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Balancing Dignity, Equality and Religious Freedom: A Transnational Topic

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The concept of dignity has made its way into contemporary discourse on rights after having taken a winding road which intersected secular thinking with religious thinking. Its pervasive utilisation by courts shows its richness as well as its amorphousness. An enquiry into comparative law suggests that the concept of dignity, especially when it is associated with the idea of equality, creates tensions with claims to religious freedom. Such clashes cannot be reconciled on theoretical grounds, but only on practical ones, depending on context and according to proportionality scrutiny.

Keywords: dignity, religion, law, freedom, human rights

INTRODUCTION

Dignity has achieved a prominent role in the contemporary discourse of rights. It has been routinely utilised in addressing many of the issues that have confronted modern democracies since 1948, when the Universal Declaration of Human Rights enshrined human dignity as its 'basic woof'.[2] More recently, the concept of human dignity has legitimised same-sex relationships and justified same-sex marriage in the United States, while it has made assisted suicide legal in Canada.[3] In other words, human dignity has progressively become a core value of contemporary constitutionalism.

The success of dignity did not come without controversy. More specifically, the affirmation of new rights – mainly in the fields of family life, birth control and terminal illness – has clashed with claims to religious freedom on multiple grounds. On a concrete level, religious practices or beliefs may conflict with the introduction or the expansion of fundamental rights that are based on dignity. On a theoretical level, since the idea of human dignity normally lies behind the political reforms and judicial decisions that implement such rights,

1 The author wishes to express his gratitude to Mark Hill QC for his extremely valuable comments on an earlier draft, as well as the Center for the Study of Law and Religion at Emory University for organising a discussion seminar on this topic.
2 T Lindholm, 'Article 1' in *The Universal Declaration of Human Rights: a commentary* (Oslo, Oxford and New York, 1992), p 34.
3 *Lawrence v Texas* 539 US 558 (2003); *Obergefell v Hodges* 576 US ___ (2015); *Carter v Canada* [2015] 1 SCR 331.

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believers may face the difficult charge of being against human dignity. In fact, religious people may seek accommodations that seem to act as an obstacle to a fuller expansion of human dignity.

Some examples drawn from different countries can illustrate this point. When Lilian Ladele sought a religious exemption from registering same-sex partnerships at the London borough of Islington, her claim clashed with Islington's 'Dignity for All' policy guidelines, which prohibited any kind of discrimination.[4] Since the Italian rate of conscientious objection to abortion is very high among physicians, some people maintain that Italy endangers not just the health but also the equality and dignity of women trying to terminate a pregnancy, while subjecting physicians performing abortion to undue social pressure.[5] Or some may consider that if a Muslim woman protests that the French ban of the complete headscarf in public places impairs her religious freedom, she is denying herself the respect that is due to her as a human being who is fully endowed with human dignity.[6]

Debates revolving around dignity create cultural and ideological rifts that are not easy to handle. European states have traditionally paid more attention to the constitutional concept of dignity than other areas of the world but they used to interpret it mainly as an imperative to improve the condition of the lower social classes and grant economic and political equality.[7] Dignity traditionally retained a social, economic and political dimension, pursuing the aim of integrating people socially and economically, while avoiding social and economic conflicts.[8] What was at stake was economic, social and political equality.

Now dignity addresses a wider variety of issues. The concept has not shifted away from social and economic subjects, as the recent South African jurisprudence amply demonstrates.[9] But now some of the most controversial issues are ethically, rather than economically or socially, divisive.[10] New rights still entail social benefits: for example, the right to assisted suicide creates the

4 *Eweida & Ors v United Kingdom* App no 51671/10 (ECtHR, 15 January 2013), para 24.

5 See *Confederazione Generale Italiana del Lavoro (CGIL) v Italy* App no 91/2013 (European Committee of Social Rights, 12 October 2015), paras 187, 191–192, 206, 2954. The Committee, however, found that this pressure did not amount to a violation of the Charter of Social Rights. The decision did not discuss the issue of dignity.

6 *SAS v France* App no 43835/11 (ECtHR, 1 July 2014).

7 B Douglas, 'Undignified rights: the important of a basis in dignity for the possession of human rights in the United Kingdom', (2015) *Public Law* 241–257, emphasises the lack of a dignity-based narrative of rights in the UK. More recently in England, the High Court considered that the dignity of one-year-old Charlie Gard would best be respected through the avoidance of an experimental treatment for his disease (for which no known medical treatment exists), notwithstanding his parents' will to try it. See *Great Ormond Street Hospital v Constance Yates, Chris Gard and Charles Gard* [2017] EWHC 972. At the time of writing, renewed litigation in this case was ongoing.

8 J Maritain, 'La personne et le bien commun', (1946) 46 *Revue Thomiste* 237–278.

9 K Young, *Constituting Economic and Social Rights* (Oxford, 2012), pp 44 and 46.

10 M Finck, 'The role of human dignity in gay rights adjudication and legislation: a comparative perspective', (2016) 14 *International Journal of Constitutional Law* 26–53 at 26: 'Dignity has ... been explicitly relied on in those areas of law that carry a strong moral connotation.'

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expectation that public hospitals will provide it. But the most controversial facets of this specific topic inhere in the public recognition of the right to be helped in committing suicide, and in the consequences on those who are directly involved in the process. If the right to assisted suicide is affirmed and no exemption is allowed, some physicians and nurses are likely to be requested to perform acts that may be contrary to their consciences. Conversely, if an exemption is conceded, a religious believer will be able to lawfully abstain from discharging a duty that conceptually relates to human dignity. The ultimate issue surrounding similar applications of dignity, therefore, is whether equal dignity among people entails an absolute equality of treatment to such an extent that no religious exemption is acceptable. It is no surprise, therefore, that dignity is at work in such contentious contemporary debates, just as it was in previous decades, when socio-economic inclusion was at stake. Dignity enjoys enough 'conceptual flexibility' to be routinely deployed in a variety of legal and political processes through which socio-cultural changes become legal changes.[11]

This article reflects on the roots of the contemporary clashes between religious needs and dignity claims that take place mainly in courtrooms, and on the means to reconcile those clashes. It fleshes out the idea of dignity in contemporary legal discourse. Then it focuses on the drivers of dignity in contemporary legal discourse, and provides a short summary of both the religious and the secular thinking that has backed it throughout the ages. This sets the stage for a focus on the theoretical physiognomy of dignity and on the interplay between its religious and secular heritages that surface in some of its recent utilisations, first dissociating dignity from religious narratives and later making them collide. Finally, the article considers the practical tools that can help to reconcile dignity with religious freedom, in the light of some prevailing European trends.

THE RECENT SUCCESS OF DIGNITY

Dignity has become so commonplace in constitutional adjudication worldwide that it now exists as a part of so-called 'generic constitutional law', a package of rights and ideas that permeate the global constitutional discourse and through which courts and legislatures fertilise each other.[12] Even US legal culture, which initially seemed to have found in privacy a substitute for dignity, reserved a covert role for 'dignity' for a while and has recently boosted it at its highest level in the Supreme Court's case law.[13] Professor Lawrence

11 Ibid, p 45.
12 D Law, 'Generic constitutional law', (2005) 89 *Minnesota Law Review*, 652–751 at 659–660.
13 J Whitman, 'The two Western cultures of privacy: dignity versus liberty', (2004) 113 Yale LJ 1151–1221 at 1153; Young, *Constituting Economic and Social Rights*, p 43. On the expansive utilisation of the concept of dignity in the US Supreme Court's jurisprudence, see J Resnik, 'Constructing the

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Tribe has found in the *Obergefell* decision on gay marriage the 'culmination of a decades-long project that has revolutionized the Court's fundamental rights jurisprudence', since it developed multiple core constitutional concepts 'into a doctrine of *equal dignity*'.[14] Finally, some British scholars advocate in favour of a broad utilisation of dignity in domestic adjudication.[15]

Such a broad success for dignity has not necessarily helped to clarify its meaning. Its uses and understandings are so manifold and nuanced from one legal system to another that dignity has become rather amorphous.[16] In the United States, it shielded individuals against the state, as in *Lawrence v Texas*, which outlawed anti-homosexuality laws; but it also fostered the state's intervention to protect individuals and help them reach fulfilment in life, as in the ruling on gay marriage. At the then European Court of Justice (ECJ), it honoured human life as a social value that cannot be mocked, to the extent that it justified the German prohibition of the laser tag game, since this game consisted in 'playing at killing'.[17] In France it prohibited dwarf-throwing as an activity that was disrespectful to a human being.[18] In Germany, the Constitutional Court employed dignity to outlaw a piece of legislation that authorised armed forces to shoot down aircrafts that were intended to be used as weapons in crimes against human lives, as such shooting could kill innocent passengers.[19] Dignity can put a check on the state, as well as trigger its intervention; it may be directed towards individuals, private or public powers; it safeguards individuals' intimate lives as well as their social standing.

Human dignity is such a complex and malleable construct that it is difficult to predict how it can be balanced with religious freedom once it has been dissociated from it. Its unpredictability stems from the winding path through which it has gone. Some aspects of dignity have arisen lately, while others have remained in the penumbra. It is necessary to single out the facets of dignity that have prevailed in order to identify the theoretical connotations of its clashes with religious freedom, as well as to determine why and to what extent accommodations between the two are feasible.

"foreign": American law's relationship to non-domestic sources', in M Andrenas and D Fairgrieve (eds), *Courts and Comparative Law* (Oxford, 2015), pp 437–471 at p 441, and M Chibundu, 'Can, do, and should legal entities have dignity? The case of the state', (2015) 75 Maryland LR 194–209 at 194.

14 L Tribe, 'Equal dignity: speaking its name', (2015) 129 *Harvard Law Review Forum* 16–32 at 16 and 17, emphasis in original.

15 Douglas, 'Undignified rights', p 241.

16 E Daly, *Democracy, Citizenship, and Constitutionalism: dignity rights, courts, constitutions, and the worth of the human person* (Philadelphia, PA, 2012), p 103.

17 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (2004) ECJ C-36/02.

18 Conseil d'Etat, Assemblée, 27 October 1995, no 143578. The ban was considered as legitimate by the Human Rights Committee of the United Nations, Communication no 854/1999, 8–26 July 2002, CCPR/C/75/D/854/1999, para 7.4.

19 Bundesverfassungsgericht no 357/05 (15 February 2006) at para 124.

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DIGNITY AND RELIGIOUS THINKING

If the contemporary pervasive utilisation of dignity finds its recent root in the Universal Declaration of Human Rights, it took a centuries-long rumination for this concept to blossom. Its elaboration has one religious and one secular component; both of them have played a significant role in its shaping, understanding, development and success.

Scholars such as Catherine Dupré have isolated the founding moments of the secular idea of dignity. Dupré identified the first moment in the works of the Renaissance's intellectual titan Pico della Mirandola, who identified the very nature of human beings as their capacity to rise above their instinctual needs and give shape to their own fate through the exercise of their freedom.[20] The second moment took place with the rise of the egalitarian, libertarian and solidaristic spirit of the French Revolution. The revolutionary values dismantled the *Ancien Regime*'s hierarchical social structure and implemented a new political order that was based on equal rights and mutual duties of brotherhood.[21] The third founding moment was Kant's conceptualisation that human beings should always be treated as ends in themselves, and never as means.[22] In Dupré's narrative, these historical turns broke the cultural monopoly of the ancient authoritarian, unequal, God-centred, ontological understandings of dignity. The 1848 French legislation that outlawed slavery was the first legal appearance of this understanding of human dignity in a document of constitutional salience;[23] from then on, the same understanding would sporadically appear in constitutional texts, before being crystallised in the Universal Declaration.

The secular line of thinking did not monopolise the discourse on dignity. On the contrary, religious voices were extremely active throughout modernity, although they used the concept in different ways. Christian, and especially Catholic, leaders utilised the idea of dignity to convey both the sense of social rank and the inherent value of the human person well into the first half of the twentieth century. But the encyclical letters that Pope Leo XIII published at the end of the nineteenth century marked an increase in the utilisation of dignity to depict the worthiness of the human person, especially in the context of workers' rights.[24] A few decades later, the socialist and Christian

20 C Dupré, *The Age of Dignity: human rights and constitutionalism in Europe* (Oxford and Portland, OR, 2015), p 32.
21 Ibid, pp 39 and 43.
22 Ibid, p 33.
23 Ibid, p 50. Interestingly, Lord Mansfield's famous opinion in *Somerset v Stewart* (1772) 98 ER 499 supported the abolition of slavery without referring to the idea of 'dignity'. On Lord Mansfield's education and religious sensibility, see N S Poser, 'Lord Mansfield: the reasonableness of religion' in M Hill and R Helmholz, *Great Christian Jurists in English History* (Cambridge, 2017).
24 S Moyn, 'The secret history of constitutional dignity', in C McCrudden (ed), *Understanding Human Dignity* (Oxford, 2013), pp 95–111 at p 100.

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movements pushed together for the incorporation of the idea of human dignity in a provision of the 1919 Weimar Constitution that dealt with economic and social rights.[25] In the 1930s, the Irish Constitution placed human dignity among its core values, in agreement with the Catholic nuncio in Ireland.[26] Before and during the Second World War, Pius XI and XII utilised the concept of dignity in their speeches against Nazi crimes and Communist ideology.[27] In 1965, the encyclical on religious freedom would take the name *Dignitatis humanae*.

In the 1940s, when the French philosopher Jacques Maritain elaborated his idea of human dignity which inspired the minds of the drafters of the Universal Declaration of Human Rights, both secular and religious thinking had been working on the concept for centuries.[28] This helped the French Jewish lawyer René Cassin and the Christian Orthodox Lebanese philosopher Charles Malik to persuade the rest of the Drafting Committee (which was in charge of penning a Proposal of Declaration on behalf of the Human Rights Committee at the United Nations) to adopt this concept.[29] The two intellectuals overcame some opposition from the Soviet bloc, which advocated statism, as well as from the Anglo-Saxon world, who were sceptical about the concept as potentially creating duties for the individual towards society.[30] Interestingly, this gap between Anglo-Saxon and Continental European understandings of dignity has not completely closed even now, as these two Western traditions still nurture different narratives on the modern concept of human dignity. Continental Europe believes that dignity rapidly gained momentum shortly after the Declaration was implemented, while some British and American scholars see dignity as arising only during the 1970s, when it took a more individualised shape that disconnected it from the earlier post-Declaration phase.[31]

The idea of dignity was not fully fledged at the time that it was enshrined in the Declaration, although it already had some clear implications, on which the religious and secular strands of thinking overlapped. For both of them, dignity was a universal good, which affirmed human beings' inherent value as transcending time and place.[32]

25 Article 151: 'The economy has to be organised based on the principles of justice, with the goal of achieving life in dignity for everyone.'

26 S Moyn, *The Last Utopia: human rights in history* (Cambridge, MA, 2010), p 54.

27 G Staab, *The Dignity of Man in Modern Papal Doctrine: Leo XIII to Pius XII* (Washington, DC, 1957), p 11. Pius XI used this concept in his *Mit brennender Sorge* declaration (14 March 1937) against Nazi acts, as well as in his *Divini redemptoris* encyclical letter (19 March 1937) against communism.

28 Maritain, 'La personne et le bien commun', p 237.

29 Lindholm, 'Article 1', p 34.

30 G Israel, *René Cassin (1887–1976)* (Brussels, 2007), p 197.

31 S Moyn, *Last Utopia*, pp 87 and 187; Dupré, *Age of Dignity*, p 60.

32 P Carozza, 'Human dignity and judicial interpretation of human rights: a reply', (2008) 19 Eur J Int L 931–944 at 933.

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It entailed political and social equality.[33] It fostered individuals' and peoples' self-determination: both individuals and polities had the right to choose freely which type of life they wanted to conduct and which destiny awaited them.[34] This idea of self-determination would later develop into two different strands of logic: in one, it would empower the political process to flesh out collective values and implement laws that incorporate morals; in the other, it would empower the judiciary to counterbalance the political process for the sake of the dignity of individuals.

For both the religious and secular strands, the understanding and realisation of dignity were to be progressive:[35] its areas of operation and meaning were not fixed, but rather were expected to expand and cover new fields.[36] Later years would confirm this progressive reading of dignity: in the span of a few decades, thanks to its moral salience and its context-based orientation, the concept has been deployed within deeply differing scenarios.[37]

The many facets of dignity that have surfaced have also prompted theoretical and practical conflicts of rights and claims, which have been resolved differently from one legal system to another. In the decision about the laser tag game, the then ECJ endorsed the German view that society can disapprove of some economic activities to the extent of prohibiting them. In *Lawrence*, the American version of dignity protected homosexual conduct against social disapprobation. And sometimes the individualist and the social paradigms of dignity have intertwined, as in *Obergefell*, where the US Supreme Court spoke of the dignity not just of individuals but also of the institution of marriage.[38]

These judicial decisions testify that dignity still embeds both an individual and a social paradigm,[39] a progressive reading of history, an aspiration to social inclusion,[40] and a sense of protection from social intrusions. Dignity

33 Regarding Cassin's priorities, see A Prost and J Winter, *René Cassin et les droits de l'homme: le projet d'une génération* (Paris, 2011), pp 295–296.

34 Chibundu, 'Can, do, and should legal entities have dignity?', p 197. On the role of organised societies as prerequisites for enjoying human dignity, see H Arendt, *The Origins of Totalitarianism* (Garsington, 2009; first published 1951), p 301.

35 Maritain, 'La personne et le bien commun', pp 253 and 267; A Scola, *L'alba della dignità umana: la fondazione dei diritti umani nella dottrina di Jacques Maritain* (Milan, 1982), p 154.

36 Chibundu, 'Can, do, and should legal entities have dignity?', p 204.

37 T Williams, *Who Is My Neighbour? Personalism and the foundations of human rights* (Washington, DC, 2005), p 152: 'In presenting dignity as the foundation of rights, . . . personalism focuses especially on the ethical dynamics of situations.'

38 Resnik, 'Constructing the "foreign"', p 445. Interestingly, although the recent Northern Ireland case *Lee v McArthur & Ors* [2016] NICA 29 (concerning a bakery run by born-again Christians who refused to bake a cake supporting gay marriage) did not quote the concept of dignity explicitly, it nonetheless gave much weight to the importance of the 'participation of gay people in many aspects of our community life' (para 50).

39 M Mahlmann, 'Human dignity and autonomy in modern constitutional orders', in A Sajó and M Rosenfeld (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, 2012), pp 370–396 at p 391.

40 Chibundu, 'Can, do, and should legal entities have dignity?', p 197.

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has been the crucible of different ways of conceiving life, at a personal as well as collective level.[41] Its concrete outcomes have depended on how the secular presuppositions and the religious presuppositions have blended, and which of them has prevailed.

DIVORCING DIGNITY FROM RELIGION

Signs of a divorce between dignity and its religious roots have surfaced lately. Where the dissociation seems to be most apparent is the treatment of assisted suicide in some common law countries.[42] In 2015, the Canadian Supreme Court legitimised assisted suicide by outlawing longstanding penal sanctions that the common law traditionally imposed on those who helped people carry out suicide attempts.[43] The Court contrasted two different values: on one side stood the protection of human life, which the Court called 'sanctity'; on the other stood 'dignity', which the Court understood as the right to self-determination, including the right to commit suicide.[44] In the Court's wording, the question of assisted suicide

> asks [the Court] to balance competing values of great importance. On the one hand stands the autonomy and dignity of a competent adult who seeks death as a response to a grievous and irremediable medical condition. On the other hand stands the sanctity of life and the need to protect the vulnerable.[45]

The intangibility of human life that the idea of 'sanctity' encapsulates is drawn from religious thinking.[46] When the Court divorced sanctity from dignity, it dissociated the religious root of dignity from dignity itself and disconnected the concept from part of its genealogy.[47] In doing so, the Court created a tension between the ideas of sanctity and dignity.[48]

41 Ibid, p 202.

42 The article considers UK and Canadian judgments, as these jurisdictions seem to have developed the most striking contrasts between the religious and secular understandings of dignity. The US Supreme Court, however, is not absent from this scenario: see *Cruzan v Director, Missouri Dept of Health* 497 US 261 (1990).

43 *Carter v Canada* [2015] 1 SCR 331.

44 T Jackson, *Political Agape: Christian love and liberal democracy* (Grand Rapids, MI, 2015), pp 88–95, reflects on the relationship and the dissociation between 'sanctity' and 'dignity'. Interestingly, he defines 'sanctity' as 'gifted inviolability based on impersonal essence' and links the concept back to religious thinking (p 91).

45 *Carter* at para 2.

46 E Kyserlingk, *Sanctity of Life or Quality of Life* (Montreal, 1979), p 10; the volume is a study commissioned by the Law Reform Commission of Canada.

47 Mahlmann, 'Human dignity and autonomy', p 376.

48 Jackson, *Political Agape*, p 194, believes that the concepts of 'sanctity' and 'dignity,' albeit connected, should be 'seen as distinct'.

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The legitimisation of assisted suicide, however, is not a direct and inexorable consequence of this divorce between the values of sanctity and dignity. In fact, in 1993 the Canadian Supreme Court framed the issue in the very same way, although it decided that the prohibition of assisted suicide could stay.[49] Even then, the Court already opposed sanctity to dignity through stating that 'Canada and other Western democracies recognise and apply the principle of the sanctity of life as a general principle which is subject to limited and narrow exceptions in situations in which notions of personal autonomy and dignity must prevail.'[50] The intellectual scenario that would later lead to the allowance of the assisted suicide was already in place when the outcome was in favour of 'sanctity', instead of dignity. It was only the balance between the two values that shifted between 1993 and 2015.

The dynamic that took place in Canada is not unique. One year before the Supreme Court of Canada legitimised assisted suicide, the Supreme Court of the UK was also confronted with this issue in *Nicklinson v Ministry of Justice*.[51] That case did not revolutionise the field, but the way that several judges in the panel framed the issue was quite telling of the progressive dissociation of sanctity from dignity.

The Supreme Court's reflections developed earlier thoughts, which stemmed from the *Pretty* controversy at both the domestic level and that of the European Court of Human Rights (ECtHR),[52] as well as from an earlier House of Lords' judgment, *Airedale NHS Trust v Bland*.[53] *Airedale* dealt with the possible termination of artificial feeding when a patient was in a persistent vegetative state. Lord Goff of Chieveley acknowledged that the principle of the sanctity of life, 'which is the concern of the state' as well as 'long recognized … also in most, if not all civilized societies throughout the modern world', was 'not an absolute one'.[54] In that context, the principle of sanctity needed to 'yield to the principle of self-determination', given also the 'invasiveness of the treatment and of the indignity' of life to which the patient was subject.[55] 'Sanctity' and 'dignity' were not put in direct opposition, as the first was perceived as needing to yield to self-determination; but the idea of a life not worth living surfaced when the Court looked at the status of the patient, implicitly contrasting it with the sanctity of life itself.

49 *Rodriguez v British Columbia* [1993] 3 SCR 519.
50 Ibid.
51 *R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent), et al* [2014] UKSC 38.
52 *Pretty v Director of Public Prosecutions and Secretary of State for the Home Department* [2001] UKHL 61; *Pretty v UK* App no 2346/02 (ECtHR, 29 April 2002).
53 *Airedale NHS Trust v Bland* [1993] AC 789.
54 Ibid, per Lord Goff, at p 863.
55 Ibid.

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In its *Pretty* decision, the ECtHR had stressed its dignitarian vision of European Convention rights, while acknowledging that scientific and technological developments were making the issue of dignity and sanctity increasingly contentious:

> The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that … notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude.[56]

Nicklinson developed that approach further. Lord Neuberger acknowledged that a segment of both secular and religious people believed equally that 'human life is sacred', while others saw 'the personal autonomy of individuals as predominant'.[57] This approach found Lady Hale in agreement: she acknowledged the moral clash of legal values by emphasising that 'Respect for the intrinsic value of all human life is probably the most important principle in Judaeo-Christian morality', but 'Respect for individual autonomy and human dignity are also important moral principles'.[58] Lord Wilson was even more vocal in weighing the 'sanctity (or, for those for whom that word has no meaning, the supreme value) of life' against 'two other ethical principles, namely those of individual autonomy and of respect for human dignity, which can run the other way'.[59] The most explicit phrasing, however, came from Lord Sumpton, who found that personal autonomy 'is an essential part of' dignity, whereas 'There is, however, another fundamental moral value, namely the sanctity of life.'[60] He drew a tension between dignity on the one hand and sanctity on the other, by concluding that 'Our belief in the sanctity of life is not consistent with our belief in the dignity and autonomy of the individual in a case where the individual, being of sound mind and full capacity, has taken a rational decision to kill himself.'[61]

No member of the UK Supreme Court, however, suggested that the religious salience of the idea of dignity must be replaced with the secular one that focused on autonomy. Instead, they confined themselves to highlighting the tensions

56 *Pretty v UK* at para 65.
57 *Nicklinson* at para 49.
58 Ibid, at para 311.
59 Ibid, at para 199.
60 Ibid, at paras 208–209.
61 Ibid, at para 209. More recently, see *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67.

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between the two viewpoints. This resonates with what happened in Canada, where the idea of dignity as autonomy has not simply silenced or replaced that of dignity as sanctity. The 2015 legitimisation of assisted suicide admits that dignity may prevail over the sanctity of life; but it nevertheless requires that the two be balanced.

Similarly, the implementation of individualistic, autonomy-based rights in the name of dignity does not simply replace the social and religious heritage of the concept itself.[62] For example, by affirming that marriage is a social institution that confers a specific status on those who enjoy it, *Obergefell* insisted on the necessity of giving full social and legal acceptance to homosexual relationships, instead of simply protecting the individual life of homosexuals.[63] In penning it, Justice Kennedy showed the intention of magnifying marriage as an institution, rather than merely protecting the single, isolated individuals who wish to get married.[64] From this perspective, the idea that the institution of marriage has a specific dignity paradoxically resembles Pius XI's *Casti connubii* encyclical (1930), which celebrated the greatness of 'the dignity of chaste wedlock'[65] multiple times.[66]

It seems safe to maintain that the facets of dignity that have a clear religious derivation have not disappeared. But some recent judicial decisions have highlighted the individualistic facets of the concept, taking their legal reasoning and outcomes far from religious doctrines. Kant's thinking seems to be one of the intellectual watersheds that have shifted the prevailing narrative of dignity away from the religious terrain. The German philosopher's understanding that human beings are called to be lawmakers unto themselves provides a coherent intellectual framework for this move:

> nothing can have a worth other than that which the law determines for it. But the lawgiving itself, which determines all worth, must for that very reason have a dignity, that is, an unconditional, incomparable worth; and the word *respect* alone provides a becoming expression for the estimate of it that a rational being must give. *Autonomy* is therefore the ground of the dignity of human nature and of every rational nature.[67]

62 J Baker, 'A matter of life and death', Oxford Shrieval Lecture, 11 October 2016, p 14, available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/mr-justice-baker-shrieval-lecture-11102016.pdf>, accessed 1 November 2016.

63 R Kahn, 'The right to same-sex marriage: formalism, realism, and social change in *Lawrence* (2003), *Windsor* (2013), & *Obergefell* (2015)', (2015) 75 Maryland L Rev 271–310 at 289.

64 Ibid, p 288.

65 *Casti connubii*, para 1.

66 See, for instance, ibid, at paras 4 and 5.

67 I Kant, *Groundwork of the Metaphysics of Morals*, ed M Gregor (Cambridge, 1997), p 43 (at para 4:436), emphasis in original.

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This approach seems to privilege the individual over the collective choice and individual self-determination over the absolute intangibility of goods and values, such as human life.[68] Kant's thinking can be used to place the self-determination of people wanting assistance in committing suicide above the intangible sanctity of life. Analogously, his theories may support same-sex couples' will to get married over contrary provisions that political majorities may have put in place. More broadly, the philosopher's ideas justify shifting the controversial issues around human dignity from the political branch, which is where collective bodies make choices, to courts, which counterbalance political powers in the name of individual and minority rights.[69]

The conflict between the Kantian vision and the religious vision on dignity has a clear moral salience. Kant celebrated the law-making capacity of the human will as holy: he believed that a 'will whose maxims necessarily harmonize with the laws of autonomy is a *holy*, absolutely good will'.[70] In turn, Maritain believed in natural law as the innate structure and orientation of human beings.[71] For him, 'the human being [was] directly ordained to God as his ultimate end', and society as a whole needed to develop according to rules that predated human will and respect the nature of human beings.[72] Maritain centred his understanding of human dignity on human nature, while Kant centred it on human will. It is no surprise that the Canadian Supreme Court opposed sanctity to dignity: both are holy, according to Maritain and Kant.

The trajectory of human dignity does not inescapably collide with that of religious freedom. But, if human beings are to be lawmakers unto themselves, as Kant envisaged, then religious people may not fit squarely within this picture. Religions normally understand the divine to be the lawgiver.[73] While human dignity celebrates human beings' will, religious freedom normally follows a law that is superior to human laws. Moreover, if the individual will is the fabric of individual rights, this perspective may not capture the essential features of religious freedom, as religious people normally exercise it by gathering and developing bonds that go beyond the individual dimension and across generations. In short, Kant's understanding of dignity seems to capture the underlying tensions between religious freedom and dignity.

68 See J Loughlin, 'Human dignity: the foundation of human rights and religious freedom', (2016) 19 *Memoria y Civilización* 313–343 at 337: 'Kant's original insight that autonomy was a key aspect of human dignity … has increasingly been interpreted in Western societies in an individualistic way'.

69 As Kennedy noted in *Obergefell*: 'An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.'

70 Kant, *Groundwork of the Metaphysics of Morals*, p 46 (at para 4:439), emphasis in original.

71 Scola, *L'alba della dignità umana*, p 153.

72 Maritain, 'La personne et le bien commun', pp 238, 260, 259.

73 D Novak, *The Jewish Social Contract: an essay in political theology* (Princeton, NJ, 2005), p 68.

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The concept of dignity embeds competing narratives and understandings that cannot be theoretically reconciled in contemporary pluralistic societies. Conflicts can only end through practical accommodations, in which religious freedom comes into play as a driver for the narratives of dignity that have temporarily lost purchase in the endless reshaping of dignity. This is why believers tend to ask for religious exemptions.

HUMAN DIGNITY AND RELIGIOUS FREEDOM

Balancing dignity-based rights with religious freedom is a context-dependent exercise. At least three general suggestions derive from judicial decisions in Europe, where the concept of human dignity has been utilised longer and more broadly than in other areas of the world.[74] Although the constitutional settings in which accommodations should take place are different, foreign experiences can be particularly useful for judges seeking guidance in this context. After all, dignity has an intrinsic universal appeal that allows for inspiration from abroad.[75]

The first suggestion is that an extremely pluralistic society should be aware of the specific weight of dignity, to the extent that it pays attention to when and how it utilises it in order to adjudicate controversies. Although European legal thinking is familiar with dignity, it may avoid utilising it when it believes that the matter should be left open for debate. This is confirmed by the different approaches to dignity in the context of same-sex marriage demonstrated in Europe and the United States. Through affirming the right to same-sex marriage as a constitutional right enforceable throughout the country in the name of dignity, the US Supreme Court has put an end to the discussion. Conversely, the European Court of Human Rights has not really utilised the concept of dignity in its case law on same-sex unions,[76] although sometimes the applicants flagged it.[77] The ECHR does not embed a textual protection of dignity, but the Court's case law is clearly familiar with this concept.[78] Although there is no evidence that this avoidance was intentional, not using dignity may have helped preserve the states' margin of appreciation in how and when these types of protection for same-sex couples should be implemented. The Court may have preferred not to use the concept of dignity precisely in order to

74 Dupré, *Age of Dignity*, p 17.
75 Mahlmann, 'Human dignity and autonomy', p 373.
76 *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010); *Vallianatos and Others v Greece* App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013); *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015); *Chapin and Others v France* App no 40183/07 (ECtHR, 9 June 2016).
77 For example, see *Oliari* at para 107.
78 For example, see *Parrillo v Italy* App no 46470/11 (ECtHR, 27 August 2015) at para 24.

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leave room for European states in a field in which they intensely care about their sovereignty.[79]

The second suggestion is that the clash between dignity and religious freedom is not resolved simply by giving absolute precedence to either one on the other. The *Ladele* decision by the European Court of Human Rights is a telling example. That case revolved around the refusal of a public employee to register same-sex partnerships – a right that local regulations associated with dignity. The existing case law at that time would have justified terminating the employee's contract because she refused to discharge some of her duties for religious reasons.[80] But the Court departed from its previous decision, and affirmed instead that

> Given the importance in a democratic society of freedom of religion … where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.[81]

According to the Court, even rights that are conceptually related with dignity at the domestic level do not trump accommodations for other rights and interests. Maybe even the necessity of accommodating dignity-based rights with religious freedom derives from the progressive association of dignity with rights that are in tension with religious freedom itself. Once dignity is disconnected from other rights and coupled with others, it may lose some of its cross-cultural appeal and need to be counterbalanced.

The third suggestion is that this context-based approach operates mainly through the proportionality test. Many of the European decisions quoted above have balanced dignity against competing rights using proportionality scrutiny. The German decision about shooting down weaponised aircraft cited the proportionality test multiple times.[82] The Canadian Supreme Court found the prohibition of assisted suicide not absolutely untenable but rather 'overbroad or grossly disproportionate'.[83] The then ECJ found that the German prohibition

79 Even the most recent case, *Taddeucci et McCall v Italy* App no 51362/09 (ECtHR, 30 June 2016), which sanctioned Italy for not allowing residence permits for homosexual partners of Italian citizens, did not pay specific attention to the issue of dignity.

80 *Eweida & Ors v United Kingdom* App no 51671/10 at para 83.

81 Ibid.

82 Bundesverfassungsgericht no 357/05 at paras 14, 143, 121 (the last of which speaks of the necessity of treating the issue of respecting the value of each human being 'in concrete terms in the individual case in view of the specific situation in which a conflict can arise').

83 *Carter* at para 77.

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of laser tag was proportionate.[84] Perhaps even more explicitly, the ECtHR made clear that dignity is not a satisfactory justification for the French ban on the Muslim veil. In that judgment, the Court maintained that 'however essential it may be, respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places'.[85]

Contrary to what some commentators have maintained, the judicial recourse to dignity is not 'hostile to compromises'; nor is it the case that 'Any balancing of the rights concerned is excluded when human dignity comes into play.'[86] The lesson that comes from the aforementioned European decisions is that dignity is so important and strong as a constitutional value that it must be deployed wisely and proportionately.

CONCLUSION

Dignity has travelled a long journey which has involved both secular and religious thinking. Both cultural strands have participated in its shaping and success, which seems to be ever-expanding. The process is still ongoing and rather tortuous, with religious aspects of this concept surfacing alongside secular ones. Overall, recent decisions show a certain decline of the religious spirit in their understanding of dignity in the adjudication process. This trend is confirmed by the increasing number of occasions in which courts are called to accommodate dignity-based rights with religious freedom, a sign that religious thinking is trying to protect itself from the expansion of dignity-based rights, instead of participating in shaping their physiognomy.

The accommodation between religious freedom and dignity seems a post-modern attempt to balance the secular and religious understandings of dignity through a piecemeal, practical and context-based approach. It may solve concrete problems; it hardly reconciles the two understandings of dignity.

84 *Omega* at para 38.
85 *SAS* at para 120.
86 E Klein, 'The importance and challenges of value-based legal orders', (2015) 10 *Intercultural Human Rights Law Review* 1–24 at 7 and 15.

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