Human Dignity and Legal Positivism

Introduction

How to make the sense of human dignity? What is its meaning and what does it demand in the framework of law? How to get information about this all and what kind of conception of law is in conformity with the way we answer these questions?

These hard problems are of practical importance since the concept of dignity is explicitly mentioned in several fundamentally important conventions and statutes concerning different aspects of life. Modern law refers to dignity for example in connection with crime and punishment, the treatment of prisoners or patients, and the basic human needs to subsistence. In these cases, we need to be able to somehow define what we mean by dignity. Dignity is also mentioned in the preambles of many international human rights treaties. This foundational role of dignity similarly raises the question about its substantive interpretation. However, the foundational function also raises theoretical questions about the nature of the concept of human dignity and its relation to the conception of law that we behold.

It is difficult to make sense of dignity since the concept is so overarching, open and disputable. Generally, it is hard to find a commonly accepted definition of dignity. In the sphere of law, legal formulations of dignity leave its meaning quite open-ended. Instead of a commonly accepted definition, we find a rich ideological history and diverging judicial references to dignity. It is not reasonable to separate the legal concept of dignity entirely from its historical and ideological evolution. However, it is not easy to form an interdisciplinary substantive interpretation of dignity; nor is it clear where to look for it.

It is thus not surprising that dignity has been criticized because of its vagueness. Since dignity is open for many interpretations, it increases the need for judicial discretion. Human dignity is a widely accepted value concept. However, when we interpret a value concept like this, we...

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1 From different references to dignity see. McCrudden 2008.
easily end up in quite fundamental moral reasoning, which many might not approve. This is why I think that dignity raises up several classical questions of general jurisprudence such as the inclusion of morality to law, the possibility of universal moral requirements, the minimum content of just law and the most appropriate way of defining law.

In this paper, I discuss these general questions about the nature of law and its relation to dignity. These questions relate my doctoral thesis. The actual thesis will concentrate on the more practical issues of dignity, aiming to clarify (especially from the Finnish perspective) the judicial concept of dignity and its relation to a philosophical one. However, while getting started with my thesis, other more theoretical questions have begun to puzzle me. The aim of this paper is to investigate dignity’s connection to a general theory of law and legal validity.

I will first make some remarks about legal positivism in general, because at least some forms of positivism appear to be difficult to combine with the type of interpretation that dignity seems to call for. Second, I will shortly concentrate on dignity as a legal concept and then I thirdly move on to the possible connections with dignity and non-positivism. These considerations will lead us to the relation between dignity and human nature. The last section consists of further considerations of the ways in which dignity might be present in our conception of law.

1. Positivism

Legal positivism is a theory of law that sees law as based on social facts. These social facts are the decisions, conventions or social customs, which are recognized as authoritative. Thus the origin of the term positivism in the Latin word *positum*, meaning to put, place, or set, addresses well the nature of law as something posited. When we understand law as something posited, we simultaneously set human community at the focal point of defining law. It is the acceptance, tolerance, decisions, commands or such in the community, which define what law is.\(^2\) Following Robert Alexy, we can describe this as the *factual dimension of law*.\(^3\) This type of definition of law generally raises concerns about the role of moral evaluation of law. Since positivism concentrates on social facts as grounding law, it asserts no necessary connection between law and morality. The social facts are the decisive feature. However, as Leslie Green sums up, “The most influential criticisms of legal positivism all flow, in one way or another,

\(^2\) Green (2003).
\(^3\) Alexy (2012), 3.
from the suspicion that it fails to give morality its due."\textsuperscript{4} It is this same suspicion that motivates me to reflect about the possibilities of fitting together positivism and dignity (conceived as a fundamentally moral concept). However, finding the appropriate way to include moral statements to positive law is not quite simple.

The positivist belief that social facts are the source of law operates at the factual dimension of law. The non-positivist theories add another dimension to their conception of law and this is the \textit{ideal or critical dimension}. The ideal dimension is the one where considerations about the correctness of the law belong. Now, even if there are differences between positivists, they generally accept the \textit{separability thesis} of these factual and ideal dimensions. \textit{Exclusive positivism} is stricter and states that morality is necessarily excluded from the concept of law. \textit{Inclusive positivism} claims that the ideal dimension is not necessarily excluded or included, but that this decision is a conventional matter. This view thus highlights the relevance of social facts. \textit{Non-positivist} theories, instead, claim that morality is necessarily included in the concept of law.\textsuperscript{5}

Inclusive positivists can accept moral considerations as part of law based on explicit or implicit inclusions of these elements. The explicit inclusion of human dignity is well apparent in several legal conventions, statutes and court decisions. In these contexts, it is possible to identify dignity as a part of positive law; it must be taken into account since the sources say so. As Leslie Green points out it is not, however, “plausible to hold that the merits are relevant to a judicial decision \textit{only} when the sources make it so”. Moral considerations are an essential part of justice also in their own right. However, in the positivist thought, they do not hold supreme authority. Legal source such as a statute or a convention can offer a reason to decide contrary to the moral arguments that are presented. In addition, the dynamic nature of law makes it possible to transform moral considerations as part of positive law. This inclusion occurs when a decision applies moral arguments in a way that causes morality itself to become a source of law. However, not everything that law refers to can thereby become law. Law refers to many things such as mathematics without making them law, the same applies to morality.\textsuperscript{6}

It is easy to understand that morality in itself does not turn into law only because law refers to it. However, it is much harder to understand the exact suitable role of moral concepts or

\textsuperscript{4} Green (2003), Chapter 3.
\textsuperscript{5} Alexy (2012), 3.
\textsuperscript{6} Green (2003), Chapter 3.
considerations under the positivist conception of law. I think that the question about the appropriate role of moral considerations has significant practical consequences. In practice, it is important to know what kind of analysis is advisable to discover the meaning of the concepts with moral quality. For example, how should we solve what dignity requires in concrete cases. Dignity as a legal concept was not formulated overnight. Thus, it can be argued that the rich past which the concept has as an ideological concept and based on actual historical events, influences our understanding about the concept\(^7\). On the other hand, as Christopher McCrudden states in his analysis of dignity in the judicial interpretation of human rights, “there is little evidence that the legal --- use of the concept has been directly affected by recent philosophical/political theory analyses, or vice versa.”\(^8\) From this lack of influence between disciplines, we can conclude that the legal interpretations are conducted much based on formal sources of law. I think that it could be useful to think about dignity also in a broader way. This broader perspective would include for example philosophical analysis of dignity. It is however not clear if including these type of analysis would still suit well with a positivist understanding of law.

Even though the connection between law and morality is not necessary in the positivist understanding about law, moral considerations can be part of legal reasoning. However, the exact way in which morality, values, and merits of law operate within the positivist framework is hard to clarify. The reason why I feel that human dignity and positivism should be discussed together stems from this presumable clash of fitting them together. Dignity as a normative, universal, abstract and value-laden concept seems to conflict at least with a strict positivist understanding of law strongly separated from morality. It is clear that there are different formulations of positivism and many of those have no problem in including some moral concepts as part of their conception. However, I think it is worth asking whether a positivist conception of law can include such wide and open-ended moral concepts as dignity. To see if there is a problem with reconciling dignity and positivism, we need to clarify the concept of dignity to some extent.

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\(^7\) Dupré (2013), 117.
\(^8\) McCrudden (2008), 663.
2. Human dignity

Human dignity is a concept that occurs in several human rights documents and national constitutional texts as well as in lower level legislation. Hence, the concept is a firm part of posited law. However, we can take dignity also as a foundational value that law protects. Human dignity has a close relation to the concept of human rights, another highly contested concept. The most important human rights texts, such as United Nations International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), represent human rights as a way of ensuring human dignity. Concerning the question of positivism and human rights, the important question is the moral nature of those rights. We can define human rights to be moral rights only if there is a moral justification for those rights. Grounding human rights on innate and universal human dignity is one such justification. As a concept human dignity seems to suggest that we should recognize on the one hand the factual dimension of social facts or posited law (say human rights texts) and on the other hand the ideal dimension of correctness and fundamental moral requirements (the ideal of dignity). To consider how dignity poses this requirement we will view next the concept more closely.

The protection of human dignity is a widely accepted legal objective. However, we cannot define human dignity in a comprehensive way that would be universally accepted. Nevertheless, there is a minimum core conception on dignity, about which considerable consensus has emerged. According to this conception, human dignity expresses the inviolable worth that belongs to every human being in virtue of his or her humanity. Secondly, dignity is not a purely descriptive concept. Instead, it states a normative requirement of also respecting this worth that belongs to everybody. Thirdly, legal formulations commonly place individuals at the focal point of law in a sense that the state exists for the sake of the individual and not vice versa.10

We can quite easily identify these elements of dignity in legal contexts. However, a closer look reveals that legal sources refer to dignity in different ways. We can find dignity explicating

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10 On minimum core conception, see McCrudden (2008), 679.
some rights or as a right/principle in itself. In addition to this, we can find dignity functioning as foundational concept grounding or justifying other rights.\textsuperscript{11}

A right most famously connected to dignity is the right to life, personal liberty and integrity through prohibition of torture and other degrading treatment. Section 7 paragraph 2 of the Finnish Constitution for example includes a statement that no one shall be tortured or otherwise treated in a manner violating human dignity. This resembles the ICCPR Article 10 (1), according to which “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. Dignity is also connected to the debated right to the basic necessities of life. In the Finnish constitution, this is apparent in section 19 paragraph 1, which states: “Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care.”

In addition to these rights, some provisions refer to dignity in a foundational sense. An example of this are the preambles of ICCPR and ICESCR that recognize the rights of the treaties to derive from the inherent dignity of human person. The Finnish constitution also mentions in its Section 1(2) the inviolability of human dignity as the grounding principle of the constitution. This role of dignity is further explained in the preliminary work concerning the particular provision. The preliminary work asserts the view that the inviolability of human dignity expresses the universal ground of fundamental rights. At least the most fundamental rights are considered to be essentially independent of the views of the state or any contemporary judicial system.\textsuperscript{12}

The different formulations of dignity might demand different reasoning from a jurisprudential perspective. I think that it is the lastly mentioned way, dignity as a fundamental value, that might be in conflict with a positivist conception of law. When the law uses dignity to define other rights, or even as a right or principle in itself, it may not differ much from other open concepts such as reasonable, just, fair, cruel etc. Interpreting these kinds of concepts seems to be a central task of courts even in a positivist doctrine. However, is the case different if dignity is understood as a foundational concept that grounds all other rights? Is it possible to accept this role of dignity and still remain within a positivist framework? I will leave this question open for now and will next investigate dignity and non-positivism.

\textsuperscript{11} McCrudden (2008)
\textsuperscript{12} Government proposal no. 309/1993 vp, 42.
3. Human dignity and non-positivism

Is it easier to reconcile the foundational role of dignity with a non-positivist conception of law? Alexy has addressed the question whether there are some necessary moral elements that law should be accountable to. If we were to recognize a necessary connection between law and morality, we would need to define what the moral basis of law is. Just like positivist approaches, the non-positivist ones also differ from each other to the extent that they highlight the role of moral claims. Thus, we can clarify the relation of non-positivism to morality in much the same way as with positivism before. **Exclusive non-positivism** is the view, which totally disregards social facts. In addition to this view, there are different levels of including the social facts into the conception of legal validity. We can define as **inclusive non-positivism** the approach that takes into account the requirements of both the social facts of the factual dimension and the moral elements of the ideal dimension of law. “Inclusive non-positivism maintains that moral defects undermine legal validity if and only if the threshold of extreme injustice is transgressed.”

Human dignity as a value concept fits well with this type of threshold view. Transgressing the threshold of extreme injustice means going beyond the limit of what is morally acceptable. In a similar vein, human dignity sets out to describe the threshold for appropriate action. As is the case with a conception of extreme injustice, so as well human dignity as a normative concept presupposes an objective baseline of what is morally acceptable.

At the practical level, it seems clear that human dignity aspires to offer an objective justificatory ground and measure for positing the most fundamental rights of individuals and thus the requirements of justice. This role is displayed in several human rights texts, the examples of ICCPR and ICESCR were already considered.

Even though human rights conventions and written law refer to human dignity as this kind of universal value, it can be questioned if this is apparent in the reality of applying human rights. There are some indicators to support the affirmative claim. For example McCrudden, who has studied human dignity in the context of human rights adjudication, has noticed that “In applying dignity, judges in several jurisdictions draw on the judicial interpretation of dignity in other jurisdictions

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14 Here I see a possible connection with the Radbruch formula and dignity in their aim of excluding the most severe injustices outside what we consider to be legally valid.
as well as their own, sometimes explicitly, sometimes without attribution.” This seems to indicate
that in practice different jurisdictions share views on what dignity requires, at least at a deep
level.\textsuperscript{15}

McCrudden’s analysis however reveals great divergence especially of the judicial use of
dignity. This finding leads him to question the possibility of finding any substantively definable
universal meaning of human dignity. He concludes that “there is no common substantive
conception of dignity, although there appears to be an acceptance of the concept of dignity.”\textsuperscript{16}

Others have concluded that dignity as a concept does not differ from other central philosophical
concepts, such as freedom or equality, whose essential meanings have also long been disputed.
The disparity between formulations of dignity might just be a sign that the concept is still
“under construction”.\textsuperscript{17} McCrudden finds more consensus in the political process of
collectively accepting the concept of dignity to ground human rights.

It seems that the central question concerning the possible inherent non-positivist implications
of dignity is whether it sets out necessary, objective, universal requirements for legal validity.
This question leads us to reflect about the origin of demanding respect of human dignity. This
origin is the human nature.

\section*{4. Human Nature}

The philosophical roots of dignity derive from the classical Roman writings of \textit{Cicero}. In his
writings we can find a concept of dignity as something that belongs to every human being
(without reference to any additional attributes) emerging. Cicero introduces this conception by
contrasting man with animals, ending up with the superiority of human nature – an outlook that
has survived to modern times. This superiority of humanity is based on man’s ability to study,
reflect, and not only to follow his sensual instincts.\textsuperscript{18} Here we can see that “dignity has been
transposed and extended into a way of saying something about human beings as such”.\textsuperscript{19} The
tendency that defining human dignity leads to considerations of the essentially human attributes
is a very recognizable character of the dignity discourse. When dignity belongs to all human

\textsuperscript{15} McCrudden (2008), 694-695.
\textsuperscript{16} McCrudden (2008), 712.
\textsuperscript{18} Cicero, De Officiis, I, 30.
\textsuperscript{19} Rosen 2012, 11-12.
beings in virtue of their humanity, it is natural to ask what is our humanity and how is it expressed. However, for example McCrudden finds this resolution to be at the heart of the divergence between formulations of dignity, since he asserts that there can be a myriad of different answers to the question about human nature.\(^{20}\)

This way of defining our humanity as a precondition of understanding what dignity means is nevertheless a standard approach to the problem of dignity. In this approach, rationality is a thread running through the philosophical tradition. Rationality figures in the writings of Kant, who is the most influential philosopher in the talk of legal dignity. The strictest sense of respecting dignity in people is derived from Kant’s statement that all people should always be treated as ends in themselves and never as mere means.\(^{21}\) The human rights discourse has adopted a reading of Kant where dignity is closely associated with autonomy; that is, to treat people with dignity is to treat them as autonomous individuals able to choose their destiny.\(^{22}\) Martha Nussbaum (whose theory includes the Kantian notion of every person as an end, but who is not emphasizing autonomy as the solely important human attribute) sees a human being as

a dignified free being who shapes his or her own life in cooperation and reciprocity with others, rather than being passively shaped or pushed around by the world in the manner of a “flock” or “herd” animal. A life that is really human is one that is shaped throughout by these human powers of practical reason and sociability.\(^{23}\)

In this excerpt, the concentration on differences between humans and animals prevails and also the importance of autonomy is maintained while an element of social relationships is included. These examples on how to conceive humanity underlying dignity and human rights are by no means meant to be comprehensive. They are rather examples of the logic behind dignity and of ways considering what factors are essential to dignified human life. These preliminary considerations will serve as a basis for examining what is required of a theory of law that has dignity as its foundational value.

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\(^{20}\) McCrudden 2008, 657.

\(^{21}\) Kant Ak 4: 429.

\(^{22}\) McCrudden 2008, 659-660.

\(^{23}\) Nussbaum (2000), 72. (footnotes omitted)
5. Dignity and Law

This section introduces one way of understanding the connection between dignity and law. In his article “How Law Protects Dignity”, Jeremy Waldron takes seriously the remark made by McCrudden that in the legal usage of dignity, people mostly use dignity because it sounds serious rather than because of its ability to capture some specific idea they have in mind. I think that Waldron is right in stating that terms like dignity are in danger of being empty of content. However, Waldron himself finds quite a deep and pervasive connection between law and dignity. He argues that there is a connection that is not dependent on contingent connections of mentioning dignity in some treaty for example, but that: “Dignity seems to hook up in obvious ways with judicial ideas about hearings and due process and status to sue.”

As I see it, to study law from the perspective of dignity connects the law with human nature. This is a similar type of connection as the one between dignity and rights, where dignity guides in discovering the fundamental rights of man. In the case of law in general, dignity poses requirements for the appropriate use of law. This view takes into account both the factual and ideal dimensions of law. Thus, law is a human construction constructed for human community. Every construction resembles its creator and should reflect the purpose that it is made for. Therefore, it is reasonable to concentrate on human nature. It is the nature of the constructor of the law and the nature of the entity it was made for. This reflects the factual dimension of law where we should appropriately consider human nature. In addition to this, human dignity as a normative concept shifts our attention to the ideal dimension of law. Because people (in power) might try to neglect the requirements set by human nature, human dignity needs to function as a kind of general command of respecting every person’s human nature.

The famous account of the inner morality of law by Lon Fuller rests interestingly on a similar understanding about dignity. In his Morality of Law, he brings forward the idea that human condition forms a crucial part of constructing law and that inner morality of law is a way of respecting human dignity.

…legal morality can be said to be neutral over a wide range of ethical issues. It cannot be neutral in its view of man himself. To embark on the enterprise of subjecting human conduct to rules involves of necessity a commitment to the view that man is, or can

24 Waldron (2012), 203.
25 It is Waldron’s thoughts on (2012) 202, which form a background for this idea.
26 This is an account that Waldron also has as his basis concerning the connection of dignity and law.
become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the principles of law’s inner morality is an affront to man’s dignity as responsible agent.\textsuperscript{27}

In his analysis of the profound connections between dignity and law, Waldron finds several links between law and the image of human nature that we hold. \textit{Self-application} is the first operating rationale of law that Waldron thinks represents dignity. It means that as far as possible people apply themselves officially promulgated norms to their own conduct. This type of operating recognizes and respects “people’s capacities for practical understanding, for self-control, for self-monitoring and modulation of their own behavior”. To illustrate the effects of conceiving law like this Waldron resorts to the familiar way of comparing man with other animals: “All this makes ruling by law quite different from (say) herding cows with a cattle prod or directing a flock of sheep with a dog.” He continues by saying that emphasis on self-application contributes to differentiate law from systems based on manipulation, terrorizing or galvanizing.\textsuperscript{28}

Another way in which law protects dignity is \textit{procedural}, which means the general requirements of fair procedure in court. Besides self-application, there are situations where official determination is needed. Again, to illustrate Waldron writes:

> Applying a norm to human individual is not like deciding what to do about a rapid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.\textsuperscript{29}

The similar focus on the rational nature of humanity is apparent in focusing on \textit{legal argumentation} as a central characteristic of law. Argumentation is important since the law is upheld by or based on arguing for different positions. Argumentation is based on the understanding about law as a systematic whole that makes intellectual sense. The basic idea in relation to dignity is the granting of possibility of argumentation for each person “as an active intelligence”. Even though dignity primarily focuses on how to further the active functioning of rational individuals, it also extends its impact on the way in which law can use its force to restrict freedom of action. \textit{Dignified coercion} is required whenever we need to use even the

\textsuperscript{27} Fuller (1964), 162.
\textsuperscript{28} Waldron (2012), 206.
\textsuperscript{29} Waldron (2012), 210.
strictest punishments available, thus for example “If something cannot be done without torture, law generally accepts that it cannot be done”\textsuperscript{30}

Dignity also embraces the idea of equal worth of everybody who is governed by law. Thus, a harsh discriminating system would not count as a true legal system. The picture about the protection of dignity in law that Waldron presents rests strongly on our faith to rationality and equal respect of every person. The actual realization of respecting these qualities is an obvious point of criticism. Waldron acknowledges that the legal concept of dignity (as a human artifice) only resembles the objective moral nature of dignity; it might be poorly exercised. One technique for diminishing the differences in people’s abilities or offsets is the practice of legal representation. Normatively human dignity should be protected irrespective of any personal characteristics; hence, it requires attempts to create an artificial equal legal dignity for all.\textsuperscript{31}

The overall picture that Waldron draws of the way in which dignity is inherent in legal practices is multidimensional and as such it well describes the common practice of referring to dignity as a pervasive concept. However, dignity is also an ideal, which might sound too utopian ever to reach. Waldron states that the commitment to dignity in our legal practices and institutions may be immanently present despite the fact that we sometimes fail to exercise it.\textsuperscript{32} I think that this question about the disparity between aspirations and reality is hard, especially when we consider the relation between dignity and legal validity. If we want to include an ideal dimension into our understanding about the nature of law, how do we react to failings in reaching that goal of correctness? Is there a threshold of acceptable error after which we cannot talk about law anymore? There exists same type of discussion about the aspiration and reality of human rights, which asks if we can really talk about rights truly, because of that huge disparity between ideals and reality.

Another difficulty is to evaluate the substantive conception of dignity that Waldron presents. It seems to emphasize quite strongly the rationality of humanity. This might be the most unproblematic aspect of humanity to combine with a general theory of law. This type of view seems to have close connections to the will theory of rights. But concentrating on other aspects of our humanity that some see just as essential, say sociability or vulnerability, could bring different connections to law apparent.

\textsuperscript{31} Waldron (2012), 212–216.
\textsuperscript{32} Waldron (2012), 221.
Conclusions

The aim of this paper has been to outline questions concerning the relation between the value of human dignity and a theory of law that we hold. To do this I have drawn very basic outlines of the concepts involved in this figure. In addition, I have studied possible ways in which dignity could be conceived to be an inherent part of an understanding about law. Earlier in my paper, I left open the question if it is possible to accept a foundational role of dignity and still uphold a positivist conception of law. After considering dignity, the non-positivist framework, and the possible weight of human nature in a theory of law, I am inclined to endorse some sort of a non-positivist framework. This stems from the order of related things that need to be considered. The law definitely has its positive aspect as a human construction. However, human nature and the normative order to respect it (that human dignity sets) precede this posited construction. The foundational role of dignity is traditionally presented so, that the considerations about appropriate ways of treating humans set requirements for how legal orders must be constructed. Because of this sequence of related things, the ideal dimension of law seems to be more fundamental than the factual dimension of social facts. As I was writing the paper, it provided me revealing insight into the meaning of human nature to a theory of law. Dignity and human nature are naturally deeply related concepts and this relation is worth studying, and as I see it, the same goes for human nature and law as well.

This paper offers just a brief survey that will serve as a basis for construing a deeper understanding of dignity as a concept of general jurisprudence. However, it has been quite interesting to see how significant a role we can give to human dignity also as a jurisprudential term. This is definitely something that is worth studying in the future. This type of study could be important for example to the general doctrine of human rights. This doctrine emphasizes the universality, indivisibility, interdependence and interrelatedness of all human rights. Human dignity as a foundational concept for all human rights is well congruent with this doctrine. The dignitarian jurisprudential perspective could strengthen the theoretical basis of the doctrine further.

Bibliography


Legal material


Government proposal no. 309/1993 vp (“Hallituksen esitys Eduskunnalle perustuslakien perusoikeussäännösten muuttamisesta “)