SW 101: Law's Autonomy and Concepts of Human Dignity

Convenors: Manuel Atienza, José Manuel A Linhares

This workshop aims discussing the *claim to Law's autonomy* (with the plurality of significations and possibilities involved) whilst simultaneously considering the role which, in the defense or refutation of this claim, plays (or has been playing) the specification and institutionalization of *humanitas* through different concepts of *human dignity*.

One of the plausible challenges is for instance considering the well-known distinction proposed by Jeremy Waldron between *dignity as rank and status* and *dignity as value*. Is it possible to say that it is precisely the first one (inseparable from the principle of *audiatur et altera pars* and the demands of due process, as well as intrinsically related to the perspective of the problem-*case*) the specification of *human dignity* which Law invented *as its own* (even though in its initial consecration this meant exploring an implacably *closed* circle of inter-subjectivity)? Could we defend that it is this specification of *humanitas* the one 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 what happens (i.e. which implications are acknowledgeable concerning the problem of Law's autonomy) when 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*) is assimilated into Law's practical world?

Another plausible reflexive challenge is certainly the one which Habermas explores concerning the «conceptual bond» that connects the categories *Menschenrechte* and *Menschenwürde*. How should we understand the «*temporal* asymmetry» drawn between the «history of human rights» (dating from 17th and 18th centuries) and the recent legal *juridification* of the concept of «dignity» (systematically imposed in the second half of the 20th century)? Is it possible claiming that the latter concept, instead of being treated as an «*a posteriori* classifying expression» *(nachträglich klassifizierende Ausdruck)*, should be understood as the «moral "source" from which all basic rights derive their substance» *(die moralische "Quelle", aus der sich die Gehalte aller Grundrechte speisen)*? Has this diagnosis of asymmetry —or has the possibility of reflexively overcoming it— significant implications whilst considering the problem of Law's autonomy?

Each presentation should last 25 minutes (with 15 minutes of discussion)

Tuesday, the 9th
Morning

· 08.30-10.30 | Session 1 – Chair: Manuel Atienza

1) Brisa Paim Duarte (University of Coimbra, Instituto Jurídico da Faculdade de Direito), ***Human Dignity as Dogma, Principle, Value…? Critical(-Aesthetic) Approaches to Personhood, Juridical Subjectivity, Intersubjectivity and Community, and the Problem of Normative Validity***

According to a typical view, law would forge its own normative world or community either based on an axiomatic or a technical-scientific reduction of singularity, constraining the limits of subjectivity-intersubjectivity in order to enforce imperatives of reason and authority: being a *person* according to law implies the pre-defined possibility of wearing a general mask or disguise according to which the very law *becomes* able to see in the first place; it is to be translated to a previously fixed code (ultimately set by modernity) that *mirrors, foresee,* and *prescribes* the caricatural image of *homo juridicus* (Alain SUPIOT), with its necessary linguistic specificity and unsurpassable vocabulary limitations (instrumental to the integrity of an autonomy claim taken as a form of self-preservation of authority and self-isolation of law's code). In this sense, blindness becomes the precondition of law's possibility of sight.
The normative core of juridical subjectivity (and intersubjectivity) continues to be critically reassessed and reinvented, however, by «apocrypha» (Desmond MANDERSON) in contemporary discourse who, reflecting post-modern quest for opposing narratives, seek to surpass the traditional dualisms that shape traditional approaches, accommodating new understandings of what being a subject, according to law, must mean, the extensions of the normative compromises it entails (whether *implying* a comprehension of personhood and human dignity as *dogma*, *principle*, *value*…), and the consequent ideal *community* law's experiencing must envision and try to achieve. Is this aestheticization simply another sign of the definitive decline of a culturally-shaped narrative of law, one already dismissed… or, on the contrary, it can be seen, first, in a more constructive perspective, as an important contribution to the necessary critical affirmation of a contemporary project of normative validity – even though the answers such a reassessment provides are *a priori* limited by the preservation of an orthodoxy-heterodoxy division?

2) Eduardo Chia (Goethe University, Frankfurt am Main), ***About the meaning of autonomy (of the law) in legal theory***

This paper will attempt to enquire about the different uses in legal theory of the concept of autonomy (of the Law). Legal scholars belonging both to the continental and the Anglo-American traditions, particularly those who can be pigeonholed within the legal positivism account, have stated that the Law is self-sufficient because it has an *existence* that is different from other normative phenomena. Hence, the Law would have a not dependent and not

conditioned existence as a *normative order*[1]. To assert this statement, authors have used the concept of *autonomy* (of the Law) in different ways.

The first part will be analytical and descriptive. It will explore the discussion in contemporary practical philosophy about the concept of autonomy, as well as its boundaries and extensions as stated by the authors (Dworkin, 1988; May, 1998; Lindley, 1986; Brandom, 2013). Here, the paper will explain the distinction between the autonomy *in* the Law (Sellers, 2007), and the autonomy *of* the Law. Concerning the latter, it will explain what reflexivity and responsiveness of the Law mean in this context.

The second part will describe the specific methodological and ideological standpoint that legal theorists adopted to make use of the idea of autonomy (of the Law). First, this section will discuss the distinction between the autonomy of the Law and the *relative* autonomy of the Law. Second, this part will show how the various approaches to the topic —reviewing some seminal legal theory oeuvres— tend to pass over the idea of *autonomy* in a singular form. For instance, without any exhaustive taxonomic claim, it can be mention that the concept has different *uses* and *meanings* when authors want to express to what extent:

i) whether the Law is an autonomous academic discipline (Bix, 2003; Dagan, 2015) or an autonomous disciplinary topic (Fish, 1993); ii) whether the Law is autonomous concerning its (dis)connection to other normative systems like the moral or the social (This position is maintained by most of the Legal Positivism School thinkers); iii) whether the Law is autonomous as a self-referential closure social system (Luhmann, 1989, 1995, 2004) or as an autopoietic system (Teubner, 1988, 1989, 1993); iv) whether the Law is autonomous respect to the economic basis or structure (Marx & Engels, 1932; Engels, 1947; Marx, 1859; Balbus, 1977) or autonomous in relation to the economic circumstances (Weber, 1954); v) whether that Law is an autonomous practical reasoning or an autonomous process of decision-making (Raz, 1994; Postema, 1996; Sieckmann, 2012); vi) whether the Law is autonomous from political or particular goals (Fiss, 2001) or from the free market instrumentalism (Posner, 1987, 1988).

Finally, the third section will suggest that albeit legal scholar enterprises seem to seek different ends, the collective result, though not relational between different positions, is the same: the endeavour of isolating the distinctiveness of the juridical phenomenon as a particular, unique and independent type of *normative order*. Correspondingly, taken into account the meaning and uses of the idea of autonomy (of the Law) sketched in the first and second part, the paper will try to deal, in an more abstract and analytical perspective, with some discussions and reflections about whether this concept in legal theory is factual (social, epistemic and ontological) and desirable (morally or politically), or not factual, but desirable, or none of them.

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[1] Concerning the idea of *normative orders*, the work will understand this concept as *orders of justification*. Here the work will follow the idea developed by Rainer Forst and Klaus Gunther: "Die Herausbildung normativer Ordnungen. Zur Idee eines interdisziplinären Forschungsprogramms" in Rainer Forst & Klaus Günther (eds.), *Die Herausbildung normativer Ordnungen* (2011) and especially in Rainer Forst, *Contexts of Justice* (2002).

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3) Jesús Vega (University of Alicante), *Constructivist metaphors and law´s autonomy in legal post-positivism*

This paper explores the philosophical implications of two suggestive metaphors introduced by Ronald Dworkin and Carlos S. Nino: the "chain novel" and the "construction of cathedrals". Both metaphors, or models, brilliantly illustrate central points of their respective theories of law. Two features stand out in them: they are, first, practical metaphors and, second, constructivist metaphors. Both features that can be considered characteristic 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 is instead a basically structural and descriptivist conception of law. In particular, this critical impact decisively affects the positivist understanding of the autonomy of law, of the limits or the demarcation of the legal sphere. The nuclear thesis of legal positivism is the value-free neutrality of law. This is projected in different but convergent ways in the three well-known thesis: the separation (or separability) between law and morality, the social thesis 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 the denial of the autonomy of law. Especially if it in addition it defends that it is something intrinsic to the law, for that very reason, to maintain relations of a

constructive nature with the practical surrounding spheres of morality and politics. The autonomy of law could only be guaranteed, instead of erasing their borders, by way of reinforcing the idea (or the ideal) that the legal domain, is an institutionally closed and isolated system of norms. Otherwise it would not be capable of establishing any "practical difference" in relation to those other practical spheres. What is defended here is that legal post-positivism in no way poses such a threat to the autonomy of law. On the contrary: the specific constructivist approach adopted by post-positivist theories offers a better reconstruction of the idea that law has well differentiated institutional limits. These limits are not denied, but redefined in more complex terms. They are not merely "given" by rules but rather require the connection between these and some values, a connection which is produced precisely by the intermediation of legal practice. This is the fundamental idea highlighted by the metaphors mentioned and what makes the constructive element that stands out in them particularly relevant. This element has to do intimately with the "technical" and "instrumental" dimension of legal rules and institutions with respect to those values. Constructive metaphors, however, have a long tradition in legal philosophy. Both the idea that law is a "practice" and its "constructive" or "technical" nature come from previous conceptions of law. The two most important are natural law and legal realism. Without them the very post-positivist conception can not be properly understood. But it imposes on them a severe critical correction no less profound than on legal positivism.

Natural law theories inherit the Aristotelian idea of "praxis" and its internal commitment to values, but they come to oversize these values distorting the constructive connection existing between them and legal practices (it thus becomes a kind of absolutism). Legal realism emphasizes the element of construction, the technical and instrumental aspect of law, but ignores values (it thus becomes skepticism). Postpositivist theories reject both positions as they converge in distorting the true function of legal practice. The starting point is the priority of ethical-political values. These are understood as objective ideals that explain the raison d'être and the differentiation of law as a whole and its different institutions. But the materialization and realization of such ideals and values can only be achieved socially through a continuous process, necessarily creative, of putting into application that very apparatus of rules and procedures: that is the point of the 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.

- 10.30-11.00 | Coffee Break

- 11.00-13.00 | Session 2 – Chair: J M Aroso Linhares

4) Ana Margarida Simões Gaudêncio (University of Coimbra, Instituto Jurídico da Faculdade de Direito), *Merit, Value and Justification: Human Dignity vis-à-vis Legal (Inter)subjectivity – The Autonomy of Subjects Within the Autonomy of Law*

The roles nowadays undertaken by *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 if 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 on 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* (Immanuel Kant, Jürgen Habermas, Rainer Forst). 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* – 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*…

5) José de Sousa e Brito [Judge of the Tribunal Constitutional (Lisbon) *emeritus*, Universidade Nova de Lisboa], *Towards a Logic of Democracy: From Human Dignity to Human Rights*

Democracy is an institutional practice and as such, it can only be described through norms, in a certain combination of rules and principles. In its modern form, in consequence of the American and French revolutions, democracy is a historic institution situated in a geographic space, which can be characterized as a rule of law state or democracy as a system of rules and principles. These norms differ from state to state according to the democratic practice of each, but they coincide in the following abstract characteristics:
- they uphold the principle of political equality, as equal participation of all citizens to build up a collective will by using equal rights to vote and to be elected and to accede to public office, and by the complementary liberties of expression, information, press, reunion and association;
- they uphold the principle of majoritarian decision;
- they recognize human rights;
- they uphold division of powers. independent judges and representative government.

The written or unwritten constitution of a democracy can include or may presuppose a constitutional principle that logically implies all other principles and rules that characterize democracy.
Let us see if such a norm can be found in some formula of Kant's categorical imperative or in a similar norm inspired by it: "To every person is due equal respect and esteem (as recognition of her value as a person)", or, in other words, "Every person has a right to equal respect or esteem, which is due to her as a person", or, shortly, "Every person has the same human dignity", or, again, in one of Kant's formulas, "The subject of ends, i. e., the rational being herself, shall never be put as a ground for every maxim of action as simply mean, but as the supreme restrictive condition in the use of means, i.e., always simultaneously as end."
Last norm is far more instructive than the former ones, because it makes clear that the rational agent is a person as subject of ends, and it makes also clear what human dignity or

the value of a person as such consists of, namely, being hold as the supreme restrictive condition in the use of means, i. e., always as end. It does make sense to say that neither a rational agent or a person nor her constitutive parts nor her actions nor her ends may be hold as simply means for the ends of others. It is so if the agent holds himself and holds the others as rational agents who pursue freely their own ends, which are as such equally valuable as the ends of others. We are dealing with a principle of autonomy as basis of ethics, the ethics of mutual respect is the ethics of autonomy.
Human rights derive from the equal dignity of persons, i. e., of their equal value as rational agents, therefore autonomous, having the power to give themselves their own law.

6) Manuel Atienza (University of Alicante), ***The foundation of human rights: autonomy or dignity?***

Answering the question as to whether the foundation of human rights lies in human dignity or in autonomy implies a double dimension: theoretical and practical. Thus, from a theoretical point of view, it seems that there are ethical conceptions (kantism or Catholic Church doctrine) based on the first of these two principles, and that explains why human dignity is considered in almost every contemporary Constitution and Declaration of rights as the foundation of human rights; while ethics of liberal inspiration favour the second one, autonomy, and as a result sometimes this second value or principle is presented as an alternative to dignity, that is, as a better ground upon which to build a justificatory theory of human rights. Meanwhile, from a practical point of view, people who, for instance, are in favour of legalising abortion, euthanasia or subrogated motherhood seem to support their arguments in the value of autonomy, whereas those who oppose these thesis insist on the value of human dignity.

Nevertheless, there are some good reasons to doubt the adequacy of previous opposition. For instance, some feminist groups who oppose subrogated motherhood agree on this point with the doctrine of the Catholic Church in putting human dignity before personal autonomy, which is very surprising given that with respect to other practical (similar) disputes the positions are rather antithetic: traditionally, the feminist movement has defended abortion in the name of the right of women to exercise their autonomy, while people who oppose abortion often base their arguments in the dignity of human life. And, with respect to the above mentioned theoretical dimension, it is rather strange to put ethical conceptions (kantism and Catholic Church doctrine) that, until recently, were considered by many as incompatible moral doctrines in the same theoretical place.

What I try to defend here is that the opposition between dignity and autonomy is simply a false opposition. Even more: that it is not only wrong to present these two values as opposed, but that dignity, autonomy and equality represent in some sense a unity and that the foundation of human rights must be found in this complex unity. In order to achieve this goal, I introduce the Kantian thesis on the unity of value. Then, I analyse Isaiah Berlin's conception of moral pluralism. And finally I examine some aspects of the dworkinian thesis of the unity of value. My general conclusions are that Berlin's position is not as far away from the other two as one may imagine; and that practical rationality demands some understanding of the unity of values, even if this understanding could be interpreted as a sort of unity in diversity.

Afternoon

- 14.00-16.00 | Session 3 – Chair: J M Aroso Linhares

7) João Cardoso Rosas (University of Minho), *Dignity and Human Rights Law: Promise, Emptiness and Delivery*

The concept of dignity acquired its centrality in human rights international law with the Universal Declaration of Human Rights (1948). In this context, dignity could be seen as an *ersatz* for the language of the "sanctity" of human beings and their natural rights, which is absent from this Declaration. The *promise* of the concept of dignity, then, was to serve as the main moral source or foundational basis for contemporary human rights.

In my paper I criticize this view from different angles and I stress that a thick conception of dignity, which is required by this kind of moral and foundational promise, unavoidably leads to the unpalatable conclusion that not all human beings have dignity. In fact, dignity as rationality, or moral agency, or personhood (as in James Griffin, for instance), or any other thick normative ground, will necessarily exclude from the status of dignity young babies, severely disabled people or coma patients, i.e., precisely the kind of people whose fragility human rights are supposed to protect.

Furthermore, I criticize the kind of disappointment that the unfulfilled promise of foundational dignity tends to lead to. This is the idea that dignity is no more than an *empty* placeholder, or a mere classifying expression that would apply to human rights *a posteriori*. In other words, the emptying of the concept of dignity in the framework of human rights law leads, in the best case, to the idea that dignity is not a foundational feature of human rights but rather what can be attributed to human beings once these rights are realized in practice. In the worst case, this emptying of the concept leads to the idea, to use an expression popularized by Michael Rosen in this context, that dignity is «the shibboleth of all empty-headed moralists».

The central point of my criticism of this emptying of dignity is the role, or the number of roles, that the concept actually performs in human rights text law and adjudication. As demonstrated by Cristopher McCrudden, among others, a minimum or thin conception of dignity, the general idea of an intrinsic worth of human beings, is a main aspect of our understanding of human rights today, in spite of the fact that this vague idea can lead t o different and contrasting interpretations. Even when one takes a purely "political, not metaphysical" (John Rawls) stance on human rights (e.g., Charles Beitz), a minimum conception of dignity should still be considered relevant in the contemporary practice and this is what dignity can *deliver*.

Furthermore, I contend that the above mentioned thin conception of dignity cannot be discarded because it is a historical transcendental, a basic condition of possibility that arises in modernity and makes of universal human rights a conceivable idea.

8) Orit Kamir (Israeli Center for Human Dignity), *Israel's War on the Hegemony of its "Basic Law Human Dignity"*

In 1992, Israel enacted its Basic Law Human Dignity and Liberty. The law guarantees universal human rights that derive from the joint basic values human dignity and liberty. Israel's Supreme Court, widely associated with the protection of human dignity and rights, labeled the Basic Law "Bill of Rights" and established it as the foundation of its human rights jurisprudence.

In the second decade of the 21st century, Israel is ruled by an extreme right wing government. This regime considers human dignity jurisprudence as a dangerous obstacle to its nationalistic policies and aspirations. It has, therefore, been attempting to curb the scope and of Israel's Basic Law Human Dignity and Liberty and undermine the autonomy and legitimacy of the Supreme Court.

The government's attack on the Basic Law combines several courses of action. One is directed specifically at the judicial application of human dignity and rights to refugees and asylum seekers. Much like other nationalistic governments around the world, the Israeli one boasts a very hard line against refugees and asylum seeker (who in Israel are mostly Eritrean). The regime attempts to deny them basic human rights by locking them in concentration camps and forcefully expelling them to third countries (Uganda and Rwanda). In the last few years, the government repeatedly enacted laws allowing long term imprisonment of asylum seekers in concentration camps in the Israeli desert. As the legislation was repeatedly struck down by the Supreme Court, the government planned to explicitly exempt this legislation from judicial intervention. This plan was interrupted only by the government's dispersal, and may be assumed again after the coming elections (in April 2019).

At the same time, the extreme right wing minister of justice systematically pushed to nominate conservative judges who would limit the application of the Basic Law and dignitarian judicial intervention. Over the course of three years she has, indeed, succeeded in transforming the judiciary at large and the Supreme Court in particular.

The regime's most dramatic course of action in its war on human dignity and rights was the legislation of an additional Basic Law: Israel -- the National State of the Jewish People. This Basic Law was explicitly intended to counterbalance the effect of Basic Law Human Dignity and Liberty. It was meant to reduce the significance and influence of universal human dignity and rights, and to instruct the judiciary to subject universal human dignity and rights to nationalistic considerations.

The extreme right wing attacks on both human dignity and the autonomy of law has been supplemented by the rigorous strengthening of an alternative discourse: that of national honor. These last two decades I have been researching the struggle between the discourse of honor and that of human dignity. In Israel, this struggle has taken on a unique form, because both "honor" and "dignity" are expressed by a single Hebrew word: *kavod*. This linguistic peculiarity has enabled the regime to argue that the discourse of national honor, culminating in the new Basic Law: Israel -- The National State of the Jewish People, is the true expression of *kavod*, whereas human dignity and rights discourse, associated with Basic Law Human Dignity and Liberty, is treacherous and dangerous.

9) Julie Copley (University of Adelaide, University of Southern Queensland), *No argument: human dignity and the making of legislation*

The Dignity of Legislation and *Law and Disagreement* by Professor Jeremy Waldron were both published in 1999. The books' common concerns were twofold: to increase philosophical thinking about law and legislatures; and to foster examination of theoretical implications of disagreements about how best to achieve the ends of justice, liberty, security and equality. In the literature, argument has ensued about Waldron's proposal to recover legislatures as a legitimate source of legal authority. As to the foundational nature of regard for human dignity when law is enacted in the circumstances of disagreement, however, there is some consensus. Present threats to democracy, as identified in the Congress Theme, demand a revisiting of this conception of human dignity.
In the two decades since 1999, many, including Judge Richard A. Posner and Professors Joseph Raz and Ronald Dworkin, have engaged with Waldron about matters such as judicial power to invalidate statutes, the institutional competence of courts to enforce fundamental rights and the arbitrariness of law made by way of a political process. Consistently, Waldron's responses urge due recognition of every person's right to participate in decision-making on matters of concern shared amongst members of a community – the right not to be excluded from a decision affecting that person and to which that person will be subject. On this principle, there is little argument with Waldron; for example, Professor Raz in *The Rule of Law and Its Virtue* (1979) stated respect for human dignity involves regard for people's capacities to "plan and plot their future" and in *Is Democracy Possible Here? Principles for a New Political Debate* (2006), Professor Dworkin urged those on either side of public debates to strive to make "genuine argument among people of mutual respect possible and healing". Although not the normative theory of legislation sought by Waldron, there is agreement: human dignity as a foundation to the making of law in the circumstances of disagreement.
In the digital era, public argument on matters about which people reasonably disagree – matters on which our parliaments pass legislation – has diminished and become less genuine. Due recognition of, if not Waldron's normative approach to, the shared capabilities of humans to plan and plot their futures is required. Legal thought provides some common ground.

- 16.00-16.30 Coffee Break

- 16.30-18.30 Session 4 - Chair: Manuel Atienza

10) Attila Lengyel (Jagiellonian University in Cracow), *The metaphysical basis of dignity in context of law's autonomy*

What is dignity in a metaphysical perspective? Someone can be sceptical about this question, stating that the ontological status of *dignitas* is a secondary inquiry. Although, taking into consideration that the paradigmatic status of dignity as an autonomous and universal concept, which substantiate further fundamental political and legal ideas such as human rights, equity and democracy, demands reflection about the ontological status of the concept

itself. The answer is crucial for understanding the modern legal systems on both the national and international level.

The goal of the presentation is to defend the claim that dignity should be considered in the modern philosophy of law as an autonomous concept inherent towards law. The source of this inherency lies in the metaphysical status of dignity, which itself is a keystone to widely described deontological system, also as a part of contemporary law systems, that affirm the primary principle of inviolability of dignity, which is recognized in constitutions of many countries.

By researching the historical origination of ~~the~~ human dignity, which has been described by *stoics* in their considerations about the values of World, I will try to disclose the nature of dignity. Following the intuitions of Diogenes from Babylon, who acknowledged in 2nd century BC that admittedly the nature, which surrounds the human beings has its own value (*axiâ*), but still only human beings have specific nature and unique internal value (*axioma*), I will try characterize the essence of human dignity.

Furthermore, after reflection about the philosophical sources of modern understanding of the concept of dignity, especially underlying the Judaeo-Christian and Kantian originations of the term. It becomes evident that human dignity is the foundation of contemporary legal systems, that can be perceived as gateway between our moral intuitions and the legal framework, which is established by the authorities of sovereign countries. It is worth considering what are the reasons for affirmation, that many contemporary constitutions and international declarations recognize~~d~~ the existence of human dignity. Therefore, it is crucial to look at the sources of human dignity, that proves arguments for its existence in case of denying the status of concept, which may imply serious violence of fundamental principles of human rights.

In my view, we can find these sources in the ontological status of human beings. The philosophical and anthropological justifications are crucial for deep understanding of the dignity and its existence in the contemporary jurisdictions. Although the relation of dignity towards law is specific and as a fundamental concept the reasonings, which refer to it has to be cautious. Having said that, the aim of the presentation is to deliver the arguments and substantiation for the above stated claims.

11) Silvia Niccolai (University of Cagliari), *Rediscovering Law as a Subjective, Human Experience: the Relation Between Law's Autonomy and Human Dignity in Alessandro Giuliani's Thought*

Is human dignity a value external to law? Is human dignity a purpose that law has to pursue? Or is human dignity a constitutive value of law, inherent to it? The work of the Italian law philosopher, Alessandro Giuliani (1920-1997), who, in his early studies, deeply explored the link between law's autonomy and *humanitas*, provides an inspirational point of view on these questions.

According to Giuliani, from modernity onwards, an instrumental vision of law has prevailed. Be it rationalist Natural Law, legal positivism, or sociological-based anti-formalistic trends — all share the assumption that law is moved by factors external to human individual action, and thus serves to guide it. The problem of "how to give norms to men" is paramount in these visions, but when law is instrumental as a technique of social control, destined to be

filled with contents from the outside, no matter how good and noble are these contents, they are all relative and unstable; and such is law, void of content of its own, and thereby available for whatever use. The autonomy of law is then undermined — and *humanitas* as well. In fact, thinking instrumentally of law also means thinking instrumentally of human beings: reduced to objects, to things that are directed and guided by others.

To safeguard law's autonomy and *humanitas*, we need to return to a subjective vision of law, wherein empirical individuals, in their relationships (with their ends and needs), are seen as the sources, not the objects, of norms. When the problem, "how are norms given to men?", leaves room for another problem, "how are the juridical norms of human conduct formed?", law appears as a practical science of human conduct, driven by a "moral of sympathy", that breaks the divide between the legal and the moral. The ancient *regulae iuris* of the Digest exemplify this dimension of law. Rules such as, "no one is bound to perform the impossible," or, "the other side has to be listened," originate not from a legislator, but from the sympathetic observation (made by a human being, a participant of the same nature as those who are observed) of some constants of human experience, of characteristics common to all.

In this light, the juridical experience appears endowed with autonomy because it is built around its own constitutive principles — it has its own content — so it is not pliable to whatever purpose. It is a human, subjective, experience, connected to human action; and such is legal knowledge, which carries with it the typically human characters of uncertainty, temporality, interdependence, and the limits of knowledge. Cultivating the autonomy of law means, at the same time, protecting the *humanitas*.

Written in the early '50s of the last century, these studies remind us that exploring the link between the autonomy of law and human dignity, implies interrogating how we think, how we conceive of ourselves and of the living together. They belong to the European cultural *koiné*, which, in post-World War II, investigated the connections between totalitarianisms (including totalitarian capitalism) and the forms of reason. In the today's neoliberal context, they help us to understand that the instrumental reason threatens humanity also by corroding of the autonomy of law.

12) José Manuel Aroso Linhares (University of Coimbra, Instituto Jurídico da Faculdade de Direito), *Is dignity a noncontingent autonomously juridical "idea"? A conversation piece with Jeremy Waldron*

«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, *Dignity, Rank, & Rights* (2009), Oxford University Press, 2015]. 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 (severely discussed and often misunderstood) distinction between *dignity as a ranking status (dignitas)* and *dignity as value or (absolute inner) worth (Würde)* 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 the

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.