceptions (implicit exceptions: that is what revising or abolishing means) while still being rules (see Atienza 2019). But what I wish to highlight here is that Celano’s particularism and his thesis that in law (in those difficult cases that require weighting) it cannot be said that there is only one correct response, is not, in my opinion, a necessary consequence of having assumed evaluative conflictualism, as Berlin does. That is, I do not consider that there is a contradiction in assuming the evaluative pluralism of the latter, which is more a concept than a conception of pluralism, as Berlin did not precisely define what his version of pluralism was) and considering at the same time that the weighting carried out by legal practitioners in those cases obeys a model of practical rationality (or reasonability), which clearly cannot be that of the rationality of formal or empirical sciences, but which could be governed by the idea of the correct response. I will return to this later.

4 Unity of Value and Human Dignity in Dworkin

In the last of Dworkin’s books, *Justice for Hedgehogs*, Isaiah Berlin is very much present, beginning with the actual title of the book. But Dworkin had already addressed Berlin and his moral pluralism in another previous work, *Justice in Robes*.

What this last work does is summarise Berlin’s thesis that values are plural, that they can conflict and that appealing to an ideal of a perfect whole, is not only false

but dangerous. Dworkin recognises the interest and depth of Berlin's approach but disagrees with it, for several reasons. One of these is that he does not agree that the defence of the holistic ideal, (that which Dworkin defends and Berlin attacks) has the consequences that Berlin claims. Dworkin considers, effectively, that such danger exists, (as totalitarian systems such as Stalinism would have effectively subscribed to the thesis of axiological monism), but this is merely contingent. Moreover, the greatest danger of our era in terms of what it does to western societies would be on the opposite side: it is moral pluralism (they are the foxes not the hedgehogs [see below] that endangers any defence of the values of liberalism (to which both Berlin and Dworkin adhere). The depth of Berlin's approach would be based on the fact that the latter does not confine himself to defending cultural pluralism, and extracting from that axiological relativism, as so many authors have done in recent times. Berlin is a moral objectivist and he holds that it is not simply that values may clash for historical, contingent reasons: for example, if a nation has suffered an unjust class system—Dworkin concedes—it may be necessary to limit freedom for a while, abolishing private schools for a generation in order help restore equality. But it is not simply this that Berlin is stating, but rather that those clashes, for example, between freedom and equality are inevitable, they constitute tragic cases; so it is not a question that (in relation to one of those conflicts) we have doubts, uncertainties, as to how they will be resolved, we know that they cannot be resolved; that there is no possible response that would not lead to violation or damage to either one of the two values. And this where Dworkin's main criticism lies.

By highlighting the existence of that conflict, Berlin's approach entails a specific way of understanding, for example, the value of freedom: the capacity to do as one likes without interference from the rest. And this is what Dworkin questions, because for him freedom would be the ability to do what one wants, but always having respect for the moral rights, duly understood, of others (Dworkin 2006, p. 112). And if these issues are viewed from this second perspective, then it would be possible to reconcile (in the event of any conflict) the value of freedom and, that of equality, for example, or any other. What underlies this issue is the fact that freedom, equality etc. are what Dworkin calls "interpretative concepts" which will be addressed below. But in order to dispense with Dworkin's approach in that work, it is necessary to clarify that here he does not claim to have demolished evaluative pluralism with his previous arguments; that was to be the subject of his other book: *Justice for Hedgehogs*. What he believes he has proven is that in order to defend that position, it is also necessary to demonstrate that the way in which the value or the values that come into conflict have been understood is adequate (Dworkin 2006, p. 116). And this adequate conception of values is not one that can be found in dictionary definitions, nor does he depend on empirical discoveries; Dworkin recognises, by the way, the importance of an historical analysis of those concepts—interpretative concepts—but the history of political ideas cannot give us, shall we say, the most adequate concept of freedom. To achieve this we need to have recourse to a moral and political philosophy of a substantive nature (p. 113).

And now let us turn to *Justice for Hedgehogs*. As is known, Berlin (taking his metaphor from the ancient Greek poet, Archilochus) classified intellectuals as foxes

and hedgehogs. Whereas the fox knows a lot of things, the hedgehog only knows one, but that one thing is very important. And for Dworkin, that big thing is unity of the value, the idea that ethical values (on how to live well) and morals (how we should treat others) are interdependent—they configure a complex unit; they support each other rather than coming into conflict. That thesis, in Dworkin's opinion, opposes the most extensively propounded perspective in philosophy in recent times (especially in the Anglo-Saxon world) which is inspired more by the way that the fox acts or which is equivalent, by moral pluralism which, as we have just seen, to affirming that there are many values (justified moral principles and ideals) and it is inevitable that they will clash.⁷

What Dworkin defends—it is appropriate to emphasise this—is not that conflicts between values (or between rights) can be resolved by rational procedures; but that such conflicts do not exist, that there are only apparent conflicts, but and that there are no such things as genuine conflicts of values (see Dworkin 2011, p. 119). As a result, there could be no conflict between, by way of example, safety and freedom, or between freedom and equality and so on, and that the problem can only be resolved by sacrificing one (or an aspect of one) of those two values, as tends to be stated. And one of the examples that Dworkin provides to dispense with what in his opinion, would be an equivocal or, rather an error of approach, is Berlin's celebrated conflict between two notions of freedom, namely, negative freedom (such as non-interference) and positive freedom (as autonomy).

Berlin—Dworkin tells us—considers that both notions of freedom constitute ends in themselves, values, and they may well clash when, for example, in order to promote democracy (positive freedom requires some form of democracy and equality) some kind of limit needs to be placed on individual freedoms (on negative freedom). But Dworkin considers that this approach is erroneous. And Berlin's error would be in having failed to distinguish between two ideas or two aspects that come within the scope of what the author considers to be "negative freedom". For this reason, in the interests of clarity, Dworkin proposes that two different terms be used: "freedom" and "liberty". Although these words are often interchangeable in English, he proposes the following distinction: "Someone's total freedom is his power to act in whatever way he might wish, unimpeded by constraints or threats imposed by others or by a political community. His negative liberty is the area of his freedom that a political community cannot take away without injuring him in a special way: compromising his dignity by denying him equal concern or an essential feature of responsibility for his own life" (Dworkin 2011, p. 366).

That is, freedom is a value, and therefore has a concomitant claim of justification; or in other words, if something (an action or a state of affairs) is qualified as valuable, then that means that someone cannot carry out a valuable action which, however, was lacking in justification. Freedom (like other values) belongs to the area that Dworkin calls "interpretative" concepts, which he places in contrast to " criterial"

⁷ As representatives of that position, Dworkin cites in the first place Berlin, and then Thomas Nagel (Dworkin 2011, p. 425, note 2).

(or classificatory). Concepts. These last are characterised by a series of notes (which would be the connotation of the concept), so that when there are discrepancies in the use of a concept of this type, this would be due to the fact that in reality, they are not dealing with the same criteria, or in other words, that a concept is not shared. However, in relation to interpretative concepts, the disagreements would be due to causes other than those mentioned previously. Using a (same) interpretative concept presupposes that a practice is shared (not simply a set of defining criteria, as in the other case), and the correct use of the concept is concerned with whatever is the best interpretation of that practice; that means that the same concept can be shared—freedom or equality—although there are considerable differences of opinion regarding when such cases are manifested, such as whether or not an action of an authority is an example of violation of freedom etc. (see p. 161). Our disagreements in relation to the use of those concepts, are concerned, in short, with the fact that we interpret the practices that we share differently (p. 6).

Thus *freedom*, according to Dworkin, does not presuppose any value (it is simply a question of the wishes that a specific person may have regarding the manner in which they want to act) and therefore it is not part of what should be understood by negative freedom or liberty. Naturally, there may be a clash between the wishes and preferences that an individual or set of individuals may have, but that could not be considered a conflict between values; nor, by the way, could it be considered such by Berlin, as we have seen earlier. So that if what we take into account is the *value* of negative freedom (if “negative freedom”—or more generally “freedom”—is considered as an interpretative concept), then this could not conflict with positive freedom, as those two notions of freedom constitute two aspects of the same value, responsibility which, in turn, is one of the components of human dignity: “Because responsibility has those two dimensions, so does liberty. A theory of positive liberty stipulates what it means for people to participate in the right way. It offers, that is, a conception of self – government. A theory of negative liberty describes which choices must be exempt from collective decisions if personal responsibility is to be preserved” (p. 365). Or in other words, establishing the duty not to kill and supporting it with a strong sanction does not mean—Dworkin tells us—any restriction on anyone’s freedom, that is, does not jeopardise any value, because it does not affect the dignity of anyone but conversely, promotes human dignity. The (alleged) conflicts between values—we insist on this—should not be confused with conflicts between wishes or conflicts arising in terms of phenomena, reality; and thus, for example, Dworkin does not deny that in some cases is it necessary to impose limits on political freedom in order to prevent destruction of democracy: “But such constraints are as much injuries to democracy itself as they are to negative liberty: these are circumstances in which—allegedly—both democracy and negative liberty must be compromised immediately to protect both from graver loss later, not cases in which one of these virtues is preferred to another” (p. 366).

Dworkin’s idea of unity of value, as he recognises, is very close to that of Kant and in fact they are both differentiated by the philosophical idealism of the latter; “Kant’s unification of ethics and morality is obscure because it takes place in

the dark: in what he called the noumenal world, whose content is inaccessible to us but which is the only realm where ontological freedom can be achieved" (p. 19).

In Dworkin's case what that unity provides is the value of human dignity which he indubitably characterises in Kantian terms and in a manner in line with the field of ethics and morality. In the first case (ethics for him refers to the individual plane, to what living well means), human dignity has two dimensions, which gives rise to two ethical principles, self-respect and authenticity. Those two principles, taken jointly, offer a conception of human dignity: "The first is a principle of self – respect. Each person must take his own life seriously: he must accept that it is a matter of importance that his life be a successful performance rather than a wasted opportunity. The second is a principle of authenticity. Each person has a special, personal responsibility for identifying what counts as success in his own life; he has a personal responsibility to create that life through a coherent narrative or style that he himself endorses" (pp. 203–204). In the field of morals (we refer—it should be recalled—to how we treat others) dignity, that is, self-respect and authenticity, extends to others, and gives rise to what we could call the principle of equal treatment (treating everybody in the same way), and autonomy (respecting the ethical responsibilities of every individual); for this purpose Dworkin uses the Kantian thesis that we cannot adequately respect our own humanity if we do not respect the humanity of others. Dworkin's two principles of justice thus express jointly the idea of dignity and constitute the two requirements that public authority must observe in order to be legitimate: "First, it must show equal concern for the fate of every person over whom it claims dominion. Second, it must respect fully the responsibility and right of each person to decide for himself how to make something valuable of his life" (p. 2). The unity of value would attain morality in general, which according to Dworkin, has a tree-like structure and also includes the law: "Law is a branch of political morality, which is itself a branch of a more general personal morality, which is in turn a branch of a yet more general theory of what it is to live well" (p. 5).

However the theory of Dworkin's unity of value is not the antithesis of Berlin's evaluative pluralism either. As has been mentioned several times, for him, values do not constitute wishes, but rather they possess an objective entity. Berlin's historical perspective when analysing moral concepts does not appear to be too distant from the Dworkinian notion of interpretative concepts either: it could be said that perhaps the latter are highly likely to be analysed historically, although history is a source of conceptual clarification, but—as we saw above—a parameter of justification cannot be provided, that is, it cannot permit it to be said when such use of those concepts is correct. However, there is also a coincidence between these two authors relating to what Dworkin considers "the most radical view I defend: the metaphysical independence of value" (p. 9), which is simply Hume's thesis (adequately interpreted) which was also decisively important for Berlin: which is that the objectivity of morals (moral values) is independent of the truth in formal sciences or in empirical sciences. There is unquestionably a significant difference between them: whereas for Berlin, values frequently come into conflict, without it being possible in those cases to obtain a "final synthesis", Dworkin defends that final synthesis in a very radical

manner, that unity of value, because he denies, as we have seen, that is possible to speak of conflicts between values. But it is possible, however, that this difference is not in fact as profound as it might seem in principle, that is, it is possible that when resolving those conflicts (for one, apparent, for the other real) the positions are actually so very far apart. This will be explained below.

5 A Possible Synthesis

If, as I have suggested, the differences between Berlin and Dworkin (or Kant) are not so radical as it might seem in principle, this is due to the fact that they may all be considered as representatives of political liberalism and that Berlin—like the other two—is also a moral objectivist, although it is, as we have seen, a question of a somewhat special type of objectivism which, moreover, seems only to have been touched on in his work rather than properly developed.

Moral pluralism can be understood, in principle, as a conception according to which, both in individual and in social or cultural terms,—there is a plurality of values, of what are considered ultimate ends, which are not structured in such a way that they can all be considered as forms or manifestations of a single value. Obviously, the thesis is not particularly interesting if it is interpreted merely in a weak or descriptive sense: as a statement that effectively, there are individuals, societies or cultures that interpret what they consider to be their values in this way. As such, it is a statement that at least in many cases is unquestionably true. And as proof of this, we need only refer to the texts of our constitutions and the manner in which they are understood, in general, by those who need to apply them. In the case of the Spanish Constitution, for example, a number of “higher values” of the system are enunciated (in article 1 in which dignity happens to be notably absent), and it is a cliché that almost all legal practitioners accept today that those values (principles or rights) can conflict with each other, without there being any rule that allows such conflicts to be resolved. So what is interesting then, is when moral pluralism is considered as the stronger thesis, according to which, as there is no such thing as a single value, with a criterion for creating a hierarchy of all those values, possible conflicts could not be resolved in a fully satisfactory way, as opting for one of those values in conflict would to some extent entail damaging another (the one that clashed with it).

If understood in this second sense it could be held that there are still diverse conceptions of legal pluralism. One of those conceptions (perhaps the most current) is relativist pluralism, according to which, when those conflicts arise, it is not possible to rationally justify a decision in favour of one of the two values that clash; that is, reason cannot say anything or says very little regarding which of the two values should prevail, so that if one of them is not satisfied, it can only be seen as a sacrifice, a loss of value. Or, more precisely, perhaps moral relativists may well think that, given the nature of values, it is essential as far as is possible, through institutional means etc. to avoid conflict between them, and where this is impossible,

endeavour to mitigate their negative effects. But those conflicts cannot be resolved (rationally), as there are no objective criteria (irrespective of what an individual or a group might think; that is, not relative) that can be applied to the situation.

Another possible conception of axiological pluralism consists of making it compatible with some type of more or less robust moral objectivism, that is, with the idea that not all values *are equal*, so that there are some objective criteria (regardless of the ultimate ends of a culture or an individual) which could be used when attempting to resolve a conflict of values. Those who support this type of objectivist pluralism do not deny the need (in some cases) to sacrifice all or one dimension of some of those values, but they consider that sacrifice to be rationally justified. And this would seem to be the case of Berlin. That is, as we saw previously, he thinks that there would be some principles, some values, which cannot be dispensed with; for example, the need for intercommunication (between cultures and between individuals), for a minimum of freedom and equality, the obligation to avoid extreme suffering, etc. Those would be the criteria that would be appropriate to use, or would need to be used when rationally choosing one conflicting value over the other.

This last conception still differs from Dworkin's view, as he does not accept that this type of conflict exists, for reasons that we have already seen. However, it is worth pausing for a moment here in an attempt to more effectively specify what this author really wants to say, at least as I interpret his comments. To do so I will propose some examples taken from the law.

Let us take the well-known situation (imagined by Judge Holmes) in which the spectator shouts "Fire!" in a theatre full of people, when there is actually no fire in the building and his cry is tantamount to creating a risk to all those present. It would be clear to anyone that this is not an action covered by freedom of expression as it is expressed in our constitutions, but the method used to reach that conclusion is different, depending on what—for example, a lawyer would follow for this purpose, a procedure offering a theory of weighting such as Robert Alexy's, or conversely, that suggested by Dworkin. The first of our two legal practitioners would more or less say that given the circumstances, personal safety of people carries much greater weight than freedom of expression so that it would be justified to place a limit on the latter by virtue of the principle of proportionality (weighting in a strict sense); the harm to this value is very small compared to that which would be caused to personal safety, were this limitation not established. Whereas a Dworkinian legal practitioner would argue otherwise, holding that in those circumstances it would be pointless to speak of the "value" of freedom of expression (as there is no value in this type of linguistic action), so that freedom of expression (properly understood) would not have been affected in the slightest: quite simply, no clash between values (or between principles that express values) has occurred; prohibiting someone from shouting "Fire!" in a theatre cannot be considered a restraint on freedom of expression.

This last reasoning can also be applied to the examples that we provided at the start, (or at least, partially). Thus, permission (or non-punishment) in some cases of abortion cannot presuppose an attempt against the dignity of human life (this is not a

question of weighing freedom against autonomy), as the value of life (a dignified life) would not begin with conception but at some point subsequent to development of the foetus. The same could be said in respect of euthanasia. Or in the case of surrogate maternity: if this institution is considered to be legitimate, it cannot be because here priority has been given to the potential parents' autonomy, and that of the pregnant woman in respect of her dignity and that of the child, but because it does not affect the dignity of anyone; if this were not the case—that is, if the dignity of persons were at stake—that type of practice would not be justified.

I believe that this way of presenting the “conflicts” between values, that is, Dworkin's way, is perfectly plausible, at least in many cases. Or in other words, not all that the legal practitioners usually call conflicts of values are in actual fact real conflicts, that require weighting in the strictest sense; that is, in many cases there would not seem any point in stating that some values (or principles) cancel out others. But I see two disadvantages to Dworkin's position.

One is that from a practical point of view, there is not really much difference between an approach based on the unity of value and which denies the existence of conflicts between values, and an approach based on evaluative pluralism and which considers (as is customary practice—it seems to me—in our courts) that there are criteria, rational criteria, for resolving, if not all, at least quite a few conflicts arising in legal practice. If we return to the two aforementioned methods, all the difference would appear to be in that some (those who would have recourse to weighting: leaving aside the specificities of weighting as Alexy understands it) start from the premise that there is a conflict between values (or principles or rights) *prima facie* which would be resolved, when all the elements of the case have been considered, in favour of the reasonable proposal; whereas the Dworkinians would also deliberate, considering the reasons, even though that operation is carried out within a single value, but—it should be recalled—a complex value which has many dimensions. The final normative judgment, however, does not vary and will consist of establishing that shouting “Fire!” in a theatre full of people is prohibited, that the practice of abortion or euthanasia is legal (it should be permitted) if such and such circumstances are present etcetera.

The other disadvantage (but this could be also levelled at many who defend weighting), is that it is not at all clear that both the law and morals need to exclude the existence, despite these being exceptional situations, of tragic cases, that is, cases which cannot be resolved without being detrimental to some essential element of a value, of that which we have good reasons to consider as being an ultimate end. I propose two examples of what I consider to be tragic situations.

One of these would have been that faced by Socrates when, as is common knowledge, he was accused of impiety and ultimately condemned to death. He never stopped considering life as a value (despite reasons given in the *Apologia* as to why death should not be feared), but he considered that authenticity as a value was superior to continuing to live, and therefore he did not reject the penalty imposed on him. However, unquestionably, his situation was tragic, in those conditions it was impossible to preserve those two values at stake: life and authenticity. And regarding judges who operate in legal systems in many rich countries, the laws that order

(through they themselves or the administrative authorities) expulsion of immigrants that have entered the country illegally, are frequently faced with the need to make decisions of a tragic nature; if they did not apply the current law, they would be failing in their duty as authorities subject to higher powers, and would be placing at risk values that we consider essential—in general, those which we relate to the Rule of Law and democracy—but applying that law, in turn, would appear to be incompatible (at least in many cases) with the requirements of human dignity, as it would be discriminating against someone (depriving them of essential rights) due to circumstances that are beyond their control, having been born in an “inadequate” country.

If we were to ask how someone who subscribed to a conception similar to that of Berlin’s evaluative pluralism would react in relation to the questions raised, my response would be that they would probably be in favour of weighting, although this person would still recognise—it seems to me—that Dworkin’s position (or that of Kant) takes into account—and perhaps exaggerates—an important element of these situations, namely, the requirement to pursue consistency in moral matters.

Thus, those who adhere to Berlin’s thesis could not fail to recognise the existence of tragic cases of dilemmatic situations. However, I see no reason why the thesis of the single correct response should not also be assumed, in relation to the cases that judges are presented with; in Dworkin’s version, or in any other slightly weaker form (but in reality, very similar to Dworkin) such as that of Alexy. Subscribing to this thesis presupposes in reality accepting that the values (at least in general) are commensurate; and that there are no cases (or only very exceptionally) of equivalence, or of an absolute tie. In relation to Dworkin, that unit of measurement arises from his idea of human dignity (this is what unity of value consists of); and the practical impossibility of there being a tie, an equivalence between reasons would, according to him,—and I believe he is right in thinking this—be a rather banal thesis: however difficult a legal case may be, ultimately, having deliberated sufficiently on all the circumstances of the case, it is almost impossible for the reasons that favour one decision to be exactly the same as those that defend another alternative decision (judicial issues are generally bivalent).

A Berlinean advocate, as we have seen, would reject any mention of a commensurability of values, but in the sense that they would not believe that situations of conflict can be resolved (or can always be resolved) by utilitarian rule (such as maximisation of wealth or reduction of human suffering) or the famous Rawlsian rule of lexicographical priority of freedom as opposed to equality, nor, of course, would they be prepared to give any credit (I believe that they would be more likely to disdain), construction such as the Alexian formula for weighting. However, moral objectivism presupposes recognition that there are, in fact, some criteria that can be used in cases of conflicting values, as not all the values have the same worth. The criteria that Berlin suggests are, of course less articulate than those of Dworkin (or the three Kantian formulas of the categorical imperative), but they still constitute, as mentioned previously, a version (reduced if you will) of what could well be qualified as human dignity. Perhaps these cannot be applied to all cases in which values conflict. But they do apply to many. And among those many would be, I

think, the alleged conflicts of values that have to be resolved by judges in the context of a constitutional state.

Thus a Berlinian jurist would perhaps operate in a similar way to someone who followed Dworkin's or Alexy's conception (in the case of the latter, having dispensed with the numerical paraphernalia). That legal practitioner would find that almost always, having studied the substance of a case, there would be better reasons in favour of one of the two possible solutions; that is, I do not think that taking into account the characteristics of our legal systems (which include constitutions that include values of political liberalism, and the existence of presumptions, burdens of proof and other mechanisms that help to resolve cases), a Berlinean jurist would come across many situations which resulted in a complete tie, perfect equivalence of values, not even when having to face a tragic case, as here, naturally, here could be recourse to the lesser evil which would permit, at least on many occasions, opting rationally for one of the two options available, namely, the least worst.

And finally, I do not believe that this type of jurist would have to opt for the model of weighting that Celano called particularist. That is, either those difficult cases (with conflicting values) would be resolved with the Dworkinian method, or that of weighting, the result of deliberation (which we could call weighting in its broadest sense) which are not simply casuistic solutions, which are valid exclusively for that case, but solutions based on rules, that is, on regulations formulated with a view to universality, although they remain open, at the same time they are likely to be interpreted as defeasible conditionals.

And the conclusion reached by all this is, in my opinion, that it would not be in any way ridiculous to propose a theory of values that combine in some way the Kantian and Dworkinian monism with moral pluralism in a version more or less close to that of Berlin. What I do consider should be ruled out is relativist pluralism, as that is a conception of ethics that does not permit the provision of a foundation for human rights, or for articulating a plausible conception of weighting (considering weighting in a broad sense and equivalent to deliberation).

I believe that on one hand, the unity of value should be considered at the very least as a regulatory idea, a requirement of practical rationality. If this were not the case, it would be at least problematic to speak of *unity* of practical reason; that is, if moral reasons are ultimate reasons which could be outlined in practical discourse, it would appear that those reasons have to be imbued with some sense of order, they should speak with one voice. It seems to me that this is what is behind our constitutions and declarations of rights (beginning with the UNO) when they use human dignity as the basis of all rights but, at the same time, they continue to recognise that those rights (values or principles) are plural and at least potentially, conflicting. It also underlies the Kantian notion of moral law: a complex unit in which it is possible to distinguish various components or perspectives. And also the Dworkinian theory of unity of value: the diverse elements of dignity—on a personal and social plane—are complemented and provide mutual support.

But this unit also has some limits, or if you will, it comprises a plurality of elements that form a dialectic unity, which will inevitably conflict, and it is not possible to think of some kind of final synthesis in which they will all be reconciled.

Hence the importance in my view of recognising the existence of tragic cases, of irreconcilable tensions, as it is not possible to reach a solution that does not erode an essential aspect of any ultimate end. As we have seen, the Dworkin tendency would seem to deny those situations, in the sense that he would not attribute their existence to values as such but to social reality, it would be a consequence of human activity and, therefore it would be on the plane of empirical reality, not on that of values. But this is hardly satisfactory, and is a rather artificial way of avoiding the *real* conflict in our past and present societies. I believe that a theory of values has to be adapted to the way our societies have been in the past and as they are today, and what the human beings that live in them are like. And if this taken into account, then inevitably it must be recognised that there are situations in which whoever has to make a decision finds themselves faced with the impossibility of satisfying both evaluative demands raised (albeit many or just one, but with several irreconcilable elements). The only way of avoiding this I think, is to have recourse to a kind of idealisation, albeit Kant's world of noumena, or the thesis of metaphysical independence of the value, things which I am not quite sure are really differ from each other or not.

And in this context, the conflicting vision of history and societies that are represented in Berlin's conception can play a very positive role. As although it is true that the theory of law cannot dispense with aspiring to moral correction, what the law generates, and as a result, also the theory of law is in fact, social conflict.

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Part II

Exploring the Problem of the Autonomy of Law in the Trends of Contemporary Legal Discourse(s)

Hart, Raz and Kelsen on the Puzzle of Law's Autonomy



Eduardo A. Chia

Abstract The paper attempts to reconstruct the claim for the autonomy of modern western law in the oeuvre of Hart, Raz and Kelsen. It suggests that law's autonomy for Raz and Hart is realisable in relative terms, as they would accept that law's ultimate determination depends on social facts; moreover, they argued for no sharp *separation* between law and morality. This scenario renders the law's autonomy claim superfluous. Conversely, Kelsen articulated a cogent argument for law's autonomy by closing the system to the chance of incorporating exogenous elements in legal determination. He based his argument on a non-factual and non-reductive postulate besides strictly separating law from morality. Law's determination is self-standing; therefore, it is genuinely autonomous. There is no relativisation of the claim. However, this autonomous law becomes problematic because it may irritate rational personal autonomy. Conclusion shows that the law's claim to autonomy is an intricate puzzle that requires rethinking its possibilities. The challenge is not trivial for legal theory; a sound reflection on the claim would conciliate a genuine autonomous law with rational autonomy.

1 Introduction

The idea of an autonomous law is a central claim of modern legal theory. It is also an intriguing puzzle. As some scholars suggested, it is a paradoxical claim, as is the idea of moral autonomy (Meld Shell 2013, 108–122; Khurana 2013, 50–74). Insistence

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on presenting the law as autonomous seems to be at odds against its grounds. However, conceiving law as non-autonomous might render it redundant. If adequately articulated, it matters for making an emancipatory law possible. Legal scholars stand fractured between those who reject legal autonomy and others that affirm it. Analytically, questions about autonomy arose from an interest in unravelling the law's true uniqueness as a self-sufficient normative order. The law claims its reflexivity. Interest in this problem stems from both continental and Anglo-American legal theories. Hans Kelsen developed the idea early on to a sophisticated degree in the Germanophone discussion. In Anglo-American jurisprudence, the legal autonomy discourse has been less explicit but not absent. I cannot address all the arguments put forward in these few pages. Therefore, I will examine how three contemporary legal philosophers associated with legal positivist tradition have approached the claim. Legal positivism has insisted on the law's autonomy by claiming to determine its distinguishability from its most similar competitor: morality.

In what follows, I shall attempt to reconstruct the argument for law's autonomy in H.L.A. Hart, Joseph Raz and Hans Kelsen. Emphasis is because they are presented as “[t]he most important architects of contemporary legal positivism.” (L. Green and Adams 2019). As for the first two, I will take some of their most substantial theses from which it is possible to cast how they approached the claim. One is the argument that law is separable from morals, whilst the other contention refers to law's ultimate reliability upon sources founded in social facts. Analysis suggests that Hart and Raz are engaged with the autonomy argument ambivalently. For them, the autonomy of law is somehow “relative”. I will then contrast that conclusion with Kelsen's view on legal autonomy, which does not yield relativisation. It is a more convincing account because the law is self-referential (*Eigengesetzlichkeit*). Kelsen does not let the law depend upon the facts nor accept a mere separability but instead suggests sharp separation from morals. Nevertheless, Kelsen's self-contained model is not exempt from complications. I will only state a few of them. Conclusions indicate that the law's autonomy problem is far from being an uncontested issue. Further scrutiny is required.

This text will develop under the following plan. Firstly, I will provide a general mapping for the discussion (2). Here I will identify analogous arguments showing how the issue has been approached in modern legal theory. I will then explain some methodological decisions. Secondly, I will delimit the concept of legal autonomy follow in this paper (3–3.1). Subsequently, I will give a very brief historical review of the idea of autonomy and its relation to legal theory (3.2). Thirdly, I will present the separability thesis as it has been approached in contemporary Anglo-American analytical jurisprudence (4). Afterwards, I will show H.L.A. Hart's development of the separability of law and morality. Mainly, I will review Hart's thesis on conceptual separability and contingent connections. Some questions and problems will be raised (4.1-4.2.-4.3). Fourthly, I will expose Joseph Raz's treatment of the autonomy of law. I will begin with the thesis on the autonomy of legal reasoning (5). Then, I will explore Raz's idea on the sources of law based on social facts (5.1). Certain doubts and difficulties will be introduced and discussed (5.2). Fifthly, I will outline

two of Hans Kelsen's postulates from which it is possible to reconstruct a sound argument favouring the non-relative autonomy of law (6). I will describe Kelsen's methodology firstly (6.1), immediately, Kelsen's peripheral imputation doctrine (6.2), and at once, Kelsen's separation thesis through the idea of legal validity (6.3.). A recap and a few potential drawbacks of the argument will be briefly raised (6.4–6.5). Finally, I will offer some concluding remarks and critical comments (6). Rather than providing answers and solutions, this paper aims to formulate questions and sow doubts about an old dilemma. It will focus on revisiting the law's autonomy claim in contemporary legal theory in an exploratory, descriptive and non-conclusive fashion.

2 Problem Overview and Methodological Clarifications

In 1996, a collective volume in Anglo-American Jurisprudence was published on law's autonomy, edited by Robert George. The book's title, however, is distracting. Instead of grappling comprehensively with the autonomy of law *per se*, the book addressed legal positivist debates about the question of to what extent (if at all) law has connections to morality. Only one contribution explicitly dealt with the autonomy topic (Postema 1996, 79–118). In the preface, the editor outlined the autonomy of law debate contours in this tradition of legal philosophy. “[The natural law theorists] [...] much less deny the (relative) autonomy of law, as a social phenomenon and as an intellectual discipline, from morality and moral philosophy.” (George 1996, viii [brackets added]). It is noteworthy to highlight its allusion to the law's “relative” autonomy. It is an intriguing assertion. The question is, how can something be autonomous but, at the same time, non-autonomous? What does this “relativisation” of the law's autonomy mean in this context? If a phenomenon is relative, it is not absolute, i.e., dependent on something, and does not exclude other relations.

Robert George was not alone in suggesting something like that. For example, Andrei Marmor wrote that “[l]aw is *partly* autonomous because it is conventional, and not the other way around” (Marmor 2001a, 208 [emphasis added]).¹ In public law and cultural studies of law, Robert Post wrote about the “*relatively* autonomous discourse of law” (Post 1991, vii–viii [emphasis added]). Similarly, during the 1970s and 1980s, there was a lively dialogue on the autonomy of law in the context of the sociology of law and Marxist legal theory. This debate seems to be a theoretical landmark that was then taken up, without satisfactory explanations, by jurisprudential discussions (Tomlins, 2007, 551). These authors centred on a dominant interpretation of Marx's thinking on the place of law concerning society's economic base.

¹Following Hart's ideas, Marmor also qualifies the autonomy of law. For him, the law is a social practice constituted by “social conventions”. A detailed exposition of his arguments is available at Marmor (2001b) 144 ff.

According to some of these authors' writings,² the law would be nothing but a reflection of economic relations. In historical development, the law would not have played a causal role by itself (Engels and Marx, 1978, 26-27). Marx believed that the autonomy of bourgeois law was compromised by ideological interests that sought to distract from the truth about the modern law's character. Thus, the law lacks genuine autonomy and operates under instrumental purposes, even though it has a differentiated metaphysical status. According to this viewpoint, the law is not autonomous. Later authors like Engels and Althusser tempered the assertion and suggested that law possesses somewhat "relative" autonomy (cf. Engels 1967, 462–465; Althusser 1995, 276; in the American socio-legal discussion, see Balbus 1977, 571).

The autonomy argument also evokes the dispute on the nature of adjudication and legal reasoning between "formalist" and "realist" positions of the late 19th and early twentieth centuries in the USA. The former supported radical autonomy, whilst the second declared the law instrumental and not wholly autonomous. Legal reasoning poses an inner logic that provides rational solutions in the juridical field for legal formalism. It does not need to manage external resources, for there is no necessity to call upon political, moral, religious, or other extra-legal reasoning. Instead, based on its own sources, the law establishes decision-making procedures to arrange conflicts and be reflexive about itself. However, the core of these legal formalist theses received harsh criticism from the legal realist movement. These authors argued that legal reasoning, as judicial reasoning, cannot be autonomous since it is unavoidable that judges rely on policies or empirical sciences when deciding. To the extent that the law is radically indeterminate, adjudicators must necessarily complete it, even resorting to extra-legal reasoning (cf. Bix 2003, 978–979). Thus, the law becomes primarily judicial decisionism. There is no case for the law's autonomy under these terms.

Although there is no debate under those premises in contemporary analytical jurisprudence, finding proximities and certain discursive continuity is possible. Somehow, the law is also "relatively" autonomous for foremost writers in the analytical legal positivist tradition, albeit for distinct reasons and contexts. The question is that law is closely connected to other normative orders and ultimately depends on non-legal factors to exist and determine its content. Thus, it does not appear that the autonomy of law is complete but rather partial—as it was conceived by the Marxist legal tradition and American legal realism. However, this assertion seems contradictory to the aims of legal positivism, which stresses the separation and differentiation of law as an autonomous order. Indeed, Robert George correctly identified the emphasis in the autonomy argument with the legal positivist programme.

Notwithstanding, generalising with the label legal positivism seems troublesome at this point. Even inaccurate. There are disagreements between authors who are

²The instrumentalist approach is mainly based on interpreting a passage from the Preface of Marx's *Zur Kritik der Politischen Ökonomie* (1859). Marx and Engels offered a similar argument earlier in *Die Deutsche Ideologie* (1845-1846).

usually classified in this doctrine and amongst self-ascribed positivists. Moreover, different legal positivist schools unfolded with their own identities due to geographical particularities and contexts. Therefore, although this paper will refer to certain widely accepted general tenets of legal positivism, the focus will be on leading scholars. Nevertheless, there is one precaution to be considered. This exercise could run the risk of being infructuous. The comparison may be unsuitable because certain epistemic preconceptions and situational influences are bound to each author's thoughts. With this in mind, this paper considers that the law's autonomy claim is a conundrum that goes beyond a sole intellectual tradition. In this sense, what will become manifest is that scholars who are usually labelled as legal positivists have dealt more explicitly with law's autonomy in jurisprudence. Hence, the emphasis will be on the writers and not on multiple perspectives or families of theories that do not provide a precise picture of an author's argumentation.

3 Autonomy Conceptions

I shall use 'autonomy' in its etymological sense as *auto-nomos*, or in other words, "having its laws". The term meaning may imply an understanding of autonomy as self-legislation, self-determination, or self-government. Independence from the dominion of other's laws was the idea ancient Greeks thought of when describing the city-state's status (G. Dworkin 1988, 12–13). They described a *political* entity as an *autonomia* when it self-produced its own rules and definitions to self-determinate its boundaries and trajectories as communities. Under this understanding, an autonomous body has no external dependencies, nor does it have the quality of heteronomous, nor does it need external inputs to operate in the world. Thus, autonomy's etymological roots were related to a political body's characteristics. However, at that time, there were no sharp distinctions between ethics and politics, private and public life, or between individuals and the community.

From modernity onwards, autonomy's concept was expanded to the individual agent. The aim was to provide reasons against the subjects' determination by a given natural hierarchical order resulting from medieval age circumstances. Springing from the Enlightenment—primarily since the developments of Rousseau (though still in a political fashion) and then refined by Kant—the concept of autonomy was rethought and assimilated to personal will (Kant 1996a, 37–108; Kant 1996b, 133–272). It consolidated a substantive moral meaning as a reaction to the rising tension between authority and freedom. This intellectual development has been historically configured in that shape because autonomy was mainly related to reflections about the status of personal liberty. The Kantian view of moral autonomy as self-determination or self-government was widespread in modern practical philosophy development (Schneewind 1998, 5). It takes the notion of a subject as freely making up her consciousness under their own universal moral code. Kant's significant contribution was the (re)invention of the concept of autonomy, detaching it from the political sphere and transferring it to the realm of morality (*Ibid.*, 1). The above

denotes the most elementary philosophical meaning of autonomy: a self-legislated agent. It does not necessarily imply the idea of independence. I will return to this understanding of individual rational autonomy in Sect. 6.5.

3.1 Autonomy in the Law and Autonomy of the Law

Contemporary legal theories employ autonomy under two senses in continuous tension: subjective and objective. The former is associated with personal self-determination and takes, to some extent, the connotation that Kant ascribed to it. The latter refers to the law's ontological status. Regarding the subjective meaning, it involves the individual will primarily manifest through giving consent for executing actions. Here the law intervenes in regulating human agency and personal actions. The law does this at least through two modalities. Firstly, it realises and protects private autonomy through subjective rights. E.g., constitutional rights. Secondly, the law expedites people's interaction concerning ordinary affairs, business, and the transmission of property. E.g., the freedom principle in private law. Autonomy *in* the law is the denomination for the subjective sense. I will not pursue it further here since it is not the research aim.³

The second sense of autonomy in legal theory is its objective denotation: autonomous law. Positively, it entails juridical autonomy as a self-referential normative order; self-determination of law's normativity, i.e., self-sufficiency as how law creates and replicates itself. Negatively, it presupposes law's decoupling from other normative orders. It entails an intriguing claim: the law does not depend on social, moral or political phenomena: law's non-dependence. The invocation of autonomy makes it possible to identify the law's *differentia specifica* (Jestaedt, 2008, xxv) as a normative reflexive order. It does not need any recursion to external spheres to be what it is. It is a matter of applying the autonomy concept to emulate individual self-determination to the realm of the law's existence. It is about the law's status, conceiving it as a unique system existing in its own right. This step could mean assuming the possibility of individuating and apprehending the juridical phenomenon in the world. In so far as the law is ontologically autonomous, it is describable according to the particularities of the law itself. The authors analysed in this paper appealed to the objective sense directly and indirectly. This work will focus on this conception of the autonomy *of* law.

³Mortimer Sellers edited a collective volume called *Autonomy in the law* (2007). It addresses how the law regulates private autonomy in various comparative legal systems. It includes multiple practical topics, like assisted dying, wrongful life and the death penalty, from different law disciplines. See esp. the introduction (Sellers 2007, 1–11).

3.2 *Autonomy of Law. A Brief Historical Review*

The statement about law's autonomy requires some historical context. Before “post-metaphysical” thinking, there was no insistence on sharply detaching the law from morals or normative orders grounded in religion or mystic authority. The questions about autonomy were not relevant. There was a sense of the unity of normativity that did not admit major departmentalisations. The argument for the individuation of the phenomena (including normativity) came with modernity’s emergence, the rise of the bourgeois state, the Enlightenment, and the division of labour by specialisation. It involves, amongst others, the social life areas gradual separating from each other, their disentanglement from some seemingly global and mythical overall dynamic, and their reconstruction as a specific field with distinct rules and dynamics (Jameson 2002, 90). It is crucial to isolate the specifically juridical space if it is plausible to apply this discourse to the legal phenomenon. To distinguish between the matters that properly pertain to law. Legal scholarship argues that legal materials are not related to a religious or sacred origin. Law is not the result of God’s commands, the Church, or an absolute monarch. Politically, it was a reaction against ancient times. The social events unfolding involved searching for the independence of all spheres of human activity—e.g., economics from politics, the law from morality and religion.

In this historical development, the rise of early legal positivism played a role. In the British tradition, authors like Bentham or Austin intended to answer whether it is possible to identify the law without reference to another competing normativity or evaluative and desirable standards (Christodoulidis et al. 2018, 133–136). The central idea was to associate the distinctiveness of the legal phenomenon as valid law with roots in social facts materialised through the will of men and modern secular democratic institutions. It transitioned from a holistic worldview to the individual’s standpoint, seeking a far-reaching differentiation that led to a multiplicity of social fragments. It was the starting point of the modern positivist separability thesis and its principal argument: the law is neither identical nor can it be confused with other normative phenomena. The law, then, has its own identity and consequent implications.

The quest for the law’s specificity led to a division into *provinces*.⁴ The law was one of them. The immediate question that arises is separation from what? The answer is to be found in one of legal positivism’s central theses to explain the nature of modern law: the detachment from morality. This separation was a fundamental achievement because they had no radical differentiation historically. Both have shared similar terminology and have used deontic elements such as permission, obligation, or prohibition. In this context, just as the American colonies declared their political independence from the European monarchies, law claimed emancipation from the realm of morality.

⁴This is, of course, the sense exposed by John Austin’s *The Province of Law Determined* (1832).

4 Autonomy of Law as Separability

There is no unique legal positivist theory (Spaak and Mindus 2021, 3–5; Waluchow 1998, 389–390; Raz 2009a, 37). It has multiple versions, and they vary in their contours. Not all positivist accounts are necessarily compatible between them. In the Anglo-American jurisprudence tradition, most legal positivists aim to provide a descriptive conceptual response to the distinctive common characteristics of law. To do that, some authors appeal to identify those shared properties focusing upon social facts alone.⁵ Likewise, they reject the notion that there are evaluative components in determining what the law is. The discussion about the best interpretation of these positivists' assertions is profoundly specialised and sophisticated. Attempting to make a general description or catalogue might not do justice to its intellectual development. Despite this, it is plausible to mention some distinctions among their commitments. The literature has identified at least six main legal positivist theses (Bertea 2007, 68; Green 2008, 1035 ff.): sources (i); practical difference (ii); conventionality (iii); incorporation (iv); social facts (v), and the separability thesis (vi). Yet, it is reasonable to assert that analytical legal positivism can rest on two central tenets (Bertea 2007, 67–69; Coleman and Leiter 2010, 228): separability and social facts. In this regard, the separability thesis is one that *almost* all legal positivists share. The most prominent positivist author in analytical jurisprudence, H.L.A. Hart, characterised law under this label. This issue shall receive a further examination *supra*.

Various prominent contemporary Anglophone legal positivist authors have had something to say on this point. Whilst not claiming to be exhaustive, I shall present a sample here. “If there is one doctrine distinctively associated with legal positivism, it is the separability of law and morality” (Krammer 2004, 1 ff.). “The Separability Thesis, foundation of positivism, asserts that law and morality are conceptually distinct”. It denies “there is necessary overlap” between the law and morality (Himma 2002, 125). However, whether this *is* the pivotal trait of legal positivism is heavily controversial. Hart (1958) himself was cautious about the point. He identified more than one separability doctrine (see *supra* next section). In contrast, an author like John Gardner jettisoned the separability thesis as false. He indicated that correct legal positivism affirms legal rules’ validity by invoking a sources-based thesis. This scholar propounded the following proposition: “In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits.” (Gardner 2012, 19–20).

Other authors have replaced the sources thesis with the social one (Coleman and Leiter 2010, 228; Simmonds 2002, 127–131). Nevertheless, these legal scholars have maintained the separability thesis as an undistinguishable positivist tenet. “All positivists share two central beliefs: first, that what counts as law in any particular society is fundamentally a matter of social fact or convention; second, that there is no

⁵ See, e.g., assertions and descriptions made by Green and Adams (2019), esp. “Development and Influences.”

necessary connection between law and morality" (Coleman and Leiter 2010, id.). Notwithstanding, Coleman has rejected the statement in other of his works. "Things change, for I now think that the separability thesis is no part of positivism at all and that it is in any case very likely false [...] If the separability thesis is not the core of legal positivism, then what is? In my view, the core of legal positivism is the social facts thesis" (Coleman 2009, 365–366; 383–384). In the same order of ideas, an author like Joseph Raz thought that the separability thesis was not sound and propounded the "social thesis" as the fundamental principle amongst another positivist theses (Raz 1994, 230 ff.). Later, he finally dismissed the *separability* thesis though accepting the *separation* thesis (Raz 2009a, 37–45; Raz 2009a, 314–315). Given that the separation thesis and the sources-based social thesis implicitly underline the autonomy of law in both its negative and positive sense, in what follows, I will first examine the separability thesis under Hart's understanding. Afterwards, I shall consider Joseph Raz's sources-based social thesis.

4.1 H.L.A. Hart and the Separability Thesis

Hart never explicitly asserted anything about the autonomy of law. Neither affirmation nor negation follows from silence. Therefore, I will attempt a reconstruction of the claim following his writings on jurisprudence.⁶ Namely, taking into account his emphasis on the *separability* thesis. This tenet has been a significant legal positivist claim, so it was for Hart. It connotes law's autonomy since it appeals to distinguishing legal from morals. It aims to present law as social practices that are neither dependent on, nor related to, morality. In anglophone legal philosophy, the thesis consolidates with H.L.A. Hart's *Positivism and the Separation of Law and Morals* (1958, 594–600). In this lecture, Hart discussed the British utilitarian legal positivist theses regarding critiques and misunderstandings formulated against them by some non-positivist authors like Lon Fuller and Gustav Radbruch. In the article, he identified in a footnote *at least* five theses that might represent the legal positivism account in the "contemporary jurisprudence." One of them was "the contention that there is no necessary connection between law and morals or law as it is and ought to be." (Hart 1958, 600, note 25). It is worth noting that the separability claim was not Hart's original personal thesis. Instead, he mainly described and discussed state-of-the-art. Namely, reviewing and clarifying the positivist legal doctrine from Jeremy Bentham's tradition and John Austin's works.

⁶Peter Fitzpatrick's critique of *The Concept of Law* and legal positivism in general identified H.L.A. Hart as one of those authors who defended a substantial autonomy of law. "The current champion [of those who assert law's autonomy] remains H.L.A. Hart with his 'concept of law'" (Fitzpatrick 1992, 3–6 [brackets added]). Fitzpatrick emphasised the strong connection of law with the social dimension. However, Fitzpatrick errs in believing that the law is entirely autonomous for Hart.

Hart focused his stance, arguing against the confusion about what the law *is* and what it *ought to be*. The formulation means the following: firstly, it leads Hart to reject the claim that it is possible to identify a necessary or natural connection, a coincidence between the concept of law and morality. The statement does not mean that legal rules validity criteria must fulfil moral considerations. E.g., officials might be prone to applying evaluative considerations in adjudication; likewise, the law content does not necessarily need to conform to or derive from morality. Both are separate phenomena. Secondly, the appraisal of a legal system's justice differs from describing the law. Valid law might be, nonetheless, morally wrongful. Howbeit, a law's description certainly does not preclude judging a legal order if it does not uphold basic moral standards. This stance means that a legal system might be immoral and despicable; however, it is still conceptually legal. These two arguments are synthesisable in the following proposition: the law's content and existence do not relate to morals.

Hart reconfirmed and fully articulated those statements time after in *The Concept of Law* and the *Postscript*. In those texts, he insisted that “although there are many different contingent connections between law and morality, there are no necessary conceptual connections between the content of law and morality; and hence morally iniquitous provisions may be valid as legal rules or principles.” (Hart 2012, pp. 181–182, 268). Hart admitted that his utterance is pertinent only in the conceptual domain whilst in the factual realm, the law and the morality have frequently coincided: “it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though, in fact, they have often done so.” (Hart 2012, pp. 185–186). A case of contingent convergence is the common normative language shared by morality and law, e.g., the idea of responsibility. Despite contingent connections, Hart argued that there are substantial conceptual divergences between moral and legal responsibility. Rather than semantic dissimilarities, the content of the legal and moral rules and principles highlights the differences. Notably, this is apparent in the responsibility criteria applied. Legal liability may rely on strict or even objective liability concepts. However, this is not, in principle, possible to harmonise with the moral responsibility concept (Hart 1967, pp. 346–364, partly reprinted in Hart 2008, pp. 222–227; Hart 2012, pp. 167–180. See also Freeman 2014, p. 16). There is a sense of law's autonomy in Hart, at least in the conceptual sphere. Law is conceptually separable from morals. However, one question comes. Why is law separable and not an entirely separate domain?

In chapter IX of the *Concept of Law*, one might find an answer to the question.⁷ Here Hart admitted the natural law minimum content in every legal system. Law and morals necessarily share specific normative content. To explain it, the author alludes to some “truisms” regarding human nature and aims, besides the existence of some environmental material conditions. The “elementary truths” included limited human

⁷Another strong connection point might be between rules and justice in *The Concept of Law*, chapter VIII. I will not dwell on this point, as I am interested in describing the limited scope of the separability thesis.

altruism, scarcity of resources, human vulnerability, approximate equality, and narrow personal understanding (Hart 2012, 176, 192–200; Hart 1983, 111–116). The assumption about human nature is an anthropological thesis. Simultaneously, his presupposition about humankind's primary purposes as a commitment to survive is a teleological thesis. The argumentation clarifies that those features yield reasons to have legal rules in a particular society to the extent that it permits neutralising natural human tendencies to conflict and violence. Natural law minimum content's purpose is to achieve human endurance. Such fundamental moral rules facilitate human survival in social communities and lead to elemental ethical principles that might later acquire legal forms, e.g., banning murder, rape, or assault. Two queries arise at this point. Firstly, as Hart argues, one may ask whether those statements presuppose some essentialism regarding human nature. Secondly, the basic ethical prohibitions may correspond to the content of penal law norms in most criminal codes. The content of these fundamental legal rules may, at this level, remain indiscernible from universal moral principles. Thus, one might ask whether Hart suggests that moral principles might integrate the legal basis.

Regarding the former, someone could criticise those contentions about human nature. Arguably, Hart is not considering the possibility of how life's material and social conditions may instead determine one result or another. According to some social theories, social life is radically contingent, and the possibility of any given human nature is highly controversial. Some of these authors may argue that human nature is based on a materialist historical whole of social relations and not on the idea of an abstract isolated human being in an a-historical state of nature, as Hart supposed, following the account suggested by Hume and Hobbes⁸ (cf. Hume 1888, Book III, part 2, sect. 2; Hobbes 1996, chaps. 14, 15). As for the second query, Hart accepts that law content usually coincides with morality. The point to note is that the author insists on the contingency of such relations. Society's moral minimums would not necessarily attain universal application concerning the addressees. Nor would those rules be necessarily developed toward legal form; neither might they necessarily be the content thereof. This reading is further evidence of the conceptual scope to which Hart refers. Law is only separable at the conceptual level, which leaves margin for connections to non-legal elements in non-conceptual hypotheses. The separability thesis alone does not suggest that law is a wholly self-referential order. The autonomy of law seems relative on this point in so far as there is no entire separation of law and non-juridical elements.

4.2 *Separable But Not Separate*

Given the above, does Hart accept a strong separation between law and morality? It seems that the answer is negative. He only stated that the factual reality of law does

⁸ Marx's approach to human nature [Gattungswesen] is explained by Geras (2016) 61 ff.

not necessarily imply that its concept contains value elements. Only descriptions of the facticity are sufficient to elucidate the law's concept. It is important to remark that Hart's assertions about the links between law and morality rely mainly upon a conceptual basis. Law's autonomy as a separation from a normative order such as morality is only related to the conceptual aspect. Law and morality have different concepts, so accepting contingent connections in non-conceptual domains is reasonable. E.g., mutual reinforcement in some instances, appraisal of law's justice, rules foundation in morals and shared normative vocabulary. Indeed, these confluences do not make law an inescapably moral issue. Law's autonomy is only relative because separability registers in a limited realm. Thus, for Hart, the law is, to some extent, conceptually (and relatively) autonomous. The law might be non-autonomous beyond that scope because the analytical-conceptual approach is narrow. Law's historical, sociological, and cultural understanding is beyond conceptual reach. That is to say, in those programmes that conceive law as a human practice necessarily embedded in culture, history or economics, non-autonomous law may be conceivable. It was the case for critical authors from sociology or anthropology like Pierre Bourdieu (1986, 3–19) or Sally Falk-Moore (1973, 720–722). Whilst not neglecting the nuances related to the different intellectual and methodological traditions represented by non-philosophical scholars, Hart seems to have left room for alternative interpretations.

Hart's remaining doubts about separability unleashed an intense debate in analytical jurisprudence. The dispute over his legacy is exquisite and nuanced between different interpretations of the separability thesis, i.e., inclusive vs exclusive positivism. The disagreement revolves roughly around to what extent it is possible to conceptualise law by including some fundamental moral principles through the rule of recognition. According to Brian Bix, “exclusive legal positivism interprets or elaborates this assertion [the separability thesis] to mean that moral criteria can be neither sufficient nor necessary conditions for the legal status of a norm.” In different terms, paraphrasing the author: exclusive legal positivism states that ‘social sources fully determine the existence and content of every law’ (Bix 2005, 36–37 [brackets added]). In its turn, “inclusive legal positivism interprets the separation of law and morality differently, arguing that while there is no necessary moral content to a legal rule (or a legal system), a particular legal system may, by conventional rule, make moral criteria necessary or sufficient for validity in that system.” (Bix, Idem).

Whilst the separability thesis seems persuasive, the dispute over its soundness is subtle. It revolves around the extent of the meaning of necessary and contingent connections. Accordingly, depending on the type of answer offered, it would be possible to determine the ultimate factors that influence the law's content and makes possible its determination. Hence, the task within the analytical positivist doctrine is to clarify the types of connections and attributes of interrelations between normative orders according to sundry methodological frameworks. For instance, Jules Coleman has insisted on some of the intricacies of the distinction amongst positivist authors to keep the thesis' coherence. “Since many [...] of the most interesting of these [statements] will be necessary relations, it is easy to see why the so-called ‘separability thesis’ has gained such prominence in jurisprudence. There are at least two

problems with focusing as much attention [...] on the separability thesis. The first is that there is not really ‘one’ thesis. It can be interpreted narrowly or broadly, and there are a number of different narrow interpretations as well as a number of different broad ones, each of which can be assessed individually. The second problem is that the focus on the ‘separability thesis’ has proven distracting. Too little attention has been paid to other philosophically important ways in which law and morality might be related to one another [...]” (Coleman 2007, 582 [brackets added]).

4.3 Separability Relativises the Autonomy of Law

Hitherto, it was possible to see that the normative order from which law has tried to differentiate and detach itself is morality. The autonomy claim is a reaction against the conflation of law and morals and plays somewhat of an ethical role. Hart did not support an amoral theory of law. Neither did he have an ideological objection against natural law reactionary characters and its postulate about allegedly immutable normative orders. Instead, Hart sought to prevent positive law from being instrumentalised as an excuse to subvert higher moral values. If one accepted that both fields were indivisible, the ideal morality might be endangered as the freedom of men to criticise the deviant or iniquitous law that could oppress individuals. Thus, the feasibility of decoupling law from morality was a basis for a morally apt law and a free critical morality. Without embracing non-positivist theses, it is viable to formulate judgments about the justice of a given legal system without denying that it is inevitably legal.

Hart’s argument allows non-necessary and non-conceptual relations between law and morality. E.g., contingently, the latter may inform the former before its institutional determination by a legislature. Furthermore, the law may incorporate morale and political components when adjudicators complete legal rules’ “penumbra” areas. This stance positions him as an “inclusive positivist” (cf. Hart 2012, 250–251),⁹ at least as far as his separability thesis is concerned. In empirical matters, he even seems to be correct. Let us consider, e.g., subjective rights provisions in most modern positive constitutions. This circumstance means that morality and law, as normative orders, follow different and parallel paths at the conceptual level. Beyond this distinction, there is no substantial autonomy of law. The law’s claim to individuation as an autonomous phenomenon seems diffuse. One can observe that the separability thesis, rather than delineating an autonomy of two normative orders as separation, leaves the law in a difficult position, for apart from the conceptual sphere is cumbersome to find the law’s specificity. The argument seems incapable of separating them both in a strong sense. Accordingly, the postulate asserts that law and morality may contingently intersect at some points; whilst the overlap is not

⁹In the pages cited above, H.L.A. Hart recognises himself as a “soft positivist”.

necessary for the concept of law, neither might it determine one another and vice versa. Is this assertion sound enough to trust the law's autonomy fate?

One might insinuate that there is a weak form of separation in this claim. This affirmation is because there is a tiny space left for upholding the autonomy of law through the separability thesis. Consequently, the reconstruction of the law's autonomy claim in Hart's thought acquires the character of a relative one. Similarly, the separability argument is silent about the consequences of relations with other phenomena such as politics or economics. Thus, at least in the way formulated by Hart and some of its commentators, separability cannot be a sound thesis for the autonomy of law. Nonetheless, within the Anglo-American juridical discussion, exclusive positivism suits better a substantial autonomy of law; it was certainly not one of Hart's arguments. By an act of self-closure and not admitting the possibility of integrating law with moral elements, exclusive positivism succeeds in positioning a more autonomous law. One of its central tenets is Joseph Raz's source-based conception of law. Although it does not allow for the permeability of moral ingredients, it leaves law subordinated to the factual. Law depends on social facts alone. In the next section, I will dwell on this thesis. Howbeit, first, I will examine Raz's ideas about the autonomy of legal reasoning.

5 Joseph Raz and the Autonomy Theses

Joseph Raz is an author who explicitly dealt with the law's autonomy puzzle more directly in anglophone legal philosophy. Raz stated that it is possible to identify and distinguish *at least* two autonomy theses in contemporary jurisprudence—the autonomy of legal reasoning and law's autonomy. This section focuses on the autonomy of legal reasoning (Sect. 5.1). To some extent, this argument updates legal formalism's longstanding claim. Under varied views, authors such as Gerald Postema, Robert Summers, Ernest Weinrib, and Stanley Fish have said something about it. Reasoning as thinking about the law in judicial decision-making is the debatable key. It is a distinct approach to legal autonomy, and it is not the essay subject. Nonetheless, I will succinctly reconstruct Raz's argument to clarify his position on legal autonomy. Raz thought it was necessary to elucidate the flaws in the autonomy of legal reasoning and reveal why it is untenable as a thesis on legal autonomy. The aim is to provide a better insight to examine his argument on law's autonomy (Sect. 5.2). This section (5.1) will be descriptive, and the reader is free to skip it and move on to the next one.

5.1 Raz's Rejection of the Autonomy of Legal Reasoning

Raz endorsed the idea of a unity of non-autonomous legal reasoning (Raz 2009b, 121). He rejected and criticised the legal reasoning autonomy thesis (Raz

2009b, 376–382). The author linked the legal reasoning discussion to the pre-emption thesis or the exclusionary reasons for action. This movement relates to Raz's service conception of authority: “the fact that an authority requires performance of action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do but should exclude and take the place of some of them” (Raz 2009a, 46). The pre-emption thesis is also present in moral reasoning as part of the rules (understanding rules in a broad sense) (Raz 2009b, 381–382). Therefore, legal reasoning cannot be properly autonomous.

In order to understand his viewpoint, it matters to remark that he conceives legal reasoning in dual terms (Raz 1993, 2; Raz 2009b, 121).¹⁰ Firstly, as reasoning about what the law is —i.e., reasoning regarding the nature of law. “Legal reasoning is reasoning about the law, or reasoning concerning legal matters” (Raz 1993, 1). He called that outlook the legal reasoning “weak sense”. In later works, Raz also called this aspect “legal reasoning *or* legal thought” (Raz 1994, 238 [italics added]) and “reasoning according to law” or “reasoning to establish the content of the law as it is”, as well (Raz 2009b, 379–378). This reasoning would be autonomous because it is necessary to conclude that the law has certain value-neutral content (*Ibid.*, 376–379). Raz's entire argumentation leads to the sources-based conception of law, which means it is unnecessary to recourse to evaluative arguments to determine the law's contents.

Secondly, it is understood as reasoning about how legal disputes must be judicially decided based on the law. “[Legal reasoning] is any reasoning to conclusions which entail that, according to law, if a matter were before a court, the court should decide thus and so” (Raz 2009b, 376 [brackets added]). This approach is what he called legal reasoning “strong sense”, and it is ordinary evaluative reasoning. This type of legal reasoning would not be autonomous because it focuses on the adjudication process. In this instance, the adjudicator's decision will contain judgemental considerations. Nevertheless, Raz remarks that legal reasoning is not exclusively judicial reasoning. In connection with that, he mentions as an example that this type of legal reasoning is primarily interpretative reasoning —it aims to establish the content of authoritative legal binding standards. Such a case is not autonomous; neither is it moral reasoning, but a *kind* of practical reasoning. For example, when someone uses legal analogies.

On this point, Raz's position is quite subtle. He claims that if one admits the autonomy of legal reasoning, there may be no moral control over it. E.g., if judges decide a case by applying subjective preferences without following ideal principles to resolve the dispute legally. In this scenario, the courts might have incommensurable options (Raz 1993, 15). Other claims by Raz support this interpretation; for instance, he argues that legal reasoning should be governed by moral reasoning (Raz 2009b, 116), suggesting that the former is a part of a higher whole called practical

¹⁰If one reads Raz's early work on legal theory and then his later works, one notices changes in his argumentation. Whether he has maintained an unchanging view regarding his idea that legal reasoning encompasses these two types is debatable.

reasoning. Even later, Raz introduced some non-legal components to his framework, for example, by adding that a moral argument is required to defend the position that the necessary function of law is to ensure cooperation (Martin, 2014, 164). He notes, moreover, that in well-organised societies, the law fulfils functions of social cooperation or coordination, which appear to be of a normative nature (Raz 2009b, 382–383).

Raz argued, in earlier work, against how some contemporary versions of American legal formalism understood the source-based conception of law. Like the preceding American formalists, this school supported the law's autonomy by developing a thesis on the autonomy of legal reasoning. They considered that the law was radically determined by the legislator. These authors stated that legal reasoning (mainly judicial) is distinctive, posing a suitably juridical logic that works as a rational activity. A legal conclusion is deducible logically from other laws. Raz described their programme on legal reasoning as “a type of technical reasoning obeying its own rules, like economic reasoning of reasoning about plumbing” (Raz 1993, 5). For Raz, this approach understood the sources thesis in a narrow sense as considering the law derives exclusively from or is dependent exclusively on the activities and intentions of law-makers (Ibid. 7). Raz insisted that this model of legal reasoning is not juridically autonomous but rather an instance of moral reasoning (Ibid, 15). Valuative reasons shall not “filter” legal reasoning to influence the law's determination. Consequently, the autonomy of legal reasoning is not a correct stance for positivism. The law's autonomy has no bearing on the supposed autonomy of legal reasoning. Raz even remarked that no serious author has ever argued that this type of reasoning may be autonomous (Raz 2009b, 379). For this author, the question of the law's autonomy relates to whether or not its content is determined independently of morality (Ibid, 381).

5.2 *Autonomy of Law and Joseph Raz's Sources Thesis*

The second thesis refers to the law's autonomy itself. It is related to an aspect of Raz's sources-based conception of law, to say that: “[a] law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument” (Raz 1994, 211; also Raz 2009b, 4). Raz upholds that “[t]he fate of autonomy (of law) is bound up with the fate of the sources thesis” (Raz 2009b, 382 [brackets added]) in interrelation with the pre-emption thesis. Given this context, what is the source thesis, and how does it differ from the separability thesis? I will attempt to advance a response. However, understanding the author's position on law sources requires clarifications about why he dismissed the separability thesis; an exposition of Joseph Raz's social thesis arguments will be necessary for what follows.

Firstly, one must note that Raz rejected the separability thesis. In its most predominant versions, Raz considered the latter an implausible characterisation (Raz 1994, 227). The existence and content of the law are not at stake in the

possibility of separating it from morality. Admittedly, “there is some necessary connection between law and morality” and “inherent connections between legal and moral concepts” (Raz 1994, 227, vii; also, Raz 2009a, 315). For this author, the law cannot but claim legitimate moral authority (Raz 1999, 149 ff.; Raz 2009b, 107). Notwithstanding, Raz concurs with the postulate of the absence of conceptual links. The law adequately defined does not need recourse to evaluative elements (Raz 1999, 164). Those arguments are particular features of Raz’s approach. After addressing the shortcomings, Raz turned to the sources thesis as a less problematical positivist tenet. As a result, the separability thesis was discarded.

Secondly, Joseph Raz initially proposed the “social thesis” as a fundamental legal positivist principle. Compared to other approaches, it reflects better the character of law as a social institution. The raw elaboration is the following: “what the law is and what it is not is a matter of social facts” (Raz 2009a, 37). Further developments and later versions thereof are not exclusive to him. Raz himself established nuances and distinctions. Initially, he drew attention to the “strong social thesis”. Its formulation is the following: “[a] jurisprudential theory is acceptable only if its *test* for identifying the content of the law and determining its existence depends exclusively on facts of human behaviour capable of being described in value-neutral terms and applied without resort to moral arguments” (Raz 2009a, 39–40). Raz thought that this thesis was flawed. Its difficulties were associated with the insufficient specification of “tests” for the law’s existence and identification based on social conditions. He pointed to distinguishing three essential ingredients for the tests: (a) law’s efficacy, (b) law’s institutional character, and (c) law’s sources. Raz saw that some legal positivists were ambiguous, especially toward (c). They focused on conditions (a) and (b) for the law’s social foundations. He called that movement the “weak social thesis”; it also falsely characterises legal positivism. Hence, for a better framing, Raz excluded conditions (a) and (b), concentrating on sources, which he denominated the “strong social thesis” (*Ibid.*, 47). Such *sources* are *facts* whereby the law acquires validity *or* legal existence. Sources also make it possible to identify the law’s contents (cf. *Ibid.*, 47–48). At this point, it is unclear how facts endow normativity to the law.

Despite that, argumentation on the justification of the law’s autonomy thus comes to a closure. The sources thesis excludes the likelihood of ‘infecting’ the law’s content with evaluative ingredients. “[T]he truth or falsity of legal statements depends on social facts” (Raz 1994, 231). Making the legal ultimately dependent on the factual excludes the possibility of permeating the law’s content by resorting to moral arguments. Legal positivism’s claim to isolate law by making it autonomous (from morals) succeeds Raz’s formulation. The social facts are value-free. Everything appears to fit. The “strong social thesis” is incompatible with any affirmation referring to the law’s identification with moral arguments because those cannot be law sources. In this stance, the determination of the law’s contents is not internally self-referential but dependent on external fact-based sources. Therein also lies the law’s existence. In sum, for Raz, the law’s autonomy relies on its legitimate authoritative factual character, which is the core of the nature of law. The legality’s

closure seems complete. Nonetheless, the dependence on social factuality for the law's determination remains. I will examine this situation in the next section.

5.3 Social Facts Dependence and Law's Autonomy

As explained, Joseph Raz rejected the possibility of autonomous legal reasoning. The author concluded that legal reasoning's strong meaning might be mostly evaluative, interpretative, or practical. Likewise, he affirmed the law's autonomy not through the separability thesis because it might be ambiguous but through the idea of social sources of the law. Raz believes that the sources thesis is the central antecedent for the autonomy of the law. Law is a system of rules whose content is identifiable without engaging in moral or political argumentation. The law's sources based on social facts structure the law's content and existence. Given the above, a question arises: what are the social facts in Raz's legal theory?

Primarily, one can think of the kind of empirically-based events given in the phenomenal world. These facts seem to be materialised by someone's will, which possesses political authority and community recognition. According to this stand-point, social facts are not moral facts. Through the human will mediation, those social facts adopted the form of law's sources, e.g., a statute's enactment, the administrative authorisation given by a public official or a judicial decision. These acts became legal facts without losing the property of being social facts. Here the legal operate supervenient, albeit not in an incompatible way, nor losing identity, on social facts. Examples may correspond to a meaning of social facts with connotations attributable to an individual's subjectivity, which is consistent with an author's definition: "the social facts can be understood to be contingent, descriptive facts about people's actual actions, utterances, dispositions, attitudes, and mental states [...] facts about the products that people have produced, such as facts about the meaning of the texts they have written" (Plunkett 2012, 145). Three related issues emerge here: (a) the puzzle of the passage from the factual to the normative; (b) the nature of the society's theory under discussion; (c) whether a type of reductivist legal narrative may be being adopted. I will briefly comment on them. Excessive synthesis indeed distracts both the sophistication and richness of the discussion. I will try to be as balanced as possible, given space limitations.

(a) The autonomy of law's normativity conundrum arises here. If one does not appeal to the law's normative self-referentiality, it will remain subject to another external phenomenon successively. In Raz's case, he addresses law's normativity as an agent's ability to identify legal rules as reasons for action because of the (political) authoritativeness of those rules. The law's closure seems to remain unrealised. If law ultimately depends on social facticity as direct human actions, certain precautions must follow from factual to normative. This movement is troublesome, and multiple authors have offered explanations. An answer might be the assumption of moral non-naturalism. An alternative is admitting that the law does not possess normativity. This movement is noticeable if one looks at Raz and other legal

positivists who believe there is no obligation to obey the law. Obedience, then, seems to rest at last on the coercion enforced by legitimate practical (political) authority. Use of actual force as a measure of final resort. I will leave the question open and will not discuss this point further.¹¹

(b) Calling on social facts implies a specific model of society as a reference. Different meanings of social phenomena emerge depending on the kind of society one has in mind. Choosing a liberal or a socialist model of society gives rise to a divergent understanding of the social milieu that may not inevitably be compatible. This situation means that social facts are not necessarily neutral in so far as those facts are also political. Social facts do not exist out of society politically organised. Otherwise, they would just be isolated brute facts that could be the subject of the natural sciences. No reputable author would reduce legal facts or social facts to a set of brute facts. Indeed, it is not Raz's case. Instead, Raz's account is similar to psychologism,¹² which concentrates more on the empirical mental states of isolated subjects than their involvement in society. It presupposes a society model in which an agent alone determines societal elements without dialectical movements. This statement is so because of the following. Firstly, intentional acts of human will whereby the law's sources materialise rely upon agents' internal deliberation and individual attitudes and beliefs. Secondly, legal rules, which ultimately depend on facts-based social sources, are reasons for subjective action connected with a legitimate (practical) authority. For Raz, those movements underlie the law's normativity.

Such a connection of social facts with individual behaviour contradicts, e.g., Émile Durkheim's idea of social facts. This author linked them to society as a community that commits to beliefs and moral sentiments, whose law is but a reflection (Durkheim 2013, 20 ff.; Treviño 2019, 2). The concept of society behind the notion of social facts necessarily impacts the idea thereof. Thus, one may suggest that the kind of social theory that presupposes Raz's claims about social facts is not problematised thoroughly, especially considering that it is not an uncontroversial concept. Raz's writings on political and social philosophy suggest that the idea of society underlying his oeuvre may align with liberalism. The question is whether liberalism is an adequate theory of society. This state of affairs also raises questions about whether a more satisfactory understanding of the nature of law might be achieved through social philosophy or sociological jurisprudence. I will confine myself to posing doubts because answers are beyond this essay's scope.

(c) The law seems unable to detach itself entirely from reductionism to social facts. Some complexities appear at this stage. Firstly, legal facts depend on social facts that depend on other, more elementary facts in a continuous chain of successive

¹¹ A recent discussion on the transit from the factual to the normative in contemporary positivism can be found in Gizibert-Studnicki (2021) 420 ff. Although without extensively reviewing Joseph Raz's approach. Suggestions on non-naturalism in Anglophone legal philosophy are found in M.S. Green (2021), 277.

¹² I take psychologism in a broad sense as an orientation to interpret world events and phenomena in subjective terms, focusing on individual mental factors.

subordination. The law's derivative character poses a metaphysical feature. It represents an inexorable point for the autonomy argument. Analytical legal positivism enquiry closes itself when an agent descriptively identifies the posited factual elements. It does not suggest anything else behind the relationality and dependence on other phenomena (beyond sources). To this extent, the nature of law's derivativeness is traceable to types of metaphysical dependence, be it grounding, supervenience or reduction. Debate centres on the specific kind of derivability. The metaphysical controversy demonstrates the difficulties involved in the idea of legal autonomy based on the social sources' thesis. Further implications of the ongoing debate are significant for legal philosophy; I cannot elaborate on those issues here.¹³ However, it presents a tricky problem for Raz's legal positivism (as well as for Hart and other positivists). Such a qualm seems to be a blind alley for the above argumentation (cf. Greenberg 2004, 157 ff). Equally, the law model proposed based ultimately on social facts alone does not finally achieve the autonomy it claims. Its inability to offer a non-reductivist account makes the claim of law's autonomy unlikely. Once again, it seems that law is thereby rendered *relatively* autonomous.

Recapping, for Raz, law's autonomy is not at stake in the autonomy of legal reasoning. Instead, he proposed that the law's autonomy involves determining its content without using evaluative ingredients; that is the valid law. The exclusion of value-based components in determining the law does not mean that other elements are excluded. As a reductivist thesis, the factual sources keep opening the moment whereby the legal is permeated by the social, the political or the cultural. There is no full law's self-referentiality or self-sufficiency. Autonomy implies that the law is independent of valuational factors in its determination—non-connected with morals. However, the dilemma is that the theory engages a reductivism for determining the law that resorts to a necessary dependence on facts. Likewise, the claim is agnostic regarding the different meanings and theories about society involved in an assumption regarding social facts. Despite that, even if it were possible to commit to a concrete social theory, achieving a complete detachment of law from social facticity in the law's determination remains challenging. In this positivist framework, a strong autonomy thesis does not obtain because the law is not independent of social facticity. For any social or political theory, this seems redundant. What is curious is that legal positivism, which claims to isolate law from valuational and political components, ends up offering this kind of solution. Legal reductivism to social facticity leaves the autonomy of law as *relative*. Indeed, it is not a matter of understanding the law's autonomy as if it is radically divorced from society. Such a controversial affirmation would be audacious. The task is to assess the coherence of one of the fundamental claims of legal positivism on its own terms, immaterially. Years earlier, in continental legal theory, there was a positivism that

¹³ An elaborate treatment in recent philosophy of law is found in Giszbert-Studnicki (2021) 429–440; Giszbert-Studnicki (2016) 121–144; Pavlakos (2017), pp. 139–160; Chivoli and Pavlakos (2019) 53–76.

articulated a strong thesis of legal autonomy, which, notwithstanding its shortcomings, avoided some of the weaknesses of analytical legal positivism.

6 Hans Kelsen and the Autonomy of Law

The above exposed prompts the question of whether analytical legal positivism might adequately account for a postulate on law's autonomy that does not relativise itself. Neither Raz nor Hart seem to offer a satisfactory answer. However, early on, Kelsen's jurisprudential account founded in pure knowledge of law *qua* law suggests a persuasive theoretical framework for affirming a non-relative law's autonomy. The model has a self-closure mechanism founded in a logico-transcendental premise as epistemic presupposition —the hypothetical *Grundnorm*. It functions as a non-reductive source of normativity: “the normative validity of the whole system is to be derived from the *Grundnorm* presupposed, assumed, by legal science” (Ebenstein 1945, 93). Law's content and existence ultimately conform to the *Grundnorm*. That movement also provides reasons for arguing the autonomy of law's normativity.

The advantages of this theoretical account for law's autonomy are the following. Firstly, it does not need any recursivity or relational determination to other phenomena based on social facticity to set the law (non-factual thesis). Secondly, it poses a broad epistemological ground to plainly state the law's separation from moral facts and other normative orders (separation thesis). Hence, asserting the law's autonomy does not need to rely on social facts nor accept any class of connection with morals or politics. In the interest of brevity, in what follows, I will present two related arguments in a very condensed form that allow me to reconstruct Kelsen's claim to law's autonomy: juridical imputation principle and separation from non-legal normative orders. I shall, however, first describe some of Kelsen's methodological premises.¹⁴

6.1 Kelsen's Methodology

Hans Kelsen's *Reine Rechtslehre*'s general aim was to show the possibility of knowledge of the law *as such*. It proposed an epistemological approach to the nature of law as cognition. Kelsen sought to scientifically cognise it in its pure state, apart from any extraneous elements; the law must be “freed” [*befreien*] from non-legal ingredients such as ideologies, psychology, sociology, morals or politics. Those fields were considered impurities for true legal knowledge. For Kelsen, the non-pure

¹⁴In this section, I will not assess the various long-documented shortcomings of Kelsen's theory of law.

comprehension of law was the central problem of legal science at the time. He saw that one methodological strategy to redress the trouble was to *separate* positive law from the realm of nature. Pure Theory (of law) idea is the rational presupposition of scientific work, whereby non-legal matters in the apprehension of law shall exclude. Scientific knowledge leads to an intellectual elaboration of law that makes it fully autonomous in its self-determination. Pure Theory's advantages provide a solid basis for arguing legal autonomy and the normativity of law. At least in its initial jurisprudential writings, Kelsen insisted several times that the Pure Theory *liberates* the law from nature and morals, ensuring, thus, legal autonomy (cf. Kelsen 2008, 3, 24, 33–34, 44, 47).

Kelsen's task in developing the project was twofold. Firstly, criticising the continental tradition of natural law; secondly, questioning the classical approaches of empirical positivism. The former is based on an all-encompassing view of a static natural order that gave law an inherent moral character. The latter reduces the legal order to an exclusively naturalistic claim based on facticity. In these circumstances, Kelsen thought about elucidating and giving specificity to the legal phenomenon *qua* law by separating it from morality and the factual. The law does not depend upon facts (Kelsen 1945, 111–113), nor is it embedded in other normative orders such as morality (Kelsen 1960, 60–71).¹⁵ Law's existence is entirely independent of these phenomena.

This clear demarcation lies in the neo-Kantian *Sein/Sollen* duality replicated by Kelsen's legal theory as the need to distinguish between the extra-legal factual (*Sein*) and the normative law sphere (*Sollen*). According to Kelsen, we are all aware of the difference, and no further explanation of the assumption is possible (Kelsen 1960, 4). This explicit distinction between two worlds is fundamental for the whole kelsenian system. For instance, it allows us to grasp the category of imputation as purely juridical, i.e., it only belongs to the realm of the *Sollen*.¹⁶ Legal concepts exist only in that domain. However, it may be possible to identify an actual correlate in the world of *Sein*. E.g., the act of maliciously taking someone else's property without consent is translatable into law under the legal norm that punishes theft (Vesting 2015, 1–2). However, both the action and the valid juridical norm are neither equivalent nor derivable from each other. The former and the latter are independent spheres. Here, the fate of legal autonomy is at stake.

¹⁵I quoted only one of Kelsen's major works. The sharp separation between law and morality is a recurrent argument in several of Kelsen's writings throughout his oeuvre and is not limited to the texts I have mentioned here.

¹⁶I will come back to this in more detail later.

6.2 Kelsen's Peripheral Imputation Doctrine

Kelsen distinguished, on the one hand, natural science (namely empiricism and psychologism) underpinned by the causality principle and, on the other, legal science informed by the imputation [Zurechnung] doctrine. Imputation is a transcendental normative category that bonds the factual with external human acts. “The idea of imputation as the specific connection of the delict with the sanction is implied in the juristic judgment that an individual is, or is not, legally responsible [*zurechnungsfähig*] for his behaviour” (Kelsen 1950, 3). To illustrate the distinction between what is natural and the legal normativity, Kelsen had earlier explained how the juridical idea of imputation works: “[i]f the mode of linking the facts in one case is causality, in the other, it is imputation, which the Pure Theory of Law recognises as the special lawness or lawfulness [*Gesetzlichkeit*] of law” (Kelsen 2008, 33–34).¹⁷ Here, Kelsen is explicit about the law’s self-referentiality, showing that imputation (of liability) is a purely legal category. This case means the law’s capability to self-produce normative meanings: that is what lawness or lawfulness is all about. It is at this stage that the law’s autonomy manifests itself neatly. Imputation within the legal order is central to avoiding reductivism to the factual. The link to normatively ascribing legal responsibility for fulfilling the legal condition is not natural causation but imputation as juridical normative self-reference. Kelsen was emphatic on this point, even though it may be an analogous process to the causal relation. The interrelation between the autonomy of law and the idea of imputation requires further explanation. I will try to offer an outline in what follows.

Conceiving the legal norm as a hypothetical judgment rather than an imperative (as moral rules would be) was central to Kelsen’s Pure Theory programme. His account materialises the purpose of liberating law (and thus achieving legal autonomy) under that assumption. The hypothetical judgment is a structure that allows us to distinguish the object of legal science: legal norms. It expresses the particular linking of a conditional statement of fact with a conditional result. The legal norm, in this understanding, becomes the legal proposition [*Rechtssatz*], which adopted the basic form of laws (Kelsen 2008, 33).¹⁸ In this regard, Somek pointed out that “*Rechtssatz* is not the sentence reporting what the law requires but the type of object that legal knowledge is prepared to accept as its proper object, namely, as a legal norm [...] The object needs to be presented in a manner that preserves normativity while holding it distinct from morality” (Somek 2017, 62). The interplay of these elements lies at the core of what Pure Theory and legal autonomy are all about. The link between factual conditional and consequence is not proper to natural sciences but is specifically juridical: peripheral imputation. It is a rational artificiality constructed by human reason. In Kantian terms, it is an *a priori* category that operates

¹⁷The original: “Ist die Weise der Verknüpfung der Tatbestände in dem einen Falle die Kausalität, ist es in dem anderen die Zurechnung, die von der Reinen Rechtslehre als die besondere Gesetzlichkeit des Rechtes erkannt wird.” ([1934] 2008, 34). *Supra* I will comment on this.

¹⁸cf. Paulson (1998), 163. He categorised this type of hypothetical judgment as object-distinction.

as an epistemic condition for the possibility of phenomena knowledge. It serves to distinguish and displace, let us say, the lawness or lawfulness of law, belonging to *Sollen*, from the legality of the natural, which belongs to *Sein* (Kelsen 1925, 48–49).

This conception of law led Kelsen to affirm legal autonomy as a normative order and the autonomy of legal science concerning other disciplines. Kelsen presented a species of immanent legality of the contents of legal norms. Scientific activity for law knowledge does not mean reducing it to a set of purely descriptive causal explanations. For Kelsen, legal science relies on a transcendental *apriori argument*, namely normative imputation. This approach coincides with the above-mentioned neo-Kantian distinction between *Sein* (causality) and *Sollen* (imputation) as a fundamental working basis.

6.3 Kelsen's Separation Thesis Through the Idea of Legal Validity

In the later development of his work, Kelsen was explicit regarding the separation thesis core. Unlike Hart and some of his interpreters, who admitted the *separability*, Kelsen was straightforward about *separation*. Kelsen's programme leaves no room for any moral or non-legal component, not even in contingent contexts. Kelsen's law closure is stouter than his British counterpart. Thus, Kelsen noted that: [t]he claim of separation of law and morality, law and justice, means that the validity of a positive legal order is unrelated to the validity of this one, solely valid, absolute morality, “the” morality, the morality *par excellence*” (Kelsen 1960, 68). Kelsen also contended, a time before, in an introductory article for the anglophone audience, how Pure Theory primarily entails the separation of law from morality. “[W]hat is here chiefly important is to liberate law from the association which has traditionally been made for it —its association with morals. This is not, of course, to question the requirement that law ought to be moral. That requirement is self-evident. What is questioned is simply the view that law, as such, is a part of morals and that therefore every law, as law, is in some sense and in some measure moral” (Kelsen 1934, 481 [italics added]).

Kelsen's insistence on the strict separation between law and morality outlines his conception of complete legal autonomy. He wants to show here that, in so far as no sharp contrast between the two normative orders, in all cases, wherever is a confluence of legal and moral norms, it could amount to the concurrence of a single practical order. This situation would render law redundant, and its norms would not realise the legal consequence of the unlawful act. Besides, no real legal-scientific knowledge is possible in such a hypothesis because there would be no research object. Thus, the author wrote that: “[t]o consider law and morality from one and the same point of view as valid orders, or, what amounts to the same thing, to accept law and morality as simultaneously valid systems, means to assume the existence of a single system comprehending both” (Kelsen 1945, 374). Identifying legal norms as

objective meanings reflects his conception of constructive jurisprudential activity as pure normative science. As an objective scientific field, the law needs its own object of knowledge, namely legal norms, which require unequivocal identification, separation and delimitation from morals, religion, and customs. Legal norms are never moral norms. Otherwise, contradictions and non-logical consequences unfold, and ideological or religious agendas contaminate the law and render it impure. Legal science would become objectless, ergo trivial. Thus, true knowledge of the law becomes unattainable.

Hans Kelsen's position on strict separation is understandable considering his epistemological account regarding moral propositions and legal norms as autonomous spheres of meaning. Legal norms address an agent's behaviour. "The Pure Theory of Law [...] considers legal norms not as natural realities, not as a fact in consciousness, but as meaning-contents [...] it considers facts only as the content of legal norms, that is only as determined by the norms. Its problem is to discover the specific principles of a sphere of meaning" (Kelsen 1934, 478). The author believed that moral propositions were not susceptible to rational justification or scientific corroboration. Admittedly, he thought moral statements were irrational and radically subjective, e.g., people reasonably disagree on justice means or demands. Conversely, juridical propositions, i.e., the legal norms, might be objects of scientific cognition in as much as they are endowed with an objective dimension attained through the idea of *Geltung* or validity. Upon this basis, the entirety of Kelsen's legal theoretical framework rests. Legal norms exist and are binding only if they satisfy a formal pre-established procedure (Kelsen 1968, 1427). Law's validity is tested by how the legal norms are self-determined. Other anterior legal norms authorised their validity on the same grounds. The process continues in succession until they reach the postulated supra-positive *Grundnorm*, the definitive validity source of all legal norms (cf. Kelsen 1945, 110–115).

On the contrary, moral rules do not possess this dimension of formal validity, nor could they be a matter of objective meaning. For Kelsen, unlike his Anglo-American legal positivist peers, the law's validity does not ultimately depend on exogenous content. Neither individual psychological processes nor mental events are involved. Social facts, moral facts or values do not determine or impinge legal validity. Rules are not a source of specifical juridical normativity as reasons for an agent's actions. Under Kelsen's scheme, it is sufficient that the law determines itself following the formal procedure established by the *Grundnorm* (cf. Kelsen 1951, 653). This step works as a formal character of legal creation. The facts that might be the source of the law's content are always contingent, non-determinant, and meaningless external materials before legal validation. At this point, what arises is that the Pure Theory constructs a type of legal normativity that is utterly distinct from moral normativity. The autonomy of law's normativity is at the centre of the theory. The normativity of law is not dependent on an outward practical authority because it is self-generated. Law and morality are two autonomous normative spheres. There is no possibility of any relevant connections or external dependency.

6.4 Recap

According to the reconstruction proposed in this paper, Hans Kelsen's idea of legal autonomy manifests through two arguments. They refer to the twofold dimension whereby Kelsen detached law from other phenomena: (i) from the dominant moral and political ideologies; (ii) circumventing the reductionism of the social sciences. The first appeals to the notion of imputation as the typically juridical element wherewith the autonomy of the law is expounded. The second refers to the autonomous dimension of legal validity that maintains a sharp separation between law and non-juridical normative orders. The notion of juridical validity [*Rechtsgeltung*] in Kelsen is crucial because it determines an exclusive property of the legal norms that may impact their peculiar ontological nature in the realm of *Sollen*. There is where the second aspect of the autonomy of the law lies—the law's specific existence (its validity) based on the presupposed *Grundnorm*. “The quest for the reason of validity of a norm leads back not to reality, but to another norm from which the first norm is derivable” (Kelsen 1945, 111).

Although Kelsen stresses the epistemological character of his theory, the ontological implications are explicit—especially when demarcating the metaphysical non-dependence on the factual. These assertions entail that questions about the ontology of the juridical come into play when he refers to law's existential dimension. This is a problematic peculiarity of Kelsen's philosophy of law. The following sentence is unambiguous in this respect: “[t]o speak [...] of the ‘validity’ of a norm is to express [...] the specific *existence* of the norm, the particular way in which the norm is given, in contradistinction with natural reality, existing in space and time” (Kelsen 1992, 12 [emphasis added]).¹⁹ For Kelsen, validity is the criterion that allows us to distinguish a legal norm from mere social practices, morals or customs. Simultaneously, it denotes that it would be erroneous to reduce legal norms to mere empirical facts within the natural causal realm. Kelsen's conception of validity might explain why he wrote that one law quirk is the self-regulation of its own creation: law and only law produces law—the law's self-reproduction. For “[i]t is a peculiarity of the law to regulate its own creation.” (Kelsen 1951, 654).

A few comments and questions will help to summarise and clarify the argument. Kelsen did not initially use in the German language the concepts *Autonomie* or *Legalität* (as the quality of laws of any kind) to refer to the autonomy of law, but the words *Eigengesetzlichkeit* and *Gesetzlichkeit*. No translation can correspond precisely to the original concepts. Albeit, one might say that those terms denote the law's pureness to determine and reproduce itself as a proper juridical normative order: self-lawness or self-lawfulness (note that Kelsen even used a unique legalistic vocabulary). Furthermore, as the self-constructed legal norms are the exclusive

¹⁹The original: “Wenn im Vorhergehenden von einer “Geltung” der Norm gesprochen wird, so soll damit zunächst nichts anderes ausgedrückt werden als die spezifische Existenz der Norm, die besondere Art, in der sie gegeben ist; zum Unterschied von dem Sein der natürlichen Wirklichkeit, das in Raum und Zeit verläuft.” ([1934] 2008, 20).

object of scientific enquiry, the law is also an autonomous (pure) discipline of knowledge. The Kelsenian model is self-contained and provides a coherent argument for legal autonomy. It is a flawless well-structured discourse based on the idea of pureness and one of Kelsen's most outstanding theoretical achievements. It does not fall into the dependence problem nor admit relevant connections with non-juridical normative orders. The autonomy of law is not relative but complete. Nevertheless, this type of radical autonomy might generate controversies with another autonomy conception: the rational personal autonomy that is a core component of the rule of law ideal as an amalgam of its formal and substantive versions (Tasioulas 2020, 132–135). Such tension might occur if the law's closure on itself goes too far to a great extent. How would that be achievable? Is it inexorable?

The following paragraphs pose questions about the potential difficulties that a scheme law's autonomy without relativisation based on Kelsen's legal theory might trigger. The paper will not attempt to offer formulas or solutions. Instead, it aims to present queries for future research to address obstacles that might hinder the interplay between legal autonomy and personal autonomy.

6.5 Some Potential Difficulties of the Non-Relative Autonomy of Law

In this subsection, I will attempt to articulate a possible troublesome upshot if the idea of the law's autonomy, in the non-relative fashion proposed by Kelsen, is taken to an intensification.

To admit the claim to the autonomy of law would imply that a legal system may self-enclose itself. Law's self-determination would risk an impervious closure to any possible interaction with the social environment, politics, and non-legal normative spheres. This programme was, to some extent, Kelsen's aim. The historical and social context in which Kelsen developed his theory may explain why such a scholarly enterprise followed. However, paraphrasing Alexander Somek's suggestion (2017, 64), this conception of legal autonomy leaves law like a lacklustre machine-like artefact with high reflexivity without enough responsiveness. Hence, the law presents itself as a radically formal and self-reflexive construction that, without being driven by any valuable purpose and without paying heed to whether it is responsive to social malaise, only ends up serving itself, i.e., replicating the legal norm's condition that dictates that a legal consequence must follow—nothing more, nothing less.

Such imperviousness of autonomous law may render it untameable. According to Jeremy Waldron's argument (2021, 126–127), it may lead to the possibility of the rule of laws itself rather than rule by people. If one expresses it in the language of political theory, the conundrum involves the tension between rule *by* law and rule *of*

law.²⁰ An autonomous law risks blind seclusion and may not necessarily be responsive to subjective rights, i.e., freedoms embodied as human rights norms. A self-reflexive law, without conciliation with rational autonomy, i.e., being limited to developing substantial degrees of responsiveness, may dissociate from the normative basis for social coexistence. It may become a rigid formalism unsuitable of responding to conflictive situations where the legal system does not offer a sound solution. In the same way, an automated autonomous law threatens to totalise or monopolise other normative orders under the complete juridification of all non-legal domains. Accordingly, the idea of the rule of law based on rational personal autonomy is elemental to the proper functioning of a true radical democracy. It may moderate the possible excesses to which the formal closure of law may lead.

To some extent, what I have exposed may explain why authors such as Hart, Raz, and other scholars have relativised the claim to law's autonomy. Even at the price of ambivalence in one of their arguments about law's distinctiveness. These authors tried to bridge a tension that seems irremediable and constitutive. Now, these shortcomings were not Kelsen's project in any case. Quite the contrary, Kelsen was not agnostic, and his later work was a consistent defence of democratic values and the idea of justice even though he deemed them non-legal constructs. Notwithstanding, his theoretical system may experience these outcomes in the case of full legal order automation. Relative law's autonomy seems inevitable to keep Anglo-American analytical legal positivism's internal coherence. Therefore, the question is how to coherently assert a responsive and reflexive law's autonomy without simultaneously denying it through its relativisation.

7 Concluding Remarks

According to the reconstruction above, the law does not complete substantial autonomy. Although not explicitly stated, H.L.A. Hart and Joseph Raz indirectly alluded to the law's autonomy through two of their emblematic theses in the analytical jurisprudence tradition. One was negative, the other positive: (i) separability from morals; (ii) sources founded in social facts. These two theses raise a few doubts as arguments for a strong statement of legal autonomy. Firstly, the separability thesis asserts that the law's content and existence are not necessarily related to morals. As proposed by Hart, this separability tends to become hazy if this contention means there might be as many contingent connections as intersections in a non-conceptual setting. Where is the law's autonomy when the law might link with morals? It seems the claim becomes narrow. Secondly, as Joseph Raz suggested, the

²⁰Klaus Günther (2019/2021) has discussed the vicissitudes of some constitutional democracies. He suggests an intermediate solution that takes advantage of what he calls a “productive tension” between (substantive) law and (formal) democracy. This paradox also evokes the old controversy between *Ius* and *Lex* or, as Franz Neumann's (1937) formulation, the tension between the two moments of the rule of law: *ratio* and *voluntas*.

source-based conception of law claims to identify law's content and existence as exclusively dependent on legal sources grounded on social facts alone derived from positive human action. Some difficulties arose from this thesis. One is the legal reliance on the factual; another is the dependency on exogenous phenomena in law's determination. How might the law be autonomous in as much as it metaphysically depends on social facts, institutional facts or non-legal facts that are not moral facts? The law's autonomy claim tends to be blurred.

For these authors, law's autonomy claim means, to a certain extent, that law is an order conceptually separable from morality and determinable by recourse to non-moral facts. Nonetheless, as I have tried to show, such an endeavour is, to a certain extent, troublesome and does not lead to the viability of discourse on non-relative legal autonomy. For legal positivism, the law is autonomous, but it is also non-autonomous. The form the two authors formulated the issue, the constancy of dependence and relationality, renders autonomy redundant. Hence, relativisation emerges as an intermediate category that assumes dependence on something that is not exclusionary of relations with other orders. Analytically, it is challenging to think of something autonomous that is non-autonomous simultaneously. The law's autonomy will remain unrealised since it cannot be utterly detached from dependence on social facts, nor can it be autonomous beyond conceptual separability. Thus, the idea of law as a self-referential normative order loses momentum.

Admitting the relativisation of the law's claim to autonomy may even seem a truism. Intuitively it does not seem easy to conceive a radical autonomous law. One might argue that law's determination involves a degree of dependence on and relationality with non-juridical fields. The law places itself in social interaction. Autonomy does not mean autarchy or total isolation. As Bix has noted, one may state that the claim of complete autonomous law is nothing but archaic and outdated jargon reminiscent of the old formalism and certain recalcitrant positivisms. Only the "relative" autonomy of the law is defensible (Bix 2003, 985). However, this observation might be enhanced by introducing a distinction between law's independence and autonomy. An entity may not depend on another body (*in-dependēre*), but this does not necessarily imply that it can endow itself with laws (*auto-nomos*). There are different kinds of dialectical relationality between the juridical and cultural, economic, social and political orders. The interplay is necessary for the context of the law as a normative system of social relations. It is, therefore, necessary to draw the distinction and pose the conundrum dialectically. Affirming that there is a "relative" autonomy contradicts its concept. Instead of relativising the autonomy of law or discarding it altogether, it is reasonable to rethink the claim and develop suitable categorisations and methodologies.

In the early 20th century, Hans Kelsen put forward a theoretical model with a persuasive argument for non-relative legal autonomy. Kelsen's *Reine Rechtelehre* rests on the rejection of methodological syncretism. Law is determined and validated based on the *Grundnorm* of the legal order. Law possesses self-recursivity. Kelsen's programme did not fail when confronted with difficulties of the ultimate metaphysical determination of law because he did not reduce the law to social facticity. The theoretical approach was non-reductive and non-factual—the system dispensed the inclusion of non-juridical elements in determining the content of valid law.

Likewise, it was a legal positivist project based on the sharp separation of normative orders. Indeed, Kelsen never wrote that law is not an integral part of society. Nor did he dismiss the impact of other human activities on the law. Quite the contrary, the *Reine Rechtslehre* admits the law's openness to political contingency under the idea of a dynamic procedural order when enacting legal rules. Therein lies the law's validity in its own right. For Kelsen, the law is self-contained in its establishment and its self-determination. This programme finds expression in the idea of *Eigengesetzlichkeit* and *Rechtswissenschaft*, which encompasses a legal system's self-determination and the law's status as an autonomous scientific discipline.

Despite these achievements, Kelsen's *Reine Rechtslehre* may abstract law to unreasonable levels, thoroughly disconnecting law from society's normative ideals. The law may lose its *ratio* if it closes on itself and turns blind to human material interests. Paraphrasing J. W. Harris' critique of Kelsen (1996, 99–103), the law's normativity may become powerless when faced with the automation of the law's strict formal structure. The law's intense reflexivity without responsiveness to basic normative standards that neutralise the possibility of eventual arbitrariness in personal autonomy is latent in Kelsenian legal autonomy. The complete autonomous law has the potential to become a "cold-blooded" order. The internal logic of this autonomous law, which closes in on itself, might be prone to the non-realisation of personal autonomy. Such a situation leads us to an immanent contradiction in the possibility of the law's autonomy concretisation. Even if it is a sound claim, it seems practically unworkable. Kelsen's objective model is theoretically successful but risks overly formalisation and self-closure. Whereas Hart's and Raz's approaches seem plausible, they nevertheless pay the price of discursive ambiguity concerning their own theoretical programmes' aims.

The autonomy claim is a horizon for the law's realisation in an emancipatory form. Nevertheless, according to the authors' theories examined in this paper, it does not seem achievable. Even if one accepts that it is sufficient to claim autonomy solely to become apart from morality, there are still unresolved questions as to whether and to what extent, if so, are there connections or relations of dependence regarding the law's determination vis-à-vis the realm of politics, the diversity of pluralist societies and the effects of global capitalism. In such cases, the quandaries multiply, and achieving the law's autonomy becomes intricate. The continuing ambivalence that underlies the modern law's status is what we have seen so far throughout this text. Its claim to genuine autonomy conflicts with the law's continual necessity for recursiveness to morality, politics, society, or economics. Modern law's contradictory character shows its symptoms in the vicissitudes that legal positivism theory has undergone, especially in its Anglo-American version. As a dominant tradition, it is remarkably ambivalent in its treatment of the autonomy of law as it introduces a problematic relativisation of the claim. Relativisation, which renders the idea of autonomy superfluous, seems to emerge as the middle ground between two tensioned poles. This complexity raises questions: whether and to what extent it is feasible to conceive of a true autonomous law reconciled with personal autonomy. This movement, in turn, reflects the two conflicting moments of modern law: objective law and subjective rights, coercion and freedom. Much work remains to be done to overcome this tension.

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Constructivist Metaphors and Law's Autonomy in Legal Post-Positivism



Jesús Vega

Abstract This essay explores the implications of two well-known metaphors introduced by Ronald Dworkin and Carlos S. Nino: the “chain novel” and the “construction of cathedrals”. They are constructivist and practical metaphors that can be considered emblematic of the post-positivist conception of law. As such, they challenge the nuclear thesis of legal positivism: the value-free neutrality of law. This thesis implies that the legal domain is institutionally separated from morality and politics as a necessary condition for the autonomy of law. What is here defended is that the specific constructivist approach adopted by post-positivist theories offers, on the contrary, a better reconstruction of the idea that law has well-differentiated institutional limits. These limits are not denied by post-positivism, but rather redefined in a more complex and accurate way. Far from being limits merely “given” by rules, they rather result from the connection between these rules and some substantive values, a connection which is produced precisely by the intermediation of legal practice. This is the fundamental idea highlighted by the metaphors in comment and what makes the constructive element that emerges out of them particularly relevant.

1 Introduction

This paper explores some philosophical implications of two suggestive, well-known metaphors introduced by Ronald Dworkin and Carlos S. Nino: the “chain novel” and the “construction of cathedrals”. Both metaphors brilliantly illustrate central points of their respective theories of law. Two main features stand out in them: they are,

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first, practical metaphors and, second, constructivist metaphors. Both features can be considered emblematic of the post-positivist conception of law, a conception that has impacted in a strongly critical way, along the last decades, on the conceptual framework of legal positivism, which in turn is rather a basically structural and descriptivist conception of law. In particular, such critical impact decisively affects the positivist understanding of the autonomy of law, that is, of the limits or demarcation of the legal domain.

The nuclear thesis of legal positivism is the value-free neutrality of law. This thesis is projected in different but convergent ways in the three well-known sub-thesis: the separation (or separability) between law and morality, the social and the discretion thesis. According to this perspective, any conception of law that puts into question the neutrality thesis—like post-positivism and, before, natural law theories—should lead in an indefectible way to outright challenge the autonomy of law. Especially if in addition such a conception defends that for the law is intrinsic to maintain relations of a constructive nature with the practical surrounding spheres of morality and politics. For, according to legal positivism, the autonomy of law could only be ensured by strengthening the idea (or ideal) that the legal domain is an institutionally closed and isolated system of norms, rather than by weakening its borders with respect to morality and politics. Otherwise, the law would no longer make any “practical difference” in relation to those other normative spheres.

What is here defended is that legal post-positivism in no way poses such a threat to the autonomy of law. The specific constructivist approach adopted by post-positivist theories offers, on the contrary, a better reconstruction of the idea that law has well-differentiated institutional limits. These limits are not denied by post-positivism, but rather redefined in a more complex and accurate way. They are not merely limits “given” by rules but rather resultant from the connection between these and some substantive values, a connection which is produced precisely by the intermediation of legal practice. This is the fundamental idea highlighted by the above mentioned metaphors and what makes the constructive element that emerges out of them particularly relevant. This element has closely to do with the “technical” and “instrumental” dimension of legal rules and institutions with respect to those values.

Constructive metaphors, however, belong to a very long tradition in legal philosophy. Both the idea that law is a “practice” and has a “constructive” or “technical” nature come from earlier conceptions of law. The two most important amongst them are natural law and legal realism. These conceptions provide an essential framework necessary to get an adequate understanding of the post-positivist conception, but at the same time the latter impose on them a severe critical correction no less profound than does on legal positivism.

Natural law theories inherit the Aristotelian idea of “*praxis*” and its characteristic commitment to values, yet they come to oversize these values distorting the constructive connection existing between them and legal practices (thus becoming a kind of absolutism). Legal realism, in turn, emphasizes the element of construction—the technical and instrumental aspects of law—but ignoring now values (it thus becomes skepticism). Post-positivist theories simultaneously reject

both positions as they converge in distorting the true function of legal practice. For them the starting point is to assume the priority of ethical-political values. These are seen as objective ideals that explain the *raison d'être* and the differentiation of law as a whole and into its diverse institutions. The materialization of such ideals and values, however, can only be socially achieved through a continuous process, necessarily creative, of implementation and permanent putting into application the very legal machinery of rules and procedures: that is the point of legal praxis as an enterprise. The constructive nexus between institutions and ideals is, then, the great idea expressed by Dworkin's and Nino's metaphors. Let's start by introducing them.

2 Dworkin's Chain Novel and Nino's Cathedral Metaphors

In Chapter 7 of the *Law's Empire*, Dworkin connects his concept of "integrity" to the notion of a "consistency of principle" which should lead to the "best constructive interpretation of the community's legal practice" (Dworkin 1986, p. 225; 1982a, p. 540ff.; 1982b, p. 166ff.; 1985, p. 158ff., pp. 407–408). There would be many similarities, he says, between the judicial practice that determines law through such type of "constructive interpretation" and the activity of a literary critic that elucidates the different dimensions of value offered by a literary piece. The judges, however, would be both authors and critics, and their intervention in the practice should be clearly "more direct" (Dworkin 1986, p. 229). In the legal practice the distinction between author and interpreter, between creating and interpreting, is "a (false) dichotomy" and should rather be understood as referring to two different aspects of one and the same process. To show this, Dworkin proposes to make the comparison between law and literature—the "aesthetic hypothesis" (1985, p. 149)—even more precise by imagining "an artificial genre of literature that we might call the chain novel":

In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity (Dworkin 1986, p. 229).

Dworkin differentiates two moments in the process of interpretation. First, a "fit" moment, which attempts to capture the meaning of the text under the light of the type of enterprise that it represents and the guiding principles of its genre (a novel in this case). Second, a "substantive" or "soundness" moment, that leads to determine which of the different readings resulting from the previous formal moment would be the more adequate to continue the enterprise in the best possible way from a critical point of view (Dworkin 1986, p. 231; 1985, p. 408). Thus, Dworkin concludes, there is no space to "draw any flat distinction between the stage at which a chain novelist interprets the text he has been given and the stage at which he adds his own chapter, guided by the interpretation he has settled on." (Dworkin

1986, p. 232) The same would happen in judicial interpretation, especially in hard cases (Dworkin 1985, p. 159). The two moments of the interpretative process—*fit* and *soundness*—would jointly reflect the ideal of law's integrity. Hard cases emerge when the first moment does not allow a choice between two or more possible interpretations. Then the judge must decide “by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community” (Dworkin 1986, p. 255).

Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He must interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is. (Dworkin 1985, p. 159)

Carlos Nino, in turn, entitles the §17 of his *Fundamentos de Derecho Constitucional* under the heading “The Constitution and the cathedral” (Nino 2013, p. 63ff.; 1996, p. 33ff). The suggestion is now to introduce as a “rationality model” of the constitutional practice the analogy with the long and complex historical process of building a cathedral. This model would appropriately symbolize how such a process constitutes a highly complex type of conventional practice. This consists of actions and decisions that are not taken in isolation, but rather need to coordinate to each other and in fact are part of a collective and interactive process that extends through time across generations. At the core of the analogy is the architect who must continue with the construction of a cathedral that has already been initiated, assuming that the work is underway before him and that it will probably not be completed by him, but instead by other builders afterwards. Each architect draws inspiration from his own construction style (e.g. the gothic style) and uses it as a parameter to evaluate and judge “the merits of the incomplete building whose construction he must continue” (Nino 2013, p. 64). If despite the deficiencies the already existing construction may exhibit under her current architectural criteria and aesthetic values, the architect deems that continuing with the project is still valuable, and that this is anyway a better option than simply abandoning or demolishing the building or undertaking a new project *ex nihilo*, then his actions must take necessarily into account the portion that has already been constructed as well as the parts that other architects will possibly construct in the future. So, the architect's assumed *ideal* of a gothic cathedral cannot be immediately and completely materialized in the actual process of construction. This reveals the existence of an “specific rationality for action in collective works”, when it comes to applying such ideals “to an action that contributes to that work without having control over the total work” (Nino 2013, p. 65). The same situation we find in the legal practice, where constitution founders, legislators or judges are only able to make a singular and modest contribution to a common project that is actually the overall intentional—and non-intentional—result of innumerable agents over long periods of time. Hence, the kind of rationality constrained by certain decisions of other agents that this practical, collective scenario imposes is

a “second best” rationality. Sometimes the most rational option may be to take sides, not for the optimal values ideally speaking, but instead for alternative ones of a more modest value, since these would be actually the right ones that can prove to be more effective in achieving those other optimal or ideal principles in the long run. Thus, it would be irrational for a judge to solve a case “as if he was creating the whole legal order through his decision, or the legal order relative to that question” (Nino 2013, p. 67). Instead, the participant in legal practice must perform a type of complex reasoning that articulates over two levels. First, it globally evaluates the existing legal practice under the light of the values and principles that it allegedly promotes. If it turns out to be a legitimate practice, even if imperfect—yet in a way that appears more reasonable or realistic than other alternatives—then we step into a second level. This implies the agent’s acceptance of the established institutional framework as the most appropriate to carry on the practice and then she proceeds to justify particular decisions within it that can contribute to preserve and improve such practice under the guidance of the values that overall legitimate it, even if imperfectly. This way, it is possible to determine some limits to the ideal reasons that would follow from those values, and then some limits to the legal practice as a whole. For the preservation of legal practice itself requires excluding certain justificatory reasons that, even if *in abstracto* result most legitimate, given the circumstances must yield to “second-best” alternatives. Otherwise the fundamental legal values, and therefore the whole legal practice as such, could become self-frustrated on the long term (Nino 2013, p. 74).

3 Constructivist Models of Law: A Brief Historical Survey

If we agree that philosophy builds concepts with images, while art builds images with concepts, the persistent presence of metaphors throughout the history of legal philosophy is hardly surprising. A conception of law can be defined as a kind of theory that incorporates at its core some model that can supply some plastic representations of the complex array of actions, norms, techniques, institutions, concepts and doctrines that make up legal phenomenology. This is exactly what the aforementioned metaphors do: they propose a “transference” (*metaphorein*) or “projection” of relationships of some kind from a primary domain (“source”) towards a secondary one (“target”) in such a way that it makes possible to describe the second *as if* it was the first (Black 1962, p. 53ff.; 1993, p. 28ff.; Ortony 1993).

The vast variety of models that have been projected into the field of law can be divided in two large classes: *theoretical* and *practical* models. The former are associated to a scientific model of rationality and their projection onto the law

seeks to illuminate *theoretical* or epistemic relations and values (e.g. truth, deduction, systematicity, objectivity). Thus the mathematic models,¹ the naturalist models (“organic” metaphors),² and overall, the logical models.³ As to the *practical* models, they correspond with the sphere that the Greeks called *praxis*: that is, those forms of action characterized by the implementation of certain values or virtues under the light of *phronesis* or “prudence” as *eupraxia* or “good practice”. The prototype of praxis for Aristotle is morality and politics (which he jointly names *politiké*) but also law: hence its very characterization as *jurisprudence*, which presupposes conceiving the activity (*agere*) of lawyers, judges and legislators as a deliberative and prudential practice ultimately oriented towards justice, the highest political-moral virtue (*ars boni et aequi*).

Between the theoretical and the practical a middle position is taken by a third type of models that constitutes the central interest of this paper because of its constructive nature: the *technical* models. Ever since antiquity, the technique (*techne*) is conceived as a type of transitive production (*poiesis, facere*) of objects, artefacts or constructs of various genre. Now it is in these very *products* where the pertinent values lie, and not so much in the individuals’ actions themselves (without which, however, they cannot exist at all). Techniques differ therefore from practices by the higher degree of objectivization that the production of objects imposes and by the decantation of rules and procedures oriented towards such production. This explains its close relation to the sciences—the *techne* takes an intermediate place between the *phronesis* and the *episteme*—intensified by later technologies. The more impersonal the artefact produced by the technique, the more this technique is based on objective values. Some objective techniques are close to the “mechanicist” theoretical models, from which arise the analogies of juridical-political phenomena with autoregulated or automatized machines (paradigmatically, the clocks [Mayr 1986, p. 54ff., 102ff.]) or the engineering metaphors, and even the architectonical metaphors themselves, all of them sharing a distinctive *constructivist* character. Nevertheless, the techniques

¹ Let us just cite two very distant references from one another: the Aristotelian distinction between justice as geometric and arithmetic proportion (*Eth. Nic.*, V) and Kelsen’s Neokantian view on jurisprudence as a “geometry of the legal experience” (Kelsen 1923, p. 93ff).

² Organic metaphors are ubiquitous and sometimes deceitful. One good example of that can be found in R. von Ihering, who in its first formalist period (*The Spirit of Roman Law*) referred to the “anatomy” and the “physiology of the legal organism” as well as to the “analysis” and the “synthesis” of the concepts, while in its latter period (*The End in Law*) when his approach was explicitly teleological and functional—no longer “mechanicist”—he however talked about “social mechanics”. The organic metaphor inspires otherwise the idea of law as a ramification of morality (Dworkin 2011, p. 405ff.: “A tree structure”) and it also underlies other well-known images like the “legal transplants” of legal comparatists (Watson 1993, p. 21; 2001: Ch. 7-8) or the “eye” of the law (Stolleis 2010).

³ The image of law as an “axiomatic system” has been a persistent methodological ideal for legal rationality from the antiquity (when the Euclidian ideal of science was established as a system of propositions deduced from axioms) until contemporary times (when formal logic is applied to law), including middle (Thomist iusnaturalism) and modern ages (the iusrationalist ideal of codification). See Alchourrón 1996; Alchourrón and Bulygin 2012.

are practices characterized by the fact that they generate products. Products such as the literary works (the tragedies of the *poetica*), the speeches and discourses (the juridical, political and moral *logoi* of the *techne rethorike*), the medical remedies. These would be “constructs” that are qualified by virtue of their instrumental goodness with regard to the internal ends or goods of the respective art (efficacy, goodness, correct persuasion, health, etc.). Even if they are different from the “objective” devices of the different arts and crafts, they share with them an equally constructive conformation.

This brings us right to the central meaning of our metaphors. The chain novel and the cathedral apparently represent, according to the said above, technical metaphors that are diametrically opposed to each other: a (beautiful) art and a (mechanic) technology. However, this appearance disappears if we consider the kind of values pursued by them. They do not deal with values of ultimately *theoretical* character (truth or objectivity), for in that case the type of construction concerned would involve technologies indistinguishable from sciences and therefore completely separated from practices.⁴ When techniques deal, instead, with values of ultimately *practical* character, as it happens with architecture, engineering, medicine or navigation (all of them frequent metaphorical images of law), then the corresponding rules, procedures and products are entirely subordinated to the practical *activity* of the subjects, since such activity is its very purpose and only in its exercise the pretended values could instantiate. The techniques in question consist of an *undertaking* or *enterprise*, a continuous course of action. Its constructive dimension is then a consequence of the fact that practice (the action) and technique (the rules, procedures and products) are intertwined as two aspects or dimensions of one and the same complex process.

Now, it is precisely this fundamental imbrication between the practical and the technical—the *agibilium* and the *factibilium*—what our two metaphors share in common. Although they both highlight the constructive element of legal praxis as well as its instrumental element, the point they essentially focus on is the *subordination* of both aspects to the achievement of ethical-political values of justice, that is, to practical values. This variety of *practical constructivism* was early on applied on law by Aristotle (1995), when he analyzed the legislative activity as a type of “architectural prudence” (*arkhitektoniké phronesis*).⁵ The kind of deliberation

⁴Let's consider in that sense, for instance, a famous mechanic metaphor with enormous importance within the legal field—the scale—which has survived from ancient times as a traditional icon of justice itself (Kissel 1984, p. 92ff) and has been associated with the liberal ideology (*checks and balances*) that liquidated the mechanistic authoritarianism of the old regime (Mayr 1986, p. 139ff). Its constructive meaning, however, substantially changes when interpreted under theoretical values (in congruence with its original context as a measuring instrument first for craftsmen and later for physicists) and it is then associated to supposedly *objective* scales and magnitudes, as it is the case in R. Alexy's “weight formula” (Alexy 2003).

⁵The legislator that “establishes” or “gives” the law (*nomothetes*) actually *produces* it as a “craftman” (*demiourgos*). Just like a weaver or a houses or ships builder, he manufactures certain types of objects: laws (*nomoi*, including the foundational laws or constitutions) which are the “works” (*erga*) of politics (*Eth. Nic.*, VI, 8, 1141b24-6; X, 9, 1180a21-3; *Pol.*, II, 12, 1273b32-3;

involved in legal rules is compared to *techne* (e.g. the “flexible leaden rule” used by Lesbian builders that “adapts to the shape of the stone” [Eth. Nic., V, 10, 1137b34-1138a3]), but it finally resolves into a *practical compromise* in relation to the values of justice they are meant to materialize.

This practical constructivism took, however, a pronounced intellectualist turn all along the natural law tradition. On the one hand, the relationship between positive law and natural law was tendentially interpreted in terms of theoretical values: as a *derivation* or *conclusion*, not anymore a practical construction. On the other hand, since this was a conclusion or consequence of practical *moral* principles or values, it was produced by means of an operation of *determinatio* which Thomas Aquinas (1956) compares again with the labour of an *artifex* or builder.⁶ Under this conception, though, the law ends up collapsing with morality. Strictly speaking, there is no room in it for legal reasons as distinct from moral reasons: insofar as there are actual practical reasons for acting in the legal sphere, these will be moral reasons and, insofar as they are not moral, legal practice is reduced to a mere “technical” instrument, a simple pragmatic and contingent device that can be instrumentally effective in achieving social coordination but is no longer guided by practical reason (Finnis 1990, p. 7ff). The so called *determinationes* lose, then, their constructive connection to praxis and values turn into self-evident “moral absolutes” (*per se nota*) making part of an “comprehensive” conception of religious character.⁷ This is precisely what a sound moral constructivism denies, as it conditions universality and objectivity of whatever principle of justice to certain discursive rules and processes (“overlapping consensus”, “reflective equilibrium”) that practically and institutionally mediate between the different substantive conceptions (Rawls 1987; Nino 1989; Atienza 2017, p. 200ff). Then, the material justifications of legal decisions, which are for sure guided by moral ideals, are not, however, merely “given” by such higher principles or values pertaining to an ideal, moral order, but they rather ought to be *constructed* bottom up from the very social and political practice.

VII, 4,1326a30). These works have an “architectonic” character because they constitute the “order” (*taxis*) of the political community out of an institutional *design* or *arrangement*. The whole activity within the polis must remain governed by constitutional rules (the *politeia* that establishes the regime structuring public powers) and legislative rules: not only the activity of citizens in general, but also that of the political authorities themselves, the rulers, who are subject in their relations with the citizens to the legal rules “as manual workers [*heirotechnai*]” to the builder’s design (Eth. Nic., VI, 8, 1141b29).

⁶The positive law is produced “in the same way the constructor (*artifex*) has to determine the common design of a house in the figure of this or that house” (Sum. Theol., I-II, q. 95, a. 2; see Finnis 1989, p. 284ff., 294ff., 380). For Aristotle (1995), positive law or “legal justice” (*nomikon dikaios*) is “that which is originally indeterminate, but when it has been laid down is not indeterminate anymore” (Eth. Nic., V, 7, 1134b20). The “determination” of law is then a kind of practical *production* of an object that does not exist before such a production, remaining in strict dependence on the specific actions of legislators, magistrates and judges.

⁷See Finnis 1989, p. 295, 371ff.; Kelsen (1946, p. 265) was perfectly right when he conceptually connected any form of natural law to a theological hypothesis.

Undoubtedly, the conception of law that in contemporary legal philosophy has most vigorously underscored the *practical* dimension of law, i.e. its dynamic, procedural and simultaneously technical and constructive character, is legal realism. A very important metaphor in this regard is that of law as “social engineering” introduced by Roscoe Pound (1923, p. 150ss; 1940-1, p. 3ff.; 2002, p. 234ff.; see Llewellyn 1931, p. 1236), which conceives law as an “activity” or “law in action”, so making way for an *instrumentalist* approach (Summers 1982; Pérez Lledó 2008; Tamanaha 2006, p. 101ff.). “Law itself”, according to Llewellyn’s famous motto (2008 [1930], p. 5), is nothing but that what legal officials *do* (Frank 1963, p. 46ff., 138). This “*do-law*” clearly reveals the underlying turn towards *praxis* that transforms the *law in books* into a means to an end, instead of “an end in itself” (Llewellyn 1931, p. 1236), a transformation already anticipated by von Ihering (1970).⁸ Thereby the metaphor of “juridical machinery” (a frequent expression by Llewellyn) becomes totally deprived of all its possible “mechanistic” connotations. On the contrary: that image displays the legal apparatus as the deployment of action itself that *consists* in recurrently proposing and attaining ends that transcend law—as an ongoing *process*, a “flux” or “moving law”. The *technique* is then totally immanent to a *praxis*. The instruments or artifacts of such a technique (i.e. the precepts and procedures themselves: “rules *for doing*”) refer to a practice being *exercised* (“rules *of doing*”, “working rules”, “real rules”… not just “paper rules”).⁹ And this is precisely what gives this technique its distinctively *constructive* character.

Realism is yet an essentially *open* practical constructivism. It suffers from an intrinsic skeptical tendency, that has deleterious effects both on the *evaluative* or ideal element of law and even on its very *technical* or instrumental aspect. The development of legal practice is rarely considered by realists under the perspective of the possible *justification* of its coercive operations, nor of the respective institutions. Instead, the dominant perspective is that of those strategic professionals who must calculate in advance or “predict” their production or consequences: that is, the perspective of the “bad man” or his *alter ego*, the attorney. This purely technical, non-institutional standpoint turns legal rules into evaluatively neutral devices, once they are washed up with “cynical acid” (according to another famous technological metaphor of Holmes [1952, 174]), or become more or less “malleable”, “pretty playthings” that can be put “into temporary anesthesia” from a moral viewpoint (in Llewellyn’s famous words, 2008 [1960], p. 7, 107). According to the more radical realist versions, legal rules and procedures lack almost all justificatory force as they get reduced to mere disguises for the “rationalization” of decisions

⁸See Atienza 2017: chap. 1. The mature writing of von Ihering (1970) *Der Zweck im Recht* (1877), published in the United States in 1913 under the title *Law as a Means to An End* (Boston: Boston Book Co) had, via Pound, a significant influence on the realist movement, that turned the expression into an slogan (see Llewellyn 1931, p. 1223). Tamanaha 2006, p. 60ff.

⁹Llewellyn 1931, p. 1236. Holmes (1952 [1897], p. 172, 174) had referred to the uninterrupted chain of “operations of the law” that interfere with social practices through “material consequences” whose most patent manifestation is “coercion” or “public force”.

(Frank 1963, p. 140). No legal decision would be genuinely “determined” from within the law, no argumentation would be justifiably *internal* to the normative legal materials, but instead exclusively determined from “external” real rules (sociological, psychological, economic or political).

This radicalized tendency was continued during the last third of the twentieth century by the *Critical Legal Studies* and related movements, which combined legal realism with the Marxist conception of law as a “superstructure”.¹⁰ However, neither Pound nor Llewellyn defended the total rupture between the technical-institutional element and the ideal-evaluative one of legal practice. For them there are values *intrinsic* to the judicial machinery, embodied in its procedures, mostly the judicial, and in its rules, whether statutes—“valuable tools of social readjustment” [Llewellyn 2008 [1930]: 16]; see also 2011—or judicial precedents. These values are thus considered to be more or less remotely connected with the ideals of justice.¹¹ This was the orientation that finally prevailed in later most influential currents of North-American legal thought: *Legal Process School*, Lon Fuller, Robert Summers, etc.¹² And it is also from this tradition that Dworkin himself takes up the insight to found the thesis of law as a constructive practice oriented to the realization of political-moral values. The central argument behind the literary metaphor is to show (even against “pragmatism”) to what extent in the field of law any “technical” element *is* necessarily evaluative. Here, exactly like in the field of art, the pivotal purpose of practice is to recreate, within the framework of established rules and institutions, some objective values whose validity, however, can only be manifested through that very practical recreation. Hence, Dworkin returns to the old connection between practice and values idiosyncratic to the *praxis* and makes it the hallmark of his criticism of legal positivism.

¹⁰ It is revealing that an architectonic metaphor is here again at stake. This case it is yet a rather *mechanicist* or *static* one, as it differentiates between a “superstructure” (*Überbau*) and a “infrastructure” (*Aufbau*) supporting and “overdetermining” the former. This model tends to preclude virtually any autonomy of legal praxis due to its rigidly external, socioeconomic determinism: the jurist (specially the judge) is more of an “activist” than a “technician” or “social engineer”, which accordingly takes strategic decisions that are “political”, not institutional, on behalf of “ideologies”, not of values. See Kennedy 1997: chaps. 6–8; Santos 2009, p. 551ff.

¹¹ See., e.g., Pound’s (1960) distinction between “natural” and “positive” natural law; Llewellyn 2008 [1930]: xxix, (“legal machinery and justice”), 39ff., 86ff. (“legal justice”)], 174ff.; 461 (“common good”). Twining attributes to Llewellyn, of whom he was a student, the following phrase: “[Technique without ideals may be a menace, but ideals without technique are a mess]” (Llewellyn 2008 [1930]: 67n.).

¹² Hart and Sacks (1994). Fuller (1969, p. 96) compared the “procedural” requirements of the “inner morality of law” to “those laws respected by a carpenter who wants the house be bullets to remain standing and serve the purpose of those who live in it.” For Summers (1971, 2006) law’s “technique element” and “formality” always fulfill a moral function.

4 Legal Positivism: Law's Autonomy Around Rules

And thus we arrive at legal positivism. Despite the appearances, this is a conception of law unquestionably correlated to a constructivist approach. Yet have previously characterized it as a descriptive approach. This apparent contradiction is cleared up if we take into account that legal positivism is a *structural* and *closed* kind of constructivism: a form of “normativism” intimately linked to theoretical values and in particular to the notion of a “logical system”. This is how the axiomatic or deductive ideal stands as the dominant model for the rationalization of the practical values of law, allowing the legal order to be implemented (and taught) in terms of consistency and completeness. In this sense, positivism is a “crypto-constructivism”, that is persistently inclined to hide the obvious fact that the “legal system” is an “external system” or “master system”, that is, a *constructed* system, that *results* from practical processes in which logic plays an *instrumental* role (Losano 2002: I, 168ff., 195ff.; II, Ch. I; Alchourrón 1996, p. 333ff., 348).

Legal positivism reverses the steps taken by realism in order to conjure its skeptical risks. Now the look on legal practice focuses exclusively on the norms as *law in books*. The law is reduced to a completed product, an “object” or “thing”, a “normative system” that introduces a sharp cutting line with respect to the previous practices from which it results and only generates subsequent practices in a strictly *endogenous* or *immanent* sense. Legal practice as an “activity” remains confined to the “structure” (the system), i.e. the space demarcated by the rules-product. And thus such practice gets “overdetermined” by this structure as a *self-enclosed* system. Law is a closed down system, in which all construction is actually reconstruction or “self-production”. The two decisive criteria in this regard are the “authoritative closure” (based in the internal continuity between legal practices, in terms of the notion of “intention”) and the “normative closure” (based in the postulate of an “ultimate norm” or “master rule” that provides validity to all the others). Both strategies are, naturally, always interwoven. For legal rules always outcome of authoritative intentions that generate canonical texts and propositional contents the normative “validity” of which consists in their being recurrently applied (“application intentions”, “intent”) in congruence with the ulterior purposes these propositions are aimed to and reflect in its structure (“further intentions”, “purpose”). This defines the relevant scope of legal interpretation (Raz 2009, p. 349ff.; Marmor 2005, p. 127ff.; Barak 2005, p. 126ff.). The legal closure is formulated under different varieties—purely formal-normative (Kelsen), authoritative (Hart, Raz), logical-subsumptive (Alchourrón and Bulygin, Ferrajoli, Schauer). . .—but it has always the same effect: to show the practice of law as essentially independent of external or subjective evaluations and, consequently, as a kind of objective, “neutral” technique. Hence the thesis of law’s value-free neutrality.

This is of course a *sui generis* kind of neutrality because it is taken for granted that law is an institution that *existentially* cannot put aside the moral and political values that appear as justifications of the overall system of legal rules. However, legal positivism assumes that these values are *external* to the legal system itself. For they

are ideals located *beyond* the law, in the realm of morality and particularly politics—where collective agreements are reached—whereas law itself is just the normative structure resulting from there. *Essentially* or conceptually, then, this structure can be analyzed in its very internal logic as such, independently of those values or at least in terms of relative abstraction from them.¹³ This way is it possible for legal positivist methodology to concentrate on the routine legal practices forming the course or core of the legal system, those determined by the continued development of the intentions and semantic content of the legal rules (i.e. the “easy cases”). This is how the apparent prism of neutrality or distance typical of a “descriptive” point of view of “social facts”, “conventions”, or of the law “as it is” (the social thesis) arises. A point of view that is self-conceived as “external”, stimulated by just “theoretical” or epistemic values, not practical ones (Postema 1998). “Description—Hart concludes in the *Postscript* (1996: 244)—may still be description, even when what is described is an evaluation”.

The autonomy of law is therefore, according to legal positivism, strictly a function of legal rules insofar as they are self-referential and self-founded rules. The moral purposes and values relevant to law are those, and only those, already (“technically”) categorized in its rules. The applicability and justifiability of such values become operative just by means of logical reasoning. This way the reproduction and transfer of legal rules’ propositional contents to new rules and decisions within the limits of the system is enabled and the required “technical” objectivity secured. Legal reasoning is ultimately a classificatory or subsumptive reasoning, formulated in deductive terms. So, this “technical closure”, that remains a constructive one, establishes internally and negatively the practical and autonomous differentiation of law as a social, highly institutionalized convention that self-segregates from morality.

Certain basic metaphors used by legal positivism perfectly illuminate this essentially *negative* way of conceiving the autonomy of law in terms of a clean cut or “separation” of its technical-institutional dimension from the ideal-evaluative one. They are images inherent to the standard legal-positivist view on rules as “entrenched”, “opaque”, “exclusionary”, “peremptory”, “content-independent”

¹³For instance: the “dynamic system” of law necessarily contains—Kelsen admits—“value judgments”, but these are only “relative” or “subjective”, not “objective” judgments, and thus law might actually incorporate “whatever content” (Kelsen 1960, p. 65ff., 204ff.); the moral-political functions of law as a system of rules allows require a “minimum content of natural law”, Hart concedes, but the validity of that system can be *conceptually separated* from any correction contents (Hart 1983; 1996, p. 185ff); law *morally* claims authority, but can be identified regardless of any evaluative consideration (Raz 1995, p. 210ff); the “axiomatic basis” of a legal system depends on the system of values that constitutes the legislator’s “relevance thesis” (Alchourrón-Bulygin 2002, p. 149ff.), and the formulation of the factual and normative predicates of any single rule can only be designed on the basis of value judgments relative to its rationale or “underlying reasons” (Schauer 1991, p. 23ff), but this evaluative dimension can be set aside and the attention focused just on the formal-propositional relations of logical consequence.

logical-linguistic devices.¹⁴ Under these conceptualizations hide out constructive, architectonic metaphors of a basically *structural* and *static* format. The role of legal rules is limited to passively “shield” a self-sufficient and autonomous space of justification or validity for the legal practice. Such a function is performed by building a “containment wall” against value judgments or material principles as if these were extra-legal elements, instead of the very foundations of such rules. Only exceptionally, once a wall’s *structural failure* occurs and “interstices” (i.e. fissures) appear—an image Hart that uses to illustrate the “discretion thesis” and he borrows from Holmes and legal realists¹⁵—would it be inevitable to resort to evaluative judgments. Then the legal technique makes transparent its “creative”, dynamic and *constructive* face, its deliberative nature related to principles and values. Yet this is seen as a sort of “intrusion” of the moral and political considerations within the “limited domain” of the law (Schauer 2004, p. 1942). Evaluations are necessary in law only to the extent that rules generate severe counterproductive outcomes because of their ordinary logical automatism.

All of these “crypto-constructivist” images clearly suggest the idea that the institutional technification of the law, within the framework of which the ordinary course of legal practice runs, precisely necessitates neutralizing, containing or repressing any value judgements not expressly stabilized by its rules, as if they were similar to “pathologies” (another repeated image)¹⁶ or “toxic leaks” that represent a permanent and fatal threat to the structural and physiological mechanism of law, and even could cause, in the end, its destruction. The legal technique has to be in itself a “neutral” or value-free technique: its genuine “ideals” are formal and *internal* to the legal “institutional machinery”—efficiency, predictability, formal equalit, allocations of power—and not external, *substantive* ideals such as justice. Material injustices are just “suboptimal” effects, normalized technical “mistakes” (rules’ or legislators’) that do not alter at all the legal validity, which remains detachable and autonomous from morality (Schauer 1991, p. 135ff). The famous eight canons of Fullers’s “inner morality of law” (1969, pp. 33–94)—requiring rules to be general, public, prospective, clear, consistent, effective, stable and congruently applied—have nothing to do with *moral* claims nor even with the correction principles coming from of a “procedural natural law”—we will come back right to

¹⁴ Schauer (1991); Raz (1990), p. 58ff; Hart (1982), p. 243ff. It is worth noting that this approach to rules tends to survive in the post-positivist legal theories when they highlight rules all-or-nothing, subsumptive way of application (Dworkin 1978, p. 24ff.; Alexy 2003) or its “closed” structure (Atienza and Ruiz Manero 1998: Chap. I). The hallmark of post-positivism, as we will see right away, lies however in the distinction between rules and principles and their mutual interplay. This distinction entails a priority of the axiological over the deontological dimension of law, since an internal “duality” is introduced both at the level of rules (which result from balancing operations and require evaluations in order to be correctly applied) and at the level of principles (that have values as content and can only be applied by means of rules).

¹⁵ Hart (1994), p. 273; Cardozo (1921), pp. 113–114, 129. In his dissent in *Southern Pacific v. Jensen*, 244 U.S. 205 (1917), Holmes said: “I recognize without hesitation that judges do and must legislate, but they can do so only interstitially”.

¹⁶ See how Raz (1995, p. 33) refers metaphorically in this regard to an “infection”.

this. As Hart (1983, p. 347) states, such requirements are rather technically neutral imperatives, “principles of good craftsmanship” compatible both with praiseworthy and perverse ends, exactly as by using them the carpenter can build “hospital beds or torturer’s racks”. In turn, for Raz the rule of law, consisting of a system of rules and procedures, is “a tool” that, just like any other, “is morally neutral in being neutral as to the end to which the instrument is put”, exactly in the same way “a sharp knife” that is used to harm does not for that reason cease to be “a good knife”. ¹⁷

5 Legal Post-Positivism: The Autonomy of Law as a Matter of Value

Legal post-positivism completely reverses this understanding of the autonomy of law. The neutrality thesis is openly rejected since values are considered as the real criteria structuring legal institution and legal rationality as a whole. Law is a practical institution in the strict sense of *praxis*: i.e., its “technical” or formal dimension—the set of rules and procedures composing its normative “structure”—serves to the material achievement of fundamental political-moral values within a given society. The institution does not merely “reflect” such evaluative contents, but also presupposes the inescapable asymmetry between law as a “technique” and the moral rights and principles that it *recognizes* as its very foundations. Value judgements cannot be removed from the institutional legal sphere, but rather they need to be permanently articulated by reconnecting this sphere to its moral and political grounds. And this is where the constructive function of legal practice becomes prominent. Legal practice is the mediating enterprise between the technical dimension and the ideal or evaluative dimension of law.

So far, the legal practice had been seen solely in terms of the “empirical construction” of legal rules and techniques, either as an “open” pragmatic (realism) or “closed” logical (positivism) set of relations. But now the practice appears as the device for the *materialization* of the fundamental values justifying the rules and techniques of legal institutions themselves. These objective and ultimate ideals, insofar as they require being institutionalized at the large scale of a political community (or an aggregation of them), account then for the articulation of legal practice as a whole—therefore a political-moral enterprise—and explain its own “technical” and logically “closed” structure. Thus, practical values are the *raison d'être* of the theoretical values (logical or technical values) operating in law. Again, as in the original Aristotelian sense, there is a primacy of the *praxis* over the *techne* within the legal field. At the same time, it is now about an *objectivist* variety of

¹⁷Raz (1979), p. 225. See, however, Raz (1995), pp. 334–335, where he seems to retract from this “analogy between legal reasoning and reasoning about practical engineering problems, or more generally between legal reasoning and reasoning about matters which Kant identified as the realm of the useful and the Greeks called *techne*”.

constructivism. Post-positivism step away from realist instrumentalism and positivist “normativism”—thus avoiding their respective skeptical and formalist drifts—as well as from the absolutist implications of natural law. Legal practice is seen as a matter of “construction” insofar as it is the productive and transformative *medium* that communicates, along a continued and recurrent process, the technical and logical-systematic legal apparatus with the political-moral values justifying it. The moral objectivist perspective assumed by post-positivism is then strictly inseparable from the justificatory function performed by legal practice in reference to ultimate values. This “ultimate” character means that those values are not merely “functional” in relation to any contingent, socially given interests or values—although they obviously *must* be empirically functional—but rather that they have a *critical* function in relation to the latter. The evaluative has a controlling role over the instrumental, not the other way around, and this is the essential feature of the legal institution.

We can now appropriately capture in their deepest sense the point of Dworkin and Nino’s constructivist metaphors. They both highlight the *architectonic* dimension of values in the law as well as their *totalizing* or holistic dimension. The political and moral values entirely arrange the structure and function of the legal institution and guide the legal practice “as a whole”. This is manifested specially in the role that *principles* play in the law. On the one hand, principles express certain ethical-political ideals or aspirations that have foundations *per se* external to the legal institution. On the other, they reformulate such ideals in terms of *internal* legal criteria—whether substantive (fundamental rights or general policies) or formal (institutional or formal principles) (Dworkin 1977: chaps. 2, 6; Atienza and Ruiz Manero 1998: Chap. I; Alexy 2002, p. 47ff). These are criteria providing justificatory reasons and guidelines for legal (not just moral or political) validity that must be deliberated, incorporated and recreated in each one of the decisions integrating legal practice. Llewellyn (1960, p. 191, 222) uses a powerful image to express this transversal dimension of values in law: they are like “grains” going across legal practice and according which particular decisions are “carved”.

Yet values figure in legal practice under very different modulations. There is indeed a differentiation within the law as a whole in diverse institutional practices, functionally diversified but nevertheless mutually integrated. These are basically the legislative, judicial, doctrinal and professional legal practices. In each one of them values and principles perform different practical functions. Legislative and judicial practices, in their mutual concatenation, constitute the basic core of law as an institution, the mainstream of law as a praxis. They monopolize the production and application of legal rules and it is their practical and holistic development what constitutes the target of Nino and Dworkin’s constructivist metaphors—whereas realism focusses on professional and positivism on doctrinal practices. Those metaphors exhibit the legal practice as a *continuum* in progress in which both sub-practices—production and enforcement of legal rules, in turn attached to other standards and procedures—internally link together keeping definite equilibrium relations of functional separation and mutual deference. Such institutional relations are, in the end, governed precisely by substantive ideals or values (such

as equality, liberty, autonomy or dignity) that shape and justify their respective procedures: the democratic legislative process based in political representation and the judicial process based in impartiality. The maximization of those material values, given the concrete circumstances, is then demanded to every particular decision integrating the legal practice. This requirement determines its constructive character.

Let us consider first the intrinsically evaluative structure of the *practice of legislating*. Although it arise from instrumental, mean-end schemata (framed in turn by wide political projects of social transformation and policies) the legislative practice necessarily requires evaluative deliberations and *balances* as it consists in the activity of constructing rules out of principles. Legislating as an activity needs to satisfy certain value parameters since congruence is necessary to achieve the unity of purpose towards the general interest any law is aimed at (Atienza 2013, p. 712ff.; Ekins 2012, pp. 118–142; Oliver-Lalana 2005). Legislative praxis (constitutional one included) is yet an essentially “open” activity. There are numerous ways of formulating legal rules and of composing them with different purposes under the same set of principles. None of such possibilities can be completely prefigured in advance, given its closely dependence on social change, ideological-political stance, constitutional history and other variables. But this does not mean that the legislative activity is a completely “undetermined” practice. Its *constructive* character rather comes from the fact that every new rule is the result of the specific and singular balancing operation that underlies every legislative act. This operation has to find an adjustment—even if deviating from them—to previously lay down legislation along a continuous, “cascading” process. The pertinent agreements must be reached both at the level of some publicly categorized courses of action and some reasonable values justifying them (Rawls 1993, p. 133ff)

This explains why the kind of norms composing the basic *instrumentarium* of the legislative technique has to be specifically *rules* (that is, action-norms and end-norms [Atienza and Ruiz Manero 1998]). They must be general, plainly categorizing classes of actions and consequences, publicly promulgated (in a “master book”), *pro futuro* oriented, consistent with each other (within a “master system”), sufficiently stable, practicable and congruently applied norms, that is, they must satisfy Fuller’s legality canons, precisely because “the enterprise of subjecting human conduct to the governance of rules” (Fuller 1969, p. 96) is subject to the requirements of practical rationality. Those are then *moral* requirements, not just “procedural”. For they represent at once conditions for the *best* possible institutionalization of any substantive moral and political values the law can pursue. In other words: Fuller’s criteria embody the only rational way for a collective decision-making system to effectively maximize the moral basic values in the long term and on the large political scale. Therefore such criteria cannot be downgraded to a merely instrumental or formal level. They are central part of a “technique of authority”, but at the same time they are definitory too of law as a “technique of justice”

committed to the *justifiability* and *correctness* of its institutional products.¹⁸ The fact that the technique of “legality” is *dissociable* from such and such particular purposes or material agreements does not make it a “neutral” technique appropriate to turn *any* rule into legitimately “legal”. On the contrary: it is precisely by passing through the filter of those requirements when certain purposes make visible their greater or lesser content of injustice. The discussion about how radically unjust law puts into question its own legality (Fuller 1969, p. 153ff., Alexy 1999, Rundle 2009) clearly reveals that the technique of legality cannot be evaluative indifferent.

A general evaluation of this kind, in terms of justice, takes place in the first level of legal reasoning in which, according to Nino, the legitimacy of legal practice as a whole must be globally assessed by anyone of its participants. Once the evaluation is positive and a given institutional framework becomes globally justified upon it, then the particular legislative decisions that are developed within it must keep the *best possible adjustment* with the legislative decisions previously adopted, even if it comes to their amendment. This is what Nino’s metaphor expresses when it refers to the cathedral construction as a process in which any decision taking part thereof, whether implementing the same architectural style or transforming it, needs to start relying on the work already built in the foregoing phases. Such a continuity must be constantly restored given the successive and cumulative products of legislative practice, coming from very different times and political decisions. Nino expresses with this suggestive analogy how legislative construction is an activity of materialization not only characterized by optimization but also by integration of styles and ideals aiming at opposite directions. In many occasions the optimal purported ideals can support not-so-good, relatively deviant, or “second-best” decisions, rather than drastic or supposedly “revolutionary” changes.¹⁹ Such kind of deference towards the settled decisions and interpretations and such kind of relative deviations or “imperfect justice” (Rawls 1999, p. 74ff) are actually necessary conditions for the

¹⁸The rationality criteria of the “legislative technique” (linguistic, pragmatic-intentional, systematic, etc.) are in fact subordinated to an “axiological reasonableness” that is transversal to all them (Atienza 2013, p. 715). According to Fuller, the “internal morality of law” is not a “substantive” but rather a “procedural natural law”, for it has to do “not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be”. Hence it remains “indifferent toward the substantive aims of the law and is ready to serve a variety of such aims with equal efficiency” (Fuller 1969, pp. 96–97, 153).

¹⁹It is worth noting that the “gothic enterprise” has been spoken of as an holistic “idea” or amalgamation of technical, moral, religious and philosophical ingredients (Scott 2003). Erwin Panofsky has studied along these lines the influence of the scholastic philosophy on the gothic style: “Like the High Scholastic *Summa*, the High Gothic cathedral aimed at ‘totality’ and therefore tended to approximate, by synthesis as well as elimination, one perfect and final solution” (Panofsky 1976, p. 44). Just like the scholastic dialectics, the construction progresses on the basis of a postulate of *concordantia* or reconciliation of styles and artistic and technical solutions in competition. In this synthesis work, sometimes constructive paths have to be projected that might apparently look erratic and deviant: “In retrospect, it is easy to see that what seems to be an arbitrary deviation from the direct road is in reality an indispensable prerequisite of the ‘final’ solution” (Panofsky 1976, pp. 63–64).

preservation of the legal institution itself, for the durability of the global enterprise of law, outside of which *no* value would be achieved at all in the long-term. The two basic levels of legislative balancing—substantive and formal-institutional²⁰—are then bridges connecting the legal enterprise with morality and politics but, at the same time, separating them from each other and so saving law's own differentiation (Nino 1994). The autonomy of the law becomes constructively safeguarded, therefore, by means of a combination of evaluative judgments and argumentations.

Finally we shall consider the *practice of judging*. To participate in the judicial institution is equally to continue a collective work through the exercise of evaluations and the rational foundation of the resultant value judgments. The practice of judges goes in the inverted direction than that of legislators. Legal reasoning comes back now from the particular cases given in the social practice to the general rules and principles that should govern them. Legislation is a practical “top-down” process, while jurisdiction is rather “bottom-up.” Again, both the structure and function of the institution are essentially value-designed. Judges must look at the rules under the light of their axiological foundations when applying such rules to the situations presented before them. Exactly the *same* evaluative arrangement—the same organized set of political-moral ideals—that justifies the system of legality, or rule of law, now demands the institutional impartiality and independence of judges (and so the separation of powers). If legal rules constitute institutional “constructs” oriented to the achievement of valuable purposes and states of affairs, then a different institutional practice is needed for undertaking a new task: that of verifying that those values categorized by the rules are effectively materialized in the particular cases regulated by them. So, judges must *correctly* determine all and each one of the cases that are brought before them by applying all and only the legislative rules. This is what it means after all that these are rules pertaining to a “technique”, i.e. “devices” or “instruments”. Yet this technique institutionally transforms the position of the judge into a position of *commitment* or *adhesion* towards such legal rules. That is, a position not only deferential to the authority of the democratic legislator (thus ensuring the *prima facie* “technical” applicability of legal rules) but specially loyal to the claims of correctness and the substantive reasons underlying them, reasons that must be *updated* and *recreated* in every single judicial decision adopted on behalf of the legislator. Judicial practice then is the one that “encloses” or covers all other legal practices (legislative and administrative) because its institutional function is precisely to pronounce conclusively (which does not mean infallibly) on the correctness or incorrectness of any other decisions already taken in the law.

This is exactly the picture drawn by Dworkin's literary metaphor of the “chain novel”. Judicial practice appears here as a collective, *in fieri* activity, a series of constructive and reconstructive operations of interpretation, in which judges act simultaneously as authors and critics. Judges have to get involved in a deliberative

²⁰On “institutional reasons”, see Summers (1978); Atienza and Ruiz Manero (2001); on “formal principles”, see Alexy (2014).

and evaluative activity indispensable to adopt those decisions that represent the *best* articulation of the basic values guiding the entire legal enterprise in relation to the concrete case at stake. These are the institutional values governing judicial institution itself (the novelistic genre in the case of the chain novel) as well as those substantive values that specifically shape the interpretation adopted by the judge (the author's literary style). Judicial practice is thus a set of interpretive operations composing and recomposing the normative legal materials in the light of the entire "architecture" of the principles and values that make up the law "as a whole". Judicial decisions transform the "indeterminate" diversity of such materials into a coherent unity and then ascribe this to "the Law", representing the entire community, not simply the legislator *qua* authority. This critical and totalizing nature of judicial practice is mirrored by its *argumentative* institutional articulation: reasoned opinion, review system, dissent voting, abstention and recusal, etc. And, of course, these features categorically discard any skeptical or value-free view on legal rules as "technical" devices that should be strategically malleable (in the realist fashion) or as a morally neutral "carpentry" (in the positivist fashion). From the judge's perspective—as opposed to the lawyer's and the professor's—the legal technique is internal to a genuine "practice" (*praxis*). As such, it is a technique that can only be conducted on the basis of substantive evaluations that fully engage judges in the attainment of certain purposes under certain political-moral conceptions justifying them. In sum, as a "technical" agent, the judge is subject to the imperative of determining the "one right answer": i.e. that of inquiring and ascertaining the best justificatory reconstructions for legal rules that could be produced, as premises for her decisions, out of the set of principles governing the whole legal system. Law, then, cannot be practically indeterminate, but simply practically uncertain (Dworkin 2011, p. 90ff).

As a consequence, the so-called "interpretive techniques" are not mere resources doomed to decisionism or judicial discretion. They do not constitute mere persuasive tools available for the "rationalization" of decisions (realism), nor are they occasional or exceptional expedients for the judge to make "extra-legal" evaluations when the rules fail (positivism—and natural law too). As we already said, legal practice widely transcends the judge's personal criteria and subjective motivations in relation to each particular case. The interpretation techniques are practical reasoning schemata based on principles that enable the rational reconstruction of the rules. The methodical significance of such schemata lies in bringing out the substantive and institutional reasons that *objectively* can justify a singular evaluation on the practical consequences to the case in presence derived from the legal rules taken as premises. They are thus *constructive canons*—"canons about how statutes are to be constructed", in Llewellyn's words (1960, p. 521ff). As such, their function is to find the interpretation that best satisfies the values involved in the light of the legal system in its integrity, "architectonically". This constructive, optimizing dimension takes places even in the so-called "easy cases", which supposedly would result just from the logical-subsumptive, "neutral" instantiation of legal rules. For the *prima facie* applicability of the "textual argument" also depends on value judgements only justifiable by invoking institutional and substantive reasons (just like all other

arguments reinforcing literalist readings: *a contrario*, systematic, *a fortiori* reasoning, etc.). The distinction between “easy cases” and “hard cases” is actually itself evaluative. Easy cases are those *correctly* regulated, when literal interpretation is supported by principled reasons that are solid enough to generate an agreement about the relevance and coherence of the respective rule and the rightness of its practical consequences. A hard case is by contrast an *incorrectly* regulated case, in relation to which reasons arise solid enough to put aside the literal interpretation as an unjustified one—since either the rule did not regulate the right property of the case or regulated the wrong property. Then arguments are brought in favour of alternative *rectifying* interpretations (teleological, analogical, *ad absurdum*, etc. reasoning) that allow for increasing the coherence or reducing the incoherence of the initial incorrect interpretation. From this perspective it is quite clear why hard cases, as Dworkin points out, make the “creative” character of legal interpretation more transparent, as the disagreements and controversies of the interpreters become evident when they formulate opposite interpretations of the same rules and values. The constructive or transformative implications arising from the different conceptions or readings that each interpreter advocates for are much more ostensible when such readings entail alternative proposals for rule readjustment or coherentization regarding the case (*soundness dimension*). This constructive dimension is, however, also operative when there is convergence instead of divergence in the ways of amending the previously settled interpretation of the rules (*fit dimension*), for cases are always dissimilar to each other and the continuity with such established interpretation is not totally “given” but rather must be turned explicit and materialized case by case.

Thus legal reasoning arises as a definitely practical, value-involved reasoning. Legal principles guide all the constructive resources of this reasoning and determine, through the mediating interpretations, the *justified* perimeter of the rules: i.e. both their “clarity” zone, where a correct adjustment between values and rules takes place (and the law is then “determined”) and their “penumbra” zone, where disagreements and “indeterminacies” emerge that are solved by introducing coherence judgments, formulating exceptions and correcting legal gaps and inconsistencies (MacCormick 1995). This kind of strict practical rationality (praxis) subordinates the implementation of all its technical criteria (logical-systematic, semantic, intentional, authoritative, formal... criteria) upon conditions of genuine justifiability. However, although axiological congruence is the dominant imperative, this does not mean that all coherent outcomes are equally acceptable, that *any* interpretation can be justified. Coherence construction in the judicial practice has limits. It must safeguard above all the very institutional division of work within the legal practice as a whole. On the one hand, any constructive alternative available for judicial decision must be realistically framed within the interpretative routes and outcomes that the practice has defined in the past. Possible new jurisprudential lines or expectations that the selected interpretation may trigger in the future must be considered as well. This double retrospective and prospective assessment determines, in the same way as Nino, the two Dworkinian moments of reconstruction (*fit*) and construction (*soundness*). On the other hand, it is also necessary for the judicial decision to preserve the *impartiality* of the judiciary itself and its proper function within the institutional

architecture of law. This is a particularly relevant requirement in such legal systems—as those recognizing constitutional rights—where judicial activism can give rise to a severe intensification of the constructive role of judicial authorities. In such systems, the configuration of “hard cases” (out of conflicts of rights that reflect moral and political controversies) and the judicial revision of legislation must be carried out, if legitimate, by preserving at all cost the singularity of the practice of judging. This constitutes a kind of practice which is not institutionally aimed at *deliberating* rules (such as legislative practice) nor at bureaucratically *applying* them in a “managerial” manner (such as administrative practice) (Fuller 1969, p. 208ff.) Otherwise judicial practice would just collapse into politics. Any such “judicialization”, often associated to moral scepticism, would be institutionally as unjustified as the “overinterpretation” of rights in terms of moral values, often associated to dogmatism. The implementation of ethical-political values through judicial practice takes place in a fundamentally different form, namely, the “propagation” (in Nino’s own words) of such values across overall legal practice by means of systematically impartial, critical and uniform decisions. Legal reasoning always depends, then, on the imperative of preserving the internal equilibrium of legal practice. Contributing to the maintenance of the institutional physiognomy of judicial practice within the complex “technique” or “machinery” for collective decision-making which it is integrated in, together with the other legal sub-practices, is therefore a necessary condition for the generally stable realization, through all of them, of the fundamental political-moral values. The autonomy of law, in short, is one of those values.

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Part III

**Intertwining the Claim to Autonomy
and the Concept of Human Dignity**

Merit, Value and Justification: Human Dignity Vis-à-Vis Legal (Inter)subjectivity—The Autonomy of Subjects Within the Autonomy of Law



Ana Margarida Simões Gaudêncio

Abstract The role(s) nowadays undertaken by the concept of *human dignity*, pervasively proposing it as *the* essential foundation of law, in its many significances and conceptions, involve specific underpinning references when it is specifically considered within legal subjectivity and intersubjectivity, whether acknowledged as an axiologically external foundational reference ascribed *to* law, on the one hand, or, on the other hand, as an essentially normative internal foundation conferred *by* law. Underlining the normatively constitutive possible projections of the latter reference, the presupposition of reciprocal recognition of *human dignity* between *persons* requires a critical and genealogically inquiry into its meanings and substances, regarding the different *senses* of *human dignity*, from its distinctly deontological and axiological avowals as *merit* and as *value* to its discursively critical conception (s) as *justification* (mostly from Plato, Aristotle, Jean-Jacques Rousseau, Immanuel Kant and George W. F. Hegel, to Charles Taylor, Jeremy Waldron, Stephen Riley, Jürgen Habermas and Rainer Forst).

1 Contemporary Role(s) of Human Dignity and Law

The roles nowadays undertaken by the concept of *human dignity*, pervasively proposing it as *the* essential foundation of law—in its many significances and conceptions, involve specific underpinning references when it is specifically considered within legal subjectivity and intersubjectivity—, whether acknowledged as an axiologically external foundational reference ascribed *to* law or as an essentially normative internal foundation conferred *by* law. Underlining the normatively constitutive possible projections of the latter reference, the presupposition of reciprocal recognition of *human dignity* between *persons* requires a critical and genealogically inquiry into its meanings and substances, regarding the different *senses* of *human*

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dignity, from its distinctly deontological and axiological avowals as *merit* and as *value* to its discursively critical conception(s) as *justification*. Exploring such an approach, the discussion on the meaning(s) of *human dignity* in law involves the possibility of ascribing a normatively constitutive character to the *reciprocal recognition* of *human dignity* as the background of legal (inter)subjectivity. Thus, questioning the signification of *a person as a legal subject* (not only in its legal *personality*, but also in its legal *personhood*, whilst considering other possible *legal subjects*); and, above, and beyond, the assertion of an axiologically constitutive autonomous normative foundational conception of law as the constitutive background of that specific *human dignity* in a *juridical sense*. And, therefore, reflecting on the legal meaning(s) of the *autonomy of subjects* (and the inevitably corresponding dialectic between *liberty* and *responsibility*) within the *autonomy of law*.

In fact, plentiful meanings are nowadays ascribed to *human dignity*, as if it could constitute a *universal* foundation—or several universal foundations—of *being human*, of a *human being*, and of *human relations*. Of course, the roles undertaken by *human dignity*, whilst proposing it as *the* essential foundation of law, involve, in their many significances and conceptions, specific underpinning references. And, as it is considered within legal subjectivity and intersubjectivity, questioning its meanings leads, at least, from the understanding of an axiologically external foundational reference ascribed to law, on the one hand, to, on the other hand, an essentially normative internal foundation conferred by law.

Despite the plurality of the understandings of subjectivity and of the roles nowadays ascribed to law, the foundation invoked of law is increasingly resting on human dignity as a *secure value*, and on human rights, and has its natural, necessary, and universal consequence. Such a specific concern, within the philosophical foundations and the meaning of law as a social normative order, requires a reflection on the pertinence and meaning(s) of human dignity, from a genealogical point of view—as *merit*, and/or as *value*, and as *justification*—, and from a legal theoretical approach—by questioning human dignity as an indispensable feature for establishing human subjects as legal subjects. Therefore, this reflection will crucially approach to the construction of human dignity in law, starting from the *idea* of law and moving towards intersubjectivity—which means not only considering human dignity as a feature absorbed by law, but also, and mostly, considering juridical human dignity as a human feature created by law. This reflection encompasses, then, three main steps: firstly, acknowledging the contemporary roles of human dignity in law; secondly, discussing the historical and contemporary meaning of human dignity as *merit*, and/or as *value*, and as *justification*...; and thirdly, stating a proposal for the meaning and role of human dignity within law, beyond an ahistorical-natural *given value*, rather as a historical-cultural *axiological construction*...

Even though human dignity is a signifier with so many meanings (and contents) as the civilizational experiences considered—since the generic category of human dignity will only make sense if substantially densified according to the context (Marques 2009, p. 566)—, only the reciprocal recognition of that dignity—understood as a constitutive element of juridical subjectivity and intersubjectivity, and of

its actual realization—may be the basis of a *materially autonomous meaning of law* (Neves 2002, pp. 869–870). That is a crucial statement to this reflection: affirming law as a normative validity—and that it is not enough to affirm that this validity will be that which, in each concrete historical community, might be...—, bearing in mind the contributions of other normatively relevant dimensions of practice, which confer to it the quality, the legitimacy and the role of a regulative order and a critical instance of social praxis (Neves 2008a, pp. 10–14; Neves 2008b; Linhares 2008, pp. 426–427; Neves 2013).

2 Human Dignity *and/in* Law

2.1 Human Dignity as a Value: *From Merit to Honour, Recognition and Statute/Rank*

Genealogically, as Umberto Vincenti points it out, human dignity has been presented as a crucial *value* in human relations, though first as merit, and only *ab initio*, i.e., potentially, as an intrinsic feature. Distinguishing, in fact, four meanings of dignity: dignity as a virtue, as an acquired merit, as an intrinsic quality/feature, and as titularity of rights (Vincenti 2009). Beyond the etymological origin of the term, in its Greek origins, that which the Romans afterwards called *dignitas* already meant a *virtue* of character, of action, referring to acting virtuously, and assigned to those who acted so—and then, as *axía* and *axíoma* (Vincenti 2009, I. “Dignità e valore”, pp. 7–40, 7–10; Poisson 2004, pp. 43–48). It would be understood not as an expression of a right, but as a reward for the accomplishment of duty, as the merit attained by some action—therefore, in Seneca, for instance, dignity could be pervasive, as referring to *acting right*. Dignity would, then, constitute a feature of every person—in different ways—but not depending on being a person, rather resulting from action, as Aristotle already had pointed out in *Nicomachean Ethics*, and, still before, Plato had considered in *The Republic* (Vincenti 2009, pp. 10–18; Plato 2000; Aristotle 1984, 4.3. 1123b). In Roman terms, then, dignity as merit is understood as a part of the Greek *axía*, and also a part, an initial and very relevant part—for instance, in Ciceron, especially in *De officiis*—, of *dignitas* (Vincenti 2009, pp. 12–22; Giltaij 2016, p. 233; Ciceron 1956). And, so, differently from the, also polysemic, *existimatio*—meaning much more than reputation (Giltaij 2016).

Essentially, therefore, *dignitas* leads to *auctoritas*. And justice, measured from this sense of *axía*, or *dignitas*, would mean *suum cuique tribuere*, and, so, not strict equality, but some distribution referring to each one’s merit—a first reference to the juridically specific meaning of *dignity* (Vincenti 2009, pp. 18–27). And the influence of Christianity, though not strictly original, was crucial to the broadening of the assumption of human dignity to being considered a pervasive feature, ascribed to each human purely by being human (Aroney 2021, p. 1212)—as, for instance Pico della Mirandola stated in 1486, in his *Oratio de hominis dignitate* (Mirandola 1486).

Therefore, *being human*, *human being*, and *human dignity* are different expressions with many distinct possible meanings—so, *human dignity* may not be constructed only by considering *humanitas* in a biological sense; it requires *humanitas* as a cultural feature. And it may be, therefore, *pervasive* only in a formalistic and nominalistic sense, though not, perhaps, in its substantial and normative content.

Contemporarily, the *multiplicity* of subjectivities, leading to the *multiculturalism* as a consequence of the need to pacify intersubjectivity, in a combination of *differentiation* and the *demand for recognition*,¹ is illustrated by the conclusion stated by Charles Taylor that *non-recognition* or *misrecognition* constitute a form of *harm*.² In this sense, the concerns for *identity* and *recognition* in the Modern Ages result from the combination of two historical changes: on the one hand, the tendential replacement of the Pre-Modern concept of *honour* by the modern concept of *dignity*—as a result of the abolition of social classes and of the establishment of democratic regimes³—and the consequent development of the notion of *authenticity*,⁴ as the novelty of *authenticity* in Rousseau, and then in Hegel, with the development of the notion of *recognition* (Taylor 1994, pp. 35–36; Hegel 1807, chapter 4); and, on the other hand, the development of the Modern notion of *identity*, and the resultant *politics of difference* (Taylor 1994, p. 38). Concerning the first

¹“A number of strands in contemporary politics turn on the need, sometimes the demand, for *recognition*. The need, it can be argued, is one of the driving forces behind nationalist movements in politics. And the demand comes to the fore in a number of ways in today’s politics, on behalf of minority or “subaltern” groups, in some forms of feminism and in what is today called the politics of “multiculturalism”.

The demand for recognition in these latter cases is given urgency by the supposed links between recognition and identity, where this latter term designates something like a person’s understanding of who they are, of their fundamental defining characteristics as a human being.” (Taylor 1994, p. 25).

²“Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.” (Taylor 1994, p. 25).

³“We can distinguish two changes that together have made the modern preoccupation with identity and recognition inevitable. The first is the collapse of social hierarchies, which used to be the basis of honor. I am using *honor* in the *ancien régime* sense in which it is intrinsically linked to inequalities. (...)

As against this notion of honor, we have the modern notion of dignity, now used in a universalist and egalitarian sense, where we talk of the inherent “dignity of human beings”, or of citizen dignity.” (Taylor 1994, pp. 26–27).

⁴“Democracy has ushered in a politics of equal recognition, which has taken various forms over the years, and has now returned in the form of demands for the equal status of cultures and of genders.

But the importance of recognition has been modified and intensified by the new understanding of individual identity that emerges at the end of the eighteenth century. We might speak of an *individualized* identity, one that is particular to me, and that I discover in myself. This notion arises along with an ideal, that of being true to myself and my own particular way of being. Following Lionel Trilling’s usage in his brilliant study, I will speak of this as the ideal of “authenticity”. (Taylor 1994, pp. 27–28). “The ideal of authenticity becomes crucial owing to a development that occurs after Rousseau, which I associate with the name of Herder — (...) as its major early articulator, rather than his originator. Herder put forward the idea that each of us has an original way of being human: each person has his or her own “measure”. (Taylor 1994, p. 30).

change, *identity* and *recognition* would constitute not monological, but dialogical, categories, in opposition to the assumptions of *rationalism* (Taylor 1994, pp. 32–34). Moreover, egalitarian recognition, typical of a democratic context, manifests the recognition of *identity* and *authenticity* (Taylor 1994, pp. 36–37) in the distinct intimate and public *recognition spheres*,⁵ meaning *universal recognition*, based on *equal dignity*,⁶ focusing on Rousseau and Kant.⁷ Concerning the second change, in the *politics of difference*, *recognition* is based on a principle of *universal equality*, presupposing the exposure of *discrimination*⁸—gathering in Kant the dignity of the *person* as a *universal human potential*, which inspires Taylor in the assumption of the identity of the *person* in the *politics of difference*.⁹ But there are many perceptions of human dignity and of its relations to law. So, in a different vein, Jeremy Waldron intends human dignity within law as a specific *statute*, or *rank*:¹⁰ and, as such, both as a universal characteristic of humans, and, eventually, simultaneously as *the content of rights* and *a foundation for rights*¹¹—thus distinguishing the meaning of *dignity* in the quality of *principle of morality* and *principal of law*—and asserting it, in this latter sense, as a *statute* or *rank* conferred by law. This statement presupposes a divergence of the meaning of dignity as *status* from Kant's perspective on dignity as *value*, by emphasizing the distinction between the meaning of *value* and that of *worth*, and of the distinction between them within the meaning of

⁵“And so the discourse of recognition has become familiar to us, on two levels: First, in the intimate sphere, where we understand the formation of identity and the self as taking place in a continuing dialogue and struggle with significant others. And then in the public sphere, where a politics of equal recognition has come to play a bigger and bigger role.” (Taylor 1994, p. 37).

⁶“With the move from honor to dignity has come a politics of universalism, emphasizing the equal dignity of all citizens, and the content of this politics has been the equalization of rights and entitlements.” (Taylor 1994, p. 37).

⁷“The politics of equal dignity has emerged in Western civilization in two ways, which we could associate with the names of two standard-bearers, Rousseau and Kant. This doesn't mean that all instances of each have been influenced by these masters (though that is arguably true for the Rousseauian branch), just that Rousseau and Kant are prominent early exponents of the two models.” (Taylor 1994, p. 44). See also Vincenti (2009), pp. 27–40.

⁸“With the politics of equal dignity, what is established is meant to be universally the same, an identical basket of rights and immunities; with the politics of difference, what we are asked to recognize is the unique identity of this individual or group, their distinctness from everyone else.” (Taylor 1994, p. 38).

⁹“The politics of equal dignity is based on the idea that all humans are equally worthy of respect. (...) For Kant, whose use of the term *dignity* was one of the earliest influential evocations of this idea, what commanded respect in us was our status as rational agents, capable of directing our lives through principles. Something like this has been the basis for our intuitions of equal dignity ever since, though the detailed definition of it may have changed.” (Taylor 1994, p. 41, referring to Kant 1785).

¹⁰“I will actually argue against a reading of the dignity idea that makes it the goal or *telos* of human rights. I think it makes better sense to say that dignity is a normative status and that many human rights may be understood as incidents of that status.” (Waldron 2012, p. 18).

¹¹“A more interesting duality of uses has to do with the distinction between dignity as the ground of rights and dignity as the content of rights.” (Waldron 2012, p. 18). See also Waldron (2015).

dignity as *Würde*. In Waldron's view, the historically constructed notion of human dignity rests on the Classic and Christian cultural notion of dignity, as a specific feature of human beings, both in morality and in law.¹² And, still differently, in Stephen Riley's view, law must be limited by human dignity, and this latter cannot be understood without the former, which means that human dignity has normative value and content, establishing a very tight relationship with law (Riley 2018, 2019).¹³

In fact, the reflection proposed here focuses on the differences between the signification of human dignity as *merit* and the usual consideration of human dignity as *value*, which requires the presupposition of Waldron's notion of *rank* or *statute*—since the word *value* assumes many meanings in the discussion on dignity, which, consequently, often become undistinguished. Therefore, such a reflection on the meaning(s) and content(s) of human dignity, from a juridical-philosophical point of view—and, thus, directly posing the question of the foundation, the meaning and the content of human dignity in and for the law—, requires questioning the distinction of moral, philosophical and constitutional understandings of human dignity, as well as the understanding of the foundation and of the constitution of the meaning of juridical subjectivity and intersubjectivity. And, concomitantly, it establishes the material foundations for the reciprocal conference of the quality of *subject of law* and the corresponding delimitation of the domain of relevance of the law itself—and specifically asks in which terms the plural meanings of human dignity constitute value(s) and/or right(s), both in terms of the reasoning and of the institutionalization of the juridicity.

Beyond *merit* and/or *value*, but also within these two notions, and on the cultural and philosophical heritage they represent—mostly between Kant's understanding of *dignity* and Hegel's proposal on *recognition*—, from practical-axiological to theoretical-procedural approaches, human dignity is increasingly seen from several different perspectives, which can exemplarily be stated in two main outlines: as a *universal* or a *regional* intrinsically formal-procedurally presupposed or constructed feature of human beings, on the one hand; and/or as a *universal* or a *regional* intrinsically substantial-axiologically presupposed or constructed feature of human beings, on the other hand. This means admitting human dignity as a signifier with multiple signified possibilities (meanings) and contents—considering that it will make sense only if it is substantially densified in space and in time, as, after all, Aharon Barak also assumes: “Indeed, any understanding of human dignity is based upon a given society’s understanding at a given time, which might change as times

¹²“‘Würde,’ in sense of the passage in Kant’s *Groundwork*, expresses a type of *value* or a fact about value. ‘Dignity,’ by contrast, conveys the idea of a type of *status* that a person may have.” (Waldron 2012, p. 24).

¹³“Law must be understood as limited by the demands made by human dignity. Conversely, human dignity cannot be properly understood without clarifying its interaction with legal institutions and legal practices.” (Riley 2018, *Preface*). “The most general form of this question of foundations is whether and how human dignity is foundational (i.e., necessary) for certain laws and, conversely, if and how law is foundational (i.e., necessary) for human dignity.” (Riley, 2019, pp. 439–440).

change. Therefore, I do not accept the opinion that human dignity is an axiomatic, universal concept.” (Barak 2015, p. 6). “Human dignity as a social value reflects human dignity’s place among the values of a given society at a given time.” (Barak 2015, p. 12).

2.2 *Human Dignity as a Dialogical-Procedural Feature of Human Beings*

Surrounded by such a cultural and historical scenario, in a twofold theory, Rainer Forst’s concept of human dignity as *reason-giving* represents an illuminating example of how the understandings of intersubjectivity may change within the corresponding understandings of human dignity, from an axiological-substantive *value* to a discursive-procedural *right to justification*. Criticizing transcendent and religious perspectives on human dignity, Forst proposes what he calls a “historically reconstructed” concept of human dignity—mostly inspired in Ernst Bloch’s conception—, as “a context-transcending normative understanding of the person as the basis of fundamental moral claims and as the ‘ground of critique’ of social norms”¹⁴.

Such a proposal requires an essential (core) notion: the notion of *person*. And *person* as a specification of *human being*: “(. . .) the person as a justifying being, as a being who uses and ‘needs’ justifications in order to lead a life ‘fit for human beings’ among his or her fellows”.¹⁵ So, being a person presupposes, in this approach, first, to be a human being, and, second, to be endowed with a *right to justification*—meaning “(. . .) a right to justification of all actions or norms that affect them in morally relevant ways – and acknowledging that every moral person has a duty to provide such justification”.¹⁶ Such an approach presupposes understanding societies as *orders of justification*, still considering their “complex and plural contexts and narratives of justification”, and pointing out that persons, as “normatively

¹⁴“Contrary to the view that any answer to this question must rely on a transcendent, religious justification, (. . .) I will make a plea for a historically reconstructed, yet context-transcending normative understanding of the person as the basis of fundamental moral claims and as the ‘ground of critique’ of social norms”. (Forst 2011, p. 966). See also Bloch (1987).

¹⁵“This involves a notion of the person as a justifying being, as a being who uses and ‘needs’ justifications in order to lead a life ‘fit for human beings’ among his or her fellows.” (Forst 2011, p. 966).

¹⁶“Recognizing this dignity means seeing persons as beings who are endowed with a right to justification of all actions or norms that affect them in morally relevant ways – and acknowledging that every moral person has a duty to provide such justification. In a reflexive turn this right is to be seen as the most basic right because it is the presupposition for being able to orient oneself autonomously in social space as a “space of reasons”.” (Forst 2011, p. 966).

independent beings within the space of reasons”, are ‘critical’ beings who never comply with just one given order of justification”.¹⁷

Forst presupposes human dignity as “(. . .) a status that applies to human beings as human beings, regardless of their specific identity”,¹⁸ not considered in terms of basic needs or substantive social condition,¹⁹ but as an expression of self-determination, of reciprocal respect for the autonomy of each other, or, in other words, specifically, as a *right to justification*—referring to Kant, as the “worthiness of every rational subject to be a law-giving member in the kingdom of ends”. And, therefore, a concept of human dignity with moral and political roots and consequences in its construction and content,²⁰ considering each person as a law-giving member in a community.²¹ Consequently, all human beings would have an “unconditional right to justification”, as a “basic right on which all other basic rights are founded”. The right to justification would, then, be the first human right and the basis of all other human rights, so that: (1) “to possess human dignity” would mean to be “an equal member in the realm of subjects and authorities of justification”, independently of the capacity to actively exercise the capacity of justification; (2) “to act with dignity” would mean being “able to justify oneself to others”; (3) “to be treated in accordance with this dignity” would mean “being respected as such an equal member”; (4) “to renounce one’s dignity” would mean “no longer regarding oneself as such a member but as inferior”; (5) “to treat others in ways that violate their dignity” would mean “regarding them as lacking any justification authority”.²²

¹⁷“To understand societies as orders of justification in this sense is not to imply that they do not contain complex and plural contexts and narratives of justification, but it does mean that basic claims exist which point beyond these contexts and call for a new order. Conceiving of ourselves as being normatively independent within the space of reasons makes us into ‘critical’ beings who never comply with just one given order of justification.” (Forst 2011, p. 966).

¹⁸“In contrast to the dignity of a craftsman, who regards it as ‘beneath his dignity’ to perform or be required to perform substandard work, ‘human dignity’ refers to a status that applies to human beings as human beings, regardless of their specific identity”. (Forst 2011, pp. 966–967).

¹⁹“The violation of dignity consists in being ignored, not counting, being ‘invisible’ for the purposes of legitimizing social relations. In issues concerning human dignity, therefore, one should not think in terms of the end, of (objective or subjective) conditions or states of affairs, but of social relations, of processes, interactions and structures between persons, and of the status of individuals within them. (. . .) Being recognized in one’s dignity as a human being means, in general terms, not being ignored in questions that concern one in essential ways.” (Forst 2011, p. 967).

²⁰“As already suggested, the general concept of human dignity is, by contrast, inextricably bound up with that of self-determination in a creative and simultaneously moral sense that already involves a political component. At stake is one’s status of not being subject to external forces that have not been legitimized to exercise rule – in other words, it is a matter of being respected in one’s autonomy as an independent being. Kant captured this idea in terms of the ‘worthiness of every rational subject to be a law-giving member in the kingdom of ends’.” (Forst 2011, p. 968).

²¹“To be such a law-giving member means not being disregarded when it comes to legitimizing moral action or social rule, and knowing that one should not disregard others in this respect either, that one is subject to the law oneself.” (Forst 2011, p. 968).

²²“This conception of dignity, and correspondingly of respect for others as ‘ends in themselves’, means that humans must be regarded as beings who have an unconditional right to justification, a

Reflecting on this proposal of a *critique of relations of justification*,²³ some points on its content and effects must be underlined, in order to establish further discussion on the meaning of *human dignity*, generally, and in *law*, especially.

The first point involves considering the basic *right to justification* proposed by Forst as consisting of the need to ascribe to every person a *veto-right*, the right to reject any action or affirmation that could not be *general* and *reciprocal*, meaning that generality and reciprocity would be the decisive criteria in social interactions, so that “the criteria of validity of reciprocity and generality become transformed into criteria of discursive justification”.²⁴ In such a discursive approach, the basic right to justification would constitute the starting point to, on a second level, any political constructivism of rights in concrete legal communities.²⁵ And it should be understood from the point of view of social relations as *power relations*—according to Forst’s critique of power, primarily as a discursive phenomenon, regarding an essential concept of *noumenal power*.²⁶ In fact, this view allows for the objection that it is not always assured that every person may act his *right to justification*, even if we consider that every person is the titular of such a right, which means that we must consider that it is not always possible in reality to construct a relationship in which each subject may reject any assertion which is not general and reciprocal.

basic right on which all other basic rights are founded. To *possess* human dignity means being an equal member in the realm of subjects and authorities of justification – an attribute, I should add, that does not depend on the active exercise of the capacity of justification, which would exclude infants or disabled persons. Correspondingly, to *act* with dignity means being able to justify oneself to others; to be *treated* in accordance with this dignity means being respected as such an equal member; to *renounce* one’s dignity means no longer regarding oneself as such a member but as inferior; and to *treat* others in ways that violate their dignity means regarding them as lacking any justification authority.” (Forst 2011, pp. 968–969).

²³ See Forst (2011), p. 972.

²⁴“When it comes to justifying morally relevant actions in a social context, the decisive criteria are reciprocity and generality, since such actions must be justified by appeal to norms that can claim to hold in a reciprocal and general fashion. If one proceeds recursively from the claim to validity of such norms and asks what conditions must be fulfilled in order to redeem it, the criteria of validity of reciprocity and generality become transformed into criteria of discursive justification.” (Forst 2011, p. 969).

²⁵“The underlying basic right to justification leads not only to substantive basic rights, but first of all to guarantees of participation in the processes in which such basic rights are formulated and justified. In this sense, the right to justification excludes paternalistic stipulations and denials of rights. Thus, on a second level, in addition to the moral constructivism that is abstract in nature, a more contextualized, discursive ‘political constructivism’ must be conceived which determines the basic rights and claims that should hold in a concrete legal community, always under the proviso that all those who are at risk of suffering disadvantage or discrimination have a reciprocal right of veto.”. (Forst 2011, p. 969).

²⁶“Against this background, power must be regarded primarily as a discursive phenomenon, indeed, however apparently paradoxically, as a noumenal phenomenon.” (Forst 2011, p. 970).

The second point, and the subsequent objection, refers to the consequent universalizability Forst ascribes to that discursive construction of human dignity in reference to a *right to justification*. In fact, such a discursive approach based on the right to justification, in Forst's proposal, would, by its nature and structure, avoid the objection that the comprehension of human dignity in question and its ground on moral autonomy would be purely "western", non-universalizable.²⁷ This second objection, as a result of the first point considered, is mainly that such a "critique of relations of justification"²⁸ model would require the establishment of an intersubjective model stating a "basic structure of justification" as a fundamental claim of political and social justice.²⁹ Such a condition, which is certainly desirable, is still nowadays hardly accomplishable in several contexts.

The third and final point asserts that the approach may be much different if we think the foundations of intersubjective relations as being settled on *foundation* and not on *justification*. In fact, *justification* could, at the limit, allow for an acceptance *ex post* of any assertion; in contrast, in the approach assumed in this reflection, *foundation* means affirming *ex ante* any assertion. Therefore, in this approach, the statement of the value judgment underlying relationships, mostly in law, rests on the juridical foundation of each assertion presented within it. Which means that any assertions in juridical normativity are built on an axiological set of values, internally built by or filtered by law, as their presuppositions, not on external assumptions externally imposed to law. This is, in the current approach, the differentiating feature of the autonomously constructed normativity of law, conferring on such assertions their juridicity (Neves 1999).

Understanding these different meanings, and their relevance within law, requires us, then, to deepen the effective densification of human dignity as a constitutively juridical value, and of juridicity as a selectively substantiating, regulating and critical instance of praxis, in a materially autonomous sense (Neves 2002, pp. 864–866; Neves 1996, p. 32 ff.; Neves 2008b, pp. 127–128; Neves 2009; Loureiro 2008, pp. 675–704).

²⁷"The idea of the dignity of the human being as a being equipped with the right to justification makes it possible to address and defuse the objection that the central conception of moral autonomy involved is a purely 'western', non-universalizable one – a specific aspect of the general problem of cultural immanence versus critical transcendence." (Forst 2011, p. 971).

²⁸"Thus the 'critique of relations of justification' has a number of different meanings. First, it has the meaning of the critical analysis of non-justifiable political and social relations, including those in the economic and cultural dimensions – relations of discrimination, of exclusion, of deficient emancipation or equality of opportunity." (Forst 2011, p. 972).

²⁹"The basic claim of political and social justice with regard to this process is to establish a 'basic structure of justification'". (Forst 2011, p. 972).

3 Human Dignity and Juridical Dignity, from Human to Post-human...

Conceived from the idea of human dignity, juridical dignity—as a condition and a substrate to conferring rights and duties—currently faces decisive challenges as to its intentionality and to its content: once the human being ceases to be the only constitutive subject of law, it is the intelligibility matrix of law itself that is changed, producing a shift as to the characterization of the centre of imputation of juridical subjectivity and intersubjectivity. The traditionally established reciprocal recognition of a specific condition of personhood will therefore be outdated.

If and as long as being human assumes a member of the human species as the imputation centre for determining juridical relevance and consequent responsibility, even if within a chain of levels of control increasingly established through *artificial intelligence*, this intersubjectivity will be assumed and thought through the analogy with historical-cultural experiences, by reference to different perceptions of *being a person*, and the notion of *dignity* that corresponds circumstantially to it... The question will, however, be completely different if this type of intersubjectivity is not the only one: that is, if one or more subjects intervening in the legally relevant relationship may not be persons. If the term *post-humanism* designates, among multiple specifications, generically, overcoming *humanism*—the humanism of the Roman *humanitas*, but also, and in sequence, the *humanism* of the Renaissance, as Heidegger summons them, from the outset in *Brief über den Humanismus* (1947)—, even of *the human*, nowadays, beyond the limits of human intelligence, whether through *postmodernism* or *transhumanism*, it is proposed here to reflect on *humanity* as the conjugation of the *given* and the *acquired* as elements of the constitution of *the human*, in the sense in which, for example, Jesús Ballesteros (Ballesteros and Ruiz-Gálvez 2007) has presented—as based on Nietzsche's *Übermensch*, but, paradoxically, by abdicating the reference to *amor fati*.

As long as the notion of being a *subject of law* presupposes being *a person*, and, with that, *a human being*—or a collective composed of human beings—that will be the fundamentally guiding characteristic to confer the quality of *holder* of subjective rights and legal duties—and, consequently, the dogmatically constructed requirements, for the meanings of legal personality, capacity for the enjoyment, and, in a certain way, and under certain conditions, the exercise of subjective rights and, concomitantly, of legal duties—, and will correspondingly imply the identification of a rational imputation centre, integrated in an element of the human species: the fundamental question—the *paradigm*—remains, therefore, in *being a person*, also because it implies *personhood*, firstly, and *personality*, next. Human dignity, so specifically taken under the requirements of the meaning of the *reciprocal recognition*, as Castanheira Neves proposes, requires assuming that only the *reciprocal recognition* of a civilizationally contextualized sense of human dignity—considering human subjects—, understood as an axiological-culturally raised element, constitutive of legal subjectivity and intersubjectivity, constitutes the support of a *materially autonomous sense of law* (Neves 2008a, pp. 10–14; Neves 2008b;

Linhares 2008, pp. 426–427). If, and/or when, the subject of law is no longer a *person*—or a collective of persons—, there will be not only an alternative sense of legality, there will also be a different sense of intersubjectivity—not just juridically, in particular, but socially, in general... In such intersubjectivity, personality would possibly not prevail any more, and it could be presented in a gradation of centres of rational imputation, at least as human and non-human.

4 Human Dignity and Law, Among Merit, Value, and Justification: From an Ahistorical-Natural Given Value to a Historical-Axiological Construction

Reflecting and taking the different approaches considered above, proposing a discussion on the meaning(s) of *human dignity* in law will be stated through the possibility of ascribing a normatively constitutive character to the *reciprocal recognition* of *human dignity* as the background of legal (inter)subjectivity. In fact, as Nicholas Aroney too recently wrote, human dignity presupposes not strict *individuality*, but also *community* (Aroney 2021). Therefore, the signification of *a person* as *a legal subject* (not only in its legal *personality*, but also in its legal *personhood*, whilst considering other possible *legal subjects*) will require questioning; and, above and beyond, it will involve the assertion of an axiologically constitutive autonomous normative foundational conception of law as the constitutive background of that specific *human dignity*—thus reflecting on the legal meaning(s) of the *autonomy of subjects* (and the inevitably corresponding dialectic between *liberty* and *responsibility*) within the *autonomy of law*.

Proposing *human dignity* as a value, and, specifically, as *the* essential value in the foundation of law, would present no innovation at all, it can be said. But the question is not the enunciation of such a *value* as a *premise*; the question is: what does it mean to say that *human dignity* is the essential *value* foundation of law?

So, still, considering *human dignity* as a *value* in the foundation of law requires distinguishing ahistorical-natural given values to historical-axiological constructions, on the one hand, and, consequently, on the other hand, moral and juridical differentiating value, generally, in social practice, and, specifically, in legal practice.

As Michel Tournier points out, in his book *The Mirror of Ideas* (*Le miroir des idées*, 1994), in our cultural identity, like in a game of cards, some features constitute the *given*, and some other the *constructed*. In the former Tournier includes “(...) our hereditary genes, our physical makeup, our dispositions” (Tournier 1998, p. 109). It is, though, not the whole story, as Tournier follows: “But it is also the milieu into which we were born, where we grew up – which we have not chosen any more than the colour of our eyes”. And, in the latter: “It is then necessary to ‘construct’ our life. First, our culture (...). Second, our apprenticeship (...). Finally, our livelihood (...)” (Tournier 1998, p. 109). Considering *human dignity* in law as a *constructed* feature—as a *value*—, not a *given*, or intrinsic, one, requires positing its content not

only as *merit* nor merely as any *intrinsic value*, on the one hand, and the acknowledgment that *human dignity* cannot be reductively understood as an externally *constructed* or *given* value to be ascribed to law, on the other. Such a rejection means that *human dignity* in law and *to law* represents a specific merit ascription *and* value recognition. Of course, it may be—and surely, at least historically, as it has been said, it is...—inspired, or effectively grounded, on the cultural references of ethics, morality, and religion, at least. But what is crucially stated here is that, within law, and so within its specifically autonomous intention, content and requirements, *human dignity* is rather an essentially normative internal material foundational feature and value conferred *by law* to legal subjects. This means that law, if considered in the autonomous meaning presented, not only reflects on its content and prescriptions the practical-axiological judgments of each community, but it also specifically interprets, transforms-translates and construes its own reflection on those practical-axiological judgments—which means recognizing a dialectical relationship between law and reality, in which both the contents and the valuations are dialogically constructed and reciprocally influenced. It means, in its turn, that law is not only a mirrored reflection of history, but nor is history only a mirrored reflection of law (Gaudêncio 2008). Which is also to say, in our present context, that *human dignity* is not only a mirror of law, but nor is law only a mirror of *human dignity*. Therefore, the meaning of *human dignity* which law considers is the *human dignity* it constructs, by considering, in its foundations, the *human being* as the *core* of every practical valuation—and this means also that *human dignity*, *human legal dignity* and *legal dignity* may also differ. And all this requires, in fact, the recognition of different *problems* within the structure and content of *juridical dignity*, from that of distinguishing *who* or *what* is worthy of legal protection—after all, the very original *problem* from which law arose—to that of recognizing *who* or *what* can assume the position of *legal subject*—after all, the very original *subject* for which law arose.

The structural understanding of the foundations of law are, then, assumed as the civilizationally outlined possibility of identifying some *values*-projects as essential vectors for juridically relevant intersubjectivity—that in which something *inter-est*, that justifies the relativization of the intervening subjects, whilst recognizing them as subjects with a specific *dignity statute*, other than that which refers to absolute relations; a *juridical dignity statute*, in a specific definition of the relative position of the subjects, as a concretization of normative principles in practical criteria. And so, as mentioned above, assuming the *normative principles as normatively juridical principles*, as concretizations of that presupposition of dignity, as conditions for the possibility of a project of construction of juridical intersubjectivity, and, after all, as self-transcendental axiologically juridical foundations intersubjectively assumed from and intending to practical validity, in continuous construction and historical re-densification.

All that has been said is based on an axiological densification of a continuously constituting conception of juridicity, which, far from implying a return to a natural law theory (jus naturalism), establishes its basis on intersubjectively aggregating and historically constituting axiological valuations, thus refuting a strictly social-

political overlapping consensus³⁰ or a strictly formal-procedural discursive determination.³¹ It rather regards those values as self-regulatory and self-transcendental axiological references—as *conditions of possibility*, but in the self-availability of the members of the concrete historical community in question; and, therefore, neither of pure empirical contingency—since they assume themselves to be binding ideals—, nor of heteronomous origin—since they result of historically human constitution and reconstitution (Gaudêncio 2012). And it intrinsically implies assuming that *human dignity* is a signifier with as many (signified) meanings and contents as the civilizational experiences considered—since the generic category of human dignity will only make sense if substantially densified, in context (Marques 2009)—, for only the *reciprocal recognition* of that *dignity*—understood as an organic element of juridical subjectivity and intersubjectivity, and of their respective effectiveness—may constitute, to concord with Castanheira Neves, the support of a *materially autonomous meaning of law* (Neves 2002, pp. 869–870). Such a *recognition* of such a *dignity* as a constitutive element of law, whilst not forgetting the contributions of other normatively relevant and juridically practical dimensions, confer on law the *role* of an indispensable intersubjective instance, normatively regulative and reflexively critical of the social praxis.

After all, both *law* and *dignity* should be critical and genealogically continuously reviewed in the underlining of the normatively constitutive possible projections of asserting *human dignity*. *Human dignity* is to be considered not only as an externally *constructed* or *given* value to be ascribed to law, rather it should also be proposed as an essentially normatively-internal material foundational *construction*, as a feature and as a value to be recognised in law, generally, and conferred by law, specifically—standing on the essential assumption of *reciprocal recognition*, beyond a dialogical-procedural justification, and, so, ascribed as a dialogical-axiological valuation. The meaning of juridicity underlying this statement, within a jurisprudentialist perspective, as constructed by Castanheira Neves, affirms a materially autonomous determination of juridical intersubjectivity as a specific type of intersubjectivity—that in which the subjects refer to an object through a *tertiality*, exactly proposed by what is meant as *law*, the *tertium comparationis*, emerging as a collection of specific cultural values in force in each spatial-temporal framework, built on a concrete community self-availability (Neves 2008b, 2009). There, these values represent, on the one hand, a historical construction—the manifestation of the irreducible dimension of constitutive historicity that the law presupposes—, on a first level, of historically constituting axiological valuations; that, on a second level, manifest themselves juridically in fundamental normative principles; and, in a third level, assume the crucial axiological acquisition of the notion of *person* as the *subject* of law, requiring the reciprocal recognition of the

³⁰ Considering here the overlapping consensus in the fundamental construction of Rawls's political liberalism, especially in Rawls (2005), pp. 133–172.

³¹ Considering here, exemplarily, Habermas's proposal, especially as exposed in Habermas (1992), pp. 516–537.

ethical dignity of each person. And, on the other hand, those *values* represent the projective reference horizon for the self-binding normativity of law (Neves 2002, pp. 863–871; Bronze 2019, pp. 170–196, 480, 490–543, 570–579; Linhares 2006, pp. 59–64; Linhares 2007–2008, p. 117; Marques 2009, p. 566; Gaudêncio 2019, pp. 108–169; Gaudêncio 2020, pp. 777 ff.).

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Between Principles and Rules



An Itinerary Around Law's Morality and Human Dignity

Silvia Niccolai

Abstract The relationship between human dignity and Law, and between Law and Moral, are closely linked to the way in which we think of Law and theorize it. E.g.: if we understand Law as a set of commands assisted by sanctions, this, firstly, certainly does not enhance the dignity of the subjects of the Law, who are conceived as passive recipients of orders. Secondly, it leads to separating Law from Moral, which cannot be coerced, but drives us also to imagine Moral as a sort of Law, a set of rules addressed to individuals from the outside (from traditional habits, for example). One meaning of the word ‘moral’ fades, the one in which it indicates a quality of every single human being: ‘moral’ because intelligent, conscious, capable of choice. The same happens if we think of Law as a technique of social engineering and control, which directs human behaviour (even towards ends deemed morally valid, or useful). In all cases the result is seeing both Law and Moral as ‘objective’ realities that operate separately from the moral contribution of individuals, without the contribution of their sense and their intellect. In a word, separately from the subjective dimension. Whereas it is in this dimension that human dignity is rooted.

These considerations presupposed, the paper starts by recalling Dworkin’s theses, which have meant a big change in the conceptions on Law and its relations with Moral. What, precisely, and how much have they meant in favour of a more ‘dignified’ (morally free and equal) vision of the ‘subjects’ of Law?

Without intending to give a general answer to this question, but aiming only to propose a practical example, the chapter follows the paths of Dworkin’s thought in a legal culture strongly imbued with normativism, legal positivism, and legal instrumentalism, such as the Italian Constitutionalism. Here, ‘principles’ and ‘rules’ have been understood as functional equivalents of the ‘norm’ and not much has changed in the traditional view according to which Law is an instrument of social engineering, to the performance of which the moral freedom of the agent is scarcely relevant. This is due, the chapter argues, to the unwillingness of many scholars to recognize as a true ‘principle’ one of Dworkin’s examples, which is a *regula iuris* rooted in

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Roman Law and in the '*Ius commune*': the prohibition of unjust enrichment. After suggesting some historical and cultural reasons that may have hampered the recognition of a principle in a *regula*, the chapter compares the dominant views with Alessandro Giuliani's alternative reading of the principles/rules issue. Giuliani's point is that principles are *regulae*, exactly in the sense of the ancient *regulae iuris*, which are as many constitutive principles of Law. The *regulae* are 'observations' and 'interpretations' of human behaviours; they are descriptive more than prescriptive; they function as centres of argumentation oriented by a logic of the 'preferable' which is rooted in experience and in common opinion, Giuliani maintains. Thus, the *regulae* express the connection between Law and the world of human action; they are reminiscent of an idea of Law not separated from the subjective experience. Thinking of principles as *regulae*, Giuliani renews the theme of the 'internal' Morality of Law, arguing that Law always presupposes the intelligent cooperation of (and between) human beings. This brings us to an intense re-evaluation of human dignity—as freedom and equality of, and among, moral beings in Law, which Giuliani evokes with the dialectics between the Moral of Obligation and the Moral of Virtue.

1 Maxims of Equity in Dworkin's Examples

1.1 Ancient Precepts

In order to explain his famous theory, Dworkin gave some examples of what a principle is and why it is different from a rule. The first example was illustrated in the *Riggs v Palmer* case, 1889, where a New York Court found that the defendant, who had killed the person whose estate he was the heir of, could not inherit; and this held notwithstanding the silence of the Law in this regard (Dworkin 1982, p. 91).

The principle that the judges relied on in that case corresponds with the legal adage *Nemo locupletari debet ex aliena iactura*, a *regula iuris*. The *regula* is in its turn a specification of the general precept *Neminem Laedere*, of the maxim *Ex dolo malo* and of similar sayings, all of which express the idea that no one should benefit from his wrongful acts.

The *regulae iuris* are a patrimony of precepts, criteria, or principles "in a generic sense" as Dworkin would say, that come from the ancient Roman Law and formed the basis of a European Common Law in the Middle Ages. Even after codification, this heritage has remained rather alive in Continental Europe too. Instances of correspondences between the *regulae* and the maxims of equity have for long been important in the education and practice of common law lawyers and the same goes for the compilations of *regulae* used by continental jurists.¹ In Italy, after the

¹ Compare Wharton (1925) to De Mauri (1936). Today, collections and translations of Roman maxims for passing legal exams and succeed in legal practice in Common Law Countries are disseminated on the internet, e. g. *Top 121 legal maxims for law exams*, on writinglaw.com. Of

Civil Code of 1865, the Courts continued to apply the *regulae iuris*, even though scholars disapproved: these latter, who had in the whole adopted a legalistic approach, taught that all Law was in the Code (Giuliani 1982, pp. 190 ff.).

The judges who referred to the *regulae* were of the same mind as the New York Court of Appeals in *Riggs v Palmer*, which was to moderate law and contract, taking into account something which has always to be recognized, even though the written law does not state it. This, if Law has to be truly Law, they thought. And indeed, after all: what Law would it be that rewarded the illicit and the fraud, or abuse? In 1877 the Florence Court of Cassation ruled that the Law could not but recognize the principle *Malitiis non est indulgendum*, even though the Code did not mention it. If law tolerates a situation where someone builds a wall on his property only in order to harm the neighbour, no one would believe in Law for long. And in what sense shall it be spoken of Law, in a country where the Ruler can harm the rights of the Ruled? Paralleling *Riggs v Palmer*'s concepts, the Rome Court of Cassation stated, still in the second half of the Nineteenth century, that an expropriated landowner had a right to compensation, and this precisely thanks to the moderating function of Law (Colorni 1946, p. 673). In fact, neither the Code nor Statute (the Constitution of that time) provided it. In the absence of any norms applying to work contracts, some Courts affirmed, on the basis of the *Cuius commoda eius et incommoda* principle, that the employer had to pay the employee also during periods of illness (Roselli 1980, p. 673).

Jumping in time to 1999, when assisted reproduction techniques were already widespread in Italy but not yet regulated, the *regula iuris Nemo venire potest contra factum proprium* transparently influenced a decision of the Court of Cassation which denied the right to disavow paternity to a man who had consented to his wife's heterologous fertilization (Patti 2000, p. 14). In 1992, a building abuses condonation law was annulled. In a ruling where exactly the same point of view held by the Florence Cassation of 1877 still resonates, the Constitutional Court reasoned that benefiting abusers had adverse effects on public faith and discouraged people from engaging in correct behaviour, thereby violating the *Neminem Laedere* principle, "constitutive of a juridical order".

1.2 Examples and More Than Examples

As an example of principle, Dworkin chooses a *regula*; but it must be said that Dworkin does not intend at all to rediscover the old maxims as legal principles due to some features specific to them—relating, for example, to their contents or to the way

course, *Regulae* and maxims do not fully coincide, and the compilations are not always the same; but there are strong concordances however, which signify the unity of European law prior to codification (Giuliani 1957, p. 99). On the decline of the maxims in English law as a consequence of the advent of legal positivism see McQuade (1996, pp. 75 and 78); on their longer survival in US Law: Winkel (2001), who explains with this the examples chosen by Dworkin.

in which these precepts have been formed. Principles express “exigencies of justice, correctness, or some other dimension of morality”; they come from “implications of the legislative and judiciary history” or from the “practices and interests of the community”. To Dworkin, it is not so important where the principles come from, what counts is how they perform.²

Even though Dworkin does not say that maxims *are* the principles of the law, in his arguments the presence of maxims is not limited to the mere quotation of an example or two. To the contrary, maxims are at the basis of his theory. It is the antique maxim of equity indeed, “treating like cases alike”, that plays the pivotal role of avoiding the Courts adjudicating on the basis of changeable policies, instead than on the basis of principles.³

Besides, the salient characters that Dworkin assigns to principles transparently recall the *regulae*’s operation in the *interpretatio* based on fairness (equity) which was typical of Middle Age jurists’ reasoning. The Italian Law philosopher Enrico Pattaro, in an important essay from 1987, recalled that in the post-classical period and up until the modern age “judges and lawyers did know well that there were many exceptions to the *regulae*, that these latter had not to be taken literally and could not be applied to all cases”; and he observed that “it is then clear that this point is of the greatest interest in relation to the recent and reputed theory of Ronald Dworkin on law’s principles, which distinguishes these latter from the rules,⁴ among others things, for their flexibility which allows exceptions without prejudice on the validity of principles”.⁵

²In an essay of 1921, Roscoe Pound had posed the question whether the common law maxims, whose link with the *regulae iuris* was clear to him, could be considered general principles of law. To this question, which could have led to identifying a substantial content proper of the legal experience, the theorist of the law as social engineering technique responded in the negative: to function as principles, maxims need to be framed in a theory, in a legal conception, that explains and directs their functioning, otherwise they are “not yet” true principles. For Pound, a mature law system contains rules, principles and conceptions; each of them performs different functions in the system, which must be made explicit by a theoretical model (Pound Pound 1921). It could be said that Dworkin has provided a theory in which to frame the *regulae*.

³Rebuffa (1980, p. 219), who uses the Italian word *regola* in order to refer to what Dworkin calls principle; that is interesting in relation of the arguments discussed below.

⁴*Regole*, in Italian.

⁵Pattaro (1987, p. 41). The point refers to the classic discussion on the medieval *brocardo Exceptio firmat regula in casibus non exceptis*, but it is worth noting that it was Paul’s maxim, which opens the Digest’s Book *De Regulis Iuris Antiqui*, to affirm that a rule can be put aside if *in aliquo vitiatum* (that is, if not apt to a certain case or to a certain need), while continuing to be valid for the rest. Paul’s definition was the object of the medieval jurists’ *traditio regulae* (which consisted in the effort to understand Paul’s definition of the *regula*, in order to apply it in practice) and therefore it is the basis from which reflections and practices have sprung up over time around the fundamental concepts of law: i.e. what a rule is, how it has to be applied, when it is valid, when it is not, etc. Paul says: “*Regula est, quae rem, quae est, breviter enarrat; non ut ex regula ius sumatur, sed ex iure quod est regula fiat. Per regulam igitur brevis rerum enarratio traditur; et, ut Sabinus ait, quasi causae coniectio est; quae simul cum in aliquo vitiatum est, perdit officium suum*”.

Furthermore, it is well known that at a medieval trial the *regulae* did assign a presumption in favour of the party who could invoke one of them as support of his action or claim, which recalls the dimension of weight of Dworkin's principles.⁶ Often in Dworkin's speech on principles the many metaphors do resonate, the same metaphors that have flourished in the bi-millennial elaboration of which the *regulae* have been the subject: the principles that offer a direction, without containing a decision, closely recall the *regulae* as "indicators of the law" of which Francis Bacon famously spoke. There are surely reminiscences of classical times behind the image of the judge Hercules. This latter, after all, does nothing but offering a substantial imago of the results that can be attained thanks to the *subtilitas* that Justinian recommended the interprets of the Digest to make use of, even though of course, Justinian's advice could also describe the efforts expected from an exegete in interpreting the law in books. In Dworkin's idea, according to which a rule becomes a principle thanks to the addition of expressions like 'normally' or 'according to good faith', it resurfaces exactly the way in which, according to some law historians, the *regulae iuris* were formed. Peter Stein, the author of a classic work of research on the matter, states that those who compiled the Digest's Book *De regulis iuris*, which is at the origin of the *regulae*'s (and of the maxims of equity's) tradition, put together a whole of "juristic rules" (which were originally extremely detailed and very closely linked to a concrete and specific case), and *generalized* them by adding universalizing expressions like *nemo*, *semper*, *numquam*, *omnia*, etc.⁷

1.3 A Very Rich World

The success of Dworkin's theory can perhaps be explained, at least in part, by the fact that it sparks and evokes components of jurists' imagery and lexicon going back millennia (whether or not their memory is conscious) and are actually common among both common law jurists and civil law jurists.

It is not purely by chance that amongst the language and views advocated by Dworkin's opponents, references can be found to a world of ideas and expressions that, in the legal culture, have been shaped around the *regulae iuris*. Raz, for example, while criticizing Dworkin, described the principle as "a concise allusion

⁶See Pastore (1985, p. 14 and 28). The *praesumptio* granted to those who can invoke a *regula* in support of their claim is still today the reason why it is believed that recalling a *regula* or a *brocardo* strengthens the persuasiveness of a lawyer's arguments ("gain an edge with more content about legal maxims" is, e.g., the recommendation the India Asian Encyclopedia, see the website *india.lawi.asia*) even though the reasons that explain such a presumption, anchored to the logic of the preferable that we will explore when recalling Giuliani's thought, are perhaps got lost.

⁷Stein (1966), pp. 117–119, who, however, criticizes this method precisely because it would have betrayed the casuistic nature of a true judge-made law, typical in his view of the rules, moving them towards the model of norms.

to a number of norms”; this wording is very close to the definition of the *regula* offered by Paul’s fragment which opens the Digest’s V Book, where the *regula* is described as “*brevis rerum enarratio, quasi cause coniectio*”.⁸

Carriò, in his famous reply to Dworkin, started by saying that the prohibition of illicit enrichment (Dworkin’s example) is a principle or standard that, in law, plays the same role as the advantage rule in football. In developing this comparison, Carriò uses words that recall the operation of the *regulae* in the medieval *interpretatio*: the advantage principle/standard is addressed to those who apply the rules, refers to the way in which rules have to be applied, serves to justify exceptions, is neutral as towards the merit of the problem at stake and goes together with a negative logic,⁹ a logic of the dispute, which progresses by confutation and justification.

Carriò includes among principles the “maxims, aphorisms, proverbs, fragments of wisdom that come from the past and bring with them the worth of accrued experience and the prestige of tradition”; he considers the *usus fori* the best way through which principles become “positive”. Carriò aims to demonstrate that legal positivism does not at all ignore the “very rich world of principles”. His point is that, according to legal positivism, the operation of principles only depends on whether the norms of recognition of a given legal order recognize them (or not) (Carriò 1970, p. 92).

In the following I will report some features of the way in which a *regula* (the *regula Nemo audiatur allegans turpitudinem suam*) has actually existed in the Italian Legal experience of the Twentieth Century. Contrary to what Carriò maintains, a *regula* is changed when applied in a positivistic model, which greatly influences the way in which principles operate. But, apart from this, what I would like to point out now is that the ‘very rich world of the *regulae*’ surfaces behind both Dworkin’s principles and their criticism. This can be explained by the fact that the principles of ancient law have offered, over the course of time, room for the most diverse conceptions of the Law. To Kelsen, the *regula iuris* is the scholarly definition, as it is well known, a descriptive statement; to the German realists of the Free-Law movement the whole of the ancient *regulae*, exalted by the Pandettists, were the metaphor of a Law crystallized in dead dogmas and backstepped towards reality. But the *regula* of the *regulae*, the mother of all *regulae*, Paul’s statement: *non ex regula ius sumatur sed es iure quod est regula fiat*, was to them the emblem of the reasons of the living law against the dead letter. Over centuries, the *regulae* have lent themselves to uses and interpretation far different from each other; to quote another

⁸It is Pastore (1985, p. 31), who attentively recalls this Raz’s point (1972, p. 828). Giuliani’s thought, which we will retrace later, will help us to understand, if needed, that the model of the *regula* is recognizable also in those opinions, that define principles as standards of judicial technique having their source in common sense (Soper 1977, p. 75, also quoted in Pastore (1985), p. 35).

⁹This point is especially meaningful if connected to the Giuliani’s reading of the *regulae*, which, as we will see, focuses on their negative character (the *regulae* as tools to avoid what is wrong, not to establish what is right).

example, they were the model on which the modern rationalistic natural law doctrines moulded the principles (axioms) of an invariable logic from which all the law was presumed to be deductible (the *leges legum*).¹⁰

2 A Principles-Oriented and a Rules-Oriented Idea of Law: Does It Make Any Difference? Suggestions from the Paths of Dworkin's Distinction Between Principles and Rules in Italy

2.1 *Lost in Translation*

In Italy, Dworkin's *rules* have been translated with the word *regole*, which corresponds to the Latin word *regula*. This has surely something to do with the fact that in Italy, the connections between principles and *regulae*—though put to the forefront by Dworkin's main example, which is a maxim/*regula*—have been underestimated, especially by constitutionalists (even if recognized by some Authors, as I have recalled above). As a consequence of Dworkin's language, which leads one to think that a *regola* (a rule) by definition cannot be a principle, it has been forgotten that, for long, in Italian legal culture, the idea itself of law's principles was expressed exactly by the *regole* (the *regulae iuris*). This is not extraneous to another fact, often noticed: in the unfinished research on the differences between principles and *regole* which has followed Dworkin's reception in Italy, the definitions by which scholars try to grasp the concept of *regola* are very artificial and disappointing (Cerrone 2012, p. 633; Pino 2012, p. 3). As a matter of fact, *regola* is an expression to which nothing corresponds in the Italian legal language but principle, while the idea, which Dworkin expresses using the word rule, mainly corresponds to the concept of a norm. Actually, Dworkin's 'Principles and Rules' would had better translated into 'Principles and Norms'. But here the problem was that, in Italy, the constitutional principles have always been considered as norms, and for a long time, scholars' most predominant preoccupation, far from being that of researching the differences between principles and norms, was that of affirming their *identity*, in order to give constitutional principles the most juridical strength. In turn, the fact that in Italy constitutional principles have always been considered norms explains why the main accusations addressed to those constitutionalists who have adopted the distinction between principles and rules, is that of having worked against, or at the expense of, the normativity of the Constitution.

It is worth saying that the acceptance of Dworkin in Italy took place at a very peculiar moment, especially for constitutional law. After the Italian Constitution entered into force in 1948, legal positivism was the undisputed ruler of constitutional

¹⁰ As it happened in the Domat's and Pothier's systems, and see Stein (1966, pp. 178–179) on this turning-point.

interpretation. The Constitution, and all its many wide and general principles, was considered as a normative act superior to ordinary laws; a programme of action, which had to be put into effect by parliamentary laws (and judicial interpretation). Scholars at that time were confident that the Constitution, thanks to its superior normative strength, would bind legislators and ensure that they implemented constitutional principles, which were full of emancipatory and reforming content (it was normal to describe the Constitution as a ‘project of society’, that had to be realized through the law). The legislature, composed by representatives from political parties, appeared in turn as the organ most apt to interpret the demands of justice, recognition and emancipation arising from the society, demands that were considered coincidental to the constitutional principles imbued with instances of social justice.

In the 80s, when Dworkin was translated, these concepts were beginning to decline: distrust towards the legislature, which was distrust towards the political parties, started to take place. The elaboration of this crisis of trust took a long time, but it came to bear very significant fruits in the decade between the early 90s and the early 2000s. At that time the new ‘principles-oriented constitutionalism’ has taken shape, opposing the ‘rules-oriented’ or ‘legalistic constitutionalism’, faithful to traditional ideas. While legalistic constitutionalism still considers legal positivism, as Bobbio taught in the 1960s, the theory of law best suited to describe a constitutional democracy (because it states that politics is subordinate to the Constitution, which entrusts the task of its implementation to the legislators, who represent the people), this neo-constitutionalism maintains that it is rather Dworkin’s theory instead that provides the best explanation of how law functions in a Constitutional state.

2.2 A Principles-Oriented Constitutionalism

The two types of constitutionalism oppose each other because one maintains that the Constitution must be considered a norm, in the sense of a preceptive source of strictly normative nature (precisely *a rule*), while the other proposes the rediscovery of the Constitution as a set of principles, defined as the ‘bridges’ that allow the continuous adaptation of the law to the needs of society. The role of interpreter and implementer of the Constitution, as well as the role of interlocutor of societal needs, is transferred from the legislature and political parties, to the judge (in particular, but not only, the constitutional one); in this direction goes also the argument that, once the class struggle has faded and its interpreters have vanished, society is marked by a myriad of needs that cannot be traced back to political representation or systematized in an all-encompassing regulatory design.¹¹

¹¹The traditional references of progressive culture (the class struggle and the political party that expressed it, the communist party), had been lost. Progressivist jurists, who no longer saw the legislature as an expression of society and no longer considered society interpretable through the

Actually, the ‘principles-oriented constitutionalism’ has often been accused of having encouraged the non-physiological growth of powers of the judiciary, which has been witnessed in Italy, but, this said, much remains to say about its most relevant characteristics and implications. Principles-oriented constitutionalism, which in some ways differs greatly from Dworkin’s theses, rigidly adopts Dworkin’s distinction between principles and rules as an indisputable model, in order to underline the fact that, unlike rules—which function rigidly according to the ‘all or nothing’ criterion (i.e. if it applies it is valid, if it does not apply, it is invalid¹²)—principles are capable of more flexible and evolutionary interpretation; therefore, thanks to the balancing and weighting operations they allow, principles are a more appropriate legal tool to handle the complexity and dynamism of a constitutional democracy.

As mentioned above, principles-oriented constitutionalism has promoted such opinions within a tradition that had always considered the constitutional principles as true norms and the entire Constitution as a norm of recognition. The most innovative, scandalous and provocative aspect of these theses then lies not in the fact that they have encouraged, much less discovered, creativity on the part of the judge,¹³ but in two very different outcomes. Firstly, the principles-oriented constitutionalism has affirmed, rather implicitly but clearly, that *the Constitution could no longer be understood as the only norm for the recognition of principles* (and this is a completely logical and direct consequence of Dworkin’s positions) because principles come from the ‘meta-law’, which is to say, they come from what is *beyond* the law (from society, culture, etc.), and what is beyond law is also *beyond the Constitution as a norm*. Secondly, and for the same reason, principles-oriented constitutionalism has favoured *an adaptive interpretation of the Constitution itself* (after all, it is known that, even for Dworkin, principles “change rapidly”, and as

schemes of the class struggle, turned to principles and shifted their confidence to judges. Of such a change of mind important testimony is offered by an essay published in late 1980s by the prominent legal positivistic law philosopher Scarpelli, where arguments are developed, very close to those that Zagrebelsky would advocate in his celebrated book, *The Mild Law* (Zagrebelsky 1991), with which principled-oriented constitutionalism was founded. After noting that the crisis “of law as code” is interconnected with important cultural transformations, in particular with “the very strong acceleration of social transformations” that exacerbates conflicts that are no longer “reducible to the class struggle”, Scarpelli defines himself a “somewhat repentant believer in juridical positivism”, and declares his hope in judge-made law, with which “the principles of law come to the foreground in juridical experience”. Principles, Scarpelli maintains, from which “no consequences are deduced by way of narrow implications, [and which] serve to justify norms and decisions along the ways of a complex and flexible argumentative discourse”, are more apt than legislative norms to govern pluralistic democracies (Scarpelli 1987, p. 19).

¹²It is worth noting that this description of the *regola*, taken from Dworkin’s definition of the rules, is the point of maximum departure from the tradition of the *regulae iuris*, which instead operated along a logic of the exception, or of equity (see the quotation from Pattaro in par. I.1. above and also note 5).

¹³At the time of neo-constitutionalism’s rise, the law-making role of judges was already very strong in Italy, where the traditional formalistic conceptions of the role of the judiciary had gone through a massive anti-formalist revolt since the end of the 1960s.

such why should constitutional principles not change also?). The founder of pro-principles constitutionalism, Gustavo Zagrebelsky has always sympathized with philosophical (social) positivism's claims and greatly emphasized the need that law adapts to the needs of a changing society, needs that are interpreted—which goes without saying—by the society's *pars melior*.

In a nutshell: neo-constitutionalism has instigated an evolutionary process in the interpretation of the Constitution, which had always been imagined, on the contrary, as a table of values which although certainly not crystallized, was intrinsically stable and permanent, charged with the task of fuelling politics, but not destined to be fuelled in its turn from anything outside of it. The Constitution was imagined to be there to make politics evolve, and if the Constitution was itself the future and the progress, it did no need anything external that made it evolve and progress. This is the *principle*, that the principles-oriented constitutionalism has broken.

2.3 Adapting the Law. To Something External and Changing, or to Something Interior and Which Is Always the Same?

As I said, once Dworkin's principles and rules were translated into principles and *regole*, Italian constitutionalists, in a controversy that basically has raised the question of the Constitution as a norm, did not take into much account the fact that, in Italian law—like in the common European law of the intermediate age, up to the codifications and beyond—just the *regulae iuris* had represented, in the eyes of legal science, the closest thing to law's ‘principles’.

The habit of Italian judges of the pre-republican period to go back to the *regulae iuris*, of which I gave some examples at the beginning, had developed thanks to the Civil Code of 1865. The Code allowed the judge to apply the general principles of law when a precise norm was lacking or when analogy was impossible. At that time, judges thought that the condition that authorized them to go back to principles (i.e., the absence of a norm for the specific case or of a similar norm) meant that they had to apply the principles every time they could not find an *adequate* norm, or more precisely a norm *apt to what the respect of the Law always demands*. The law always required (so they thought) the respect of some basic premises (for example, it requires that no one should enrich themselves from their fraud—everyone knows it); if written law did not mention these instances, then the general principles intervened to supplement the written law. Reasoning like so, the judges gave the *regulae* exactly the same space and role that, according to the pro-principles constitutionalists, is proper to ‘true’ principles only and which, according to them, was born only with the rise of the ‘constitutional’ principles: that is, the ability to intervene not only in the event of gaps in written laws, but always, at any moment, in

the interpretation and application of written laws.¹⁴ Pre-republican jurisprudence, in contrast, was convinced that it was always necessary to use these principles to avoid arbitrary and unjust conclusions to which an interpretation limited to written laws could lead.

The idea was in fact that the law should be adapted not to something external to it (which is to say, to the changeable needs and purposes of society and politics), but *to itself, that is, to its permanent and constitutive principles*; therefore, if the legislature had failed to expressly sanction these principles, it was the judge's duty to insert them in their proper place. It is worth saying that reasoning like so, often the judiciary was able also to respond to new societal needs, as is shown by one of the examples I gave at the beginning (the employer's obligations towards the sick employee). In the very end, below the many novelties that continuously surface in social life, we find some eternal themes that recur: avarice and egoism, the need for redress and honesty, which law has confronted for ages.¹⁵

Italian constitutionalism, imbued with legal positivism, erased this historical memory, and for obvious reasons: this memory says that there is no need for a superior and rigid Constitution to review laws, because Law contains principles, with which laws can be compared and which are in turn internal to the Law, although not positively stated. The *damnatio memoriae* in which the *regulae* have occurred¹⁶ helps to explain why—when the possibility or necessity of rethinking constitutional principles was felt, when the possibility of an interpretation of the law beyond the text was acknowledged—the principles-oriented constitutionalists, instead of recovering a tradition which had always said that there are principles *in* Law (principles which provide measures and criteria that aid the search for applicable law); instead of, at the minimum, confronting their thesis with this tradition, were only able to imagine the space of principles as placed *above or outside the law* (in culture, in

¹⁴It is important to note that, arguing that the main character that would differentiate the ‘new’ constitutional principles from the ‘old’ general principles is the capability of the former of intervene at any moment of the interpretation of the law, and not only in the case of gaps in the law, contemporary scholars refer to the “general principles of law” as they were understood by the pre-constitutional *legalistic* scholars, who (contrary to the Courts’ practice of considering the *regulae* as general principles) were of the view that general principles are a product of generalization, abstraction and subsequent deduction that starts from the positive normative datum. In other words, the narrative on which the novelty of constitutional principles is constructed (as that of operating differently from the old general principles of law), simply and completely removes the *regulae iuris* tradition.

¹⁵Transparently, the Courts’ use of considering the *regulae* general principles was the reflection of a way of thinking according to which the term of reference of law is not the ‘whole’ but the man, not the ‘society’ but a sum of individuals and their relations; society changes, but man is always the same, with his limitations, with his passions, vices, abuses and with his resources and virtues. The *regulae iuris* are rooted in a subjective, non-objective vision of law, as I will state later in referring to Giuliani, and for this reason they bring with them a non-instrumental vision of law.

¹⁶Bobbio, at the height of the triumph of legal positivism in Italy after the war, blamed them as being “empty formulas” (Bobbio 1966, p. 894).

society).¹⁷ Even the values that these jurists consider ‘proper’ to Law are so, in their view, because law is an expression of a culture and of a historical time that is characterized by a certain set of values, mainly political; proper to law are the principles connected to the rise of the modern state and expressed by modern political thought (modern ‘legalistic’ *Nullum crimen sine lege* is a beloved example, preferred to the *Favor rei*, far more ancient and general, and stemming from equity: Zagrebelsky 2002, p. 875). Therefore, values of law were born and discovered outside the law; values that have enervated and shaped the law were not born from its practices and its science, neither from the peculiar problems that Law handles. The merit of principles, according to Zagrebelsky, is in fact to “open the law to the meta-law”—to all that is beyond and outside the law—which is in itself a poor thing. When discussing principles, “the great currents of contemporary juridical thought” (Zagrebelsky 1991, p. 158)) immediately come on the forefront and rather than juridical, the question becomes philosophical or even political (in the higher sense, of course).

From here we could begin to trace a discrete analogy with what traditionalist, legalistic constitutionalists think: for them, the source of principles is the Constitution, but the Constitution is animated by politics, which is its lifeblood. The difference is that legalistic constitutionalism holds that politics is something that is done through certain actors (i.e. the political parties), and certain procedures (i.e. the legislation) and it is an expression of ‘we, the people’; the neo-constitutionalists consider politics and its subjects obsolete as sources of the law and substitute ‘society’ for the ‘people’.

2.4 Dworkin’s Wrong Examples

In fact, both the advocates of principles-oriented constitutionalism and their opponents have argued that Dworkin is wrong when he considers *Nemo locupletari debet ex aliena iactura regula* to be a principle; according to them, this is not a good example of principle or maybe not even a principle at all. This brings arguments in favour of those who, as I myself did a few lines above, have doubted that the differences between the two orientations are as radical as they seem.

Luigi Ferrajoli, the main exponent of legalist constitutionalism, argues against the distinction between principles and rules,¹⁸ because he believes that most of the constitutional principles are equivalent “to the rules stating the corresponding obligation or prohibition”. Ferrajoli points out that in a Civil Law system, such as

¹⁷In doing so, neo-constitutionalism scholars follow antique methods that had been already discovered during the pre-constitutional era by legal positivistic interpreters convinced that law had to be adapted to a changing society by the means of an historical-evolutive interpretation (Degni 1909).

¹⁸As adopted, he says, by “Alexy, Dworkin, Atienza, Ruiz Manero, Zagrebelsky” (Ferrajoli 2018, p. 27).

the Italian one, the problem of *Riggs v Palmer* would have been resolved on the basis of “absolutely unequivocal rules”, not constitutional, however, but codified, and more precisely on the basis of an article in the Italian Civil Code which excludes from any succession, through unworthiness, those who had “voluntarily killed or tried to kill the person whose succession is concerned”. Although the problem is posed differently in a Common Law than in a Civil Law system, such as the Italian one, “it is highly questionable that the same solutions imposed by the rules of the Italian civil code was reached by the judges in *Riggs v Palmer* on the basis of principles (...) the decision was instead based—following numerous maxims on interpretation formulated by Ruthenford, Bacon, Puffendorf, Smith and Blackstone and other maxims of substantive law of the Common Law—on precise legal rules, albeit derived as implicit in other rules, such as respect for the will of the testator, who certainly would not have designated his murderer as his heir (...). But in all cases, it was a matter of applying rules” (Ferrajoli 2010, pp. 2801 and 2797 and footnote 52).

Gustavo Zagrebelsky is, as mentioned, of the opinion that constitutional principles are inherent to a ductile interpretative practice and that they function as “bridges” between law and “culture”. Zagrebelsky distances himself from Dworkin’s example, noting that it is “a principle of legal civilization that has been recognized in all legal systems” and also by the Italian Constitutional Court in a ruling on building offences, and yet the one given by Dworkin is not a good example of principle, because “the true ‘principle’ that sustains this self-styled principle could be expressed as follows: the law cannot allow one to take advantage of reprehensible actions. If the proposition: ‘no one should derive a legal advantage from an offence’ was a principle, then principles would be only very general rules. In fact, this proposition synthetically contains a sum of simple rules, corresponding to the number of acts defined as illegal in a certain legal system and to the goods of life subject to legal protection such as illegitimate rights, claims and interests” (Zagrebelsky 2002, p. 875).¹⁹

Law’s principles, Zagrebelsky maintains, are often “third or fourth hand, but no less venerable. They can be found in legal traditions proper not to law in general, but specifically to “constitutionalism” (such as the *Habeas Corpus* principle) or in philosophical traditions (such as the dignity of the human person”); however, law’s principles do not include a prohibition on taking advantage of one’s own illicit actions (which however does not lack antiquity, one could say). This Author is available to recognize as principles *only those pertaining to the typical places of constitutionalism* (the relationship between authority and freedom, which is at the bottom of the very ancient *Habeas Corpus* principle) on condition that they have

¹⁹ Note that here Zagrebelsky literally reformulates the *Nemo locupletari regula* in order to deny that it is a principle.

links to that *modern genealogy of ideas and theories*, in which constitutionalism, considered a distinguishing achievement of modernity, has been shaped.²⁰

In short, *Neminem laedere* is not a principle because we can derive it not from the traditions of constitutionalism but from the Civil Code (as if it was born with it). Zagrebelsky's conclusions are not that far from Ferrajoli's: even in the eyes of those who believe that constitutionalism is the legal system in which "what is constitutionally stipulated [is] binding and compulsory", as Ferrajoli puts it, *Neminem laedere* is not part of the principles/rules that characterize a constitutional order, but if anything, it belongs only to a legislative system.

2.5 Two Constitutional Thesis, One and Only Instrumentalism

The attitude of Ferrajoli and Zagrebelsky towards Dworkin's example, their refusal to recognize *Neminem laedere* as a (constitutive) principle of Law, and therefore to recognize that the field of legal principles includes logical/ethical criteria, which were elaborated before modernity and without which law would not be such, suggests that both move within similar assumptions. According to La Torre (2010, p. 18), the two Authors, so distant at first glance, have something profound in common, namely the adherence to legal positive concepts.

An education to positivistic ways of thinking certainly transpires in the reading that the two Authors give of the example of Dworkin: Ferrajoli, who refers to the existence in the Civil Code of a norm that repeats the *regula*, recalls the way of reasoning of the Scholars who, in the Nineteenth century, preoccupied with making the *regulae iuris* coexist with legalistic assumptions (Cervi 1900), affirmed that the *regulae* could be considered valid only in so far as they had been re-formulated by the Code. Zagrebelsky, stressing that *Neminem laedere* is only a very general norm

²⁰ Denying *Neminem laedere* the status of a general principle of Law, Zagrebelsky adopts the traditional, purely legalistic view according to which general principles are drawn by abstraction and generalization from written norms (see note 14 above): in the positivistic tradition, the *Neminem laedere* principle has always been considered, in Italy, as the general principle of non-contractual liability, in the limited sense that it sums up many articles of the Civil Code on the matter. On the other hand, the *Habeas Corpus* principle and *Nullum Crimen* (which Zagrebelsky acknowledges as principles), are transparently correspondent with the Italian Constitution's provisions on personal freedom and criminal law; being tied to the "authority/liberty" relationship, Constitutionalists are accustomed to recognizing them as analogous to the constitutional principles. Instead, it is not immediate to recognize *Nemo locupletior* in the Constitution, simply because there has never been the habit of searching for that principle within the Constitution nor to think that it can have constitutional relevance. Nonetheless, this principle can certainly be recognized within the wording the Art. 41 of the Italian Constitution, according to which the freedom of private economic enterprise cannot take place to the detriment of human freedom, dignity and security; and the morality of the market, as I will say later, is certainly one of the biggest aspirations of the Italian Constitution.

(which can mean: ‘a norm that can be applied in many cases’; or ‘a norm resulting from a generalization of particular rules’) adopts the idea that a general principle is nothing more than the result of the generalization of many particular rules, an idea that under the Italian Civil code of 1865 marked one of the strongholds of the advancement of legal positivism.²¹ By denying *Nemo locupletior* the rank of principle, Ferrajoli reaffirms the idea that a principle is constitutional insofar as it is written in the Constitution, Zagrebelsky reaffirms that it is constitutional insofar it is contained in a certain cultural tradition, which is that of constitutionalism, as an aspect of modern culture concentrated on the relationship between authority and liberty, power and rights.

Zagrebelsky’s is the vision of a jurist who dialogues with the social conscience in order to give it its principles in the light of refined theories of democracy; Ferrajoli’s is a vision still confident in an unequivocal will of the Constitution that, in order to become real, needs only to receive objective realization through the political process. Different views, but they coincide where they refer to the vision of law as a technique of social control or for the pursuit of (no matter how noble) objectives, which law takes from the outside, here from the culture of society, of which legal science is the guardian (Zagrebelsky 2002, in the end), and there from the Constitution, a political project in the form of norm (Ferrajoli 2018, pp. 60–61).²² Rather than saying that the two theses share legal positivistic premises, it would probably be more exact to observe that they have in common *an instrumental vision of law*, understood as a void, an instrument, a technique, at the service of socio-political needs and purposes (that may or may not coincide with a specific political organization).

The belief in a Constitution by principles or in a Constitution by rules, if something can change in terms of a more or less strict legal positivistic faith, does not modify the premise according to which it is the norm the foundation of law, a form fillable with different content but having always the same characteristic, that of tending to obtain certain results. In this sense, La Torre’s critique²³ is highly pertinent: both the principles-oriented and the rule-oriented constitutionalism continue to conceive the *law as norm*. Yet it has been correctly observed that behind the

²¹ The thesis, to which I have already referred (see note 14 above) spread after the advent of the Civil Code of 1865, in reaction to the use of jurisprudence to refer to the *regulae iuris*. In harmony with this thesis Bartole (1986 p. 496) still argues that the *regulae iuris* are equated with general principles as the result of the generalization of particular rules.

²² “With legal positivism modern politics was born as the government of society through the production and transformation of law by legislation”; after the advent of a superior normative Constitution “politics continues to be the source and the engineer of law” (Ferrajoli 2018, pp. 60–61).

²³ For both Zagrebelsky and Ferrajoli, La Torre writes, Law is an instrument, “but Law degraded to an instrument ceases to be truly Law and becomes something different” (La Torre 2010, p. 18).

difference between principles and rules, the idea of the “statutory norm” dominates (Spantigati 2002, p. 341).²⁴

In fact, as I have said before, Dworkin’s theory was grafted in Italy onto a tradition which was used to considering principles as norms and that had deeply internalized the idea of the instrumentality of law. When law is an instrument (for pursuing the high purposes of emancipation and justice, of course, but this is not the point because an instrument can serve good and bad ends as well), it makes no difference whether law comes from representative politics that implements constitutional principles, or from society and culture that inspire jurists and judges. Even Dworkin, in any case, while distinguishing principles from policies, admits that the distinction can lose meaning in some cases and certainly it does not appear to him as fundamental as that the distinction between principles and rules (Dworkin 1982, p. 91). At the very end, to Dworkin too it is not instrumentalism that is the problem, but the monopolization of law in the “rules” set by political actors who, as we know, may not want to carry out the recognition of rights. Oriented to avoid this risk, oriented to obtain a (noble) political goal, his theory is purely instrumental, after all.

3 Regulae Iuris in Alessandro Giuliani’s View

3.1 If All That We Can Know Is What Justice Is Not

The *regulae iuris* were the focus of very refined studies that the law philosopher Alessandro Giuliani (1925–1997) had initiated in the early 1950s. This considered, it is surely perplexing that mainstream elaboration of Dworkin’s thinking in Italy practically ignored the *regulae*.

Giuliani’s is a complex reflection, the themes of which would remain constant throughout his research activity, driven by the concern that law is resolved by a purely instrumental technique, subordinate to “politics, economics, religion, history, reality, and the life of society” (Cerrone 2016, p. 996). Legal instrumentalism puts at risk all the values of law—and the very values of living together—starting with

²⁴ Some of Zagrebelsky’s statements are highly significant in this regard: “A law based on principles serves to govern complexity, develops in pluralist societies and is the characteristic of constitutional states. Principles incorporate policy arguments”. A principle has a normative character, *ex principium derivationes*; principles are axioms of the legal order. A principle is an open norm. Although the law by principles, plastic and adaptable, carries with it the risk of casuistry, which threatens the very idea of law as a legal system and equality, in the light of the complexity of today’s law and its inspiring principles, flexibility and adaptability are not defects to be corrected, but requirements imposed by the Constitution. A rule becomes a principle with the addition of expression like ‘normally’ or ‘reasonably’. “Principles make up for infinite multiplication of rules that otherwise would be necessary to grasp all the possible variants reflected in particular cases” (Zagrebelsky 2002, pp. 890, 871 and 895). These are quite clear expressions in the sense that principles are functional equivalents of norms in the views of an anti-positivistic scholar. Zagrebelsky’s theory, imbued with ethical non-cognitivism, appears “relativistic” to Chessa (2014, p. 343).

human freedom. And, Giuliani underlines, contemporary formalisms and anti-formalisms, legal positivism and the trends that have opposed it, all share the same logical premise, that of conceiving law as a technique devoid of its own content and being purely instrumental.

According to Giuliani, the reduction to a technique coincides with the detachment of law from the world of human action, which is instead law's source and measure. Giuliani saw in the *regulae iuris* the examples of "constitutive principles of law" (Giuliani 1957, p. 8),²⁵ and in a double sense: in the sense that they express the contents, the ends, or the values or ideals proper to Law (the avoidance of arbitrariness and abuse and the search for the fair reparation of the wrong) and in the sense that they show the way in which the law is constituted (the way in which the law *should be constituted*, should *not cease to be constituted*), that is *in constant connection with human experience*, both in its practical aspects and in its intellectual and spiritual dimension.

The *regulae* can be described as "observations" but also as "interpretations of behaviors",²⁶ and the etymology of the word *regula* is offered by the verb *reor*: 'I think, I judge, I reason'.²⁷ Understood in this way, the *regulae* express the possibility that—through reasoning about the actions and relationships that exist between individuals, that is to say by *interpreting* them, giving them *meaning* through the use of logic or of a form of reason, analogous to that which human beings commonly exercise—some constants are identifiable. These constants, rooted in the human experience, do not signal an end to be achieved. They signal *an eventuality to be avoided*. A rule such as *Nemo locupletari debet ex aliena iactura* originates from the experience, which shows that if we reward abuses, worse consequences are likely to follow and everyone can understand why: no one, compelled to endure another's arrogance, would ever recognize this as fair. It is important to consider that the

²⁵The idea of linking rules as constitutive principles of law to constitutional principles has broad implications, as explored by Cerrone (2012, p. 645; 2016, p. 993).

²⁶For an example of the traditional definition of the *regulae iuris* as "the result of a long series of observations" see F.S. Gargiulo (1905, p. 1). This definition is very dear to Giuliani; by the means of the *regulae* Giuliani intends to show how "the concept of norm is linked to that of human action" (Giuliani 1953, p. 17): "To Roman Jurists, law [was] a natural reality produced by human actions that could be observed and understood. This is why the concept of norm was completely alien to them. (...). They saw law not as a set of norms or imperatives, but as an interpretation of the juridical aspects of human conduct and action. In fact, if we open the title of the Digest "*Regulae iuris*" we will not find many conceptual definitions or arrangements, but rather interpretations of behaviour: "*Eius est nolle qui potest velle. Non vult heres esse qui ad alium transferre voluit hereditatem*" (ib., 119). The Roman Jurist, a metaphor of the 'impartial observer', is a model, for Giuliani, of both the judge and the legal scholar; the latter should share the impartiality of the former.

²⁷*Reor* is also the etymological origin of *Ratio*. On *regula/reor* v. Giuliani (1953, p. 159 and 197). More frequently, the etymology of *regula* is instead traced to "regere" (to lead, direct) and the word appears connected to 'rectus, straight, right, correct'; the rule is also the ruler (in the sense of the measuring instrument), the canon, also in the sense of 'standard measure' (Stein 1966: p. 51 and 144, who in turn accounts for the link between *regula* and *ratio*: p. 94). The spread of this second etymology derives from the generalization and retrospective use of the modern concept of norm.

regula, which on the one hand says that it is better to avoid someone from profiting from his illicit act, on the other hand does not always and in any case define what *is* illicit: ascertaining the practical consequences to which the *regula* leads in the concrete circumstances is left to the responsibility of those who use the *regula*.²⁸ This is the “internal morality of law”, which consists not in establishing a set of ready-to-use moral precepts that have to be observed, but in engaging all those who are involved in law—claimants, judges, and each person in the mutual relations of societal life—in research aiming to avoid what, as far as we know from experience, justice *is not*.

3.2 *Principles of Negative Justice in the Logic of the Preferable*

Giuliani refers to the *regulae* in order to call our attention on the proceeding from which they result. The making of a *regula* consists in the operation (mental and linguistical, ethical and social) of assigning value, which is to say *sense*, to human actions and relations (to facts) by other humans that observe these facts and consider their implications and consequences.

Maxims, such as *Ad impossibilia nemo tenetur* (nobody is held to do the impossible) or *Audiatur et altera pars* (listen to the other side) or *Malitiis non est indulgendum* (abuses should not be allowed) are the result of the sympathetic observation that men have made of themselves and of the behaviour of other men, sharing the sense of the *common limits of the human condition* (which tells us that nobody can do the impossible) as well as the sense of the *common limits of the human mind* (which warn to us that is always better listen to the other side before making a decision). A human being who investigates the sense of his own actions and of the actions of others feels the consequences that some kinds of actions may probably have. He can see and recognize, also with the help of memory, imagination, and comparison, the probable negative effects of certain courses of conduct and thereby the opportunity of avoiding them. When the Classical Roman Jurist Celsus observed that *Malitiis non est indulgendum*, he knew that—as experience and imagination both teach everyone of us—if law rewards the abuse or remains indifferent towards arbitrary acts, many harmful, disruptive consequences will arise (resentment, revenge, imitation of the abusive conducts).

Thus, the ancient maxims are to Giuliani the proof of the existence of law’s constitutive values, and these are: *avoiding the abuse*, which is to say *searching for justice, equality, certainty by avoiding what, in given circumstances, and after a careful examination, appears a probable cause of injustice, inequality, uncertainty*.

²⁸The *regulae* express mere advices, not prescriptions, modern Authors critically maintain. Bobbio (1966, p. 894) condemns for that reason the *regulae* as useless and pointless. Rather, they express the link between ‘fact’ and ‘law’, and this is why they are so troubling to legal positivism.

The *regulae* are principles of a *negative justice*, transmitted by legal science, which, over the course of time, operating both theoretically and practically, has contributed to shaping them.

Fuelled by the ethics of reciprocity, a *regula* is posed by an observer which is impartial, but also involved: a human among humans, plunged into the same reality, of which no one is the master.²⁹ The *regulae* offer then the “argumentative passages” of a negative logic, which is not oriented to constructing the Just and the Good (because no one can know what they are), but to avoiding the abuse and the damage, including that provoked by the lack of that elementary form of control (an elementary form of justice) which is represented by intersubjectivity and fair confrontation. They are as many *rules of conduct* that speak to the responsibility of the agent, and thereby suppose him or her to be always morally free (capable of doing good or wrong, in that each one is capable of choosing his purposes and the connected means). In this sense, as we will see, the *regulae* are tuned on the “moral of virtue” and demonstrate that the legal rule cannot be reduced to a mere technical rule.³⁰

This way, the *regulae iuris* do preserve, in favour of every individual, the difference between being *the subjects* of a juridical order, and being *subjected* to whatever kind of collective organization; and the difference *between a juridical order and any other organizational ‘fact’*. The *regulae* always go together with an intelligent agent who has recognized them, who has used them in searching the better solution in face of contrasting interests, who has chosen if and how to follow them in his action. *This intelligent agent is every empirical individual*, the sum of them in the course of time: law is the *cooperative enterprise* resulting from the manifestations of the social and axiological dimensions of the human intellect.

Thus, a *regula* states what, by the means of an intersubjective exchange, in the course of time, has appeared *preferable*; in this sense—which is qualitative—a *regula* expresses the *probable* and the *normal*. In its turn, a *regula* is never shielded from dialectics which verify its relevance and usefulness in better understanding a given problem. Only, someone who claims that the normal (the preferable, the probable) does not apply to a given case is held bound to prove it.³¹

On the one hand, then, a *regula* is shaped by reference to concrete actions and behaviours and to their justifications (all vehicles of opinions expressed in words);

²⁹ It is easy to understand the moral inherent to Giuliani’s interpretation of the *regulae*: law can be seen as a means for the living together among people rather than as a mean for governing, and exerting control, over people. The choice among the two alternatives is in its turn a matter of the ‘preferable’ and Giuliani, who strongly opposes to instrumental conceptions of law, prefers of course the first.

³⁰ See on this point, which counters the positivist assumption that juridical norms are technical rules (on which Bobbio 1965, p. 204) also Giuliani 1974.

³¹ Then, a *regula* is never true nor false, it is never valid nor invalid: what counts, is whether it is relevant or not to the understanding of a problem (a rule can be “vitiated” in some cases, but valid elsewhere). The *regulae iuris* are a constant reference in Giuliani’s work; for some of his opinions, on which I rely particularly in this article, see Giuliani (1953).

on the other hand, the *regula* does not prescribe a given conduct, it does not depict a ‘precise’ case and a ‘certain’ consequence, expected to be always the same. Instead, a *regula* is a position taken, a choice, in its turn *an opinion*: the opinion which appears preferable after a careful, fair debate, a long series of concrete checking and verifications.

The judicial controversy is then the space of dialectics, and the controversy is made possible by a ‘commonplace’ in relation to which opposite arguments can be confronted with each other. It is a commonplace indeed, that makes diverse opinions capable of mutually speaking. A *regula* offers a “center of arguments”, a “dialogical (topical) agreement”, “the substitute of an ontological order”, a *locus communis*: it has to be verified not in the light of the true/false alternative, but in the, more ductile, “porous” logic of the relevance. Then the *regula*, which is dialectical because its making is rebuttable and justificatory, resists confutation while making confutation possible, thus opening up to change. It accompanies an effort to comprehend, not one of manipulation of reality.

The condition that makes all this possible is what Vico called *veriloquium*, the mutual commitment to tell one’s own *subjective truth*.

3.3 A Subjective Vision of Law

Giuliani stresses that under the *Naturrechtsphobie* cultivated originally by the Historic School and then inherited by legal positivism, what was at stake was the denial of legal science as a source of the law, and the reduction of jurisprudence to a technique, devoid of inherent constitutive values—according with the aspirations of the new modern rationality, instrumental and calculating, and with the false historicism that sees history as a continuous repeat of the past (Giuliani 1957). The essence of normativism (which finds the autonomy of law in its “normative” nature) appears to Giuliani problematic because it is based on the separation/opposition between the “Sein” and the “Sollen”. When entirely placed in the “Sollen” sphere, law is conceived as a tool of discipline and reform (manipulation and construction) of the human experience. The authoritarian implications of this are transparent: it has meant sacrificing, in law, the dimension of a form of knowledge (of the human conduct), in favour of the dimension of instrument of reform (of human conduct).

This explains the continuity between legal conceptions which are apparently contrary to one other, such as anti-formalistic and sociological realistic trends that while criticizing the limits of legal positivism, have adopted and magnified the basic positivistic assumption (i.e., the vision of law as technique of social control), more respondent to the needs of society than to those of individuals (Giuliani 1953, 1957). Admonishing that “the notion of technique belongs to a non-human world” (Giuliani 1953, p. 38) Giuliani claims that: “The reduction of jurisprudence to a technique happens every time science is curtailed to being the research of a fact, of a piece of data, of an external and presupposed object. The science in these conditions does not have its own contents or constitutive values: it is the research of a changeable fact

external to it. Analogous to normativism (which was a version of legal positivism) are sociological trends, which have searched the contents of law, the contents of the norm, in a social science” (Giuliani 1953, p. 120).

The lasting remainder of this, which is to say of an instrumental vision of law, is that all juridical values appear nothing but the contingent (and thereby relative and unstable) fruit of some political trend, e.g. modern liberalism (Giuliani 1957, p. 48). But: if equality or liberty are not considered constitutive constants of the juridical experience, the alternative is to consider them the *transitory* expressions of some ideologies.

From here, the importance appears of the “descriptive” (not solely ‘prescriptive’) character of the *regulae*: they express the permanent connection between “what is” and “what ought to be”. To recognize in ‘what is’ a deontological component limits what can be established in the name of an abstract ‘*ought to be*’. When the making of the law presupposes human nature to be something intelligent—not an inanimate object at the disposal of whatever technique (law as a technique included)—the risk is reduced that Law becomes a completely artificial item, in-human or anti-human. Extremely uneasy with the collectivistic, anti-individual implications of the reduction of law to a technique, Giuliani, with his subjective conception of law, aims to restore the grounding of law in the individual, in the individual experience, action, and feelings, including those aspects of the human nature that are irrational, emotive, passionate and sentimental.

Re-valuing a subjective conception of law means claiming the capability of human beings—of individuals—to feel and think values, and to make them exist practically thanks to “the social operations of the human mind”, such as language. By exchanging each other’s evaluations and opinions the individuals exchange, choose and create values. This, it is clear, means affirming that the principles of a civil order are the result neither of the will of a legislature nor of the progress of society, but rather of the experience and of the intellectual operations that originate in a myriad of individuals and of relations (also in the dimension of time), all involved in reasoning over the problems of human actions. And it is because “human action is subjective, it is considered in relation to the element of conscience” that it must be “the object of a subjective science” (Giuliani 1957, p. 196).

It becomes crucial to be aware that the science of law consists of searching for that degree of objectivity which is possible in a subjective science (anchored to the human action, the realm of opinions). The *regulae iuris* are an example of this method, in that they are based on “constants and generalizations derived from the observation of experience”. This grants law the objectivity “which is possible in the field of the subjective, in the field of opinions” (Giuliani 1957, p. 182).

Understanding law subjectively means understanding Law historically, bearing in mind that history is not only a series of stages, outdated by the continuous advancements of “progress”: its protagonist is the human being who has, says Giuliani recalling Vico, needs and capabilities—in other words a nature—that recur. In this sense he writes that “if we lose trust in some principles we walk out of the legal experience and therefore out of the human experience” (Giuliani 1957, p. 35).

3.4 *Regulae in a World of Norms?*

The *regula* is in Giuliani's view an elementary unit of law, and an extremely valuable one. The *regula* recalls the constitutive connection between law and the human experience, which is made of conscience and intellect. The 'norm', a modern concept (Orestano 1989, p. 74), is instead the moment of the split between the two. It renounces the demanding engagement required by the *regula*, which is searching for the preferable in the debate of opinions and instead pretends to belong to the field of necessity, of what *must* be.

Thus, the norm seeks to establish the *true nature* of things, without offering however any help to the research of it and often puts it even out of sight, because, concentrated as it is on the 'essence', the norm is not able to be a good companion in dealing with qualitative problems, which are the problems typical of Law. The fact is that, differently from the norm, a *regula* is loaded with history—with human history—and brings with it a great number of human vicissitudes and contingencies. This makes it far more familiar than a norm to these latter. A *regula* is therefore a more ductile instrument for their understanding.

The *regula Nemo audiatur allegans turpidudinem suam* (which corresponds to the maxim of equity 'He who comes to justice must come with clean hands') offer a useful example to clarify this. In Italy, in the twentieth Century, the *regula* was interpreted in a modern key, as if it was a norm. This pushed forward the need to previously establish in a positive, 'certain' and 'clear' way what is *turpis* ('shameful'), and it also brought to understand the *regula* as a 'sanction' against those who perform 'shameful acts'. Dealing with a *regula* which has (from a rationalistic viewpoint) the severe defect of not establishing exactly *what* the *turpitudes* are, and under the pressure of the need to *clearly define* them—in order not to leave any uncertainty and opacity in the law—the Italian scholars stated that '*turpis*' had *necessarily* to do with sexual behaviour and with sexual behaviour *only* (Rescigno 1966, p. 175). This interpretation was intended to reduce the space of operation of the rule in judicial practice. However, this attempt to define the *regula* as much and as well as possible ended up *denying it any space*, given that over time the link between *turpitudo* and sexuality has appeared steeped in old-fashioned moralism. As a result, the *regula*, considered aiming to "sanction" non-conforming sexual behaviour, was set aside and no longer used by Courts.

In the light of the logic of the normal and of the preferable, instead, we can never know *a priori*, once and for all, what is '*turpis*'. To ascertain this, we need to make reference to common sense and opinions, as they take relevance in relation to a given act or a concrete demand, always taking into account the circumstances of time and space, all qualitative aspects. Besides, in this logic, it appears clear that the meaning of the *regula* is not to sanction, punish or impede *turpitudines*, but to avoid someone gaining advantage from illicit acts. The modern approach forgets all of this.

The point is that by dint of defining the *turpis* and pushing it into the sexual sphere; by dint of wanting to deal with a maxim *as if it was a norm* (that is, as the prescription of certain types of behaviour to be avoided, and of the related sanctions),

a maxim has been annulled which, if it did express a morality, it was in the civic field, not in the sexual one. In fact, in Italy, the *regula* was used until the 1900s against corrupt and fraudulent commercial agreements that were deemed harmful for the community. Interestingly, some Authors have recently complained that with the disappearance of the maxim, a principle of “morality of the economy” has disappeared, of which the present times are however in strong need (Breccia 1999, p. 218).

In the Italian Constitution there are very strong prescriptions according to which rights should prevail on the logic of profit. Nonetheless, the Constitution has failed to oppose the emergence of neo-liberal values. When law must be apt for the times, the “spirit of the time” does condition the interpretation of constitutional principles (and rights).

The paths of *In pari causa*, a *regula* transplanted in a positivistic model, contradict Carriò’s idea, according to which it is sufficient that the norms of recognition include the maxims, and these will function as principles. In reality, the opposite is quite true: if the dominant attitude is positivistic, even the maxims will be understood as norms, and this will also happen to the principles (and maxims are principles). It is no coincidence that this is the characteristic and the aspiration, in Italy, of legalistic constitutionalism: giving principles a precise, compelling content so they can be handled as norms. But constitutional principles alone, with all the values they are imbued with (as in Italy those of the economic Constitution, concerned with guaranteeing freedom, dignity and human security in the face of profit) are reduced to very little—so experience teaches us—if the adaptive pressures arising from politics, society, ‘reality’ in their continuous changes, are not tackled from an autonomous point of view. The *regulae* recall that Law is this autonomous point of view; one that resists the seductive illusion of knowing what justice *is* (while ideologies, policies, governance models always pretend to know what justice *is*), and instead focuses on excluding what we know by experience what justice *is not*. Which is the only thing we know.

4 Taking Human Dignity Seriously: Thinking Law on a Human Scale

4.1 Rules of Conduct

The main implications of Giuliani’s reflection on the *regulae iuris* concern the relationship between law and morality.

Even in the realm of legal positivism, the ‘Dworkinian Turn’ has left a softening in the rigid line that once divided Law from Moral; however, still today Dworkin’s idea of a “positivized morality” which feeds law’s principles troubles the scholars (Chessa 2014, p. 490 ff.).

Certainly, there is a difference between saying that Law is separated from morality (according to traditional legal positivistic approaches) and saying that it can trace some of its contents in morality (as it is more commonly admitted today). Nonetheless, the two positions have something in common: they both understand morality as a set of precepts, that is to say, of norms, which can be found somewhere outside the law and that are ready to use. This is an ‘objective’ vision of morality (a set of data that apply to people’s behaviour) which mirrors an objective vision of Law. Composed of ‘principles’ or composed of ‘rules’, in fact, if objectively understood Law is a set of data presumed to be applied to people’s behaviour, and which indicates what ‘ought to be’.

The logic of the preferable, which inspires a subjective vision of law, leads to very different consequences as regards the relationship between Law and Moral: when Law is thought of as the field in which free and responsible agents make choices about the better way to act (and therefore about how to better define, or to judge, or to regulate a given situation) the problems of Law and those of morality coincide, and neither Law nor Moral can be reduced to a code of heteronomous ready-to-use norms.

Giuliani advocates this point by elaborating the couple ‘Moral of the obligation/Moral of virtue’. Retracing famous Aristotelian places, he explores the difference between the world of practice and the world of technique. Giuliani goes back to those that, according to Aristotle, are the “two greatest normative manifestations of the practical intellect”: art, the domain of *poiein* (technical-productive knowledge) and prudence, the domain of *prattein* (active practical knowledge). In the first case (technical-productive knowledge), “a doing has a reference to the results (i.e., a house, a pair of shoes, etc.)”; in the second case (practical-active knowledge), “an action is considered from the point of view of intention, of the use of freedom”. The distinction between the Moral of obligation and the Moral of virtue arises on this ground: “the rules of conduct have a different, even opposite meaning, in the field of *praxis* and in the field of *poiesis*”.

In the first field, the rule is the justification of the action and it presupposes the recognition of an axiological function of reason; in the second case the rule does not appear any different from a technical rule: “an art in fact gives rules that regulate the means and the achievement of ends” (Giuliani 1974, p. 558).

In the world of technique, one must know, and one can always know, how to act in order to obtain a certain result, and therefore pre-established rules can and must be followed. In the world of technique, it is sufficient to execute the rule in order to fulfil one’s task in a correct way and avoiding blame (e.g., to build an edifice, it is necessary and sufficient to follow the construction rules). Moreover, in the world of technique, rules are subjected to a continuous evolution due to the modification of knowledge, which changes the ways of solving a given problem. Therefore, a single craftsman, or scientist, can make a discovery that facilitates the work or perfects the results and once communicated to the others, all will apply the new discovery because it is simply a question of carrying out a task, of obtaining a given result in the fastest and most effective way possible. This is the field of the Moral of obligation.

Things go far differently in the world of practice, to which the rules of conduct belong. These rules concern *how to act in pursuing our goals* in situations in which we always are in relation with others. Here the problem dominates, of choosing *how to act in given circumstances*, which are always special. Our actions are linked to different circumstances of times and places and they involve the subjectivity of each individual. Therefore, there cannot be a prescription that is invariably valid for every action and that ends up being acceptable to all minds, and a Moral of virtue enters into play, because the agent's choice about how it is *better* to act is always involved.

4.2 A Moral of Virtue

When conceived as rules of conduct, moral norms are the rules that each individual gives to his own actions by exercising his sense of the just and of the unjust; which is to say, they are expression of freedom. Giuliani's point is that juridical norms also, being likewise moral norms, belong to the genre of the rules of conduct. On the basis of this point of view he questions a 'scientific' and 'normative' vision of both Moral and Law, a vision where both are conceived as mere sets of heteronomous prescriptions.

Giuliani recalls that moral reasoning (a non-scientific science of human action) benefits from the transfer—operated by Aristotle—of the legal model of reasoning, “which is transmitted in dissent and controversy”, in the moral field. That transfer was made possible by the commonality of problems, with which Moral and Law deal; such a commonality is in turn understandable only by recognizing that Law, as Moral, belongs to the world of praxis, not to the world of technique. In fact, “ethical propositions are characterized by a conflictual situation: must I obey the father or the laws? An ethical problem therefore appears similar to a judicial dispute” (Giuliani 1974, p. 561). This is because, Giuliani maintains, both Moral and Law pertain to field of human action, the field of the controversial and of the questionable, where it is not possible to have rigorous and scientific rules; therefore “there is the resort to the model of the virtuous and prudent man. It is not an absolute model, but a research method, represented by the dialectic (..), which is the logic of practice, of *how to act*” (Giuliani 1974, p. 561). In fact, “the conclusion of the practical syllogism is not a judgment, but an action or a deliberation. There is no ‘right action’, absolutely and in all cases; the right action has to be sought in relation to the situation, the circumstances, the nature of things. For that reason, in both Moral and Law, we must be wary of a pre-constitution of conflict solutions” (Giuliani 1974, p. 561), which is possible only at the cost of denying the “complex and dynamic structure” of qualitative problems (Giuliani 1975, p. 30).

Belonging to the world of praxis, not to the world of technique, law appears dominated not by a morality of the obligation, but by a morality of virtue. This places in the foreground, on the one hand, *the intention*, the interior and individual moment

of moral freedom (the choice on how to act³²) and, on the other hand, a set of *social operations*, those required by the verification of the value of a certain action, which calls into play the opinion of many people, an intersubjective checking. “In a morality of virtue, the discourse around the rules of conduct presupposes the recognition of *an axiological function of reason*, which is ensured by *the practical intellect*: the phenomenology of law, in this perspective, starts not from the norm, but from moral dispositions, which are natural in the sense that the word nature had among the Greeks” (Giuliani 1974, p. 561). The commonality of juridical rules with moral ones also explains why—and here Giuliani is in strong harmony with Adam Smith’s *Theory of Moral Sentiments*—the juridical rules, like the moral ones, are formed *independently of the coercion* and instead “inductively, through the experience of what our moral faculties approve or disapprove of” (Giuliani 1997, pp. 38–39). This is transparently the same process, based on the logic of the preferable and realized through the observation and interpretation of behaviours, from which the *regulae iuris* originate.

The nature of rules of conduct, proper to legal rules, also makes it understandable that the problem of progress is very different in the world of moral choice (and therefore in Law) on the one hand, and in the world of technique, on the other hand. The way in which Mevius has resolved himself in a given affair cannot simply be made known to Caius who will as a consequence act the same way, because Caius is in turn capable of regulating himself in his affairs by himself. Unless of course, we want to suppress the individuality and intelligence of Caius and his competence for himself, that is, the freedom of Caius. This result (the suppression of liberty) is what is obtained when it is claimed that the legal rule is comparable, rather than a moral rule, to a technical rule, that is, when the legal rule is conceived and described as a prescription to be invariably followed in order to obtain a given result, which is what happens when Law is understood instrumentally.

Giuliani concludes that the Moral of obligation “on which opposed positions have met, such as rationalism and utilitarianism, is an aspect of the modern conception of reason, formal, subjective and calculating” (Giuliani 1997, p. 67). Stressing the relationship between juridical norms and moral norms, both rooted in the subjective dimension, his reflection opposes any temptation to objectify one and others. This objectification has to be avoided because it leads, on the one hand, to equating both Moral and Law to a set of prescriptions exterior to the human, subjective, action and, on the other hand, to making this latter insignificant, and irrelevant.

In fact, a legal rule, when it operates as a pre-constituted solution of conflicts, performs as a *technical rule*, vehicle and expression of the Moral of the obligation; it aims at supplanting the individual and intersubjective axiological capacities with the predetermination of standardized action models. It is only by holding firm the

³²The action is “the most significant element of personality” (Giuliani 1957, p. 151). Giuliani’s refusal to qualify law as an objective deontological and preceptive reality, corresponds to an insistent and peculiar emphasis—which is explicitly aimed at safeguarding the value of freedom—on the *introspective* character of the basic concepts of law (*ib.*, p. 158) and of the *interior* character of human action (*ib.*, p. 152).

affinity of legal rules and moral rules, as practical rules of conduct, that human freedom in the world of Law can be safeguarded, and the connection between Law and freedom preserved, as well as the fundamental value of isonomy. We are all equals, indeed, before the problems of moral choice that law always entails.

It is the logic of the preferable that enters again into play: it suggests that nobody should be denied the capability to subjectively tackle the question: ‘how should I act, here and now?’, if we want to keep alive, in our living together, the basic conditions of substantial equality and individual freedom.

4.3 The Problem of Instrumentalism with Human Liberty

In Giuliani’s view, it is therefore in the moment of the *reor*—that is to say: it is in the freedom and responsibility of choosing the best way to act—that the morality of law dwells.

Today’s prevailing ideas on the relationship between Law and Moral appear very distant from this view, but also very similar to each other. As we will see, to a strictly observant legal positivist, the norm must be a rule (in the sense of well detailed and rigorous prescription) precisely to exclude, in the agent, the moment of the *reor* (of thinking). For a principle-oriented jurist, the moment of the *reor* is reserved only for a few privileged subjects. If we consider that in the moment of *reor* the individual axiological capacities that belong to all men are expressed, then its exclusion or limitation in the world of Law raises serious questions when it comes to freedom and equality.

Let us consider the position of legal positivists first; they are the heirs to a tradition that has devalued the *regulae iuris* as empty formulas for their obviousness (Bobbio 1966, p. 894) and as mere advice or imprecise logical directives with uncertain consequences (Crisafulli 1943, p. 219).³³ Giuliani’s *regula*, the fruit of the individual choice on the best way to act, is evidently the opposite of the idea (which is dear to legal positivism) of the rule as the reason/guide for action, which must be internalized and followed independently of its underlying reasons. Raz’s definition of the norm as a “reason for action” is in fact the exact opposite of the Giuliani’s *regula*; and it transfers to *every rule* the function of social control proper in general to Law, when understood in an instrumental sense. In an attempt to defend law as rule, assuming that law is “essentially an instrument of social control” one Author has recently returned to underline that ‘vague’ rules—for example ‘drive safely’ (with prudence and caution)—fail in their objective, of “allowing citizens to coordinate their reciprocal actions”. Instead, a precise rule, for example ‘do not

³³ Crisafulli, a leading interpreter of Italian Constitutionalism, criticizes the idea that the principle would constitute “a purely theoretical directive, a logical proposition, *a thought* in short, from which it would be the interpreter to draw, from time to time, the rules of the concrete case” (Crisafulli 1943, p. 219. By adding italics I emphasize the positivistic jurist’s propensity to exclude from Law the moment of the *reor*, a point which I will address again later).

exceed 50 km/h', is fully consistent with this objective. Vague norms do not allow citizens to identify promptly and with certainty how they *must* act because they ask the individual "to seek the solution for himself". These types of rules are bad legal norms, as they do not serve the purposes of Law; instead, they have the different effect of "allocating the decision-making power", and this, for the purposes of control and uniformity which are assumed as the aims proper to Law, is a dysfunctional effect (Civitarese Matteucci 2006, p. 708).

With a revealing example the case is made of the secretary to whom the boss says: 'pass me urgent phone-calls only'. And what phone calls are urgent? By formulating a vague rule, the boss allows the secretary the discretion to assess what is 'urgent'. This is dangerous. The secretary's discretion appears on the one hand *indecipherable* (as if we did not possess certain common notions through which we can determine that a call that warns of an unexpected event is urgent and the one that reminds us of a routine appointment is not) and, on the other hand, *threatening for the autonomy of the subject* (in this case the employer) who relies on the 'power' of others of evaluating, thinking, judging. This is the reason why 'precise' rules are better, a positivistic lawyer maintains (Civitarese Matteucci 2006, p. 710).

This type of advocacy for a rules-made law tells us, in essence, that the norm that expects individuals to make use of their intelligence and sense about what is appropriate and correct in given circumstances is a wrong norm, a flawed one, a non-juridical norm, precisely because it involves *the risk of having to trust in each other*. The fact is, Giuliani would say, that "in a pre-established systematic the conscience appears to be an element of disorder". However, if the ideal of human conduct from the point of view of a strictly positivistic conception is the secretary, who "is not responsible for the choice because [her] function is purely technical" (Giuliani 1966, p. 211), who is governed by very precise rules that suppress her sense, then there is a problem here, specifically with the value of human freedom.

4.4 The Problem of Instrumentalism with Equality

Things are not far different when it comes to the ideas of the pro-principles thinkers. They recognize the space of *reor*—evaluation, and choice—in Law, but reserve it to certain categories of persons, namely constitutional judges or judges in general and jurists, at least the 'cultivated' ones. In this case, the distinction between rules and principles works in the sense that the law is divided between rules, that are "obeyed" and do not refer to the world of values and to the great options of the juridical culture (Zagrebelsky 1991, p. 149), and principles, of quite another calibre. To understand the principles, one needs to have cultural resources capable of grasping the 'allusions' that a principle makes to the great questions of culture, while in order to

understand the rule it is enough to understand its language well.³⁴ When thinking this way, along the basic principles/rules distinction a border runs, which separates the educated and the wise (who *interpret* principles and *dialogue* with them) from the ordinary people who just *execute* the rules: these latter are expected only to understand that they have to obey the rule, whatever it says.

Thus, a two-level Law is outlined: at one level the Moral of obligation operates, which is to say the logic of command, and this is the space in which the standardized and hetero-direct life of the common man moves, basically receiving from rules “the criterion of [his] actions: the rules tell us how we must and must not act in situations foreseen by the rules themselves” (Zagrebelsky 1991, p. 150). At the other, superior level, the Moral of virtue unfolds. Only those who have to deal with principles can take a position and handle the indeterminate, non-predefined problems of what is just. Principles, therefore, correspond to the sphere of freedom (they enter into play when the situation in which we find ourselves is not predicted by the rule) and they open the space in which we are asked to exercise our freedom (in view of taking a position). To the common man is addressed the strictness of the technical rule, which is the legal norm when understood as a mere “directive proposition of human conduct”. To the educated man and the judge only are reserved the moral pleasures offered by the intellectual activity of measuring oneself by the dilemmas of finding the appropriate rule of conduct (normally addressed to others), through the exercise of the *sensus recti* and *iniusti*, or, in short, the privilege of holding and exercising the axiological function of the intellect.³⁵

Zagrebelsky’s definition of the principle as a “norm without a case in point” evokes a space in which a man asks himself how one should act, what is right and what is not, a space where the man *thinks*, in a situation that is not predetermined nor typified. Here, but only here, Law rejoins its components of freedom, and

³⁴Their scorn towards legal positivism notwithstanding, pro-principles thinkers adopt arguments that were dear to the legalist jurists of more than a century ago in Italy, particularly the most influential among them. Vittorio Scialoja, disdaining the equitable tradition of Roman and common law, saw in it the source of a “seditious equity, which serves to incite the discontent of the people” by highlighting the imperfections of positive law and *making people believe that law is a simple thing that everyone can understand* (Scialoja 1879 *italics added*; see also Cazzetta 2011, p. 804 ff.); Nicola Coviello, disparaging the “old hands” who thought that knowing some ancient maxim meant knowing the law, vigorously contested the idea that the principles of law could be interpreted “*by any person rather than only by those who have authority over the social group over which the rules must rule*” (Coviello 1915, p. 7, *italics added*).

³⁵A point of view comparable to Fuller (1963, p. 5) emerges: Law, in general, is a system for subjecting human conduct to a system of norms; norms must exist; some limit themselves to laying down the basic rules necessary for an orderly social life. These norms apply the Moral of obligation, they are simply to be performed and clear to everyone (*‘do not kill’*); others require the engagement of a human being “at his best” and do appeal to the Moral of virtue: these are the rules that concern the ideal existence and functioning of the Law and pursue an ideal of perfection. Law, therefore, lies for the most part on the register of the Moral of obligation, with its objective standards and its mechanisms of reward and punishment; where the pressure of duty ends and the challenge of excellence begins, the Moral of virtue intervenes because choices are at stake there (which is to say, freedom).

individuality is relevant. The rule is instead charged with constraint; it is the fenced off space of those who are not free because they receive from the outside the standardized criterion of their action, the indication of what they must do or not do. The rules, Zagrebelsky continues, are things that must be observed and applied mechanically and passively by “thinking automatons” that use simple logical schemes such as syllogism and deduction. Using this expression, ‘thinking automatons’, Zagrebelsky demonstrates that he perceives the dehumanizing component that underlies legal positivism as well as any instrumental conception of Law as a technique of social control. However, instead of addressing his critique to this dehumanized vision, he accepts it and takes it for granted that the rules (as he understands them), and all that they imply as regards the reification of man, do exist and cannot but exist. Otherwise (and Bentham or Hobbes would surely agree) there would be only chaos, of course. With the Constitution and a principles-oriented Law, rules in fact do remain, even though they are only “one side of Law” (Zagrebelsky 1992, p. 153); to the extent that they remain, the rules are perfectly placed in the same position and role assigned to them by the strictly observant legal positivists. However, one may wonder whether it is apt for a constitutional democracy taken seriously to have an idea of man that accepts that, even only sometimes, an individual person functions as a ‘thinking automaton’. The question is whether a world of Law where the many are touched by the rules and the few by principles truly reflects an idea of isonomy.

4.5 Rediscovering the Morality of Law: A Matter of Moral Freedom

Legal positivists maintain that a well-functioning Law is one in which individual discretion is excluded, particularly that of the subjects of the Law; therefore, Law should preferably be made up of ‘rules’. ‘Principialists’ argue instead that in Law a sphere of discretion exists, and it must exist, but it is limited to some people. Both are today prone to accept a certain relationship between Law and Moral; but as for the idea that Law has strictly to do with everyone’s equal moral freedom, both continue to present problems.

In contrast, and in harmony with his idea of the Moral of virtue, Giuliani theorizes that law should be thought of as “a continuous scheme of delegations” (this is the thesis of the *Contributions*, Giuliani 1953) so that at any moment and for each subject, be it a judge, an administrator, or a citizen, *the premise of conscious and responsible (free) action is kept alive and operating*. Here the world of Law is inspired by a principle of freedom and equality (even in responsibilities), there by a principle of authority and deprivation of responsibility. Here the world of Law is inspired by a radical principle of isonomy; there authoritarian and asymmetric elements remain. Besides, compared to legal positivism, which at least presupposes the authority that dictates the rules for everyone (and regrets that discretion is

somewhat unavoidable in the case of the judge), legal ‘principialism’ sounds more disturbing, when it is argued that the cultivated man is exempt from the rules and can carry out a dialogue between his peers with principles, thus explicitly reserving moral freedom only to some individuals.

What conclusions can one try to draw from all this? One could be this: the distinction between principles and rules, which took place (especially in Italy) obliterating the historical experience of the *regulae iuris* (*mindful of a subjective dimension of law*), grant the role of protagonists of the world of Law only to the great institutional and collective actors: legislators, judges, society, groups, experts. Giuliani calls them the ‘Wholes’ (totalities, entire): they hold more power or have more wisdom than common people, and (regardless of whether one is an advocate of the principles, or an advocate of the rules) Law is a business reserved to them.

Another conclusion could be this: the distinction between principles and rules does not call into question the instrumental presuppositions according to which Law is a norm established by someone for others (and although there are many types of norms, and some are called principles, the substance does not change). The distinction between principles and rules being nothing but a difference between functional equivalents, it becomes understandable why the definition of both focuses on aspects that merely differentiate them in terms of behaviour, functionality (the rule is rigid, the principle flexible, from the rule we deduce, with the principle we reason). But the word *regola/regula* recalls a difference of another kind, a qualitative one, which concerns not to what purposes law is useful, but where it comes from and how it takes shape.

To Dworkin, who imagines Hercules drawing the just solution from an objective reality called Law which already contains all answers for all questions, Giuliani replies that “in the absence of a code, the prudent man’s behaviour is the rule of conduct” (Giuliani 1997, p. 23).³⁶ Unlike evoking a world of Law entirely reduced to norms and entirely instrumental to the ends that the Wholes prefigure (and very far from being fascinated by these latter), the *regulae* remind us that the protagonist of Law is man, with his limits, defects, and with his resources. In their perspective, human actions and relationships do not appear only as the mere object of norms, but also as the sources and measures of the living together, of the values we aspire to. Perhaps, it is only by ceasing to oppose principles and ‘rules’, and by beginning rediscovering the principles as *regulae*, that we can renew the link between Law and the value of human dignity, which does not go without taking human freedom and equality seriously.

³⁶ Giuliani reformulates the Aristotelian definition of prudence, following Aubenque (1963), p. 45.

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The Legal Meaning of Human Dignity: Respect for Autonomy and Concern for Vulnerability



António Cortês

Abstract Human dignity is the supreme principle that defines the ultimate limits and frontiers of the whole system of basic rights. We must therefore identify its legal meaning, range and specific content. Duties to oneself and self-harm are beyond the limits of law. Legally speaking, only otherness, only one's relationship to others, is relevant. The legal principle of human dignity demands that the humanity in each person should be treated by other people and by the state as an end in itself. This primarily means respecting people's autonomy, freedom of choice and personality. However, it also implies understanding the phenomenic reality of the human being as an embodied and vulnerable creature. People's capabilities must be developed within certain favourable social conditions: some people are especially fragile and therefore need special care from others and/or protection provided by the state and the law; moreover, people's bodies, life and health are vulnerable and technology increases natural risks and dangers. Limit situations in biolaw, such as euthanasia and so-called designer babies, should be discussed in the light of an integral conception of humanity. In fact, treating the humanity in each person as an end in itself implies respecting their autonomy and personality, but also demands that we take human vulnerability into consideration. This conception is essential to defining the boundaries of law.

1 The Foundation of Rights and the Limits of Law

Human dignity is the most fundamental principle of justice and law. In a hypothetical original moment of communication on the structure of a well-ordered society, human dignity is the minimum we all would fight for. The system of individual liberties and the equitable social distribution of opportunities and goods necessary for the self-fulfilment of each person logically presupposes a prior moment of

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recognition and respect for human dignity.¹ Moreover, the limits and frontiers of law defined by the political and judicial powers in each period of history depend on the normative force, meaning and range of this primordial principle.

Human dignity is firmly enshrined in the 1948 Universal Declaration of Human Rights. The Preamble refers to the “inherent dignity” of “all members of the human family” and Article 1 solemnly declares that “All human beings are born free and equal in dignity and rights.” The idea here is that dignity is not a special honour or aristocratic privilege of the few, but a democratic feature of all human beings.² Every person is important in their own right.

This principle is also expressly consecrated in the Charter of Fundamental Rights of the European Union. Article 1 categorically states: “Human dignity is inviolable. It must be respected and protected”. The inviolability of human dignity therefore implies that it must not only be respected, but also positively protected by states and the law. Many constitutions also present human dignity as the supreme principle of the legal order and thus the supreme, most radical limit on the validity of all legal norms and decisions.

However, even when constitutions and international conventions such as the European Convention on Human Rights are silent, it may be argued that human dignity underlies and is central to the whole system of rights.³ In fact, the premise that there are human rights and constitutional rights that prevail over ordinary laws is founded on the idea that human beings are the ultimate reason or justification for all legal systems. As Habermas notes, there was always “a close connection” between the concept of human rights and the notion of human dignity, “although initially only implicit”,⁴ as human dignity is the “moral source that nourishes the contents of all human rights”.⁵ This idea is reflected in the two binding UN Covenants on Human Rights, adopted in 1966 as further developments of the Universal Declaration, in which it is explicitly proclaimed that the recognized rights therein “derive from the inherent dignity of the human person”.

The principle of “equal respect and equal concern”, Dworkin’s basic norm upon which the entire legal order should be founded, is essentially an appeal to human dignity.⁶ From a legal perspective, the destiny and life of each person cannot be fully subsumed to considerations of social utility or preservation of communitarian

¹This means that the two basic principles of justice affirmed by Rawls (1971, 1999), p. 266, are based on the recognition of the equal dignity of each and every person.

²Kriele (2004), p. 169, states that human dignity implies that every person, regardless of her capacities or behaviour, possesses a certain nobility, simply by being human.

³See Costa (2013), pp. 393–402, and Di Stasi (2019), p. 120–123.

⁴Habermas (2014), p. 15.

⁵Habermas (2014), p. 16.

⁶Dworkin (1997, 2014), p. 326: “Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect.”

values. Each person matters and deserves respect and concern in their own right and beyond all political, economic, social or scientific reasons.

Human dignity does not adopt the normative form of a “rule” with a hypothetical structure, establishing a certain legal consequence for a well-determined and typified fact situation. It is a “principle” with a categorical normative structure, valid for an unpredictable number of new and complex cases.

However, this principle has one peculiarity: it is a primordial principle, because it is *categorical* not only in its logical structure, but also in its axiological validity.

In fact, principles and rights are generally subject to possible weighting or balancing. Every principle or right may conflict with other principles or rights. Weighting or balancing is always possible in terms of concrete rights and liberties founded on human dignity, in view of different factual circumstances, but something different happens with the principle of human dignity. It is true that the scope of the principle of human dignity may be debated and that, in order to determine this scope, we must admit value judgments, gradations and even the balancing of different dimensions of “humanity” (for instance, “conscience” and “life”). Nevertheless, the principle of human dignity, within the scope of its application, is always prevalent. In this sense it may be said, quoting Grimm, that dignity “always trumps” and that it is an “absolute right”.⁷ However, because we see “human dignity” as the basis of rights, in the light of which the whole system of rights should be interpreted and developed, rather than simply as a specific right, we prefer to consider *human dignity as a categorical principle*.

Therefore, we say it is a primordial principle, a first principle, a “meta-principle”, and indeed the highest principle of a just legal system. In fact, justice is an essential goal of law and its first imperative is to give each person their due (“to each his own”; Ulpian’s *ius suum cuique tribuere*), not only by virtue of conventional or statutory law, but above all by virtue of their dignity.

The limits and frontiers of the human rights and constitutional rights system depend, as previously stated, on the normative force, meaning and range of the principle of human dignity. This principle is the cornerstone that defines the limits and frontiers of the system of basic rights, and therefore of the law as a whole.

2 The Starting Point: The Kantian Imperative of Humanity and Its Legal Formula

The philosophical development of the idea of human dignity owes its main tenets to Immanuel Kant’s practical philosophy.⁸ Kant’s influence on the post-World War II concept of human dignity may, it is true, be debated: historically, the contemporary

⁷ Grimm (2013), pp. 386–391, especially, p. 388.

⁸ On the influence on Kant’s philosophy of the traditional paradigm of human dignity developed by Cicero, Leo the Great and Pico della Mirandola, see Sensen (2011), pp 152–161.

success of the idea of human dignity is closely linked to the “Never Again” response to the Nazi experience⁹ and is not simply a consequence of Kant’s philosophical influence.¹⁰ Nevertheless, I believe that Kant’s practical philosophy is still the starker, albeit insufficient, “starting point” for understanding human dignity.

For Kant, the fundamental key to defining the idea of dignity is contained in the second formula of the categorical imperative which lies at the very centre of morality, including law and ethics. The formula is the following: “*Act in such a way that you treat humanity, whether in your person or in the person of any other, always simultaneously as an end and never as a mere means*”.¹¹

A person is free and therefore an “end in him or herself”, that is, a being who is not “a mere plaything of nature” and “not merely a means to the will of another”.¹²

For Kant, a person is simultaneously “*homo noumenon*” (a being capable of freedom, “wholly supersensible”, a “personality independent of physical attributes”) and “*homo phaenomenon*” (a being affected by physical attributes, a person in her empirical existence).¹³ The *homo noumenon*, “humanity” as such, is therefore “the capacity for freedom”, or one’s personality independent of physical attributes. It is this personality, capacity for freedom and autonomy that must be respected in people.¹⁴ Nevertheless, we must be cautious when interpreting the assertion that, for Kant, the concept of dignity “means nothing else than the respect towards a person’s autonomy”.¹⁵ According to the categorical imperative, “person” has a double meaning: *homo noumenon* (an autonomous personality, a free and rational being) and *homo phaenomenon* (the human being in his or her empirical or physical existence). This “complicates” the formula and its application.¹⁶

It is nonetheless true that, for Kant, in law and ethics, the noumenal reality of the human being, his or her autonomous personality, is decisive. And autonomy is beyond sensibility: it is a “stoic” autonomy, a rational freedom according to moral law, which implies multiple “duties” to oneself and to others.

The Kantian philosophical framework is still the basic starting point for understanding human dignity as a legal principle. However, for legal purposes, only “duties to others” matter, not duties to oneself. Furthermore, we must understand the notion of “autonomy” in a more realistic way.

⁹ Grimm, “Dignity in a Legal Context. . . .”, p. 385. See also Gross (2013), pp. 92–93.

¹⁰ For a “Kantian background” to the inviolability of human dignity in the German Basic Law, associated with a Catholic influence, see Rosen (2018), pp. 80–104.

¹¹ Kant (1994), p. 52: “Handle so, daß du die Menschheit, sowohl in deiner Person als in der Person eines jeden anderen, jederzeit zugleich als Zweck, niemals bloß als Mittel brauchst”.

¹² Sensen (2011), pp. 102–103 and 110.

¹³ Kant (1997), p. 347.

¹⁴ See Sensen (2011), p. 130, *et passim*.

¹⁵ Schaber (2016), p. 259.

¹⁶ See Welzel (1990), p. 172, where he observes that “humanity” has a double meaning: “*homo noumenon*” and “*homo phaenomenon*”.

First of all, it is necessary to determine whether there is a specifically “legal” formula for the principle of human dignity. We should begin by stating that the way each person treats humanity in his or her own sphere is a matter of ethics or personal morality, but not a matter of law. Only relations between individuals and other people and between individuals and the state are a matter of law. At this point, reference can be made to the notion of the “intrinsic otherness of law”.¹⁷ For the law, as a specific normative order, the relevant perspective is not the way in which people, on the basis of self-responsibility, treat themselves. Unless the capacity for autonomous decision is not guaranteed, self-harm without the interference of others is not a matter of law. Only “otherness” concerns the law. From a legal perspective, there are no duties to oneself, only duties to others and the corresponding rights.¹⁸

The idea that the law is only concerned with otherness goes back to Aquinas’s theory of justice. In fact, Aquinas offered a clear explanation: justice “implies the relationship of one man to another”, “justice is concerned only about our dealings with others (*justitia est semper ad alterum*)”.¹⁹

Although in a more radical and liberal form, the intrinsic otherness of law also underlies John Stuart Mill’s harm principle: “The only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant”.²⁰

Within the scope of contemporary philosophy of law, Kaufmann also concludes that “apart from their relationships to others, human beings may have religious and moral duties, but not legal ones”.²¹

Moreover, in law it is important how each person’s humanity is treated by other people, but also how it is treated by the state. In fact, as the history of totalitarian regimes clearly shows, states may not only protect and promote, but also offend against human dignity. Human rights therefore appear primarily as rights or liberties against the state. In fact, history is teeming with situations in which states, even democratic ones, surpass the limits of their power, disregarding people and considering them merely as the means towards presumed higher collective or public ends. Sometimes people are treated by the state as disposable objects rather than free agents. Yet the law must ensure that each person is treated with dignity, as an agent and possessor of a sphere of autonomy. The humanity of each individual must be respected.

¹⁷ Domingo (2010), p. 150.

¹⁸ Today we consider human dignity from the perspective of rights: Kant stressed the perspective of duties implied in the consideration of people as autonomous beings. See Cortês (2005), pp. 610–614.

¹⁹ Aquinas (1947), Question 58, Article 2.

²⁰ Mill (1989), p. 13.

²¹ Kaufmann (1993), p. 216.

Taking these arguments concerning the necessary otherness of law into consideration, and the fact that human dignity must also be affirmed in relation to the state, my proposal for the legal formula for the principle of human dignity is as follows:

The humanity in each person shall always be treated by other people and by the state simultaneously as an end in itself and never as a mere means.

Or simply:

The humanity in each person shall always be treated by other people and by the state as an end in itself.

People cannot just be a means, that is, useful or disposable “objects”²² in the hands of others or the state. They must be considered as autonomous beings and ethical personalities, never as a mere means (object) in the hands of the state or other people. In Kantian terms, this implies respect for each man’s unique innate right: the right to “liberty”²³ Kant never differentiated between specific human rights and basic liberties,²⁴ as the 1789 Declaration of Rights of Man and of the Citizen did and as many international law instruments do today. Nevertheless, he changed the traditional normative perspective of natural law by clearly placing liberty at the centre of the legal order.

3 The Most Obvious Implication: Rights and Liberties as “Trumps” and Limits on Power

The idea of human dignity remains fundamental to understanding the whole logic of human and constitutional rights as “trumps” against the majority. As Dworkin explains, “we need rights . . . when some decision that injures some people finds *prima facie* support in the claim that it will make the community as a whole better off”.²⁵ In other words, human rights basically limit global utilitarian calculation and communitarian perfectionism. The aggregate maximization of the happiness of the majority, in the manner of Bentham, or the pursuit of a communitarian ideal, perhaps in the manner of Plato’s republic or Marx’s classless society, should not be achieved by sacrificing the personal liberty of individuals, as if they were disposable or negligible objects, a “mere means” towards a higher communitarian end.

As previously mentioned, each person is of the utmost importance, as an autonomous being with his or her own goals and life plans. Of course, the exercise of rights and freedoms must take “due recognition and respect for the rights and

²² See Dürig (2011), p. 218: “Human dignity is violated when the concrete human being is degraded to an object, to mere means . . .”.

²³ Kant (1997), p. 345: “The innate right is only one: liberty (the independence towards others’ arbitrariness)”.

²⁴ For an emphasis on this point, see Holzleithnerm (2009), p. 88.

²⁵ Dworkin (2009), p. 166.

freedoms of others” into consideration and, moreover, “everyone has duties to the community in which alone the free and full development of his personality is possible” (Article 29 of the Universal Declaration of Human Rights).

However, as Seelmann and Demko assert, “The individual never exists [...] exclusively for the good of the other” or for the good of the “community”.²⁶ This implies a basic duty not to sacrifice a person’s autonomy for the sake of others or the state. Thus, the law cannot admit the heteronomous use of one person without considering him or her an agent or autonomous pole.

Arguing that rights are trumps means they have priority, which is not to say that they are absolute. No right is an absolute. Every right admits restrictions justified by other rights or even by the basic demands of the common good. However, in speaking of rights as trumps, I mean to convey that it is up to any given power, whether political, economic, social, technological or other, to justify restraints on personal liberty. In fact, human dignity, at the core of which we find personal liberty, is the ultimate reason for all types of power.

A person may be treated as a means, as useful and as having *utility* as a means of production, for instance, or as a means towards the common good. Nevertheless, human beings should always be “simultaneously” treated as an end in themselves, that is, with *humanity*. This essentially means respecting their personality and personal freedom—life, physical integrity, personal identity, reputation, privacy and so on. People are treated as an end in themselves when the state and other people respect their humanity as something of prevailing importance, and therefore when the person is not treated as a utilitarian good that offers some kind of advantage to other people or to the state. Personal liberty breaks the logic of utilitarian calculus. Kant’s formula does not exclude situations when people choose to freely serve as a means by being useful to benefit another, such as a company or the state, as is the case in a working relationship, for example. Without cooperation, humanity could not achieve any progress. Being useful for the benefit of others or the community corresponds to the basic condition of humanity. What we must exclude is the possibility that the “humanity in each person” may be disregarded as a *mere means* or mere *utility*, an object without *humanity*.

The different dimensions of personal liberties are not equally important but have a distinct normative force in different factual circumstances and may, according to their relative importance, be sacrificed for reasons of *strict necessity*. However, the principle of human dignity should not lose its categorical force. Personality and the corresponding personal liberties—such as life, physical integrity, personal identity, reputation or privacy—have priority and a prevailing force.

In some cases, the essential nucleus of the principle of human dignity is directly violated. This is particularly the case in extreme forms of *nullification of personal liberty* such as slavery, torture, the death penalty or punishment without sufficient guilt, even if there is a potential social value to this, such as the prevention of crime.

²⁶See Seelmann and Demko (2014), p. 259.

In these cases, the person is reduced to a mere object in the hands of others or the state and is treated as such, as an instrument, not a person or an autonomous agent.

In the case of slavery²⁷ and torture²⁸ in particular, the person's "humanity" amounts to nothing: the person is completely reduced to an instrument in the hands of others. He or she is treated as an object, not as an autonomous agent. His or her personal freedom is nullified by others.

Yet even aside from extreme possibilities such as those mentioned above, in situations where personal liberty is not completely nullified but merely impaired, it is important to affirm that only *reasons of strict necessity*, based on the rights and liberties of others or on the primary conditions of the common good, may justify a restriction of personal rights and liberties. The more important a specific personal liberty or personal good is, the more important the rights or public interest that justify restricting the personal liberty or good in certain circumstances should be.

The burden of proof always lies with the public powers. It is up to the authorities to justify and explain the specific and concrete reasons for restraining personal liberty. Furthermore, there can be no doubt that aiming to strike a balance is not admissible when the practical nullification of personal liberty is at stake. The "heart" of personal liberty should always be respected.

4 Reinventing Human Dignity from the Perspective of "Vulnerability"

The legal formula for human dignity postulates that "The humanity in each person shall always be treated by other people and by the state simultaneously as an end in itself and never as a mere means". Yet does this simply amount to respecting an abstract and decontextualized capacity for freedom? I do not believe so. We must reinvent the Kantian categorical imperative.²⁹ We need an *integral concept of humanity*. More specifically, *we must re-understand the notion of "humanity" in the light of vulnerability*. It is impossible to understand human dignity in isolation from human vulnerability.³⁰

Kantian "humanity" must be reinvented or, at least, re-understood. In terms of Kantian practical philosophy (law and ethics), a "person" should be understood

²⁷ See Scott (2013), p. 74: In the ownership of slaves as property the person is reduced to the legal status of a "thing", but even after its formal abolition, slavery still exists in situations of extremely humiliating and degrading work conditions.

²⁸ See Rosen (2018), p. 158: "When you torture me, you humiliate and degrade me, but the harm is not just that: you cause me extreme pain and thereby deprive me of effective self-control".

²⁹ Linhares (2007), p. 51.

³⁰ Sedmak (2013), p. 566: "The concept of human dignity is linked with the concept of vulnerability in at least two ways: first, because the concept of human dignity has emerged in confrontation with the fragility of human existence; second because situations of experienced vulnerability prove to be the acid test of human dignity in its entirety".

primarily essentially as a noumenal autonomous being, not as an anthropological reality or phenomenon. Rationality and freedom are specifically “human” and man, as a sensible being with empirical existence, is secondary. I would like to propose another understanding of “humanity” which more clearly assumes the phenomenal or anthropological reality of human beings as persons. In this sense, we may try to reconcile Kant and Aristotle. As Nussbaum observes, being “a great biologist and the son of a doctor, Aristotle was never tempted to view the human being as a disembodied creature”³¹ and “he understood human vulnerability”.³²

Humanity is not simply man’s specific characteristic of rationality and freedom. Humanity is more than animality, yet as is the case with other animals,³³ also includes the body, life, health, genetic code, sexuality, procreation, food, shelter and other needs. Of course, the way in which human beings deal with all these realities is specifically human; it is in a certain sense *more sophisticated* and more *rational*. The differences must be taken into consideration, but the analogies should not be ignored. Man has similarities with other animals in that he is also a *sensitive being*, capable of pleasure and suffering.

Humanity is not simply a noumenal, but also an anthropological reality. When we talk about “humanity”, what is at stake is the autonomy of sensitive beings with concrete and existential potentialities, needs and inclinations, an autonomy that can be promoted or endangered, not simply a *stoic* abstract autonomy.

It is very interesting that, for Kant, “humanity” was not static, but something that could be promoted. As Kant writes: “it is not enough the preservation (*Erhaltung*) of humanity in each person as an end”, its “promotion (*Beförderung*)”³⁴ is also necessary. The promotion of humanity according to “universal laws” should imply the development of individual “talents” and help for those in “need”.³⁵ Therefore, if the “humanity” in each person is to be treated by the state as an end in itself, a person should not be deprived of the possibility of *developing his or her own talents*, nor should he or she be deprived of the *essential goods or services* required to satisfy his or her own *basic needs*.³⁶

Thus, having started with Kant, we must now think beyond his premises.

³¹Nussbaum (2011), p. 127.

³²Nussbaum (2011), p. 127.

³³MacCormick (2008), p. 30, argues that “Humanity [...] is not in radical contrast with animality. [...] There are therefore things that are of value to us simply in virtue of our animal nature”.

³⁴Kant (1994), p. 53.

³⁵Kant (1994), pp. 44–45.

³⁶Kant (1997), p. 446: “It is rightful for the government to oblige [through taxes] the rich to supply the means of subsistence to those who are incapable to provide their own most basic natural needs”.

First of all, humanity implies certain “central capabilities”,³⁷ as Nussbaum would say, but also *basic needs* in the Rawlsian sense³⁸ (basic needs will naturally be satisfied if all basic capabilities are secured, but the lack of one single central capability might be enough to prevent one person from satisfying his or her own basic needs). In this context, *vulnerability is the difficulty in developing central capabilities*, namely through access to “education” (as in Article 26 of the Universal Declaration of Human Rights), *and the difficulty in providing for one’s own basic needs*, such as “food, clothing, housing and medical care” (as in Article 25 of the Universal Declaration of Human Rights). Therefore, in order to treat the humanity in each person as an end in itself, states should create conditions that ensure people are not deprived and are able to develop their “central capabilities” and, on a subsidiary level, the state should ensure that no one is deprived of the essential goods or services required to satisfy their basic needs.³⁹ Aiming to treat the humanity in each person as an end in itself, the law must enlarge its frontiers or limits, protecting in minimum and differentiated terms the so-called *social rights*—which include education, work, health care and social security—in order to make liberty effective. As Article 22 of the Universal Declaration of Human Rights stipulates, everyone is entitled, “in accordance with the organization and resources of each state”, to “the economic, social and cultural rights indispensable for his dignity and the free development of his personality”. An economic, social and cultural minimum is a requirement for human dignity: it is a matter of “humanity”.

Secondly, the law must assume that *some people are especially vulnerable* but nevertheless as “human” and entitled to dignity as everybody else. The law must assume that “humanity” does not simply mean autonomy, but also “vulnerability”. In this context, we will consider *vulnerability as the incapacity or difficulty associated with avoiding harm (being injured) or acting with full autonomy*. As Ricoeur has clearly pointed out, Kant stressed autonomy but did not take into sufficient consideration human vulnerability or fragility. Now, human existence is a “paradox of autonomy and vulnerability”.⁴⁰ Vulnerability, as the incapacity or difficulty associated with avoiding being harmed by others, is part of human existence, and, as Hart showed, the first reason for the inevitable existence of the law.⁴¹ However, some human beings, such as children, women in certain contexts and the

³⁷ Nussbaum (2011), pp. 33–34: capabilities such as life, bodily health, senses, imagination and thought, emotions or capabilities referring to each person’s relation to others, to animals and to material things. On page 94, Nussbaum stresses that “the principle of each person as an end [which she defends] is a version of Kant’s idea of the duty to respect humanity as an end and never as mere means”.

³⁸ See Rawls (1996), p. 166: “below a certain level of material and social well-being and education, people simply cannot take part in a society as citizens”.

³⁹ Connecting a “social minimum” (“*Existenzminimum*”) to human dignity, see Seelmann and Demko (2014), p. 245, and Shaber (2016), pp. 257, 260 and 261.

⁴⁰ Ricoeur (2001), pp. 85–105.

⁴¹ Hart (1994), pp. 194–195. In fact, “human vulnerability” is the first truism that justifies the “minimum content of natural law”.

handicapped, disabled or terminally ill, are especially vulnerable. In more general terms, this includes any person subject to discrimination, whether due to race, colour, sex, language, national or social origin, or property (as in Article 2 of the Universal Declaration of Human Rights). Their autonomy and their personality must not only be respected, but also protected by the state and the law (see again, in particular, Article 1 of the Charter of Fundamental Rights of the European Union, based on the tradition of the post-World War II German Basic Law). Treating these people's humanity as an end in itself means considering them as they are, that is, in their specific fragility, with separate levels of, and potential for, autonomy. This vulnerability demands *special protection* by the law and sometimes—as in the case of children or handicapped and terminally ill people—*care* by others.

Finally, we must remember that Kant died at the beginning of the nineteenth century. He could never have imagined the risks that scientific and technological development would impose on nature, on which human beings depend (climate change being the most glaring example), far less the risks of applying technology to human beings themselves, through genetic manipulation of reproductive cells (maybe “the most serious question that can be posed to man” in the age of technology⁴²). Humanity is not simply rationality and freedom, but also its physical and biological support. Being human does not simply mean being rational and free, but also having a body and being a specific animal. Our body, our life and our health are vulnerable. Genetics deals with the most delicate equilibria of our vulnerable nature. In fact, the genome is a very complex book of instructions for our cells and organs, including the brain. When we change one single gene, it may cause immediate and/or unpredictable long-term problems for the whole equilibria of the human DNA. We would do well to recall Hans Jonas' imperative of responsibility, contained in the formula “Act so that the effects of your action are compatible with the permanence of genuine human life”, or expressed negatively as “Act so that the effects of your action are not destructive of the future possibility of such life”.⁴³ It is only with this sense of responsibility towards the uncertainties of biotechnology that we may claim to be respecting “humanity” as an end in itself.

⁴² Jonas (1984), p. 21.

⁴³ Jonas (1984), p. 11.

5 Humanity in Biolaw Limit Situations: The Question of Voluntary Euthanasia and the So-Called Designer Babies

We should interpret the principle of dignity as applied to complex problems in biolaw in the light of the above notion of “humanity”. What are the limits on medicine imposed by the legal principle of human dignity? Let us now turn to issues such as euthanasia or parents choosing their children's genetic features. Is Dworkin, who accepts both voluntary euthanasia⁴⁴ and designer babies,⁴⁵ right or wrong? In my view, he overestimates ethical independence and undervalues the full meaning of “humanity” as vulnerability.

Let us start with the difficult question of voluntary euthanasia. The law cannot forbid suicide (otherness of law), nor can it compel people to receive medical care that they, in full awareness, do not wish to have (patient's autonomy). If the legislative power attempted to forbid suicide or compel people to receive unwanted medical care, it would exceed the limits of law. However, in principle, the law may never leave homicide unpunished, leading to the controversial matter of voluntary euthanasia, which takes place when a doctor not only witnesses the death of a patient but also, in accordance with the patient's wishes, kills him or her, even though this is done at their bidding and in a context of irreversible extreme suffering. This question must be examined, as Seelmann and Demko suggest, without legal paternalism or the imposition of a unique image of the person. Nevertheless, we must treat the humanity in each person as an end in itself, because human dignity is the supreme limit of law. Dworkin accepts voluntary euthanasia, even if he affirms the “sanctity of life” conceived in its dual dimension: biological and biographical. However, he does not consider the minimal content of the “ethics of care” as a precondition for any discussion on voluntary euthanasia. He does not consider *palliative care* (on a medical, social, psychological and spiritual level), the *caregiver's* status, or the *procedure* to secure *true autonomy* (the procedure to ensure that the request for euthanasia is not just a request for the care of others in the context of extreme suffering). Dworkin respects individual freedom of choice, the choice of a personal biography, but does not take the demands of personal vulnerability into sufficient consideration.

On the contrary, it seems to me that the law would exceed its limits, imposed by human dignity, if it were to decriminalize euthanasia simply as a consequence of *freedom of choice* in situations of terminal illness with irreversible and unbearable suffering, without guaranteeing that the vulnerable person had previously had access to a reasonable standard of palliative care (or physical and moral pain relief). A law that intends to decriminalize euthanasia merely as a matter of abstract *freedom of choice*, ignoring this *ethics of care* (as an ethics of life and active compassion), does

⁴⁴Dworkin (1993), pp. 179–241.

⁴⁵Dworkin (2000), p. 452.

not respect “humanity” (*the autonomy of sensitive beings*) as an end in itself and therefore exceeds the limits of valid law. Freedom of choice in situations of extreme irreversible suffering, and thus of extreme vulnerability, is inconceivable without very strict and demanding procedural conditions in the context of an ethics of care or active compassion.

Dworkin also accepts human genetic engineering, assuming, in line with Rawls, that the “genetic lottery” is a source of injustice. He accepts the idea of so-called designer babies: children genetically manipulated to have certain specific physical or intellectual attributes, a possibility made more and more plausible by recent “gene editing” techniques which could be applied to man in the future. From Dworkin’s point of view, talents are good and positive and thus if we can improve them, we may do so: “there is nothing in itself wrong with the detached ambition to make the lives of future generations of human beings longer and more full of talent and hence achievement”.⁴⁶ I believe, however, that the legal principle of human dignity must lead us to draw a very clear boundary in the case of genetic engineering and that this principle is incompatible with the possibility of designer babies.

Sandel contends, following Habermas, that “to think of ourselves as free, we must be able to ascribe our origins “to a beginning which eludes human disposal”, a beginning that arises from “something – like God or nature – that is not at the disposal of some *other person*””.⁴⁷

This premise cannot be fully accepted. Taking this idea to the extreme would exclude the possibility of reproductive medicine and even the possibility of family planning. The very existence of a child usually depends not only on some transcendent reality (such as God or nature), but also on the responsible choice of his or her parents.

We must nevertheless reject the possibility of the genetic editing of babies.

The genetic manipulation of human beings involves risks and uncertainties that are difficult to control and implies treating the humanity in each person as a mere means to perform the arbitrary preferences of others. A law based on human dignity must distinguish between, on the one hand, the legitimate aim of avoiding a serious illness with a well-determined origin leading to unusual suffering, as a universally shared desire that can be achieved without the risks of genetic manipulation through pre-implantation genetic diagnosis and, on the other hand, the illegitimate promotion of eugenics through gene editing, according to the arbitrary preferences of parents, which risks destroying the delicate equilibria of the genetic constitution of the human being.

When Dworkin argues that genetic engineering based on “ethical individualism”

is admissible, given the “absence of positive evidence of danger”,⁴⁸ he disregards the *precautionary principle*, according to which the more uncertain the effects of

⁴⁶Dworkin (2000), p. 452.

⁴⁷Sandel (2007), pp. 82–83.

⁴⁸Dworkin (2000), p. 452.

technology are, the more we should refrain from using it. As Hans Jonas explains: “Experience has taught us that developments set in motion by technological acts with short-term aims tend to make themselves independent, that is, to gather their own compulsive dynamics, an automotive momentum, by which they become not only, as pointed out, irreversible but also forward-pushing and thus overtake the plans of the initiators.”⁴⁹ In genetics, given the risks of irreversible harm for future generations, we should always adopt Hans Jonas's principle of the “prevalence of bad over good prognosis”⁵⁰ and an “ethics of preservation and prevention, not of progress and perfection”.⁵¹ We must therefore reject the “extreme anthropocentrism, to which all of nature (including human) is but a means for the self-making of a still unfinished man”.⁵²

Moreover, even if we consider the improbable hypothesis that there are no risks to human physical and mental health, human dignity implies respect for human plurality and imperfection, for the plural differences and natural vulnerabilities of each person as he or she is. We cannot transform human procreation into a global competition for perfection without endangering the idea that people are ends in themselves. We should not abandon the Kantian premise that perfection is a duty of virtue that each person has to oneself⁵³; it is not something to be imposed, without the autonomous collaboration of the self, by others or the state. Perfectionism without consideration for personal autonomy is not simply a dangerous ideology, but an ideology incompatible with the limits of human dignity.

There is therefore a legal imperative to preserve the genetic identity of the human being, a *right to genetic integrity*, which categorically forbids so-called designer babies.

6 Conclusion: Respect for Autonomy and Concern for Vulnerability

The legal formula for the categorical imperative is this: “The humanity in each person shall always be treated by other people and by the state simultaneously as an end in itself and never as a mere means”. A person is never merely a useful or disposable object in the hands of other people or the state. Treating the humanity in each person as an end signifies respecting their autonomy, but also taking their vulnerability into consideration. In order to consider vulnerability, the law should

⁴⁹ Jonas (1984), p. 32.

⁵⁰ Jonas (1984), p. 31.

⁵¹ Jonas (1984), p. 139.

⁵² Jonas (1984), p. 156.

⁵³ Kant (1997), p. 515. According to Kant's universalistic premises, the two supreme ends and duties of virtue are “self-perfection” (which presupposes the autonomy of the self) and “others' happiness” (which also presupposes the autonomy of the other).

expand its boundaries beyond the strict purpose of securing autonomy and civil liberties. Respect for personality and autonomy, and concern for vulnerability are the essential objectives of a law oriented by human dignity.

The limits of law must always be defined in the light of human dignity. On the one hand, the law should respect its limits in restricting personal freedom and, on the other hand, it should expand its frontiers in response to the multiple forms of human vulnerability.

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Part IV

Dialogues with Emmanuel Levinas

The Double Sense of the Law-Dignity Relationship in Emmanuel Levinas



Susan Petrilli

I have never claimed to describe human reality in its immediate appearance, but what human depravation itself cannot obliterate: the human vocation to saintliness.
("Violence du visage", in Emmanuel Levinas, *Alterité et transcendance*, 1995[1985], Eng. trans. p. 180)

Human dignity cannot be violated. It must be respected and protected (The European Union Charter of Fundamental Rights).

Abstract Dignity can result from an intrinsic quality: the dignity of a gaze, the face, associated with the single individual's intrinsic value, with singularity, with the I's respect for the other as other, even before the advent of positive law; or, it can derive from a social condition demanding respect, even obedience from others, dignity connected with a high office, with authority, social position. The law defends a role, social position, juridical position, an authority that is elected, nominated, inherited; the law defends the law itself; the law is law and is respected as such; dignity is the law itself. This double "position" of the law, this dual law-dignity relationship is a constant object of reflection by philosopher Emmanuel Levinas (1906–1995) throughout his writings, and is developed in this chapter around the following themes: dignity and responsibility; the relationship of reciprocal implication between "law" and "dignity"; original peace and authority of the face; when respect of the law becomes effacement of the other; freedom ensuing from responsibility for the other to the point of "substitution"; language, subjectivity, justice; language, face and ethics; the finite and the infinite; justice and signification; law as original recognition of the right of others; justice and responsibility; ambivalences of the face; body, algorithm and responsibility in the digital world; human rights, the problem of freedom and self consciousness; from need to desire; justice, love, saintliness; Levinas and Bakhtin for a humanism of the other; a view from semiotics; the relation to the other and semioethics.

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1 Dignity and Responsibility

Dignity: a condition of respectability, integrity, honesty, propriety, value, stature, loftiness, highness, calibre, standing recognized of somebody by somebody else, human dignity. In social history the qualification or value or attribute “dignity” is often associated with interest, what Emmanuel Levinas also terms “inter-estedness,” which consists in reducing “dignity” as a value to the qualification, the status of “identity”. In this respect, referring again to Levinas, in particular his essay not incidentally titled “Droits de l’homme et droits de l’autre homme” (1985a), something not very different occurs as regards human rights: human rights become the rights of identity, of belonging, of the I, to the exclusion of the other (cf. Levinas 1981, 1982d, 1982e; cf. also Petrilli 2019a). As in the case of “dignity,” the other is excluded from “human rights” as well. And these two occurrences are obviously connected to each other.

By reattributing identity value to the person who must earn it and not just self-attribute it gratuitously, even arrogantly, that is, to the I as I, the I as “I am,” Levinas evidences how dignity is a value based on the I recognizing the other, on recognizing the other as other. Dignity consists in recognizing the alterity of the other, of others, recognition which occurs when the I takes responsibility for the other. The other constitutes an absolute ethical imperative on the I. Consequently, such recognition is not a concession made by the I to the other, but the expression of inevitable involvement, compromise, implication of the I with the other and for the other, of non-indifference in the face of the other (cf. Arnett 2017). The I is bonded to the other in an intrigue, an entanglement that cannot be unravelled, in a relationship to the other without shelter.

In his essay titled *Emmanuel Levinas* and subtitled *La scoperta dell’umanità nell’inferno dello Stalag 1492* (Discovery of humanity in the hell of Stalag 1492), Bernhard Casper observes that the unconditional dignity of each person, dignity that cannot be eliminated, consists in that person’s responsibility for the other (*Ibid.*, p. 34). Levinas says as much with a brief formula: “moi = responsabilité”. This is responsibility that knows no limits, a “responsabilité illimitée”. In *Autrement qu’être ou au-delà de l’essence* (1974), Levinas explains “unlimited responsibility” in light of his conception of language, with special reference to the distinction between “Said” and “Saying”: unlimited responsibility comes from the hither side of my freedom, from a “prior to every memory,” and “ulterior to every accomplishment,” it comes from the non-present *par excellence*, the non-original, the anarchical, prior to or beyond essence. And he continues:

The responsibility for the other is the locus in which is situated the null-site of subjectivity, where the privilege of the question “Where?” no longer holds. The time of the *said* and of *essence* there lets the pre-original *saying* be heard, answers to transcendence, to a dia-chrony, to the irreducible divergency that opens here between the non-present and every representable divergency, which in its own way – a way to be clarified – makes a sign to the responsible one. (Levinas 1974, Eng. trans., pp. 10-11)

This original, primal condition of responsibility in the face of the other, on which depends the I's dignity, a condition of participation, of preoccupation, unrest for the other, is not a condition that is easily endured. It is accompanied by the demand of interrogating the philosophical privilege of being, of identity, of calling one's own self to question and interrogating one's beliefs and certainties, as we tend toward the hither side of being itself and beyond being, prior to and ulterior to essence (*Ibid.*, pp. 18–19; Ponzio 2006a, 2006b).

At the origin of laws, of the State is not the Hobbesian situation of *homo homini lupus*, but necessary recourse to delimitation of original responsibility for the other, to the equal distribution of original responsibility among many others (cf. Hobbes 1651). The I is not only in a relationship with *one* other, but, unfortunately for the I, with *multiple* others, not only “close”, but also “distant”, not only present here and now, but latecomers, others that arrive subsequently.

Human dignity calls for consideration relatedly to the dimension of alterity, absolute alterity: dignity is the problem of singularity, of the “properly human”, it is the problem of responsibility. By contrast with other living beings, the human animal has the prerogative of bearing the weight of responsibility, that is, responsibility for the other, not only for one's neighbour, for one's similar others, but for life over the entire planet (cf. Petrosino 1998, 2016, 2017).

Each singularity is associated with responsibility for the other, but this is not responsibility of the I, circumscribed and safeguarded by alibis, hence limited, special, “technical” responsibility, as would say another philosopher of alterity, Mikhail Bakhtin (1919, 1920–1924, 1990), but unlimited, infinite responsibility. Reference here is to the responsibility that the alterity of the other, of others (*autrui*) provokes in me, the other in its singularity, in its non-functionality, in its absolute alterity, the other of the face in its nudity, as Levinas says. The I's unconditional and absolutely uneliminable, impenetrable dignity consists in responsibility for the other; it is given in the I's vocation for the other.

To contextualize human dignity in the dimension of the alterity of the other, of others—not relative alterity but the absolute alterity of the other “man”, the other human being, of *the other as other*—means to recognize that this is a dimension, a condition that is prior to the dignity reached in relation to being and its multiple identities. Absolute alterity is a dimension that being and its identities presuppose: the I's social status, conquered through one's successes, fulfillment of one's capacities, competences, skills, through reaching one's goals, successfully completing tasks relative to social role, as established by a given official order, etc. (Facioni et al. 2015).

Instead, the Levinasian dimension of *autrement qu'être*, “otherwise than being” valorizes the dignity of singularity, the dignity of the uniqueness of each one, uniqueness that does not imply separation from the other, but instead the other's irreplaceability. Dignity depends on the other, it is given in the relation to the other—it is the other who renders me special, singular, in an intrigue of relationships impossible to get free of, impossible to unravel. Impossible because the other comes without being called, beyond all prevision, calculation, possibility of control, outside being, outside identity, outside the subject (cf. Levinas 1961, 1968a, 1987a;

Ponizio 2013). The other in its singularity, in its irreplaceability presents itself and surprises, astonishes; the other impedes closure of the totality, interrogates the certainties of totalitarian discourse, of truth, knowledge. In the opening to the other the I comes to consciousness, it reaches self-consciousness, becomes aware of itself, even of its own emotions, whether joys or sorrows.

2 The Relationship of Reciprocal Implication Between “Law” and “Dignity”

“Dignity” takes different meanings. It becomes dignity resulting from a given condition demanding respect, even obedience, from others: dignity relating to a high office, to a senior position, preeminence based on authority, on social status. Titles such as “Your Highness”, “Dignità” in Italian, are in fact attributed in recognition of the highest office, of social rank, of respect for nobility, and so forth. Dignity here indicates socially recognized authority. The “dignitary” is the person who carries out an important role in a given society, as in the case of the ecclesiastical dignitary, the political dignitary. Dignity can also indicate the authority of an idea, a conception, and relative respect for that idea, for that conception—general, fundamental, absolute principle, as in the case of an axiom. In all these acceptations of the word “dignity,” we are dealing with the dignity of being, with the ontological dignity of the human being, as if dignity simply consisted in being something, as though it were a fact of “essence”. This is a question of multiple different dignities, of the different aspects of dignity, its different masks, corresponding to the different identities of being.

The dignity of the law can derive from the intrinsic value of each one, from the respect that I owe the other as other: the dignity of the nude and helpless face in front of which, before all positive law, I perceive the commandment “you shall not kill”.

Or, the law carries out the role of defending an office, a social, juridical position, an authority that is elected, nominated, inherited; the law defends the law itself; the law is law and must be respected as such; dignity is the law itself.

This double “position” of the law, this dual law-dignity relationship is a recurrent object of reflection in the writings of Emmanuel Levinas, throughout all his works.

As Levinas observes in “Liberté et commandement” (1953), to guarantee freedom, to avoid the danger of tyranny, it will be necessary to institute a just State, to formulate just laws. But order established in such terms can backfire on the I itself, in the form of fixed and unflexible law, *dura lex*, it too tyrannical and violent. And above all, because it is based on the rights of the I, precisely, on the order of a just State with its just laws, the State with its laws can also command war, an “inevitable” means of defence, the realistic face of being and of *inter-estedness*, an unavoidable tribute to the *conatus essendi* of the individual and of the community an individual belongs to as an individual (see also Levinas 1966).

In the name of its very own freedom the I is open to blackmail by an impersonal order, to the point even of accepting without question the *extrema ratio* of war. Recourse to violence is sanctioned, considered necessary in order to suppress violence. The impersonal discourse of the law administers the being of things in realistic terms. And in such discourse, war presents itself as irresistible violence, ineluctable sacrifice of the I, sacrifice that cannot be avoided (cf. Petrilli and Ponzio 2016a).

Nonetheless, being has its *otherwise* in its very own foundation. And this foundation is still more realistic, indeed truly realistic. Allusion here is to the realism of the face to face situation, face to face with the other, with others. Levinas explains that this is a relationship of commandment without tyranny, which is not yet obedience to an impersonal law, but rather the indispensable condition for the institution of such a law. The I is constituted as responsibility beginning from the opposition of a nude face, the opposition of disarmed, defenceless eyes, which is not the opposition of a force, it is not a relationship of hostility.

The face, says Levinas in “*Ethique et esprit*” (1952, now in *Difficile liberté*, 1963), is inviolable, the eyes absolutely devoid of protection, the most naked, vulnerable part of the human body. Nonetheless, the eyes oppose an absolute resistance to possession by knowledge: “Knowledge reveals, names, and consequently classifies. Speech addresses itself to a face. Knowledge seizes hold of its object. It possesses it. Possession denies the independence of being, without destroying that being – it denies and maintains” (in Levinas 1963, Eng. trans., p. 8).

3 Original Peace and Authority of the Face

Opposition of the face is a peaceful opposition. But here, peace is not at all suspension of war, violence withheld in order to perform violence at the best, for the sake of performing it to perfection (cf. Ponzio 2009a, 2012a). On the contrary, violence before the face of the other consists in the very elimination of this opposition, in circumventing it, bypassing it, in ignoring the face, and avoiding the gaze; and, as a consequence, in the possibility of finding the right argument through which *no* inscribed on the face of the other insofar as it has sense in itself, independently of the I, can be interpreted as an adverse force, and consequently as an opposition to vanquish and overcome, to subdue.

Violence consists in conquering the other, in overwhelming the other, even through the law, the violence of knowledge that claims to name, classify, possess the other, in spite of opposition to violence; opposition expressed in the commandment, inscribed in the dignity of the face even before its explicitation in the formula, “You shall not kill,” which asserts the demand of respecting, and not violating, the dignity of the human person, dignity of the individual in its absolute alterity as a single unique individual, as a singularity. According to Levinas, to find oneself in front of a face, not only directly, but also in indirect terms—for Levinas we are in a face to face relationship with the other not only in that other’s presence, but also in

front of any of the other's manifestations, whether a piece of writing, a handcrafted work, an artwork, the other's household, dwelling—is already to feel responsibility for the other, to perceive not only the command "you shall not kill," but also respect for the other, the obligation to listen to the other, to welcome the other, being the essential basis of all forms of "social justice" (cf. Levinas 1982a, b, 1984a).

On considering the relationship between I, other and justice we inevitably incur in ambivalences, contradictions and paradoxes and to keep account of this is to somehow acknowledge the ambiguities and contradictions that inhere in life, in relationships among others with each other, in sociality. Levinas renders all this superbly with his original hyperbolic style of writing, intensely evocative, poetic, and thus capable of pushing philosophical reflection to the edges. All these complexities are constantly held into account by Levinas and inevitably condition his reflections on the relationship between I, other and justice.

In Levinas's description, the face is the place of exposition to the other, as such it presents itself in its nakedness, disarmed, defenceless, with no security, no guarantees; thus from under the face's masks there also transpires its vulnerability, weakness, mortality. Nonetheless the face is also the place of authority, of command, the face with its exposition, vulnerability, impotence is at once authority that commands "you will not kill"; thus the face is the place of contradiction between fragility and authority. The I never gets free of the other and in this inability to escape the other, to discharge responsibility, in this constriction to the other, there is the infinite, the dignity of the elusive alterity of the other, therefore a concrete, infinite responsibility: "a responsibility prior to deliberation, to which I am exposed, dedicated, before being dedicated to myself", as Levinas (1995[1985b], Eng. trans. p. 105) says in "Violence du visage" (an interview of 1985 with Levinas, by Angelo Bianchi, originally published in the journal *Hermeneutica*, now in *Alterité et transcendance*, 1995. The latter is a collection of twelve papers chosen by Levinas, originally published between 1967 and 1989, and the last volume published before his death in 1995).

Responsibility for the other even becomes responsibility for the other's faults, to be guilty for the other, to the point of taking the blame for the other, of paying in the other's place, of becoming the other's "hostage": "That way of being for the other, i.e., of being responsible for the other, is something dreadful, because it means that if the other does something I am the one who is responsible. The hostage is the one who is found responsible for what he has not done" (*Ibid.*). This situation is based on a responsibility that precedes distributive justice, responsibility in front of the justice that distributes, the justice that measures, the measures of justice, *Measure for Measure*, as recites Shakespeare—but the true measure of justice is not the *dura lex* of equal balance, the measure of balances, a truth which allowed Portia in another of Shakespeare's plays, *The Merchant of Venice* to save Antonio's life against Shylock's appeal to impartial law. According to Levinas, the very feeling of having done nothing for the other renders us hostage: responsibility of one who is not guilty, of the innocent—another paradox. Even the perfectibility of the law, the possibility of improving the administration of justice, is inscribed in my unconditional obligation toward the other.

In the bad conscience of European humanity, says Levinas in “Thou Shalt Not Kill”, a section of his 1991 book, *Entre nous. Essai sur le penser-à-l’autre* (Eng. trans., pp. 192–193), there is anxiety for the suffering inflicted upon others by the “logic of things,” by the demand of coherence with reality, by the realistic “ideo-logic” of the world as-it-is (Petrilli 2004); there is concern, unrest for suffering inflicted merely in the perspective of a deserved conviction, of a just punishment; there is the anxiety of the responsibility shouldered by those individuals who have survived the violent death of the victims, as if each single individual, though presumed innocent, were called to answer for the misery one did not cause and for the murder one did not perform. In the face of the other, there is no shelter, and Levinas admonishes that not even the fear of each for himself, in his own mortality, not even defending oneself, can succeed in absorbing the scandal of indifference toward the suffering of the other (*Ibid.*, p. 192). In the biblical imperative “you will not kill,” turned to each one in the face of each other one, we feel all the weight, all the pervasiveness of responsibility, unlimited responsibility, as it falls upon each singularity, in one’s absolute alterity, behind the relative responsibility of the single individual, that is, of the individuality, a question of limited responsibility, that is, formal, reciprocal responsibility associated with identities, which identities compose the genus, the generic class, in this particular case mankind, humankind:

It is as if, in the plurality of humans, the other man abruptly and paradoxically – against the logic of the genus – turned out to be the one who concerned *me* par excellence; as if I, one among others, found myself – precisely *I* or *me* – the one who, summoned, heard the imperative as an exclusive recipient, as if that imperative went toward me alone, toward me above all; as if, henceforth chosen and unique, I had to answer to the death and, consequently, the life, of the other. A privilege which the logic of the genus and of individuals seemed to have obliterated. “Thou shalt not kill” – what an extraordinary ambiguity of individuals and genus (Levinas 1991, Eng. trans., p. 193)

4 When Respect of the Law Becomes Effacement of the Other

Situations can be given, and historically they have been given, in which respect for the law—above all when the law safeguards the *I* in front of the other, when it favours one’s own rights—predominates over respect for the dignity of the other. In this case, to respect the law means to efface the other and thus trample on the other’s dignity. “I was simply doing my job,” “I did my duty,” “I not only obeyed orders, I also obeyed the law,” “I enforced what I was told was the right thing to do”: these more or less are the declarations made by Adolf Eichmann during the trial against him which took place in Jerusalem. This is the type of declaration that leads Hannah Arendt to write *Eichmann in Jerusalem. A Report on the Banality of Evil*, 1963. Unconditional respect for the law can lead to the belief, as in Eichmann’s case, that responsibility means to have a clean conscience in front of the law and what it commands (cf. Petrilli and Ponzio 2020).

Justice arises to avoid tyranny and thus guarantee freedom, to safeguard the life of each one in sociality, justice is social justice, a question of the impartial distribution of justice according to the law. Reflecting on the relationship between freedom, responsibility and dignity, Levinas in *Autrement qu'être ou au-delà de l'essence* avers that the “Good” reabsorbs “the violence of non-freedom”, and thus he proceeds to interrogate the notion of “finite freedom” which he relates to the notion of “pure freedom” (Levinas 1974, Eng. trans., pp. 123–124). The idea of a responsibility prior to freedom, where freedom and alterity are associated in responsibility for another, for others, confers an irreducible sense to the very notion of “finite freedom,” without damaging the dignity of freedom thus conceived, that is, in finitude. “Finite freedom” contains an element of “pure freedom,” and consequently it poses the problem of limiting the freedom of the will, but without solving it.

In an essay of 1954, “The Ego and the Totality,” Levinas had already signaled the complexity of the relationship between will and justice maintaining that injustice cannot be reduced to an offence of the will, attacked in its dignity (now in Levinas 1987b, Eng. trans., p. 39). The will can be maltreated, violated, bent and twisted, indeed because of its very essence the will is exposed to violence, but, at the same time, it escapes the very violence it attempts to dominate. And, in fact, already in his early writings, Levinas deals with the question of the need of evasion, “De l'évasion” is the title of an early essay by Levinas, of 1935. With the concept of “evasion”, Levinas alludes to the need to exit the identity of being, of the I, to exit the identity of the identical, of the same (cf. Petrilli 2019b). He finds the possibility of evasion from being, from the sphere of the I and the obsession of confirming and barricading self in situations that the I cannot control, that inevitably escape the I: pleasure, given its unbounded nature (apart from his prose, Giacomo Leopardi had already evidenced this with his poetry); shame, as unmotivated unease, traceable in the individual not yet become adult, in the child, whom, when asked to pronounce its name refuses to respond, and mother, or whomever cares for the child, offers the justification “s/he's shy”; nausea (a concept formulated by Levinas well before publication of Sartre's *Nausée*), that is, the condition of not bearing each other, feeling nausea for what the individual does normally, for the places one inhabits, one's dwellings, even in front of one's very own identity (cf. Levinas 1976).

5 Freedom Ensuing from Responsibility for the Other to the Point of “Substitution”

Responsibility for the other is responsibility without conditions. And it is in this situation of responsibility that the I's freedom is determined. Freedom is conferred on the I by the other at the very moment that the other puts the I in the condition of having to answer to the other and for the other. It is in this *having to answer* that the I is rendered free. Levinas says “ordained” free. Finite freedom, to be able to do something or not, is not original freedom, but rather is positioned in an infinite

responsibility in which the other is other not because s/he limits my freedom, but because, calling me to question, interrogating me with his/her presence, with the mere fact of existing, the other puts me in the condition of being free to respond to that other in one way or in another, even opposite to the first.

This obligation to *answer to the other and for the other* foresees the condition of “substitution”, of my replacing the other in that form that can be characterized as the condition of *hostage*, as anticipated above, to the point of persecution, of sacrificing oneself for the other, in the other’s place, of giving my life even for him (cf. Casper 2019). This is a new type of accusation, as claimed by Levinas during a conversation with Augusto Ponzio at his home in Paris (20th November 1988): “guiltiness without guilt, ‘indebtedness’ without debt. Obligation of responsibility that nobody else can replace, debt that nobody else can pay in place of the I, and thus, for the I, the materialization of one’s own uniqueness as *I'*” (“Responsibility, substitution, writing. Dialogue with Emmanuel Levinas”, in Ponzio 2019, p. 22, Eng. trans. my own; cf. Poirié 1987). Consequently, finite freedom is not simply an infinite freedom that operates within limited boundaries. Even more: in the impossibility of withdrawing from infinite, unlimited responsibility for one’s neighbour, for the other, in one’s unreplaceability, Levinas sees the *election* of the human, and not servitude, observing that religions detect the supreme dignity of the human in such election (Levinas 1974, Eng. trans., pp. 124–125).

The first case of the I is not the nominative, but the accusative, in other words, the first case consists in being called to question, interrogated: interrogation that concerns one’s very own being, one’s own condition, one’s own life situation. The original question, according to Levinas, is not that indicated by Martin Heidegger, “why is there being rather than nothing?”, but rather the question addressed to the other by the I: “why *can you be* this and that and I can’t be?”, “why can you be under shelter, safe, fed to satisfaction, and I can’t be?”. In the situation of the “I” in the accusative, of the I called to question, the I must respond with no possibility of delegating. The I’s responsibility, the I’s response, is mandatory, inescapable. The I in this responsibility for the other is irreplaceable. Not only its freedom, but also its uniqueness, singularity, irreplaceability, unrepeatability are thus constituted in the relation to the other, in responsibility for the other that cannot be declined, that cannot be refused (cf. Fanizza et al. 1998).

6 Language, Subjectivity, Justice

The problem of subjectivity, developed in terms of the relationship between alterity and identity, involves the problem of language. The origin of language, that is to say, language as conceptualization, as classification, as the capacity to extract that which is common from difference, and consequently language as the possibility of nominating and distinguishing in different ways, according to the different languages, is only possible in the relationship with the other. According to Levinas, language too arises from having to respond to the other, to an appeal made by the other, to the

other's request of help, of acceptance, of shelter. Therefore, even before consisting in having *to say* something, language, as Levinas rightly remarks, consists in having *to give* something to the other, in having *to do* something for other. Language too is founded on the I's unlimited responsibility, before and beyond being, before and beyond the identical, the same. Language presupposes encounter with the other, as its condition of possibility. This is not only the other, my neighbour, the other in proximity, nor is it only the first comer, but still others, those who may present themselves at a later time, that can arrive subsequently, that the I may encounter in the course of life, obligated to respond to them as well (cf. Levinas 1947, 1954). There is always another and another still in the open network of sociality. Therefore, language too is implicated with justice, that is with justice before the law.

The problem of language is studied by Levinas in relation to reason and knowledge, which is a relation he interrogates (Levinas, "Philosophy and Transcendence", in 1995[1989], Eng. trans., pp. 3–38): is reason at the foundation of language or does language precede thematization, knowledge, the concept, with respect to which it is constitutive? What does Levinas understand by language?, and why even pose the problem? This is the philosophical question of the relationship between the particular and the universal. With Roland Barthes (1980, 1984) we could say that this is the problem of the relationship between *mathesis singularis* and *mathesis universalis*, in other words, between the identity of the universal and the alterity of the particular, the singular.

To the extent that it is capable of expressing always more than what the signifier says, language is significance, alterity and excess that cannot be absorbed by meaning, by the theme, by the identical. In Levinas's terminology language as what he denominates "saying" trascends the boundaries of the "said," of meaning, of the concept, and presents itself as "writing," *écriture avant la lettre*, well before writing understood as "transcription," in the sense of these terms as described and related to each other by the same Barthes (1953). Language in Levinas is the event before it is fixed in representation, the possibility of impossible involvement with the other, the other whom as other evades possession, mastery by the I (cf. Petrilli 1994, 1998, 2015d; Ponzio 2017). As the condition for unconditional participation in the situations of others, the essence of language is interpellation, appeal.

It ensues that the origin of language, which in Levinas is also the origin of signifying, is saying without the said, what he describes as "passivity of passivity," in which subjectivity signifies without reserve, "difference of one *and* the other" as "difference of one *for* the other," "non-indifference *for* the other", "dedication to others", what he also indicates as a *sincerity* " – and this sincerity is saying". In *Dieu, la Mort et le Temps*, of 1993 (a book that collects the course of lessons held by Levinas during the academic year 1975–1976, the last he taught at the Sorbonne), Levinas explains thus:

When the Saying has meaning only through the Said, the Saying is covered over and absorbed by the Said.

To the Saying without a Said an opening is necessary that does not cease to open, and that declares itself as such. The Saying is that declaration. (We must give the lie to everything

that is constructed as an internal world, as interiority.) It is necessary that the Saying be a Saying of the Saying itself, a Saying that goes without thematization, but that exposes itself ever more. This is a Saying turning back on itself as though it were a matter of exposing the exposure, rather than standing there as in an act of exposing. To Say is thus to exhaust oneself in exposing oneself, to make a sign of that of which one makes a sign, without resting in its form of a sign. The sign would thus be a passivity of the obsessional extradition, where this extradition surrenders to the other, rather than being established in a position or in a substance.

There is, then, an *iteration of the Saying*, which is pre-reflective iteration and which designates the Saying as a Saying the Saying [*Dire le Dire*]. That is the utterance of the *here I am*, which identifies with nothing if not the voice that utters and surrenders. Here is where we ought to search for the origin of language. (Levinas 1993, Eng. trans., pp. 191–192)

And, let us add on our part that, as a consequence of what Levinas himself claims, it is here that we must search for the origin of justice (cf. Levinas 1977a).

7 Language, Face and Ethics. The Finite and the Infinite

Levinas establishes a relationship between language and face: the face of others is language, that is to say the place of encounter with the other, by contrast with attachment to being, to identity, to the *conatus essendi*. The face to face encounter, encounter with the face of others, is already in itself appeal in front of the I to “dis-inter-estedness”, to subjecting oneself to the other, to making oneself available, to surrender, and giving oneself. The face is image, but not in the sense of image resulting from vision. The face is image that is not revelation, that does not reveal itself, unveil itself, but rather re-veils itself. In the language of the semiotics of Charles Peirce we could claim that the face is an icon, that it self-presents itself according to the category of firstness, that is, for itself, *kathautho'*, as Levinas says. This is the face as absolute and not relative alterity; alterity which in Peirce's language does not present itself as secondness, that is conditioned by the relationship to something else (as occurs for all identities, woman-man, father-son, communitarian-extracomunitarian), nor as thirdness, that is a sign that needs another sign to signify, another sign that interprets it (cf. Peirce 1923, 1931–1958). Levinas says that the other is not a sign, but makes signs.

This is the reason why the relationship with the other is at the origin of language, it is not in language, but it is at the origin of language. In this sense the image of the face is not reducible to the status of object and as a consequence it is not reducible to the concept whose function is that of rendering the object intelligible, comprehensible and therefore appropriable, manipulable. With respect to the object and to the concept, with respect to reality which is made of objects and concepts, with respect to vision which sheds light and illuminates, the face as image is the double, the shadow as Levinas says in “*La réalité et son ombre*” (1948).

In a note to his essay “Langage et proximité” (included in the 1967 edition of his 1949 book, *En découvrant l’existence avec Husserl et Heidegger*), Levinas explains the sense in which he understands the term “ethics”, and precisely:

We call ethical a relationship between terms such as are united neither by a synthesis of the understanding nor by a relationship between subject and object, and yet where the one weighs or concerns or is meaningful to the other, where they are bound by a plot which knowledge can neither exhaust nor unravel (Levinas 1949, 2^a ed. 1967, Eng. trans. 116, note).

In Levinas, ethics in the sense described above, which as such is at the origin of signification, ethics that precedes ontology (as he repeats in his essay of 1984, “Prayer without Demand”), concerns the relationship between language and body, in an intrigue where the relationship consists in the first place in contact, participation, and responsibility of the I for the other (cf. Ponzio 2008a, 2009b). The ethical intrigue involving together body and language gives rise to an assymetrical communication in which sense, from the I to the other, is not indifferent and is not reversible. Such intrigue is the space of the singularity of each one, of excess with respect to the official order, of significance that is not exhausted in signification, of saying that oversteps the said (see also “La Signification et le Sens,” in Levinas 1972, pp. 17–63, in which he explains the ethical dimension of communication). The ethical intrigue says of the word as a unique, unrepeatable event, expression of irreducible alterity of the single individual, of one’s unreplaceability, and therefore of infinity in irreversible responsibility of the I for the other, or as Levinas also says in *Autrement qu’être ou au-delà de l’essence* (1974), of infinite meaning in responsibility. The ambivalence of infinity, or transcendence, which is always enigmatic alludes to what cannot be possessed, known, or assembled once for all, the trace of impossible incarnation in proximity with the other, where there emerges a responsibility that does not originate in me:

The fleeting trace effacing itself and reappearing is like a question mark put before the scintillation of the ambiguity: the infinite responsibility of the one for the other, or the signification of the Infinite in responsibility. There is an ambiguity of the order that orders to me the neighbour that obsesses me, for whom and before whom I answer by my ego, in which being is inverted into a substitution. In it I could not arise soon enough to be there on time, nor approach without the extraordinary distance to be crossed augmenting before every effort to assemble it into an itinerary. (Levinas 1974, Eng. trans., pp. 161–162)

In the face of the single individual there is the infinite. In the face there is the uneliminable trace of the absolutely other, of uniqueness, on the respect of which depends the I’s dignity, that is the dignity imposed upon me by the other’s elusive alterity, in that other’s mystery, alterity that evades the totalizing grasp of knowledge, possession by the I, framing in whatever identity. The trace of the infinite in the face of the other says of the invisible, of absence, a metaphor of signifying prior to thematization, the said, the object, knowledge, being, identity, representation, prior to the concept; the infinite of the face is transcendence given in the relationship with the other “man”, the other human being, transcendence that does not become immanence, entrapped in the identity of being.

As Levinas says in an essay of 1968, “Infini”, originally published in *Encyclopaedia Universalis* (now in *Alterité et transcendance*), we come to know the finite in the light of the infinite, the measure of that which is, of all things, is the infinite:

Infinity is the adequate measure of all that is: it is the finite straight line that is in potentiality and the infinite straight line in act, actualizing that which was only potential in the finite straight line. Henceforth, it is by the infinite that the finite is known – a thesis that is affirmed in Campanella (1568-1639), Descartes, Malebranche, Pascal, Spinoza and Leibniz. The indetermination of the world is the imitation of God’s absolute infinity. The unlimited character of space acquires the dignity of a perfection, in counter-distinction from the Aristotelian order of values. Thus, outside rigorously scientific motives, it was a religious thought that determined the infinitism of modern science. Giordano Bruno (1548-1600) said to the inquisitors of Venice: “I teach the infinite universe, the effect of the infinite power of God”. (Levinas 1995[1968b], Eng. trans. 1999: 66)

Indeterminacy of the world reflects the absolute infinite, therefore in the indeterminacy characteristic of life, there is the trace of dignity conferred by infinity, irreducible alterity. Paradoxically, if we can somehow approach the finite this is through infinity, if the finite is knowable in some measure, this is possible on the background of the infinite, that is to say keeping account of the indeterminacy of the world, and as Levinas says, such indeterminacy is the imitation of the absolute infinite.

8 Justice and Signification. Law as Original Recognition of the Right of Others

In the assymetrical relationship between the I and the you there enters the third, another neighbour, another face, another unreachable, unknowable alterity, another incomparable, unique, single individual. This tells of the proximity of the multiplicity in which the I passes from the relationship of responsibility for the other, to the question who comes first?

This is where the problem of justice arises. Who is the other par excellence? How to judge? How to compare incomparables in a relationship between one unique single individual and another, among singularities? The person one is responsible for is unique, and the person responsible cannot delegate this responsibility, so that the person responsible is also unique, singular (cf. Ponzio 2016).

In his essay of 1986, “La proximité de l’autre”, Levinas returns to reflect upon such issues that traverse all his writings, as in his book *Autrement qu’être ou au-delà de l’essence* (1974). The question of the third, as anticipated, is the question of the other, after the “first comer,” also the “second comer”, the third, so that the problem of social justice emerges with the multiplicity, with the need therefore to compare, know, judge:

The act of consciousness is motived by the presence of a third party alongside of the neighbour approached. A third party is also approached; and the relationship between the neighbour and the third party cannot be indifferent to me when I approach. There must be justice among incomparable ones. There must then be a comparison between incomparables

and a synopsis, a togetherness and contemporaneousness. There must be thematization, thought, history and inscription. But being must be understood on the basis of *being's other*. (Levinas 1974, tr. it.: 21-22)

“Peace, peace to the neighbour and the one far off” (Isaiah 57, 19). This line from Isaiah in the Sacred Scriptures, cited by Levinas, poses together the problem of the other and of the third party, both my neighbours. Not only is there the “first comer” to answer, to welcome, to respect, but the “second comer” too, and again the “third comer”. The third too is my neighbour, and is also a neighbour of the other (*autrui*). The presence of the third gives birth to the problem of justice, to that of equity, fairness, and thus the demand of law. Justice is necessary, says Levinas, which means to say that comparison of incomparables is necessary, equality among incomparables, identification among singularities irreducible to systems:

Justice is necessary, that is, comparison, coexistence, contemporaneousness, assembling, order, thematization, the visibility of faces, and thus intentionality and the intellect, and in intentionality and the intellect, the intelligibility of a system, and thence also a copresence on an equal footing as before a court of justice. Essence as synchrony is togetherness in a place. Proximity takes on new meaning in the space of contiguity. But pure contiguity is not a “simple nature”. It already presupposes both thematizing thought and a locus and the cutting up of the continuity of space into discrete terms and the whole – out of justice. (Levinas 1974, Eng. trans., p. 157)

Commencing from justice the problem is how to reconcile the multiplicity, the many others, copresent, contiguous, in contemporaneity, on the basis of the law, before a court of justice; how to distribute justice in equal manner, how to live out unlimited responsibility, for all, on the basis of the law. Here, then, the demand to institute the State with its laws which are not meant to discriminate, in front of which “all are equal”.

The unidirectional flow of Saying, of proximity, of responsibility is interrupted by the problem posed by Being, by the need for intelligibility of the system. Entry of the third is the very fact of consciousness, which implies accessibility to the abstraction of the concept, comparison of incomparables, thematization of the Same on the basis of the relationship with the other, beginning from the proximity and the immediacy of saying, prior to problems, “whereas the identification of knowing by itself absorbs every other” (*Ibid.*, p. 158).

In spite of this, at the basis of law and as the ultimate finality of law there remains responsibility for the other, recognition of the other’s alterity, which means to recognize the other’s special condition, distinctive needs, unique requirements. And on this depends the dignity of the person who is called to answer to the other. Dignity alludes to the other as a value, the other to respect, appreciate, valorize, to take into consideration and to love. Genus, generic class and its identities take second place.

To understand being it is necessary to start from the *other than being* (*autrement qu’être*), from the signification of approach, of proximity; being is being with the other, with others, for or against a third party; with the other and the third party against oneself, in justice. Justice opposes philosophy that does not see beyond being, that reduces saying to the said, thereby abusing language, that reduces sense

to interest. Instead, it is in disinterestedness, passivity or patience, when responsibility for the other is also responsibility for the third, that justice, the synchrony of being and peace take shape and establish themselves (cf. Petrilli 2017).

This situation leads to the need to transform an assymetrical relationship, among unequals, a relationship without reciprocity into a relationship of reciprocity and equality among the members of a given society, thereby placing limits on the unlimited responsibility associated with the primordial condition of the “for-the-other”. At the source of the quest for justice there is the for-the-other, to forget this involves the risk of transforming the sublime and difficult work of justice into a purely political calculation, which may even reach the level of totalitarian abuse (Levinas, “Violence du visage,” 1995[1985b], Eng. trans.: 171).

Justice and consciousness arise from signification. Being as being is a function of justice. Justice is signified by signification, hence by “the-one-for-the-other”. As Levinas explains in *Autrement qu’être*, justice as such demands equivalence or simultaneity between “consciousness acceding to being and being open to consciousness” (1974, Eng. trans., p. 163). According to Levinas: “Everything shows itself and is said in being for justice, and receives the structures of the thematized and the said – even signification and justice” (*Ibid.*). Sociality requires justice, it involves the need to compare singularities, incomparable others, to which necessity is associated consciousness and knowledge. Justice presupposes infinite responsibility for the other, non-indifference for the other, as its condition of possibility. Justice arises from love for the other, love without concupiscence, says Levinas, from love as charity, as listening, acceptance, the welcome, as dis-inter-ested love, at the service of the other, love at the service of love.

So then sociality implies justice and citizenship, and in the search for reciprocity, impartiality, comparison among incomparables, among singularities, in a situation where the other has no privilege over the I. Nonetheless, in this situation where justice limits initial responsibility the I remains in a relation of subordination to the other, because the arrival of the third poses the fundamental problem of human rights, which are always the other’s rights. Levinas is in accord with Wladimir Jankélévitch when he claims that: “We don’t have any right; it is always the other who has rights”. The relation to the other is neither one of fusion, nor of empathy, nor of identification, the relation to the other is envisioned as alterity. Sociality for Levinas is the best of the human. Before all verbal expression, the alterity of the face, of the for-the-other, elects me and summons me, calling me to my inescapable responsibility (“The Proximity of the Other”, Levinas 1995[1986], pp. 102–103). In the alterity of the face, the for-the-other commands the I. Therefore, it is a question of founding justice that offends the face on obligation towards that face:

Sociality is that alterity of the face, of the for-the-other that calls out to me, a voice that rises within me before all verbal expression, in the mortality of the I, from the depths of my weakness. That voice is an order. I have the order to answer for the life of the other person. I do not have the right to leave him alone to his death. (*Ibid.* pp. 103-104)

We have commented on Levinas’s use of paradox and hyperbole as characterizing his argumentative procedure and somehow reflecting, even enhancing, the

signifying ambivalence of the alterity relation in sociality. Levinas's description of the ambiguity of the face is another example: the face object of exposition to the other, expression of fragility, is also the place of authority, of command. The face, exposed to the possibility of violence, even murder, is together authority and commandment manifest in the expression "you will not kill". It follows that the face is the place of ambivalence between vulnerability and authority, weakness and resistance.

9 Justice and Responsibility. Ambivalences of the Face

When we enter the sphere of the inter-human the first question that concerns us as members of the same social organization is justice. As Levinas repeats in "Paix et proximité", originally published in *Les Cahiers de la nuit surveillée*, 1984 (now in *Alterité et transcendance*), because of the need to apply the principle of equality indiscriminantly, to each single individual in one's uniqueness, according to the order of justice, confrontation among incomparables is superimposed upon the relationship with the other, the incomparable. With respect to my relationship with the unique, this involves overlap of the neutrality (presence, representation) of being, thematization and visibility of the face, the weight of possessing and of exchanges, the need of thinking together the multiplicity and the unity of the world, under a single synthetic theme, promotion of the relation and of ultimate significance of being to intentional and intelligible thought, and finally the importance of the political structure of a society, of the system of essentially egalitarian laws, of institutions in which the I, the "for-the-other of subjectivity," enters with the dignity of the citizen (cf. J. Ponzio 1999, 2004, 2007).

Nonetheless notions like "being," "rational truth," "political unity," and relations established with such notions at the basis, are the source of conflict and violence to the extent that they are centred on identity and the defence of one's own rights. Here, then, is the need to underline that the very dignity of the law presupposes the entanglement, intrigue between the relationship among others, among singularities, therefore the "one for the other," on one side, and being, presence, representation, thematization of very being, that can always be reconducted to incomparability, to unrepeatability of the unique, to the infinite of the naked face, to its dignity insofar as it is absolutely other, my neighbour, on the other.

As Levinas reiterates in "Paix et proximité", we must remember that the origin, justification and the measure of human identities is peace and justice; justice legitimizes them ethically, that is, retains the sense of the properly human as dis-interestedness beneath the weight of being, which means that justice is not a natural and anonymous legality regulating human masses, from which techniques of social equilibrium are derived to harmonize antagonistic, blind forces through transitional cruelty and violence. Consciousness is based on justice so that while nothing escapes control of the responsibility of "the one for the other," legality puts limitations on responsibility and delimits the State, at once demanding watchfulness over the other.

For the human person, as Levinas observes (1995[1984b], Eng. trans., pp. 143–144), cannot be reduced to a case subsumed in a general rule, as instead the computer is capable of doing.

Does the just and egalitarian State, the democratic State, proceed from war of all against all, or from irreducible responsibility of one for the other, from the uniqueness of the face, in an ambivalence that calls for watchfulness over the other, for love and care for the other? (cf. Galli 2011). Precisely because consciousness arises in proximity of one for the other, as such it can become “dis-inter-estedness”. That the foundation of consciousness is justice means that consciousness, the objectivity of thought and of knowledge are founded on justice, and not viceversa. The reasonable order of justice set up through knowledge is superimposed upon the “extravagant generosity of the for-the-other,” as Levinas says. And here philosophy becomes “a measure brought to the infinite of the being-for-the-other of peace and proximity, and as it were a wisdom of love” (Levinas 1995[1984b], p. 144). It ensures that there is no justification whatsoever for the institution of war, much less in name of historical necessities, no clean conscience for war!

The human is return to the interiority of nonintentional consciousness, to bad conscience, to the possibility of fearing injustice more than death, of preferring to suffer injustice rather than inflict it, to evoke *Gorgia* by Plato, as Levinas claims in a text of 1989, “Philosophie et transcendance” (now in Levinas 1995[1989a], Eng. trans.: 29). A bad conscience derives from the face of the other man that in his mortality interrogates me: a question that does not expect a theoretical reply, an information, but that appeals to responsibility in a relationship of involvement, of ethical proximity in sociality and in love. This is the disinterested love of responsibility, in which the I and the other in their singularity are not reduced to the status of individuals in an abstract class, no more than anonymous points in the logical extension of a concept.

In the presentday world, the loss of the sense of responsibility, the basis of civil society, the loss of the sense of dialogical, caring implication in the life of others is evident on various fronts. A striking example is provided by the problem of migration and how it is mostly mishandled by governments worldwide. These in fact have proven largely incapable of finding the correct equilibrium between safeguarding the rights of their citizens and offering hospitality to migrants, unheeding of human responsibility toward a central, inalienable value as is the dignity of the human person as a singularity, the dignity of the other’s face (cf. Petrilli and Ponzio 2019; Petrilli 2020a).

10 Body, Algorithm and Responsibility in the Digital World

À propos technological society that our use of the computer sums up and represents, Levinas makes it clear that responsibility for the other cannot be enclosed in a general rule, in an algorithm. Today in the digital era the need to take one’s responsibilities, the need for accountability is felt ever less. This type of

“development” doubtlessly finds an explanation, even if partial, in the way we experience time, which is no longer the time of the other (Levinas 1946), of listening to the other, but time transformed into “everything at once, immediately”. The “digitized individual,” citizen of “virtual reality” is interested above all in surviving in the present.

The urgency of contemporaneity, of the contingent replaces the dimension of alterity, of time for the other, of giving to the other; the urgency of the present annihilates the time of relationships and of actions that call for time experienced in such terms. Moreover, technological society emerges ever more as risk society, in which the human individual—continuously threatened by dangers inevitably presented by technological progress (exposed daily as we are to identity fraud, informatic viruses, PIN cloning, fishing, fake news, etc.)—is thrown into virtual war among identities.

In the social order of velocity, functionality, efficiency, productivity, competitiveness, now the order of technological society, the time of the human is abolished, time for the other, the time of listening. Digital communication is successful the more it sensationalizes life, reducing, even eliminating the spaces of intimacy, privacy, modesty. Digital communication is associated with a digital space where the individual offers itself as a spectacle for the curious, in global virtual spaces paradoxically become ever more isolated, as spectator eyes look, rummage, denude, vulgarize, popularize and disseminate, stripping bodies of their dignity in the alternating play of maintaining distances or invading the other’s life to the extreme. In spite of the appearance of sociability, digital relations dispense users from any effort involved in cultivating friendship, encouraging the tendency to individualism and its egotisms, including different forms of “popular elitism” manifest in aggressivity towards the weak, as in xenophobic or homophobic behaviour generally (cf. Eco 2018).

Together with the sacrifice of the time of alterity, of the human, which implies elimination of the values, feelings, behaviours that connote the properly human—including the sense of responsibility and of dignity connected with the time of responsibility, the capacity for indignation at offending the dignity of the human person, as in the case of injustice inflicted upon the other—, ever less interesting appears the time of love, absence, waiting, expectation, mercy, the time of the body, care, dedication, desire, trust, encounter, of the non-functional, the time of patience, shame, modesty, seduction, tenderness (in spite of Barthes and his figures of amorous discourse!) (cf. Barthes 1977, 1982, 2007). From the point of view of the human, this is the time of the tyranny of monolingualism and of totalizing monologism, imposed according to the dominant values of global communication which, paradoxically, is total communication, but characterized by the tendency to social and linguistic alienation (Rossi-Landi 1970, 1978).

The society of globalized communication is pervaded by anaesthetized feeling, by the lack of inspiration by the other, of the sense of responsibility for the other (cf. Perniola 1991, 2009; Petrilli and Ponzio 2000; Petrilli 2008b, 2010). In the “state of necessity” to which we are constrained by “digital hyper-risk society,” the individual, committed to avoiding the traps set up by the society he lives in, is

ever less mindful of the “qualities” that orient his actions—the I is always less attentive, less thoughtful toward the other, he feels ever less responsible toward the other. Even the law recognizes and tollerates the widespread “insensibility” that characterizes today’s world: the person who finds himself exposed to the danger of serious harm to himself or to others, therefore who finds himself in a “state of necessity,” as recites the Italian penal code [art. 54], can act without taking responsibility for his actions. The citizen of digital society is relieved by law from his own responsibilities, in other words, he is becoming less responsible, that is, legally irresponsible (cf. Manicardi 2020).

11 Human Rights, the Problem of Freedom and Self Consciousness. From Need to Desire

In “Les droits de l’autre homme”, 1989, first published in *Les droits de l’homme en question*, Levinas maintains that since the Renaissance the “rights of man” pertain to the human person independently from prior external authority as much as from the will to take one’s own rights or deserving them. Human rights, also denominated natural rights, rest with the human person irrespective of physical, mental, personal and social differences. Human rights precede the law and the social and psychological conditions of their concrete formulation. These, instead, are influenced by the cultural, technical and economic state of a given society, as well as by the intellectual level of citizens. Nonetheless these conditions do not constitute the foundation of human rights, they are neither the origin of this “privilege” attaching a priori to the human person, nor its justification. At the same time, the tenor (*teneur*), the quality, the level of human rights is not arbitrary, but derives from the a priori which valorizes its “normative energy,” that is, the right to free will, thus as independence from an absolute, as a “dignity” (Levinas 1995[1989b], Eng. trans., p. 146).

But the right to human rights, the right to free will is exercised in the concreteness of the human empirical order, as the right to being-there, to live, thus to satisfy the needs of livelihood, of sustenance, the right to work, the right to wellbeing, to health, the right to beauty, that renders life bearable, ultimately the right to life in the world under all its aspects, the right to interhuman relations, whether established directly or around things. From a pragmatic point of view, free will is exercised by the single individual in a social world that is already given, experienced, an already lived world, already regulated and codified, already intonated, accentuated by the life of others.

For Levinas to defend human rights does not simply mean to become conscious of one’s own rights, but to establish and formulate the demands of freedom, therefore its concrete conditions in the effective reality of modern civilization—a freedom which in Western thought defines the infinite. Levinas believes that the infinite as spontaneity, which means to say as freedom, will dominate the Western conception of the infinite (“Infini,” in Levinas 1995[1968b], Eng. trans. p. 65).

If all have a right to free will the problem arises of how to safeguard each one's freedom with respect to the other's freedoms: how do all the members of a multiplicity coexist, each one unique and free, without violating the rights and the freedom of the other? "The war of each against all, based on the Rights of Man!," ironizes Levinas (1995[1989b], Eng. trans. p. 147). Following Kant on the need to respect the other as an end and not as a means, Levinas identifies the possibility of peace among freedoms, among freedoms of the many, in the notion of "good will," in "practical reason," the will to listen to and hear reason. Thanks to the propensity for the rational, hence the universal and the intelligible, freedom consists in freely imposing limitations on one's own free will, in consent to limiting one's own freedom so as not to limit the freedom of others. Just as one's uniqueness is given in the relation to the other, it is in the relation to the other that the I finds his freedom, his dignity.

But beyond Kant Levinas keeps account of the distinction between rationalism of the intellect and rationalism of reasonableness and maintains that the Kantian notion of "practical reason" does not fully account for free will, which means to say that free will is not contained by practical reason without posing difficulties. Beyond respect for the universality of a maxim of action, there is goodness, hence such feelings as mercy or charity or love, which Levinas describes as attachment to the other in that other's alterity to the point of granting him priority over oneself. The rights of man arise as the rights of the other, they express the for-the-other of the social, the for-the-stranger beyond identity and return to the same (*Ibid.*, 149).

Not only is freedom of the I constituted starting from the relation to the other, but self-consciousness itself. The I emerges on the background of what in *De l'existence à l'existant* (1947) Levinas describes as the *il y a*. This text closely questions Heidegger's philosophy and the phenomenology of being in its indifference, as an impersonal, anonymous being, as *il y a*, as "there is", unclaimed by any being (cf. Ponzio 2019, p. 35; also, Ponzio 1995a, 1995b; and Petrilli et al. 2005).

Escape from this anonymous persistence of being, from *essence*, as Levinas was later to say in *Autrement qu'être ou au-delà de l'essence* (1974), in the sense of the accomplishment of being, of the process or event of being, of what he names *essence*, occurs in the relation to the other, as other (*autrui*). The other exits from presence, identity, from initiative taken by the I.

The I emerges from the background of the impersonal *il y a* and asserts itself in the encounter with the other, where the I reaches self consciousness which is also to exit from self. The first exiting from self, an eruption from being, starts from the recognition of things and is accompanied by the *jouissance* of life, which involves the singularity of each one. The relation to the other is the experience that gives rise to opening and true exit from self. Despite satisfaction, pleasure, *jouissance*, the subject discovers it is not sufficient to itself and thus opens to the other, opening that is at once appeal and response to the other. Interrogation of self originates in proximity to the other in the passage from a relation with things based on need to a relation based on recognition of the needs of others and on desire. "All exiting from self represents the fissure that opens up in the same toward the other. Desire metamorphosed into an attitude of openness to exteriority. Openness that is appeal

and response to the other. The proximity of the other, origin of all putting into question of self” (“La proximité de l’autre,” in Levinas 1995[1986], p. 99).

Contrary to Martin Buber who establishes a relation of reciprocity between I and you, an immediately social relation among equals—I am for the other what the other is for me—, Levinas works on the hypothesis that the I-other relation is an assymetrical relation, one of profound inequality, a relation among unequal. When I expect my generosity toward the other to be reciprocated, this relation does not imply generosity but transforms into a commercial relation, an exchange relation, even if a question of good intentions, of good behaviour. Instead, in the relation to the other, the other is one to whom I owe something, toward whom I have an original responsibility, toward whom I have obligations. Levinas insists on the meaning of the gratuitousness of the “for-the-other,” that presupposes unconditional responsibility: “The ‘for the other’ arises within the I, like a command heard by him, as if obedience were already being [*l’être*] listening for the dictate. Alterity’s plot is born before knowledge” (*Ibid.*; cf. Ponzio 2012b).

12 Justice, Love, Saintliness

The human consists in opening oneself to the death of the other, in preoccupation with the other’s death. Humanity is manifest around the death of my neighbour. In other words, in my response to the death of others is manifest the humanity of the human (where, like “humility,” “human” derives from *humus*, from humid mother earth, and not from *homo*), my humanity (Levinas, “Le philosophe et la mort,” 1995 [1982c], Eng. trans. p. 158).

Justice arises from thinking for-the-other, from responsibility that the other bears for the other, which gives justice its dignity. The human is capable of recognizing saintliness and forgetting itself. But the central point in Levinas’s discourse here is not that the human being is a saint, or moves toward saintliness, but that saintliness, the human vocation for saintliness, that human depravation cannot eliminate, is recognized as a value, recognition which defines the human, as says Levinas in “Violence du visage” (1995[1985b], Eng. trans. p. 171).

The human order calls for justice, but Levinas reconducts justice to charity prior to one-for-the-other, to our unlimited obligation toward the other, to the other’s singularity. In this sense, at the foundation of the human is love, dis-inter-ested love for the other. Justice flows from otherness. Therefore, it is important that the institutions that exercise justice are overseen by the charity from which justice issues. At the origin of sociality is *fear for* the other, love, responsibility for the other, and not at all *fear of* the other as wanted instead by the ontological order, by being. For justice to be just it is fundamentally important to maintain the relation of continuity between the institutions of justice, thus politics, and the preeminence of the other. In other words, justice must not lose sight of the face, of the other, the other as a singularity and not merely as an anonymous individuality. Justice practiced as pure rationality threatens the human with totalitarianism, a risk that accompanies the

determinism of the rational totality. Rational justice is compromised, as Levinas says, when the relation with the other is profaned. “And there, between purely rational justice and injustice, there is an appeal to the ‘wisdom’ of the I” (*Ibid.*, p. 176).

The for-oneself is always suspect. Justice can be traced back to charity, to the for-the-other, and in this initial charity resides the human. Polemicizing with Heidegger, Levinas maintains that the human being is not only the being who understands what being means, but “the being who has already heard and understood the commandment of saintliness in the face of the other man” (*Ibid.*, p. 80). Even in primal “altruistic instincts,” there is the voice of God (Levinas 1968c, 1977b, 1978). Levinas in the Jewish tradition questions reducibility of this altruistic instinct, where God has already spoken, to a phenomenon of the anthropological order: “The anthropological meaning of instinct! In the daily Jewish liturgy, the first morning prayer says: ‘Blessed art thou, O Lord, our God, King of the Universe, who giveth the cock knowledge to distinguish between day and night.’ In the crowing of the cock, the first Revelation: the awakening to the light” (*Ibid.*).

Dignity of the wrong-doer who has repented for one’s actions, who wants to expiate one’s sins, is given in the wrong-doer’s prayer to God, because that prayer is for God. In our suffering the other suffers with us. “I am with him in distress” (Psalm 91, p. 15), in human suffering it is God, the other, who suffers most. The I who suffers prays for the suffering of God who suffers for the sins of humanity and the painful expiation for sin, a “kenosis of God!” So prayer is for the other and not for oneself (*Ibid.*, p. 182). The prayer of the “just” is the prayer that the I addresses to the other for-the-other, the prayer is the “for-the-other”, a prayer preoccupied for the other, for the other’s suffering for which the I too is guilty.

13 Levinas and Bakhtin for a Humanism of the Other

The sense of the distinction established by Levinas between “justice” and “political calculation”, where justice is moved by the other, both as cause and end, and politics instead is reduced to a calculation, to representation, becomes even clearer in light of Bakhtin’s distinction between “moral responsibility”, that is, responsibility without alibis, without justifications, responsibility as *answering to the other and for the other*, each in one’s own inalienable *alterity*, in one’s own *unreducible semiotic materiality*, on the one hand, and “technical responsibility,” which in Bakhtin’s terminology is also “juridical responsibility,” “legal responsibility,” understood as limited responsibility, circumscribed and guaranteed by alibis, on the other (cf. Hand 1989; Levinas 1989c).

The problem of responsibility is centrally important in Bakhtin’s thinking and is connected with his original interest in moral philosophy, which he describes as “first philosophy”. He had already elaborated his vision of artistic discourse in relation to the problem of responsibility in his early text of 1919, “Art and responsibility”. Subsequently, in his 1920–24 essay, only published as late as 1986 under the title *K*

filosofii postupka (English translation, *Towards a Philosophy of the Act*, 1993; translated into Italian as *Per una filosofia dell'atto responsabile*, in Bakhtin e il suo Circolo 2014, pp. 33–168), he characterizes the problematic at the centre of his attention as “moral philosophy”. For Bakhtin, the problem of responsibility cannot be reduced to responsibility circumscribed to the sphere of identity, whether the identity of the artist, author, character, even less so the identity of a literary genre, or of a language. Bakhtin is not concerned with identity. Whatever the question he is treating, whether of the ethical, aesthetical or linguistic order, Bakhtin’s interest rests with *alterity*. Responsibility is of interest to Bakhtin as the human capacity to *answer to the other and for the other* without alibis (cf. Ponzio 1993). He works on the word to evidence the presence of the other in it, the presence of another word that renders it internally dialogical; the word is opening to the other, the place of dialogue and encounter with the other. The I’s singularity is singularity of the word in relating to the word of others. The fundamental problem in philosophy is the problem of the other, and the problem of the other is the problem of word, of the word as voice, recognised as the demand of listening (cf. Bakhtin 2008; Petrilli 2012b). Bakhtin and Levinas both admired Dostoevsky who knew how to listen to words, and listened to them as voices (cf. Petrilli 2012a, 2015c, d; Petrilli and Ponzio 2016b, pp. 11–38; Petrilli 2007).

Already in these early writings Bakhtin took his distances from Kantian and neo-Kantian philosophy to go beyond. He asserted the primacy of moral philosophy over theoretical philosophy, and maintained that both theoretical reason and aesthetic reason are aspects of practical reason (Bakhtin 1993, Eng. trans., pp. 3–5). Bakhtin accused formal ethics in Kant and in the neo-Kantians of theoreticism, that is, of abstraction from the I in its alterity, unrepeatable singularity, uniqueness determined in irreplaceability, non interchangeability in the relation to the other (*Ibid.*, p. 41). Formal ethics in Kant and the neo-Kantian’s does not succeed in getting free of the fault of “material ethics,” that is, the conception of the universality of duty. The category of duty, rightly considered a category of consciousness if interpreted in terms of responsibility without alibis for the other, is however understood as a category of theoretical consciousness, as a universal category, therefore it is theoreticized. The imperative is conceived as universal, and consequently Kantian and neo-Kantian philosophy are not in a position to account for individual action.

In Kant and the neo-Kantians, as Bakhtin observes, the categorical imperative is subordinated to its capacity of being universal (“Act only according to that **maxim** whereby you can, at the same time, will that it should become a universal law”); the action of the single individual is justified by its capacity to become a norm of general behaviour; the will creatively active in action creates a law to which it submits, thereby alienating itself in its product. The world of the practical reason of Kantian and neo-Kantian formal ethics is not the world of concrete responsible action, the world of *moral responsibility without alibis* (and in this sense distinct from “technical responsibility” and from juridical responsibility), but the world of its “*theoretical transcription*” (*Ibid.*).

Like Levinas Bakhtin too works at the construction of a humanism of alterity. Kantian practical reason, though considering the other as an end, is founded on the

primacy of consciousness, of the Cartesian “I think,” which favours its development in the direction of idealism (cf. Petrilli 2013, pp. xix–xxvii). Therefore, Kantian reason, in spite of itself, is the reason of identity, the reason of the humanism of identity. And this dimension of Kant’s philosophy enters Martin Heidegger’s thought system with his critique of humanism and of metaphysics, in the assertion of ontology as fundamental, and the impossibility of exiting the horizon of being, in thematization of ontological reason, as reason without transcendence, without the “otherwise,” to evoke Levinas.

Levinas quite remarkably became aware of all this very early in his studies having witnessed the encounter between Ernst Cassirer and Martin Heidegger at Davos, Switzerland, in 1929, as a young scholar. Thanks to that encounter Levinas was immediately aware of the need for radical philosophical interrogation of sense for “man” in terms of the humanism of the other “man” (as recites the title of his book of 1972, *Humanisme de l’autre homme*). For Levinas that encounter sanctioned the end of a certain type of humanism, traditional humanism, the humanism of identity, opening definitively to a new humanism, that is, the humanism of alterity. And in the early 1920s Bakhtin too had already critiqued the limits of Kant’s and neo-Kantian theoreticism, the limits of thematizing, objectivating consciousness.

Both Bakhtin and Levinas were aware of the central importance of the other in the construction of a new humanism capable of non-indifference in the face of the other, of dialogical participation and responsive understanding. Exiting the humanism of identity is achieved by recognizing the fundamental importance of non-indifference, which shifts the I from the relation to oneself and from being with which the I identifies toward a relation beyond identity, being and knowing, which is the relation of alterity as responsibility without alibis. The common thread that unites Levinas and Bakhtin beyond differences is the trajectory from difference, identity and from non-indifference (interest) of the individuality for all that on which depends its being, to the non-indifference of the singularity, of a uniqueness for another uniqueness, outside genre, genus, generic class with its guarantees and protections (cf. Petrilli 2015b). Here responsibility is unlimited responsibility, beyond any possibility of delegation, including to forms of circumscribed responsibility, guaranteed by alibis, such as technical, juridical responsibility, responsibility regulated by a profession of faith, an ethical code, in the name of some formal ethics, where the maxim of action is made to respond to the requisites of universality, as claimed by some abstractly human reason and as such vitiated by theoreticism (cf. Ponzio 2008b).

The I in its irreducible alterity, as a singularity, exceeds belonging, identity, and as such is without shelter, manifesting itself in its total exposition and vulnerability, irreplaceable in its responsibility for the other, absolute and non-delegable responsibility. The individual subject, instead, as individuality belongs to a generic class which renders it equal to the other members of the same class, interchangeable, replaceable in its limited responsibility circumscribed by role, social position, social contracts, legislative specifications, all of which confer the benefit of alibis. The constitution of the individual in the identity of some generic class (identity of role, profession, social position, political party, sex, nation, ethnic group, etc.) is achieved by sacrificing alterity, one’s own, by sacrificing singularity, therefore one’s

irreplaceability and capacity for involvement without limitations in the relation to the other, in situations concerning others, in the life of others. And all this involves the possibility (or illusion) of attenuating what Levinas describes as *obsession for the other*, that is the obsession of one's responsibility without alibis for the other.

14 A View from Semiotics

From the point of view of “global semiotics” as described by Thomas A. Sebeok (cf. Sebeok 1986, 1991, 1994, 2001), which recognizes signs not only in the sphere of anthroposemiosis, but of life in general, establishing a relationship of interdependency and reciprocity between semiosis and life, the problem of dignity and of the relationship between *dignity* and subjectivity, dignity and justice is inextricably connected with the problem of the dignity of life in its globality, human and nonhuman. Human dignity takes shape in a greater context than that of specific situations and in a greater time than that of contemporaneity.

Respect, integrity, honorableness, value, elevation, social rang, authority, perhaps better authoritativeness, dignity is all these things and more, dignity is freedom, responsibility, love, loyalty, justice, charity, compassion, mercy, also obedience, humility, dignity is time, the time of lightness, of the infinite, and of engagement, of commitment, with Mikhail Bakhtin (1970–1971, Bakhtin 1986, pp. 132–158) the “great time,” that is, the time of unlimited, infinite answerability, it is the dignity of a lifetime and also of very life in general, and it is also the dignity of death as the crowning of a whole lifetime.

Human dignity inevitably has to do with semiosis, connected as it is with corporeity, with need and its satisfaction, in that singular form that Levinas denominates *jouissance* and in which he has consist the exceptionality, the irreplaceability, the incomparability of each one; human dignity is connected with deferral of a sign to another sign, a transcendent movement in which is generated sense, significance, value, and also the singularity of each one (Rossi-landi 1990). Reading Bakhtin (1981), we can claim that dignity is “sign materiality,” in the sense that it arises from the essential, indispensabile condition of interrelatedness, intercorporeity, dialogism, therefore from the relationship with the other that such a condition involves (on sign materiality, cf. Petrilli 2008a, 2020b).

Dignity derives from the other, from others. And insofar as it is sign material, the relation with the other develops in the entanglement, the intrigue between dependency and autonomy, between community and singularity, continuity and fracture, interruption, between presence and absence, visible and invisible, imaginable and unimaginable, between the rule, the law, the code and excess with respect to these. Sign materiality, semiotic materiality is also constituted in the intrigue between *indicality*, *symbolicity* and *iconicity* of the sign according to Charles Peirce’s typology (1931–1958), which establishes that all signs are always “degenerate” in the sense that each type is always interrelated with the other, *differs from the others, but defers to the others* in that double sense of *deferring* that Derrida (1967) renders with the term “*différance*”. The term “intrigue,” as employed by Levinas, already

underlines that it is in such dynamics, complementary and contradictory, that semiotic materiality is constituted, and that such elements and such movements are interdependent, refer to each other, in the global interweaving of life (cf. Levinas 2002, 2020). The relation with the other presents itself and develops in the alterity of semiosis, in exposition to the other, even possibly having to take the other's place, of having to assume the condition of "hostage" (cf. Derrida 1996).

Another semiotician who contributes to showing how identity loses any possibility of attributing dignity to itself the very moment it becomes "closed identity" is Charles Morris, author of *The Open Self*, a book of 1948. In Morris's understanding, "closed identity" involves the self-exaltation of identity, its self-entrenchment, closure, whether a matter of individual identity, of the identity of a community, or of an entire nation, and so forth according to a progression of ever larger entities. This book by Morris, written at the beginning of the so-called "cold war", is a strong and well argued critique of US politics where the question, yet again, is the question of dignity. In this case too the whole argument shows, with the instruments of semiotics, how the sign itself—as we have observed, without the sign there is no life—is always a response to another sign; it always occurs in the open-ended chain of "unlimited semiosis", as Peirce would say, and requires, in turn, a response that motivates and activates it. All this entails that the sign is always tridimensional: to the syntactical and semantic dimensions is necessarily associated the pragmatic dimension (see also Morris 1938): the sign arises from another sign, responds to it and attends a response from it. Closure of the I turned in upon its own identity, in the exaltation of one's own identity—to which, starting from the very title of this book of 1948, Morris juxtaposes the "open self"—proves to be a choice, a standpoint no less than delusory, destined to failure, and this because of the structure itself of semiosis, of all semioses, human and nonhuman, which is relation, response, opening.

15 The Relation to the Other and Semioethics

We have referred above, in § 7, to the concept of "ethics," in the sense used by Levinas, that is, as inevitable involvement of the I with the other. This situation is confirmed by semiotics as practiced by Peirce to Sebeok through Morris, authors we have referred to, as well as by that particular approach to the study of signs that goes under the name of *Significs*, inaugurated by Victoria Welby, known in the past for her important correspondence with Peirce (cf. Hardwick 1977), and today recognized for her important contribution to the study of meaning and language (cf. Petrilli 2009, 2015a; Welby 1983). From the encounter in our studies among these authors and their contributions developed from different disciplinary perspectives (philosophy, semiotics, significs), we have proposed the term "semioethics" to indicate the perspective angle through which semiotics can contribute to addressing topics like the juridical, of direct interest to us here (cf. Petrilli and Ponzio 2003, 2010; Petrilli 2010, 2014). Noteworthy is the contribution, as results from our

discourse so far, that can come to semioethics from the philosophy of Emmanuel Levinas.

Semioethics is necessarily oriented in a philosophical sense, as indicated by its very denomination. But worth pointing out is that semiotics too, as the general science of signs, cannot avoid a philosophical orientation. The reason for this inevitable encounter between general semiotics and philosophy is explained by Umberto Eco in his “*Introduzione*” to the Italian edition of *Semiotics and Philosophy of Language* (1984). As Eco writes (*Ibid.*, p. xii, my own Eng. trans.):

I believe that a general semiotics is philosophical in nature, because it does not study a particular system but *poses* the general categories in light of which those different systems can be compared. And for a general semiotics philosophical discourse is neither advisable nor urgent: it is simply constitutive.

Levinas clarifies that by “first philosophy” he intends philosophy of dialogue, therefore philosophy that cannot but be ethics (cf. Abbagnano 2006). Ethics for Levinas implies dialogical encounter with the other, it manifests itself in alterity, in the primordial “for-the-other”: “even the philosophy that questions the meaning of being does so on the basis of the encounter with the other”, as says Levinas in “*La proximité de l’autre*” (1995[1986], Eng. trans. p. 98). The origin of meaning, of intelligibility, of rationality is in the face of the other, in responsibility for the other man, so that ontology, objective knowledge, politics have meaning thus conceived at their foundation (cf. Diamantides 2007). They are “commanded” by meaning as responsibility for the other, by unrest for the other prior to representation of the other in the social, in the community.

The plurality of human beings with whom we are necessarily implicated makes justice necessary and with justice the objectivity of knowledge, fairness, the impartiality of judgement; the multitude involves the need to set up law courts and political institutions and, paradoxically, even a certain violence, in fact implied in all justice: to defend the other, my neighbour, as Levinas observes in “*Violence du visage*,” always involves a certain violence for someone (1995[1985b], Eng. trans. p. 172).

That ethics is “first philosophy” means that ethics, as described above, comes before ontology. Levinas repeats this: reason, knowledge, ontological thought are founded on ethics and must be nurtured by ethics, inspired by ethics. At the basis of all forms of humanism in sociality there is the for-the-other, attention for the other, thinking for the other, preoccupation, unrest for the other. This is the original condition described by Levinas in his book 1972, *Humanisme de l'autre homme*. The condition of good and evil, of their possible existence is the *other*. There can be neither goodness nor evil, neither cruelty nor justice nor injustice without reference to the other. Both good and evil as characterizations of human doing presuppose alterity, addressing the other, they depend on the existence of others. In semiotic, rather biosemiotic terms, alterity is what moves the advancing of semiosis and therefore of life, the orientation of communication and, in the specifically human world, the intentionality of the non-verbal behaviour and of the word in “good” and in “evil”. All encounter, says Levinas in “*La proximité de l’autre*,” begins with a benediction, contained in the word “hello,” which is already presupposed by all

cogito, all reflection. Addressed to the other man this greeting is an invocation: “I therefore insist on the primacy of the well-intentioned relation toward the other. Even when there may be ill will on the other’s part, the attention, the receiving of the other, like his recognition, mark the priority of good in relation to evil” (Levinas 1995[1986], Eng. trans., p. 98).

16 Closing Considerations

All the values of the I and thus all its rights are *for the other*. “For the other,” because of the other, is understood in a double sense, both as a complement of cause, and a complement of end.

Freedom itself, maximum recognition of the I and its maximum right, derives from the other, from others. Just as the I’s very identity derives from others. The identity of each one is decided a priori with respect to the I—and we could even claim before one’s birth. This is so for paternity, for one’s name, citizenship, social status: all this depends upon others. Decisions are made concerning the I in one’s absence, as occurs in court when someone is condemned in absentia, by default. Others have informed me of who I am. The beginning of my life is recounted by others. In the same way, others will recount my death, but this time not to me. Even freedom comes from others. It is the other who confers upon me this value and this right.

It is in the face of the other who interrogates me and demands something of me, not only verbally but with one’s mere presence, that I must respond. And this response can be positive or negative, it can be acceptance or refusal: I am free. And therefore it is the other who gives me “this faculty”. My freedom comes from others. I can even decide in front of things, I can decide to take or leave them, keep or destroy them, bring them into my space or expel them.

But if we can speak of freedom here as well, this freedom is still connected with the other, it continues to be conditioned by the relation to the other. We could say that when a question of the other, it is not possible to look the other way, to walk away, to play it cool as though nothing has happened.

To return to the problem of dignity, doubtlessly it is connected with my identity. The entire span of a lifetime can be devoted to obtaining recognition for the dignity of a role, a social position, a profession, an office. This commitment, this effort concerns the conquest of an attitude that the other must have toward me, and precisely toward my identity, affiliation, position in a community. And all this is generally also regulated by the law, and concerns my rights.

And yet, as we have attempted to evidence through various trajectories in our discourse, there is another dignity that concerns me, another dignity of my own, that concerns me, this time not as an identity, an individuality, but as a singularity, not as this or that, as belonging or not belonging, but in so far as it’s me, apart from all qualifications, from all my identities.

This other dignity concerns my singularity and implicates *my responsibility for the other*, responsibility I shoulder, independently from my identity. This is my responsibility for the other, without conditions, without justifications, without alibis, without loopholes. This is my responsibility independently from what the law commands, independently from what the law prescribes or does not prescribe, and also independently from the limits that the law foresees concerning the responsibility of each one.

This then is responsibility that involves my dignity as a singularity, a responsibility independent of the law, outside the law, a responsibility that can end up demanding that I even take a stand against the law—examples are not difficult to trace, whether in past history or in conditions and situations of the present.

All this tells us that this other form of dignity and responsibility that concerns me and is the condition for dignity, is prior to law and at once the reason of law. The law, legislation arise to regulate my original responsibility, which is responsibility for the other on which depends my identity as a singularity—not as an individuality, not as belonging, not as the member of a generic class, a collective of some kind.

We have used the expression “reason of law”. This reason cannot be absolute, nor can obedience to the law be absolute. The reason of law is measured, evaluated, verified, founded on its respect for my dignity as a singularity, which consists in my absolute responsibility for the other, given in my election as the only one responsible.

This also says that laws and rights are objectionable, adjustable, perfectible (cf. Cheng and Petrilli 2016; Petrilli 2016); and this says that before being obliged to respond to the law as an identity, I must answer for the other in my singularity, for the other, my neighbour, in that other’s irreducible alterity.

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Human Rights, Rights of the Other, and Preventive Peace: A Levinasian Perspective



Augusto Ponzio

Abstract Human rights, rights of the other and preventive peace are closely interconnected, as evidenced above all by the philosopher Emmanuel Levinas (1906–1996). Particularly interesting on this account is his 1985 essay, “The Rights of Man and the Rights of the Other”. With this distinction Levinas evidences how as the rights of identity, human rights do not include the rights of the other. The relationship with the face of the other is a relationship in which single individuals are taken into account not on the basis of identity, role, genre, ideological position, but of their reciprocal absolute (non-relative), irreducible, infinite alterity. In the face of the other the single individual is called to answer without alibis, outside the roles foreseen by functional and productive communication. The other is inseparable from the I, the same, and as *étranger*, absolutely other, the other cannot be included within the totality of the same (cf. Ponzi 2006b, 2007). The other is necessary to the constitution of the I and its world, but at the same time it is refractory to all those categories that wish to extinguish its alterity, thus subjecting it to the identity of the same. Limitations on individual responsibility, limitations of an ethical-normative, juridical and political order, behavior regulated by the laws of equal exchange, functions fixed by roles and social position, distinctions among individual identities sanctioned by law: none of this will succeed in undoing the intricate tangle between self and other, in absolving the I from responsibility for the other. To recognize this means to act for preventive peace.

However much we keep account of Reality and History in thinking about Future History, however much Politics is instructed by History, we continue repeating the same errors, the same horrors of Reality and Past History owing to our insistent reference to the category of Identity. To perceive such repetition and to avoid

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deluding ourselves into believing that development, innovation and progress are possible on the basis of the Identical, we need a viewpoint that is ‘other’.

Only by recourse to the category of Alterity, Otherness will it be possible to imagine a development in history that is other with respect to past history: the category of Otherness reveals the extent to which the History of Reality and Politics, of War and Peace is constantly repeated. The other’s point of view, comprising recognition itself of the other which makes such a viewpoint possible, interrupts the monotony of repetition (cf. Catone and Ponzio 2005; De Leonardis and Ponzio 2008).

The Critique of Occidental Reason thus understood requires a *point of view that is other*, and as such calls for a ‘Critique of Dialogical Reason’. The critique of dialogical reason is the critique of the category of Identity. An approach that is radically critical calls for preliminary *recognition of the other*, or, better, acknowledgement of the fact that recognition of the other is an *inevitable necessity* (cf. Petrilli et al. 2005; Ponzio et al. 1998; Ponzio 2006a, 2008a, 2008b).

Recognition of the other not as a concession, a free choice made by the I, the Subject, the Same, but as a necessity imposed by alienation of Identities, the loss of sense, by the situation of *homo homini lupus* (the allusion is to Hobbes’s fallacy!). The latter is not mythically antecedent, but ensues from such concrete abstractions as Freedom, State, Politics, Law.

The Preface to *Totality and Infinity* (Eng. trans. of Levinas 1961) by Emmanuel Levinas (1906–1975) starts with the question if lucidity, the mind’s openness upon the true, consists in catching sight of the permanent possibility of war (on Emmanuel Levinas, see Ponzio 2019). On the basis of the connection between war, ontology, politics, history, totality, and truth in the perspective of Western Reason, the answer is necessarily affirmative.

The protestation of an individual in the name of his personal egoism or even of his salvation is of no avail: ‘[...] a proclamation of morality based on the pure subjectivism of the I is refuted by war, the totality it reveals, and the objective necessities’ (Levinas 1996, p. 25).

Given the irrefutable evidence of the totality and the opposition of peace to war, ‘evidence of war has been maintained in an essentially hypocritical civilisation, that is, attached both to the True and to the Good, henceforth antagonistic’ (*Ibid.*, p. 24).

The relationship with the face of the other is a relationship in which individuals do not exist as identities, roles, genera, ideological positions, but on the basis of themselves, of their reciprocal absolute (non-relative), irreducible, infinite otherness—therefore not on the basis of the totality. Such individuals have the possibility of producing ‘signification without a context’.

In the face of the other the individual is called to answer without alibis, and thus understood the individual can speak standing outside the roles and parts played by the same in the ordinary system of functional and productive communication. Individuals can speak ‘rather than lending their lips to an anonymous utterance of history’ (*Ibid.*, p. 23).

Peace—says Levinas—is produced as this aptitude for speech (Ibid.).

This peace is the fundamental relationship with the other. There is not only the peace of war.

The relation with other and the connected experience of the infinite are the foundation of consciousness, the I, thought, discourse, truth, reason, freedom, identity (cf. Levinas 1963, 1987a, 2020).

Consequently, once we have abstracted from the intersubjective horizon of the I and from the world, that which remains as I is not a particular way of viewing reality, of depicting it, of evaluating it, of possessing it and transforming it, all being operations that no doubt presuppose the intersubjective relation.

Dialectic from G. W. F. Hegel (1770–1831) to Jean-Paul Sartre (1905–1980) did not succeed in formulating an effective critique of identity or of Western reason. Levinas's philosophy represents an alternative that needs serious consideration to the end of developing a critique of reason that is based on otherness, a critique of reason that is really dialectic, that is, *dia-logic* (cf. Petrilli 2006, 2007; Petrilli and Ponzi 2005, 2016; Ponzi 1990).

With the shift in focus from identity (whether individual, as in the case of consciousness or self, or collective, as in a community, historical language, or cultural system at large) to otherness—a sort of *Copernican revolution*—, the Levinasian critique of monologic reason questions not only the general orientation of Western philosophy, but also the tendencies dominating over the culture engendering it.

Levinas's philosophy is not a philosophy of dialogue but a critique of dialogue according to the dominant conception founded on the category of identity. Throughout his research Levinas developed his critique of a limited, that is, non dialogic conception of dialogue.

For Levinas dialogue is not exchange, it is not communication between that which is *said* by one person and that which is *said* by another. Dialogism may be traced in *saying* itself, independently of exchange, in saying which is not dialogue understood as a relation between giving and receiving, nor therefore as respect, tolerance, sharing, pooling things together, common enterprise, accord, mutual agreement, equal distribution.

Antecedent to the verbal signs it conjugates, to the linguistic systems and the semantic glimmerings, a foreword preceding languages, it [saying] is the proximity of one to the other, the commitment of an approach, the one to the other, the very signifyingness of signification (Levinas 1974, Eng. trans., p. 5).

According Levinas dialogue is a ‘relation to the other’ beyond knowledge, and quite apart from the intention and the will of the I. Dialogue is understood as *inevitable exposition to the other*, impossibility of closure, witness to the inevitability of involvement, necessary non-indifference, finding oneself again and again, in spite of alibis and excuses, in the condition of having to answer to the other and for the other, irrevocable *responsibility*.

Levinas is strongly stating his opposition to the concept of dialogue understood as a relationship between two preconstituted and autonomous subjects who decide to exchange ideas.

On the contrary, as formulated by Levinas, dialogue is passive witness to the impossibility of escape from the other; it is passive witness to the fact that the other

cannot be eluded, to the condition of involvement with the other apart from initiative taken by the subject who is called to answer *to* the other and *for* the other (cf. Levinas 1934, 1935).

The other is inseparable from the I, the same (*Même* as intended by Levinas), and as *étranger*, absolutely other, it cannot be included within the totality of the same. The other is necessary to the constitution of the I and its world, but at the same time it is refractory to all those categories that wish to extinguish its otherness, thus subjecting it to the identity of the same.

Otherness is not outside the sphere of the I, which does not lead to its assimilation, but, quite on the contrary, gives rise to a constitutive impediment to the integrity and closure of the I as Identity, as totality, as the same (cf. Levinas 1987b). The relation with the other is intended as a relation of excess, as a surplus, as the overcoming of objectifying thought, as release from the relation between the subject and the object and from the relation of work and trade.

The same/other relation irreducibly transcends the realm of knowledge, the concept, abstract thought, even though the latter are all possible thanks to this relation. Instead the I/other relation, as proposed by Levinas, has an ethical foundation. But what does ‘ethical’ mean in this context? Levinas gives the following explanation:

We call ethical a relationship between terms such as are untied neither by a synthesis of the understanding nor by a relationship between subject and object, and yet where the one weighs or concerns or is meaningful to the other, where they are bound by a plot which knowing can neither exhaust nor unravel (Levinas 1967, Eng. trans., p. 116 note).

The meaning of ‘ethics’ differs here from the traditional acceptation. We may say with Jacques Derrida (*Adieu to Emmanuel Levinas*, 1999) that in Levinas ‘Yes, ethics before and beyond ontology, the State, or politics, but also ethics beyond ethics.’ Levinas bequeaths to us an ‘immense treatise of hospitality’, a meditation on the welcome offered to the other (cf. Greisch and Rolland 1993).

A movement towards the other without return to the self, to identity, connotes the *specifically human* present in any human enterprise, in ‘all human work [*œuvre*], commercial and diplomatic’ (Levinas 1948, Eng. trans. 1987; cf. Ponzio 2004), whatever this may be. As says Levinas, beyond perfect adaptation to its own goal, the human enterprise

[...] bears witness to an accord with some destiny extrinsic to the course of things, which situates it outside the world, like the forever bygone past of ruins, like the elusive strangeness of the exotic (*Ibid.*, p. 2).

According to Levinas, the true problem for us Westerners is not so much to refuse violence as to question ourselves about a struggle against violence which could be a struggle against the institution of violence (See Levinas 1974, Eng. trans, p. 177) ‘Preventive war’ is not a struggle against the institution of violence but is itself violence and feeding violence.

On the contrary, that which is necessary is *preventive peace*. War against war, war against terrorism, perpetuates that which it is called to make disappear, war against war consecrates war and its virile values in good conscience. Developing Levinas’s

reflections, we may say that ‘just’ and ‘necessary’ wars, ‘humanitarian’ and ‘preventive’ wars are wars made with a good conscience. Refusal of violence which languishes in passive non-resistance to evil, and refusal of violence which is war against war may benefit from the alibi of good conscience, but both encourage violence and prime ‘infinite war’ (see *Ibid.* See also Ponzio 2009a, b, c).

The way to preventive peace is the way of a *bad conscience*, of *patience* that does not ask patience of others and is based on a difference between one self and others, on an *inequality* in a sense absolutely opposed to oppression.

Preventive peace is in *non-indifference*, non-indifference to the other, to another, non-indifference which is responsibility for the other, ‘the very difference between me and the other’ (Levinas 1974, Eng. trans, p. 178).

I am answerable before the other, responsible before all others for all others. I am responsible for the very faults of another. The condition of being hostage is an authentic figure of responsibility for the other. Non-indifference for the other, that is, responsibility without alibis for the other, is openness towards the other than being. This openness is not the initiative of an intentional subject, an effect again of its will, inwardness in being, interest.

This openness has another sense from that of accessibility through open doors or windows, another signification from that of disclosure, or of the will to dialogue. It is openness outside the subject, outside the theme, without the possibility of being absorbed in the ‘object’, without the possibility of seeing, knowing, understanding, grasping, taking in hand, operating and possessing, outside the good intentions of a subject. Openness is ‘disinterestedness’ (*disinteressement*) (*Ibid.*), it is openness outside the *essence* (*esrement*)—the process or event of being—outside *conatus essendi*.

Openness signifies the outside without cover, without shelter, it signifies non-protection, homelessness, non-world, non-inhabitation, layout without security.

But the significations of openness are not only privative: openness signifies the other side of identity, of inwardness, the demythization of the I, the situation before its closure in the abstract notions of freedom and non freedom, the situation in which one is not yet nailed to the I.

There is in openness ‘a complex of significations deeper and broader than freedom’, where ‘inwardness frees itself from itself, and is exposed to all the winds’ (*Ibid.*, p. 180). There is exposure without deliberation, which would already be closedness, closure in identity, in its illusory barricades.

Non-indifference is a passivity, wholly supporting. It penetrates identity even in the retreats of its inwardness and obsesses it before all thematization, before taking a foothold in being. Non-indifference is exposure of the subject without his ‘as-for-me’ of defence and aggression, exposure without reciprocity. ‘The exposure precedes the initiative a voluntary subject would take to expose itself’ (*Ibid.*). It opens on to the world but is not in-the-world, is non being in the-world.

The restlessness of passivity—a passivity more passive still than the passivity of matter—in the exposure to another, in responsibility for him, the restlessness which takes place without a decision, is restlessness in exposure to another exposure, that is to the openness of a face, the face of the other, the openness of its nudity.

Exposure to another is the asymmetric relation in the face-to-face position (see *Ibid.*, pp. 189–193). The face-to-face position is exposition of one's own nudity, out of role, without position, function, power, defence. It is my relation in my alterity to the other in his alterity.

Alterity in the face-to-face exposition is not relative alterity of roles, positions, functions, power. It is absolute alterity. The exposedness of an alterity to another alterity in the face-to-face relation is before identity, subjectivity, freedom, language, being and it is their condition.

Preventive peace, liberation from the world of war, this opening up, this *beyond*, is in the proximity of a neighbour. The other, my neighbour, concerns me with a closeness closer than the closeness of the being of things, of world, with a proximity closer than presence, a proximity in his same absence. Proximity of the other is responsibility for the other. Proximity means my not delegable responsibility—in my unicity, oneness, as a unique being—for the other, my subjection to the other, the support of a crushing charge of alterity. Singularisation is not a propriety of the subject itself, but the consequence of the not delegable responsibility of the subject in his alterity to the other in his alterity.

Non-indifference to the other—and ever more in the world of globalisation, to my neighbour—is an openness of self without a world, without a place, is the not being walled in being, the not being nailed to being, '*u-topia*' (*Ibid.*, p. 182; cf. Petrilli 2012, 2016).

U-topia with respect to unity, the community, which, in spite of incomparability, the oneness of each one of us, drags us off and assembles us on the same side, 'chaining us to one another like galley slaves, emptying proximity of its meaning' (*Ibid.*).

U-topia as beyond being, otherwise than being, disinterestedness (*dis-interessement*), the excluded middle besides being and not being. Exposed to the proximity of the other the I of each individual is virtually a chosen one, called to leave the identity of the ego and its extension in the unity of community, people, agglomerations of peoples, to respond with responsibility: *me, here I am*, that is, *here I am for others*.

So in the order or disorder of the modern world, in which peoples and their agglomerations or dispersions are in the desert without the manna of their customs, their wretchedness, their illusions and their, already degenerate, redemptive systems, the subject breaking with identity loses his place radically or his shelter in being, to enter into ubiquity, which is also a *u-topia*.

Responsibility for the other cannot have begun in my commitment, in my decision. The unlimited responsibility in which I find myself comes from the hither side of my freedom, from a 'prior to every memory', an 'ulterior to every accomplishment', from the non-present *par excellence*, the non-original, the anarchical, prior to or beyond essence.

The responsibility for the other is the locus in which is situated the null-site of subjectivity, where the privilege of the question 'Where?' no longer holds (see *Ibid.*, p. 10).

U-topia of absolute exposition to the other, responsibility for the other has nothing to do with utopianism considered as such by the realistic vision of modern man who interprets himself as a being among beings, while instead the very character of modernity consists in the fact that it is impossible to remain solidly anchored to self, identity, territory, roots, being, in a word, to remain at home.

Concerning his book *Otherwise than Being or Beyond Essence*, which is exposed imprudently to the reproach of utopianism, Levinas says:

This book escapes the reproach of utopianism – if utopianism is a reproach, if any thought escapes utopianism – by recalling that what took place humanly has never been able to remain closed up in its site (Ibid., p. 184).

In front of the face of the other, the I is called into question. Through its nudity, exposition, fragility, the face says that otherness will never be eliminated. The otherness of others resists to the very point of calling for recourse to homicide and war—being the evidence and proof of the other's irreducibility. Another one, *autrui*, this other, says Levinas, puts the I into the accusative, summoning it, questioning it, calling it back to the condition of absolute responsibility, outside the I's initiative (cf. Levinas 1949).

Absolute responsibility is responsibility for the other, responsibility understood as answering to the other and for the other. This type of responsibility allows for neither rest nor peace. Peace functional to war, peace intrinsic to war, a truce, is fully revealed in its misery and vanity in the light of absolute responsibility.

The relation to the other is asymmetrical, unequal: the other is disproportionate with respect to the power and freedom of the I. Moral consciousness is this very lack of proportion, it interrogates the freedom of self.

It is before the need to answer to others, it is under the weight of unlimited responsibility for others, that the rights and freedom of the self are instituted. The origin of self, which is an origin without an *arché*, in this sense anarchical, lies in an uneasy conscience in front of others, in a dirty conscience, therefore, in the need to justify one's presence, in one's responsibility without alibis and without escape from others.

In the continued effort to achieve a clean conscience, the self in the nominative, understood as the subject, as intentional consciousness, as speech, derives from interrogating the self and putting it into the accusative. From such interrogation also derive self's freedoms, self's rights—'human rights', elaborated to defend the self summoned by the face of the other to account for the rights of others, in this sense to defend itself as an 'I'.

Prereflexive, confused consciousness, preceding all intention, all will, all aim, which is not acting, but pure passivity, is a *bad conscience* (see Levinas 1983, Eng. trans. 'Non intentional Conscience', in Levinas 1998d). In Levinas the French word '*conscience*' is used for both consciousness and conscience. Bad consciousness is ethical conscience.

Without identity, without the protective mask of responsibility delimiting itself in the mirror of the self—self-assured and affirming himself—, without titles, stripped bare of all attributes, consciousness is consciousness not in the world by virtue of its

being-without-having-chosen-to-be, as in the Heideggerian *Geworfenheit* (being ‘thrown’) (see Heidegger, *Being and Time* (1927), Eng. trans. 1962, p. 67) but in question: *bad conscience* (cf. Levinas 1946).

Bad conscience is consciousness on the hither side of the self that already puts itself forward and affirms itself, or confirms itself in the world and in being, in the very manifestation of its emphatic identity, in saying ‘I’.

Consciousness preceding the consciousness of a subject already distinguished, identified, justified, posited as the ‘indeclinable nominative’, assured of its right to be, is a questioning of affirmation and confirmation of being, and the *accusative* in a sense is its first ‘case’.

The questioning of being by death, which is always premature, does not perturb or thwart the good conscience of being, or the rights of identity. Bad consciousness is questioning of the very justice of the position in being *by the other*. Being as bad conscience, being put in question is having to answer to another, to one’s fellow man.

The pre-reflective I is the I pre-occupied, non-indifferent, before the face of the other, the I of the bad conscience. The I of the ‘good conscience’ is the I of the bad conscience who has shielded himself, but has also forgotten, under the justifications of identity and its indifferent difference, the first person of whom the accusative is his first case.

Good conscience is the I of the interchangeable individual who has forgotten the first person who is subject to others and incomparable to others, non-interchangeable, irreplaceable, unique in his responsibility for others and who is precisely not an individual of a genus (see Levinas 1982, Eng. trans. 1998, pp. 168–169). The I of bad conscience is the I exposed to the very uprightness of the face of the other who—writes Levinas playing on the dual sense of *regarder* as ‘looking at’, ‘to concern’—whether he looks at me or not, concerns me [*qu'il me regarde ou non, il 'me regarde'*] (cf. *Ibid.*, p. 171).

The questioning of consciousness and its configuration as bad conscience is the basis of the I: the I starts from the accusative case, from responsibility without alibis for the other. Being in the first person, being myself, being ‘I’, is having to answer for my right to be, being as bad conscience: being put into question, but also put to the question, being responsible.

Language originates from having to answer for one’s right to be, that is, from bad conscience. Having to speak, having to say ‘I’: this is justification as regards the other. The essence of language is non-indifference, responsibility; it is ‘friendship and hospitality’ (Levinas 1961, Eng. trans., p. 305; cf. Derrida 1997).

Identity is a combination of justifications. Bad conscience is non-indifference towards the other, fear for the other: a fear that goes back behind and despite my good conscience and comes to me from the face of the other. The rights of my identity originate in order to justify my ‘being in the world’ or my ‘place in the sun’, my home. They originate in order to silence bad conscience and its fear for the other who has already been oppressed or starved by me, by my usurpation of a place that might belong to the other (see Levinas 1983, Eng. trans., pp. 130–131. See also Petrilli and Ponzio 2019a, b, and Petrilli 2020).

The question about my right to be is already my responsibility for the other. To be or not to be, says Levinas, is probably not the question *par excellence*. The question *par excellence*, or the first question, is not even the Heideggerian question ‘why is there being rather than nothing?’, but the question that is repressed by good conscience: ‘have I right to be?’ (Levinas 1982, Eng. trans., p. 171). Exposed to another in the face-to-face position, the I is without alibis, in the accusative case, in the situation of having to answer for his being in the world, for his place, for his usurpation, for the *Da*, here, of his own *Dasein* (here-being) from which the other is excluded.

Return to bad conscience and its responsibility and non-indifference for the other is a suspension of the rights of identity with their negation of all otherness and their exclusion of the other: ‘a suspension of war and politics which pass themselves off as relation of the Same to the Other’ (Levinas 1983, Eng. trans., p. 132). The human, Levinas writes (*Ibid.*), is the return to bad conscience, to its possibility, as Socrates in *Gorgia* said, of fearing injustice more than death, of preferring injustice undergone to injustice committed.

Responsibility for the other is the original relation with the other. It is unlimited responsibility. This responsibility, according to Levinas, is the ‘secret of sociality’. (Levinas ‘Diachrony and representation’, in Levinas 1991, Eng. trans. p. 169). From the start, the encounter with the other is the responsibility for him, for one’s ‘neighbour’, which is the name for the man, whoever he is, for whom one is responsible. Love, as non-indifference, charity, is original, and it is original peace (See Levinas, ‘Philosophy, justice, and love’, in Levinas 1991, Eng. trans., pp. 103–121; cf. Ponzio 2010, 2015).

Peace cannot be identified with the end of combats that cease for want of combatants, by the defeat of some and the victory of the others, that is with cemeteries or future universal empires. Peace must be my peace, in a relation that starts from an I and goes to the other, in desire and goodness, where the I both maintains itself and exists without egoism (Levinas 1961, Eng. trans., p. 306).

Original peace is what Levinas calls an ‘asymmetry of intersubjectivity’, an exceptional, extraordinary situation of the I. Levinas recalls Dostoevsky on this subject. In *Brothers Karamazov*, one of the characters says: ‘we are all guilty for everything and everyone, and I more than all the others’.

Original peace is the absolute precedence of the face of the other. The face of the other, encounter with the other, requires me as the one responsible for the other. This responsibility is inalienable. It is a responsibility of the I as a singularity, as unique, and such responsibility is different from the responsibility you, as the individual of a genus, yield to someone.

Unlimited and inalienable responsibility for others is the very possibility of the uniqueness of the one and only, beyond the particularity of the individual in a genus. In the relation to the face, to the absolutely weak, to what is absolutely exposed as bare and destitute, responsibility is an election, an individuation without the genus, a principle of individuation.

Says Levinas: ‘on the famous problem: “Is man individuated by matter, or individuated by form?”, I support individuation by responsibility for the other’ (Levinas, ‘Philosophy, justice, and love’, in Levinas 1991, Eng trans., p. 108). I am responsible for every man, my neighbour, and no one can substitute me. In this sense I am chosen.

I am responsible for the other, although the other is not responsible for me. As says Dostoevsky, I am responsible for another more than anyone else. The relationship with the other is not symmetrical, it is not at all in Martin Buber (see Levinas, ‘Martin Buber and the Theory of Knowledge’, in Levinas 1976, Eng. trans., pp. 17–39).

I am responsible for the other even when he commits crime, even when he bothers me, even when he persecutes me. But I do not live in a world in which there is but one single ‘first comer’; there is always another other, a third, who is also my other, my fellow.

The third is himself also a neighbour, and also falls within the purview of the I’s responsibility. Otherness, beginning with this third, is a plurality. Proximity is a human plurality. The I has to know which one of the two others has precedence. The I, as responsible for the other and the third, is responsible for their interactions. The I is responsible for the other even when he commits crimes, even when others commit crimes. The I is responsible for the persecution of his neighbours. They have a right to defence. If self-defence is a problem for the I, this problem appears because one threatens his neighbour.

For the I the question of others is a demand for justice. There is a necessity for justice (see Levinas, ‘Diachrony and representation’ in Levinas 1991. Eng. trans., pp. 166–167). There is the obligation to compare unique and incomparable others. This is the moment of knowledge. Justice emerges from responsibility for the other. Responsibility for the other precedes justice. Justice is born from non-indifference, love, charity.

Justice calls for judgement and requires a comparison of what is in principle incomparable, unique. Comparison, equity, objectivity appear with justice. Justice requires perception of the individual in a genus, it requires species and genus.

The I, precisely as responsible for the other and the third, cannot remain indifferent to their interactions, and in the charity for the one, cannot withdraw its love from the other. The self, the I, cannot limit itself to the incomparable uniqueness of each one, which is expressed in the face of each one. Behind the unique singularities, one must perceive the individuals of a *genus*, one must compare them, judge them, and condemn them.

There is a subtle ambiguity of the individual and the unique, the personal and the absolute, the mask and the face. This is the hour of inevitable justice—required, however, by charity itself.

The hour of Justice, of the comparison between incomparables, who are grouped by human species and genus. And the hour of institutions empowered to judge, of states within which institutions are consolidated, of Universal Law which is always dura lex, and of citizens equal before the law (Levinas, ‘The Other, Utopia, and Justice’, in Levinas 1991, Eng. trans., p. 229).

Justice requires judges, institutions, laws and, consequently, the state. A world of citizens, identities, individuals, persons, masks is necessary which belongs to a community, and not only the face to face relationship, of unique to unique. ‘If there were no order of justice, there would be no limit to my responsibility’ (Levinas, ‘Philosophy, justice, and love’, in Levinas 1991, Eng trans., p. 105). Thus the state emerges from the limitation of non-indifference and charity and not, as in Hobbes’s vision, from the limitation of violence and fear of others (*homo homini lupus*).

According to Levinas, the problematic of justice is opened in terms of justice and defence of the other, my fellow, and not in terms of threat that concerns me (*Ibid.* See also Poirié 1987, pp. 104–105 and 115–119. See also Levinas 1974, Eng. trans. p. 128). On the basis of justice and state there is not a fear of the other, the other that bothers and persecutes me.

On the basis of justice and state there is a fear for the other, a fear of persecution of my neighbours, because I am, more than anyone else, responsible for the other even when he commits crimes, even when he suffers crimes and persecutions (see Levinas 1974, Eng. trans. p. 128).

According to justice, asymmetry of intersubjectivity tends to become symmetry, equality, exchange, relations under the same conditions, equal rights. To treat all men with justice also means to treat myself with justice, and certainly my unlimited responsibility, my responsibility for all, can and has to manifest itself also in limiting itself.

The I is himself third in the relation of the other to another and he too calls for justice. In the name of his unlimited responsibility, the I is called to look after himself, to care for himself. But unlimited and asymmetric responsibility which justifies this concern for justice, for oneself can be forgotten. In this forgetting, says Levinas, consciousness is pure egoism (see *Ibid.*). Egoistic interests

take dramatic form in egoisms struggling with one another, each against all, in the multiplicity of allergic egoisms which are at war with one another and are thus together (*Ibid.*, p. 4).

Justice founded on non-indifference, charity and love for the other may become indifference and cruelty. Only the responsibility of I as unicity and his relation to the face constitute the reference to which justice and the work of the state must be reconducted, and which they must take as their model.

It is in the name of responsibility for the other, in the name of mercy that the rigors of the *dura lex* may be mitigated and that justice may be perfected, may become juster.

The title of Levinas’s essay ‘The Rights of Man and the Rights of the Other’ (Levinas 1985, in Levinas 1987b, Eng. trans. pp. 116–129), is symptomatic of the possibility of contradiction between claiming the rights of identity as the rights of man and the rights of alterity, as the rights of the other man.

According to Levinas, since the eighteenth century rights, understood in a rigorous and almost technical sense, claimed under the expression ‘rights of man’, are based on an original sense of rights which springs from responsibility for the

other man. The rights of man belong to an original relationship with the other before any legislation and any justification.

In this sense, they are *a priori*, independent of any initiative and any power, but also independent of the roles, functions and merits of individuals. They are prior to all permits, concessions, authority, entitlement, to all traditions, jurisprudence, privileges, awards or titles, to all will and reason, but also to all theology (*Ibid.*, p. 117).

These rights, that do not need to be conferred, express the *absolute* alterity of the human individual, i.e. an alterity independent of all relative relationships, of all reference, of all membership to a social community, a social corps, corporation, etc.

This absolute alterity is uniqueness beyond individuality as the specimen of a kind, as the member of a genus, of a class, of a group; it is uniqueness prior to any distinctive sign, uniqueness of the I responsible in the first person for the other.

Thus original responsibility for the other man—in which, as mentioned, according to Levinas lies primordial peace—is the real foundation of the rights of man. These do not depend on the scales of justice. Limited by justice, the rights of man emerge as forced, compulsory rights, and the peace they inaugurate among men remains uncertain and forever precarious: ‘A bad peace. Better, indeed, than a good war!’ (*Ibid.*, p. 122).

Like real peace, human rights become repressed and abstract rights are obtained from the power of the State, by politics and its strategies and clever dealings. Limited by justice the rights of man remain bounded within a community and connected with peace that the obedience to the law, imposed by force, obtains and ensures.

Instead, as founded in original non-indifference and responsibility for the other man, the rights of man correspond, says Levinas, ‘to a vocation *outside* the State, disposing, in a political society, of a kind of extra-territoriality’ (*Ibid.*, p. 129) and independence.

In a liberal State that guarantees this independence, justice is founded on the rights of man, and not vice versa. At the least tendentially, the rights of man and the rights of the other man should coincide.

But liberalism and democracy are powerless in the face of fascism if the rights of man defended by their justice are not also, at least tendentially, the rights of the other man.

Like justice, freedom cannot be assumed as foundational to the rights of man, not only because freedom is itself one of man’s rights, but also because it presupposes responsibility for the other man and is based itself on the prior peace of the relationship of one non-interchangeable individual to another, of unique to unique, of incomparable to incomparable. In other words, freedom is itself based on the relationship of the one *facing* the other, that is, of the I *for* the other.

My own freedom starts in relation to the other who appeals to my irreducible and non-transferable responsibility.

My freedom and rights, that is, the freedom and rights of any identity manifest themselves in non-indifference toward the other, in responsibility for the other, for the rights of alterity, prior to manifesting themselves as my freedom and rights, that is, as the freedom and rights of a particular identity. These rights and this

responsibility can never be exhausted given that it is not possible to extinguish our debt to others.

In today's world, fear of the other understood as fearing the other, fear that the subject experiences of the object, has reached paroxysmal degrees. However, contrary to the Hobbesian principle of '*homo homini lupus*', such paroxysm is not the starting point but the point of arrival in the constitution of identity.

In Western history, identity has always prevailed over otherness; difference and relative indifference have always prevailed over non-indifference; relations among individuals belonging to the same genus, with ever more restricted responsibilities, have always prevailed over relations without alibis among singularities outside genera (cf. Levinas 1994).

Capitalism has constructed its socio-economic reproductive system on identity, to the point of exasperation. This means to say that capitalist ideology has developed the subject's fear of the other—object—to paroxysmal degrees, ever more limiting and attenuating the attitude of fear for the other. In today's world, fear of the other understood as fearing the other, fear that the subject experiences of the object, has reached paroxysmal degrees (On the relation between signs and ideology in today's economics system, see Ponzio 1993, 2008c, 2009a, b, c, 2011, 2012, 2020; see also Rossi-Landi 1990). However, contrary to the Hobbesian principle of '*homo homini lupus*', such paroxysm is not the starting point but the point of arrival in the constitution of identity.

A paradox connected with globalisation today in its current phase of development is that social relations emerge as relations among individuals who are separate from each other, reciprocally indifferent to each other. The relation to the other is suffered as a necessity for the sake of achieving one's own private interests. And exclusive preoccupation with one's own identity, with one's own difference indifferent to the differences of others, increases fear of the other understood as fearing the other.

Following this type of logic, the community is the passive result of the interests of identity that are indifferent to each other. Indeed, the community so construed presents itself as a compact identity only as long as its interests require cohesion and unification.

The egological community, the community of selves forming the identity of each one of us presents the same type of sociality. This is sociality founded upon relations of reciprocal indifference among differences and identities.

Such a condition results from and at once is evidenced by separation between public behavior and private behavior in the same individual subject, separation and mutual indifference among roles, competencies, tasks, languages, among responsibilities in the same individual, in the same subject, separation viewed as the 'normal' or 'standard' way of conforming to the social system that subject belongs to.

Limitations on individual responsibility, limitations of an ethical-normative, juridical and political order, behavior regulated by the laws of equal exchange, functions fixed by roles and social position, distinctions among individual identities sanctioned by law, identities and differences whose sphere of freedom and imputability is at once delimited and guaranteed by law. None of this will succeed in undoing the intricate tangle between self and other, in eliminating the inherent

asymmetry in the relationship between self and other, in impeding obsession for the other, in ending involvement, in avoiding substitution.

Responsibility for others has a dual orientation: the other is elevated and taken upon one's own shoulders, so to say, producing an asymmetrical situation. As says Levinas, the person I must answer for is also the person I must answer to. I must answer to the person whom I must answer for. Responsibility in the face of the person I am responsible for: responsible for a face that regards me, for freedom.

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Augusto Ponzio (17/2/1942) is Professor Emeritus in Philosophy and Theory of Languages, University of Bari Aldo Moro. He founded the Department of Philosophy of Language in 1970 and inaugurated the PhD program at the same university in Theory of language and the science of signs, in 1988. From 1970 to 2011 he taught Philosophy of Language and from 1999 to 2012 General Linguistics. He has contributed with his monographs, as editor and translator to the dissemination in Italy and internationally of works by Peter of Spain, Karl Marx, Mikhail Bakhtin, Emmanuel Levinas, Ferruccio Rossi-Landi, Adam Schaff, Thomas Sebeok and Roland Barthes. He directs several book series in collaboration with Susan Petrilli and from 1990 “Athanor. Semiotica, Filosofia, Arte, Letteratura”. Among his more recent books: *L'écoute de l'autre* (L'Harmattan, 2009); *Encontros de palavras. O outro no discurso* (Pedro&João Editores, 2010); *Procurando uma palavra outra* (Pedro&João Editores, 2010); *Incontri di parole* (Mimesis, 2011); *Bachtin e il suo circolo. Opere, 1929–1930*, bilingual Russian/Italian text (Bompiani, 2014); *Tra semiotica e letteratura. Introduzione a Michail Bachtin* (Bompiani, 2015); *Il linguaggio e le lingue* (Mimesis, 2015); *La coda dell'occhio: Letture del linguaggio letterario senza confini nazionali* (Aracne, 2016); *Linguistica generale, scrittura letteraria, traduzione* (Guerra, 2018); *Alterità e identità. Con Emmanuel Levinas* (Mimesis, 2019). With Susan Petrilli he has co-authored *Lineamenti di semiotica e di filosofia del linguaggio* (Guerra, 2016), *Identità e alterità. Per una semioetica della comunicazione globale* (Mimesis, 2019); and *Dizionario, Enciclopedia, Traduzione. Fra César Chesneau Dumarsais e Umberto Eco* (AGA; L'Harmattan, 2019), and contributed to the volume edited by S. Petrilli, *Diritti umani e diritti altrui* (Mimesis 2019). Just published is his monograph *Quadrilogia: La differenza non-indifferente—Elogia dell'infanziale—Fuori luogo—In altre parole* (Mimesis, 2022). In addition to various European languages his works are also translated into English, French, Spanish, Brazilian Portuguese and Chinese.

Part V
Dialogues with Jeremy Waldron

No Argument: Human Dignity and the Making of Legislation



Julie Copley

Abstract The idea of human dignity is widely relied on in modern constitutional systems, yet in legal and political theory it is the focus of significant contention. Jeremy Waldron's engagement, since 1999 when *The Dignity of Legislation* and *Law and Disagreement* were published, with the democratic and constitutional practice and with the theoretical argument constitutes a rich source of legal, political and social analysis of human dignity. Waldron's own literature demonstrates that, as an “essentially contested concept”, we ask questions about human dignity as a way of pinning it down. When public authority is exercised to make legislation, the invaluable, aggregated and illuminating work of Waldron across this period demonstrates the concept of human dignity to be indispensable—empowering as well as constraining exercises of legislative authority.

Human dignity is invoked explicitly in the constitutions of many modern states, and Jeremy Waldron argues that the value of equal freedom for all is invoked implicitly in the structures and rights of a modern constitutional state when there is a constitution governing—for the people—exercises of public authority. Relevant to the idea of legislation, Waldron's lengthy democratic jurisprudence encompasses an initial conceptualisation of procedural and citizenship dignity, then subsequently particularised as a status-concept, a juridical concept, and as a pervasive constitutional value “marking out the point of the whole enterprise” (Waldron 2019, p. 19). This essay follows that progressive particularisation of human dignity, examining the concept and its functionality in a modern constitutional state. As an “essentially contested concept”, human dignity manages and resolves difference within a pluralistic political community, proving capable of combatting undemocratic and internally-divisive threats to modern constitutional states.

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1 Legislative Virtues

Waldron says use of a concept such as ‘human dignity’ requires the user to explain its content—what dignity requires, is based on, and why dignity is the same for all human persons. Explanation is necessary too of the range of application of the term, and Waldron refers to human dignity as doing two jobs. Vertically, dignity identifies “a particular value or set of requirements that attend our dealings with each human person”, and horizontally, dignity “asserts an equality of that value or a sameness of those requirements across all human persons” (Waldron 2017, p. 3). The concept of human dignity, and the vertical and horizontal application of human dignity in a modern constitutional state has been analysed by Waldron as relevant to exercises of legislative power. Accordingly, “the dignity of legislation” constitutes a productive perspective from which to examine Waldron’s lengthy engagement with an early conception and a developing concept of human dignity.

In the publications of *Law and Disagreement* (Waldron 1999b) and its complement, *The Dignity of Legislation* (Waldron 1999a), Waldron’s analysis is of legislation and its virtues. The *conceptualisation* of dignity occurs within a study of “statutes and the institutions that enact them” (Waldron 1999a, p. 9). Waldron’s aspiration is to a process of making legislation seen “at its best” as something involving community representatives coming together “to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all” and for them to do so “in a way that openly acknowledges and respects (rather than conceals) the inevitable differences of opinion and principle among them.” For the idea of legislation is not the same as the idea of law (Waldron 1999a, p. 128). Lawmaking is “any activity that has the effect of making or changing the laws”, but lawgiving is “the business of making or changing law *explicitly, in an institution and through a process publicly dedicated to that task*” (Waldron 1999b, pp. 28–29). The idea of legislation then “embodies a commitment to explicit lawmaking, a principled commitment to the idea that on the whole it is good, if law is to be made or changed, that it should be made or changed in a process publicly dedicated to that task” (Waldron 2012c, pp. 106–107; Weinrib 2016, p. 52).

The representative exercise of legislative authority is one of the hallmarks of a modern constitutional state and parliaments and their procedures are remarkably similar around the world. Waldron observes that the similarities arise from a common human response to similar problems; that is, a political community’s felt need for a set of enduring rules and procedures that constitute a public space. Hannah Arendt describes a “stable worldly structure to house their combined power of action” (Waldron 2016, p. 273). Thus, “the legislature occupies a pre-eminent role in most legal systems, largely due to the fact that it is an institution set up explicitly – dedicated explicitly – to the making and changing of the law stated” (Waldron 1999b, p. 76). The common foundations across modern constitutional states are that: the political community for which law is given is essentially plural (Waldron 1999b, p. 60); legislation must stand in the name of all in the community; and it must stand for all “even in the circumstances of controversy over the

substantive values that it embodies" (Waldron 1996, pp. 1537–1538; Arendt 1963, p. 208).

Together, *Law and Disagreement* and *The Dignity of Legislation* are to "recover and highlight ways of thinking about legislation that present it as a dignified mode of governance and a respectable source of law" in order to make "a healthy difference ... to our overall concept of law" (Waldron 1999a, pp. 2–3; Waldron 1999b, p. viii). Waldron does not deny the disrepute of legislatures and legislators, but suggests we follow the advice of Machiavelli to look past the tumults of the legislature for the good effects engendered by disagreements. One reason to do so is to address a problem—that "we are not in possession of a jurisprudential model that is capable of making normative sense of legislation as a genuine form of law, of the authority it claims, and of the demands that it makes on the other actors in a legal system" (Waldron 1999a, pp. 1–2, 35). Other reasons are to overcome: disinterest and distrust on the part of orthodox legal theorists such as Ronald Dworkin and HLA Hart; scholarly trivialisation of the legislative process confining it to "interstitial issues of policy" having "no compelling moral dimension"; and scholarly inattention to the structure and institutional details of legislatures (Posner 2000, p. 583).

Legislation's norms have long been part of Western jurisprudence, particularly positivist jurisprudence and, in *The Dignity of Legislation*, Waldron examines "the resources we have in our tradition of political thought for sustaining and elaborating" thought about legislation and which present its good effects (Waldron 1999a, pp. 2–3, 39). In the work of Immanuel Kant, John Locke and Aristotle, Waldron finds a lengthy tradition of thought about a philosophically overlooked form of lawgiving. Each has something to say about themes connected with legislation as it responds to "the primal need to extrapolate some decision-procedure from the very notion of a political society" (Waldron 1999a, pp. 3, 164). The result of that decision-procedure (legislation) is not, Waldron says, the same as issuing a decree (Waldron 2012c, p. 107):

... it is a formally defined act consisting of a laborious process. In a well-structured legislature, that process involves public consultation and the commissioning of reports and consultative papers; as well as the informal stages of public debate, it includes also successive stages of formal deliberation in the legislature, deliberation and voting in institutional settings where the legislative proposal is subject to scrutiny at the hands of myriad representatives of various social interests.

We insist on the formal elements and a laborious process "because of the way they enable law to respect human dignity". Waldron declares it essential to law that it be susceptible to deliberate change, given the legislature is set up to explicitly make and change law, publicly and transparently (Waldron 2012c, pp. 50, 95). Thus, "it matters ... not only that the laws come from the right source, but that they come from the right source in the right way" (Waldron 2008, p. 24). And respect for human dignity in the legislative process is consistent, Waldron argues, with the accounts of Lon Fuller and Joseph Raz. For those theorists, and for many, he says the enactment of a properly drafted statute "is precisely the sort of activity to which (for example) Lon Fuller's famous eight principles of ... the inner morality of law" are properly directed (Waldron 2012c, p. 82):

Generality, clarity, constancy, publicity, prospectivity, and practicability – these are in fact all best understood as virtues of legislation. Indeed, Fuller's presentation of those principles in his *The Morality of Law* was precisely as a discipline incumbent on a legislator, Fuller's rather hapless character, King Rex.

Further, the legislative process demands respect for human dignity because disagreement about matters of principle is the rule, not the exception, in politics (Waldron 1999b, p. 15). Aristotle holds that “[i]t is possible to argue . . . that in the making of law the collective wisdom of a people is superior to that of even the wisest lawgiver” (Waldron 1999a, p. 108). Thus, legislatures are a common, human response also to the need for joint action where there is disagreement (Arendt 1963, pp. 175, 208): transparent and systemic lawgiving adopted as “the democratic solution to the problem posed by the fact that in a complex, heterogeneous society people do not agree on ends” (Posner 2001, p. 19). And disagreements are complex in a modern democratic community in which legislative authority is exercised on behalf of the aggregate of its electors who are not passive subjects of laws made by another, but “active citizens who contribute to the creation of the laws by which they are bound” (Weinrib 2016, p. 54). Bentham recognised therefore that proposed legislative measures must involve a “back and forth . . . between the prejudices of the people and the fallacies of their representatives” (Bentham 1931, pp. 77–78; Waldron 2016, p. 146).

Waldron's conceptualisation of dignity in *Law and Disagreement* and *The Dignity of Legislation* may be seen on the one hand as a political arrangement and a legislative institution having a dignity, and on the other as a requirement that each private person within a political community for which laws are given be treated with dignity and have his or her human dignity respected. Regarding the former, Waldron describes an elected legislator as, “the individual person as essentially a thinking agent, endowed with an ability to deliberate morally and to transcend a preoccupation with his own particular or sectional interests” (Waldron 1999b, p. 222). Regarding the latter, Waldron insists we are all equal in the authorisation of political action, because consistent with Gregory Vlastos's idea of “a single status society”, modern democracies are organised as societies in which all are of equal high rank (Waldron 1999a, p. 160; Vlastos 1984, p. 54). Each must be seen as having equal voice authorizing and constraining exercises of legislative authority. And, as Raz states, respect for human dignity requires treatment of humans as persons capable of planning and plotting their future (Raz 1979, p. 124; Waldron 2012c, p. 52).

Dignity in this latter sense is encapsulated for *Law and Disagreement* in the monograph's “motto” taken from Thomas Hobbes' *Leviathan* and deeming it “intolerable in the society of men” for each private person within a political community to demand their sense of right be treated as the one that is to prevail (Waldron 1999a, p. 12). And for *The Dignity of Legislation*, the sense of the dignity of private persons in a modern constitutional state is encapsulated in a paragraph

from John Stuart Mill's *Considerations on Representative Government* (Waldron 1999b, pp. 160–161; Mill 1861, pp. 329, 335):¹

... it is a personal injustice to withhold from anyone ... the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people. If he is compelled to pay, if he may be compelled to fight, if he is required implicitly to obey, he should be legally entitled to be told what for; to have his consent asked, and his opinion counted at its worth.... Every one is degraded ... when other people ... take upon themselves unlimited power to regulate his destiny.... Every one has a right to feel insulted by being made a nobody, and stamped as of no account.

Each motto is relevant also to human dignity as a citizenship-related status-idea, analysed by Waldron in the two 1999 publications and maintained in subsequent publications. This first particularisation by Waldron of dignity—as a status-concept—is an enduring feature of his arguments about dignity. It is examined in Sect. 2.

2 A Status-Concept

Human dignity can be approached as a status-concept, Waldron suggests, and as such it draws attention to the rights, duties, powers and immunities attaching to a private person, and is a foundational element for different rights and norms. A status-concept makes sense of the rights and norms being gathered together for an underlying reason and Waldron suggests that in the case of human dignity, the underlying reason relates to “the special and momentous significance of the individual human person” (Waldron 2019, p. 8).

Regarding exercises of legislative authority in a modern constitutional state, Waldron's literature consistently draws attention to the moment of citizenship dignity in a modern constitutional state. In *The Dignity of Legislation*, Waldron commences a chapter about “Kant's positivism” by stating there are many of us in a political community, and we disagree about justice. Waldron's chapter finds Kant insistent that we “take account of the fact that there are others in the world besides ourselves” and see others “not just as objects of moral concern or respect, but as *other minds, other intellects, other agents of moral thought, coordinate and competitive with our own.*” In urging adoption of Machiavelli's conception of politics, the suggestion is that we ought as Kant said, “proceed with [others in the community] into a rightful condition”; that is, into civil society governed by legislation, and that we should accept the reality of social strife as a fact of life, the circumstance of politics. There will be “several conceptions of justice and rights” in a political community and, if each is militantly upheld, it is difficult to put universal and equal dignity to work in law (Waldron 1999a, pp. 35, 56–57).

¹Waldron notes Mill did not extend his conception of human dignity to all private persons equally.

Lawgiving is designed “to enable us to act *in the face of disagreement*” (Waldron 2016, p. 294). A sense of the legislative limits for a modern constitutional state is to be located in the political culture. There is likely to be disagreement and contestation among the people as to what the legislative limits are. Yet, acting as a body, the people are “capable of making better decisions, by pooling their knowledge, experience, and insight, than any individual member of the body, however excellent, is capable of making on his own” (Waldron 1999a, pp. 84, 93–94). In *The Dignity of Legislation*, Waldron notes that these principles do not assume a cool consensus existing only as an ideal. Nor are they abstract theoretical considerations (Waldron 1999a, p. 155):

In the United States, in Western Europe, and in all other democracies, every single step that has been taken by legislatures towards making society safer, more civilized, and more just has been taken against a background of disagreement, but taken nonetheless in a way that managed somehow to retain the loyalty and compliance (albeit often grudging loyalty and compliance) of those who in good faith opposed the measures in question.

Indeed, Waldron has lived experience of the good effects of landmark social reforms effected by citizens demanding legislation according with shared values within a political community. His early years were in New Zealand, regarded around the turn of the twentieth century (prior to Waldron’s birth) as the social laboratory of the world (Siegfried 1914; Webb 1959).² With the enactment of the *Electoral Act 1893* (NZ), for example, New Zealand became the first self-governing nation to include women in the electoral franchise. Robert Stout, one of the earliest enrolments (in 1871) at the University of Otago where Waldron later spent his undergraduate years, became its first law lecturer, New Zealand’s Attorney-General, Premier (Prime Minister) and Chief Justice, KCMG and privy counsellor. Stout and Lady Anna Paterson Stout were key proponents of women’s suffrage and primarily responsible for initiating legislative reform in New Zealand qualifying testamentary freedom to ensure maintenance of dependent family members from an estate (Atherton 1990).³ It should not surprise then when Waldron says that although voting in democratic elections may seem mundane and “although it is shared with millions of others, this vote is not a little thing”. Rather, it should be understood “in a more momentous way, as the entitlement of each person, as part of his or her dignity as an (equal) peer of the realm, to be consulted in public affairs” (Waldron 2012a, p. 36).

²Posner states that “Jeremy Waldron, law professor and political philosopher, is a New Zealander educated there and in England, and, although he has lived and worked in this country for many years, he brings to the study of American constitutional theory the valuable perspective of an outsider. He sees things that we natives overlook even though they are right before our eyes” (Posner 2000, p. 582). And Allan and Geddis note that Waldron has been described as “one of New Zealand’s most distinguished sons” (Allan and Geddis 2006, p. 94).

³*The Dictionary of New Zealand Biography, Te Ara*, states: “Stout had a sound knowledge of most of the major political theorists of the day. On occasions he spoke in the House with the works of John Stuart Mill piled ‘three feet high’ in front of him” (see <https://teara.govt.nz/en/biographies/2s4/8/stout-robert>).

While the dignity of citizenship and human dignity are not the same, Waldron suggests there are both resonations beyond the confines of Kant's philosophy, and implications for the way we think about human dignity in the modern world. Like Kant, Waldron assumes citizenship to be a status, and "when citizenship is taken to be an important status that, in one state or another, should be available to everyone, then what it amounts to may be a good guide to the way in which human dignity can be realized in a world of separate states." Dignity too is best understood as a status-term, in Waldron's view, and it is usually associated with a status that is valued and respected (Waldron 2013a, p. 333). However, the dignity of citizenship involves "layers of respect beneath whatever democratic arrangements might exist for voting and other forms of political participation." It is, Waldron argues, "the dignity of being one of those for whose sake the legal and political structures exist and by whose agency – along with that of millions of others – those structures are sustained" (Waldron 2013a, p. 340).

Waldron's argument about dignity as a status-concept engages with and withstands the arguments of other theorists. Christopher McCrudden observes that, in talking of the dignity of the citizen so as to bridge the gap between an egalitarian idea of human dignity and dignity as status, Waldron argues for a modern understanding of dignity that takes "the intuition that dignity is about status" and combines it with "modern commitments to equality" (McCradden 2013, p. 42). According to this understanding, the general quality of a relationship between the rulers and the ruled in a modern constitutional state may be determined from an extension of the dignity of a citizen to a large proportion of the population (Waldron 2013a, p. 340). Michael Rosen, however, suggests that the idea of levelling-up to ensure equality in status-based conceptions bears little meaning (Rosen 2013), and Jacob Weinrib argues Waldron's attempt to use historical meanings of dignity as a status-concept to explain modern constitutional practices is unsatisfactory even if influential (Weinrib 2016, p. 24). The reason Weinrib provides is that Waldron gets things backwards: Waldron does not explain why human dignity constitutes the relevant standard for evaluating legal conventions and argues instead that human dignity "is itself the product of legal conventions" (Weinrib 2016, p. 28).

Waldron's argument is consistent nevertheless with Charles Taylor's approach to modern social imaginaries, including as to the manifestation of the general will in the public sphere by a sovereign people as a key plank of the modern constitutional state (Taylor 2004), and Weinrib concedes Waldron's view of dignity as a convention about legal, political or social rank is capacious (Weinrib 2016, p. 26). Thus Waldron's understanding of human dignity as a status-concept endures, with Waldron stating it makes sense of the rights and norms that may be gathered together regarding "the special and momentous significance of the individual human person" (Waldron 2019, p. 8). Indeed, Waldron's later work affirms human dignity's ability to make sense of "our active political equality in democratic and electoral arrangements", the power of citizens to participate, and their standing to demand accountability for exercises of public authority (Waldron 2019, pp. 3–4).

Within a modern constitutional state, including as relevant to legislative authority, Waldron argues that human dignity as status-concept is tied also to ambitions for

dignity as a juridical concept. This second particularisation of Waldron's dignitarian literature is examined in Sect. 3.

3 A Juridical Concept

Weinrib explains the term 'juridical' refers to a relationship between a state and its people "comprised of rights and corresponding duties that regard each party not as an isolated entity, but as the participants in a common association" (Weinrib 2016, p. 75). Waldron similarly describes human dignity as having a legal status that, like infancy or bankruptcy, "sums up the whole normative condition of a person in certain circumstances". It follows from the circumstances of being a private person (Waldron 2019, p. 8). In short, dignity's "proper home" is in law (Waldron 2012a, pp. 14, 134).

Presenting the Berkley Tanner Lectures in 2009, Waldron identified an imperative to move away from earlier "bland generalities" about human dignity and towards dignity as a juridical concept, an entitlement of each person in a modern constitutional state (Waldron 2012a). In an interview complementing the Lectures, Waldron said analysis of the legislation responding to terrorism in the United States including the US Patriot Act enacted in 2001 caused him to re-appraise the earlier conceptualisation of human dignity (Institute of International Studies University of California 2009). Attempts to speak with purpose about legislative constraints on the imposition of "cruel", "inhuman", and "degrading" treatment and punishment commonly involve bland generalities, he says. These divert from the specifics; for example, a broad dignitarian reading of human dignity constitutes no more than "a broad catch-all restraint", distracting from the explicit and detailed restraints provided by human rights and humanitarian law (Waldron 2010, pp. 290–291).

The modern notion of dignity, Waldron proposes, "involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility" (Waldron 2012a, p. 33). Referring again to Vlastos's suggestion that we are a single status society, Waldron observes it is a suggestion he takes "very seriously indeed" as it makes it possible to "use aspects of the traditional meaning of dignity associated with high or noble rank, to cast light on our conceptions of human rights" (Vlastos 1984; Waldron 2012a, p. 34). Therefore, in moving from bland generalities about dignity, Waldron maintains it is best understood as a status-concept: one referring to the standing of humans in the grand scheme of things, each private person commanding a high level of concern and respect (Waldron 2017, p. 3). And Waldron suggests the modern universalisation of the ancient right of a person of noble standing to have her or his voice heard in public matters helps tremendously when we seek to deepen talk of human dignity (Waldron 2012a, p. 36).

This levelling up and expansion of honour allows Waldron's dignity-as-rank to underwrite an equal dignity for each private person in a political community (Waldron 2012a, p. 6). Rosen describes this as "expanding circle view" of history—

a political, social and legal conception afforded originally to a small group but widened over time to become universal. It is the idea of the one higher status (Rosen 2013, pp. 79–80). Waldron agrees there are not different kinds of human person and, in a political community, each person holds the high rank of legal citizenship and has the status of someone to be heard and taken into account (Waldron 2012a, pp. 58–60).

As a juridical concept, dignity is understood by Waldron to be a principle of morality and a principle of law” and certainly “a principle of the highest importance, and it ought to be something we can give a good philosophic account of.” Explaining that it is not just surface-level rules that have a legal character, Waldron admits he is “enough of a Dworkinian to believe that grounding doctrines can be legal too – legal principles, for example, or legal policies.” This is because law “contains, envelops, and constitutes these ideas; it does not just borrow them from morality” (Waldron 2012a, pp. 13–15). So, in analysing how human dignity works in its proper home in law, Waldron considers on the one hand explicit references to dignity in law such as in constitutions and conventions on human rights. On the other, he considers the way in which the application of law and compliance with it are “deeply dignitarian in their character” (Waldron 2012a, pp. 119–129).

The distinct principles—explicit and implicit—are developed in Waldron’s jurisprudence where Waldron identifies an increasing importance in the distinction between the principles (Waldron 2012a, pp. 135–136, 147n2). In “How Law Protects Dignity”, Waldron says the “most obvious way in which law protects dignity is by proclaiming and enforcing specific norms that prohibit derogations from or outrages upon human dignity”, as in Common Article 3 of the Geneva Conventions proscribing “outrages upon personal dignity” (Waldron 2012b, p. 200). Implicit protection of dignity, such as “prohibitions on degradation … in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the European Convention on Human Rights” may be less obvious, but are “deeper, more pervasive, and more intimately connected with the very nature of law” (Waldron 2012b, p. 200). The implicit principle concerns how the law is applied, and compliance with the law. Waldron finds “an implicit commitment to dignity in the tissues and sinews of law—in the character of its normativity and in its procedures—and we do well not to sell this short by pretending that dignity is a take-it-or-leave-it kind of value” (Waldron 2012b, p. 222).

Here too Waldron’s literature about the juridical nature of human dignity in a modern constitutional state has developed through engagement with the democratic jurisprudence of others. In the work of Ronald Dworkin, Waldron similarly identifies a clear relationship between human dignity and “the principles and policies that a legal system has committed itself to implicitly” (Waldron 2013b, p. 6). While dignity is the “unifying ethical vision” that in *Justice for Hedgehogs* brings together different facets of Dworkin’s comprehensive theory of justice, in *Is Democracy Possible Here? Principles for a New Political Debate*, Dworkin identifies two dimensions of human dignity: every life is of intrinsic potential value and everyone has a responsibility for realising that value in his or her own life. Dworkin’s stated democratic ambition for the two dimensions is that they be understood to be

compatible, given they are of sufficient depth and generality to establish common ground across political divides and to generate argument about their interpretation and consequences (Dworkin 2006, pp. 10–11).

The combined strength in law of the explicit and implicit principles, Waldron suggests, is that they work to enrich and strengthen each other. In combination, an explicit standard and an implicit principle “represent an abundance of riches” (Waldron 2012b, p. 221). Nevertheless, observing dignity is ever in danger of platitude, Waldron repeats his view of dignity as a status-concept (Waldron 2012b, p. 201). Armed with this strength, Waldron then explains what he understands human dignity as a juridical status-concept to be; that is, what he means when he asks “about the various ways in which law protects, recognizes, vindicates, or promotes human dignity”. It is something like this, he suggests (Waldron 2012b, pp. 201–202):

Dignity is the status of a person predicated on the fact that she is recognized as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her; it assumes she is capable of giving and entitled to give an account of herself (and of the way in which she is regulating her actions and organizing her life), an account that others are to pay attention to; and it means finally that she has the wherewithal to demand that her agency and her presence among us as human being be taken seriously and accommodated in the lives of others, in others’ attitudes and actions towards her, and in social life generally.

Thus, dignity is “a genuine making-room for another on a basis of sure-footed equality and acting toward another as though he or she too were one of the ultimate ends to be taken into account” (Waldron 2012b, p. 202; Dworkin 2006, pp. 127–159). As a juridical concept, dignity defines “a powerful dignity for us all, in ways that enable us to define a distinctive dignitarian content for the ideal of equality before the law”. It is the idea of a certain status to be “accredited to all persons and taken seriously in the way they are ruled” (Waldron 2012a, pp. 36, 202).

Moreover, dignity must function as a normative idea because “people try to do all sorts of things with power”. Waldron points out that one of the things people might try to do is “treat certain people as having a status that is lower than this or treat people as though the capacities I have mentioned are unimportant and have no implications for the way those people are ruled” (Waldron 2012a, p. 202). A vital point made in this context by Rosen, and with which Waldron concurs, is the importance of being able to identify and condemn degradation in the language of human dignity; respecting a person’s dignity involves “treating them with dignity”. Even if degradation is merely symbolic, Rosen says, it is powerful nevertheless (Waldron 2012b, pp. 94–97). Similarly, Meir Dan-Cohen observes that what is socially and legally granted—such as by legislation—can be socially and legally withdrawn, and a society may fail to confer equal dignity upon all (Waldron 2012b, p. 6).

Relevant to human dignity as a juridical value, Waldron engages also with the thought of others about self-application. Waldron refers to law’s general reliance on individual application of “officially promulgated norms” (Waldron 2012b, p. 6):

To embark on the enterprise of subjecting human conduct to rules involves . . . a commitment to the view that man is . . . a responsible agent, capable of understanding and following rules . . . Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws or to order him to do an act that is impossible, is to convey . . . your indifference to his powers of self-determination.

Comparable recognition is found in Joseph Raz's publication, *The Rule of Law and Its Virtue*, where the rule of law is connected to law's "action-guiding character" and relates in turn to the idea of dignity (Waldron 1999b, pp. 95–96). Raz states that respecting human dignity "entails treating humans as persons capable of planning and plotting their future". This means that respecting people's dignity includes respecting their autonomy, their right to control their future" (Raz 1979, p. 214).

Attention is drawn by Waldron also to similarity between Fuller's account of the inner morality of law and the "self-application" of HLA Hart and Albert Sacks (Fuller 1969; Hart and Sacks 1994). Waldron notes that "the law strains as far as possible to look for ways of enabling voluntary application of its general norms and many of its particular decrees", and this self-application occurs when people apply laws to their own conduct without state coercion. It is, in his view, "an extraordinarily important feature of the way legal systems operate" (Waldron 2012a, pp. 205–206). Self-application relies upon the capacities of private people for practical understanding, self-control, self-monitoring and for them to modulate their own behaviour as to norms they are able to understand. Law is defined by a near-universal emphasis on self-application, and is differentiated clearly from other systems functioning primarily by manipulating, terrorising or galvanising behaviour. Waldron says that, as recognized by Fuller, self-application represents "a decisive commitment by law to the dignity of the human individual" (Waldron 2012a, pp. 205–206). Gregory Alexander supports Waldron's discussion of law's respect for ordinary human agency and his understanding that "the capacity to deliberate about the meaning of open-ended norms [is] an aspect of human dignity" (Alexander 2018, p. xvii). Waldron in turn notes Dworkin's unifying ethical vision in *Justice for Hedgehogs*, that "[e]ach person . . . has a certain responsibility for the precious shape of his or her own life, and everyone has a duty to respect the conditions under which others are able to discharge that responsibility" (Waldron 2013b, p. 6).

Human dignity, as a juridical concept then, affirms dignity's proper home in law. The positioning of dignity explicitly and implicitly within a legal and constitutional framework enables it to work clearly and strongly along both horizontal and axes. As examined in Sect. 4, Waldron describes that work within a modern constitutional state as pervasive and uniting.

4 A Pervasive Value

The third particularisation found in Waldron's literature regarding dignity and legislation emerges when human dignity is placed, explicitly and implicitly, within the legal framework of a modern constitutional state. Waldron states that dignity

works “as an integrating idea across the whole range of constitutional considerations – structures as well as rights, empowerment as well as constraint.” Thus, within modern constitutional states, human dignity performs a “pervasive and uniting function” with specific work to do if invoked in the content of a particular right, but more widely “it helps to mark out the whole of the enterprise” (Waldron 2019, pp. 1, 18).

Although traditionally in constitutional practice dignity has not performed an overtly normative role regarding exercises of public authority (Rosen 2013, pp. 1–2; Hale 2013, pp. xv–xvi), many modern constitutional states employ the term explicitly when invoking abstract constitutional concepts (Weinrib 2016, pp. 23–24). In the German and South African constitutions, for example, “all humans have inherent dignity as an attribute independent of and antecedent to any constitutional protection thereof” (Weinrib 2016, pp. 27–28). While Dworkin describes use of the idea of human dignity “almost thoughtlessly either to provide a pseudo-argument or just to provide an emotional charge” (Dworkin 2011, p. 204), Weinrib’s unified theory of public law approaches human dignity as “the organizing idea of a groundbreaking paradigm in public law” that is “invoked as a right or value that imposes an overarching obligation on all public authority.” The concept of human dignity, Weinrib says, concerns the “equal right of each person to freedom”, and public law “presupposes human dignity as its unifying basis” (Weinrib 2016, p. 14). Each person has a right to determine the purposes he or she will pursue and a duty to pursue those purposes in a manner respecting the rights of others to freedom (Weinrib 2016, pp. 1, 7).

Identifying that human dignity is present explicitly and implicitly in constitutional texts and in modern constitutional jurisprudence, Waldron’s later literature describes human dignity as an “all-pervasive” wide-ranging constitutional value, one to be understood “as a non-fungible value” and affecting “how policy calculations are to be made”. Dignity performs an explicit uniting function within many liberal/democratic constitutions, and affirming the joint, equal attribution of human dignity made by the citizens of a political community when a constitution is enacted (Waldron 2019, p. 19; Weinrib 2016, pp. 139–140). Human dignity has particular work to do when it figures in the content of some particular right, but, beyond that, it unites the political community around the joint democratic enterprise. Operating as a wide-ranging constitutional value, human dignity collects up a whole range of ideas—“protections, benefits, structures, empowerments, entitlements, institutions, forms of respect, and equalizations going well beyond a list of individual rights” (Waldron 2019, pp. 6, 15). This pervasiveness of human dignity in the modern constitutional state, Waldron suggests, addresses stated skepticism about the concept’s vagueness and malleability (Waldron 2019, p. 15). Some analysis of human dignity finds it to be a “vacuous concept” without boundaries (Bargaric and Allen 2006), an indistinct concept that “masks a great deal of disagreement and sheer confusion” (Rosen 2018, p. 67), an “impossibly vague” idea that does not “provide a universalistic, principled basis” for exercises of public authority (Riordan 2013, p. 421), and a subjective idea varying “radically with the time, place, and beholder” (Pinker 2008). In Waldron’s view, these concerns are over-stated—although there

may not be a ready definition of human dignity, there is a history of “attempts over the centuries to say what is special and worthy of respect in the human individual” (Waldron 2019, p. 16).

For exercises of public authority in a modern constitutional state, human dignity as a pervasive, juridical concept has important implications. As a juridical concept, dignity further rebuts the stated skepticism about dignity’s specificity and the work that it can do. The term juridical goes to the relationship between a state and its people comprising rights and corresponding duties that draw state and private people together into a common association; as a juridical value, human dignity both “justifies public authority and regulates its ongoing operation” (Weinrib 2016, pp. 7, 75). Thus, Waldron refers to dignity’s juridical value as “an integrating idea across the whole range of constitutional considerations”, empowering as well as constraining (Waldron 2019, p. 1). When human dignity is a pervasive juridical value in the constitutional framework, “each person has both a right and a duty to interact with one another” on terms consistent with that value: with respect for each person’s equal freedom (Weinrib 2016, pp. 15, 75). Indeed, Alexander argues that the duty extends to awareness of obligations to future generations (Alexander 2018, p. 129).

The pervasiveness of human dignity as a juridical concept in modern constitutional states serves also to strengthen and consolidate Waldron’s theory regarding legislation and dignity. As a “capacious convention” (Weinrib 2016, p. 26), and a wide-ranging constitutional value, the concept of human dignity allows Waldron to collect under the one “constitutional” umbrella his legal, political and social thought. There is room under the umbrella, for example, for theoretical analysis regarding dignity and citizenship, entitlements of private persons in modern constitutional states, dignity and legislation, and law and disagreement. An approach to human dignity as a pervasive, juridical concept additionally furthers Waldron’s objective of enriching legal theory with the resources of political theory to enhance democratic and legal practice (Waldron 1999a, p. 3). Three specific examples of the practical usefulness of dignity as a juridical concept and a pervasive constitutional value, as relevant to exercises of legislative authority, are provided.

First, Waldron argues equal respect and dignity “are not just abstract philosophical theses about Kantian imperatives” but, when embodied in political systems, equal respect and dignity “are among the most important values that there are – not least because they entangle themselves with and intensify what people fear from, or hope for, so far as their political institutions are concerned” (Waldron 2016, p. 10). Accordingly, citizens insist their governments treat private people with dignity and demand legal and political constraints are in place to ensure governments do so. Insistence on the rule of law, Waldron says, is insistence that all are treated with dignity, even if coercion is sometimes necessary in lawgiving (Waldron 2019, p. 19).

Second, Waldron draws attention to Arendt’s identification of a felt need for legislative representatives to act according to a set of enduring procedures constituting a “stable worldly structure to house their combined power of action” (Arendt 1958, p. 41). Waldron notes the use of “worldly” indicates a focus on structures more

enduring than the actions and legislators they house, structures which exist as features of a world humans have made for themselves (Waldron 2016, p. 293). Political theory holds it possible to design democratic structures and processes to balance the self-interest of men and to further the common good, as evidenced by principles of legislation that are “shared by the adherents of rival theories of justice” and “among rival agendas for public policy” (Waldron 2016, p. 147). Indeed concerns about the influence of particular politicians upon lawgiving arise because of the importance of public authority. Legislators: “exercise power; they have an impact on people’s lives; they bind whole communities; they impose costs and demand sacrifices.” Waldron says that for these reasons neither law, nor the exercise of legislative authority, is a game (Waldron 2016, p. 150).

Third, disagreement and argument are essential to the making of legislation in a modern constitutional state. On the one hand this is to ensure authoritative legislation, standing in the name of all private people in a political community, is enacted via a process respecting of human dignity (Waldron 2012c, pp. 109–110):

We have democratic institutions because we want to maintain equal respect for one another in the midst of our disagreements. We have human rights on account of our vulnerability to the worst excesses of human power. We demand economic freedom, free markets, and private property because our life-plans are different from one another and because we know that there is no other way to reconcile our varying preferences in a coherent way of life. And we subject ourselves to the discipline of the Rule of Law so that we can be governed in a way that respects our dignity in the forms and procedures that are used.

On the other, disagreement and argument are essential in a political community because the plurality of private people will reasonably disagree about some matters; for example, how a right should be stated in legislative form. For some matters, such as health care and privacy perhaps, the community will not dispute what equal freedom of each person requires, and there will likely be a direct statement of that requirement without any legislative reference to human dignity. However, where there is no shared benchmark, dignity itself may be used as the standard. An example provided by Waldron is Article 23 of the Universal Declaration of Human Rights requiring “remuneration ensuring … an existence worthy of human dignity” (Waldron 2019, p. 5).

As a juridical concept, and a pervasive value across legal and constitutional considerations, Waldron notes that the objective of democratic argument about dignity is not, as Rosen suggests, to assign different meanings of human dignity to its different occurrences (Rosen 2018, pp. 59–60). It is to ensure legal and political deliberation occurs to identify the legislative limits set at the relevant time by a political community; that is, “we ask questions about human dignity as a way of pinning it down” (Waldron 2019, p. 5). Asking questions about dignity is therefore a democratic mechanism. It reconciles varying preferences into a coherent way of life and, in a modern constitutional state, democratic argument authorises and constrains exercises of legislative authority. Thus, as examined in the final section, human dignity as a contested concept furthers the momentous entitlement of each person to equal freedom (Waldron 2012a, p. 36).

5 Contestation

It is compellingly proposed by Conor Gearty that the “beauty of the democratic approach to dignity is that it manages . . . differences and resolves them” (Gearty 2013, p. 168). Waldron’s dignitarian literature particularising human dignity is instrumental to this understanding of the democratic approach to dignity, as examined in previous sections. The particularisations of dignity developed by Waldron—dignity as a status-concept, a juridical concept, and as a pervasive constitutional value—serve also to facilitate deliberative argument about its proper use.

Lady Hale observes that, as a status term human dignity “is the sort of meaning a lawyer can understand . . . a precise description of a status attached to a particular individual, a status which by definition only a few can have.” However, if it is to have a pervasive and uniting function in a modern constitutional state, and to have a contemporary meaning such that human dignity is “that all people must be treated equally as well as valued equally”, although the law “may eventually have reached this point, . . . the lawyers did not invent such a major shift in political thinking.” Rather, “[t]he people did that” (Hale 2013, p. xv). They were “[f]reedom-fighters, levellers, feminists even, who knew that they were not being accorded their proper respect as human beings and sometimes called this dignity” (Hale 2013, p. xvi). Waldron similarly points to monumental reforms effected by legislation in such circumstances. Examples include “[t]he prohibition of child labour, the reform of the criminal process, the limitation of working hours, the dismantling of segregation, the institution of health and safety regulations in factories, the liberation of women” (Waldron 1999a, p. 101).

Definitions in law do not always “come in the form of a checklist of necessary and sufficient conditions” but as a contested concept human dignity encourages crystallization in democratic argument (Waldron 2019, p. 16). That crystallization is necessary in political communities where the aspiration is for legislation to be made by way of “concerted, cooperative, coordinated or collective action in the circumstances of modern life” (Waldron 1999a, p. 156; Waldron 2012b; Habermas 2010, p. 469). In the same way, Waldron notes the lack of a ready definition may challenge but not disqualify the use of dignity in legal argument. This is because “[w]e sometimes need concepts in law that challenge the demands of technical advocacy and that invite serious normative reflection, ideas whose elaboration involves continual argument about their proper application” (Waldron 2019, p. 16; Gearty 2013, p. 162).

When the concept of dignity is contested, there is a clear role for theory; that is, when “the content of what we have to respect in one another remains something of a mystery” (Hale 2013, p. xvi). In these circumstances, dignity supplies a value, or a set of values, that other approaches do not (Waldron 2019, p. 5; Habermas 2010, p. 479). As identified by Lady Hale and by Waldron, the legislative limits are formed by the private people in a political community knowing when they are being accorded their proper respect as human beings, and the role of theorists is to supply the thinking behind that knowing (Hale 2013, pp. xv–xvi). Private people and

theorists alike therefore ask questions about human dignity as a way of pinning it down (Waldron 2019, p. 5; Gallie 1956). Jürgen Habermas refers to human dignity as a ‘portal’ via which morality’s “egalitarian and universalistic substance . . . is imported into law” (Habermas 2010, p. 469).

For such an inquiry, Waldron draws upon the history of human dignity as a status-concept, referring to a history of past attempts “to say what is special and worthy of respect in the human individual” (Waldron 2019, p. 16). There is support from Liora Lazarus for this reference to the history dignity comes trailing. Lazarus proposes that, as “what may be viewed as disagreements on matters of principle [may be] premised on untested prejudices, ungrounded factual assertions or even self-interested arguments”, resourcing of history and philosophy may be a crucial persuasive device in strengthening the fabric of political debate (Lazarus 2012, pp. 239–248). Support too from Habermas for Waldron’s understanding of a rank generalisation process that means that “all citizens now acquire the highest rank possible” (Habermas 2010, p. 473). Habermas adds though that “universalization must be followed by individualization”, and “the relative superiority of humanity and its members must be replaced by the absolute worth of any person” (Habermas 2010, pp. 473–474). For Habermas, the concept is “the unique worth of each person” (Habermas 2010, p. 474). Charles Taylor however argues that, as more than one shared good is sought in a ‘secular’ and plural modern state, public authority must be exercised neutrally as between citizens and values to enable all people of very different outlooks to respect the authority of legislation and the authority of the state (Taylor 2010, pp. 25, 29; Taylor 2004, pp. 170–171; Taylor 2011, p. 36). Moreover criticisms of the problems arising from “the relationship between organized and hierarchical religions and the use of dignity” are frequent in scholarly literature about human dignity, and for this reason, it is common for an overtly secular meaning of human dignity emerging “in the aftermath of the horrors of World War II” to be referenced (McCradden 2013, p. 30; Weinrib 2016, p. 25). So, in a plural and secular but democratic political community, we collaboratively and equally pose questions about dignity.

As an “essentially contested concept” that empowers and constrains legislative authority, the proper democratic use of human dignity “involves continuing argumentation about its proper use” (Waldron 2019, p. 16 n57; Gallie 1956). Dignity is a concept around which we can meet and discuss. It is of particular utility when it might be necessary to introduce deep transformations in broadly-held social and cultural expectations and perceptions (Carozza 2013). Bernhard Schlink identifies the functionality as equivalent to *Sehnsuchtsbegriff*, a “concept that encapsulates our yearning for a recognition and protection of humans that is not up for grabs (political grabs, balancing grabs)” (Schlink 2013). Weinrib argues that contestations about dignity demand that legislation be made via a public process designed to ensure the legislation conforms as closely as possible to the legal, political and social norms shared by people in the state (Weinrib 2016, p. 15). This functionality is capable of addressing the concern of Dworkin that most people on one side of a democratic policy debate “seem persuaded that it is useless to try to argue with or even to understand the other side” (Dworkin 2006, p. 5). Indeed, the contested juridical

concept of human dignity as a pervasive constitutional value “leaves open difficult conundrums of moral philosophy, while allowing us to make progress on the central issues and main practical ramifications associated with the concept of dignity” (Waldron 2016, p. 5).

Waldron’s vision is for the sense of how dignity is being put to work in law to grow and develop (Waldron 2012a, p. 135). Relevant to exercises of legislative power in a modern constitutional state and commencing with publication of *The Dignity of Legislation* and *Law and Disagreement*, Waldron’s analysis of human dignity, and Waldron’s engagement with the dignitarian analysis of other theorists, continues to develop greater specificity about human dignity. Regrettably, while “lively debates” are had with Waldron about, for example, legislation being made in the circumstances of politics, the scholarly debates are not accompanied in most cases by “close analysis” of Waldron’s dignitarian arguments (Latham-Gambi 2021, p. 243; Posner 2000). Waldron’s body of work, however, is settling dignity more securely in its proper home in law, and identifying more instructively dignity’s pervasive value in a modern constitutional state. In an era when democracy is beset by manifold challenges, the essentially contested concept of human dignity works to mark out the whole point of a modern constitutional state and is an indispensable concept around which all private people in a plural, secular democracy may meet to argue and discuss when law is given.

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Is Dignity a Non-contingent Autonomously Juridical “Idea”? A *Conversation Piece* with Jeremy Waldron



José Manuel Aroso Linhares

Abstract “Dignity (...) is a principle of morality and a principle of law. (...) Dignity seems at home in law: law is its natural habitat. (...) [M]aybe morality has more to learn from law than vice versa.” (Waldron). The *conversation piece* which follows endeavours to clarify this assumption, less however in order to reconstitute the “place” of dignity in Jeremy Waldron’s conception of Law (as a decisive component of his defence of normative or ethical positivism and the corresponding justificatory aims) than to treat his well-known distinction between *dignity as a ranking status (dignitas)* and *dignity as value or (absolute inner) worth (Wiürde)* as a plausible reflexive resource or tool, which a non-positivist culturally contextualized experience of Law should advantageously mobilize (and assimilate) whilst developing a critical-archeologic reconstitution of a specific *context of emergence* and a corresponding *argument of continuity* (highlighting the institutionalization of *controversy* and *respondere*, if not *audiatur et altera pars* in Roman *civitas* as the beginning of a successful *practical-cultural project*). Considering the purposes of this reconstruction, the possibility of highlighting the invention of dignity as an *endogenous* legal idea (privileging a *ranking status account*) and the opportunity to consider a significant experience of *transvaluation* (putting dignity “to work in a new and egalitarian environment”, precisely the one which Modernity and Enlightenment introduced) are certainly non-negligible resources.

Notwithstanding its subtitle, the essay which follows endeavours less a full-length accomplished dialogue with Jeremy Waldron’s concept of Law than a transparent (and hopefully “productive”) “misreading”¹ considering some of its components: as

¹The expression “productive misreading” adapts a well-known formulation by Gunther Teubner (1998, p. 124).

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if we were exploring the possibilities (and promises) of an argumentative displacement (or transposition)—deliberately affecting the integrating reflective horizon—and in this sense acknowledging the self-sustaining relevance and transversality (if not *sveltezza*) of a specific *conclusion-claim*. In order to clarify this intention, it needs to be added that the reflective aim is not reconstituting the *place* (or the *role*) that a certain *jurisprudence of dignity* occupies (or plays) in Jeremy Waldron's conception—as an integrated component of his *normative thesis about law* and the *normative (or ethical?) positivism* which warrants it (Waldron 2001)²—, it is rather admitting that his well-known (severely discussed and often misunderstood) distinction between *dignity as a ranking status (dignitas)* and *dignity as value or (absolute inner) worth (Würde)* can be treated as an autonomous reflective resource or tool, which for instance a certain *non-positivist* (culturally contextualized) experience of Law (defending a practical-culturally conceived *separation thesis* between juridicity and morality) admits, advantageously mobilizes, and assimilates whilst developing a decisive *argument of continuity* (Linhares 2016, 2018). The counterpoint *status or rank/worth or value* allows us certainly to explore a constitutive opposition between semantic and pragmatic contents (and the corresponding performance contexts), it allows us also however to acknowledge diverse emergence conditions (sustaining different practical worlds), which means associating them with *ideas* (or even *principles*) which are said respectively originally *legal* and *non-legal* or *extra-legal* ones (attributable to moral or religious world views or to political or social philosophy, as well as to literary experience or ethical interiorisation). The appropriation of this reflexive tool is all the more indispensable as, according to Waldron, the correspondent exercise of differentiation presupposes the recognition that, dignity being “a principle of law” and “a principle of morality” (Waldron 2015, p. 13), the juridically endogenous idea has here an undisputable priority or precedence,³ which very clearly means that, concerning dignity, “maybe morality has more to learn from law” (“including [from] the philosophical and normative part of jurisprudence”) “than vice versa” (2015, pp. 14, 133).

²This *normative (prescriptive, ethical or democratic)* version of positivism (Waldron, Campbell) contrasts with a purely *descriptive (conceptual or epistemological)* version (Hart, Coleman) whilst assuming that positivism is less a theoretically (analytically) self-sufficient perspective than a position to be defended, “valued or encouraged (...) from a moral, social and political point of view”. Concerning the plausible labels, whereas Campbell hesitates between the possibilities of “ethical” and “prescriptive positivism”, Waldron prefers the expression *normative positivism*: “Unfortunately (...), that term has also been used in recent years to describe a different thesis—namely, the version of legal positivism that identifies law with norms (as opposed to brute facts about power, commands, and sanctions). On this account, the theories of H. L. A. Hart and Hans Kelsen qualify as versions of normative positivism even if they are not in themselves normative positions. (...) The term ‘ethical’ seems [however] unsatisfactory to me. (...) In this paper I shall mostly use the label ‘normative positivism’, despite the possibility of confusion...” (Waldron 2001, pp. 411–412).

³“[D]ignity need not be treated in the first instance as a moral idea” (Waldron 2015, p. 15), “[d]ignity seems at home in law: law is its natural habitat” (2015, p. 13), “dignity [is] an idea [which] law create[d]” (2015, pp. 13, 15).

1 Two Narrative “Accounts”

Allow me just two more words in order to recall the *jurisprudence of dignity* reconstituted by Waldron. If we already know that the core of this reconstitution explores a specific counterpoint, we now need to give privilege to its narrative intelligibility, which means opposing the “*ranking status*” accounts and the “*absolute worth*” accounts (with their indisputable affinities respectively to *dignitas as a legal idea* and *worth or Würde as an extralegal one*). Notwithstanding the complexity of the contents experienced (often escaping or falsifying the apparent linearity of these accounts and their expected paths), this narrative intelligibility is certain a productive one.

First of all, it allows us to access two incommensurable *worlds of names* and the role which they play in the effective organization of meanings. Whereas the constitutive reference in the signifier *dignitas* favours a clustering of rights and duties⁴—and thus unveils a chain of *signifieds* which include standing, ranking status and tradition, honour and noble bearing, deference, considerability, degree of estimation and respect, non-degradation, self-possession, self-control and auctoritas, but also potestas, hierarchy, positional privileges and haughtiness (Waldron 2015, pp. 4–6, 14, 18, 21–22, 30–33, 51 ff)—, to explore the signifier *Würde* (“fundamental worth or absolute inner worth, dignity as value [beyond price]”) means in contrast giving privilege to the connotations of absolute worth, intrinsic value, non-fungibility, capacity for morality, autonomy, authenticity, sacredness or sanctity of life, if not directly to the Kingdom of Ends formula (Waldron 2015, pp. 6, 23 ff., 27–30, 137 ff.).

And yet, this narrative intelligibility does not condemn us to incommensurability. Quite the contrary, the counterpoint in question is designed by Waldron less in order to emphasize incommunicable differences, than as an opportunity to acknowledge that the first of these two accounts (whose reflective productivity the Author clearly favours) is (or has been) capable of preserving its autonomy and identity, whilst responding to diverse practical-cultural contexts and their institutionalization challenges, or more precisely and specifically, whilst responding to equality or egalitarian claims and the correlative demands of universalization (Waldron 2015, p. 14)... and to these as components of performative contexts in which the second account (the “absolute worth” account)—through the universalist dynamics imposed by the decisive (albeit heterogeneous) influences of Roman-Catholic Teaching and modern and Enlightenment moral philosophy (culminating in Kant’s arguments)—has become explicit (and apparently dominant). According to Waldron, this acknowledgment not only explains manifest conceptual contaminations—those which prevent the possibility of sustaining pure “worth accounts”, treating dignity as a purely

⁴“Dignity as the ranking status [...] comprises a given set of rights, [...] that a person may occupy in society, display in his bearing and self-presentation, and exhibit in his speech and actions.” (Waldron 2015, p. 28).

value-concept, entirely free from rank connotations⁵—, but also and above all unveils a decisive cultural and institutional dynamics... and with this a significant experience of *transvaluation*—“[putting dignitas] to work in a new and egalitarian environment [or simply universalizing an] ethics of honor” (Waldron 2015, pp. 14, 26).

I believe that as far as dignity is concerned the connotation of ranking status remained, and that what happened was that it was transvalued rather than superseded. [...] The older [notion of rank] is not obliterated; it is precisely the resources of the older notion that are put to work in the new (Waldron 2015, pp. 31, 33)

It is the attention paid to this experience of *transvaluation* which finally allows the *thesis* (or the *conclusion-claim*) of *equal dignity* that we all know (and that Waldron has been treating as the basis of a promising *work in progress*): the one which defends that “the modern (and contemporary) notion of human dignity”, whilst involving “an upwards equalization of rank” (2015, p. 33), “represents a sort of normative levelling-up to the treatment and respect that traditionally was due to those occupying the topmost rungs in society’s hierarchy of status” (2015, pp. 143–144). As if we were trying “to accord to every human being something of (...) the expectation of respect that was formerly accorded to nobility” or as if we were organizing ourselves “not like a society without nobility or rank, but like an aristocratic society which has just one rank (and a pretty high rank at that) for all of us” (2015, p. 144).⁶

2 Developing the Promised “Misreading(s)”

Notwithstanding its undisputable vulnerability to misinterpretations, is this a productive thesis? I shall argue here that it is. The reasons I would like to invoke coincide however only very partially with those which Waldron has been exploring, whilst considering the implications of the *status account* to reinvent the problem of responsibility or the dialectics autonomy/responsibility—to understand for instance the tensions between choice and responsibility (or to warrant the role of duties), as well as rejecting the modern experience of autonomy, with its hypertrophy of a *perspective of rights* (2015, pp. 140–141)⁷—... or whilst rethinking some of the

⁵Neither St Thomas Aquinas nor even Kant, notwithstanding his celebration of a “quasi-aesthetic ideal” (Waldron 2015, p. 25), would escape in fact these contaminations (2015, pp. 24–26, 28–30, 31 ff, 137–138).

⁶“[W]e can use aspects of the traditional meaning of dignity, associated with high or noble rank conceptions to cast light on our of human rights. [...] I think all this is tremendously helpful in deepening our talk of human dignity and enriching our understanding of rights. The idea that both notions are connected with ideas of status, and with the transvaluation of older notions of rank, is a stimulating one...” (Waldron 2015, pp. 34, 36).

⁷“[O]ur modern understanding of autonomy sees it almost entirely as a matter of right untinged by any sense of responsibility. Once upon a time, autonomy carried with it a sense of responsibility; but

apparent difficulties concerning human rights (2015, pp. 16–19)—opening up the chance to distinguish “dignity as a general status and the particular rules that protect and support it”, as well as to defend the thesis that whereas “dignity is a normative status”, “many human rights may be understood as incidents of that status” (2015, p. 18).⁸ The lack of coincidence is in fact easily understandable, not so much because the assimilation is a partial one (highlighting only some of the components at stake), but also because the argument it allows will be unequivocally integrated into an alternative conception of Law, requiring from now on a transparent (and hopefully productive) misreading exercise. As I have already anticipated, the alternative in question conceives of law and morality (or moralities) as specific ways of creating intersubjective meanings, generating unmistakably distinct practical worlds—allowing (without paradox or unmotivated defiance) the identification of a *non-positivist separation thesis* (Linhares 2016). This *thesis* requires in fact a full historical-cultural contextualization of law’s answers, on one hand treating those answers (and the corresponding questions, as well as the acquisitions which stabilize them) as explicit cultural artefacts (significantly *inscribed* in the *possibilities* of the Western Text), and on the other hand giving their historical emergence and their continuity the intelligibility of an institutionalized *way of life*, if not the identity of a practical project-*projecting*—which in any case means considering a *certain Law* and this one seriously treated as a *non-universal* (culturally plausible and civilizationally moulded) response to the *universal* (anthropologically necessary) problem of the institutionalization of a *social order*. In its deliberately non-conventionalist idiom (privileging the claim to autonomy and the problem of limits), this is certainly only one of the possible *views of the cathedral*—a view which, following one of the most fruitful and challenging lessons of Castanheira Neves (2008, pp. 9–41, 101–128), I have been persistently pursuing (2016, 2018, 2020). In what sense does however this view and the critical approach it demands assimilates Waldron thematization of dignity? I would say that we can consider three plausible contributions—all of them relatively unexpected (when we consider the reflexive legacies privileged by Waldron’s conception) . . . and as such all of them particularly significant (and providing unsuspected corroborations) . . .

2.1 *Law and Moralities: An Indirect Contribution*

I’ll begin with the least specific of the three contributions, and I mean “least specific” because what is at stake here is not directly the content of dignity, but rather its origin and character, or more precisely, its “habitat” or “proper home” (Waldron 2015,

now it is just a matter of choice and freedom. It operates as an emancipating concept in a straightforward way in which dignity does not . . .” (Waldron 2015, p. 140).

⁸ See also (with a specific consideration of the problem of the assisted suicide) Waldron (2017).

pp. 119,⁹ 133–137), being certain that this issue and the assumptions it allows are taken seriously by Waldron as a step towards an unexpected global implication, concerning the counterpoint between legality and morality. Whilst maintaining that “dignity seems at home in law”, that “law is its natural habitat”, or that “dignity need not be treated in the first instance as a moral idea...”(2015, pp. 13, 15), Waldron opens up an explicit pathway to defending that there are authentic (endogenous) juridical *grounding contents* and that those contents demand an autonomous specific perspective (and an *immanent critique*, involving *internally* objectified standards), which means also explicitly rejecting the need to treat every reflection concerning juridical aspirations, claims and demands or every reflection concerning legally institutionalized contents in the perspective of their worthiness, soundness or correctness as an unavoidably “moral” reflection (as if we were condemned to an exercise in moral thought).

After all it is not just surface-level rules which are legal in character (as though anything “deeper” must be moral). I follow Ronald Dworkin in believing that grounding doctrines can be legal too—legal principles, for example, or legal policies. Law creates, contains, envelops and constitutes these ideas. It does not just borrow them from morality (2015, p. 15).¹⁰

Regarding the framework (the thematic limits and the answer possibilities) of a certain familiar Anglo-Saxon debate between positivists and non-positivists (with their array of *separation*, *separability* and *non-separation* theses)—a framework which, aggravated through the *a-cultural* (and in this sense allegedly universal) configuration of the proposed answers, has already contaminated the legal theoretical debate much beyond its “natural” frontiers (producing more confusion than clarification) . . .—regarding this debate and its expansive pathos, I repeat, Waldron’s conclusions are in fact not only surprising but also precious.¹¹ All the more precious, I dare say, when the conception of Law which assimilates them (which mobilizes them as unsuspected resource) defends (not only *beyond* Waldron . . . but also already *against* Waldron) a fully practical-cultural treatment of Law’s aspirations (re-thinking law’s constitutive cultural-civilisational *originarium* in a *limit*-situation such as our own). One of the cornerstones of this conception (in the way I defend it)

⁹This page, with the formulation “proper home”, concerns Wai Chee Dimock’s commentary (“High and Low”).

¹⁰“[A] lot of what we call moral thought is not devoted to the establishment of a moral order analogous to a legal order, but is in fact oriented to the evaluation and criticism of the legal order itself. Political morality is *about* law, and so the place of dignity in political morality orients itself critically to the place of dignity in legal system. What I have been arguing is that a lot of this moralizing involves *immanent critique*, rather than bringing standards to bear that are independent of those the law itself embodies. We evaluate law morally using (something like) law’s very own dignitarian resources” (Waldron 2015, p. 67).

¹¹To corroborate this, it suffices to recall Michael Rosen’s negative reaction in his commentary “Dignity Past and Present” (Waldron 2015, pp. 79–98), considering Waldron’s defence of a juridically “endogenous” class of concepts as an “intriguing and ambitious claim” (Waldron 2015, p. 83). “I doubt that there are such purely legal foundational ideas, but, if there are, then (...) dignity is not one” (Ibid.).

is precisely the invoked *separation thesis* between law and morality: an approach that does not exclude convergences, and overlaps between *law* and *moralities—moralities* which may range from *positive conventional substantive morality* or *ethicity* (consecrating the particularism of *mores* and traditions) to a *critical (tendentiously universal and procedural) political morality* (celebrating the cultural-neutral quality of modern or Enlightenment acquisitions)¹²—, but which treats them as distinct languages or different sets of “occasions” for the “creation of meaning” (if not as practical-existential resources), with different leading problems and unmistakably distinct understandings of communitarian *validity* (determining, as such, experiences and concepts of autonomy and responsibility that are *not to be reciprocally confounded*). With this conclusion: if we are allowed to speak of ethics (or rather of an ethical dimension) as a constitutive feature of the *quest for the law*—if we want, with Fuller, to persist in identifying the “morality that makes law possible” (Fuller 1969, pp. 33 ff.)—it is certainly not in order to understand the incorporation of the current *dominant social morality* (in a particularistic communitarian vein) or to conclude that *moral correctness* (universally and procedurally experienced) is a condition for *legal validity* (Alexy 2010), just as it is certainly not to require that legal forms of argument incorporate (albeit with limits) the *warrants* and *criteria of philosophical ethics* (Brito 2011). It is instead (following Fuller’s claim but no longer his answer!) in order to identify a specific *internal* way of conceiving and experiencing *humanitas* and *phronēsis*, which is certainly not universal but culturally and civilisationally constructed—a way of constructing-performing communitarian meaning, whose continuity and punctuality should be permanently (heatedly and even radically) discussed, whose richness and fragility as a plausible *collocutor*, between other decisive *collocutors*, is derived precisely from this identity.

2.2 Two Direct Contributions

Waldron’s reconstitution of “jurisprudence of dignity” offers however two other (this time significantly) direct contributions, which, from the perspective which I defend, can be productively mobilized in the critical discussion on Law’s cultural

¹²In the words of Habermas (distinguishing between *procedural morality* and *substantive ethicity*), but also (simultaneously!) in the words of Hart and Waldron (underlining-clarifying a distinction which was introduced by Austin and made habitual through the dialogue with utilitarianism). See Habermas (1991), p. 100 ff., Hart (1963), pp. 17–24 (“Positive and Critical Morality”) [“... ‘positive morality’ [as] the morality actually accepted and shared by a given social group...”/ “...‘critical morality’ [referring to] the general moral principles used in the criticism of actual social institutions including positive morality...” (p. 20)], Waldron (1989) [“the moral culture of a particular community [as a] (...) body of distinctive mores, norms, and standards / a critical [reflective] (...) general account of what a society must be like if it is to accommodate the sort of beings we are...” (Ibid., pp. 561, 562, 563, 582, 587)].

project. As the intention is considering a *certain* law, with a rigorously located *context of emergence*—taking us back to the second century B.C., i.e. to the institutionalization of *controversy* and *respondere* (if not *audiatur et altera pars*) in Roman *civitas* (decisively strengthened by the reception of Hermagoras' rhetoric)—, one of the indispensable issues to be taken into account is precisely a reconstitution of this context (a reconstitution which may be able to assume the identity of a critical archaeological reflection and with it a deliberate interpellation of our present experience): the invention of dignity as an *endogenous* legal idea (privileging a *ranking status account*) is certainly a non-negligible resource in this reconstruction [Sect. 2.2.1]. The other issue has to do with a positive argument of continuity and change and the experience of constitutive historicity it allows: here is the aforementioned *transvaluation thesis* (celebrating the intertwinement between the dominant *ranking account* and the challenges of an *egalitarian environment*) which proves its mettle as a felicitous contribution [Sect. 2.2.2]. A brief allusion must suffice now to distinguish these two steps and highlight the abovementioned assimilation.

2.2.1 Law's Context of Emergence

Starting with the *context of emergence*, we could say that the core issue here at stake concerns the successful autonomy of Law's practical-cultural *project*. Which specific *differentiation practices* allow us to attribute the full invention of its *way of life* (or the corresponding claim) to Roman *civitas'* experience of “isolation” and the corresponding “rise of the jurists” (Stein 2007, pp. 4 ff.)? I would say that this is the decisive question. More than reproducing Schulz's famous diagnosis or exploring the historical experience which this diagnosis highlights (Schulz 1936, III, pp. 19 ff.), the challenge at stake (from the perspective which our contemporary circumstances demand) is rather to discuss the perplexities and misunderstandings that its *signifier* creates.¹³ The *isolation* that interests us today when we consider the republican “rise” of the secular “jurists” (the *iurisconsulti* or *prudentes*, who replaced the pontiffs)—and its “fine sense of the limitations of the law” (Schulz 1936, p. 22)—in fact corresponds less to the reflexive axis deliberately explored by Schulz—circumscribing grounds, territories or realms under the perspective of *rules* or *groups of rules*, which are said to be *legal* and *extra-legal* (religious, moral and consuetudinary) *rules* (Schulz 1936, p. 28)—than to the invention of a specific problem of inter-subjectivity or comparability that is different from all the others and as such justifies the emergence of an entirely new practice of *respondere* and this one as a distinctive specification of *phronesis*.

¹³ See exemplarily B. W. Frier (1985), pp. 184 ff. (“Jurists View the Law: the Ambiguities of ‘Autonomous Law’”)

As we know, the narrative developed by Schulz attributes to *responsa prudentium*—“juristic opinions, delivered piecemeal, usually in actual cases”,¹⁴ highlighted by *auctoritas*, albeit deprived of formal *potestas* or *imperium*—the persuasive “art of analysis”, which, ignoring the “genetic connection between law and extra-legal matters” (such as political-economic conditions), as well as abstracting itself from (silencing) the real restrictions arising out of the so-called *officium*,¹⁵ if not, in synthesis, cultivating an a-teleological formalism *avant la lettre*, made possible the separation or division between *sacred* and *profane law*, *ius publicum* and *ius privatum*, *peregrine law* and *civitas’ law* (Schulz 1936, pp. 26–34). This is a separation or division which (through the “ability” of “isolation” as “severance”, i.e. a strict keeping apart), gave *ius* (if not *juridicalness*) the nuclear (paradigmatic) identity of a *secular internal private* (even though simultaneously *substantive* and *procedural*) *order*, based on an authentic *ratio iuris* and, as such, experiencing an untouchable natural “definiteness”, if not definitiveness, corresponding to a “law of Nature” (Schulz 1936, pp. 34–36). Even without questioning the accuracy of the informative resources revealed by this narrative, we must, however, acknowledge that the narrative as such and/or the diagnosis it establishes are significantly *situated* (exemplarily *dated*), exposing us a-problematically, with the expected contribution of Jhering (Schulz 1936, pp. 37–38), to an understanding of Roman *isolation*, either of law or legal discourse [von Jhering 1883, pp. 560–674 (§§ 47– 47^d: “Analyse des römischen Formenwesens”), which treats it as a forerunner of nineteenth century normativism in general and *Naturhistorische Methode* in particular, with the coherent reduction of legal thinking to *epistemic* resources.¹⁶ The critical denouncing of this unilateral back projection—and the awareness of the pre-judgements and affinities which construct it—do not however necessarily impose the rejection of the *isolation* thesis and the corresponding claim to autonomy.¹⁷ On the contrary, this questioning may actually pave the way towards reinterpreting this *isolation* and give it a different meaning (compatible, as we shall see, with what may be called a plausible *argument of continuity*). In avoiding the misconception which reduces the claim to autonomy to its formalistic intelligibility, the approach I propose displaces the relevant

¹⁴ “[Only] occasionally in hypothetical cases” (Stein 2007, p. 5).

¹⁵ This reference has to do with the ensemble of customary and moral canons which, invoking *pietas*, *fides* or *reverentia* for example, were or had been determinant factors in the establishment of certain material solutions and in the consecration of specific formulas: Schulz (1936), pp. 20–24.

¹⁶ This reduction to epistemic resources, even though mobilizing a radically different understanding of episteme (inspired by Bachelard’s *constructivisme* and absorbing the philosophical problem of Law’s *foundations*), affects also the very stimulating reconstitution of the Roman origins which we owe to Cyril Sintez (Sintez 2014).

¹⁷ Such as the one which we may acknowledge in G.J. J. van den Bergh (2005): “In the heyday of legal positivism the isolation of law was also projected back in history, as is inevitable. According to Schulz, it was the Romans - who else - who succeeded for the first time in isolating law from all that is not law. (...) In retrospect, this seems an absurd thesis What Schulz, on the authority of Jhering, presented as history was nothing else than nineteenth century bourgeois ideology...”

perspective from the norms and the realms or boundaries that their hypothetical types define (in their relatively self-sufficient and abstractly conceived *macroscopic* point of view) to the experience of practical controversy (juridically filtered as a case-artefact) and to the corresponding institutionalization of a *microscopic* model of community, involving two subject-parties and an impartial third (Giuliani 1966). The opportunity to create *distinct* communitarian meaning comes directly and immediately from the condition of possibility which, in constituting and relating the subject-parties, gives them the performative identity of positions (to be occupied) or masks (to be *buckled*). I refer, obviously, to the condition which, by institutionalizing the opportunity (if not also the legitimacy) to claim different (contrasting) understandings of the *shared* situation-event and the *common* context-order (with the corresponding warrants-*topoi*), construct-conform these differences and the issues they explore (as sources of plausible arguments) as intrinsically compatible with a (real or virtual) practical-prudential treatment or judicative assimilation. The core of the introduced *communitas*-artefact corresponds actually to this possibility of treatment or assimilation or, more precisely, to a certain located invention of a *tertium comparationis*, which is (or should be) institutionalized through the possibility of the participation of a third (impartial) subject. It is, in fact, as if the *face-à-face* immediately experienced in the subject's encounter should be conventionally submitted to a constitutive interruption, i.e. to a thematization of intersubjectivity which, without paradox, generates a new kind of intersubjectivity. It is this intersubjectivity, specified as an authentic *attributive bilaterality* (Reale 1982, chapter XLV, pp. 681–694), which, whilst *relativizing* the subjects, makes them effectively *comparable*: on the one hand by imposing a reciprocally constitutive connection between spheres of *autonomy* and *responsibility* (spheres which will be, in later stages, normatively and dogmatically specified as webs of rights and duties) and, on the other hand, by supporting a relevance filter which, considering the *shared* situation-event, distinguishes *concreteness* from *singularity*, i.e. an analogically comparable concreteness from pure, unconditional and absolute singularity (Linhares 2013, 2020). The result is a specification of *phronêsis*, if not a response to the challenge of ensuring that the *new* and the *particular* (corresponding to the problematic nucleus) may, in circular fashion (and inextricably), become the *general* and the *old* (Bubner 1990, p. 64). It is a specification which, invoking an authentic context-order—identified with *ius quod est* and its interpretative reconstruction in *iurisprudenti*'s sentences—refuses, on the one hand, the possibility of a *respondere* which may appear as a self-sufficient (*causa sui*) expression of an inspired *voluntas* (as in the case of the pontiffs' responses) and, on the other hand, frees *judicial rhetoric* from the holistic continuum that the Aristotelian emancipation (secularization) of *praxis-phronesis* constitutively preserved, as well as from its strict reference to the *past*. The construction of a claim to autonomy seems, in fact, inseparable from this change of emphasis concerning the *temporal dimension*, not because the reference to the past loses its relevance—without the reconstitution of *what really happened* (in the words of Jackson, “the story in the trial”) there would be no possible answer to the indispensable *status conjecturalis* and the interrogation “*an sit?*”—, but rather because this reference henceforth appears organically

integrated (as the “story of the trial”) in the *present* of the controversy, as a necessary condition of the *render-tribuere* (*ius suum cuique tribuere*) which, as a judgement, appeases the parties’ claims (Jackson 1988). However, this specification of *phronêsis* would not be identifiable if it represented less of a specification of *humanitas*, a word invented in this context¹⁸ to translate the consecration of a community of comparable *equals*,¹⁹ namely a community which the Roman Republic could only conceive of as an implacably circumscribed circle (overlapping an explicit *status civitatis* and the *munus* of *paterfamilias*), the intentional meaning of which represents however a remarkable acquisition, opening up the way to a specific institutionalization of *audiatur et altera pars* and thus to the consecration of a *pragmatic of respect* (considered as a source of normative claims).

Should this pragmatic of respect and its claim for equality (as a microscopic claim inseparable from the structure of *controversy* and from the possibility of a *rational prudential comparability*) be treated as a specification of *human dignity*? I would say it should . . . and it is precisely here that the assimilation of Jeremy Waldron’s “ranking status account” becomes manifestly rewarding: not only because this account highlights the internal connections between *dignitas* and the forms and procedures of law, but also because, when considering the “life of law”, it explores the articulation between self-control (when ordinary people have “the dignity of judges”) and public hearings (“in cases where an official determination is necessary”) [Waldron 2015, pp. 53–54²⁰] It is this stimulating dialogue which allows me to add that, on account of the significance attributed to a microscopically experienced *thirdness*—granted by the adjudicator-*third* and the presupposition of *jus* (as a *tertium comparationis* of warrants, canons and rules)—, this is exactly the specification of *human dignity* which Law’s cultural project invented *as its own* (even though in its initial consecration this meant exploring an implacably *closed* circle of inter-subjectivity) and which has been continuously pursued and permanently reinvented (not merely *expanded* within its own circle!) as an indispensable identifying claim (*dignity as rank and status as an “intrinsic”, non-contingent, “legal idea”*), and also as a persistent component of a specific *validity order*.

I want to talk about a less obvious way in which law protects dignity, but a way that is deeper, more pervasive, and more intimately connected with the very nature of law. (...) [D]ignity has to function as a normative idea: it is the idea of a certain status that ought to be accredited to all persons and taken seriously in the way they are ruled. (...) When you hear my definition, the sense in which law inherently promotes dignity begins to become apparent. For it is easy to get the impression from the way I set this out of a person appearing in their own behalf before a public tribunal (say) and demanding to be listened to, demanding indeed that their view of things be taken account of before any public decision is made (for example, any public decision about what is to be done with them). This is evidently a legal

¹⁸ “Unter ihrem Namen wird die Humanitas zum ersten Mal bedacht und erstrebt. . . ” (Heidegger 1947, p. 19).

¹⁹ A dimension which Schulz was not able to consider in his exploration of *humanitas*: F. Schulz (1936), pp. 189 ff. (“Humanity”).

²⁰ See the development proposed in Waldron (2012), pp. 210–215.

idea, and it is arguably non-contingently so – in the sense that it is not a matter of the law-maker having just decided to promote dignity (in the way that the framers of Common Article 3 of the Geneva Conventions decided to promote dignity). Dignity seems to hook up in obvious ways with juridical ideas about hearings and due process and status to sue (Waldron 2012, pp. 4–5).

The pragmatic at stake and the *relativizing* mask (which this pragmatic consecrates) are, as a matter of fact, inseparable from the principle of *audiatur et altera pars* and as such represent the invention of an autonomous and responsible *subject*—the inter-subjectively *relativized* subject who, (implicitly or explicitly), invoking an order of *warrants* and *criteria*, addresses himself simultaneously to the other party and to the impartial *third*, demanding a hearing, as well as expecting a rationally *judicative* treatment of the controversy (Linhares 2012). Experiencing this *isolation* (and its legacy) by giving priority to the microscopic invention of intersubjectivity—whilst attributing the intelligibility of a contextual resource to the concentration on private secular internal normativity—is certainly indispensable to defining a clearer counterpoint between Greek and Roman understandings of law and its *dimensions*. The holistic view diagnosed by Schulz as a kind of natural difficulty in disentangling law from the communitarian ethos (Schulz 1936, pp. 20–21) acquires a completely different, transparent meaning when we understand that the representation of juridicalness enabled the Greek experience to remain inseparable from a *philosophy of justice* and the contemplation (through the intellectual virtue of *sophia*) of a cosmic being that was read (interpreted) as a presupposed, definitive, perfect order. We may, in fact, add that this juridical relevance (brilliantly opening up the path to the future *juris naturalis scientia*) corresponds to an undifferentiated normative projection of the *harmony* which such an order (in its essential totality) immutably claims—as if juridicalness should assume the identity of a global *nomos* incorporated (when not diluted) into the metaphysic of the *logos* (Neves 1983, pp. 492–506). Everything changed with the rise of the Roman jurists in the second century B.C., helped decisively by a certain Hellenistic fire of Prometheus that was not due to philosophical reflection but to *Hermagorei* and *stasis* doctrine [Giuliani 1961, III, pp. 71–111 (“L’influsso della retorica sulle teoria del processo romano”)]; the *unavailability* of the order was no longer attributed to a self-sufficient (abstract) Natural Law but to a *cosmos* of hypostasized institutions (*un mondo a parte, il cosmo delle istituzioni ipostatizzate, dei rapporti “calculabili”*), a cosmos which one may recognize (with the mediation of a substantialized *typology* involving *sapientia* and *prudentia*) when assuming a kind of *metaphysic of being* addressed to the concrete just—in the certainty that this experience of juridicalness adds to the *philosophical dimension* the decisive experience of an autonomization of *jurisprudentia* as *praxis* (Lombardi 1967, p. 31).

2.2.2 The Argument of Continuity and the *Transvaluation Thesis*

What about the challenge concerning the positive *argument for continuity*? The problem concerns still the reasons which enable us to reconstitute the invention of

controversy in republican *civitas* as a decisive *beginning*, but the question is now another one. We are very directly asking why (and in what sense) this artefact (or ensemble of artefacts), in terms of its development processes, merits (in the present context) the practical-cultural identity of a project-*projecting* (*projicere*). The knotty point lies in the formulation *projecting* (explicitly borrowed from Heidegger’s understanding of *constitutive historicity*) or, alternatively, in the way the signifier *projecting* (mobilizing explicit signifiers justified by an experience of *Geworfenheit-thrownness*) identifies the development of a practical-cultural autonomous *circle* as a simultaneous experience of *throwing* and *being thrown* (*in his own throw*), with the coherent refusal of *necessity* and *contingence* [Heidegger 1947, p. 25, (1927) 2001, §§ 31 and 63, pp. 142–148, 310–316]. Considered as a permanent constitutive tension between *continuity* and *change*—involving a communitarian *self-availability* which is simultaneously and inextricably *self-transcendentality*—this *projecting* refuses the pre-determined nature of a *plan* (in the ontic or ontic-teleological pre-modern sense of a universal a-historical order of excellences), as well as rejecting the identity of a *programme* (in the contingent-pragmatic sense which modern *Zweckrationalität* self-sufficiently justifies).²¹ It is as if the identity of law as a cultural artefact and the corresponding claim to autonomy should be reconstituted (in our ongoing effort to reconsider Western heritage and its present patrimony), whilst admitting that some major *signs* or *traces* recognizable in the *initial* step—the consecration of *dignity of status* as *comparability* and the institutionalization of *audiatur et altera pars* as a specification of a subjective and objective *tertiality*—persist as more or less explicitly constitutive *features of identity* in the subsequent trajectory, albeit permanently recreated and transformed (and as such inscribed-immersed in a *productive circle* of construction, reproduction and realization).

Whilst corroborating the conclusion-claim of plausible arguments for *continuity*, this conjugation of signs and features of *identity* is not, however, reducible to a closed “set of characteristics” which every practice or manifestation of Western law, in an *all or nothing approach*, would have to exhibit in order to count as such. Treating the development of *identifiable* practical-cultural practices (claiming autonomy and coherence) as the *deployment of a project* also means primarily arguing that the specificity of these practices and their experiences of continuity are not compatible with the claims of determinability and enclosure that *class concepts* warrant. In admitting that the European practical-cultural experience of law may be productively understood as a *concept* (and it is not certain that it is or should be!), the concept in question is certainly not a *class concept* but an *archetypal* or *aspirational* one, in which past or present expressions of the corresponding *way of life* (in the light of

²¹In the words of *Heidegger*, referring to the pre-modern sense, “[d]as Entwerfen hat nichts zu tun mit einem Sichverhalten zu einem ausgedachten Plan, gemäß dem das Dasein sein Sein einrichtet, sondern als Dasein hat es sich je schon entworfen und ist, solange es ist, entwerfend” [Heidegger (1927) 2001, p. 145].

present rewriting) occupy different degrees of “approximation”.²² Whilst clarifying that the *archetyps* in question highlight culturally specific processes of *quest* or *search* (and the corresponding experiences of *indispensability*)—identifying the claim for an *order of validity* (involving a community of autonomous and responsible relativized subject-persons)—, we may, in fact, add that the *features* mobilized have in fact less to do with characteristics than with *guiding intentions* or constitutive *aspirations* or *promises* (if not *desiderata*), “by reference to” which these past or present expressions and their institutional instances should permanently be “judged” (Simmonds 2007, p. 52).

With regard to this *judgement* and the legacy of constitutive intentions which guides it, it is, however, relevant to clarify that recognizing a trans-contextual persistence (which justifies the plausibility of an *argument for continuity*) does not mean postulating (or at least consecrating) a kind of immunity or resistance to historical contextualization. On the contrary, it means arguing that a critical-reflexive deciphering of the persistent *signs* or *traces* (and their aspirational potential) is best understood in terms of their indispensable present task when we attribute the role of specific (recognizable) *mediators* to these *guiding intentions* or *aspirations*, whose practices, fully immersed in unrepeatable “material” realities, articulate different “social-institutional” and “cultural-spiritual” (or “cultural-ideological”) *factors* or *dimensions* and the corresponding contexts of signification and realization, together with the diverse problems and solutions they generate (Neves 1976, p. 170). This assimilation of projecting as *throwing* and *being thrown* in fact enables us to understand how the reference to the same *legacy* (in its *aspirational identity*) generates unequivocally opposed modes of equilibrium or solutions for integration in different historical cycles (as well as in different institutional environments or in different tentative interpretations).²³ It also enables us to understand why the critical-reflexive deciphering of *continuity* should simultaneously (and without paradox) be conceived of as an exploration of *difference* (although not necessarily *différance*). It is precisely as an eloquent example of these dynamics that the narrative proposed by Waldron concerning the *transvaluation of dignitas* (a transvaluation which preserves the connotation of *ranking status*, although putting it to work in a new egalitarian environment) should be productively assimilated. This means admitting a critical-reflexive approach *distributing* the two accounts of dignity: a distribution which treats the *ranking account* (as the institutionalization of comparability and *tertialité*) as a key component of Law’s cultural project (translated in the so-called *argument of continuity*)... but also a distribution which identifies the philosophical, ethical and political *worth account* (with its claims to rational universality) as a key component

²²The counterpoint between *class concepts* and *archetypal* or *aspirational* ones is developed by Nigel Simmonds (2007), pp. 51–56.

²³The opposed understandings of *homo institutionalis* (experiencing the priority of a transcendent *communitas*) and *natural “unlinked” subject-individual* (treating *societas* as an immanent *artefactum*) are for example both compatible (even though with different modes of equilibrium) with the archetype *homo humanus* and the consecration of *dignity of status* as *comparability* (in its *aspirational identity*).

of a certain specific environment (definitively established from the Modern and Enlightenment turn onwards). This emphasis certainly does not exclude the acknowledgement that the political-philosophical and moral idea of *dignity as value*, autonomously introduced in the modern cycle (the culminating canonic expression of which is certainly Kantian *Menschenwürde*) has not been assimilated into law's practical world: it *has* (translated into an immediate claim of equality), first of all formally, due to a decisive understanding of *statute law as norm* (as the Rousseauian *loi encore à faire*, constitutively identified with an intrinsic expression of rational universality), then substantively, following a progressive (more or less contingent) conformation of the proposed legal-politic prescriptive solutions (and the corresponding justification). The normative *dimension* or *level* in which these claims to equality are incorporated (macroscopically referred to as a self-sufficient or, at least, autonomously conceived context-order, even when predominantly understood as a system of individual rights) is, however, significantly different from the normative dimension or level (intrinsically related to the problem-*case*) in which the said microscopic pragmatic and its experience of dignity (albeit in some historical cycles significantly hidden or apparently reduced to a subordinate place) grows and has been *growing* since Roman *civitas*'s stage. Is this a productive distribution? I would say it is. In defending the accuracy of an understanding of law's *continuity* as a cultural project and as a constitutive process of reinvention and growth—emphasizing that this process of institutionalization (of a specific order of inter-subjectivity) is irreducible to a mere “expanding circle view”, or at least that it should be experienced without the *pathos* of progress or the *providentialist teleology*²⁴ which, by giving it an acultural conformation, misunderstands this expansion—this approach allows us in fact to experience the constitutive dialectics between the endogenous components of Law's project and the contextual and environmental conditions and resources which feed its performance.²⁵ It is this dialectics which allows us to recognise that in our present historical cycle (as one

²⁴The formula is by Michael Rosen (“Dignity Past and Present”, in Waldron 2015, p. 80).

²⁵To understand the *argument of continuity* (and the productive intertwining that this argument attributes to the different historical cycles), it is in fact essential to allude to the outlines of a certain dialectical counterpoint. This is the counterpoint which emerges when we distinguish the *core* of Law's project—identified as a continuous attempt to institutionalize a specific kind of *intersubjectivity* (between *relativized*, *comparable* and *limited* spheres of *autonomy* and *responsibility* and the corresponding *masks* of subjects-persons)—from the different cultural, political and economic *environments* in which this tentative institutionalization has been (and continues to be) pursued—and where we may recognize a situated context of questions and problems (conditioning the criteria and the balance of *comparability*, whilst still able to identify the autonomous sense of “this” specific *comparability* as an unmistakable task of *ius suum cuique tribuere*). Defending this *argument of continuity* means, in fact, concluding that, even though the heritage of modern *societas* should undoubtedly be qualified as a dimension of the *institutional environment* of our present *quest for law* (with decisive acquisitions such as *rule of law*, human rights, separation of powers, exclusion of arbitrariness, social certainty, tolerance, respect, solidarity, protection against violence, freedom from want), we should equally be able to argue that Law's cultural project (in its practical identity) is *irreducible* to this *environment*. This evidently means avoiding the shortcomings of all answers which *reduce* Law's cultural project to one of its major cycles (or which at least consider that the

of those acquisitions that we assume and consecrate as an irrevocable one), the *ranking account* involving *audiatur et altera pars* and *tertiality* will identify a legal order only if the quality of *sui juris* is universally attributed (“as the status of someone who can demand to be heard and taken into account”) [Waldron 2015, p. 60]: or to say it in Waldron’s words, only if we abandon the idea behind sortal status (“the idea that there are different kinds of person”) [2015, pp. 58–59] and celebrate an “idea of law” or “of a legal system” embodying as a necessary condition “the assumption that everyone in a society ruled by law is treated as *sui juris*” (i.e. “as having full legal dignity”) [Waldron 2012, p. 17]. This is not in fact a simple expansion of the circle: it is a significant constitutive *transvaluation* of the demands and desiderata which highlight Law’s project. As I have said, a remarkable example of the dialectics between *constitutive aspirations* and *contextual or environmental resources*.

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Part VI

Exploring Human Dignity

in the Boundaries of Law

Does Dignity Promote Law's Autonomy or Undermine It? The Israeli Controversy



Orit Kamir

Abstract In Israel, as in other parts of the world, liberals view human dignity and the human rights it inspires and supports as a supreme universal principle, that serves to free the law and the judiciary from populist majoritarian chauvinism that sometimes takes hold of the parliament. The right wing, on the other hand, views human dignity as a doctrine that is foreign to the spirit and culture of the national majority that rules the state (in Israel: the Jewish majority), and demands that the law, represented by the legislature, be liberated from it. This chapter suggests that the right wing attitude promotes national honor as an alternative to universal human dignity. The chapter presents the Israeli struggle over this issue by introducing Israel's 1992 *Basic Law: Human Dignity and Liberty*, as well as the fierce backlash against it, as manifested in the 2018 enactment of *Basic Law: Israel as The Jewish Nation State*, and the ruthless attack on illegal African immigrants and judiciary that has tried to secure their human dignity and rights. The final section illustrates the clashing perspectives by reading an Israeli feature film, *Manpower*.

1 Introduction

Does the legal constitution of human dignity and human rights enhance the autonomy of law, or jeopardize it? In one way or another, this fundamental question has polarized several societies in the first decades of the twenty first century. Proponents of human dignity and human rights claim that their legal recognition liberates the law from populist agendas and empowers it to fulfill its sacred mission of protecting individuals from powerful governmental agencies. Opponents claim that by enforcing human dignity and rights, courts undermine and castrate the law that is legitimately legislated and carried out by representatives of the populace, i.e., the majority (which is usually a national majority).

This chapter sketches the manifestation of this heated debate within Israeli society in the twenty first century.

Israel defines itself as the national homeland of the Jewish people. It claims to be both Jewish and democratic. Unlike most democracies, it has no written constitution. In 1992, Israel enacted its *Basic Law: Human Dignity and Liberty*, thus finally embracing via legislation the fundamental tenet of the United Nations' 1948 Universal Declaration of Human Rights. Due to severe disputes and fierce, unresolved controversy among legislators, the basic law is so laconic and opaque that only very creative interpretation can give it operative meaning. Israel's Supreme Court took on the task, and in the years following the basic law's legislation it channeled much of its energy into developing such an interpretation. The court declared the basic law to be Israel's Bill of Rights; it read into it important values and rights (such as equality) that are not explicitly mentioned in it; it read the basic law as authorizing Israeli courts to strike down new legislation that contradicts the basic law and offends human dignity and liberty.

The Supreme Court and the judiciary at large, as well as many liberal Israelis, have viewed the basic law and the principle of human dignity that it embodies as expanding and strengthening the autonomy of Israeli law. In this view, the judiciary and the law it pronounces are empowered by the basic law to review both legislative and executive acts, and to protect individuals' human dignity, liberty and rights to the degree of striking down not merely administrative acts, but also offensive legislation. According to this narrative, dignity afforded the judiciary the necessary tools and authority to overcome populist legislation, and to pursue law's true cause: the championing of humanity and its protection from offensive intervention of the legislative and executive branches.

The opponents, right wing parties that have held both legislative and administrative power in Israel for decades, consider both the principle of human dignity and the basic law (as interpreted by the judiciary) as obstructing the ability of the (right wing) government to govern and the (right wing) legislature to legislate. Dignity and its basic law are claimed to undermine the sovereignty of the people, hence the principle of democracy, as well the autonomy and governance of the legislative and executive branches. In this line of thought, human dignity and the basic law that protects it constitute a liberal dictatorship, overruling the nationalistic sentiment of the majority of Israeli citizens.

Clearly, in Israel as in other places, these two lines of argument reflect different understandings of the law and its mission, of democracy, and of "law's autonomy". The right wing argument equates democracy with majority rule and views the law as representing the will of the majority. The autonomy of law is, therefore, a combination of two components: 1. the law's (negative) freedom from universal principles, such as dignity, that are external and foreign to the will of the majority; and 2. law's (positive) power to impose the majority's world view and execute it. In contrast, the liberal argument assumes that the law's definitive mission is to cherish humanity and human dignity and enforce human rights. It stresses democracy's obligation to protect minorities and individuals from a majoritarian dictatorship. In this view, human dignity is not external to the law, but the core of the value system that underlies it. Law's autonomy, in this story, combines 1. the judiciary's (negative) freedom from majoritarianism and populism enacted and enforced by the legislative

and executive branches, with 2. law' (positive) power to protect humanity, through enforcement of human dignity and rights.

Presenting the Israeli case, this chapter suggests that the conflict described above can be framed as a clash between a liberal human dignity-based agenda, and a national honor-based one. For liberal Israelis, *Basic Law: Human Dignity and Liberty* has freed the law from complete subordination to national Jewish honor, imposed by the right wing legislature and government. For the right wing, the same basic law subjected national Jewish honor, together with The Law that should rightfully convey it, to universal, individualistic human rights, that are external and foreign to the Jewish nation and its culture. These rights express the superiority of the individual and universalist ideology over the nation, thus offending the nation's honor. Furthermore, when bestowed on the nation's enemies, human rights, derived from human dignity, are a clear affront to the nation's honor.

In order to flesh out this argument, this article begins with a brief presentation of the exact meanings of both human dignity and national honor, as I understand and use them. Next it presents the enactment in 1992 of *Basic Law: Human Dignity and Liberty*, followed by a presentation of Israel's right wing's backlash campaign, manifested in the ruthless attack on illegal immigrants and in the enactment of *Basic Law: Israel as The Jewish Nation State* in 2018. Both these developments embody the return of national honor and the weakening of human dignity. The chapter ends with a short analysis of an Israeli feature film (*Manpower*) that presents the persecution of illegal immigrants, and offers a cultural critique that can be phrased in the relevant terms: dignity, honor and autonomy.

2 Human Dignity and Honor as Fundamental Moral Attitudes¹

Human dignity is the inherent positive value the enlightenment-based worldview ascribes to anyone who belongs to the human family. It is equally innate to the human make-up of each and every one of us. We can think of it as the moral stamp of "human quality" that is similarly imprinted on every human being and brands us identically from womb to tomb. Dignity does not depict people's empirical value; it constitutes them as normatively worthy by mere virtue of their humanity. In line with Kantian philosophy, since human dignity is the moral value of human subjects as such—it must always be acknowledged, preserved and upheld fully and unconditionally. In this line of thought, it is absolutely prohibited to forgo human dignity and treat any member of the human category with no regard of his or her intrinsic human value; we are forbidden to treat any human being as an object, as a mere means to an end.

¹This section summarizes the lengthy presentations of honor and dignity in Kamir (2020), pp. 17–48 and pp. 73–106 respectively.

On December 10, 1948, the United Nations adopted the Universal Declaration of Human Rights, which determines in its first article that “[a]ll human beings are born *free and equal in dignity and rights.*” In its opening statement, the declaration proclaims that “recognition of the *inherent dignity* and of the *equal and inalienable rights* of all members of the *human family* is the foundation of *freedom, justice and peace* in the world” (emphasis added). In this world view, human rights are inseparable from human dignity: our dignity gives rise to our rights. It is in human dignity and rights that we are all equal, and these equal dignity and rights are the basis of our freedom.

This statement famously came in the aftermath of WWII and the unprecedented brutality that members of the human family forced on each other. Horrified by humankind’s unleashed potential for cruel self-destruction, the world realized and declared that future human survival and prosperity (“freedom, justice and peace”) depended upon a universal acceptance of the tenet of human dignity. Half a century later, human dignity is widely accepted as the foundation of contemporary human rights-oriented culture.

Since the Universal Declaration, human dignity is the focal point of contemporary enlightenment-based civilization; it underlies the universalistic, humanistic, secular moral order that many of us adhere to. Yet this veneration of universal human dignity is culture specific; it is by no means shared by all societies and cultures worldwide or throughout the ages. Many cultures have relied on alternative value systems and their alternative focal points to ascribe value, i.e., worth, to their members, as well as to groups and phenomena. The most popular and successful of those types of systems has been that of honor-and-shame. Most traditional societies in most parts of the world adhered—and often still do—to honor-and-shame foundational attitudes, their logic, psychology and economy. What distinguishes a dignity culture from an honor one is that one ascribes every human being absolute, universal, immeasurable worth, whereas the other ascribes each of its members worth, prestige and standing according to his or her relative adherence to the group’s honor norms.

In honor-and-shame societies, honor is the relative value attributed to and felt by a member of society *vis-à-vis* his peers. This type of value is neither universal nor innate to all members of a group *per se*; quite the contrary, it implies comparative social status, prominence, rank and standing in the hierarchical structure of a specific group. It is admired and sought after, because its accumulation promises superiority over others, hence better living and improved prospects of survival and prosperity. In honor-based societies, shame is dishonor: the absence of honor due to inherent lack or circumstantial loss.

In most honor-and-shame societies, honor is partially bequeathed and mostly gained through the careful and disciplined adherence to the norms defined by the relevant honor code. Different honor societies adhere to different honor codes, i.e., to different sets of social norms, sometimes formally acknowledged and often unconsciously internalized. Yet in many honor societies, proud, “manly” self-assertion, bravery, extreme sensitivity to slight, and unreserved, manifested loyalty to group and leader are prevailing honor-norms. A meticulous observance of the appropriate

honor norms entitles a person to honor; failure bestows shame. Honor is ceaselessly coveted, achieved, enhanced, accrued and inevitably lost, while shame is dreaded and avoided at all cost.

Honor is reserved exclusively to group members. Outsiders, “Others”, are deemed honor-less, hence not protected by social rules: offense to them involves no loss of socially recognized honor and is therefore non-consequential. The strong distinction between insiders and outsiders is crucial for the sense of identity of members of an honor-based society. Maintaining their insider’s status justifies the harsh struggle for honor they experience throughout their lives.

In an honor-revering society, peers are in perpetual competition for honor, always measuring themselves up each against all others. Since social hierarchy is a pyramid and honor corresponds to a position in the pyramid, one member’s promotion must entail the demotion of others. The logic of the honor competition is, therefore, as Bill Miller aptly put it, that of a zero-sum-game (Miller 1993, p. 116). Whereas loss of some honor relegates a group member down the social ladder towards the bottom of the pyramid, complete loss of honor entails loss of group membership altogether: a member who lost all honor becomes an outsider. For many group members, this is fate worse than death.

Groups that encourage adherence to honor standards among their members are likely to exhibit an honor mentality in their relationships with other groups. Sport clubs whose members compete for honor amongst themselves are likely to compete for honor against other clubs. Similarly, states in which honor competition prevails among their citizens are likely to manifest similar honor-bound conduct in their relations with other states.

As this short overview shows, the logic dictated by an honor-and-shame foundational attitude differs dramatically from that dictated by a universalistic, humanistic, dignity-based one. Nonetheless, many people around the world are intimately familiar with both, combining them or fluctuating between them in innumerable ways. This is also true of groups, from classrooms and sports teams to countries and nations. Rhetoric, legislation, policies and judicial decisions can manifest a state’s dignity or honor mentality, and may enhance it.

In the aftermath of WWII and in direct response to it, the international community chose to pledge allegiance to the social order of universal human rights, which is based on the moral foundation of human dignity: the unqualified recognition of the worth attributed to every human being *per se*. The horror evoked by the dehumanization and destruction that WWII entailed lasted for the first seventy years following it; it nurtured and sustained the proclaimed international commitment to human dignity and rights. Yet, in the second decade of the twenty first century, this commitment has been subsiding. In my book *Betraying Dignity* I argue that across the globe, commitment to dignity and to the social order it inspired has been replaced by reverence of social structures that derive from, manifest and enhance a very different fundamental value: honor, including national honor.

Instead of dignity’s equal regard to every individual human being, honor promotes fierce competition for dominance and prestige, on both the personal and the collective levels.

In this context, the argument made here is that Israel is participating in the international trend of betraying dignity and promoting (national) honor. Israel does so by attacking its *Basic Law: Human Dignity and Liberty* and accusing the judiciary of using the law and the principle of dignity to curtail the autonomy of law, i.e., the will of the people, the principle of governance and the spirit of democracy.

3 *Basic Law Human Dignity And Liberty: Israel's Attempt to Move from National Honor to Human Dignity*

In several previous publications I made the argument that Political Zionism was openly and explicitly committed to the transformation of Jews (Jewish men) into men of honor (Kamir 2002, 2004, 2005, 2008, 2011, 2014). Buying into the European (antisemitic) vision of Jews as honor-less outsiders to Europe's nations, Political Zionism aspired to mold Jews into an honorable nation. Herzl and Nordau's portrayal of national Jewish honor was central to their Zionist vision (Kamir 2004, pp. 53–65). Moreover, all sections of Zionism adopted this element, and the Zionist movement at large devoted significant resources and energy to the creation of Nordau's New Jew, i.e., the Jewish Man of Honor. Zionist pilgrims and their *Sabra* (Israeli born) sons distanced themselves from the "Diaspora Jew", building muscles, carrying arms and training in "manly" self-assertion. They were to be the true sons of the bold *Makabim* (Jewish freedom warriors in the second century B.C.). The Jewish *Yeshuv* (organized community) in Mandatory Palestine, as well as the Jewish population of the new Israeli state were greatly immersed in this vision. The establishment of the I.D.F. (Israeli Defense Force) and ongoing war with the neighboring Arab states contributed to the popularity of this vision.

Concomitantly, Israel's grapple with its Holocaust trauma played into the Zionist craving for national honor. The systematic extermination of Europe's Jewry was the ultimate offense against human dignity. It was the definitive denial of and assault on the sacredness of humanity and the value of each individual human. Indeed, the unprecedented dimension of this offense to human dignity led the United Nations to establish dignity as the underlying fundamental value of the post-war era. Yet, Jews at large and the Israeli Zionist community in particular, experienced the Holocaust as a colossal offense to Jewish national honor. In the mainstream Israeli discourse, Holocaust victims and survivors were typically referred to as "sheep who went to the slaughter", i.e., as honor-less exilic Jews who shamed the nation by not standing up for themselves; by not fighting back as "men of honor" must; by allowing the nemesis to subdue them, and through them to exhibit superiority over the whole Jewish nation. The sense of national shame was overwhelming, requiring extraordinary honorable achievements that would offer relief from the shame, and a regained sense of national honor.

The apprehension, in 1961, of Adolf Eichmann, the official who was in charge of exterminating the Jews by Nazi Germany, was viewed as one such achievement. The

1967 war (the “Six Day War”), in which Israel conquered its neighboring Arab states and took over significant territories from Jordan (“The West Bank”), Egypt (The Sinai desert) and Syria (the Golan heights), was another major achievement that served Israel to regain its sense of national honor. The 1973 war (the “Yom Kippur war”) was once again experienced as disgraceful and a stain on Israel’s national honor; the subsequent Entebbe Operation (in which an Israeli military force liberated hostages that were kidnapped to Uganda on July 4th, 1976) was felt to redeem the nation’s honor. Israel continuously valued itself in terms of honor and shame, vacillating between feelings of euphoric honor and devastating shame.

Against this background, *Basic Law: Human Dignity and Liberty* was a historic turning point. Its enactment was a strong signal that Israel was ready to adopt more fully the discourse, worldview and psychology of human dignity. Literal scrutiny reveals that the Basic Law is very laconic, abstract and inconclusive. In fact, it is merely a small portion of a comprehensive Bill of Rights that liberal Knesset Members failed to legislate. Most obviously, the basic law does not mention equality, leaving this fundamental value unprotected. Nevertheless, Israel’s Supreme Court declared the basic law to be the country’s Bill of Rights, reading into it the protection of rights that are not specified in the letter of the law (Sommer 1997). So, for example, the court read the basic law’s protection of human dignity to preclude group-based discrimination, thus reading equality into the statute that does not mention it.

It was the Supreme Court’s judicial interpretation and rhetoric that marked the basic law as a socio-cultural turning point, placing human dignity and the derivative universal human rights at the heart of Israel’s legal ethos. Supreme Court Chief Justice Aaron Barak did more than anyone to strengthen the hold of dignity on Israel’s legal system. Whereas liberal circles applauded this socio-legal reform and willingly cooperated with it, conservative right wing circles rejected and resented it, arguing that the Supreme Court was overstepping its boundaries in advancing an ideological revolution that required wide public support which had never been secured.

The explicit connection between the elevation of human dignity and the demise of national honor was made, in twenty first century Israel, in two contexts: the attack on African immigrants and asylum seekers, and the legislation of *Basic Law: Israel as Nation State*. I suggest that these two cases embody the backlash against dignity and the swing back to national honor, i.e., the backlash against the liberal vision of law’s autonomy, and swing back to the right wing’s articulation of law’s autonomy.

4 Dehumanization of Illegal African Immigrants and Asylum Seekers

From the end of the 1990s and until 2012, 30–40,000 Africans entered Israel illegally; many of them were asylum seekers from disaster zones, and others migrated seeking work and livelihood. In 2012, Israel completed the building of a

wall on its southern border with Egypt to prevent the entrance of more African migrants. The Convention and Protocol Relating to the Status of Refugees UNHR (12.2010) was crafted in 1951 in the aftermath of the Holocaust, and ratified by Israel in 1954.² The Convention states that refugees shall not be returned to a country in which their life and freedom are endangered. In accordance with the ideal of human dignity, such refugees must be guaranteed basic universal human rights, including freedom of movement, the right to work, and equal treatment without prejudice based on religion, race or sex. A refugee must be treated with dignity as a member of the human family.

It was not until 2009 that Israel finally acknowledged its responsibility to examine asylum requests. Even then, it did everything in its power to avoid reviewing such requests: almost none were examined, recognized or accepted.³ Since 2012 this passive tactic of ignoring asylum requests has become an active offensive: the Knesset passed a law, initiated by the government, permitting the state to incarcerate illegal immigrants, pending deportation, for three years or more.⁴ When, at the end of 2013, Israel's Supreme Court (sitting as the High Court of Justice) struck the law down as constituting an affront to human dignity and human rights, the Knesset immediately reenacted it with minor changes.⁵ Again the law was struck down as an affront to human dignity and basic human rights,⁶ and again the Knesset reenacted it, this time authorizing only twenty months of incarceration.⁷ When this third version of the law was brought before the Court, it reduced the period of incarceration-without-trial to one year.⁸

This fierce and unprecedented battle between the legislative and judicial branches gave rise to unparalleled attacks by Knesset members on asylum seekers, illegal immigrants, the Supreme Court, the judiciary, and *Basic Law: Human Dignity and Liberty* together with the worldview that it represents. Africans were dehumanized, portrayed as a “cancerous growth”⁹ on the national body and an inherent danger to

²<https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.

³<https://www.idi.org.il/articles/2732>; https://www.mevaker.gov.il/he/Reports/Report_627/8eaa80a0-a426-4424-aefa-8fdc4e8b176a/221-zarim-2.pdf, p. 1427.

⁴For a thorough discussion of Israel's treatment of refugees see <https://www.vanleer.org.il/sites/files/%D7%9C%D7%95%D7%99%D7%A0%D7%A1%D7%A7%D7%99%20%D7%A4%D7%99%D7%A0%D7%AA%20%D7%90%D7%A1%D7%9E%D7%A8%D7%94%20-%20%D7%9E%D7%91%D7%95%D7%90.pdf>, pp. 23–26; https://www.mevaker.gov.il/he/Reports/Report_627/8eaa80a0-a426-4424-aefa-8fdc4e8b176a/221-zarim-2.pdf.

⁵https://fs.knesset.gov.il/18/law/18_lsr_301346.pdf.

⁶https://fs.knesset.gov.il/19/law/19_lsr_301620.pdf.
<https://www.idi.org.il/articles/3146>.

⁷<https://www.idi.org.il/articles/3138>.

⁸https://fs.knesset.gov.il/19/law/19_lsr_306608.pdf.

⁹<https://law.acri.org.il/he/33661>.

⁹<https://hotline.org.il/wp-content/uploads/IncitementAndHateCrimesReport.pdf>, see p. 19; <https://www.ynet.co.il/articles/0,7340,L-4233655,00.html>.

the Jewish character of the state. The Supreme Court was accused of undemocratic judicial legislation, as well as castrating and replacing duly elected members of the legislature. Human dignity and rights were said to override the will of the people and serve the legal system in its attempt to form a left wing, liberal dictatorship. This public atmosphere was instigated by the prime minister (Benjamin Netanyahu), ministers and Knesset members. It reached its peak in 2017, when the government, frustrated by judicial intervention, decided to deport illegal immigrants (including asylum seekers) to two African countries (probably Rwanda and Uganda), which apparently agreed to accept them in return for significant payment.¹⁰ To justify this extreme measure and counter the outcries of human rights organizations over this affront to the human rights of the deportees, the government unleashed poisonous rhetoric, crudely dehumanizing the African immigrants, the judiciary and human rights organizations. Their commitment to universal human dignity and rights was portrayed as disloyalty to the Jewish nation and its state. The Africans were accused of threatening the Jewish majority and Jewish character of Israel, and those who supported them, chiefly the courts and human rights organizations, were denounced as internal enemies who used *Basic Law: Human Dignity and Liberty* to stab the nation in the back and cause its downfall.

This phenomenon combined three elements: ruthless dehumanization of a small, helpless minority; rejection of the ideal of human dignity together with the Basic Law that affirmed it; vicious attacks on the judiciary that upheld and promoted dignity and the Basic Law. The minority, human dignity and the courts were all portrayed as threats to national integrity, sovereignty and honor. The Africans were portrayed as external enemies, the courts and human rights organizations as internal ones, hence traitors to nation and state. Human dignity as pronounced in the Basic Law was said to be the tool of traitors who would hold external enemies above the Jewish nation.

Furthermore, the Supreme Court's repeated interventions in legislation were described by many on the right wing as an attempt to humiliate the legislature, the government and through them the nation, and to override Israel's democratic and justified attempt to defend itself against hostile infiltration, "penetration" and take-over.¹¹ The state system of checks and balances was redefined as offensive to the honor of the legislative and administrative branches, and with them—to the honor of the whole nation. The Court's review of the other branches through the lens of human dignity was constructed as an honor-driven maneuver, used by the Court to humiliate the other branches and enhance its own status. Right wing government and Knesset members encouraged a public outcry to restrain the disloyal, honor-driven court, demote human dignity and rights, revoke the Basic Law, and expel the

¹⁰<https://hotline.org.il/refugees-and-asylum-seekers/un-voluntary/>.
<https://www.makorishon.co.il/nrg/online/1/ART2/476/796.html>.

¹¹<https://www.haaretz.co.il/news/law/1.2441374>.

“foreigners” who “infiltrated our sphere” and “threaten its Jewish character”, and thereby, the nation’s sovereignty and honor.¹²

In terms of law’s autonomy, this discourse held that the legislative attack on immigrants—supposedly reflecting the will of the people—represented law’s autonomy, as well as democracy, sovereignty and governance. By this logic, judicial intervention in support of the immigrants’ human dignity and rights undermined this legitimate, desirable autonomy of the people and the law.

Both lines of argument were intertwined in public discourse: law’s autonomy was explicitly identified with national honor, and human dignity was constructed as an impediment.

5 The Legislation of *Basic Law: Israel as A Nation-State*

The enactment of *Basic Law: Israel as Nation-State* was often presented as the jewel in the crown of Netanyahu’s right wing government. The Basic Law, enacted after a decade of failed attempts, reaffirms arrangements already enacted in earlier laws (for example, regarding the Israeli flag, the national anthem, and the state’s capital); its value is purely symbolic . Perhaps the single achievement the Basic Law can boast is the demotion of Arabic from its previous status as one of Israel’s two official languages, to a language with a mere “special status”.

Nevertheless, the basic law conveys a powerful message: human dignity and liberty no longer enjoy exclusive and superior constitutional status; from now on, national Jewish honor enjoys parallel constitutional status. National honor, hence, has been elevated to the same status as dignity and liberty, as these values have lost their relative superiority. Significantly, national honor triumphed on its own terms, i.e., according to its competitive, comparative, status-oriented logic. In this context, the demotion of Arabic reflects the humiliation of the national Other, hence, once again, the comparative elevation of national Jewish honor.

The many supporters of the Law say openly and explicitly that its purpose was to “balance” *Basic Law: Human Dignity and Liberty* and to curtail its discourse of universal human rights. In their view, since its legislation in 1992, the Basic Law has been used by the courts, the Supreme Court in particular, as a trump card to overcome any and every consideration, including national Jewish honor. The new Basic Law, this argument goes, will force the judiciary to acknowledge the supremacy of national honor. Additionally, the new Law manifests the triumph of the legislative and executive branches over the judiciary: the two have finally succeeded in imposing their preference of national Jewish honor on the branch identified with universal human dignity and human rights.

¹²Ibid.,

<https://www.haaretz.co.il/news/education/.premium-1.2441550>.

<https://www.haaretz.co.il/news/education/.premium-1.2441407>.

Forum *Kohelet* is the right wing, ultra conservative research institute that initially drafted the new Basic Law, and consistently pushed for its legislation. Presenting the draft bill, Forum *Kohelet* stated that it “wishes to put Basic Law: Israel as Nation State on an equal footing with Basic Law: Human Dignity and Liberty. This means that when the Court reviews a request [by a Palestinian-Arab Israeli citizen] to bring a spouse to Israel from an Arab country, the Court will have to balance Israel’s Jewishness against the affront to the dignity and human rights of the individual who wishes to live in Israel with a spouse from an enemy country, and deny it”.¹³ This reasoning leaves no doubt that that new Law was designed to counter the effect of the earlier Basic Law, and curtail universal human dignity and rights.

Read in context, the new Basic Law is meant to allow the incarceration and deportation of illegal immigrants, including asylum seekers, thereby supposedly preserving the integrity of the Jewish state. It is meant to curb the basic human rights of Israeli Palestinian-Arabs in the name of Israel’s Jewishness. It is meant to curtail the judiciary’s commitment to universal human dignity and human rights, and to demote its status vis-à-vis the legislative and executive branches (both controlled by the right wing most of the time since 1977). It goes hand in hand with the discourse, promoted by Netanyahu, of loyalty to nation and the leader who embodies it.

In the legislation of *Basic Law: Israel as a Nation State*, its proponents felt that they enhanced the autonomy of Israeli law. They liberated it from the grip of the external principle of human dignity, and empowered it to convey the agenda of Israel’s Jewish majority.

6 *Manpower: A Film Analysis*

Noam Kaplan’s 2014 feature film *Manpower* is situated in the southern part of Tel Aviv, in a decaying neighborhood, where lower middle class Israelis and illegal immigrants (mostly from Africa) struggle to make ends meet. The film follows the lives of four men: two Israelis, Meir and Haim, an African whose Israeli nickname is Bamba, and eighteen year old Erez, who was born in Israel to a guest worker mother from the Philippines. Haim, an aging bus driver, is in search for meaning in his life, after his son left Israel seeking a better life, together with his guest worker wife and their son. Erez feels as Israeli as anyone. He struggles to get drafted into the I.D.F., desiring to protect “the villa in the jungle”, as he refers to Israel, from its savage Arab neighbors. Finally drafted, he is not sent to the prestigious air force, as he had hoped, but to serve in the military police, overseeing (i.e., oppressing) Palestinian civilians

¹³<https://kohelet.org.il/publication/%D7%9E%D7%94-%D7%A9%D7%A8%D7%A6%D7%99%D7%AA%D7%9D-%D7%9C%D7%93%D7%A2%D7%AA-%D7%A2%D7%9C-%D7%97%D7%95%D7%A7-%D7%94%D7%9C%D7%90%D7%95%D7%9D-%D7%95%D7%9C%D7%90-%D7%94%D7%A2%D7%96%D7%AA%D7%9D-%D7%9C%D7%A9>.

in the occupied territories. Bamba, a veteran migrant worker from Africa, cleans houses attempting to provide a life for his wife and son. He is a proud, active member of a local African soccer organization, and dreams of improving his situation through determined, hard work.

Meir Cohen, the film's protagonist (Yosi Marshak), who, like the film's other characters, lives in southern Tel Aviv, commands a unit of the immigration police. His assignment is to convince African migrant workers to leave Israel "of their own free will". Meir detains Bamba and presses him to cooperate with the police and convince his friends to leave "at will". Refusing the offer, Bamba goes into hiding, but is eventually caught and deported forcefully.

The film opens with the image of Meir returning with fellow police officers from an organized visit to concentration camps in Germany. Meir admits to his wife that the visit affected him, and that like his father, he is grateful to have a Jewish homeland. His wife replies that their own home is owned by the bank, and asks whether he finally received the promised salary raise. Meir's difficult economic situation is a recurring motif throughout the film: he repeatedly fails to draw money from ATM machines, and feels humiliated when asking for yet another loan at the bank. When his commanding officer hails the work of the immigration police as the "new Zionism", Meir asks whether they will finally receive the promised compensation for the long hours they spend on the streets. But the promised compensation never materializes, and Meir finally leaves the force and offers his services to a private security company. The film ends with him drawing money from an ATM machine, declaring that "everyone is whores".

Manpower is about Israeli masculinity in crisis. But it is also about honor, dignity, and law's autonomy, as presented in this article. Meir enforces the law that is meant to embody national honor, the will of the people (the Jewish majority), and the nation's autonomy to define its (Jewish) character and to control and restrict immigration. In so doing, Meir offends the dignity of the African immigrants whose homes he invades, and whom he threatens, intimidates, humiliates, and deports. A just, sensitive man, he attempts to minimize the dehumanization his actions entail, but is well aware of the damage done. He tries to justify his actions by believing that his work is meaningful and important for the national collective. He tries to buy into the Zionist story that his superiors narrate time and again.

But unlike the young Erez, who is eager to join the Israeli collective at any cost, Meir slowly sees through the story that national honor requires the enforcement of laws that offend human dignity. He gradually realizes that as he jeopardizes the dignity of African immigrants, his own dignity is also undercut. He causes grown men to hide in attics and defecate in their pants in fear, compromising his conscience, while his salary does not suffice to buy toilet paper and other basic goods. He slowly understands that national honor is used to sweet-talk him into offending others' dignity, while his own dignity is similarly compromised by the state that he is said to be serving: his state sends him to impose brutal humiliation and tarnish his soul, while ignoring his basic needs.

Meir learns that the national honor that he is supposedly enforcing conceals a much more powerful honor system: a wealth-based one. He discovers that the real

distinction is between “the haves”, at the top of the honor pyramid, and the “have nots”, at the bottom. Both he and the African immigrants belong to the second category. Like them he struggles to buy basic products, and lives in fear of losing the roof over his family’s head. Like them, his dignity is constantly threatened. The haves use the rhetoric of national honor to seduce him to offend the dignity of his fellow have nots; but their system does very little to secure his own dignity. They offer him empty rhetoric of national prestige, but not a dignifying line of work or an income to support a dignified standard of living.

Honor-based law, that supposedly embodies the autonomy of the nation, comes at the expense of “outsiders” such as immigrants. But Meir finds that it does not protect the dignity of low class “insiders”, who are used to enforce it on their neighbors. He sees that offense to dignity does not stop at the door of “outsiders”.

Meir does not become a human rights activist. But he does opt out of the system. He denounces the rhetoric of national honor and autonomy, accepting that in a wealth-based honor system, it is every man for himself. Focusing on his family’s well-being, he stops serving the state that requires of him to enforce the law that supposedly enhances national autonomy. He prefers to sell his time and energy for as high a price as he can get, like everyone else.

Manpower does not offer an optimistic vision of oppressed men from different backgrounds uniting in universal struggle to uphold human dignity. But it does suggest a first step. It offers its protagonist a realization that buying into the rhetoric of national honor and autonomy comes not merely at the expense of others’ dignity, but also at the expense of one’s own. It invites its viewers to realize that liberating the law from the rule of human dignity is destructive to everyone, including the law enforcers. This view of dignity and law’s autonomy has not been popular in Israel in the first two decades of the twenty first century. *Manpower* went unnoticed and failed to incite public interest and discussion.

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Images and Counter-Images of *Humanitas*: A Jusaesthetic Approach to the Problem of Law's Normative Validity: Beyond the Blindness-and-Sightedness Polarity



Brisa Paim Duarte

Abstract Amid the complexity of the “post-modern jurisprudences”, in which the traditional dualisms of modernity are intended to be eroded (Minda), *aesthetic criticism* presents the ambition of restoring a humanist and pluralist (ethically inspired) sense of justice in the kernel of law’s culture and the discourse of legal thinking. Defying paradigmatic understandings of legal vision (law’s ability of sightedness), aestheticism offers, then, alternative comprehensions of law’s cultural place and civilizational meaning that are expressly designed as the counter-image of those which reflect centripetal (law-oriented) understandings of the role that law, as a project of normative validity, must play in the context of ordinary life, constitution of selves, and in the constitution of its own discourse. Is this aestheticization simply yet another sign of the definitive decline of a culturally shaped narrative of law... or could it be reassessed *alternatively*, from a constructive, juridical, and internally critical perspective, seeing law as a particular experience of sightedness—an experience of *jusaesthetics*? This paper responds affirmatively to this question.

1 Introduction

Amid the complexity of the “post-modern jurisprudences”, in which the traditional dualisms of modernity are intended to be eroded (Minda 1995, pp. 3, 189), *aesthetic criticism* presents the ambition of restoring a humanist and pluralist sense of justice in the kernel of law’s culture and the discourse of legal thinking. This is pursued by putting under suspicion fixed structural divisions between a “world” of law, which is characterized as an institutionally (bureaucratically) controlled and artificially constructed social world of (precarious) sightedness, and the incommensurability, complexity, and, ultimately, welcome unpredictability, of an indefinable “free” world outside law (outside the realm of legal vision)—a world of sensorial “life”

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and “experience”, and, in a relative sense, of the immediacy of blindness, aloof to normative predetermination.

Is this aestheticization simply yet another sign of the definitive decline of a culturally shaped narrative of law, one already dismissed by the “constellation of discourses” (Linhares 2007) and experiences growing in parallel … or could it be reassessed *alternatively*, in a constructive, juridical, and *critical* perspective—an *alternative* to the usual “*alternatives to law*” (C. Neves)? That is, would it be possible to shift the language of criticism towards a perspective in which aesthetics emerges rather *in* and *as* a movement *towards* the law, or a place to reimagine law’s very own *principle of humanity*—as an experience of *jusaesthetics*? And, in such a way, would it be possible to assert *jusaesthetics* as a necessary critical (re)affirmation of a pluralist and heterogenous, yet internally driven, *project* of normative validity—a contribution, at the end, to the very *fabric of law* criticism tries to escape? Engaging in this discussion, this paper offers an affirmative answer to these questions.

2 Law’s Interrupted Eye and Aesthetic Criticism

According to the idiom of law and aesthetics’ criticism, being a *person* in the juridical realm is like becoming a fictitious *persona*. In part as a basic requirement of law’s cultural nature or the cultural nature of the kind of *praxis* legal experience entails,¹ but, mainly, as a distortion of such a nature created by legal formalism and “orthodoxy”, becoming a subject according to law would imply the pre-defined (*pre-scripted*) possibility of *impersonation*, conceived as an act of performative, even theatrical, imagination. The theatrical here highlights the farcical habits—the artificiality—of legal language and legal culture, their tendency—even, their necessity—to turn life into textual archetypes, fiction, and, mostly, into caricatures. This is exactly the opposite of the performative nature of the theatrical highlighted by Leiboff, in line with Sarrazac, which requires the suspension of “any belief that we hold in the textual certainties”—the conception of a world close to the immediacy of experience, a world “that it is not word dependent, and more particularly, it is action” (Leiboff 2010, p. 388).

Far from this performative conception, becoming a subject in legal lenses would demand the person to be seen to wear an undifferentiated disguise by which “the screen” of the legal order, imposing its own conditions of visibility, makes such a person a product of the eye in the first place;² it implies an act of conditional sight, a decision—and, with this, an interruption, suppression, from multiplicity.

¹ “[A]ll cultural praxis consists in imposing a new, artificial order on the natural one” (Bauman 2000, p. 96).

² “The operation of normative systems (religion, morality, increasingly law) interposes a ‘legal screen’ between the subject and the social gaze, filtering the objects of vision and determining the way in which we see and are given to the world to be seen” (Douzinas 2008, p. 18; 2011, p. 253).

On the other side of the coin, through such a screen, as it gives birth to the *subject*, the law would manage at the same time to delude (even though temporarily and insufficiently) its allegedly inherent condition of *blindness*, turning it into a particular, although partial and precarious, experience of visibility. The subject, who is artificially understood as it is strategically created, represents both the law's ability and inability to see, as the result of a limited experience of *poiesis*. If, agreeing with J. Rancière, "the image is never a simple reality" (2007, p. 6), the juridical shapes keep creating images that, giving "visual form to the invisible and mak[ing] present what is absent" (Douzinas 2011, p. 247), as near to life as they are to death, are far from having ontological quality,³ simultaneously presenting, and misrepresenting, what they unveil—the being.⁴ In the legal realm images are notably designed to attend to narrow requirements of linguistic specificity and vocabulary limitations, with their simplifying, general normative patterns.

To be born, then, the juridical person loses her own identity to gain another, *i.e.*, she loses her phenomenological, umbilical connection to the very condition of human experience (her "absolute otherness"), as she joins "the plot" of an autonomous Being⁵ and is translated into the normative *character* a previously fixed language and vocabulary prescribe, a language that, by its own, could only mirror and foresee the caricature images of *homo juridicus* (A. Supiot)—the individual pre-moulded to and post-carved in a concept, deprived of personal traits and freed from private roots and bondings (Haarscher 1997, p. 27).

Whilst such images inform one of the strands of "the normative body of the individual", they themselves embody specific "regimes of visibility" (Douzinas 2008, p. 18; 2011, p. 249-ff.)⁶ that, besides creating the possibility of existence of the legal person, are instrumental both to the self-preservation of the discourse of authority, on the one hand, and to the self-isolation ("scientific" preservation) of the

³In this phenomenological approach to images, the images are not entrusted with representational, but with presentational, capacities—"without the image there would be no thing for us, no presence and, as a result, no subject could be called into existence. [...] The image both brings to presence and withdraws beings" (Douzinas 2011, p. 248).

⁴"Without the image there would be no thing, no presence and no subject. In this ability of disclosing things, the image is a prodigious and forceful entity. It confers unity and identity to the thing, by arranging it for us and reducing its multiplicity. [...] But what the image discloses is not things with ontological solidity. [...] The image stays distant both from the world of beings it brings forth and from the possibilities of availability and utilization it opens. The image presents the absent but also the absence in the thing, the fact that the thing cannot exist without the action of the other through its image. This double absence reminds us that the birth of what we can call the artistic image must be associated with the experience of death" (Douzinas 2008, p. 21).

⁵Since otherness, as Pivatto remembers us in his introduction to E. Lévinas's *Entre nous*, "interrompe a trama do ser", it is the opposite of the Being "e de suas amarras" (Pivatto 1997).

⁶"These epochal regimes exist in all cultures even though their naturalisation inhibits their identification. Such regimes form a combination of iconoclasm and iconophilia and amount to a complex administration of an era's available ways of seeing. [...] [They] bring together the sensuate body and approved ways of seeing and create what can be called the 'normative' body of the individual" (Douzinas 2011, pp. 249, 254).

legal system's integrity, on the other (throughout legal modernity's cycle, such images were expressively set *as* and *in codex*, once surrendered to the dominance of literal syntax).

As if the law, having been submitted to the constraints of "orthodox jurisprudence", with its eyes closed or blindfolded, as *Justitia* illustrates, deprived of images and graphically prevented from seeing (Douzinas 2011, pp. 252–254),⁷ had to be necessarily unaesthetic, prohibited from reaching *aisthēsis*, and the proliferation of law's written expressions, allied to the belief in the alleged guarantees of meaning to be provided in advance by the support of the letter of the text, could eventually be able to overcome the ambivalence and potential dangers and intricacies of law's traditional mythological and pictorial (pre-modern) representations (Jay 1996, p. 71; 1999, p. 26; Douzinas 2000, p. 813).⁸ According to this legacy, words are treated as secure steps to formal certainty; they communicate directly to and through the interrupted eye. Their character as artefacts that "deploy a visibility that can be blinding" (Rancière 2007, p. 7) is thought to be overcome by the very sieve of reason and its methods. In this sense, the world created by law becomes a world in which such creatures find an artefact (a selection of fictitious tools) for social compossibility, and the values, signs, and symbols through which human experiences are meaningfully lived *outside law* are erased in the process—so would be the very practical domain of *humanity*.

This dualism or tension between law's blindness and law's sightedness—which finds its final expression in the prevalence of the former over the latter, as law's *impossibility* of true sightedness—is then highlighted (explicitly or implicitly) just to be reworked, and then ideally overcome, as the normative core of juridical subjectivity and intersubjectivity continues to be critically reassessed and reinvented by the "apocrypha" (Manderson 2001) in contemporary discourse.

The means by which aesthetic reworking happens to be taken forward, in a general sense, reflecting the post-modern quests for opposing narratives (in this case, opposing narratives to the "orthodox" narrative of law), and whether these counter-narratives find their way as counter-images or as counter-*scripta*, is the one of the deconstructions of expected frontiers between reality, fact and fiction, truth and *poiesis*, (macro)normativity and (micro)narrativity, the very intersubjective

⁷ Goodrich and Hayaert question the direct association between the blindfolded symbol of Justice and sheer blindness. Offering an etymological perspective of the ambivalence associated to the *imago* of Justice, they highlight instead possible historical connections with the *fasces* used by Roman emperors and with the ambivalence and duplicity of legal language, a symbol of an art of words that stimulates "the development of law" (Goodrich and Hayaert 2015, pp. 14–16).

⁸ As a medieval antecedent of the jurist's intention to translate images into the alleged certainty of the written word, according to which "the point would be to submit them to the text regime familiar to the law", Vismann remembers Bartolo's *Grammar of Signs*—"The purpose according to Bartolo was to subject images to the logic of writing because the written word alone was rational and thus accessible to law. The result was a 'Grammar of Signs' in order to curb the rampant use of heraldic insignia, which at the time went unchecked by the authorities. [...] most proposals regarding the law's dealings with images are until this day fashioned after the Bartolo model. A grammar of signs is to restrain the auto-logic of images." (Vismann 2008, pp. 3–4).

balancing in juridical *praxis* between right and duty (with the overall tendency to the hypertrophy of the latter, as a normative projection of a claim of responsibility for the other). In aesthetic criticism, law's own blindness to aspects of life, an outcome of the legal method's faulty connection with the human realm, becomes both a discursive postulate and a precondition of the possibility of "aesthetic" sightedness; in a way, such a precariousness is the symbol of a fragile and faulty experience of humanity, it is its counter-face, an un-humanity. This creates the grounds for sensorial necessity.

Aestheticism offers then alternative comprehensions of law's cultural place and civilizational meaning that are expressly designed as the counter face of those which reflect centripetal (law-oriented) understandings of the role that law must be playing in the context of ordinary life and in its own discourse. In this process, such proposals end up providing legal thinking with alternative methodological and epistemological tools to understand what being a subject in law can possibly mean, which understandings of legal vision it implies, the extension of the normative compromises law, as a cultural artefact, entails, and, ultimately, the ideal *community* the experience of law should *enviseage* and try to achieve in consequence—after all, a community normatively built outside and beyond law's "internally" comprehended normativity and discourse.

At the base of this criticism, lies, therefore, the reflection of a general quest for the derangement of what are understood as law's fundamental myths, enhancing dimensions of life that escape from any attempt at totalization. What is at stake is an attempt to sculpt manners of surpassing the discourse of law, with its abstract categories and dogmatism, to promote ethics, as a much needed means of expression of singularity.⁹

However, much of the distrust of critical perspectives in general—and of aesthetic criticism in particular—in juridical possibility of sightedness and in centripetal normative arguments seems to come from a misrepresentation of the complexity of legal experience and discourse. A (mis)representation that restricts and subsumes the cultural image of the "practical world of law" (Linhares 2013, 2014) into one of its facets, the "orthodox" image of a rule of law as archetypally built in the modern cycle, extending the permanence of its wounds and traces. The image (the phantom) of formalism.

3 "Formalism" and "Non-formalism"

According to a standard formalist view, law would forge its own normative world or community based on an axiomatic and empirical-explicative reduction of singularity, constraining the limits of subjectivity and intersubjectivity to reinforce imperatives of reason and authority. In this context, being a subject, according to law,

⁹ A more comprehensive overview of aesthetic criticism was recently proposed in Duarte (2021).

demands the previous adequacy to law's internally constituted language, and such a language is in fact a sort of monolingual code. Considering that the term *formalism* is not an easy one, since it can be applied in many different contexts which are not always convergent in terms of their possibilities of determination (Schauer 1988), first I shall clarify in which ways I am using it here. If from a general and methodological angle the term formalism can be understood as "the concept of decision-making according to *rule*" (Schauer 1988, p. 510), more strictly, it can be applied still in two complementary senses that, in a typically or fully formalist approach, appear together and in integration,¹⁰ but that do not necessarily depend on each other:

First, as a kind of structuralism and comprehension of authority that gives prominence for law's form over its actual contents (Gearey 2001, p. 4). This privilege of form makes formalism focus on the official legitimacy of the instances responsible for the emanation of law's sources, or the compliance of such instances with the specific procedures through which the same sources are to be constituted. The problem of the legitimacy of *content* disappears, since it is answered in advance, by a narrow understanding of what the law is and can be, which sources are in charge of creating it, and of what formal or structural requirements of validity they must meet. Therefore, the consonance between the contents prescribed and any kind of potentially shared, cross-cutting axiological-normative compromises and fundaments (that could work as parameters to which law's normative meanings should correspond to become valid) is not an object of concern for legal discourse. And, in this way, law becomes a simple being, a place for reducing complexity, a space for the institutionalization of authority.

Second, in a more directly methodological sense, formalism can be related to the problem of rationality and method to be employed in doctrine and legal thinking. In this sense, I am using the term to refer to a discourse that favours a technical-theoretical and empirical-explicative scientific logic that masks its own authority (its own "subject"¹¹) to act and create law in the name of a self-sustaining objectivity and puts itself in conflict with practical reasoning. If practical reasoning focuses on the problem of how the law can be validly performed in the realm of concrete juridical controversies to fulfil certain pre-assumed (presupposed) communitarian ends and goals, or of how juridical practitioners could make sure axiological-normative compromises find their way in concrete, for the former, the problem of achieving theoretical truth is a central one, and it is understood as a matter of obtaining demonstrable, logically verifiable results.¹² In this way, a constitutive alliance

¹⁰ As in the main expressions of nineteenth century positivist normativism, namely German *Begriffsjurisprudenz* and French *École de l'Exégèse*.

¹¹ P. Schlag points out this "this eclipse of the problem of the subject" as "a vital, pervasive, constitutive characteristic of American legal thought", which "has been conceptually, rhetorically, and socially constituted to avoid confronting the question of who or what thinks or produces law" (Schlag 1990, p. 1629).

¹² Remember, at this point, Aristotle's distinction in Metaphysics between two types of *epistéme*, *thèorêtikēs* and *praktikēs*. See Aristóteles (1990), p. 86 (II, 1, 993b 19–23); Berti (2004), p. 5-ff.

between law's abstract materials and the problematic context in which they are applied (realized) is prevented: the legal experience becomes a mere vehicle to guarantee certainty and security.

Regardless of those features, today, unlike legal modernity, formalism or formalist traits are not a privilege of strictly positivistic and normativist conceptions of law, despite the general frame within which they meet such features had been strongly moulded according to those perspectives. And, more importantly, as regards law's methodology, formalism remains more a shadow of itself than a stable groundwork, and this instability allows for the reproduction of some of its claims even in intentionally non-formalist perspectives. What is more noteworthy is that formalism has been assumed in certain contexts of legal thinking as a plain synonym of law itself—as if, in the end, law's very trajectory and collective meaning had not been simply intercepted or, in important ways, even reinvented, but instead permanently altered, with no way back, means of surpassing or escape, by the normative discourse of modernity. No matter how this same discourse is opposed, or the foundational *plot* of a unidirectional civilizational transition at the hands of law, as a bulk of formal institutions, is deconstructed and brought under suspicion, the image of the ghost remains alive and well.

That means that formalist *vs.* non-formalist polarization also remains a shadow in contemporary critical debates in juridical thinking (Duarte 2021), in which the foundations of the whole structure sustaining criticism, and giving criticism its reasons, are normally tied up and attached to the very limits of the positions transversely criticized. But how is it possible to distinguish with certainty the point in where law, as a dynamic reality or “form of life” (White 2011, p. 382) stops, and discourse begins, if there is any? If there are no limits between the normative and the narrative, historical identity risks being confused with exclusivism, cultural heritage with pure orthodoxy, tradition with traditionalism, autonomy with isolationism, institution with institutionalism, and rationality with rationalism.

So, my underlying argument at this point is that formalism seems to remain, in the end, a caricature, a general defence of law as a serious, tangible, authoritative voice and entity designing its own normative world as an object to be preserved for the very sake of protection, even if the contours of this so-called object are blurred. And it seems to be in this caricature sense, that is, as a synonym of law itself (as if there could be no conceivable image of law and the legal order outside the constraints of a traditional frame), that formalism is assumed by some critical or intentionally non-orthodox strands, such as those perspectives which, in an implicit or explicit way, a reflection on the problem of normative validity and its contents happens to be intertwined with a pluralistic and *aesthetic* cognition of the multiple levels of discourses and cognitive devices produced in legal culture, their performative capacity, and the limits of juridicity. With some exceptions, in this non-formalist vocabulary, due to that confusion between law and formalist narrative, material juridical contents and civilizational expectations that make the law meet its own conditions of possibility, or its own parameters of normativity, either cease to exist or are not properly discussed. Paraphrasing Schlag, “[s]ometimes it seems as if there is only one story [...]. The story is the story of formalism” (1990, p. 1628).

Meanwhile, the discourse of law remains anxious for alternatives, no matter how solid, interesting, fruitful, and relevant its criticism may be. Making aesthetic criticism an alternative to the usual *alternatives to law*¹³ requires then, reproaching the law lost in between.

4 *Jusaesthetic Criticism(s) (Beyond the Criticism of “Law and Aesthetics”)*

Before exploring some of these points, I just would like to stress, for the sake of clarification, that the discussions of how a kind of aesthetic cognition can be affirmed recalls the long-lasting philosophical reflection on the connections between the human capacities of knowing and of feeling, what knowledge means and how it could be achieved, and of what the role of artistic devices in all that could be. This is a discussion that transcends my goals here, since on the aesthetic debate about law's constitution of selves and whether in this constitution an authentic sense of *humanitas* can or cannot be achieved by the means of law, what is more important is to explore the links between the appeal to *aisthesis* and an intentional appeal to ethics, and between law's ability to create normative meanings and the ability of such meanings to deal with complexity.

This appeal to ethics must be read according to a “humanities of resistance”, to quote C. Douzinas (2010), which affirms a microscopic perspective of law and subsume it into a macroscopic view of a humanistic ethics or ethics of alterity. In this context, the normative core of juridical subjectivity (and, by extension, of intersubjectivity), when reassessed and reinvented, becomes a means for the accommodation of an argument of indeterminacy that plays a pivotal role in what the aesthetic constitution of juridical subjectivity represents: indeterminacy helps the ethic stabilization of the grounding parameters of *recognition* of the fuller sense of humanity that law should make its best effort to unmask and attain in concrete, even though this unmasking could only take place temporarily and partially, given the normative limitations of paradigmatic culture. However, if aesthetic criticism in particular and critical thinking in general end up dialoguing only with a conservative perspective either of the legal system or the legal order, of what is *a priori* assumed as the possible representation of an institutional (authorized) legal reality, such a dialogue, despite its importance and relevance, ends up imprisoning the criticism so

¹³ As it was already highlighted in a different opportunity, the ‘alternatives to law’, according to C. Neves, can be recognized in the arguments in legal discourse for the surpassing or the abandonment of law (“the replacement of the law, in its authentic and differentiating normative sense”) and the election of other cultural instances and grounding criteria—like those of science, politics, economics, ethics...—which are expected to deal, by their own means (whilst their rational patterns, methods and *modi operandi* are claimed in legal thinking), with the ever-present problem of constituting regulative mechanisms for human coexistence—the very problem of *intersubjectivity* (Neves 2007, pp. 4, 21; 2013, p. 42; Duarte 2021, pp. 19–20).

proposed within a punctual and pre-defined discursive universe, in which positive law appears as that formal framework and the reality that it reveals, creates, and recognizes appears only as a mere secondary element, almost a residue, of this structure.

This is so because the abovementioned indeterminacy, when methodologically transposed to the interpretive treatment of legal materials (especially legal norms, rules, and precedents), operates in permanent tension with a pre-assumed notion of *undecidability*. If this combination prevents legal answers from being anticipated in any way, and judgments become walking spaces—intervals—for recreation of justice, such a recreation happens to grow from inside the formal limits of institutions, making its best effort to “fulfil” in concrete the human absences and meaninglessness of their prescriptions, exploring the necessary ambivalence of words and polarity of concepts, and possible breaches in language, in order to open law’s normative world to other dimensions of human *praxis* and practical experience of humanity that legal authority would be naturally unable to foresee, with its necessarily distorted lenses.

In this Derridean-inspired conjoined disjunction (this “nested opposition”¹⁴) between law and justice (this tension or “polarity” that nests in the heart of every word), whilst “the law” and legal decisions are always predictable, justice—as a *verb* and not a *noun*¹⁵—, as a field of singularity and difference, must remain open to *a priori* indeterminate possibilities of realization;¹⁶ it must remain *indeterminate* in such a way it cannot be the proper target for any theoretical effort. As is said about its counterpart, injustice, justice too exceeds concept, it “exceeds the theory of justice” (Douzinas and Gearey 2005, p. 30). It is dialogical, not dialectical; similar to transgressive musical performances, which “have always sought to challenge officialdom and patriarchal law by expanding the possible range of human expressiveness beyond what is accepted as the norm by society”, justice represents the space for bringing to the surface and enable “alternative” experiences “[...] often considered to be deviant, abnormal or alien” according to the patterns fixed by “power elites” (Shaw 2018, p. 308). The affirmation of justice requires then the sensorial input provided by *aisthēsis* and the clarity before what is both changeable and singular (the glimpse of the *case*) provided by *phronēsis*, a relative combination between the *Phrónimos*’ effort to unite past and present, and aesthetic gaze.

All this give rise to the image of a jurist, the judge—the third—placed inside the conflict, renouncing to law’s objective and subjective condition of thirdness (*tertialité*), which interrupts “the order of the Face to Face” (Lévinas 1998, p. 105), to be assigned the role of a “participating subject” herself (Bakhtin 2017,

¹⁴In J. Balkin’s synthesis, nested oppositions are “oppositions which also involve a relation of dependence, similarity, or containment between the opposed concepts” (Balkin 1990, p. 1671).

¹⁵“Perhaps justice itself is not an end but a means, not a goal or an outcome but an approach and an experience” (Manderson 2011, p. 125).

¹⁶“The tension between justice as sameness and justice as difference, between law as calculation and justice as the incalculable, describes a predicament that is *incapable* of yielding to a choice, a compromise, a balance, or a synthesis” (Manderson 2012, pp. 477, 491, 497-cit.).

p. 97-ff.). She must “compare” and “calculate” (as any act of judgement requires), but is also responsible (not just institutionally) for the equations made—almost as if she had a responsibility “without alibis” (Bakhtin 2017, p. 99-ff.), for the responsibility *without alibis* is the one that is fulfilled, in Bakhtin’s view, in a private sphere, by a directly participating subject in the domain of a directly participating life (a life of singularities), unlike the responsibility *with alibis*, which arises from participation in the whole, deals with social representations, is moulded by abstractions, and belongs to the public realm of society, culture, law and justice (Ponzio 2017, p. 17-ff.). Because of this, and because its requirements presuppose the normative “mediation” of a world-in-common—the world of intersubjectivity¹⁷—, this second kind of responsibility is always correlative and conditional (Neves 2008, p. 15), and, so, necessarily guaranteed and limited both in its nature (its content) and in its extension—thus avoiding the sacrifice of the possibility of autonomy due to a “hypertrophy” of responsibility (Neves 1995, p. 416).

The aesthetic judge, on the other hand, as the aesthetic *person* in general, must uncover the cloak of officialdom and institution and attend directly to the call of the other, abdicating from the outwardness of a *tertium comparationis* that could in advance limit the possibilities of this encounter.¹⁸ Since ethical responsibility knows no intersubjective limits, and the legal system and the materials that comprise it are insufficient to satisfy the demands of such responsibility, the reciprocal positions of the party cannot be validly established, and there is, again, no third party to enable comparison (Bronze 2020, p. 344 (footnote 895)). Apart from the ethical appeal, there are no material juridical standards, grounds, or criteria, for tracing the chain of practical analogies that sustain comparability, as an extensive, demanding, and ever-renewed exercise of juridical composition—*potēsis*—that does not seek identity, but similarities in differences.¹⁹ In such an aesthetic gaze, law’s capacity to forge its own vocabulary and codify reality (submitting the immediacy of time to the conditionality of a “second nature” created with the others) appears again in this methodological and interpretive context mainly as one plain secretion of formalism, and the

¹⁷ “[O] problema da integração da pluralidade humana na unicidade do mesmo mundo comunitário segundo uma referente e fundamentante validade” (Neves 2016, p. 46).

¹⁸ Her role could be approached by *analogy* from that of “the lawyer and academic today”, according to Douzinas, that is, “[t]o revive an aesthetic of justice, in the name of a justice whose judgments lie outside or beyond the law, expressions of a higher tribunal to which the law is called to account, when its eye turns into an ossifying gaze” (Douzinas 2011, p. 258).

¹⁹ In the words of Bronze, “[é] a analogia que, qual fio de Ariadne, nos guia nas labirínticas e múltiplas encruzilhadas do ‘mundo da vida’” (Bronze 2020, p. 225). The proximity between life and analogy is algo mentioned by Foucault, highlighting the contrast between the logic of similitudes, which presupposes maintaining the possibility of dissemblance and difference (“[l]’identité des choses, le fait qu’elles peuvent ressembler aux autres et approcher d’elles, mais sans s’y engloutir et en préservant leur singularité”), and, because of that, maintains the link between the words and the world, and the search for identity (of Cervantes, F. Bacon, and Descartes), “comparaison de la mesure et celle de l’ordre”, which have had a huge impact “pour la pensée occidentale” and promotes an interruption of that connection, subjugating the world to the representational anxiety of language (Foucault 2005, pp. 33, 39–41, 57–58, 61–62, 64–68, 133).

appeals to law, in turn, once it is caricatured as formalism, are identified with a major anxiety for the convenient simplification of *praxis*, including the full sense of the persons who intervene in it, merely for the sake of institution and the “invisible” but blinding power that sustains it. Such a caricature creates the counter-image of humanity that gives body to the necessity of an aesthetic and ethical healing, the remembering of what the law can be once detached from the distortions of orthodox shadows, or already is, once such shadows are taken out of the way, emerges as a remedy much needed. But a reminder that “[l]aw remains, however, a deeply aesthetic practice”, and that “[i]nstitutional image and fiction-making offers approved ways of seeing and recognising the world”, giving a certain clarity to what is otherwise “blurred” (Douzinas 2011, pp. 256–257), does not have to lead to an *a priori* seeming difference between the legal world and the artistic-poietic imaginary.

If the legal world and experience can be much more than a bulk of institutions and pre-defined positivistic and formalist discourses and legacy, as the spirit of pluralism, transgression, and diversity of aesthetic arguments rightly proves, legal aesthetics can be more than a sophisticated attack on a localized view of the rule of law and the methods and rationality of “orthodox” legal thinking or, in some situations, its contemporaneous counterparts, instrumentalism, pragmatism, and technicism. When the legal system, on the one hand, and juridical controversy—the case—, on the other (the two cornerstones of the experience of law) (Neves 1993, pp. 155–159), cease to be seen *a priori* as that formal structure and an ensemble of empirical “facts” moulded in positivistic method (unorganized “data” assembled by the jurist only to be logically subsumed into abstract legal materials²⁰), or, even as two opposite, contradictory, dimensions (so that one of them would necessarily have to subsume into the other), they can be seen as two reciprocal, analogically/dialectically intertwined, referents (Bronze 2020, pp. 176–177), holding the jurist responsible for the art of building a network of possible relationships through which the *corpus iuris* gains its positive configuration and identity at each time. As a result, aesthetic arguments and devices cease to be a supplement to law and legal discourse and start to indicate a fundamental part of such an experience and culture, as an experience of *jusaesthetics*.

This, of course, presupposes the affirmation of a different image of law, an *image* of law as a pluralist and heterogenous, yet internally driven, *project* of normative validity (Linhares 2012a, p. 497-ff.), civilisationally and culturally constructed around certain commitments and axiological foundations (principles) that, reinventing *humanitas* as a specific juridical *image* and practical artefact, amplifying law’s conditions of visibility (asserting law as a particular experience of sightedness), far from being either mere premisses-*ratio* or simple unmediated

²⁰“[. . .] [L]aw takes extraordinary measures to impose narrative certainty, meaning, and clarity on the sheer randomness and meaninglessness of the events, actions and interactions that litter human existence, and as such assume the existence of a literary necessity in everything that occurs” (Leiboff 2010, p. 387).

values-*intentio*, act, instead, as true groundings of juridical practice (Neves 1993, p. 156; Linhares 2012b, pp. 399–412).

Feeding on the inevitable and welcome human differences but looking to establish the possibility of juridical similarity within the variations, such a project manages to design, amidst the plurality, several rooms for subjectivity, and, with this, several chains and claims of intersubjectivity. A living world that keeps reinventing itself, at institutional level, to the extent it keeps on recreating the meaning and the limits of its own *praxis*, and the symbolic *ethos* (the juridical-political shared imaginary) constituting the referred axiological-normative principles-compromises, claimed as those practical-normative foundations and guides, embodies the heterogeneous material unity of a permanently constituting juridical system—a *pluridimensional corpus iuris* permanently fed by such a *praxis*, projecting itself methodologically as the *tertium comparationis* of intersubjective relations and creating a “rhizomatic”, kaleidoscopic net of possibilities (Neves 1993, pp. 155–156; Bronze 2020, p. 181-ff.). This means a project and an experience of temporal validity in which law, both synchronically and diachronically, constitutes a “way of life” that only breathes through the necessarily *redefining*—both limiting and redeeming—presence of others (Duarte 2021, p. 22). And, as such, one which keeps submitting its own conditions of *visibility* to both dogmatic and metadogmatic self-reflected, but not self-centred, criticism.

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