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Why human dignity is *not* an *essentially contested concept*

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When W.B. Gallie first observed that there is a certain kind of concepts the meaning of which is always disputed, he suggested that such concepts neither can nor should be defined, for the everlasting disagreement over their meaning is both innate and vital to their very use.[1] Though Gallie coined the notion of *essentially contested concept* and developed criteria for essential contestedness with specifically socially constructed concepts in mind, ever since 1955 the idea has been examined by scholars in wide variety of contexts and "has run wild"[2] outside of Gallie's original proposal.[3] Given the charge against the concept of human dignity as incurably vague and indeterminate, it can be tempting to label it as *essentially contested* as well, for it relieves the concept and those attempting to delineate its meaning from the pressures of legal certainty in the form of a definition.[4] However, the idea of a potentially *essential contestablity* of the concept of human dignity carries within significant implications for the concept's quest for universality in the framework of international human rights law due to the unrestricted

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[1] Walter Bryce Gallie, "Essentially Contested Concepts", *Proceedings of the Aristotelian Society* Vol. 56 (1955-1956), pp. 167-198.
[2] Jeremy Waldron, "Is the Rule of Law and Essentially Contested Concept (In Florida)?", *Law and Philosophy* Vol. 21 (2002), p. 149.
[3] For the theory on essentially contested concepts in general, see: David Collier, Fernando Daniel Hidalgo and Andra Olivia Maciuceanu, "Essentially contested concepts: Debates and Applications", *Journal of Political Ideologies* Vol. 11, No. 3 (2006), pp. 211-246. For a more focused discussion in relation to specific concepts, see: John N. Gray, "On the Contestability of Social and Political Concepts", *Political Theory* Vol. 5, No. 3 (1977), pp. 331-348, also John N. Gray, "On Liberty, Liberalism and Essential Contestability", *British Journal of Political Science* Vol. 8, No. 4 (1978), pp. 385-402; Christine Swanton, "On the "Essential Contestedness" of Political Concepts", *Ethics* Vol. 95, No. 4 (1985), pp. 811-827; Kenneth M. Ehrenberg, "Law is Not (Best Considered) an Essentially Contested Concept", *International Journal of Law in Context* Vol. 7, Issue 2 (2011), pp. 209-232; Jeremy Waldron, "The Rule of Law as an Essentially Contested Concept", *NYU School of Law Public Research Paper* No. 21-15 (2021); also Jeremy Waldron, "Is the Rule of Law and Essentially Contested Concept (In Florida)?", *Law and Philosophy* Vol. 21 (2002), pp. 137-164.
[4] See for an example of the application of Gallie's theory for the case of human dignity in: Philippe-André Rodriguez, "Human dignity as an essentially contested concept", *Cambridge Review of International Affairs* Vol. 28, Issue 4 (2015): pp. 743-756.

relativism and unlikely de-contestation that Gallie's theory implies, and therefore should not be pursued further.

The intention of this short paper is to, firstly, briefly discuss the general problematics that human dignity implies as a legal concept, whereby its omnipresence in human rights law is unmistakable, while its authoritative definition is lacking. Secondly, Gallie's proposal on *essentially contested concepts* will be looked at as a potential escape route in the search for the concept's definition in international arena. Thirdly, the shortcomings of Gallie's theory will be underlined to demonstrate why the concept of human dignity cannot and should not be considered as *essentially contested.*

The puzzle of human dignity as a legal concept in international human rights law

The concept of human dignity is undeniably at the forefront of international human rights discourse ever since the upsurge in the process of codification of human rights law after World War II. So much so that in 1986, when setting standards on the drafting of human rights instruments in the future, the UN declared that any such developments shall "derive from the inherent dignity and worth of the human person"[5]. Importantly, that declaration goes hand in hand with the traditionalist conception of human rights, whereby human dignity is the source of human rights.[6] Today, we find references to human dignity in most international human rights instruments, a token of the concept being a standard ingredient of human rights vocabulary.[7] However, despite this grounding paradigm of human rights deriving from the inherent dignity of a human person, the concept of human dignity is not defined at the international level, thus leaving the reader of international human rights law the challenging

[5] UNGA, Resolution 41/120 "Setting international standards in the field of human rights" (1986). Available on: https://undocs.org/A/RES/41/120.

[6] It also echoes the text of the shared Preambles of the ICCPR and ICSECR whereby human rights are proclaimed to "derive from the inherent dignity of the human person".

[7] Examples include: the Preamble of the Supplementary Convention to the Slavery Convention, which reaffirms "faith in the dignity and worth of the human person"; the Preamble of the Convention on the Rights of the Child, where the necessity for bringing up a child in the spirit of dignity is emphasized; the Convention on the Rights of Migrant Workers, which stipulates that all migrant workers "shall be treated with humanity and with respect for the inherent dignity of the human person" in its Article 17; and the Convention on the Rights of Disabled Persons, which in its Article 1 sets as the purpose of the document the promotion of respect for the inherent dignity of persons with disabilities.

task of interpreting the concept without any authoritative definition. Because of the heterogeneity of the concept of human dignity, it has notoriously attracted criticism for the problematics its indeterminate meaning causes for the concept's legal use. Suggesting that human dignity is "just a sonorous word"[8], a "useless concept"[9] or one completely devoid of any meaning and used when people "want to sound serious but are not sure what to say"[10], generally speaking, such dignity scepticism misrepresents the picture of dignity jurisprudence. That being said, criticism of that sort cannot be completely brushed aside, as it taps into a valid point regarding the plasticity of the concept and its lack of conformity to a single definition. Thus, when Steven Pinker infamously claimed that the notion of human dignity "remains a mess"[11], he was not utterly wrong, for the dignity picture indeed may seem chaotic as the concept fulfils different functions and exhibits varying substantive contents in different legal systems resulting in diverse dignity jurisprudence across the globe.

This lack of uniformity in the concept's interpretation, however, is a virtue. Throughout the arduous process of setting in place the framework on international human rights law, it has been exactly this malleability of the concept to varying interpretations that has helped to pave the way towards a consensus in contexts where profound political and ideological divisions existed. More specifically, the role that the concept of human dignity played in the process of drafting the text of Article 1 UDHR is exceptional: it served as the reference to the common willingness to jumpstart the establishment of an international commitment to the protection of human rights, while leaving enough space for all the parties involved to identify with that commitment in line with their particular worldviews. True, at first it is a challenge to make sense of the way human dignity is *not* defined in the UDHR at least to some extent, given the broader context of the very idea to draft such a document in the post-WWII reality in the first place, and given that several key drafters themselves claimed the necessity to give meaning to the notion of through the text of the Declaration.[12] Nevertheless, the final text is silent on the meaning of

[8] Jeremy Waldron, "How Law Protects Dignity", *Cambridge Law Journal* Vol. 71, Issue 1 (2012): p. 201.
[9] Ruth Macklin, "Dignity Is a Useless Concept", *British Medical Journal* Vol. 327, Issue 7429 (2003): p. 1420.
[10] Waldron*, How Law Protects Dignity*, p. 201.
[11] Steven Pinker, "The Stupidity of Dignity", *Human Life Review* Vol. 34, Issue 2 (2008): p. 79.
[12] When discussing the purpose of the Declaration, Charles Malik, one of the leading drafters, underlined that: "It could be said that the Commission was called upon to finish the work initiated by the Charter, in giving content and meaning to the phrase "the dignity and worth of the human person"" (See: UN Commission on Human Rights, E/CN.4/SR.50 (1948), p.4, available on: https://undocs.org/E/CN.4/SR.50). Similarly, Pen Chun Chang, another key drafter, insisted that the Preamble of the Declaration should set forth the philosophy that the document is

human dignity, or at least we do not find an explicit reference to what the concept's substantive meaning entails. The answer to this puzzle hides in the fact that the role of the concept in the process of drafting the Declaration could be seen as serving the function of a placeholder that "facilitate[d] a practical agreement between representatives of opposing ideologies"[13]. Because the notion of human dignity "could appeal to people of various ideological backgrounds without forcing them to compromise basic principles"[14] its vagueness was in no way an obstacle, rather, an advantage. In the end, it was exactly the under-theorization and imprecision of the concept that was conducive of the adoption of the document as a whole.[15] For the success of the initiative of an international regime of human rights some form of a theory of human rights was a needed, and the reference to the concept of human dignity served to mitigate the costs of the situation where a clear consensus on that theory was unfeasible by allowing those taking part in the process to insert their own theory.

Consequently, the perhaps single most important reference to human dignity in codified international human rights law is silent on the substance of the concept; even more, it has been deliberately left undefined. The success of the concept of human dignity, at least within the debates during the early codification of international human rights law after WWII, is a consequence of the very plasticity of the concept that is so often criticized as deeming it useless. If anything, the ability of the concept to serve as somewhat of a placeholder should be read as a signal that it is most certainly far from empty, but rather incredibly rich in the set of values and interests it calls for. This dynamism should not discourage us from seeking the common, the shared, the collective understanding of what the concept of human dignity stands for in the context of human rights jurisprudence. Admittedly, there are many blank spots in its theorization when it comes to its function as a legal concept, especially so when it comes to "hard cases" where dignity claim can be used to further diametrically opposite assertions, e.g. on questions relating to beginning-of-life and end-of-life matters. However, as famously

founded upon by establishing a standard "with a view to elevating the concept of man's dignity and emphasizing the respect of man" (See UN Commission on Human Rights, E/CN.4/SR.7 (1947), p.4, available on: https://undocs.org/E/CN.4/SR.7).

[13] Doron Shulztiner and Guy E. Carmi, "Human Dignity in National Constitutions: Functions, Promises and Dangers", *The American Journal of Comparative Law* Vol. 62, No. 2 (2014), p. 472.
[14] *Ibid*, pp. 471-472.
[15] Pawel Lukow, "A Difficult Legacy: Human Dignity as the Founding Value of Human Rights", *Human Rights Review* Vol. 19 (2018), p. 319.

demonstrated by Christopher McCrudden, a careful study on dignity jurisprudence across the globe already illuminates at least three elements that undoubtedly form part of a transnational understanding of what the concept of human dignity entails.[16] Firstly, it is an ontological claim embodying the intrinsic worth of every human being for no other reason than simply being human; secondly, it is a relational claim that commands certain forms of treatment to be incompatible with the respect and recognition that human dignity requires; and, thirdly, it is also a claim that limits the state vis-a-vis the individual human being thus prescribing a certain type of a relationship between the two. True, these three formulations can be regarded as too open and vague and thus used to argue that there indeed is no transnational concept of human dignity, as eventually did McCrudden, but they can also be viewed as the frame within which the substance of the transnational consensus on what a concept of human dignity certainly does comprise can be sought. That overlapping understanding of human dignity marks the limits of the concept of human dignity pertaining to the international community that is still in the process of formation, despite the concept's separate constitutional uses being manifestations of sometimes very different conceptions of human dignity.

Cognizant of the problems that the use of the legal concept of human dignity entails both in terms of its varying functional use in different legal systems and its undoubtedly elastic substantive content, the realization that there is no single concept of human dignity currently in place is straightforward. An unsurprising thought that arises next is that maybe such a concept does not exist because it is simply unfeasible to have one, that perhaps the disagreement as to the content of the concept is innate to the concept itself. It is here that Gallie's theory of *essentially contested concepts* comes in, as it addresses exactly the kind of concepts the meaning of which can never be settled definitively, for the debate over their meaning is inherent in the meaning of the concept as such.

Gallie's *essentially contested concepts*

[16] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", *European Journal of International Law* Vol. 19, No. 4 (2008), pp. 679-680.

The concepts that Gallie's theory seeks to address are those that normally attract disagreement about their proper use and, moreover, when the different uses as applied in the arguments are examined, it becomes clear that "there is no one clearly definable general use of any of them which can be set up as the correct or standard use."[17] Importantly, even when the variety of uses of a given concept is disclosed it does not bring the dispute to an end, because:

> "Each party continues to maintain that the special functions which the term (..) fulfills on *its* behalf or on *its* interpretation, is the correct or proper or primary, or the only important, function which the term in question can plainly be said to fulfill."[18]

That is to say, the different uses of the concept at hand generate, in effect, an endless dispute over the meaning of the concept, as each party to it persists to justify its use with "perfectly respectable arguments and evidence"[19].

Gallie initially put forward five characteristics for a concept that is *essentially contested.* Firstly, the concept designates a positive achievement of some sort and thus possesses strong normative value. Secondly, the said achievement is internally complex and consists of various components that have no set relative order between themselves. Thirdly, because of the several components at hand, which can be ranked diversly, the concept can be diversely describable.[20] It is within the combined result of the first two conditions proposed by Gallie that the crux of the idea of different conceptions of the same concept emerges: each of the uses of an *essentially contested concept* – its particular conception – is a specification of the concept at play. The rival conceptions retain the link to the concept as they necessarily refer to a common content of the concept, but not to a specific original structure, because, importantly, there is none. The link that ties together the differing conceptions to each other and the concept itself is that "the "common element" [of the concept] is described in a manner sufficiently broad to be susceptible

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[17] Gallie, "Essentially Contested Concepts", p. 168.
[18] Gallie, "Essentially Contested Concepts", p. 168.
[19] *Ibid*, p. 169.
[20] The conditions of internal complexity and diverse describabilty can be read together as they are necessarily interrelated. It is precisely because of the variety of features that comprise the total worth of the concept that such a concept can be diversly described. In other words, any attempt to explain or define a concept that is *essentially contested* will involve reference to its different components in a way that arranges them distinctly as to their relative importance against each other, and as such, "there is nothing absurd or contradictory in any one of a number of possible rival descriptions of [the concept's] total worth, one such description setting its component parts or features in one order of importance, a second setting them in a second order, and so on" (*Ibid*, p. 172.).

of a number of interpretations"[21]. Fourthly, the valued achievement represented by an *essentially contested concept* is open to revision over time: Gallie notes that such a concept entails an innate permission of "considerable modification in the light of changing circumstances"[22], and that such modifications can neither be predicted nor prescribed ahead of time for the specific meaning of an *essentially contested concept* is subject to periodic revision in new contexts. Fifthly, the particular uses of the concept are employed aggressively and defensively in a discussion over its meaning. In that regard, Gallie presumes that those involved in the dispute over the meaning of an *essentially contested concept* are aware of the concept's meaning being contested and recognize the fact the concept can be read in multiplicity of ways by their adversaries. In short, this condition can be read as presupposing an *essentially contested concept* to have an "irreducible agonistic character"[23]. On top of these five conditions, Gallie adds two further conditions in order to "distinguish the essentially contested concept from the kind of concept which can be shown, as a result of analysis or experiment, to be radically confused"[24], namely, the existence of a paradigmatic original exemplar of the concept at hand and what Gallie named the condition of *progressive competition*. As such, these final two conditions seek to ensure that when an *essentially contested concept* is at play "a genuine case of polysemy is at issue rather than an uninteresting case of homonymy"[25].

When going through Gallie's suggested conditions for *essentially contested concepts* one by one, the concept of human dignity seems to fulfill each and every one of them. There is no doubt that human dignity is a normative concept, that it is internally complex and diversely describable. Similarly, the openness of the concept is evident, if only one thinks of the twists and turns that its meaning has taken through time from denoting simply a status and reputation in Roman thought, to human dignity transpiring through the image of God in Catholic thought, to the radical shift towards an egalitarian idea under the UDHR. The use of the concept can certainly be characterized as aggressive and defensive, especially in human rights jurisprudence where it is often applied in an all-or-nothing manner as a trump over its competing interests.

[21] Swanton, "On the "Essential Contestedness" of Political Concepts", p 812.
[22] Gallie, "Essentially Contested Concepts", p. 172.
[23] Tullio Viola, "From Vague Symbols to Contested Concepts: Peirce, W.B. Gallie, and History", *History and Theory* Vol. 58, Issue 2, p. 247.
[24] Gallie, "Essentially Contested Concepts", p. 180.
[25] Barry Clarke, "Eccentrically Contested Concepts", *British Journal of Political Science* Vol. 9, No. 1 (1979), p. 123.

Only the last two conditions, namely, that of an original exemplar and progressive competition are less clear-cut both in general in Gallie's theory and in specific when applied to the case of the concept of human dignity.

The implications of de-contestation and radical relativism

In many respects the theory of *essentially contested concepts* remained under-theorized by Gallie himself, which deems the theoretical complications stemming from his original account on *essential contestability* rather difficult to engage with. Two such problematic points in question are, firstly, the idea of de-contestation of an *essentially contested concept* and, secondly, the question of radical relativism, both of which were neither endorsed nor explicitly rejected by Gallie himself but are troublesome for the theoretical vigor of Gallie's theory at large, and the case of its application to the concept of human dignity, in particular. These theoretical conundrums seem to mainly arise from the controversial condition of *progressive competition,* which implies some form of an eventual resolution of the debate over the meaning of the concept. If that is not what Gallie had in mind, then why else would the condition of an ever-advancing contestation be of use, that is, why use an axis of progression when he could have just as easily conceded to the faith of *essentially contested concepts'* static insolvability, if not for the sake of hinting towards some form of de-contestation down the road? Now, a strong form of de-contestation in the shape of a resolution of the disagreement through the adoption of one specific *correct* conception of an *essentially contested concept* renders the whole idea of *essential contestability* obsolete. Quite simply, once we concede to the fact that there is one *correct* conception of an *essentially contested concept*, it can no longer be considered as *essentially contested* in the original sense of the notion: it is clearly no more a case of *essential contestability* as "a final answer is now available"[26]. Ultimately, the view that behind every *essentially contested concept* there is a defined, agreeable, uncontested concept is inconsistent with Gallie's

[26] Eugene Garver, "Essentially contested concepts: the ethics and tactics of argument", *Philosophy and Rhetoric* Vol. 23 (1990), p. 252.

main thesis.[27] Either such an agreement exists, or it does not, but it cannot both exist and not exist at the same time.[28] To be sure, one might suggest that the de-contestation of an *essentially contested concept* does not necessarily have to happen because there is one, *correct* conception waiting somewhere to be discovered, but rather because some form of a temporal closure, narrowing down of the concept takes place purely practically, say, through jurisprudence. Does that mean that such concepts are therefore not truly *essentially contested*? Or do such practical temporal closures of the openness of *essentially contested concepts*, for instance through international legal agreements, bear no relevance upon the *true* nature of an *essentially contested concept* as it is only a temporal closure on paper? It is confusing at best and fatal for the whole proposal at worst to admit that a concept that bears the status of *essentially contested* à la Gallie's original proposal could ever truly lose this status, once recognized to have it. No de-contestation, be it full or partial, can be consistent with the idea of *essential* contestability. To claim otherwise is to inject Gallie's proposal with theoretical rigor it was never equipped with in the first place.

As for the accessory radical relativism that Gallie's theory implies, it is straight-forward: the status of *essentially contested concept* by definition entails relativity in the meaning of the concept, since there is no way of delineating just one conception of an *essentially contested concept* as the *correct* one and any conception is valid as long as a sufficiently recognizable connection to the broader concept is retained. Upon closer look, however, the implications of relativism are much more nuanced. Conceding to profound relativism as part of the theory is required if one is to uphold the basic premises of Gallie's account: making sense of the idea of *essentially contested concepts*, which by its definition involves any one idiosyncratic usage of a concept of that nature to be as valid as any other its idiosyncratic usage, is only possible "at the cost of introducing a radical relativism into all discourse using such disputable concepts"[29].[30]

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[27] Gray, "On Liberty, Liberalism and Essential Contestability", pp. 390-391.

[28] In a similar vein, the view that there is one conception of an *essentially contested* concept that is the *correct* one and therefore bound to be found superior to the rest sooner or later, is also inconsistent with Gallie's main premise, whereby, from the outset, the various describability of an *essentially contested* concept allows for a myriad of conceptions with no set order of relevance between them.

[29] Clarke, "Eccentrically Contested Concepts", p. 125-126.

[30] By extension, the lack of rational argument in the toolbox of defining the meaning of an essentially contested concept and the concept's norm-dependency (which follows Gallie's condition of appraisiveness), can be said to rest largely on the acceptance of theories of ethical nonnaturalism (See Gray, "On Liberty, Liberalism and Essential Contestability", pp. 339-340). Even more, Gray argues that a strong claim of essential contestability positions its

One might argue that the radical relativism is curbed by the connection that the multitude of conceptions of an *essentially contested concept* bear to the concept itself. That is, the shared set of components making up the concept as part of its internal complexity, which are nevertheless subject to varied ranking and structure of composition within the differing conceptions as part of its various describability, exhibit a degree of stability substantial enough to claim that absolute relativism is not conceivable. However, this view brings back the question of how to reconcile the idea of a supposedly unsolvable contest over the meaning of a concept in the face of a clear (however narrow), shared, common understanding of its meaning. The trajectory for endorsing Gallie's proposal as theoretically viable therefore meets a dead-end: for *essentially contested concepts* not to endorse radical relativism, there must be some sort of a shared, undisputed, universally accepted core understanding of the concept, which manifests in the link that all the conceptions of an *essentially contested concept* share between them, moreover, that shared content is also what links all the conceptions to the concept itself; but if there is such a clearly delineated shared core understanding of the concept, then the concept at hand is by definition no longer an *essentially contested concept*. In the end, the way the issues of de-contestation and relativism play out in Gallie's original proposal are ultimately illustrative of its theoretical unproductiveness.

Why human dignity is *not* an *essentially contested concept*

What these aforementioned theoretical conundrums mean for the case of the concept of human dignity is that the theory of *essentially contested concepts* is not a fitting frame to apply while surveying human dignity jurisprudence. Gallie's theory lacks theoretical precision to explain the case of the concept of human dignity in practice, where a degree of agreement regarding the concept's meaning is already manifested in international human rights jurisprudence. If human dignity were to be defined as *essentially contested*, then using Gallie's framework we would have to concede to the fact that a level of de-contestation is not only possible, but already has started to happen. However, given the unclear status of the process of

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proponents "into a radical (and probably self-defeating) skeptical nihilism" (See Gray, "On Liberty, Liberalism and Essential Contestability" p. 343).

de-contestation within Gallie's original proposal and what yielding to the possibility of a de-contestation of an *essentially contested concept* would entail for the broader argument of the theory, such concession in particular, and applying Gallie's theory to the case of the concept of human dignity in general, would be no less than theoretically unproductive. It would not tell us anything new about the legal concept of human dignity, but rather clutter the current process of its theorization with theoretical assumptions that justify distancing oneself from the important task of delineating the substance of the concept of human dignity within the framework of international human rights law.