**Human Dignity as a Legal Term**

Friedrich Toepel

Abstract

Human dignity is a beautiful term, but is it also a useful term in a legal context? I shall argue that the meaning of human dignity will vary depending on the history of the individual legal system in which it is used. It does not make sense to draw any legal conclusion from the meaning of the term within a particular moral tradition if that tradition has not been accepted as authoritative by the legal system. It may be the case that a legal system adopts a particular moral tradition, but this can never be taken for granted. All those who have to apply the term should be aware of the fact that its interpretation can have enormous consequences.

However, the most effective interpretation of human dignity observable in the present age is one which succeeds in making a moral interpretation seem authoritative while this is not yet the case and thus helping such a view to become the authoritative view. It is particularly useful for achieving such a goal to present an argument which commits a sort of naturalistic fallacy and to disguise this fallacy in a skilful way.

I take the view that the commission of an extended form of naturalistic fallacy is very common in legal literature on human dignity. While the traditional view regarding the naturalistic fallacy is that an evaluative conclusion cannot be drawn from purely factual premises, it is not often recognized that this insight also prevents an evaluative conclusion within one system of norms from an evaluative premise of another system of norms. For each system of norms regards the evaluative premises accepted merely in another system of norms as factual premises.

In my opinion the term human dignity is most useful for the lawyer or politician who is able to use it as a means of gaining influence by availing himself of the positive perception of this term and at the same time concealing successfully the commission of the described form of naturalistic fallacy.

**I. The variety of human dignity concepts**

At some time, there may have existed a definable meaning for the term human dignity. Whether this has been the case or not, at present human dignity seems to be everybody’s favourite which moral system soever he has accepted.

What holds true for moral systems in general, also holds true for human dignity: Universal ac-ceptance of a certain meaning cannot be taken for granted on account of the variation of moral codes from one society to another.

There are some who like John Finnis find this argument “unimpressive” because proper attention to history and anthropological data would show that the basic forms of human good and the corresponding practical principles would be recognized by human beings in all times and places. However, this does not address the core of the issue. There may be some features common to any moral system, but comparing some of the prevailing moral systems in the contemporary world teaches us that at least the edges and concrete formulations of common moral principles differ so vastly that hard cases are bound to occur in which the moral systems contradict each other glaringly. If a legal system has not fully adopted one such moral system, it therefore cannot simply rely on its judges to solve the hard cases by fleshing out the moral principles in the right way. The same is true for the interpretation of the term human dignity:

The most technical meaning which the term ever acquired was developed by Kant. According to his Groundwork for the Metaphysics of Morals, for Kant human autonomy is the reason for human dignity[[1]](#footnote-1) and has as a consequence that each person must treat himself and other human beings as an end in itself and never as a mere means[[2]](#footnote-2). In this way human dignity is inalienable according to this concept. Yet, of course, there arise considerable difficulties when ascribing dignity to little children and to psychotic persons who are not able to choose rationally.

For the Judeo-Christian tradition, a human being has dignity on the basis of having been created in the likeness of God.[[3]](#footnote-3) This kind of dignity is also inalienable. The consequences of ascribing dignity to human beings according to this tradition are controversial, however. It is disputed for example whether enemies may be killed or capital punishment may be imposed on human beings in spite of their dignity.

Islamic tradition likewise recognizes human dignity because Allah bestowed special favours on the progeny of Adam.[[4]](#footnote-4) In Islam also human dignity does not seem to prevent killing of people in war or imposing capital punishment. Human dignity amongst other things prescribes women to wear a head covering.

Further, the communists used the term. In the soviet party programs much emphasis was being placed on "the all-around flourishing of the personality," "the fullest extension of personal freedom and the rights of Soviet citizens," "the protection of honor and dignity," and "the full blossoming of the individual."[[5]](#footnote-5)

**II. “Wittgensteinian Fideism” is not a possible solution**

There is a view accepting all of such notions without the possibility of criticism. However, such a view does not help in international law because such terms as human dignity are not merely intended to be beautiful poetry. They are rather intended to have consequences for solving cases. If a solution is to be acceptable for all such different cultures, the language used to describe the legal standard must be unambiguous. Therefore, interpretations of terms which lead to different or even incompatible conclusions cannot be tolerated.

The view I have in mind has been most clearly described by Wittgenstein and following him D. Z. Phillips, and it has been christened “Wittgensteinian Fideism”. Whether it is based on a correct interpretation of Wittgenstein or whether it is taken out of context, I do not claim to decide authoritatively. In connection with the issue at hand, this view only serves to demonstrate that insisting on the impossibility of criticism outside a certain belief system is not acceptable in legal contexts.

The view I have in mind quotes Wittgenstein’s first Lecture on Religious Belief[[6]](#footnote-6):

*“Suppose that someone believed in the Last Judgement, and I don’t, does this mean that I believe the opposite to him, just that there won’t be such a thing? I would say: “not at all, or not always.”*

*Suppose I say that the body will rot, and another says “No. Particles will rejoin in a thousand years, and there will be a Resurrection of you.”*

*If some said: “Wittgenstein, do you believe in this?” I’d say: “No.” “Do you contradict the man?” I’d say: “No.”*

*If you say this, the contradiction already lies in this.*

*Would you say: “I believe the opposite”, or “There is no reason to suppose such a thing”? I’d say neither.*

*Suppose someone were a believer and said: “I believe in a Last Judgement,” and I said: “Well, I’m not so sure. Possibly.” You would say that there is an enormous gulf between us. If he said “There is a German aeroplane overhead,” and I said “Possibly, I’m not so sure,” you’d say we were fairly near.”*

I take the view that it may not be clear whether Wittgenstein leaves room for the possibility that there may be an external perspective to moral systems at all. In any case, he certainly regards an internal perspective as decisive for understanding a moral system. By a perspective I mean judgments about the moral norms, i. e. categorical oughts, and their application as well as the underlying fabric of justification for these oughts, whether they be factual or normative. By an internal perspective, I consequently mean the judgments about all of these elements made by someone who accepts the moral system communicating with another person also accepting the system. In contrast to that, an external perspective would be judgments made independently from a certain stance on the norms, applications and justifications of the moral system, though not necessarily denying them. The latter is the case if, for example, a believer in a certain moral system earnestly converses with someone sceptical of the basic tenets of that system. For such a situation, the believer in the system, if he is a considerate person, adopts a mere observer perspective. He speaks as if he had not yet accepted the norm, applications or justifications of the moral system.

Now, I am not sure whether Wittgenstein accepts the possibility of a dialogue in which one of the speakers adopts an internal and the other an external perspective of a moral system. Nonetheless, in my opinion Wittgenstein shows that persons can only fully understand each other when they belong to the same moral system. Therefore, there can only be security about the application of norms or principles between persons accepting the same moral system. That means that there is no such security between persons trying to communicate whilst adopting internal perspectives of different moral systems.

If it would be correct that adopting an internal perspective of the same moral system is necessary for sufficiently secure expectations in a moral discourse, this could preclude the possibility of legislation in international bodies whose members have accepted different moral systems. Moral systems will contradict each other regarding the interpretation of human dignity, as we have seen. Therefore, if we accept the internal perspectives of all moral systems, there is no way how to choose a solution valid for all. While we obviously cannot agree with such a view, I take it to be a valuable lesson that communication may fail if persons just keep their internal perspectives without mutual regard for each other. This situation may arise because different moral systems may use overlapping vocabulary so that it may not even be apparent to each of the participants in the conversation which interpretation is used.

There are persons who take advantage of such a situation, and there are persons who are deluded by such a use of language. But whether they consciously exploit the ambiguous language or whether they do it in good faith, both commit a variation of the famous ‘naturalistic fallacy’:

**III. The naturalistic fallacy of inferences from one moral system to another**

The well-known tool for detecting a naturalistic fallacy is G. E. Moore’s open question argument.[[7]](#footnote-7) Just as Moore used the argument to show that the word good must denote a non-natural quality, it can be shown that the term human dignity in a legal system purporting to treat major moral systems with the same respect must denote something else than the meaning attributed to human dignity within a particular system. Just as Moore could meaningfully ask whether something conducive to pleasure, for example, is really good, it can be meaningfully asked whether it is really an expression of human dignity that a person is autonomous, that it is created in the likeness of God, that it is favoured by Allah, that it must be a working individual.

Just as Mackie observed that the meaning of good seems to be relative to egocentric commendations[[8]](#footnote-8), the meaning of human dignity seems to be relative to the perspective of certain moral systems.

It should be noted that the fallacy committed here is closely connected with the fallacy of deriving an ought from an is. Moreover, we learn here that the temptation lies not so much in inferring a deontic ought from a factual statement which is really impossible. Persons are rather tempted because they have grown up with a certain moral system, and therefore they tend to generalize the standards of that moral system as being valid also for people of other moral systems or for a legal system. This can easily be done without deriving a deontic ought from a factual statement. The way such persons argue is rather as follows:

It is the case that x ought to be done if situation s obtains [suppressing: according to the moral system A].

Situation s obtains.

It is the case that x ought to be done [suppressing: according to the moral system B, or: according to the legal system C].

This seems to be a logically correct syllogism as long as the tacit assumptions in parentheses are not made explicit. Its premises and conclusion consist only of factual statements. But the facts stated are of a special sort. They are institutional facts which means that they require institutions to exist at all.[[9]](#footnote-9) They are in this way contrasted to brute facts which exist independently of any institutions, for example that the earth is 93 million miles from the sun. Institutions are systems of constitutive rules created by a deontic authority.[[10]](#footnote-10) Insofar, they depend on the recognition of that authority. From a perspective which does not recognize the deontic authority, the rules will not exist. When inferring from the existence of rules within a system A that the same rules do also exist within system B or C, the additional difficulty arises that system A must have been coupled with system B or C in that way that the system B’s or C’s deontic authority has recognized the rule of system A as also belonging to system B or C.

Thus, if a rule within the Christian moral system is seen as being created by God, it can only be inferred correctly that this rule also exists within a certain legal system under the condition that the legal system has made the rules of the Christian moral system mandatory. A theocratic state could be an example for such a system. The Islamic states which have internalized the rules of Islam would be another example. If however the state is permitting its citizens other perspectives than the Christian or the Muslim view, then the inference from the mere existence of rules within these moral systems to the existence in a legal system is fallacious.

The temptation to commit such a fallacy is particularly strong for adherents of religious moral systems because such systems typically claim universalizability. This is plausible. If only the Jewish or the Christian God exists, then accepting the moral rules revealed by Him is an act of sheer self-preservation. The knowledge of God’s existence makes the institutional facts existing in this moral system indistinguishable from brute facts. Believing in God’s existence leads to the same conclusion.

But does this mean that for a Christian the inference from the existence of moral rules within his system to the existence of rules within a legal system is valid? No, not if the deontic authorities fail to internalize these moral rules. At least the majority of modern European states view themselves as neutral regarding moral systems so that drawing the inference described from the existence of a moral rule to the existence of a corresponding rule within the legal systems would be fallacious.[[11]](#footnote-11) For international legal systems, neutrality of the system with respect to moral systems is even more urgently needed than with respect to legal systems of nation states.

**IV. Human dignity and meaning as use**

If something could be gleaned regarding human dignity from the preceding sections of this paper, it would be this that human dignity has a variety of meanings relative to moral systems. Because of the vast spectrum of moral systems one can never be sure that a meaning attributed to the term will be generally accepted and thus be a suitable interpretation when it is used with a legal system.

It seems therefore reasonable to turn to a similar solution as has been attempted already regarding such words as ‘I know’ or ‘It probably will …’ by Austin[[12]](#footnote-12) and Toulmin[[13]](#footnote-13), both following the Wittgensteinian proposal to regard the meaning of the words as its use.[[14]](#footnote-14) The common element of all uses seems to be that it has the function of a placeholder for the indispensable elements of personhood ascribed to a human being when personhood is ascribed to it in a moral or legal system.

As moral or legal systems are autonomous or even – speaking with Luhmann[[15]](#footnote-15) – autopoietic (‘self-creating’), no overlapping content can be guaranteed. If a new legal system like the German Federal Republic in 1949 uses the term human dignity in its constitution[[16]](#footnote-16) without explaining it and if the previous German legal systems did not make use of that term[[17]](#footnote-17), the only possibility of interpretation is recourse to existing moral systems making use of the term. There, the difficulties begin because there is no guidance which moral notions to discard and which to take over. Accordingly, the judges have wide discretion when interpreting human dignity as used in the constitution. The result is very inconsistent case law.

Incidentally, it should also be noted that because of the dependence of the meaning on an accepting authority, it should be self-evident that human dignity is indeed something that the law can confer on human beings. It may not be possible to construct human dignity in a totally arbitrary way. But certainly it cannot be part of the moral or legal system if it has not been accepted by the relevant deontic authorities, whether they be part of the legislative or the judicative.

It is also not true that religious moral systems may see this differently. They only conceal the deontic authority when they declare that human dignity would be inherent in a person because of human nature. As nature is seen as dictated by God and God is understood to be the creator of the relevant moral rules, these rules are also perceived as dependent on the acceptance of a person, God.

**V. Recommendation to avoid the term human dignity in law**

In a pluralistic society, moral rules are a poor guide for the interpretation of human dignity. A Babylonian confusion of languages which moral systems use prevents clear outcomes. In such a situation people are strongly tempted to commit the naturalistic fallacy I have described.

Therefore, contemporary legal systems which just use the term human dignity without giving any hint to its interpretation act irresponsibly. Moreover, if my analysis is correct that human dignity is a placeholder for the indispensable elements of personhood ascribed to a human being when personhood is ascribed to it in a moral or legal system, then a legal system would also contradict itself when simply leaving the interpretation to its (constitutional) judges. A person is a core notion of a legal system, for without it a civil law makes no sense. Thus, if a parliament just leaves the interpretation of the elements of personhood to its judges, it declares on the one hand that the matter is of utmost importance and on the other hand that it is not so important because it can be left to the lower authority of the judges to find out what these elements really are.

There can only be one clear solution which is to avoid the term and explicitly define the indispensable elements of personhood in an unambiguous way.

1. Kant, Grundlegung zur Metaphysik der Sitten, Akademieausgabe, Berlin 1900 ff., p. 436. [↑](#footnote-ref-1)
2. Kant, Grundlegung zur Metaphysik der Sitten, Akademieausgabe, Berlin 1900 ff., p.434. [↑](#footnote-ref-2)
3. Genesis 1:27. [↑](#footnote-ref-3)
4. Quran (al-Isra‘) 17:70. [↑](#footnote-ref-4)
5. Thomas E. Towe, University of Pennsylvania Law Review 115 (1967), 1251, 1270. [↑](#footnote-ref-5)
6. Wittgenstein, Lectures and Conversations on Aesthetics, Psychology and Religious Beliefs, Oxford 1967, p. …..; D. Z. Phillips, Wittgenstein and Religion, New York 1993, pp. 33 ff. [↑](#footnote-ref-6)
7. G. E. Moore, Principia Ethica, Cambridge 1903, Ch. I § 13. [↑](#footnote-ref-7)
8. Mackie, Ethics, Harmondsworth 1977, Ch. II p. 55, 61. [↑](#footnote-ref-8)
9. Cf. Searle, Making the Social World, Oxford 2010, p. 10 f. [↑](#footnote-ref-9)
10. Searle, op. cit. pp. 145 ff. uses the expression ‚deontic power‘. [↑](#footnote-ref-10)
11. It cannot be examined in detail here whether this is different in Anglo-American countries in which common law allows for taking into account natural law to some extent. [↑](#footnote-ref-11)
12. Austin, Philosophical Papers, 3rd. Edition, Oxford 1979, pp. 76 ff. (‘Other Minds’). [↑](#footnote-ref-12)
13. Toulmin, The Uses of Argument, Cambridge 1958, Ch. II, pp. 47 ff. [↑](#footnote-ref-13)
14. Wittgenstein, Philosophical Investigations (transl. G. E. M. Anscombe), Oxford 1953, no. 43. [↑](#footnote-ref-14)
15. Luhmann, Die Gesellschaft der Gesellschaft, Frankfurt am Main 1997, pp. 92 f. [↑](#footnote-ref-15)
16. German Constitution, Art. 1 (1): „Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.“ „Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” [↑](#footnote-ref-16)
17. The Weimar Constitution of 1919 only mentions human dignity en passant in connection with the economy in Art. 151: „Die Ordnung des Wirtschaftslebens muss den Grundsätzen der Gerechtigkeit mit dem Ziele der Gewährleistung eines menschenwürdigen Daseins für alle entsprechen.“ – „The regulation of economic life must be in accordance with the principles of justice which have the goal of ensuring an existence in line with human dignity for all.“ This is a formulation taken over from the first president oft he German Workers‘ Union („Deutscher Arbeiterverein“), Ferdinand Lassalle. [↑](#footnote-ref-17)