ON THE LIMITS OF HUMAN DIGNITY AND HUMAN RIGHTS IN THE JURIDICAL DISCOURSE

I limiti della dignità umana e dei diritti umani nel discorso giuridico

FERNANDO SIMÓN YARZA*

ABSTRACT: This article examines the conceptual and juridical limits of "human dignity" and "human rights" within contemporary legal discourse. It argues that the plurality of interpretations of dignity does not render the concept empty, yet warns against attributing excessive legal expectations to it. Dignity properly grounds juridical capacity but, as soon as we attempt to derive specific rights from it, we easily fall into mistaken absolutizations or vagueness. The paper further contends that modern human-rights language is semantically ambiguous, often conflating basic human goods with genuine rights whose scope requires prudent specification within concrete social orders. Ultimately, it highlights the indispensable role of the common good and civic virtue in shaping coherent and just rights frameworks.

KEYWORDS: Human Dignity, *Dignitas Infinita*, Human Rights, Law, Right.

RIASSUNTO: Questo articolo esamina i limiti concettuali e giuridici della "dignità umana" e dei "diritti umani" nel discorso giuridico contemporaneo. Sostiene che la pluralità delle interpretazioni della dignità non rende il concetto vuoto, ma mette in guardia dall'attribuirgli aspettative giuridiche eccessive. La dignità costituisce un fondamento adeguato della capacità giuridica, ma non appena si tenta di ricavarne diritti specifici, si cade facilmente in errori di assolutizzazione o vaghezza. Il contributo sostiene inoltre che il linguaggio moderno dei diritti umani è semanticamente ambiguo, spesso confondendo i beni umani fondamentali con diritti autentici la cui portata richiede una specificazione prudente all'interno di ordini sociali concreti. In definitiva, sottolinea il ruolo indispensabile del bene comune e della virtù civica nel plasmare quadri giuridici coerenti e giusti.

PAROLE CHIAVE: Dignità umana, *Dignitas Infinita*, Diritti umani, Legge, Diritto.

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* University of Navarra, Pamplona. Orcid: 0000-0002-1988-2416

I. Introduction

1. The Declaration *Dignitas infinita* repeatedly asserts that only from a non-individualistic vision of the human being can there be a full understanding of his dignity. Far from taking it for granted, the Declaration admits that "the phrase 'the dignity of the human person' risks lending itself to a variety of interpretations that can yield potential ambiguities and contradictions."[1] This is something that happens, in general, with all abstract values, whose claims to "universal agreement" result, as Perelman and Olbrechts-Tyteca stated, "from their generality." The moment we specify their content, "we only find the support of particular audiences."[2]

2. This assertion is also corroborated by a broad legal experience of the constitutionalism emerging after World War II, characterized by the incorporation of human dignity in numerous constitutions.[3] Already during the drafting of the *Universal Declaration of Human Rights*, a discussion arose between René Cassin, who proposed the incorporation of the concept of human dignity in Article 1 of the Declaration, and the author of the first draft, John Peter Humphreys, who considered it legally superfluous, merely rhetorical.[4] Cassin's proposal was finally ad-

[1] Dicastery for the Doctrine of Faith, Decl. *Dignitas Infinita*, 2 April 2024, n. 7.

[2] C. Perelman, L. Olbrechts-Tyteca, *Traité de l'argumentation*, Éditions de l'Université de Bruxelles, Bruxelles 2008[6], 102: "*La prétention à l'accord universel, en ce qui les concerne, nous semble résulter uniquement de leur généralité ; on ne peut les considérer comme valant pour un auditoire universel qu'à la condition de ne pas spécifier leur contenu. A partir du moment où nous tentons de les préciser, nous ne rencontrons plus que l'adhésion d'auditoires particuliers.*"

[3] For the success of "dignity" as a legal category around the end of World War II, see the works of Rebecca J. Scott, Christoph Goos, Samuel Moyn and Catherine Dupré in C. McCrudden (ed.), *Understanding Human Dignity*, Oxford University Press, Oxford 2013, 61-121.

[4] J.P. Humphrey, *Human Rights & the United Nations: A Great Adventure*, Transnational Publishers Inc., New York 1984, 44.

opted, and Article 1 UDHR was worded as follows: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." In the decades that followed, the concept of "dignity" would be recognized as inviolable by several Constitutions. Increasingly, however, it has become frequent to relativize its meaning or to dilute it into a collection of contradictory interpretations.[5] Let us think, for example, of recent constitutional literature and high court decisions in countries such as Spain and Germany.

a) The first article of the Bonn Basic Law states that "human dignity is inviolable" (*Die Würde des Menschen ist unantastbar*). At the beginning of the 21st century, however, the canonical doctrinal commentary of Professor Gunther Dürig, unmodified since 1958, was the subject of an "update" by Matthias Herdegen which, contrary to the traditional view, embraced a "processual view of the protection of dignity, with the force of an existing claim to respect or protection dependent on evolving notions."[6] This relativistic approach, according to which human dignity would be subject to evolution and change, led professor Ernst-Wolfgang Böckenförde to write a critical review of Herdegen's new commentary in the *Frankfurter Allgemeine Zeitung* on March 9, 2003, eloquently entitled: "*Die Würde des Menschen war unantastbar*" (Human dignity *was* inviolable).[7] The conflicts surrounding the concept of dignity are not minor in Spain. Article 10.1 of the Spanish Constitution proclaims the "dignity of the person" as "the foundation of political order and social peace." In one of the most

[5] Among the studies on the judicial application of the concept of human dignity, see C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, «European Journal of International Law» 19 (2008) 655-724; P.G. Carozza, *Human Dignity and Judicial Interpretation. A Reply*, «The European Journal of International Law» 19 (2008) 931-944; and P.G. Carozza, *Human Dignity in Constitutional Adjudication*, in T. Ginsburg, R. Dixon (eds.), *Comparative Constitutional Law*, Edward Elgar Publishing Ltd., Cheltenham 2011, 459-472.

[6] M. Herdegen, *Artikel 1* (2002), in T. Maunz, G. Dürig, *Grundgesetz Kommentar*, C. H. Beck, München, n. 56.

[7] E.-W. Böckenförde, *Die Würde des Menschen war unantastbar. Abschied von den Verfassungsvätern: Die Neukommentierung von Artikel 1 des Grundgesetzes markiert einen Epochenbruch* (March 9, 2003), 33.

cited recent commentaries, however, it is noted that "everything here seems uncertain, even the very identification […] of the 'person' of whom dignity is predicated."[8]

b) Case law offers us a no less conflictive situation. In contrast to the traditional notion of the dignity of the human being, recent judicial opinions identify it with a radical autonomy of the individual, understood not so much as a conditioned self-determination, but as a radical "self-constitution" of the individual.[9] Thus, for example, the German Federal Constitutional Court has created a right to suicide on the basis that, "where the protection of life undermines the protection of autonomy, it contradicts the central understanding of a community which places human dignity at the core of its order of values and thus commits itself to respecting and protecting the free human personality as the highest value of its Constitution."[10] For its

[8] J. Jiménez Campo, *Article 10.1*, in M. Rodríguez-Piñero y Bravo Ferrer, M.E. Casas Baamonde (dir.), *Comentarios a la Constitución Española - XL Aniversario*, BOE - Wolters Kluwer, Madrid 2018, 217.

[9] On the philosophical roots and evolution of the modern conception of freedom as "autonomy," I have found it very illuminating the book by A. Rodríguez Luño, *Autonomia e libertà. Saggio sulla libertà nella cultura contemporanea*, Edusc, Roma 2025. The exaltation of individual "autonomy" is the fruit of an intellectual process that begins early in Modernity, and which goes through a decisive phase in German idealism. In Fichte's words, "the essence of transcendental idealism [...] consists in the fact that the concept of being is no longer considered as a *first* and *original* concept, but only as a *negative* concept. For the idealist, the only positive concept is freedom" (J.G. Fichte, *Erste und zweite Einleitung in die Wissenschaftslehre und Versuch einer neuen Darstellung der Wissenschaftslehre*, Felix Meiner, Hamburg 1920², repr. 1954, 85). Even more radically, perhaps the most famous description of autonomy as an emancipation from nature is Sartre's existentialism, in which the existence of free man precedes his essence, so that there is no nature because man constructs himself: "(I)f God does not exist, there is at least one being in which existence precedes essence, a being that exists before it can be defined by any concept, and that being is man [...]. Therefore, there is no human nature, since there is no God who conceives it. Man is only, not only as he conceives himself, but as he wants to be, and as he conceives himself after existence, as he wants to be after this impulse towards existence; man is only what he makes of himself" (J.-P. Sartre, *L'existentialisme est un humanisme*, Nagel, Paris 1966, 21-22).

[10] *German Federal Constitutional Court Judgment (Urteil)*, February 26, 2020, n. 277. This conception of human dignity is obviously incompatible with the Platonic statement that it is not licit for us to free ourselves from this life by our own hand, because we

> part, the majority of the Spanish Constitutional Court has not hesitated to affirm recently—in a highly contested judgment, with several dissenting votes—that "a woman's decision to terminate her pregnancy is covered by Article 10(1) SC [Spanish Constitution], which enshrines 'the dignity of the person' and the 'free development of personality.'"[11] Curiously, however, the Spanish Constitutional Court invokes here the same principle to which its German counterpart appealed, on previous occasions, to provide some protection to the life of the fetus against abortion: "Where human life exists, human dignity is present to it; it is not decisive that the bearer of this dignity himself be conscious of it and know personally how to preserve it."[12]

3. In a similar perplexity, in my opinion, are we left by the discourse of human rights. The Declaration *Dignitas infinita* holds that the principle of human dignity "underlies the primacy of the human person and the protection of human rights."[13] In academic literature, it is almost commonplace to make assertions such as that human rights are "concrete expressions of the overarching idea of dignity;"[14] or that "human dignity" is the "normative unity of human rights."[15] However, our understanding of the content of human rights is far from peaceful, and today rights are invoked to defend all kinds of claims, often contradictory: from the life of the fetus and the elderly to abortion and suicide, from the inviolability of women to surrogacy and pornography, from the welfare of children to incest, from bodily integrity to sex change.[16]

belong to the gods (*Phaedo*, 62b); a thesis embraced, *servata distantia*, by Christianity and by the majority of those who profess theistic religions.

[11] *Spanish Constitutional Court Judgment (Plenum)* 44/2023, Point of Law 3.

[12] *German Constitutional Court Judgment (Urteil)* 39,1, February 25, 1975, 41: "*Wo menschliches Leben existiert, kommt ihm Menschenwürde zu; es ist nicht entscheidend, ob der Träger sich dieser Würde bewußt ist und sie selbst zu wahren weiß.*"

[13] Dicastery for the Doctrine of Faith, Decl. *Dignitas Infinita*, n. 1.

[14] D. Grimm, *Dignity in a Legal Context: Dignity as an Absolute Right*, in McCrudden (ed.), *Understanding Human Dignity*, 386.

[15] A. Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, Cambridge University Press, Cambridge 2015, 103.

[16] See the wide account of all sorts of claims offered by G. Puppinck, *Les droits de l'homme dénaturé*, Cerf, Paris 2018.

After several years of expanding individual autonomy, Dworkin's call to take rights seriously seems to find its own dialectic; and in view of the prevailing confusion, a Spanish legal philosopher has published a successful book with the title: *Taking Rights Kiddingly*.[17]

4. The contradictions that exist around these concepts constitute a reason to question ourselves about the real legal usefulness of the categories of "human dignity" and "human rights." This is the task I will undertake in the remainder of my intervention, in which I will defend the following theses:

a) With regard to the juridical practicality of human dignity (2), I will divide my presentation into two sections: (2.1) on the one hand I will argue that, from the fact that there are contested notions of dignity, it does not follow that there is no truth in this respect (2.2). On the other hand, however, I will maintain that, although "human dignity" is a basic concept, inextricably linked to the legal personality of human beings, we must be careful not to attribute excessive legal expectations and consequences to it.

b) In relation to human rights (3), I will explain how, together with its inherent vagueness, the discourse of human rights has a peculiar potential to confuse legal discussions (3.1), and I will close my presentation with a concluding reflection on the indispensability of the common good and civic virtues to wisely arrange the fragmented pieces of a human rights catalogue (3.2).

I. On Human Dignity: Meaning of the Concept (2.1) and Juridical Utility (2.2)

2.1. Plurality of Proposals and Validity of the Concept

1. The first question raised by the contradictory plurality of ways of understanding dignity is, as I have anticipated, that of the validity or the very substance of the concept. The prevailing confusion inevitably raises the question of whether we are not faced with an empty formula. Schopenhauer gave expression to this skepticism by qualifying the

[17] P. de Lora, *Los derechos en broma. La moralización de la política en las democracias liberales*, Deusto, Bilbao 2023.

"dignity of man" as "the shibboleth of all thoughtless moralists who hid their lack of a real, or at least meaningful, moral foundation behind this impressive expression."[18] In the same line, contemporary intellectuals such as Michael Rosen, after devoting their reflections to the concept of human dignity, have concluded in a similar skepticism.[19] In my opinion, we are faced with criticisms that appeal to the vagueness of the concept in order to disqualify it. Against this way of reasoning, however, we must say that the difficulties posed by the plurality of interpretations is not something exclusive to the concept of dignity, but belong—as I have indicated in the introduction—to most general moral concepts. *Per se*, the dispute that accompanies this type of notions does not deprive the concept of meaning, but rather highlights the difficulties in apprehending it.

2. In the case of the notion that concerns us, it is widely accepted that "'dignity' originated as a concept that denoted high social *status* and the honors and respectful treatment that are due to someone who occupied that position."[20] From this point on, it came to be predicated of human beings precisely because of their *status* as hierarchically superior to that of other creatures. In Cicero, for example, the dignity of the human being appears explicitly linked to his rational nature.[21] The link between the rationality of the human being and his superior dignity is at the very

[18] A. Schopenhauer, Über *die Grundlagen der Moral*, Felix Meiner, Hamburg 1985, 64-65: "*Allein dieser Ausdruck 'WÜRDE DES MENSCHEN', ein Mal von KANT ausgesprochen, wurde nachher das Schiboleth aller rath- und gedankenlosen Moralisten, die ihren Mangel an einer wirklichen, oder wengistens doch irgend etwas sagenden Grundlage der Moral hinter jenen imponirenden Ausdruck 'WÜRDE DES MENSCHEN' versteckten.*"

[19] M. Rosen, *Dignity: The Case Against*, in McCrudden (ed.), *Understanding Human Dignity*, 143ff.; and M. Rosen, *Dignity. Its History and Meaning*, Harvard University Press, Cambridge (ma) 2012, 1-62.

[20] Rosen, *Dignity*, 11.

[21] Cicero, *De Officiis*, 1.105-106: "But it is essential to every inquiry about duty that we keep before our eyes how far superior man is by nature to cattle and other beasts: they have no thought except for sensual pleasure and this they are impelled by every instinct to seek; but man's mind is nurtured by study and meditation; he is always either investigating or doing, and he is captivated by the pleasure of seeing and hearing. [...] And if we will only bear in mind the superiority and dignity of our nature, we shall realize how wrong it is to abandon ourselves to excess and to live in luxury and voluptuousness, and how right it is to live in thrift, self-denial, simplicity, and sobriety."

origin of our concept of "person," which constitutes the *nomen dignitatis*[22] that was used to designate the "individual substance of a rational nature" (*rationalis naturae individua substantia*).[23]

3. From a metaphysical point of view, the superior individuation of the rational individual allows us to grant them a superior *quantum* of being and, therefore, a special dignity:[24]

a) Inert, non-living *beings* possess a weak individuation, insofar as they exist fully merged or fused with their environment. They are not individuated by any intrinsic vital principle, but only by matter delimited under certain dimensions or "signed matter" (*materia signata*), to use the words of Thomas Aquinas.[25]

b) The condition of *living beings* is different, since they carry a principle of self-motion which implies a superior individuation. In the case of evolved animals, moreover, they possess an internal sensibility, an inner side that cannot be accessed from a purely external perspective.[26] Their individuation, therefore, is superior to that of plants.

c) Human *persons* pose a further leap in the degree of individuation, which is what leads us to revere them and to endow them with that *nomen dignitatis*: "person means the most perfect thing in all nature, that is, the being subsisting in rational nature."[27] Animals remain

[22] Thomas Aquinas, S.Th., II-II, q. 63, a. 1: "… *in nomine enim 'personae' intelligitur personae dignitas.*"

[23] "*Persona est naturae rationalis individua substantia*" [Severinus Boethius, *Contra Eutychen et Nestorium*, III (*Differentiae naturae et personae*)]. On the genesis and development of the concept, see more fully R. Spaemann, *Persons. The Difference Between 'Someone' and 'Something'*, Oxford University Press, Oxford 2012, 17-33. See also J. Finnis, *Aquinas. Political, and Legal Theory*, Oxford University Press, Oxford 1998, 176: "The word and concept *persona* entails *dignitas*, and so is applicable to every individual of a rational nature."

[24] See J. Hervada, *Lecciones propedéuticas de filosofía del derecho*, Eunsa, Pamplona 2008, 423ff.

[25] Aquinas, *Super Sent.*, lib. 4, d. 11, q. 1, a. 3, qc. 1, co: "*materia signata est individuationis principium.*"

[26] See Th. Nagel, *What is Like to Be a Bat?*, «The Philosophical Review» 83/4 (1974) 435-450.

[27] Aquinas, S.Th., I, q. 29, a. 3: "… *persona significat id quod est perfectissimum in tota natura, scilicet subsistens in rationali natura.*"

immersed in their ecological niche, they live absorbed by their nature. The person, however, is not determined by its nature. Herein lies, strictly speaking, the uniqueness of the person: in that it is not a simple specimen of a nature ("something," "what") but the "I" ("someone," "who") that carries the rational nature of each specimen of the human species. This is why its actions do not derive, in a deterministic way, from its nature: "it does not limit itself to being acted upon, like other [substances], but acts for itself."[28] That is to say, it *is free*. This freedom confers on it a lordship over reality that constitutes the basis of juridical capacity.

2.2. Juridical Utility of the Concept

1. The fact that the ontological "dignity of the person" (or of the human being) is not an empty concept, but corresponds to a genuine "superiority [e. g. in power, excellence, *status]* and intrinsic, non-dependent worth,"[29] still leaves open the question of the juridical relevance of the concept. It may seem provocative to question the juridical relevance of a concept that denotes something as closely linked to the world of law as position or *status*. According to Jeremy Waldron, "dignity seems at home in law: law is its natural habitat."[30] I consider, however, that the notion of *status* that finds in law "its natural habitat" is not so much the notion of human dignity, but the notion of dignity related to *specific* positions, honors and social ranks.[31] In contrast, the concept of "human dignity" is—just like the ontological concept of person—a concept that finds its origin and its most "natural habitat" in philosophical and theological speculation.

2. The thesis I would like to develop is that, in order for the *nomen dignitatis* "persona" to form the basis of truly universal requirements of justice, those requirements should be defined in an extremely restrictive

[28] *Ibidem*, I, q. 29 a. 1 co: "*non solum aguntur, sicut alia, sed per se agunt.*"

[29] Finnis, *Aquinas*, 179.

[30] J. Waldron, *Dignity, Rank, and Rights*, Oxford University Press, New York 2012, 13.

[31] It may be interesting to note, for example, that in Gaius's classical Roman division of law into "Persons," "Things," and "Actions," the heading "persons" refers to a variety of roles, not to human persons in the ontological sense.

manner and interpreted in an equally restrictive manner. Indeed, they should be defined in a way that is far narrower from the vagueness in which human rights discourse is usually involved. What "dignity" universally establishes is the juridical capacity of human beings. Certainly, possession and debit constitute forms of spiritual dominion and responsibility of which substances lacking free will are not capable. Only of the human being can be predicated, as a free being, "imputation," "responsibility," "suity" or "dueness." The inherent dignity of human beings therefore constitutes them as "masters," as capable of ownership or dominion, and this creates the basis of their juridical capacity or "juridical subjectivity."

a) The concept of imputation (*imputatio*) refers to the attribution of a fact as one's own. The term belongs to the same semantic family as *computare*, and it suggests the idea of recording in an account of assets and debts. This occurs even more clearly in the German translation, *Zurechnung*, which clearly expresses the meaning of imputation as an entry in an account. This type of accounting assignment of facts as one's own is obviously not possible apart from human freedom.

b) The same happens with the notion of responsibility (*responsabilitas*), which alludes to a "*res sponsio*" or link with reality that cannot occur apart from freedom. The English equivalent *liability* expresses this same link, and it is associated with the Latin word *ligare*. Once again, we are dealing with a feature of the free subject, by virtue of which he is considered the owner or lord of something.[32]

c) Finally, property and possession, with the corresponding relations of "suity" [the fact of belonging (*suum*) to someone] and "owedness" [the fact of being owed to someone] presuppose the same spiritual lordship that can only occur in the free being. The person is at the pinnacle of reality exercising a dominion over things without which it is not possible to speak of right or *ius*. In this sense, it can be said that the dignity of the person is at the basis of its juridical capacity,

[32] See more broadly, the intelligent reflections of P. Ricœur, *The Concept of Responsibility. An Essay in Semantic Analysis*, in *The Just*, The University of Chicago Press, Chicago-London 1995, 11ff.

of its capacity to possess, recognize or owe "just things" (*iura*). This idea is summarized in the classic formula of Hermogenianus: *"hominum causa omne ius constitutum est*."[33]

3. As an individual susceptible of attribution or possession, "every member of the human species is entitled to justice."[34] The quality of personhood—with the dignity inherent to it—constitutes the presupposition for speaking of "*ius suum*," and for conceiving as "*iniuria*" or offense the fact of not granting it. In this sense, it is very revealing that, referring to the inclusion of "human dignity" in Article 1 of the *Universal Declaration of Human Rights*, Eleanor Roosevelt stated that the clause "was meant to explain why human beings have rights to begin with."[35] Thus, human dignity seems to be the basis on which rights can be possessed in general. Considering that human dignity is the very foundation of juridical capacity, it can be said that any injustice is an attack on the personal dignity of the offended party.

4. However, as soon as we descend to the material determination of what can be demanded in justice, we must be careful not to ask more of the notion of dignity than it can give us. What the status personhood and human dignity specifically require is nothing other than what the order of justice confers on a person in each specific case. By virtue of its dignity, the person is the subject of rights. What rights? The rights that, in each case, correspond to it. It is very difficult to universalize this measure without falling into vague formulas, whose very content would be pending definition. Seeking absolute universality usually occurs at the expense of any specificity. We must resort to Aristotle's "lesbian rule"—a "leaden rule that changes according to the shape of the stone and does not remain the same"— [36] and take it to the highest level of plasticity. We could talk, for example, about the human right not to be treated cruelly, but we should not automatically equate cruelty with the deprivation of any specific goods, not even the most basic ones.

[33] *Digest* 1.1.5.2: "every right is constituted for man's sake." *See* also Hervada, *Lecciones propedéuticas de filosofía del Derecho*, 423ff.

[34] Finnis, *Aquinas*, 176.

[35] M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, New York 2001, 146.

[36] Aristotle, *Nicomachean Ethics*, V, 10, 1137b 31-32.

5. The difficulties posed by the concept of human dignity to clarify the extent of the rights of a person can be illustrated by reflecting on the legitimate deprivations of life and liberty.

a) That all men are born equal in freedom is unanimously held both by liberal Constitutionalism and by the classical natural-law tradition. Thus, for example, Thomas Aquinas affirms that "nature makes men equal in freedom." Given that "that which is its own cause" is free, he concludes that, "by his nature, a man is not ordered to another as to an end."[37] Aquinas seems to deny, in short, that a human being can be lawfully instrumentalized as a mere means ordered to another human being as to an end.[38]

b) Now, is it possible to affirm that penalties that deprive people of liberty, or even of life, constitute *per se* an instrumentalization of the person contrary to their dignity? Thomas Aquinas confronts this problem when he questions the legitimacy of the death penalty, and concludes that, when it is associated with a very serious crime and is necessary for the common good, it cannot be objected to by appealing to the dignity of the offender. It is not my intention here to enter into a dispute about the legitimacy of the death penalty, but I would like to focus on the substantive argument offered by Aquinas. Facing the objection of the human dignity of the criminal, he replies that the criminal "descends below the order of reason, and that is why *he falls in his human dignity*, that is, insofar as man is naturally free and self-existent."[39] In what is relevant to law, Thomas Aquinas has no qualms about relativizing human dignity. The mere fact that someone is a human being would not be enough, in his opinion, to affirm that he has not fallen in his human dignity, at least "insofar as he is

[37] Aquinas, *Super Sent*., lib. 2, d. 44, q. 1, a. 1: "*Ad primum ergo dicendum, quod natura omnes homines aequales in libertate fecit, non autem in perfectionibus naturalibus: liberum enim, secundum philosophum in 1 Metaphysic., est quod sui causa est. Unus enim homo ex natura sua non ordinatur ad alterum sicut ad finem.*"

[38] See more extensively J. Finnis, *Equality and Differences*, «The American Journal of Jurisprudence» 56 (2011) 18. It is difficult not to see the parallel (at least linguistically) with Kant, despite the distance between their respective philosophies.

[39] Aquinas, S.Th., II-II, q. 64, a. 2, ad 3: "[...] *ab ordine rationis recedit, et ideo decidit a dignitate humana, prout scilicet homo est naturaliter liber et propter seipsum existens* [...]"

free and exists by himself." This implies that, as a source of concrete rights (*iura*) (at least the right to live and to move freely), *dignitas* cannot be *infinita* or absolute, but must be adapted to demands of justice that can only be ascertained historically and in the particular case.

6. Some people might find the Thomistic text too primitive, since it deals with the legitimacy of the death penalty for heretics. Setting aside the particular question faced by Aquinas, it still remains to be explained, however, why it is not against human dignity to imprison a criminal, or to put to death the aggressor in cases of legitimate self-defense or the combatant in a just war. Without going beyond the scope of the criminal law of so-called civilized countries, liberal scholar Michael Rosen affirms—in an unintended coincidence with St. Thomas Aquinas—that "dignity can be forfeited as a consequence of criminal actions." Otherwise, he adds, one cannot explain "the idea that criminal behavior leads to the forfeiture, at least temporarily, of certain [human] rights," an idea that "is embedded in the practice of every legal system known to me."[40] However, "the idea that 'guilty' and 'innocent' persons have different degrees of dignity is directly contrary to the idea of dignity as an inalienable characteristic inherent to all human beings."[41]

7. How can we explain this aporia? Should we simply give up the concept of an "inalienable dignity" of the human being? As a juridical *status*, the notion of an inalienable *dignitas infinita* is certainly problematic, since what is right in particular is always bound to a measure linked to the common good and the concrete order of society. This explains why the criminal can "decay in his human dignity," as Thomas Aquinas affirms, and cease to be "free and existent by himself." Through crime, the offender degrades himself "in the order of reason" and in the social order, that is, he degrades himself insofar as he is a rational and social being. The notion of human dignity employed here by Aquinas does not constitute an inalienable absolute, but is mediated by the relationship of the individual to the social whole. Precisely for this reason it can be lost, and even subjected to weighing—as Rosen maintains.[42]

[40] Rosen, *Dignity*, 113.

[41] *Ibidem*, 114.

[42] *Ibidem*, 107.

8. What the ontological *status* of the human being—with the dignity inherent to it —does in fact ground is, as has been explained, the universal juridical capacity of the person *qua* person. Besides, it is also an appropriate concept for expressing the seriousness of certain forms of unjust treatment of human beings, especially when such treatment involves an arbitrary denial of their status as persons (think, for example, of abortion, human trafficking, embryonic manipulation, etc.). In this context, it is worth mentioning certain behaviors that Aristotle considers "intrinsically evil" in a well-known passage from Book II of the *Nicomachean Ethics*. Although it is a list of behaviors and vices that go beyond the domain of justice, it includes genuinely unjust actions that are harmful to the *ius* of others:

> Not every action or passion admits of a mean; for some have names that imply evil in themselves, for example shamelessness, envy, and, in the case of actions, adultery, theft, murder; for all these things and others like them imply by their names that they are evil in themselves *(auta phaula),* and not because of excesses or deficiencies in them. It is not possible, then, to act correctly in relation to them; one is always in error.[43]

With regard to this type of acts, Aquinas affirms that they are evil "always and in every case" (*semper et ad semper*), regardless, therefore, of time and place. Insofar as these harmful behaviors relate to other people, refraining from them can be characterized as a *ius* or absolute right due to someone: the "right not to be robbed"; the "right not to be murdered"; the "right not to suffer adultery"; etc. Such conduct is always unjust, *per definitionem*, and cannot lose its unlawful character by any convention or human law. Thomas Aquinas cites adultery and theft, precisely to warn that "if something in itself connotes opposition to natural law, it cannot be made just by human will."[44]

However, it should be also noted that the actions described above are evil, as Aristotle says, because they denote evil "in their very name." Thomas Aquinas refers to their prohibition by the Decalogue as that which is just "as implying in itself the very order of justice" (*quod continet*

[43] Aristotle, *Nicomachean Ethics*, II, 6, 1107a 8-13.

[44] Aquinas, S.Th., II-II, q. 57, a. 2, ad 2: "*Sed si aliquid de se repugnantiam habeat ad ius naturale, non potest voluntate humana fieri iustum, puta si statuatur quod liceat furari vel adulterium committere.*"

ipsum ordinem iustitiae).[45] The precepts that prohibit such behaviors are immutable, therefore, "given the reason of justice contained in them."[46] Thus, the prohibitions do not refer simply to the natural description of an action, but to its moral description. This explains why Aquinas maintains that these precepts, while remaining unchanged due to the reason of justice they contain, are changeable "in their application to individual cases, where it is disputed whether this or that is murder, theft, or adultery."[47] In any case, we cannot ignore that the specificity of the prohibitions of the *intrinsece mala* contrasts sharply with the vagueness that characterizes modern discourse on natural or human rights. Let us delve a little deeper into this discourse.

III. On Human Rights

In the words of the Declaration *Dignitas infinita*, human worth "is infringed on the individual level when due regard is not had for values such as freedom, the right to profess one's religion, physical and mental integrity, the right to essential goods, to life."[48] After questioning himself about the usefulness of the concept of human dignity, Paolo Carozza answers that "the ontological claim of human dignity helps sustain the very possibility of human rights."[49] As I will try to show in this section, however, the language of "human rights" uses the term "right" with considerable ambiguity.

[45] *Ibidem*, II-II, q. 100, a. 8, ad 1.

[46] *Ibidem*, II-II, q. 100, a. 8, ad 3: "*Sic igitur praecepta ipsa Decalogi, quantum ad rationem iustitiae quam continent, immutabilia sunt.*" Martin Rhonheimer asserts that, when discussing acts such as murder, "what Aristotle is saying here is not only that *unjust* killing (=murder) is always bad" (*The Perspective of Morality*, CUA Press, Washington 2011, 201). But it seems to me that this is exactly what Aristotle is saying. Aristotle uses concepts that have within themselves the reason for injustice.

[47] Aquinas, S.Th., II-II, q. 100, a. 8, ad 3: "*Sed quantum ad aliquam determinationem per applicationem ad singulares actus, ut scilicet hoc vel illud sit homicidium, furtum vel adulterium, aut non, hoc quidem est mutabile, quandoque sola auctoritate divina, in his scilicet quae a solo Deo sunt instituta, sicut in matrimonio, et in aliis huiusmodi; quandoque etiam auctoritate humana, sicut in his quae sunt commissa hominum iurisdictioni. Quantum enim ad hoc, homines gerunt vicem Dei, non autem quantum ad omnia.*"

[48] Dicastery for the Doctrine of Faith, Decl. *Dignitas Infinita*, n. 4.

[49] P.G. Carozza, *Human Rights, Human Dignity, and Human Experience*, in McCrudden (ed.), *Understanding Human Dignity*, 620.

3.1. A Semantic Ambiguity

1. The language of natural rights characteristic of the early liberal revolutions would be incorporated, as is well known, into modern catalogs of rights, and would emerge with enormous force after the Second World War. The conviction that there are objective values whose realization must be served by the legal order of society led to the adoption of the *Universal Declaration of Human Rights*. Certainly, the Declaration found support in both the secular and religious worlds, and was the subject of noble dedication by Christian thinkers of the stature of Jacques Maritain and Charles Malik. At the same time, however, there were also great humanists who expressed their mistrust. Thus, for example, after receiving a letter from the director of UNESCO soliciting his views on the project, T. S. Eliot said that "a statement of the rights of man" would only "command the assent of all intelligent men" if it was framed as "a tissue of ambiguities."[50]

2. In fact, the agreement between people from very different traditions on a catalog of rights was possible due to the abstract nature of the goods enunciated: life, liberty, security, privacy, family, etc. Insofar as we are dealing—as John Finnis, among others, would explain—with "basic human goods," universal agreement on their content is possible. At the same time, however, there has been no shortage of great thinkers since then who have firmly argued that calling these basic human goods "rights," far from fitting harmoniously into the classical natural law tradition, entails a dangerous confusion. Prominent among them are figures such as Michel Villey and the recently deceased Alasdair MacIntyre, although the list of challengers could be considerably extended. In fact, these authors can be considered heirs to a tradition of criticism that dates back at least to Edmund Burke's famous *Reflections on the Revolution in France*.

[50] "I will confess frankly […] that my first sentiment is one of astonishment that UNESCO should be occupied with such a formulation. A statement of the rights of man, unless it was a tissue of ambiguities, could never, I think, be framed in any such a way as to command the assent of all intelligent men." (T. S. Eliot to Julian Huxley [first director-general of UNESCO], in response to a draft memorandum on the scope of human rights, March 27, 1947 [*apud* M. Goodale, *The Myth of Universality: The UNESCO 'Philosophers' Committee' and the Making of Human Rights*, «Law and Social Inquiry» 43 (2018) 603ff.]).

3. It is not possible for me to deal here in depth with the conflicts that have arisen in academic discussions of rights. I would like to draw attention, however, to an equivocality in this discourse, which I believe will help to grasp the seriousness of the problem. This lies in describing as "rights" what, strictly speaking, are "abstract goods" pending concretization as genuine rights.[51] The ambiguity is inevitably produced by projecting human rights, generically, onto such basic goods. This very broad projection is caused, at bottom, by the recognition of rights without regard to historical circumstances.

4. Let us consider for a moment, for example, the human rights to life, liberty, or property. In this type of assertions, the "rights" asserted have no other measure than the (concrete and changeable) measure which configures the order of what is just. Beyond that measure—which may differ from one subject to another, from one society to another, and from one context to another—there is no right to life, to property, or to freedom. And any attack against that measure is an attack against the human dignity of the holder of the right, simply because it is an injustice done to him. Here again, what human dignity grounds is none other than the right that, in each concrete order, corresponds to each one. That is, human dignity grounds juridical capacity: that "every member of the human species is entitled to justice."[52]

5. Another interesting example is religious freedom. I would like to illustrate this example with a friendly and open discussion I maintained with the former President of the Pompeu Fabra University of Barcelona, my colleague and friend José Juan Moreso, regarding my own critique of Rawlsian liberalism. Following Rawls, Professor Moreso maintained that the Catholic Church's Declaration *Dignitatis humanae* supposed the Church's acceptance of Rawls's priority of the right over the good,[53] a

[51] For the following critique, let me cite my own work: F. Simón Yarza, *Ley natural y realismo clásico*, Thomson-Civitas, Madrid 2022, 138ff. and 152ff.; and *The Perplexing Discourse of Human Rights*, «The New Digest» (eds. Adrian Vermeule and Conor Casey), October 3, 2024: *https://thenewdigest.substack.com/p/the-perplexing-discourse-of-human*.

[52] Finnis, *Aquinas*, 176.

[53] J.J. Moreso, *Entre el deseo y la razón. Los derechos humanos en la encrucijada. Sub ratione boni*, «Revista Española de Derecho Constitucional» 115 (2019) 432-433. Rawls refers to this issue in note 75 to "The Idea of Public Reason Revisited" (see *Political Liberalism*,

position which, in my view, could contradict other social positions of the Church. The text quoted from the Declaration reads as follows:

> This Vatican Council declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits. The council further declares that the right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself. This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed and thus it is to become a civil right.[54]

Frankly, I think that the text of the Declaration is not sufficient to assume the priority of the right over the good. Such a reading, however, is made possible by the very openness of the document, which reveals the ambiguity characteristic of the discourse of rights and freedoms. I will limit myself to three remarks in this regard:

a) I do not believe I am contradicting the spirit of the Declaration by stating that, in a strict literal sense, it is not possible to maintain that "all men are immune from coercion" in "religious matters;" or that, "in religious matters," no one can be compelled to "act against his conscience." Everything will depend—as is generally the case with the rights listed in the various catalogs of freedoms—on what exactly is the action one intends to take or the action one refuses to take by invoking one's rights of conscience.

b) In reality, the Declaration itself circumscribes religious freedom "within due limits." These "due limits," however, are not defined by the Declaration *Dignitatis humanae* by postulating the "priority of the just over the good." In fact, they are not defined in any way, as is to be expected at the level of basic principles. The question of their content therefore remains open.

Columbia University Press, ed. exp., New York 2005, 476-477), where he places religious freedom as a paradigmatic case of the restrictions posed by liberal public reason.

[54] Second Vatican Council, Decl. *Dignitatis humanae*, December 7, 1965, n. 2.

c) One of the most authoritative interpreters of the Second Vatican Council and an expert (*peritus*) in its sessions, Joseph Ratzinger, while affirming that "freedom is, in the first place, a condition of being that is positively characterized by the existence of certain rights," immediately warned that "rights (*Rechte*) presuppose law (*Recht*), and become reality only in the context of the binding force of law."[55] Though not being a legal expert, Ratzinger recognized that the only rights that really exist are those that are linked to the concrete order of a society, that is, to the law.

6. The creation of broad catalogs of rights, together with the institutionalization of their application through courts and other jurisdictional instances, has led jurists to create a peculiar fictitious construct. Specifically, it has forced them to reformulate the question of the "*ius*" or what is right as a question about the just measure of generic rights, previously asserted without qualification. The concern raised by this reformulation is that, since rights do not yet indicate just measure, to what extent can they be called "rights"? Thus, in political and legal discourse, two different meanings of "rights" are mixed up: (1st) the so-called "*prima facie*" right,[56] which in its generic terms is not yet an authentic right, since it is affirmed prior to any consideration about its just measure; and (2nd) the "*ius*" or "*proprie loquendo*" right,[57] which can only be the fruit of a process of "concretization" of the undefined discourse of "*prima facie*" rights through an exercise of practical prudence, oriented to the common good and projected on the historical reality of a concrete case.

[55] J. Ratzinger, *Kirche, Ökumene und Politik*, Johannes Verlag, Einsiedeln 1987, 180: "*Freiheit ist zunächst ein Seinstatus und positiv durch das Bestehen von Rechten gekennzeichnet. Rechte setzen Recht voraus und gewinnen Wirklichkeit nur im Nexus der Verbindlichkeit des Rechts. Recht wiederum setzt ein Ethos voraus, ja, im letzten Seinszustimmung – Glaube.*"

[56] On the use of this term, see, e.g., W.K. Frankena, *Natural and Inalienable Rights*, «The Philosophical Review» 64 (1955) 216. The "lack of definition" of "*prima facie*" rights has also been referred to, e.g., by the eminent philosopher G. Vlastos in *Justice and Equality*, in R.B. Brandt (ed.), *Social Justice*, Prentice Hall, Englewood Cliffs 1962, 34.

[57] In his influential *Theorie der Grundrechte* (Suhrkamp, Frankfurt am Main 1986), Robert Alexy speaks of "definitive positions." However, I consider it more accurate to speak of "*proprie loquendo*" rights, since "*prima facie*" positions cannot be, in their broad terms, "rights" or "*iura*" of the holder.

7. The problems created by the duality just outlined can be shown through the curious convergence between one of the main apologists of rights discourse and one of its harshest critics. In his celebrated work, *Taking Rights Seriously*, Dworkin defined—and enthusiastically defended—rights as "trumps" in a card game, that is, as apodictic assertions capable of winning against any opposing argument, including appeals to public goods or morality. A citizen burns the national flag in public and is punished; a discussion begins as to whether or not it is legitimate to punish him, until into the discussion sneaks, emphatically, the exclamation, "I have the right to freedom of speech!".

8. Far from being a simple abuse of a language that is in itself innocuous, this use of rights is favored by their very formulation. There is certainly an extensive literature on proportionality and balancing that has long highlighted that rights need not necessarily be understood as trump cards. The fact, however, is that the vague use of the term "right" in human rights catalogs encourages that understanding. Leaving aside certain specific, usually procedural clauses (prohibition of double jeopardy, principle of non-retroactivity of criminal law, *habeas corpus*, presumption of innocence, etc.), most human rights clauses include very broad goods (life, liberty, expression, privacy, religion, property, etc.). In order to keep such generic "rights" within reasonable limits, it is necessary to delimit their content, making it compatible with the requirements of social life. It seems obvious that the right to freedom of expression should not include a right to vex someone without any reason, nor a right to mislead someone who has the right to be told the truth. One does not have the right to express oneself in any way whatsoever, but the fact is that the parsimonious declarations of rights say absolutely nothing about what is, here and now, the measure of my legitimate freedom of expression. Now, if a right is formulated without any measure, to what extent can it qualify as a right? Such a right can only be presented in conflict with other human rights, and therefore cannot be considered *a priori* as a right in concrete terms. It remains as such, exclusively, in a purely ideal world, namely, that of the so-called "*prima facie*" rights. With all rigor, Gregory Vlastos criticized the "*prima facie*" discourse of human rights for "an exasperating lack of definition."[58]

[58] G. Vlastos, *Justice and Equality*, 43. This discourse is somewhat reminiscent of the so-called "jurisprudence of concepts" *(Begriffsjurisprudenz)* of the 19th century,

9. Proclaiming rights without a clear measure of where the right begins lends itself, in my opinion, to considerable confusion, since the concept of right indicates something genuinely attributed, something that, in justice, corresponds to someone really and concretely. Not so, however, with most assertions of human rights. As John Finnis has said, these "need to be subjected to a rational process of specification, evaluation and qualification in a way that to some extent precludes seeing the conclusive and peremptory sound of '…having a right to…'."[59] To qualify as a "right" what is strictly speaking a good, a generic value or a starting aspiration whose contours remain to be defined, is not unproblematic, since the qualifier "right" suggests something clearly and measurably assigned and owed as a matter of justice.

10. The human goods listed in the catalogs of rights can be no more than mere *presuppositions* for deliberation on what is just; but they do not contain any practical *conclusion*, either moral or juridical. Yet, when they are called "rights," they are presented as something more than that, because a right is, strictly speaking, the conclusion of deliberation on what is just. When I generically invoke my freedom as a right, I am pointing to a simple human good, but I do so as if it were something that definitively corresponds to me, even before defining the extent to which it really corresponds to me. Precisely for this reason, I think Nigel Biggar hits the nail on the head when he points out that, in its "tendency to take all other moral considerations off the table," rights discourse "pre-empts and shuts down all deliberation" by "an initial assertion of what is properly a conclusion."[60] It is ironic that, in this critique of rights discourse, Biggar does no more than reiterate something that follows, as a corollary, from the definition of rights by their enthusiastic apologist, Ronald Dworkin: *trumps* that pre-empt and shut down deliberation. The confluence of two authors of such opposite views corroborates, at bottom, the description they both make of reality. Perhaps, then, this characterization is more than a spurious reading, and really responds to the very nature of the language of rights.

so vividly derided by Rudolf von Ihering in his work *Scherz und Ernst in der Jurisprudenz* (1884).

[59] J. Finnis, *Natural Law and Natural Rights*, Oxford University Press, Oxford 2011², 211.

[60] N. Biggar, *What's Wrong With Rights?*, Oxford University Press, Oxford 2020, 325.

11. The foregoing reflection does not, of course, preclude admitting that the text of the catalogs of human or fundamental rights constitutes a starting point for the contemporary jurist in the context of his profession. Unlike philosophical reflection, law is a topical art, i.e. it is based on a series of commonplaces accepted in the society in which it is applied. Jurists who defend the unborn child before a court of law do very well to have recourse to articles 1, 3 and 6 of the *Universal Declaration of Human Rights*, because these are the commonplaces recognized by legal practice; or, in other words, they are the cards accepted in the games of jurists. This triviality cannot prevent us, however, from making a deeper criticism of these categories and of this commonly accepted language, from examining the cards to see if they are marked in such a way as to privilege some kind of cheating in the game. Such is, in fact, the purpose of these reflections.

12. Regardless of the semantic ambiguity described above, the very breadth of the human goods listed in the catalogs of rights is in itself an invitation to caution. In the best of interpretations, human rights are no more than bearers of basic goods whose fair measure remains to be determined. What, then, gives meaning to a catalog of rights? What is it that legitimizes, for example, freedom of expression? The answer is not given by the catalog of human rights. To say that, in the catalog, the right to honor informs us of the limits of the right to freedom of expression is as erroneous as saying that the right to freedom of expression informs us of the limits of the right to honor. The limits are precisely what neither the one nor the other tells us.

3.2. Concluding Reflection

Let me conclude my remarks with a final thought, for which I will use a metaphor that I consider appropriate. Just as the pigments juxtaposed in a palette of colors do not formally determine the quality of the work of art, but are the material cause of both a good painting and a bad painting, so human rights juxtaposed in a catalog do not formally determine the justice of the social order. In other words, the enumeration of a set of basic goods or general forms of the good is of little use without their just distribution; for "he who commits injustice has, of the good, more than his due, and he who suffers injustice, less."[61]

[61] Aristotle, *Nicomachean Ethics*, III, 3, 1131b, 19-20.

In the case of the work of art, its beauty can only come from the mastery of the artist. Similarly, the quality of the juridical order will depend on the wisdom of its efficient cause. This brings us back to the need for good rulers, as well as to the indispensability of a sound spiritual tradition of the common good that gives its form to a network of relationships and institutions. This leads us to the conclusion that the very legitimacy of the discourse of rights will depend, in the end, on the fact of being linked or not to a just order that is not given by the very statement of rights. It is here that the elements that shape a moral tradition come into play, including factors such as civic virtue or the healthy customs of a society. Any truly united community needs a common *ēthos* or a collective way of life, which implies the existence of civil moral values and mandates, often established by the political authority itself. The modern claim to seclude the moral law in the private sphere is as misleading as it is fallacious.[62] Such a supposed seclusion involves a permissive public morality, that is, a collective *ēthos* that implies obligations of tolerance imposed, paradoxical as it may seem, coercively. Whatever its nature, it is this collective *ēthos* that will always determine, in our society, the measure given to so-called human rights; and, at the same time, the meaning attributed to the very notion of dignity.

[62] On this issue, I refer more extensively to my own book, F. Simón Yarza, *Between Desire and Reason. Rights Discourse at the Crossroads*, Rowman & Littlefield, London 2019 (English trans. of *Entre el deseo y la razón. Los derechos humanos en la encrucijada*, CEPC, Madrid 2017).