

Conceptual Foundations of the Universal Declaration of Human Rights: Human Rights, Human Dignity and Personhood

THOMAS FINEGAN[†]

Introduction

This article examines the meaning of three philosophical concepts which lie at the heart of the Universal Declaration of Human Rights (UDHR): human rights, human dignity and personhood. That human rights lie at the heart of the UDHR is obvious, as is the claim that one of the key innovations of the Declaration is its hugely influential emphasis on human dignity. No adequate analysis of the philosophical underpinnings of the UDHR could exclude these concepts. The reason why personhood is examined over other relevant concepts, say equality, is twofold: it has hitherto been largely neglected in this context, and its eidetic similarities with human rights and human dignity provides a novel insight into the content of other concepts often associated with human rights theory, such as universality, inherency and equality. Via an examination of the UDHR text and its drafting history a list of essential characteristics common to all three of these concepts is compiled. These essential characteristics are then employed as an interpretive lens through which to clarify the debates on the precise philosophical meaning of these three concepts. In one part a textual and originalist analysis of the relevant UDHR concept is undertaken to ascertain its essential characteristics, while the proceeding two parts examine the main competing views of the concepts in question to see which coheres best with the version endorsed by the UDHR. In the case of human rights, an analysis of their essential characteristics helps resolve the dispute over whether ‘constructivist’ accounts of rights or ‘natural rights’ accounts best cohere with the meaning of human rights as espoused by the UDHR. With

[†]

PhD candidate, School of Law, Trinity College Dublin. I wish to thank Professors William Binchy and Gerard Casey for helpful suggestions on an earlier draft of this article. I also wish to thank participants at the 2011 International Graduate Legal Research Conference, King’s College London and the Postgraduate Legal Studies Seminar, Trinity College Dublin for their various critiques, questions and suggestions.

regards to dignity, its essential characteristics according to the UDHR help clarify whether what shall be termed the 'extrinsic' or 'intrinsic' interpretations of the concept is more relevant to the human rights paradigm. Likewise with personhood and whether the 'Lockean' or 'Boethian' traditions best fit the meaning of the term in the context of the UDHR. Finally, an attempt is made to sketch the relationship between dignity and personhood in the UDHR, a relationship which is at once subtle and also important for the overall coherence and meaning of the UDHR.

An important part of the following analysis will focus on the work of Johannes Morsink. Not only has Morsink written the authoritative work on the drafting of the UDHR, but he has also written extensively on its philosophical underpinnings. While Morsink's scholarship in this area is invaluable, this article takes issue with his arguments in support of moral intuitionism as the true philosophical foundation of the UDHR. By challenging Morsink's views on moral intuitionism this article will hopefully provide a corrective to the one major deficiency of Morsink's human rights scholarship as well as helping to support the thesis on the true UDHR meaning of human rights.

While the following discussion is primarily intended as a contribution to human rights theory, with the section on personhood offering a relatively new line of investigation in this field, it is also hoped that some elements will prove of interest to those operating in other fields. Specifically, the sections on dignity may well be of interest to those working on the sharp increase in prominence of dignity as a constitutional value. The debate concerning the constitutional meaning of dignity in jurisdictions as diverse as the United States, Germany, Ireland, India and South Africa has much to gain from analysis of the UDHR since this document has had and continues to have a profound influence on constitutional values relating to privacy, free speech, equality and autonomy. The sections dealing with personhood have obvious application to the world of bioethics where use of the concept far outweighs sustained reflection on its meaning. As human rights principles are increasingly applied to the sphere of bioethics, witness the recent emergence of human rights biolaw charters, it is safe to predict that interest in concepts that straddle both areas will grow.

A final introductory note is required. Philosophers approaching the meaning of the UDHR may be inclined to think that the preeminent public statement on such an important and contested area for moral philosophy was drafted with a philosophical sophistication becoming of such a topic. Yet while there certainly were moments during the drafting process when philosophical themes were broached and argued over, the fact remains that the drafting process resembled a political auction more than a seminar on moral theory. For the most part those who advocated in favour of human

rights during the drafting process were content to assume the truth of the great human rights tradition without either explicitly defending its axioms or addressing its critics. No doubt the exceptions to this rule (referred to in this article) prove highly instructive for understanding the deep meaning of the UDHR. Yet even the most philosophical of the drafters, Charles Malik, became aware that too much focus on philosophical debate threatened the goal of delivering a political as well as a moral document. Hence this article attempts to clarify the meaning of the UDHR by not only inquiring into its text and drafting history, but also into the competing philosophical genealogies most prominent in debates over rights, dignity and personhood – genealogies that were mostly only tacitly engaged with during drafting but whose very existence the drafting and text of the UDHR undoubtedly presuppose.

1. Essential characteristics of human rights

From the UDHR, and especially its preamble, it is possible to abstract a number of essential characteristics of human rights.¹ The first preambular paragraph to the UDHR tell us that human rights are both *equally possessed* by all members of the human family and *inalienable* to all members of the human family, ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’ Equal possession means that no member of the human family has a greater claim to human rights as against any other, whereas inalienability means that human rights can never be taken away from a member of the human family, neither by government, judges nor anyone else.²

Linked to the notion that human rights are equally possessed by all human beings is the idea of their *universality*. By June 1948 the commissioners working on the draft declaration had begun referring to it as a ‘universal’ rather than ‘international’ declaration. This change in title became official in December 1948 and was of no little significance. René Cassin, who proposed the change, would later write that the edit signified a moral document binding on all concerning the rights of all and at all times,

¹ The following list is not proposed as exhaustive. It is instead a minimal list of the essential characteristics shared by human rights, dignity and personhood within the UDHR. It is possible that one or more of these terms possesses essential characteristics not mentioned in this article, or that all three terms share extra essential characteristics not mentioned in this article.

² ‘Inalienable’ is almost synonymous with the term ‘imprescriptible’, the only difference being that in the present context the former debars both the giving and taking away of rights, whereas the latter is confined to the impossibility of the taking of rights only.

instead of a political document by governments and for governments only for so long as they felt bound by it.³ By interpreting the UDHR as a whole, the word 'universal' in its title can be said to have a triple, mutually reinforcing sense: universally binding due to the universal truth of universal human rights, a sense reinforced by the preamble's invocation of the UDHR 'as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance....'

Article 2 of the UDHR affirms that human rights are *irreducible to accidental characteristics or distinctions* of the human being by proclaiming that everyone is entitled to them regardless of their 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'⁴ The equal possession of human rights by the entire human family, the inalienability and universality of human rights, and the fact that human rights are irreducible to accidental characteristics of the human being, all point to the final essential characteristic of human rights: that they are *inherent in human nature*. Article 1 of the UDHR asserts that 'All human beings are born free and equal in dignity and rights.' The key term indicative of the inherency of human rights in human nature is 'born'. Article 1 began as a joint French and Philippine proposal which unmistakably acknowledged the 1789 French Declaration of the Rights of Man and the Citizen's own Article 1, 'Men are born and remain free and equal in rights.' An examination of the drafting process reveals that delegates understood the term 'born' to refer to human rights as inherent in the human being rather than as conferred by an exterior organ.⁵ Thus 'born' in Article 1 has a metaphysical and moral meaning, rather than a socio-economic⁶ or a socio-physical⁷ meaning.

³ René Cassin, *La Pensée et l'Action* (1972) 114.

⁴ Inseparable from the equality, universality and irreducibility of human rights is the mention of the term 'everyone' throughout the UDHR, a term which was intended to be taken literally. See Johannes Morsink, 'Women's Rights in the Universal Declaration' (1991) 13 *Human Rights Quarterly* 229, 255-6.

⁵ See Johannes Morsink, *The Universal Declaration of Human Rights: origins, drafting, and intent* (1999) 290-5.

⁶ Which the word 'birth' has in Article 2 of the UDHR.

⁷ Birth is a social as well as a physical event. Logically, human rights cannot inhere in the human being *qua* human being if they are literally only endowed at birth; nor do they belong to 'all human beings' if they exist only from birth onwards.

But what is the nature of the human being in whom human rights are said to inhere? Article 1 further states that human beings ‘are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’ The principal defender of the inclusion of the phrase ‘endowed with reason and conscience’ in the drafting process was the Lebanese Charles Malik, a student of both Martin Heidegger and Alfred North Whitehead, and a member of the core group of drafters. According to Malik, it was important that the qualities which essentially characterised man were mentioned somewhere in the Declaration.⁸ Hence human rights inhere in human nature, a nature which is characterised by reason and conscience. An important clarification is necessary: many of Malik’s fellow drafters were uneasy about specifying the essential characteristics of human nature as they were well aware of how adept the Nazi ideology was of creating the category of sub-human for those they did not deem to fit the requirements for being ‘fully’ human.⁹ Thus the correct way to understand ‘reason and conscience’ in Article 1 is as potential in human nature rather than as actual in human experience. Otherwise ‘all human beings’ would not be ‘endowed with reason and conscience’ and the door would be left open for a repeat of Nazi eugenics and experimentation involving the handicapped, terminally ill, comatose and children. As a Thomist philosopher Malik would have had understood ‘reason and conscience’ in the inclusive sense: essential to each and every human being as a potential without always being actual in each and every human being.¹⁰

2. Can constructivism explain the essential characteristics of human rights?

These essential characteristics of human rights in the UDHR (*equal possession by all human beings, inalienability, universality, irreducible to*

⁸ U.N. Doc. E/CN.4/SR.50/p. 13.

⁹ See Morsink, above n 5, 296-9.

¹⁰ Of note also is the fact that Malik was responsible for the insertion of the terms ‘inalienable’ and ‘inherent’ into the first preambular paragraph of the UDHR, ‘A Conversation with Habib Malik about the Crucial Role of his Father’ <<http://www.lebaneseforces.com/malikconversationwithson.asp>> accessed 7 March 2012. As such, this lends further support to the conclusion that he viewed the natural kind (ie human being) and its essential potentialities, rather than the actualisation of the potentialities of the natural kind, as relevant to dignity and rights in the context of the UDHR. For inherent dignity and inalienable rights to apply to ‘all members of the human family’ they would have to apply universally to all individual human beings and not just to the activities of paradigmatic members of the human family. Also, dignity cannot be inherent nor can rights be inalienable if they rely on a contingent activity for their instantiation, instead of being sourced in the subject (substance) upon whom any contingent activity depends.

accidental characteristics of the human being, and *inherent in human nature* – which is a rational nature capable of conscience) are important for determining which philosophical orientation provides the true theoretical underpinning of the UDHR, and thus international human rights law generally. Broadly speaking, attempts to theoretically justify human rights can be placed in two categories: constructivist accounts and natural rights accounts.¹¹ This is not to say that all constructivist accounts are methodologically similar (or likewise that all natural rights accounts are methodologically similar), as proponents of constructivism hail from ideological camps as diverse as comprehensive liberalism and critical theory, or that they are equally as plausible as each other. It is to say that constructivism and natural rights, both broadly construed, are the two main alternatives when it comes to justifying human rights and that the explanatory successes of one usually points to the concomitant failures of the other.

Beginning with constructivism, its core relevant claim is that human rights are the products of a process of linguistic, social and/or political agreement (or convention, custom, construction etc.) rather than objective moral truths about human beings and human activity. Constructivist accounts of human rights have a number of prominent and well-respected advocates. According to Richard Rorty, a leading exponent of analytic post-modernism, human rights are nothing more substantial than a cultural phenomenon, ‘...the question whether human beings really have the rights enumerated in the Helsinki Declaration is not worth raising ... nothing relevant to moral choice separates human beings from animals except historically contingent facts of the world, cultural facts.’¹² For John Rawls, one of the most influential liberal theorists of the twentieth century, human rights are a political doctrine compatible with the politics of ‘liberal peoples’ and ‘decent hierarchical peoples’, but which are not based on a particular comprehensive moral view of the nature of the human person.¹³ Jürgen Habermas, probably the most prominent critical theorist of the

¹¹ Others have adopted more extensive categories for classifying alternative approaches to human rights theory. For example, Marie-Bénédicte Dembour suggests four categories: ‘natural scholars’, ‘deliberative scholars’, ‘protest scholars’ and ‘discourse scholars’ in Marie-Bénédicte Dembour, ‘What Are Human Rights? Four Schools of Thought’ (2010) 32 *Human Rights Quarterly* 1. According to the schema adopted in this article, natural scholars clearly fit within natural rights accounts, whereas deliberative and discourse scholars fit within constructivist accounts. Protest scholars may fit with either, depending on their theoretical convictions, as their main interest is with the practical task of redressing injustice.

¹² Richard Rorty, ‘Human Rights, Rationality, and Sentimentality’ in *Truth and Progress* (1998) 170.

¹³ John Rawls, *The Law of Peoples* (1999) 78-82.

twentieth century, considers that all systems of rights, whether human rights or any other kind, are sourced in democratic participation via rational discourse directed towards comprehensive agreement. Aside from 'the discourse principle, which is built into the conditions of communicative association in general', nothing else is prior to the 'citizens' practice of self-determination', including natural or human rights.¹⁴ Finally, Jack Donnelly, a renowned human rights theorist, defends what he calls 'functional, international legal, and overlapping consensus universality', but argues that 'anthropological and ontological universality are empirically, philosophically or politically indefensible.'¹⁵ For Donnelly, the former group are only contingently and relatively universal;¹⁶ their universality is not a statement of objective moral truth but of widespread agreement in the social, political and legal value of human rights (however well-intentioned or otherwise such agreement among the various relevant actors may be).

How compatible is constructivism with the essential characteristics of human rights outlined earlier in this article? Constructivism is a thoroughly pragmatic approach to moral and legal theory, and is unable to accommodate the irreducibly metaphysical and moral realist characteristics of human rights as articulated in the UDHR. Due to their philosophical presuppositions, constructivists cannot logically accept the principle that human rights are actually, independent of consensus, *inherent in human nature* (which is a necessarily *rational nature*). Not only would they see understandings of human nature as themselves constructs, but inherence as a concept loses all meaning if it is contingent upon social, political or cultural consensus for its actualisation. The same holds true for the rest of the outlined essential characteristics of human rights. Human rights as *inalienable, irreducible to accidental characteristics of the human being, equally possessed* and *universal* are not intended as constructs but as objective moral truths knowable by reason. Human rights could not be inalienable if they were contingent upon political or judicial consensus: a breakdown in consensus in human rights, or the forming of a consensus hostile to human rights would then deprive human beings of their hitherto 'inalienable' human rights. Human rights could not be universally existent and binding if they were founded upon society or culture: they are not accepted by all societies and cultures today, never mind 300 years ago. Even Donnelly's procedural universality is limited to the customary law

¹⁴ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) 128. Habermas' 'discourse principle' states that 'just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses', *ibid* 107.

¹⁵ Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281, 281.

¹⁶ *Ibid* 289.

sense of universality, in that none of what he calls ‘international legal’ universality, ‘functional’ universality or ‘overlapping consensus’ universality are universal in either of the trans-historical or moral realist senses. Donnelly’s affirmation of human rights universality is limited to numerical agreement; whether such agreement does or ever will exist in a genuinely ‘universal’ sense is a moot point. That human rights are equally possessed by all human beings, and that they are irreducible to accidental characteristics of the human being, makes little sense if they are solely socio-political assertions since the UDHR was intended and reads as an enumeration of pre-political rights morally binding on all states and political systems, including those that had so egregiously denied both the equality of all humans and the irrelevance of accidental characteristics of human beings to fundamental moral considerations.

3. Can the natural rights tradition explain the essential characteristics of human rights?

Historically and logically natural rights emerged from within the natural law tradition. Aristotle’s discussions on the naturally right way to live, and his distinction between natural justice (*to physikon dikaion*, with *ius* being the Latin equivalent of *dikaion*) and conventional justice (*to nomikon dikaion*), were prefigurements for the Stoic doctrine of natural law.¹⁷ Stoic natural law doctrine considered the entire cosmos to be pervaded by providential reason, and viewed man’s ability to reason as providing him with knowledge of the cosmos’ natural law.¹⁸ Though originating in Cyprus with Zeno of Citium, Stoicism exerted a profound influence upon Roman lawyers. The most famous articulation of Stoic natural law came from the Roman philosopher and lawyer Cicero who, via the mouth of Laelius in Book III of his *De Re Publica*, defined natural law as universal, eternal, unalterable, divinely ordained, independent of political enforcement, and knowable through human reason.¹⁹ Though undoubtedly an oversimplification, it is possible to draw a fairly clear line of natural law transmission from the Stoics, to the 2nd and 3rd century Roman jurists such as Gaius and Ulpian, onto Isidore of Seville and his *Etymologiae* in the 7th century, from there to Gratian’s *Decretum* in the 12th century, and from

¹⁷ According to John M Kelly discussion of natural law can be traced back as far as the ‘immutable unwritten laws of heaven’ in Sophocles’ *Antigone*, John M Kelly, *A Short History of Western Legal Theory* (1992) 19-20.

¹⁸ Leo Strauss classifies ‘classic’ natural law into three categories: Socratic-Platonic-Stoic, Aristotelian and Thomistic. See Leo Strauss, *Natural Right and History* (1965) 146.

¹⁹ Indeed, for Cicero the ‘true law’, ie natural law, is right reason in agreement with nature.

there again onto both the Medieval glossators of the *Decretum* and the philosopher and theologian Thomas Aquinas.

Yet although natural law in Roman culture was considered perfectly compatible with objective right (ie it is right that one does not harm others), no Roman or pre-Roman thinker ever derived a doctrine of subjective rights (ie *I* have a right not to be harmed) from it. This is important for the present discussion because human rights clearly fit into the category of subjective rights. *Ius* for the Romans (and for Aquinas) was limited to meaning an objectively right relationship or a moral or legal precept (ie *it* is right that he not be harmed) which, although clearly consistent with the idea of a subjective right and even foundational for it, is nonetheless not the idiom of human rights. It was not until Gratian and the Medieval decretists that rights were explicitly referred to in the subjective sense, as *potestas*, *facultas*, *dominium* etc.²⁰ At the outset the canon law idea of natural rights was not based specifically on Christian revelation but on 'an understanding of human nature itself as rational, self-aware, and morally responsible.'²¹

From this Medieval source of natural rights the nominalist William of Ockham, in the context of the 14th century Franciscan poverty dispute, articulated a distinction between natural and positive rights. The same juridical source, allied to the natural law of Thomas Aquinas, also proved the inspiration for Francisco de Vitoria, Bartolome de Las Casas and Francisco Suarez (members of the 'second scholastic' movement) to argue on behalf of the natural rights of native American Indians in the face of colonial exploitation in the 16th and 17th centuries.²² And it is from this same juridical source again that Hugo Grotius appropriated the idiom of natural rights for the slightly more secular culture of 17th century Protestant Europe. Indeed, in this respect at least Grotius was the bridge over which natural rights were carried from the Medieval canonists and post-Reformation second scholastics to Modern Protestant political theorists.

The absorption of natural rights discourse into the American colonies in the 18th century had momentous practical and theoretical effect. The natural rights theories of Samuel Pufendorf, Hugo Grotius, Jean Jacques

²⁰ Brian Tierney's scholarship has shown how it is inaccurate to hold that the subjective concept of right began as late as Gerson (against Richard Tuck) or Ockham (against Michel Villey), Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (1997).

²¹ Ibid 76.

²² On Vitoria and especially Suarez as contributing to Grotius' understanding of natural rights and international law see Antonio García y García, 'The Spanish School of the Sixteenth and Seventeenth Centuries: A Precursor of the Theory of Human Rights' (1997) 10 *Ratio Juris* 25.

Burlamaqui, Christian Wolff, Emer de Vattel and the grand theorist of liberalism John Locke²³ – all broadly²⁴ consonant with the tradition just outlined – were encapsulated in the American Declaration of Independence of 1776 which, after mentioning the ‘Laws of Nature and Nature’s God’, goes on to declare: ‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.’ The philosophy of natural rights was to the fore in that other great 18th century precursor to the Universal Declaration of Human Rights, the French Declaration of the Rights of Man and the Citizen of 1789. The key drafter of the American Declaration, Thomas Jefferson, had a role in the drafting of the French Declaration as it was he who advised Marquis de Lafayette on the drafting of the first model for the Declaration.²⁵ The final text of the French Declaration, influenced in part also by the Virginia Bill of Rights of 1776, invoked the ‘natural, inalienable, and sacred rights of man’ and ‘under the auspices of the Supreme Being’ enumerated the ‘natural and imprescriptible rights of man’ as ‘liberty, property, security, and resistance to oppression.’

4. Natural rights and human rights: one and the same

²³ Himself significantly indebted to the Anglican theologian Richard Hooker. For a synopsis of the philosophical influences on 18th century American revolutionary and natural rights talk see James H Hutson, ‘The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey’ (1994) 39 *American Journal of Jurisprudence* 185, 213-20. Neither Thomas Hobbes nor Jean Jacques Rousseau fit coherently within the natural rights tradition outlined in this article, even though both make considerable mention of ‘natural rights’. Though space prevents an in-depth treatment of the issue, suffice to say that, in the case of Hobbes, any theorist who founds natural rights upon fear, uses the doctrine to justify violence towards others, and extols the virtues of absolutist government cannot be seen as a logical continuum of the natural rights tradition. The same applies for Rousseau who founds natural rights not on human nature and reason but on sentiment and political concord (‘general will’), and who again displays marked absolutist tendencies as regards the sovereign’s power.

²⁴ By ‘broadly’ it is meant broad enough to describe these theorists as contributing towards natural rights doctrines as distinct from constructivist doctrines. There are, however, important differences between how natural law and natural rights are understood by the Aristotelian-Thomist, Stoic, Liberal and Rationalist traditions.

²⁵ See Lynn Hunt, *The French Revolution and Human Rights: a Brief Documentary History* (1996) 13-15, 71-73.

From this brief synopsis of the natural rights tradition there is already evidence to support the view that human rights may be legitimately seen as a synonym for natural rights. An important buttress to this view is that the original framer of the all-important preamble to the UDHR, René Cassin, looked to the preamble of the 1789 French Declaration for inspiration.²⁶ When the UDHR was adopted in Autumn 1948 its drafters' speeches made repeated reference to natural rights forerunners to the UDHR, the 1776 Declaration of Independence and the 1789 French Declaration.²⁷ The composition of the very first draft of the UDHR also alludes to the natural rights connection: two of the most important documents used as templates in the drafting procedure by the Canadian jurist John Humphrey, the 'Pan American' declaration and a study sponsored by the American Law Institute, both drew heavily from the constitutional natural rights tradition.²⁸ None of this should cause surprise as thirty-seven out of the fifty-eight UN member states at the time belonged to the Judeo-Christian tradition whence – to a large extent – the natural rights tradition sprang.

Aside from the historical and cultural connection between natural and human rights, philosophical analysis shows that human rights approximate extremely closely if not altogether identically to natural rights (and certainly far more closely than constructivist accounts of rights). It is possible to establish the same five essential characteristics of natural rights as outlined above for human rights. As the name suggests natural rights *inhere in human nature*, a nature which, as the long tradition of natural rights testifies to, is *rational*. Humans by their very nature as rational beings possess natural rights (which themselves are knowable through the use of human reason). As natural rights inhere in human nature they are *irreducible to accidental characteristics of the human being*. They are also *universal* in the triple, mutually re-enforcing sense as outlined above with relation to human rights: it is universally true (for all human beings at all times) that universally possessed (by all human beings at all times) natural rights are universally binding (on all human beings at all times). Natural rights are *inalienable* in that no law, political concord, social agreement, judicial decision, monitoring committee or dictator can alienate from the human being the nature upon which their natural rights are founded. Finally, natural rights are *equally possessed* by all human beings in that no human being's natural rights are more valuable than the natural rights of others.²⁹

²⁶ See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2003) 66-7.

²⁷ See Johannes Morsink, *Inherent human Rights: Philosophical Roots of the Universal Declaration* (2009) 18-9.

²⁸ Glendon, above n 26, 57.

²⁹ This is not to say that the natural rights tradition has always fully

5. Morsink on natural rights

Despite this Johannes Morsink, in two important works on the drafting and philosophy involved in the UDHR, has argued that the UDHR does not refer to natural rights – either explicitly or implicitly.³⁰ Morsink is the leading authority on the drafting of the UDHR, so in order to properly defend the claim that natural rights are essentially the same as human rights his challenge must be met.

Morsink places great emphasis on the fact that the phrase ‘all men are endowed *by nature* with reason and conscience’ was eventually deleted by the drafters from Article 1 in order to support his view that natural rights are not compatible with human rights in the UDHR.³¹ His analysis of the debates surrounding Article 1 and the Preamble³² show that the reference to nature was deleted in order to appease those who supported the insertion of ‘God’ into Article 1. At first glance this seems strange: although natural rights are not necessarily tied to either theism or deism the tradition of natural rights has often found support in a broadly Judeo-Christian worldview. But what Morsink does not make so clear is that many of the drafters (and especially the Brazilian delegation that proposed the insertion of ‘God’ into Article 1) understood nature not in the sense of the natural law or natural rights tradition but in the materialist sense of the word, ie nature as a synonym for materialism. Thus it was possible that God and nature could indeed be in opposition – unlike in the 1789 French Declaration for instance. Hence the deletion of the phrase ‘by nature’ did not constitute an explicit disavowal of the doctrine of natural rights.

The reason Morsink is so keen to divorce natural rights from human rights is his aversion to the ‘essentialism’ he associates so closely with natural rights. This essentialism is dangerous for Morsink because, according to him, when one posits a human essence and then bases a doctrine of rights upon that essence, any human who is viewed as not sharing in that essence is necessarily deprived of the corresponding rights.³³ Yet Morsink is still insistent upon the need to understand human rights as metaphysically inherent within the human being. Although his stress on inherence is consistent with human rights in the UDHR, it also poses problems for the consistency of his own argument as it is precisely the tradition of natural rights (against positivism, utilitarianism and historicism) which transmitted

acknowledged the logical implications of natural rights for equality. Infamously, the French Declaration of 1789 omitted both women and slaves from its explicit protection. Yet where natural rights take root the branch of equality almost invariably follows and in the historical examples of where this did not happen (or did not happen quickly enough) this was to the detriment of the coherence and foundations of natural rights themselves.

³⁰ Though he does not deny the *historical* reality that the natural rights tradition gave rise to the notion of human rights.

³¹ Morsink, above n 5, 283; Morsink above n 27, 30.

³² Morsink, above n 5, 284-302.

³³ Morsink, above n 27, 32-4.

the idea of inherent rights into the domain of early twentieth century rights discourse.

Another problem with Morsink's critique of essentialist natural rights is that he himself relies on essentialist concepts, specifically in regard to human nature. In response to Tore Lindholm's claim that there is no connection between *human nature* and human rights Morsink states that such a denial 'goes against what is in the text [of the UDHR] and all through the supporting archival material.'³⁴ He approvingly quotes Article 1 of the 1998 Universal Declaration of the Human Genome and Human Rights as giving us the 'biological basis' of the UDHR: 'the human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity.'³⁵ Against Jack Donnelly's constructivist account of human nature Morsink counters, 'unlike Donnelly we draw a line between the way the world with human nature in it is and the conceptions or constructions cultures use to interpret that world.'³⁶ Aside from these examples it is impossible to construe inherent human rights as Morsink does without some understanding of the essence of humanity, or indeed of human rights as essential to the human being. Any way in which natural rights are brought into dispute by essentialism applies equally to human rights.

Morsink's issue with essentialism, that it can alienate certain types of human beings from human rights protection, is overstated. Because of his suspicion of essentialism Morsink interprets Article 1's mention of all human beings being 'endowed with reason and conscience' epistemologically, ie reason and conscience are how we come to know of our human rights, rather than metaphysically, ie reason and conscience are part of what makes a human being a human being.³⁷ This interpretation not only runs against both a plain reading of Article 1 as well as the drafting history of the article (and Malik's key role therein), it is also unnecessary from the point of view of preventing discrimination against certain classes of human beings. The aforementioned distinction between actuality and potentiality allows human rights (and natural rights) to specify not only to whom such rights belong (human beings, essentially) but also to identify such beings via their essential characteristics *without* discriminating against any particular class of such beings (children, women, elderly, homosexuals, Jews etc). Morsink himself does seem to accept this point, '[i]f we accept as criterion that to be members of the human family people need to have these characteristics [reason and conscience] only potentially and not (necessarily) actually, then this is a defensible position.'³⁸

³⁴ Morsink, above n 5, 294.

³⁵ Morsink, above n 27, 46.

³⁶ Ibid 142.

³⁷ I do not want to suggest that there is no room for an epistemological reading of 'reason and conscience' within the framework of the UDHR, only that there is no room for an exclusively epistemological reading of these terms. The orders of knowing and being are intimately interlinked, and just as one cannot reason without being a reasoning being, one must reason in order to know one is a reasoning being.

³⁸ Morsink, above n 5, 296.

He does go on to mention³⁹ that it may still be possible for an ideology such as Nazism to claim that certain classes of human beings do not reason ‘properly’ – and as such imply these classes of human being are of lesser value – but neglects to mention that an incomplete actualisation of an essential potential, such as reason, does not negate the essence itself. (Of course, the Nazi ideology was more interested in will-to-power than reasoning about basic human goods.)

Morsink’s distrust of essentialism and natural rights is founded to some extent at least on an erroneous understanding of the natural rights tradition. For instance, he claims that the Medieval natural law doctrine is incompatible with inherent rights as it is necessarily tied to political feudalism – a barely supported claim that is false both historically and philosophically.⁴⁰ More serious is his claim that natural rights are tied to ‘Cartesian essentialism’⁴¹ and that natural rights are based on ‘deductive argumentation of the type found in the Western rationalist tradition’.⁴² Morsink seems to be trading on a caricature of the natural rights tradition here as neither of these claims is accurate. The kind of essentialism found in the natural rights tradition is usually the Aristotelian kind rather than the more philosophically problematic Cartesian kind. Presumably by ‘Western rationalist tradition’ Morsink means the deductive *a priori* systems of Descartes, Malebranche, Spinoza, Leibniz and others; this being the case such a tradition has had a peripheral role at best within the natural rights tradition. Even if some later followers of the rationalist tradition were natural rights proponents also, such as Christian Wolff, their commitment to rationalism was logically independent of their support for natural rights – just as Ockham’s commitment to nominalism and voluntarism was logically independent of his support for natural rights.

The import of this misunderstanding is made clear when Morsink goes on to outline what he considers a proper theoretical underpinning of human rights – ‘the capabilities approach’ of Martha Nussbaum – as a way ‘to show how we can and should look on each right in the Declaration as inherent in the human person or as linked to human nature in a nonessentialist way.’⁴³ Without wanting to go into too much detail about Nussbaum’s approach due to considerations of space, suffice to say that, as Morsink himself admits, it broadly adheres to the Aristotelian-Thomist understanding of human nature, potentiality and actuality, natural inclinations and human flourishing.⁴⁴ Tellingly, Nussbaum’s list of ten ‘central functional capabilities’ whose protection forms the basis of human rights (life; bodily health; bodily integrity; sense, imagination and thought; emotions; practical reason; social affiliation; other species; play; control over one’s environment) is basically an expanded list of John Finnis’s⁴⁵ list of seven basic forms of human good (life; knowledge; play; aesthetic experience; sociability-friendship; practical

³⁹ Ibid.

⁴⁰ Morsink, above n 27, 145-6. The most comprehensive rebuttal of this position is Tierney, above n 20.

⁴¹ Morsink, above n 27, 175.

⁴² Ibid 32.

⁴³ Ibid 161.

⁴⁴ Ibid 162, 66-85.

⁴⁵ A Thomist and the foremost natural rights theorist of the twentieth century.

reasonableness; 'religion').⁴⁶ Towards the end of his section dealing with Nussbaum Morsink approvingly quotes her as pointing out that 'natural rights ... usually proceed by pointing to some capability-like feature of persons (rationality, language) that they actually have on at least a rudimentary level ... [a]nd I actually think that without such a justification the appeal to rights is quite mysterious.'⁴⁷ So, seemingly unbeknownst to Morsink due to his equation of natural rights with rationalism, his own views on the founding of human rights are implicitly conducive towards acceptance of a natural rights theory also, specifically a natural rights theory closely linked to Medieval natural law.⁴⁸

Yet this is still not the full picture. Ultimately Morsink eschews what he understands by natural rights in favour of a marriage between Nussbaum's 'capabilities approach' and the epistemology of moral intuitionism. Two characteristics of moral intuitionism which Morsink sees as so philosophically advantageous (morality as objectively true; the role of conscience in understanding moral truth) apply equally to reason as understood in the natural rights tradition. But the other two characteristics of moral intuitionism are more problematic philosophically and are only partially compatible with the natural rights tradition, namely that we can be remarkably certain about issues of morality, and that this certitude is often pre-reflective and prior to intellectual contributions. It is true that natural rights theory accepts the existence of self-evident (*per se nota*) moral axioms and goods but not in the sense that such principles are easily and immediately discovered by a sound conscience (as moral intuitionism would have it) but in the sense that these principles stand in need of no further justification other than their intrinsic reasonableness. Likewise, while natural rights theory can accept that moral truth need not be a pot of gold at the end of a rainbow of speculative reflection, it is nonetheless clear on the important role reason plays in conjunction with conscience in discovering and clarifying moral truths, and how reason can be obstructed by emotion and prejudice even allowing for a generally sound conscience. Hence why it is that natural rights theory and not moral intuitionism provides *reasons* for believing in the principles operative within human rights. As such, moral intuitionism can be understood as an emaciated form of natural rights theory, one which accepts many of its conclusions but without acknowledging their rationale in deliberative practical reasoning.

The emphasis moral intuitionism places on epistemology seems to be a primary reason why Morsink disavows the metaphysical meaning of 'reason and conscience' in Article 1 of the UDHR. So in effect, and aside from his caricatured understanding of natural rights, the major stumbling block for Morsink's acceptance of natural rights is his commitment to moral intuitionism. Yet moral

⁴⁶ See John Finnis, *Natural Law and Natural Rights* (1980) 85-100.

⁴⁷ Morsink, above n 27, 184.

⁴⁸ None of this is to claim that practical reasoning is contingent upon metaphysical analysis. Morsink's disavowal of 'essentialism' is not overtly motivated by a concern to carefully distinguish between practical and speculative reasoning so as to avoid objections of committing the naturalistic fallacy. Rather it is motivated by a concern to avoid discriminating against certain classes of human being.

intuitionism played little or no part in the natural rights tradition behind the UDHR and hence its acceptance as a hermeneutic key to the UDHR is *post facto* projection. The 'classical' moral intuitionists whom Morsink cites, such as David Ross (1877-1971) and Henry Sidgwick (1838-1900), had no apparent influence on the philosophical underpinnings of the UDHR. Even their precursors in the Scottish 'common sense' tradition, eighteenth century philosophers such as Thomas Reid, Francis Hutcheson and Adam Ferguson, exerted far less influence on the 'self-evident' truths contained in the Declaration of Independence than did natural rights theorists such as Grotius, Burlamaqui, Locke and Vattel.⁴⁹ Morsink passes over these facts and instead argues that the drafters implicitly accepted moral intuitionism as a theory.⁵⁰ But since moral intuitionism is solely an epistemological theory which of itself does not offer a substantive account of human rights, and that Morsink himself sees such substance as attributable to a 'capabilities approach' consonant with the natural rights tradition, then it makes more sense and is much more in keeping with the historical background to the UDHR to see natural rights, not moral intuitionism, as implicit within it.⁵¹ This is especially so given that many of the advantages Morsink sees in moral intuitionism are provided for by natural rights theory also, ie the role of conscience in attaining moral objectivity, without the acceptance of certain facets of moral intuitionism which (as Morsink acknowledges) make the theory so unpopular among philosophers, ie the claim of easy unreflective certainty over moral truth.

6. Essential characteristics of human dignity

Turning to the next conceptual foundation of the UDHR, 'dignity' is mentioned five times in the document: the Preamble (twice), Articles 1, 22 and 23(3). The first preambular paragraph states that the 'inherent dignity ... of all members of the human family is the foundation of freedom, justice and peace in the world'. Straightaway there is no doubt that dignity is understood as *inherent* in and as *universal* to all members of the human family, ie all human beings. As with human rights, universality in the context of human dignity has a triple sense: the universal truth of human dignity universal to all human beings is universally binding. The universality of human dignity to all human beings is explicitly stated in the UDHR ('all members of the human family'). The other two senses, the universal truth of human dignity as a foundation for the universally binding

⁴⁹ See Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967) 27, 43 and Ronald Hamowy, 'Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's *Inventing America: Jefferson's Declaration of Independence*' (1979) 36 *The William and Mary Quarterly* 503.

⁵⁰ Morsink, above n 27, 99.

⁵¹ Morsink calls the explicit omission of the precise phrase 'natural rights' from the 1776 Virginia Declaration of Rights, and hence the Declaration of Independence of the same year, as 'only a matter of word choice', *ibid* 20. In this sense the analogy holds for the UDHR.

character of this objective moral truth, can be inferred from the moral realist understanding of dignity contained in both the first preambular paragraph where ‘freedom, justice and peace’ are founded on the ‘recognition’ of dignity, rather than its constitution, and the fifth preambular paragraph which repeats the UN Charter’s preambular affirmation of ‘faith’ in dignity (and fundamental human rights).

Article 1 repeats the inherence view of dignity (‘born’) while confirming the *equal* dignity of all human beings: ‘All human beings are born free and equal in dignity and rights.’ Like human rights, dignity inheres in human beings ‘endowed with reason and conscience.’ The reference to ‘all’ human beings indicates that dignity is not contingent upon features common to only some human beings. Hence, dignity is *irreducible to accidental characteristics of the human being*, a point Cassin seemed to endorse when he remarked that the authors of Article 1 ‘had wished to indicate the unity of the human race’.⁵²

So far dignity shares four of the essential characteristics of human rights. But is it true to say that dignity according to the UDHR is *inalienable*? It certainly is the case that once dignity is said to be inherent in the human being *qua* human being it can be logically assumed that it is inalienable *vis-à-vis* the human being insofar as s/he continues to exist. Further, both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) affirm in their second preambular paragraphs that human dignity founds human rights; both documents presuppose the truth that human rights are inalienable and, as such, it can be deduced that only inalienable dignity can found inalienable human rights. However, the UDHR does not explicitly state that human dignity founds human rights – although it does seem to equate the two very closely. A more secure path to the claim of inalienable dignity in the UDHR is through Yehoshua Arieli’s observation that human dignity, as a core theoretical component of the UDHR, is a counter-thesis to the ideology of National Socialism.⁵³ Rights in Nazi-era Germany were completely contingent upon the state and were not understood as being in anyway inalienable.

The UDHR drafting debates themselves give further insight into the nature of dignity. The first preamble circulated was authored by John Humphrey and contained an alienable understanding of human dignity: ‘That there can be no human freedom or dignity unless war and the threat of

⁵² Morsink, above n 5, 38.

⁵³ Yehoshua Arieli, ‘The Emergence of the Doctrine of the Dignity of Man’ in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (2002) 3.

war are abolished.’ The second preamble to be circulated was authored by Cassin and contained a more entrenched understanding of human dignity: ‘...human freedom and dignity cannot be respected as long as war and the threat of war are not abolished.’ The preamble which was eventually accepted was authored by Malik and contained the phrases ‘inherent dignity’ and ‘inalienable rights’.⁵⁴ The most significant challenge posed to the inclusion of dignity during the UDHR drafting process came from the South African delegate, CT Te Water, when he proposed the replacement of ‘dignity and rights’ by ‘fundamental rights and freedoms’ in Article 1. According to Te Water there was no universal standard of dignity – a view which seemed to unite the other delegates in opposition.⁵⁵ Water was clearly uneasy about the implications the term dignity would have for the apartheid regime in his home country. Malik pointed out to Te Water that dignity was included in the UN Charter at the behest of a fellow South African, Field Marshal Jan Smuts, an inclusion which was meant to indicate the value of the human person.⁵⁶ This same understanding of dignity was prominent among the UDHR drafting delegates: in response to a further South African claim that as dignity was not a right it ought not to be included in Article 1, Eleanor Roosevelt pointed out that dignity was included to emphasise that every human being is worthy of respect (and thus to indicate why human beings have human rights in the first place).⁵⁷ Hence, the UDHR understanding of dignity is that it is indeed inalienable, as well as universal, equal to all human beings, inherent in rational human nature, and irreducible to accidental characteristics of the human being.

⁵⁴ It is probable that the word ‘inalienable’ in the UDHR has the same meaning as the word ‘inviolable’ in Article 1 of the German Basic Law of 1949. For the draft texts of the UDHR see Glendon above n 26, 271-314.

⁵⁵ Ibid 144.

⁵⁶ Smut’s original preamble referred to ‘the sanctity and ultimate value of human personality’; while the final version of the Charter preamble, amended after a committee debate, refers to ‘the dignity and value of the human person’. Ruth B Russell, *A History of the United Nations Charter: the Role of the United States, 1940-1945* (1958) does not indicate whether Smuts himself proposed these changes to his original preamble, though Malik seems to think he did. Either way, dignity, value and sanctity are interchangeable terms in the UN Charter preamble.

⁵⁷ Glendon, above n 26, 146.

7. Is the extrinsic view of human dignity compatible with the UDHR?

To what philosophical tradition of dignity does the UDHR version of the concept cohere? As with rights, it is possible to locate two broad understandings of dignity into which most, if not all, conceivable interpretations of the concept fit. Juxtaposing the terminology of Teresa Iglesias⁵⁸ and Daniel P Sulmasy,⁵⁹ these two understandings could be labelled the ‘restricted-attributed’ and ‘universal-intrinsic’ views,⁶⁰ but as these are rather clumsy terms ‘extrinsic’ and ‘intrinsic’ dignity is referred to instead.

The extrinsic account of dignity holds that dignity is attributable to a human being upon their achievement of a particular action, characteristic or state, ie attributable to something extrinsic to who they are in the most fundamental sense. As such not all human beings will possess dignity except in the most idealised of worlds. This idea of dignity was frequent in classical Roman culture where *dignitas* was understood to refer to the honour due to political offices and officials. It was also present in canon law as a term referring to the offices of the hierarchical church such as bishoprics. In both cases dignity was attached to a status considered superior to that of the human. One of the first explicit examples of the extrinsic sense of dignity outside of these two contexts also happens to be one of the most famous accounts of dignity generally: that of Pico della Mirandola (1463-94) in his *Oratio de Dignitate Hominis* (Oration on the Dignity of Man). Contrary to accepted wisdom, Pico’s oration is not a sustained examination of human dignity; indeed, the only mention of the dignity of man occurs in the title – and even it was a later addition made by Pico’s nephew – and there is only one mention of the bare term dignity, occurring in the context of a typically Renaissance optimism in the ability of the human being to achieve equality with the angels: ‘let us, incapable of

⁵⁸ Teresa Iglesias, *The Dignity of the Individual: Issues of Bioethics and Law* (2001) 6 where Iglesias distinguishes between the ‘restricted’ and ‘universal’ senses of dignity.

⁵⁹ Daniel P Sulmasy, ‘Human Dignity and Human Worth’ in Jeff E Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: a Conversation* (2008) 12 where Sulmasy distinguishes between dignity as ‘intrinsic’ and dignity as ‘attributed’.

⁶⁰ The most in-depth account of the conceptual history of human dignity is Mette Lebech, *On the Problem of Human Dignity: a Hermeneutical and Phenomenological Investigation* (2009) 29-149. A much shorter overview can be found in Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655, 656-75.

yielding to them, and intolerant of a lower place, emulate their dignity and their glory. If we have willed it, we shall be second to them in nothing.⁶¹ In this case dignity is only attained through a particular utilisation of radical voluntarism by a creature for whom everything is possible: both the basest and the most exalted of ends.

For the materialist Thomas Hobbes (1588-1679) the dignity of man is accorded to him by the sovereign on the condition of his support for the Commonwealth and absolute monarchy. If the man withholds his support he is not granted dignity, and even if he does offer his support his level of dignity presupposes the further contingency of the office he holds.⁶² The empiricist and sceptic David Hume's (1711-76) approach to dignity in *Of the Dignity or Meanness of Human Dignity* is similarly utilitarian in that Hume argues on behalf of human dignity based on its benefit to virtue and to society. Comparing human beings to other animals generates an *idea* of dignity that facilitates the cultivation of virtue.⁶³ Implicit in this approach is the understanding that those who persist in vice make the idea of dignity redundant for themselves.

These fragmentary approaches to human dignity do not belong to even a broadly linear historical tradition of thought but rather to a conceptual tradition of viewing the subject at hand in a particular way. References to dignity are much more commonplace today than they were prior to the UDHR and it would not be difficult to point to contemporary versions of the extrinsic account.⁶⁴ Of course, contemporary versions could not have been known by the drafters of the UDHR and so if they were to rely either implicitly or explicitly on the extrinsic approach to human dignity it would have been partly due to persons such as Pico, Hobbes and Hume articulating that approach in the first place. But is there anything to suggest that the drafters and the consequent text of the UDHR rely on a extrinsic sense of human dignity? When it is considered that the UDHR understanding of human dignity affirms its inalienability, universality, equality, inherence in rational human nature, and irreducibility to accidental characteristics of the human being, the answer must be in the negative.

⁶¹ As quoted in Lebech, above n 60, 89.

⁶² Thomas Hobbes, *Leviathan: with Selected Variants from the Latin Edition of 1668* (first published 1651, 1994 ed) 50-57.

⁶³ David Hume, 'Of the Dignity or Meanness of Human Nature' in Eugene F Miller, Thomas Hill Green and T H Grose (eds), *Essays: Moral, Political, and Literary* (first published 1742, 1987 ed) 80-6.

⁶⁴ Such versions are ubiquitous in debates surrounding the expression 'dying with dignity' where the loss of certain attributes is seen as involving a loss of dignity.

8. Is the intrinsic view of human dignity compatible with the UDHR?

For the philosophical precursors of the UDHR's understanding of human dignity attention must instead be focused on the tradition giving rise to the intrinsic view of the concept. The first known expression of anything approximating to human dignity in the intrinsic sense is found in Cicero's (106-43 BC) *De Officiis* ('On Duties'). Although Cicero makes extensive reference to dignity throughout his works, he only once links dignity to human nature: in *De Officiis* Cicero writes, '[f]rom this we see that sensual pleasure is quite unworthy of the dignity of man ... [a]nd 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.'⁶⁵ For Cicero, human dignity resides in man's superiority over other animals, a superiority founded on man's rational nature.

The Middle Ages saw the emergence of a Christian inspired tradition of intrinsic human dignity as a critique of the Roman focus of dignity in terms of social and political rank. The 6th century liturgical prayer *Sacramentarium Leonianum*, Boethius' (480-524) *De Consolatione Philosophiae* (On the Consolation of Philosophy), the Pseudo-Ambrose treatise *De Dignitate Conditionis Humanae* (On the Dignity of the Creation of the Human Being), and the works of Robert Grosseteste (1168-1253) each indicate in their own way an alternative to the predominant Roman conception of dignity as each proffers a view that dignity is universally intrinsic to the human substance. Whereas Cicero ascribed human dignity to rational human nature, the Christian sources buttressed this ascription by the proposition that human nature is made in the *Imago Dei*.⁶⁶

The most famous account of human dignity from within the intrinsic viewpoint is that of Immanuel Kant (1724-1804). Stoicism's influence on

⁶⁵ As quoted in Lebech, above n 60, 51-2.

⁶⁶ Thomas Aquinas clearly fits within this context, and indeed provides a remarkably sophisticated account of how dignity is intrinsic to human nature, how the human subject is essentially characterised by dignity, and even how dignity is linked to justice. However, the overall coherence of his account of dignity is significantly undermined by his claim that it is theoretically possible for human dignity to be abolished by sin, *Summa Theologiae*, IIaIIae q. 64 a. 2. Interestingly, Aquinas' contention that it is faith which affirms that the human being is made in the image of God, and hence that faith affirms human dignity, mirrors the UDHR's reaffirmation of faith in fundamental human rights and the dignity and worth of the human person.

Kant played a role in his understanding of dignity, a term he uses more frequently than Cicero ever did.⁶⁷ The different constructions of dignity employed by Kant include 'the dignity of human nature' and 'the dignity of humankind', and anytime he ascribes dignity to mankind he does so based on mankind's capacity for morality, the ability to formulate and abide by the categorical imperative – a crucial deduction of which is never to treat someone as a means but always as an end. Some reticence is required, however, when situating Kant within the intrinsic tradition of human dignity: though on one level he would certainly have thought of dignity as inhering in real human beings, his commitment to transcendental idealism, where the 'I' does not know anything outside of its own intuitions and concepts, means that his account of dignity is open to the charge of being nothing more than an epistemological construction. That Kant's view of dignity is not necessarily tied to some of the major problems associated with his transcendental philosophy is indicated by the fact that the Catholic theologian Antonio Rosmini could 'baptise' the Kantian idea of dignity for its eventual inclusion in Pope Leo XIII's social encyclical *Rerum Novarum* (1891), concerned with, *inter alia*, the innate dignity of workers being affronted by their exploitation.⁶⁸

Indeed, the broad coalescence of natural law, theistic and Kantian notions of dignity was the dominant idea of dignity at the time of the drafting of the UDHR. The US Catholic Bishops' draft 'A Declaration of Rights' (1946), the American Jewish Committee's draft 'Declaration of Human Rights' (1944), and the American Declaration of the Rights and Duties of Man (1948) all propounded an intrinsic view of human dignity and all were known to at least some of the drafters of the UDHR.⁶⁹ It is not surprising, then, that the intrinsic account of dignity is fully compatible with the essential characteristics of human dignity as outlined in the UDHR. Further, only the intrinsic view of human dignity can properly account for a genuinely *human* dignity, ie dignity proper to the human being *qua* human

⁶⁷ See Hubert Cancik, 'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero, *De Officiis* I 105-107' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (2002) 33-6. Kant's three most prominent works for his view of dignity are his *Groundwork for the Metaphysics of Morals* (1785), *Metaphysics of Morals* (1797), and *On Pedagogy* (1803).

⁶⁸ See Daniel P Sulmasy, 'Death with Dignity: What Does it Mean?' (1997) 4 *Josephinum Journal of Theology* 13.

⁶⁹ This is not to say intrinsic dignity could not be located, in inchoate form at least, in other traditions stemming from the eighteenth century. Both the feminist Mary Wollstonecraft's *A Vindication of the Rights of Men* (1790) and the socialist Pierre-Joseph Proudhon's *Of Justice in the Revolution and the Church* (1858) contain embryonic examples of the intrinsic view of human dignity.

being. This understanding of human dignity is a 'bedrock truth'⁷⁰ of morality, it is not demonstrable to the extent that it could convince amoralists or moral sceptics as to its truth. It is instructive to note that the medieval *dignitas* refers both to personal worth/value and to a non-demonstrable fundamental principle.⁷¹ Behind this there was no one Greek word for dignity. Instead, those who were dignified were the *hoi axioi* (the worthy) to whom *time* (awe) was the appropriate attitude. *Axoima* and *axia*, both translatable to *dignitas*, not only indicated worth but also a fundamental principle (ie axiom). Doubtless many of the drafters of the UDHR would not have been fully cognisant of this rather convoluted story, but the etymology of dignity does fit extremely well with defining it as the fundamental worth of the human being which lies at the foundation of human rights.⁷²

9. Inflorescent dignity: another aspect of conceptualising dignity

The discussion so far has not exhausted the meaning of dignity within either the UDHR or past and present philosophical debate. Not only does dignity as a fundamental principle help ground rights but it is also concerned with standards of behaviour and states of affairs which to greater and lesser degrees may correspond to the fundamental worth of the human being. This

⁷⁰ Iglesias, above n 58, 1-2.

⁷¹ The following account of dignity's etymology is a synopsis of the one contained in Lebech above n 60, 30-2.

⁷² Some authors have argued that the UDHR does not contain a concept of dignity with a single theoretical foundation, eg Christopher McCrudden, above n 60, 678; and Neomi Rao, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 *Notre Dame Law Review* 183, 194-5. While they are correct that no overt foundation is provided for in the UDHR text, they overlook the fact that the essential characteristics of the UDHR view of dignity as indicated by its clear textual provisions and as supported by the sporadic mentions of dignity during the drafting process do point towards a general foundation for the UDHR view of dignity: one consonant with the natural rights tradition. This is not an inconsequential point, since there is a tendency in the literature to move from the premise that no theoretical foundation for the UDHR endorsed view of dignity exists to the conclusion that there is no single meaning of the UDHR view of dignity. Instructive is McCrudden's contention that Jacques Maritain and Jean-Paul Sartre shared an equal faith in human dignity, 678. While there are overlaps between Maritain and Sartre's views on dignity the latter's absolutist emphasis on human autonomy as its ground is partially inconsistent with dignity as enumerated in the UDHR. Hence suggesting that both views equally cohere with the UDHR means either that the UDHR has an inconsistent sense of human dignity or one so utterly vague as to render it somewhat meaningless.

notion of dignity has been labelled by Sulmasy as ‘inflorescent dignity’ and it is used ‘to describe how a process or state of affairs is congruent with the intrinsic dignity of a human being.’⁷³ It is again possible to distinguish between two basic approaches to inflorescent dignity, what Isaiah Berlin in the context of political theory has described as the distinction between ‘positive liberty’ and ‘negative liberty.’⁷⁴ Positive liberty is the freedom *for* pursuit of some particular goal(s) or some particular standard(s), both of which adhere to what is considered good and reasonable. Hence, a positive liberty view of inflorescent dignity sees human dignity as requiring certain minimal standards of behaviour in order for its protection and fulfilment. Negative liberty on the other hand is nothing more than freedom *from* constraints. It is an anarchic conception of human freedom which is characterised by the understanding that autonomy is an end-in-itself. Hence, a negative liberty view of inflorescent dignity sees the operation of free agency – fettered only by minimalist respect for the freedom of others – as the proper fulfilment of dignity.

When applied to the demands made by human dignity upon human beings themselves it becomes clear that the negative liberty approach to inflorescent dignity fits uncomfortably with the intrinsic sense of human dignity. Anarchically autonomous behaviour is substantially more likely to undermine the equal dignity of all human beings through illicitly infringing on others’ rights and freedom. Further, it may even undermine the dignity of the one who acts in such a completely autonomous fashion as they may engage in activities so repugnant and degrading that it is hard to imagine how they would be in any way compatible with the fundamental moral worth of the human being (eg bestiality, self-enslavement, heroin abuse etc.) As Christopher McCrudden explains, ‘[w]here a choice-based autonomy approach to human dignity is adopted, then it would seem strange to think that it cannot be waived by the person whose dignity is supposedly in issue. To do otherwise smacks of paternalism.’⁷⁵ It would also be strange if intrinsic dignity, founded as it is on *rational* human nature, could be considered compatible with the negative freedom approach to inflorescent dignity, an approach which values the absence of constraints on human agency, including the constraints of reason on the appetitive passions.

⁷³ Sulmasy, above n 59, 12.

⁷⁴ Isaiah Berlin, ‘Two Concepts of Liberty’ in Henry Hardy and Ian Harris (eds), *Liberty: Incorporating Four Essays on Liberty* (first published 1969, 2002 ed) 166-218. Berlin’s distinction between positive and negative liberty corresponds to Deryck Beyleveld and Roger Brownsword’s distinction between human dignity as constraint (positive liberty) and human dignity as empowerment (negative liberty) in Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (2001).

⁷⁵ McCrudden, above n 60, 705.

With this in mind it is scarcely surprising that many of the major proponents of intrinsic human dignity have considered inflorescent dignity to entail positive rather than negative freedom. Two telling examples are those of Cicero and Kant. For Cicero, as mentioned earlier, human dignity requires control over one's passions. Commenting on Cicero Lebech states, '[d]ignity is not something simply had, but something one must live up to.'⁷⁶ In part two of the *Metaphysics of Morals* Kant discusses the duty to respect one's inalienable dignity, a respect which is lost whenever one fails in abiding by the categorical imperative through treating oneself as a means to an end rather than an end itself.⁷⁷ For both Cicero and Kant, then, human dignity requires of the subject of that dignity the channelling of liberty for the purpose of dignified moral behaviour: a positive liberty view of inflorescent dignity. Instructive in this regard is that Article 29 of the UDHR expressly states that rights and freedoms are not absolute and that they must be balanced with duties towards the community, and the rights and freedoms of others, whereas Article 30 states that no person has the right to destroy any of the rights contained within the UDHR, presumably including those rights accruing to the person themselves.

Of course the UDHR is addressed to states more directly than to individual citizens, and hence just as inflorescent dignity places a normative framework on individual behaviour so it does on state behaviour also. In this context the negative liberty view of inflorescent dignity again fails to cohere with the UDHR's intrinsic notion of human dignity. Mary Ann Glendon has argued convincingly about how dignitarian documents of the intrinsic type by their very nature stress solidarity and the interplay of rights and duties to an extent far surpassing the more individualist legal frameworks prevalent in the Anglo-American common law tradition.⁷⁸ The disavowal of individualism and the trumpeting of solidarity by the dignitarian tradition of Europe and South America entail a far greater openness to social and economic rights than is present in the American legal and political traditions especially. A negative liberty view of inflorescent dignity applied to the state entails a relatively non-interventionist policy stance on individual welfare. The only duty the state would have if bound by such an approach to inflorescent dignity would be to ensure minimal constraints on human autonomy, enterprise and association. It is much easier, then, to reconcile a positive liberty approach to inflorescent dignity with the social and economic rights of the UDHR, where the state has a duty to ensure a livelihood minimally worthy of intrinsic human dignity.

⁷⁶ Lebech, above n 60, 50.

⁷⁷ Immanuel Kant, *The Metaphysics of Morals* (Mary J Gregor and Roger J Sullivan eds, first published 1797, 1996 ed) 171-221.

⁷⁸ Mary Ann Glendon, 'The Dignitarian Vision of Human Rights Under Assault' (Treviso, January 17 2006).

This is especially the case with Articles 22 and 23(3), the two other occasions outside of the Preamble and Article 1 where dignity is mentioned. Article 22 states, 'Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.' Article 23(3) states, 'Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.'

10. Essential characteristics of personhood

Comparatively little scholarly attention has focused on the meaning of the concept 'person' in the UDHR as against the many works which discuss its understanding of rights and dignity. Yet, like dignity, person is mentioned five times in the UDHR: in the fifth preambular paragraph, and in Articles 2, 3, 6, and 30. The fifth preambular paragraph reaffirms 'faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women....' The phrase is borrowed from the preamble to the UN Charter and it immediately raises the question as to the identity and characteristics of the 'human person.' The mention of the term person in the preamble is the only time in the UDHR where it is qualified by the adjective 'human'. Since the UDHR is to be interpreted as a whole it is safe to assume that human person and person are equivalent terms. Beyond this the phrase indicates that the person is in possession of dignity, understood by the UDHR to be intrinsic, and is closely connected to the equality of fundamental human rights. Even at this stage it is difficult not to think that personhood and human being are intimately related.

This intuition is confirmed by Article 6 which reads, 'Everyone has the right to recognition everywhere as a person before the law.' As 'everyone' refers to all human beings without exception the UDHR accepts what Morsink has described as 'stripped down' personhood,⁷⁹ a personhood stripped down to what Anna Gear has termed in another context the 'embodied vulnerability of the human sub-stratum.'⁸⁰ There was considerable debate as to whether the reference to juridical personhood in Article 6 should be retained, with the UK and US delegations in particular reluctant to keep it (for jurisprudential and, possibly in the case of the latter,

⁷⁹ Morsink, above n 4, 230.

⁸⁰ Anna Gear, 'Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights' (2007) 7 *Human Rights Law Review* 511, 517.

domestic political reasons). However, the majority of delegates present were impressed by the arguments of Cassin and others who pointed out that personhood had been used as a legal tool for denying the fundamental rights of human beings such as Jews and black people; the article was necessary according to Cassin because 'persons existed who had no legal personality.'⁸¹ The attribution of personhood to all human beings by the UDHR is further evidenced by the other instances where the term person is mentioned as in these cases unless personhood and being human are coterminous the UDHR would explicitly remove certain undefined classes of human being from its protection. To illustrate, Article 2 reads, 'Everyone is entitled to all the rights and freedoms set forth in this Declaration ... no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs...'; Article 3 reads, 'Everyone has the right to life, liberty and security of person'; while Article 30 reads, 'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.' Indeed 'human beings' is mentioned only twice in the UDHR, in the second preambular paragraph and in Article 1, and in the latter case an earlier draft of the Article had people inserted instead – though both 'all people' and 'all human beings' accomplish the same conceptual task in Article 2 in that both avoid latent discrimination based on sex.⁸²

Since in the context of the UDHR personhood is coterminous with being human, and since persons possess inherent dignity as well as being subject to human rights (ie natural rights) protections, it can be concluded that personhood according to the UDHR shares the same essential characteristics as both dignity and natural rights, ie equally possessed by all human beings, inalienable to all human beings, universal, irreducible to accidental characteristics of the human being and inherent in rational human nature. Before moving on it is worth briefly mentioning another characteristic of personhood according to the UDHR, one it shares to some extent with the UDHR's view of inflorescent dignity, that of the

⁸¹ Morsink, above n 5, 44. Humphrey was responsible for originally making reference to juridical personality in the UDHR, see John P Humphrey, *Human Rights and the United Nations: A Great Adventure* (1984) 40. For an analysis of personhood in American law, and how it has been employed judicially to both protect and deny protection to certain classes of human beings, see David Fagundes, 'What We Talk about When We Talk about Persons: The Language of a Legal Fiction' (2001) 114 *Harvard Law Review* 1745.

⁸² Morsink, above n 4, 233-6. As well as 'human beings', 'all members of the human family' is mentioned in the first preambular paragraph. Here too an earlier draft had inserted instead 'all persons', see Morsink, above n 27, 27.

communitarian dimension to the concept. During the drafting debates Malik emphasised the primacy of the person, both an individual *and* a social being, in contrast to Roosevelt's exaltation of the 'individual.'⁸³ This relational dimension to personhood helps makes intelligible and credible the limiting functions of Articles 29 and 30 on individual freedom.⁸⁴

11. Is the Lockean view of personhood compatible with the UDHR?

As with rights, dignity and even inflorescent dignity, a conceptual analysis of personhood indicates that there are two primary and competing ways of interpreting it: what are termed here, following the thinkers who supplied the standard definition for the respective traditions of enquiry into personhood, as the Lockean and Boethian accounts of personhood. Though the Lockean philosophy of personhood appeared later by over a millennium, it is currently the more influential account of personhood within the academic community at large.

According to one reading of Locke⁸⁵ only persons – as distinct from human beings – have natural rights.⁸⁶ A person on Locke's empiricist view is classically defined in the second edition of his *An Essay Concerning Human Understanding* (1694) as a 'thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places, which it does only by that consciousness which is inseparable from thinking....'⁸⁷ Locke goes on to explicitly state that personhood ultimately consists solely of consciousness,

consciousness always accompanies thinking ... in this alone consists personal identity, ie the sameness of a rational being: and as far as this consciousness can be extended backwards to any past action or thought, so far reaches the identity of that person; it is the same self not it was then; and it is by the same self with this present one that

⁸³ Glendon, above n 26, 41-2.

⁸⁴ As Glendon notes, '[t]hough its main body is devoted to basic individual freedoms, the Declaration begins with an exhortation to act in a spirit of brotherhood' and ends with community, order, and society', *ibid* 227.

⁸⁵ A notoriously inconsistent thinker, Locke did not always make it easy for commentators to formulate a general, settled account of his philosophy.

⁸⁶ For discussions on Locke's use of personhood in the context of his moral philosophy see Gary B Herbert, *A Philosophical History of Rights* (2002) 114-20 and Ruth Mattern, 'Moral Science and the Concept of Persons in Locke' (1980) 89 *The Philosophical Review* 24.

⁸⁷ John Locke, *An Essay Concerning Human Understanding* (P H Nidditch ed, first published 1690, 1975 ed) 335.

now reflects on it, that that action was done.⁸⁸

In this view personhood is not ascribed to human beings as such, but is rather an entity's consciousness of their conscious experience. Personhood persists insofar as some memorial continuity to consciousness persists: hence theoretically the one human being may be home to a number of persons (or even none) over the course of his/her lifetime.

This account of personhood is substantially the same as the one found in Kant where 'a person is a subject whose actions can be imputed to him ... a thing is that to which nothing can be imputed.'⁸⁹ Kant bases his moral view of personhood on the more basic psychological view of personhood, where personhood entails the 'ability to be conscious of one's identity in different conditions of one's existence.'⁹⁰ Today, what has come to be known as the 'neo-Lockean' account of personhood is widely accepted in a variety of different forms.⁹¹ For instance, the noted philosopher of evolutionary naturalism Daniel Dennett has famously argued that self-consciousness, intentionality, rationality, relationality, the ability to reciprocate and verbal communication are all necessary conditions for personhood to exist,⁹² while Michael Tooley has proposed a list of seventeen properties often cited by philosophers as sufficient conditions for personhood including consciousness, the ability to experience pleasure and pain, temporal awareness, social interaction, the ability to plan a future for oneself, and moral deliberation.⁹³ These are but two examples of Lockean personhood 'checklists' and the issue of randomness can already be glimpsed from them: as Dennett himself acknowledges, 'there can be no way to set a "passing grade" that is not arbitrary.'⁹⁴

The problem the Lockean view of personhood poses for human rights in the UDHR is that it denies personhood to certain classes of human beings such as the young, handicapped, comatose, senile (and arguably even sleeping!) – a point which is enough to render it incompatible with the UDHR personhood theses of equality, universality, inalienability,

⁸⁸ Ibid.

⁸⁹ Kant, above n 77, 16.

⁹⁰ Ibid.

⁹¹ Carol Rovane defines neo-Lockianism as the view that 'to be a person is to be a series of appropriately related – i.e., psychologically related – intentional episodes', Carol Rovane, 'Self-Reference: The Radicalization of Locke' (1993) 90 *The Journal of Philosophy* 73, 76.

⁹² Daniel Dennett, 'Conditions of Personhood' in Amelie Rorty (ed), *The Identities of Persons* (1976) 175-96.

⁹³ Michael Tooley, 'Personhood' in Helga Kuhse and Peter Singer (eds), *A Companion to Bioethics* (2009) 117-27.

⁹⁴ Dennett, above n 92, 193.

irreducibility and inherence. As Rovane notes, ‘the common-sense attitudes that include infancy, senility, and interruptions of psychological life as parts of a single person’s life reflect a fundamentally unLockean point of view, one which conflates “person” and “human being.”’⁹⁵ There is potentially another problem with Lockean personhood from the point of view of the UDHR, at least in relation to how Locke himself understood it. Locke defines personhood without any reference to sociability and relationality. His is a thoroughly individualistic view of personhood, a view which fits comfortably with the common depiction of Locke as an important figure in the traditions of economic and ethical individualism. Thus Lockean personhood, by itself, would seem to have some difficulty in justifying the limiting functions of Articles 29 and 30 of the UDHR on individual freedom. Of course, the question of whether proponents of Lockean personhood are logically committed to such pronounced individualism is a matter separate from the historical connection between the two, and moves by contemporary proponents of Lockean personhood to include characteristics such as relationality and reciprocity among the necessary conditions for personhood go towards dispelling notions of such a logical commitment (though such notions will presumably find sustenance in a personhood founded on *self*-consciousness).

12. Is the Boethian view of personhood compatible with the UDHR?

Boethius was not the first thinker to make use of the term ‘person.’⁹⁶ The Latin word *persona* was a translation of the Greek theatrical term *prosopon*, the latter meaning mask (worn *pros opon*, ‘before the face’), whereas the former came to mean, again in the context of drama and theatre, a role or character (*per sonare*, ‘to sound through’).⁹⁷ To this foundation the Romans

⁹⁵ Rovane, above n 91, 77. Commenting on neo-Lockian accounts of personhood Jenny Teichman states, ‘[m]uch recent philosophy, on the other hand, if put into legislation, would have the effect of reducing the area of rights by reducing the number of human beings who count as persons: thus exemplifying the way in which liberal premises can sometimes lead to anti-egalitarian conclusions.’ Jenny Teichman, ‘The Definition of Person’ (1985) 60 *Philosophy* 175, 179.

⁹⁶ For an anthropological history of the term see Marcel Mauss’ famous essay, ‘A Category of the Human Mind: the Notion of Person; the Notion of Self’ in Michael Carrithers, Steven Collins and Steven Lukes (eds), *The Category of the Person: Anthropology, Philosophy, History* (first published 1938, 1985 ed) 1-25.

⁹⁷ The masks worn by ancient actors were not intended to hide the identity of the actors but instead to portray the identity of the theatrical characters, see Aldo Tassi, ‘Person as the Mask of Being’ (1993) 37 *Philosophy Today* 201, 201.

added a juridical and moral layer, much like our understanding of personhood, whereby a person is an individual with legal standing or an individual who ought to be recognised before the law. Though personhood to the Romans was intimately linked to being human, slaves were excluded.

It was not until the Christological debates of the fourth and fifth centuries that the concept assumed an explicitly defined ontological character. These debates on the unity of the triune God and the manner in which human nature came to be united to divine nature in Jesus Christ relied ultimately on a definition of personhood. The theatrical and legal connotations of personhood proved a fruitful point of departure for theological reflection because they already suggested distinct, individual and rational identity.⁹⁸ The Council of Chalcedon (451) resolved the dispute over the tri-unity of God and the unity of the human and divine in Christ by turning to *prosopon* as a vehicle for making intelligible how Christ's dual nature could be instantiated in a distinct and irrepeatable individual (one person, two natures), and how a triune God of three persons could inter-relate closely enough so as to avoid the charge of polytheism.⁹⁹ From the outset, then, the ontological view of personhood encapsulated individuality, life, rationality (possessed analogously by both God and human beings), and relationality (of relevance to the communitarian dimension to the UDHR – 'spirit of brotherhood').

It was in the aftermath of the Chalcedon council, while ecclesial debate concerning its deliberations was still ongoing, that Boethius entered the fray to provide a concise definition of the concept of person in response to what he saw as prevalent misunderstandings. In *Contra Eutychen et Nestorium* (*Against Eutyches and Nestorius*: c. 512) Boethius responds to the eponymous thinkers who have completely conflated personhood with nature by offering definition of a person as a '*naturae rationalis individua substantia*' – 'an individual substance of a rational nature.'¹⁰⁰ This formula,

⁹⁸ Joseph W Koterski, 'Boethius and the Theological Origins of the Concept of Person' (2004) 78 *The American Catholic Philosophical Quarterly* 203, 206.

⁹⁹ It is plausible to think that this early emphasis on relationality in the Boethian version of personhood helps make the concept more amenable to interrelationality and sociability than the self-consciousness of Lockean personhood. Perhaps a phenomenological re-working of Lockean personhood could overcome this potential shortcoming, one stressing that consciousness of self is constituted by consciousness of others.

¹⁰⁰ Anicius Manlius Severinus d Boethius, 'Against Eutyches and Nestorius' in Hugh Fraser Stewart, Edward Kennard Rand and Stanley Jim Tester (eds), *The Theological Tractates: The Consolation of Philosophy* (1973 ed) 85. I am grateful to Eamonn Gaines for sharing with me his expertise on Boethius.

which Aquinas accepted with some minor tweaking,¹⁰¹ was the primary philosophical understanding of personhood up until the time of Locke. Though Boethius' definition was clearly born of a theological context it has been historically, and can be logically, applied to the specific issue of human personhood. In this regard it shares an interesting similarity with Locke's definition: Locke's concept of personhood was partly developed through a philosophical attempt to legitimise the Christian dogma of personal identity and moral responsibility before divine judgement¹⁰² – though of course this did not prevent Lockean personhood from exerting such a formative influence on legal and ethical theory thereafter.

The Boethian understanding of personhood differs from the Lockean understanding in two important respects. First, it provides personhood with a concrete ontological basis in the very existence of an individual being rather than in consciousness or other epistemic activities. Related to this feature is the impossibility of attributing Boethian personhood to corporate entities such as companies, and of an individual being ever being more than one person throughout their existence (whereas a schizophrenic could possibly be two persons in the Lockean sense). The second relevant difference relates to how rationality is understood. On the Lockean view, rationality is a condition for personhood once it is presently actual or, at the very least, the state of rationality is potentially actual at any given instant, ie irrational thoughts can potentially change to rational thoughts at any given moment. But on the Boethian view (and the Thomist view – both are Aristotelian in this regard), what defines an individual substance as having a rational nature is its essential potentiality to be rational; Christopher Megone puts it succinctly,

any member of a natural kind has a nature that is its essence, and the essential properties of that natural substance are a set of potentialities – the particular set

¹⁰¹ Koterski, above n 98, 222-4.

¹⁰² See Bert Gordijn, 'The Troublesome Concept of the Person' (1999) 20 *Theoretical Medicine and Bioethics* 347, 349-54. Gordijn argues that 'person' is a redundant concept in bioethical debates in that it is merely a 'cover-up' for more substantial moral categories. In this regard Gordijn's argument is parallel to Ruth Macklin's treatment of dignity in Ruth Macklin, 'Dignity Is A Useless Concept: It Means No More Than Respect For Persons Or Their Autonomy' (2003) 327 *British Medical Journal* 1419-20. Both Gordijn and Macklin pay insufficient attention to the historical dimensions to the respective terms and the consequent competing conceptual understandings of same. In failing to do so they both lose sight of the distinctive and original meanings of the terms in question, and of the possibility for analysing how these meanings fit within competing legal and moral philosophies.

that plays a role in the teleological explanation of that substance's behaviour. In the case of any member of a species, what makes it the thing it is – a member of that kind – is its instantiation of this set of potentialities.¹⁰³

As Megone goes on to argue, such a view explains why a three-legged horse is still a horse: such a horse instantiates the essential potentialities of a horse but has failed to actualise all that would be actualised by the paradigm member of the horse-kind.¹⁰⁴ Hence the Boethian view explains why the comatose, very young, senile, mentally handicapped etc are all persons: they all instantiate the essential potentialities characteristic of personhood, they are all individual substances whose nature is to be rational – even if, for whatever reason, none of them are fully rational presently.

Since on the Boethian view all human beings are persons, in marked contradistinction to the Lockean view, it follows that the UDHR understanding of personhood is implicitly Boethian rather than Lockean: personhood is inherent in rational human nature, inalienable, equal to all human beings, irreducible to accidental characteristics of the human being, and universal to all human beings as a universally binding universal moral truth. It comes as no surprise, then, to learn that the dominant concept of personhood at the time of the drafting of the UDHR seems to have been the Boethian version, as exhibited by the US Catholic Bishops' draft 'A Declaration of Rights' (1946), the American Jewish Committee's draft 'Declaration of Human Rights' (1944), and the American Declaration of the Rights and Duties of Man (1948).¹⁰⁵

13. How do human dignity and personhood interrelate with each other and with human rights?

This article has sought to show that human rights, human dignity and personhood possess the same essential characteristics. Yet so far little has

¹⁰³ Christopher Megone, 'Potentiality and Persons' in Mark G Kuczewski and Ronald M Polansky (eds), *Bioethics: Ancient Themes in Contemporary Issues* (2002) 162. Teichman puts it in less technical language, 'in order to count as a person an individual creature need not itself be actually rational, as long as it belongs to a rational kind.' Teichman, above n 95, 182.

¹⁰⁴ Ibid.

¹⁰⁵ See Klaus Dicke, 'The Founding Function of Human Dignity' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (2002) 113. A contemporary proponent of Boethian-type personhood is the Thomist Joseph Torchia. See Joseph Torchia, *Exploring Personhood: An Introduction to the Philosophy of Human Nature* (2008).

been said by way of the interrelationship between these three concepts in the UDHR. Before concluding it is worthwhile to offer a preliminary examination of such an interrelationship, especially since the relationship between dignity and personhood in the context of the UDHR is very much a neglected topic.

On the one occasion where dignity and personhood are mentioned together in the UDHR, the preamble's recital of the 'dignity and worth of the human person', it is a clear emphasis (dignity *and* worth) of the fundamental value of human personhood. As both the preamble and Article 1 make reference to the dignity of all members of the human family/all human beings, personhood parallels humanity in relation to dignity: human dignity is one and the same thing as personal dignity according to the UDHR. If such a parallel is not to be empty tautology then it would have to add somehow to the meaning of the UDHR. Arguably the most satisfactory explanation available is that personhood offers a moral and metaphysical emphasis or gloss to the basic biological expression 'human being'. What does it emphasise? That which separates this being from others: its rational nature. It is this rational nature that explains and is at the basis of the dignity inherent in human nature: rational nature is an inherently dignified (valuable) nature.¹⁰⁶ Human dignity, then, is the value attributable to the human being on account of the type of being he/she is, a being with a rational nature or, in another word, a person. The rational nature indicative of personhood is essential to what makes a human being the type of being it is and consequently what distinguishes it from others beings that lack such a profound dimension to their existence. No doubt there is a metaphysical dimension to this understanding of personhood but this is completely in accord with Cassin's reminder during drafting that persons existed who had no legal personality – ie that the personhood relevant to the field of human rights was not a legal fiction, like, say, corporate personality, but a fundamental reality about the human being to the effect that all human beings are equally valuable on account of their essential nature. Malik reminded his colleagues during drafting that the term used in the UN Charter for the value of the human person was 'dignity', while Roosevelt pointed out that human dignity was the reason why there were human rights in the first place.

It is no coincidence that the traditions of intrinsic dignity and Boethian personhood contain a very similar picture of the relationship

¹⁰⁶ Mette Lebech speculates that "[h]uman dignity" probably became part of current usage at the same time and for the same reasons as the expression "human person", ie to designate the fundamental value or importance of the human individual as such. The 1948 *Universal Declaration of Human Rights* testifies to the currency of both terms....' Lebech, above n 60, 27.

between the two concepts in question. According to Cicero the dignity of human nature resides in the *persona* (role) of reason as a characteristic of the human being that separates him/her from other animals.¹⁰⁷ The aforementioned *De Dignitate Conditionis Humanae* (On the Dignity of the Creation of the Human Being) postulates a triple dignity inherent in the human being corresponding to the three powers of the soul, intellect, memory and will, and analogous to the three persons in the one God.¹⁰⁸ Alongside endorsing the Boethian definition of personhood as an individual substance of a rational nature, Aquinas also cites approvingly the definition of person as a subject (*hypostasis*) ‘distinct by reason of dignity’,¹⁰⁹ a distinction which Aquinas links with the subject’s rational nature. Contemporary theorists sympathetic to these traditions of enquiry hold a similarly interrelated view of dignity and personhood: according to Patrick Lee and Robert George,

[a]lthough there are different types of dignity, in each case the word refers to a property or properties – different ones in different circumstances – that cause one to excel, and thus elicit or merit respect from others. Our focus will be on the dignity of a person or personal dignity. The dignity of a person is that whereby a person excels other beings, especially other animals, and merits respect or consideration from other persons. We will argue that what distinguishes human beings from other animals, what makes human beings persons rather than things, is their rational nature.¹¹⁰

This account of the relationship between personhood and dignity fits perfectly with the (albeit implicit) account contained within the UDHR.

Even though the UDHR, unlike both the ICCPR and the ICESCR, does not explicitly recognise that human rights ‘derive from the inherent dignity of the human person’, ie recognise that human rights are founded on dignity and personhood, it is clear the source document of the contemporary human rights corpus does envisage an exceptionally close, symbiotic and mutually reinforcing relationship between the concepts of human rights, human dignity and personhood. Hence what is almost explicit in the UDHR is made fully explicit in the ICCPR and ICESCR’s recognition that human rights ‘derive from the inherent dignity of the human person’. With this in

¹⁰⁷ See Cancik, above n 67, 19-25.

¹⁰⁸ See Lebech, above n 60, 66-8.

¹⁰⁹ *Summa Theologiae*, Ia q. 29 a. 3.

¹¹⁰ Patrick Lee and Robert P George, ‘The Nature and Basis of Human Dignity’ (2008) 21 *Ratio Juris* 173, 174.

mind it is not surprising that all three concepts should share the same essential characteristics.

Conclusion

It comes as no surprise to learn that human rights, human dignity and personhood, which are so intimately linked in the text of the UDHR share the same essential characteristics. Indeed if these concepts did not share so much in common it would pose a significant threat to a holistic interpretation of the UDHR, and to human rights instruments generally in as much as they are founded on the UDHR. That the conceptual background to these three core ideas is so complex, long and possibly even out of synch with the contemporary philosophical *Zeitgeist* may cause some to disregard attempts at its analysis as esoteric, self-indulgent and ultimately inconsequential. Yet the practicalities of human rights are not dissociable from their philosophical meaning and as such meaning is easily forgotten or obscured, reminders and analysis should be welcomed by all – from those concerned with conceptual truth to those primarily concerned with the just application of human rights. The importance of this point is heightened when one considers the emergence of new fields of human rights application such as bioethics, where all three concepts under discussion in this article are critical, and environmental law, where the same is potentially the case also. Further, in the field of comparative constitutional law the concept of human dignity is being cited more and more by judges just as scholars collectively lament its supposed indeterminacy: much could be gained by turning again to the moral truths presupposed and enshrined in the UDHR, especially since judicial reference to dignity is so often framed in accordance to dignity's relation to the human person.

The collective meaning of the three concepts treated in this article, a meaning inseparable from the idea of objective moral truth, should caution theorists attempting to co-opt human rights within a preconceived relativistic framework. Such attempts are more and more prevalent in a world where the objective moral basis for human rights has never been less accepted and where the political utility of human rights has never been more lauded. Yet in a rush to reaffirm the objective morality at the heart of the UDHR it is vital to take objections to such objectivity seriously. This is the one failing of Morsink's human rights scholarship; his endorsement of moral intuitionism tends to undermine somewhat his otherwise brilliantly clear elucidation of the philosophical meaning of inherent human rights. While this article has critiqued Morsink on this point it has only offered broad indications of what a convincing rationale for inherent human rights looks like. The focus has been more on conceptual coherency than on

substantive moral theory. Attempts at the latter will hopefully benefit from the emphasis on conceptual consistency here.