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Human Dignity and the Rule of Law

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1. Introduction

How we characterise the rule of law is linked to how we characterise law and politics. By the same token, how we characterise human dignity is linked to how we characterise law and morality. Consequently, associations between the rule of law and human dignity threaten to produce nothing but a confusion of conceptual, normative, and disciplinary debates. I will argue that their conjunction can be informative provided that we focus on a systemic understanding of human dignity concerned with the moral orientation of legal systems. This also requires, in part, a survey of conceptualisations of the rule of law. But the following discussion is more specifically a defence of one particular approach to understanding human dignity's systemic role in law.

In bare terms 'the rule of law' denotes the general qualities and functions of law: equality, impartiality, and order. From a more functional perspective it connotes the institutional arrangements required of non-arbitrary governance: a system of rules, institutional oversight of those rules, and insulation from political fiat. The rule of law is not, then, a *description* of law; it marks something other than the existence of legal institutions or law-giving authority. Beyond that, however, we find a potentially contradictory mixture of legal and political, conceptual and institutional, claims. On the one hand, the rule of law functions as a political ideal implying self-restraint. On the other it is an internal standard for law implying coherent regulatory practices. It concerns, as Judith Shklar puts it, basic 'institutional restraints' and, at the same time, a 'rule of reason' overseen by wise judicial authorities.¹

On one explanatory level differences of emphasis concerning the rule of law relate directly to the antagonism of legal positivism and natural law. While both can agree that law functions to coordinate actions, the legal positivist believes that (more or less²) any norms with any content are compatible with this coordinating role while the natural lawyer insists that mere coordination is not enough and that

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1 J. Shklar, *Political Thought and Political Thinkers*, 1998, p. 22.

2 Hart's 'minimum content of natural law' is an important statement of positivist hesitancy in accepting the full force of this claim: H.L.A. Hart, *The Concept of Law*, 2012, pp. 193 et seq. A contrasting account of how minimal, but morally essential, substantive commitments can be found in any system of law properly so-called is provided by Robert Alexy: R. Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, 2002.

law exists where there is respect for all conscious rational agents. By extension, positivist readings of the rule of law tend to deny that the rule of law has any critical role in our understanding of law. Natural law readings associate it with deliberate conformity on the part of law-makers and legal officials to a conception of the person.

The frequent occurrences of human dignity in the context of general jurisprudence largely, but not exclusively, reflect the latter natural law position. They suggest that the rule of law provides an internal critical perspective on law and that this arises from respecting human status and agency within systems as a whole. So human dignity is intended to fill out a critical understanding of the rule of law by stressing the *general orientation of systems* towards agency: coordinating and not simply controlling; relying upon, and not simply bypassing, rational individual agency. In this context human dignity is separated from specific regulative practices like human rights law and relates to the moral orientation of legal systems, i.e. their relationship with justice, integrity, and respect. As we will see, a linkage between the rule of law and human dignity in the work of Joseph Raz will challenge this account of law and challenge the relevance of any such invocation of 'moral orientation'. The importance of his position is not so much in its being a positivist 'response' to natural law accounts of the rule of law but rather in its implication that the relevance of human dignity in this context is confined to implying special wrongs produced by law wherein our rational agency is frustrated.

The central themes of this paper are – following on from this mixture of jurisprudential and conceptual debates – the links between human dignity and the rule of law but also, more importantly, the ways in which human dignity outstrips the rule of law making more specific normative and structural demands. The parallels between the two lie in the demand that power be exercised in such a way that rational agents are respected. Law is intended to compel us to be social, but socialised in a way that is coordinating as opposed to controlling, a point agreed upon by Raz, Fuller, and Waldron in their readings of the rule of law. Human dignity, by contrast, invites far greater focus on the detailed features of state and individual interaction. Human dignity concerns our status and our equal worth, but also the ways in which various forms of degradation can flow from state power, and the distinctively dehumanising aspects of bad governmental practices. Put another way the rule of law concerns the power and potential vices of public authorities; human dignity stresses the ways in which state power should match human possibility. We might say that human dignity concerns the 'regulative reach' of law not simply the 'regulative desiderata' of law.

I first consider the rule of law's various meanings and associated tensions and then turn to two, related, systemic implications of human dignity. These are the idea of 'normative holism' in law and the idea of the 'anthropologisation' of law and legal systems. These are thereafter explored via two characteristically jurisprudential concepts, justice and human rights. These draw out much more clearly the kind of conception of the person, and related normative implications, that are shared by theories of human dignity and the rule of law. I conclude that association between the rule of law with human dignity is mutually illuminating or bilateral: we can clarify human dignity's systemic meaning and thereby isolate law's dignitarian aspects.

2. The rule of law

2.1. Substance

An understanding of the rule of law requires understanding its variability on two axes: the substance of the idea and the function of the idea. By substance I mean that it admits various 'thicknesses' from thin formal claims to thicker conceptualisations of governance. Function, to be returned to, concerns the institutional setting and normative systems it works within. Exploration of substance shows that while the rule of law is not equivalent to a complete moral, legal or political theory, it can play a unifying role in such theories, drawing together institutional practice and theory. It does this because it implies a commitment to good, or stable, order and the variable substance of the idea reflects how much flesh is given to these ideas of 'good' and 'order'.

From the outset we can note that in many substantive accounts of the rule of law there is also a putative relationship with human dignity. Human dignity immediately assists in dividing these accounts

in terms of their substance. A thin idea of the rule of law identifies it with nothing but the existence of law and its application of force: i.e. *we should obey the law* and be ruled by it. Failure on the part of governments to apply this to themselves produces, says Raz, a distinctive wrong: ‘deliberate violation of the rule of law violates human dignity.’³ A thicker idea, identifying the rule of law with the qualities found in *coherent legislation and use of rules*, is treated by Fuller as a precondition of human dignity.⁴ ‘To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can 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 a responsible agent.’⁵ Waldron takes Fuller’s ideas and adds *procedural and participatory demands* ensuring the active ‘presence’ of individuals in a legal system; the rule of law is diffused throughout judicial and evidential practices.⁶

‘Applying a norm to a human individual is not like deciding what to do about a rabid 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.’⁷

Finally, if we connect the rule of law to *good governance* through the defence of democratic representation or administrative transparency, it is intelligible, as the United Nations does, to associate this too with human dignity.

‘Democracy (...) is based on the freely expressed will of people and closely linked to the rule of law and exercise of human rights and fundamental freedoms. Democracy, and democratic governance in particular, means that people’s human rights and fundamental freedoms are respected, promoted and fulfilled, allowing them to live with dignity.’⁸

Of these positions, the most common reference point is Fuller’s work. In what follows I elaborate Fuller’s position in order to lay the ground for a contrast with Raz’s functional account. The focus of Fuller’s analysis is legal rules themselves – what legal rules can demand of us, the extent to which we know the rules, and the possibility of conforming our behaviour to rules – and the extent to which formal failures in rule use by law-makers challenges the status of those rules as, together, forming a legal system. This general standard, the ‘internal morality of law’, takes the form of eight desiderata for law-making, summarised (alongside the making of rules *simpliciter*) as generality, publicity, non-retroactivity, clarity, non-contradiction, constancy, and congruity.⁹ Fuller identifies this combination of desiderata, in turn, with human dignity. That is, the substance of his account, focussing on the use and application of rules, entails that in the absence of these desiderata we should fail to govern through law and thereby fail to respect citizens as rational agents. The rule of law and human dignity together point to human possession of reason as the capacity for basic self-governance, but also the structural dependence of self-governance on rational use of rules by governments.

In its contribution to our understanding of the substance of the rule of law Fuller’s work is important and will be returned to. Two challenges to Fuller’s position are pertinent from the outset. One, following Hart, insists that we can accept Fuller’s position but see these not as *moral* aspects of law but as basic requirements of any purposive activity.¹⁰ Second, we could also deny that Fuller has a coherent sense of human dignity if, assuming human dignity to be partly a notion of equality, the desiderata are compatible

3 J. Raz, ‘The Rule of Law and Its Virtue’, in J. Raz, *The Authority of Law: Essays on Law and Morality*, 1979, pp. 221-222.

4 L.L. Fuller, *The Morality of Law*, 1964.

5 *Ibid.*, p. 162.

6 J. Waldron, ‘The Concept and the Rule of Law’, 2008 *Georgia Law Review* 43, no. 1, pp. 1-61.

7 J. Waldron, ‘How Law Protects Dignity’, 2012 *Cambridge Law Journal* 71, no. 1, p. 210.

8 ‘Democracy and the United Nations’: <http://www.un.org/en/globalissues/democracy/democracy_and_un.shtml> (last accessed 13 March 2015).

9 See Fuller, *supra* note 4.

10 H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, 1983, pp. 57 et seq.

with slave or apartheid systems that, while discriminatory, are consistent in their use of rules.¹¹ These problems can be addressed, jointly, as indeterminacy between two specific conceptions of the interaction of rulers and ruled: basic means-end rationality in law *versus* contractarian reciprocity. At one extreme, Fuller's underlying commitment to good ordering might imply an extensive social and political philosophy far beyond basic commitment to acknowledging human rationality: it would be a contractarian theory of reciprocity or fiduciary responsibility between ruler and ruled.¹² At the other extreme, this could ('merely') be a defence of coherent use of rules: i.e. means-end rational promulgation of rules observing minimum demands of 'ought implies can'. However, note that such consistency with rational agency also provides a standard for identifying law itself: 'anything that claims the status of law must be able to guide action.'¹³ This minimum demand of fulfillability is not 'merely' a necessary condition of governance by rules but a necessary condition of governance by *law*. The different desiderata associated with means-end rationality in legislation are (Fuller might be taken to be arguing) conditions that *must be met by law properly so-called*. Thus our understanding of Fuller's analysis, and the substance of the rule of law more generally, might be said to rest on the question of at what point there is legal governance properly so-called: once certain formal criteria are fulfilled, or once certain formal criteria *consonant with the nature of the governed* are fulfilled? The former only requires rules and rule-use. The latter requires an account of the governed and the virtues of the governing. This distinction requires, in turn, an analysis of the relationship of law and politics and whether the rule of law can, and does, have anything to say about the virtues of governing. The question for the next section therefore becomes whether the rule of law should be thought to function in law, in politics, or somewhere between the two.

2.2. Function

Scholarly and policy discussions of the rule of law, taken as a whole, place the concept somewhere between politics and law.¹⁴ It is now common to associate the rule of law with the assessment of states by their achievement of 'good governance' across their political and legal institutions.¹⁵ The rule of law is only part of good governance, but a crucial structural part.

In seeking to be more specific about what this standard of assessment is we can treat the rule of law as more a political ideal or more a legal ideal. This difference might be thought only to concern the 'target audience' of the rule of law: it could be intended to guide the actions of judges, or politicians, or 'law-makers' generally understood. A deeper difference in function might be thought to reside in the notion '(self-)governance': the extent to which we believe that individuals are capable of self-governance might inform the degree to which we valorise formality and consistency (law) or stability and the common good (politics). The difference might also be thought to reside in the difference between intention and outcome: is the rule of law a virtue concerned with the will of law-makers, or rather a standard met when a minimum threshold of legislative coherence, or institutional independence, is passed? In essence, where and how the rule of law functions as a standard is unclear. The following discussion of E.P. Thompson and Nigel Simmonds leads towards discussion of Joseph Raz who demands the dissolution of these debates via a specific conception of law and its own self-correction.

E.P. Thompson claimed that the rule of law is an 'unqualified human good'.¹⁶ In response to critics, the force and background assumptions of this assertion are made clear. It was made

'as a historian and a materialist. The rule of law, in this sense, must always be historically, culturally, and, in general, nationally specific. It concerns the conduct of social life, and the

11 For dignity's links with equality see J. Waldron, 'Is Dignity the Foundation of Human Rights?', 2013 *NYU School of Law, Public Law Research Paper* No. 12-73, <<http://ssrn.com/abstract=2196074>> (last accessed 13 March 2015).

12 Explored most fully by E. Fox-Decent, 'Is the Rule of Law Really Indifferent to Human Rights?', 2008 *Law and Philosophy* 27, no. 6, pp. 533-581; E. Fox-Decent, *Sovereignty's Promise: The State as Fiduciary*, 2011.

13 L.M. Austin & D. Klimchuk (eds.), *Private Law and the Rule of Law*, 2015, p. 1.

14 For a range of positions see D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order*, 1999, and B.Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law*, 2006.

15 See the work of the World Justice Project in measuring the quantitative and qualitative aspects of the rule of law: <http://worldjusticeproject.org/sites/default/files/files/introduction_key_findings.pdf> (last accessed 16 March 2015).

16 E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act, 1977*, p. 263.

regulation of conflicts, according to rules of law which are exactly defined and have palpable and material evidences – which rules attain towards consensual assent and are subject to interrogation and reform.¹⁷

The quality and content of rules is important: they must be the kind of rules consistent with human interests or agency and capable of being consented to ('attain towards consensual assent'). But Thompson is ultimately concerned with the separation of the legal from the political as an exercise of political virtue. The phenomenon of the rule of law is the unexpected self-constraint of those who could otherwise tyrannically impose a self-serving form of order without concern for the common good. This broadly defined phenomenon will vary. And if the rule of law is (nationally and historically) 'specific' it is not reducible to general qualities of a legal system or specific criteria of rational rule-use. It will be discovered in an arrangement of rules that are necessary but not sufficient conditions for something to be an unqualified good. A similar arrangement of rules, in another polity, might fail to be an unqualified good. In this sense we have an important rejoinder to Fuller; the apartheid system with a functioning legal system is rightly excluded from unqualified approbation. Conversely, there seems to be no reason why Thompson's account could not be construed as a concretisation of Fuller's arguments. Luban suggests how that might be done:

'Fuller believes that the rule of law enhances human dignity. The point is not that the rule of law is logically incompatible with despotic government or harsh laws. Rather, the point is that the rule of law robs despotism of some of its most characteristic devices, and in this way it is practically incompatible with despotism. Why would repressive governments want to burden themselves by restricting the laws they enact to those permitted by Fuller's canons? It seems overwhelmingly likely that they would not, because their power to intimidate their subjects would diminish.'¹⁸

This more empirical reading of Fuller concerning likelihoods and the characteristic qualities of despots seems a plausible meeting point between Thompson and Fuller, though Thompson still has to answer why we can talk of *unqualified* goods, and Fuller answer why such likelihoods and characteristics abuses are *definitive* of law. At best this empirical claim leaves the rule of law a political ideal in a limited sense: a defence of a particular institutional arrangement, at a particular time and space, including systematic and general laws, amounting to the self-constraint of the political through consistent rule-use aspiring towards consent.

In comparison we might take a position like Nigel Simmonds' which treats the rule of law as an archetype governing law itself.¹⁹ Law (legal institutions and legal principles) should be understood as approximating to a greater or lesser extent the ideal of the rule of law, i.e. good internal organisation of law. This 'aspirational view is best thought of as composed of two separable theses: first, the claim that the notion of law is structured by an archetype; and, second, the claim that the archetype is an intrinsically moral idea.'²⁰ That is, the rule of law is not merely (as per Fuller) the 'internal morality' of law pertaining to certain arrangements of rules, but also an 'external morality', i.e. a standard or regulative idea for legal systems much as justice might be thought to be. Such a standard is not absolute or defined by specific qualities; rather the archetype draws legal officials to make each system 'good of its kind'. 'Perhaps the judicial task is one of fidelity, not to a rule of recognition, but to the idea of law itself; and perhaps our understanding of that idea is deepened by the experience of pursuing it.'²¹ Simmonds' position is opaque because we either have an *ideal* possessing moral value or *good law* itself possessing moral value, but it is not clear which. Moreover, there appears to be a third option at work, namely that the rule of law also

17 Quoted in D.H. Cole, "An Unqualified Human Good": E.P. Thompson and the Rule of Law', 2001 *Faculty Publications*, Paper 403, p. 188, <<http://www.repository.law.indiana.edu/facpub/403>> (last accessed 13 March 2015).

18 D. Luban, 'The Rule of Law and Human Dignity: Re-examining Fuller's Canons', 2010 *Hague Journal on the Rule of Law* 2, no. 1, pp. 29-47, at p. 40.

19 N. Simmonds, *Law as a Moral Idea*, 2007.

20 *Ibid.*, p. 54.

21 *Ibid.*, p. 157.

denotes that *threshold* – of means-end rationality but also good governance – at which a system ceases to be merely a set of rules and begins to be a legal system properly so-called.²² Therefore, ultimately, the idea of the rule of law is somewhere between that of a moral threshold and a legal virtue. Simmonds provides a number of suggestive links between law and the rule of law, but the function of the rule of law is therefore something much more equivocal than in Thompson's narrow idea of political self-constraint. The rule of law is at times a value, a virtue, and an archetype for law; it is certainly an ideal, but one whose normative and conceptual status remains elusive.

Thompson and Simmonds mark what we might consider to be the principal fault-lines in the concept of the rule of law, i.e. a *functional* equivocation between political virtue, legal virtue, and legal ideal. The division by Shklar into institutional restraint and rule of reason only partially captures this. On the one hand, we can valorise various kinds of 'institutional restraint' but without further, extrinsic, normative and political principles this amounts only to a vague and variable commitment to rule-use. On the other hand, the 'rule of reason' could be associated with two different standards: virtuous rule by the wise, and law approaching its ideal form. The functioning of the rule of law occupies a confused conceptual and practical space: between political and legal, and between institutional practice and ideal.

In contrast to this confused mixture of functions, Raz provides a positivist account of law devoid of extrinsic standards and within which the rule is only the aspiration to overcome law's own potential for inconsistency. For Raz the rule of law 'means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it.'²³ He argues that the 'rule of law' has acquired a number of accidental connotations that are to be discarded:

'If the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph. The rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.'²⁴

There is a temptation, at least as Raz sees it, to assume that aspiring to and fulfilling the rule of law is equivalent to fulfilling the demands of human dignity. Indeed such a position might be attributed to Fuller and Raz's position, like Thompson's, is important as a corrective to that assumption. However, two things are immediately puzzling about Raz's claims. First, why a legal system may 'lack or possess' a *political* ideal. The functioning of law might well 'manifest' such an ideal but this would presumably have no bearing on those within the system who are governed by *legal ideals*, for example defensible and consistent procedures or sound legal reasoning. Second, why is this something that comes in gradations? Where are these gradations: at the level at which the law is obeyed by the powerful, or at the level to which legal systems approach or approximate an ideal? Both Thompson and Simmonds have answers to this with regard to, respectively, the virtue of self-restraint in politics and the threshold achievement of the ideal of law. Raz, however, insists on a deflationary answer. That law should be viewed in an instrumental light. It is intended to serve basic (reason-giving, action-coordinating) functions that can be achieved regardless of the content of the law and which do not relate to substantive political ends or projects. As a consequence, the degree to which a legal system manifests such an ideal is the degree to which law coordinates actions *consistently* or *rationaly* in the light of our political ends or commitments. Our political goals may be liberal or repressive, but the virtue of law remains the same: to coordinate actions and give reasons in a defensible – means-end rational – way. The rule of law is only a moral phenomenon 'in the breach':

22 Ibid., p. 191.

23 Raz, *supra*, note 3, p. 212.

24 Ibid., p. 211.

‘The rule of law is essentially a negative value. The law inevitably creates a great danger of arbitrary power – the rule of law is designed to minimize the danger created by the law itself. Similarly, the law may be unstable, obscure, retrospective, etc., and thus infringe people’s freedom and dignity. The rule of law is designed to prevent this danger as well. Thus the rule of law is a negative virtue in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself. It is thus somewhat analogous to honesty when this virtue is narrowly interpreted as the avoidance of deceit.’²⁵

The rule of law is nothing more than preservation of law’s own instrumental capacities to promulgate and apply rules consistently. ‘Human dignity’ is that which is violated when politics is inconsistent or rules impossible to fulfil.

There is something important in Raz’s stripping the concept of the rule of law of its *substance* while at the same time being able to retain a clear systemic *function*. Nonetheless, Raz’s assumptions are contentious. We might posit an alternative conception of law, a more substantial conception of politics itself, and a less narrow conception of human dignity. In other words, we do not have to accept Raz’s explanation of how substance and function interact in the rule of law.

2.3. Interaction of substance and function

First, it is easily overlooked that the rule of law implies an extensive, as well as authoritative, system of norms. However thick the concept is, even in its thinnest form it implies an *entire* legal system and implies the governance and the dependence of the individual upon a whole range of fields of law. Law is more than a set of basic commands, prohibitions and permissions: it is the framework for coordinating individual and collective lives in all their complexity. So the rule of law must be understood in the context of the potential ‘intrusion’ of law into the entirety of our individual and social affairs.²⁶ This is what we might call the ‘normative holism’ of law. In that sense the rule of law is as much the concern of the ordinary citizen as it is the legislator. And the virtue, if it is such, should be expressed at every level of legal and administrative governance. Put another way, we might concede Raz’s instrumental characterisation of law and still claim that the range of breaches or ills that can be associated with the rule of law are potentially legion, because they interact with the entirety of humans’, public and private, practical lives. And for this reason we should hesitate in seeing the rule of law as merely a ‘response to the state’s capacity to frustrate the will of the individual’. The ‘response’ is complex, implying the whole range of procedural and substantive safeguards associated with law.²⁷ And ‘frustration of the will of the individual’ is complex too, having very different meanings if we focus on the use of criminal law or on the rules governing, for example, wills and inheritance.

Second, law’s ‘independence from politics’ is a conceptually and practically complex notion. The relationship between law and politics is closer to co-constitution than it is to direct institutional antagonism. Judges can make law (and therefore must observe the kinds of legislative virtues attributed to legislators); it is legally permissible for there to be extraordinary executive powers to suspend constitutions; and any political activity that ceases to be legal might also cease to be political. The latter point is far-reaching. Law and politics are not just institutionally entwined but co-definitional. Each forms or constitutes the other, and it is this that permits variation in the *substance* of the rule of law. On the one hand, to say that all properly political actions must also be legally permitted actions is only to say that everyone, even law-makers, are constrained by the law. On the other hand, law-makers are in a position to change the very rules that they are governed by, and the rule of law implies a kind of consistency in the use of rules that transcends the possibilities of legal change open to law-makers. So on the question of how substance and function interact, Waldron is right to stress the close relationship between law and politics. As he argues, the rule of law ‘can be used to consecrate a form of constitutionalism – the idea that the legislature as well

25 Ibid., p. 224.

26 See Austin & Klimchuk, *supra* note 13.

27 See Waldron 2008, *supra* note 6.

as the state is subject to substantive constraints (constraints based on individual rights, for example) in its law-making.²⁸ This variation in how the rule of law functions at the intersection of law and politics – how we construe the legal structuring of the political, and the limits we seek to place on how politics shapes the legal – gives rise to the variations in substance we have addressed.²⁹

The import of these wide-ranging concerns for the present enquiry is that the rule of law need not (*pace* Shklar) denote a single kind of ‘institutional restraint’ relationship between political institutions and legal institutions. Rather, we can see a complex interaction of ideal governance and real institutions encompassing both power and justice. As Luhmann puts it, the rule of law ‘expresses a reciprocal and parasitical relationship between law and politics. The political system benefits from the difference between legal and illegal being coded and administered elsewhere, namely in the legal system. Conversely, the legal system benefits from having peace, a clear differentiation of authority, and with it the enforceability of decisions secured elsewhere, namely in the political system.’³⁰ The ‘reciprocal and parasitical’ marriage between law and politics not only requires us to reject Raz’s purely instrumental picture but gives credence to ‘virtue’ interpretations of the rule of law over ‘threshold’ readings. The rule of law does not simply describe the relationship between law and politics; even less does it indicate that law plays a merely subsidiary, instrumental, role in delivering ends identified elsewhere amongst political actors. Rather the rule of law arises out of the conjunction of the two and their joint, but nevertheless partially antagonistic, effort to ensure that individuals are respected. The rule of law is the conscious effort, across a system of governance, to ensure that minimum kinds of respect are acknowledged within their co-constitution. But this minimum is not easily translated into a minimum *threshold* because, as suggested, the regulative reach of law is expansive and because there is no simple relationship between violation of the rule of law and a single class of harms. Rather we are closer to the idea of a virtue within a system and its actors: those administering law are committed to an ongoing effort to restrain power and make the legal system the best it can be. On this account we admittedly face a loss of clarity regarding when the rule of law is achieved or accomplished. But the concomitant gain is in bringing to the fore the critical purchase of the idea: a relationship between governance and respect or, more specifically, between law and human dignity.

Thus the function of the rule of law is bound up with the requirements – institutional and professional – of law’s independence from other institutions. The rule of law regulates the relationship between law and politics and it manifests various ‘thicknesses’ because of the variety of real practices and ideal norms that exist between the legal and the political. It is within this conceptual space, then, that we should attempt to conceptualise the significance of human dignity. The function of human dignity in this context could simply point to *a principle or value that is shared* by law and politics. It could point to *the necessity of politics being governed by law*. Or its function could be, more specifically, to point to *a range of ways in which law and politics must interact* if they are individually and jointly to be morally defensible. It is the latter approach that I will explore. This first requires more careful delineation of the range of possible places human dignity has, or could have in law.³¹

3. Human dignity and legal systems

3.1. ‘Moral orientation’

Any investigation into the relationship between human dignity and law must, I would argue, chart a path between two extreme and inadequate positions. The first is a strongly ‘externalist’ one treating human dignity as a moral norm that has been granted legal enforcement.³² The second is a strongly ‘internalist’

28 J. Waldron, ‘The Rule of Law in Public Law’, 2014 *NYU School of Law, Public Law Research Paper* No. 14-40, p. 15, <<http://ssrn.com/abstract=2480632>> (last accessed 12 June 2015).

29 This relates to significant constitutional issues of institutional design, entrenchment of norms, constituent power, and the possibility and desirability of constitutional change. Generally see N. Walker & M. Loughlin, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, 2007; specifically, see J. Waldron, ‘The Core of the Case Against Judicial Review’, 2006 *The Yale Law Journal* 115, no. 6, pp. 1346-1406.

30 N. Luhmann, *Law as a Social System*, 2004, p. 371.

31 For more detailed analysis of this see S. Riley, ‘The Function of Dignity’, 2013 *Amsterdam Law Forum* 5, no. 2, pp. 90-106.

32 See S. Hennessey-Vauchez, ‘A Human Dignitas?: The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept’, *EUI WP Law 2008/18*, <<http://cadmus.eui.eu/handle/1814/9009>> (last accessed 16 March 2015).

position that suggests that all and any legal norms must be understood in terms of the ‘normative closure’ of law and that any moral significance attached to human dignity must be ignored in favour of a purely institutional and systemic understanding of its function.³³ The former provides an insufficiently systemic understanding of the concept; the latter provides an insufficiently critical understanding of the concept. Overcoming the deficits of these positions can be achieved by isolating the modern concept of human dignity.

The history or genealogy of the concept of human dignity must lie for the most part outside the boundaries of this paper. Nonetheless, the positing of epochal divisions, and historically discrete concepts, is unavoidable in the clarification of a systemic understanding of the concept. The different forms of human dignity relate to different notions of the human. We might say that there are three concepts of human dignity associated with the human as a political animal, the human as *imago dei*, and the human as the human person.³⁴ Despite certain etymological and functional overlaps these three philosophical anthropologies support three different concepts and only the last has systemic significance. The first two of these concepts concern self-regarding duties and the metaphysics of humanity; they invoke the worth of the individual, and the distance between the human species and other species, justifying norms of fitting behaviour and of dominion.³⁵ In comparison, the idea of human dignity associated with the human person is conceptually bound up from its inception with universality and legal rights. Foreshadowed in the Enlightenment, politicized in the revolutionary era, and clarified in Nineteenth and Twentieth Century humanism, this is notion that the human is everywhere and always deserving of formal legal protection.³⁶ There is, in other words, an already existing link with law and formal equality in this concept. The concept of human dignity relevant to modern legal and moral thought is underpinned by predominantly egalitarian, rather than strongly anthropological or ontological, claims: ‘human dignity does not formally rule out all inequality, e.g. distributive or social inequalities, [nor] virtue distinctions between persons. [Human] dignity is only inconsistent with radical inequality, i.e. any system that makes ad hoc and non-meritocratic distinctions in the moral status of human persons.’³⁷ There is, as many scholars agree, a link here with Kant and Kantianism.³⁸ But the most important aspect of this conception of human dignity is its emphasis on formal equality and its incompatibility with perfectionism. Regardless of any specific relation with Kantianism, there is only one concept of human dignity relevant to systemic protection by law, and this modern concept of human dignity permits various systemic conceptions and functions across a number of fields of regulation.³⁹

What are its putative systemic uses or functions? There are three main ways in which human dignity can be treated as having a relationship with, or providing moral orientation within, legal systems. First, it describes certain formal characteristics of systems, perhaps closely related to the rule of law or, alternatively, implying that legal validity flows from one basic norm.⁴⁰ Second, it is the foundation, or *telos*, or ideal end-state of human rights as a group. Third, it is the means of signalling the impermissibility of atrocity or other gross and systematic misuses of law. These have been deliberately described as forms of ‘moral orientation’ as opposed to norms. They are different ways of recognising and protecting the human person through a trans-legal principle.

To understand this systemic or orientating aspect of human dignity it is critical that we observe the division between human dignity as a norm and as a principle.⁴¹ The former would take human dignity to be a specific requirement or set of requirements; the latter would be either something to optimise

33 See Luhmann, *supra* note 30.

34 See Hennette-Vauchez, *supra* note 32.

35 See G. Kateb, *Human Dignity*, 2011.

36 For contrasting, historical and philosophical, accounts of the emergence of the concept of the human person see J. Maritain, *The Social and Political Philosophy of Jacques Maritain: Selected Readings*, 1956; M. Lebeck, *On the Problem of Human Dignity: A Hermeneutical and Phenomenological Investigation*, 2009.

37 R. Debes, ‘Dignity’s Gauntlet’, 2009 *Philosophical Perspectives* 23, no. 1, pp. 45-78 at p. 60.

38 For example, O. Sensen, ‘Kant’s Conception of Human Dignity’, 2009 *Kant-Studien* 100, no. 3, pp. 309-331.

39 See M. Neal, ‘Dignity, Law and Language-Games’, 2012 *International Journal for the Semiotics of Law* 25, no. 1, pp. 107-122.

40 For contrasting accounts of this see Waldron 2013, *supra* note 11, and C. Dupré, ‘Human Dignity in Europe: A Foundational Constitutional Principle’, 2013 *European Public Law* 19, no. 2, pp. 319-341.

41 See generally, W. Brugger & S. Kirste (eds.), *Human Dignity as a Foundation of Law, (Proceedings of the Special Workshop held at the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy in Beijing, 2009)*, 2013. Also, C. O’Mahony, ‘There is no Such Thing as a Right to Dignity’, 2012 *International Journal of Constitutional Law* 10, no. 2, pp. 551-574.

across our normative practices or something to be given weight in normative reasoning even if it does not represent a specific norm. As a norm human dignity is paradoxically a *problem* for the rule of law: it is sufficiently vague to have multiple, antagonistic, meanings that cannot be unified or lexically ordered.⁴² As a principle however, it encompasses a range of compatible possibilities: human dignity concerns the necessary inclusion of certain *classes* of norms within a system (those concerning basic interests and equality), or certain formal arrangements about the adjudication or legislation of rules. These are formal demands on systems – the interaction of norms, and the presence of certain kinds of norms – but not directly the substance of those norms.

To understand this it is important to distinguish, in turn, a principle from a *telos*. Certain uses of human dignity imply an end-point, end-state, or goal: human dignity as the outcome of observing human rights, or human dignity as the accomplishment of good governance.⁴³ However, if we think of the rule of law as a necessary condition of human dignity, we are not concerned with an outcome of systems but a principle that works to evaluate systems through their consistency with basic protections. By extension, human dignity implies a *trans-legal* principle with which we gauge the basic moral commitments or orientation of a legal system. This signals a parallel with the opposition of political and legal ideal found in the discussion of the rule of law, i.e. the existence of a principle appropriate for judging systems but not part of the substance of those systems.

To understand this trans-legal function is, finally, to draw the distinction between human dignity as status and value. Waldron, in this respect, gestures towards the correct reading: ‘Dignity, in my view, is a sort of status-concept: it has to do with the standing (perhaps the formal legal standing or perhaps, more informally, the moral presence) that a person has in a society and in her dealings with others.’⁴⁴ Two further clarifications to this are important if we are to understand human dignity in a systemic, rather than sociological, way. First, as a status concept the equality associated with human dignity transcends jurisdictions and is not an accident of social arrangements in any particular constitution. Second, and relatedly, as a status concept we are dealing with a trans-, not extra-legal, concept. Human dignity does not sit outside law as a moral value that may or may not be instantiated or protected. It is a status principle relevant for all legal norms and processes regardless of jurisdictional barriers. Human dignity as a status concept is trans-legal and indefeasible. It is not an extra-legal moral principle or a ‘basic humanitarian concern’ functioning as a *pro tanto* reason for action.⁴⁵ It is the moral basis of the law as such.

With these clarifications and hesitations in place, I will hazard three significant parallels between our understanding of human dignity and the rule of law. The first concerns the potential blurring of principle and *telos*. In both cases we have a principle (or virtue in the case of the rule of law) that has a kind of corrective function for systems, but also (and quite differently) the implication of an accomplished end-state or threshold condition for a politico-legal system. The latter idea is better captured in the idea of *Rechtsstaat* (in the case of the rule of law) and uses of human dignity in human rights law that invoke ‘existence worthy of human dignity’.⁴⁶ Both ideas tempt us to envisage a state of affairs rather than a critical principle whereas it is their critical function that is important. Second, there is variability in the conception of the person at work, particularly in terms of how much substance is granted to agency and rationality. Are we dealing with generic conditions of agency, with basic rationality, or with a more substantial idea of how ‘ought implies can’ can be explicated via human ontology? Third, there is a problem of standards or principles being ‘external’ or ‘internal’ to legal systems. The argument that follows not only gives more specificity to a systemic reading of human dignity but also to lend more precision to where these concepts do overlap and where they diverge.

42 C. McCrudden, ‘Human Dignity and the Judicial Interpretation of Human Rights’, 2008 *European Journal of International Law* 19, no. 4, pp. 655-724. See also R. Brownsword, ‘Human Dignity from a Legal Perspective’, Chapter 1 of M. Düwell et al. (eds.), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, 2014.

43 For instance in the New Haven Policy School of international law. See, for example, M.W. Reisman, *The Quest for World Order and Human Dignity in the Twenty-first Century Constitutive Process and Individual Commitment*, 2013.

44 Waldron 2008, *supra* note 6, p. 201 (footnote removed).

45 This contra N.K. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension*, 2000.

46 Universal Declaration of Human Rights, Article 23.

3.2. Holism and anthropology

The normative importance of what I will call holism and anthropology can be partly expressed in familiar concepts of jurisprudence and practical philosophy. We seek *justified* coercion in a social system: the state's monopoly on violence should be justified on the basis of good collective, political, reasons not political fiat.⁴⁷ And we want *permissions* to be a feature of legal systems in particular: we want them to make space for choice as an end in itself, and to admit contingency into governance rather than seeking to regulate every aspect of our lives. This is implicit in much constitutional law and implies that law is, in some ways, deliberately self-limiting.⁴⁸ As already suggested, we can say that law is intended to compel us to be social, but socialised in a way that is coordinating as opposed to controlling (a point agreed upon by Raz, Fuller, and Waldron in their readings of the rule of law). Put in these terms, there is a division of labour, rather than antagonism, between the two main schools of jurisprudence. Positivism traces the structural qualities, and structural independence of law, necessary for it to be a system of authoritative justification. Natural law, understood in its relationship with natural rights, is a defence of good order and natural permissions: our 'natural state' is characterised for the most part by the absence of commands or prohibitions, the function of natural rights is to turn those weak permissions (the absence of commands) into strong permissions (a legally enforceable sphere of autonomy).⁴⁹ But the normative importance of permissions and justification can only be partly expressed in the normal concepts of jurisprudence and practical philosophy. Connecting these with human dignity demands translation into two more distinctive concepts.

First, law's 'holism' is the continuing effort to create a social order characterised by lawfulness. There is no need to posit a single norm giving unity to law, only a systemic function vis-à-vis other social systems, namely to ensure governance by law. In this sense, we can agree with Raz that law's authority is linked to law's claim to be authoritative: it displaces other normative systems with a distinctive, unified, body of social norms permitting the coordination of practical reasoning across a society.⁵⁰ In relation to politics in particular, law's function is not to demand particular ends, e.g. social justice, from political institutions (in this sense Raz's instrumental picture is correct); but law does demand justified use of coercion from a state with a monopoly of the means of coercion (in this sense our understanding of law must be sociological and not just instrumental). The term holism is intended, therefore, to invoke the expansive nature of legal systems: the possibility of *general, and justified, governance by law*.

Second, the idea of the 'anthropology' or 'anthropologisation of law' is largely captured in the Fullerean conception of the rule of law. The internal morality of law is intended to denote better attunement of legal systems to the nature and agency of individuals, and more generally the function of law to protect contingency in human affairs. In this sense we should treat the rule of law as a necessary condition of human dignity. Nevertheless, the anthropological aspects of human dignity demand more than this: internal systemic and formal commitments that align systems with not only human agency but also human forms of life. As Simmonds puts it, 'if we are to have a real understanding of what it [a legal rule] requires of us, so that we can guide our conduct by it, we must be able to grasp the values or objectives that the rule serves, and to see how the rule fits intelligibly into some possible pattern of life.'⁵¹ I will go on to link this with human rights laws understood, functionally at least, as limits on the power of government and the maximisation of permissions.

From this position we can make some generalisations about what human dignity means for law when cashed-out in terms of anthropology and holism. The most direct instantiation of human dignity in systems is the existence of a range of basic rights preserving natural freedom. Human dignity has rightly been associated with anti-consequentialism, the importance of legal recognition, the status of the individual, and with defence of strong permissions.⁵² Human dignity reflects our collective commitment

47 See R. Forst, *The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach*, 2012.

48 E. Fox-Decent & E. Criddle, 'The Fiduciary Constitution of Human Rights', 2009 *Legal Theory* 15, no. 4, pp. 301-336.

49 'Permissive natural law does not exactly confer rights on human persons; rather it defines an area within which their inherent power of free choice can licitly be exercised.' B. Tierney, 'Natural law and natural rights: old problems and recent approaches', 2002 *The Review of Politics* 64, no. 3, p. 405.

50 See Raz, *supra* note 3.

51 Simmonds, *supra* note 19, p. 163.

52 Each position can be found represented in M. Düwell et al. (eds.), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, 2014. See also M. Rosen, *Dignity: Its History and Meaning*, 2012 for particular emphasis on recognition.

to individual status and with its resistance to the sacrifice of the individual for the common good. This is often expressed through the language of deontology and Kantianism. But these fail to root human dignity clearly in systemic virtues and lead quickly to defence of specific norms prohibiting degradation.⁵³ My argument is rather that human rights can also be defined in a negative sense, like the rule of law, in resisting or undoing a vice or failure endemic to governance itself: the tendency to over-regulate, to use force arbitrarily, or crush the possibility of contingency from human affairs. The limit of Raz's account of the rule of law, then, lies predominantly in his failure to acknowledge that the self-regulation of law has to be understood in terms of the conception of the person it protects, not a 'purely' systemic failing. With this in mind, we can consider what specific implications this general account has in terms of additional norms (human rights) and law's other principal virtue (justice).

3.3. Anthropology and the question of human rights

The significance of the human person as the anthropological presupposition of human dignity is the combination of fact and value: the formally equal legal person and the embodied human being. Concern for the human person encompasses recognising formal equality but also recognising the vulnerability of the embodied person; it encompasses basic bodily protection and the highest potential of human agency. This explains the difficulty of understanding human rights as a class of norms. These rights are basic, and owed to every individual, but they mix what is basic for the biological person with what is basic for the legal person. So, while the condition for membership of the class of human rights is often thought to be relationship with a moral right standing in need of positive legal enforcement, here it is the qualities of the human that are used to generate a set of basic rights. This explains human dignity's long-standing relationship with atrocity as well as with human rights; we are concerned as much with the vulnerable human as with the sovereign legal person. And it concerns why human dignity like the rule of law has a complicated relationship with the conception of the person it interacts with. Rationally agentic, self-constituting, sovereign, and vulnerable, this complex mixture of properties, having quite different conceptual statuses, are those properties also associated with the human person and the modern notion of human dignity.⁵⁴

This has two important aspects when we think about human dignity as the foundation of human rights: the sources of human rights' *content*, and the relationship between the *justification* of human rights and the rule of law. Of course the question of the nature and justification of human rights involves a voluminous literature that it is impossible to touch upon here. Nevertheless, certain core issues are shared with the concerns explored in this paper, not least the significance of interests in generating the content of human rights, and the extent to which human rights are to be thought of as moral rights or primarily political rights existing between state and citizen.⁵⁵ The following remarks arise from a more narrow concern with human dignity and the rule of law but they speak to these perennial questions of human rights theory.

Regarding the content of human rights, the notion of the human person implies that – systemically and normatively – the state as the primary guarantor of the interests of the human person has two sets of responsibilities. Protection of the formal equality between persons and protection of the basic embodiment and vulnerability of the human. Both demands, equally and inalienably, attach to every individual. Human rights laws spell out the various permutations of this combination of responsibilities, entitlements and protections in the light of the most common threats to them. This general account of content is expressed, correctly, by Fox-Decent as existing in the same conceptual and functional territory as the rule of law:

'Human rights serve the same end [as the rule of law, i.e. liberating us from arbitrary governance] by supplying mid-range principles which, like Fuller's internal morality, mediate the relationship between abstract ideals of agency and dignity, on the one hand, and the many conditions under

53 See P. Tiedemann, 'Human Dignity as an Absolute Value', in Brugger & Kirste, *supra* note 41, pp. 25-40.

54 A. Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights', 2007 *Human Rights Law Review* 7, no. 3, pp. 511-543.

55 See, *inter alia*, R. Cruft et al. (eds.), *Philosophical Foundations of Human Rights*, 2014.

which governance through law is possible, on the other. Human rights, in other words, like the rule of law, protect us from the power of others.⁵⁶

It might be objected here that the rule of law is much more closely related to human will and frustration of the human will than positive principles of good ordering. As Raz argues, the vice or error that the rule of law addresses is the bypassing of rational agency by legal systems, not failure to protect our interests. The state could, in other words, still deliver goods that are in individuals' interests while violating the rule of law and negating our human dignity. Thus the rule of law and human rights should be linked, it might be argued, to will and agency, not the entirety of our entitlements. However, even if this were true the present question is one of human rights' *content*, not their overall function. Such content cannot be generated purely by formal means related to agency and will. Rather, the human person is the relevant starting point here and it is this, in conjunction with a systemic reading of human dignity, that generates a plausible – if varied – set of 'basic' rights implied by the nature of the human person.⁵⁷

Second, the unusual *justificatory* problem of human rights is their taking positive legal form but denying the need for positive legal authority. Human rights are intended to be enforced in law but deny that they share the authority of other laws. Put another way, for the state to claim that it has the authority to create or deny human rights is a contradiction: the source and the validity of the rights lie in humans themselves, not in social authority. Accordingly, the correct justificatory approach to human rights should be similar to that of human dignity and the rule of law: identifying, from outside the system of governance itself, the limits of ordering. That is, if such norms are to be justified it is by way of the entitlements of a trans-legal conception of the human person, not the prudential or instrumental foundations of the state and positive law. Such an argument must be traced, as it is here, to a particular conception of the person that already contains both formal equality and the human animal; we should treat equals equally, but we should also acknowledge and respect the uncertainties and vicissitudes associated with the human form of life. Justification – of human rights and the rule of law – must end here, in a kind of anthropological limit to governance. That limit is well expressed by Waldron. Using the language of archetypes (in a way that is clearer than Simmonds' usage, i.e. in a sense closer to 'symbolic' than to 'regulative idea') Waldron links the rule of law to certain kinds of substantive commitments having foundations in the nature of those governed:

'law (at least in the heritage of our jurisprudence) has set its face against brutality, and has found ways of remaining forceful and final in human affairs without savaging or terrorizing its subjects. The promise of the rule of law, then, is the promise that this sort of ethos can increasingly inform the practices of the state, not just courts, police, jailers, or prosecutors. In this way, a state subject to law becomes not just a state whose excesses are predictable or whose actions are subject to forms, procedures, and warrants; it becomes a state whose exercise of power is imbued with this broader spirit of the repudiation of brutality. That is the hope, and I think the prohibition on torture is an archetype of that hope: It is archetypal of what law can offer, and in its application to the state, it is archetypal of the project of bringing power under this sort of control.'⁵⁸

In essence, the link between the rule of law, human dignity, and human rights is to be found in the nature of those who are governed. However, this is not, as Raz suggests, at the technocratic level of the demands of successful governance, but at the justificatory level of what stands outside positive law as its foundation.

56 Fox-Decent, *supra* note 12, p. 577.

57 An account of human rights close to that of Tasioulas, at least in respect of its focus on diverse interests and the unification of human rights around a conception of the human person. See J. Tasioulas, 'Towards a Philosophy of Human Rights', 2012 *Current Legal Problems* 65, no. 1, pp. 1-30.

58 J. Waldron, 'Torture and Positive Law: Jurisprudence for the White House', 2005 *Columbia Law Review* 105, no. 6, pp. 1681-1750, at pp. 1742-1743.

3.4. Holism and the question of justice

While the rule of law implies the application of formal justice, it is important to stress that law also involves natural justice and equity. The holism of a legal system is also captured, therefore, in the consistent but not necessarily formal(ised) deployment of principles of natural justice.⁵⁹ This much is shared with Dworkin⁶⁰ and his idea of integrity as an interpretive practice undertaken in courts. But legal institutions also deal with private law as well as public law, and they deploy corrective justice as well as distributive justice. The field of private law aspires to – even if it is not purely a manifestation of – corrective justice, meaning prioritising right legal answers over collective distributive needs. In other words, this aspect of law is, like human rights law, non-consequentialist and individual-focussed. But it is different from the state-centred content of human rights (i.e. the dangers characteristically created by the state for the individual); it is related, rather, to the basic normative relationships between individuals. For this reason amongst others we rightly talk about legal systems being dignity-preserving without thereby also having to talk about human rights.⁶¹

So, when we are concerned with the holism of law and its aspiration to justice we are concerned with the normative range of law: the fact that law does not just provide certain constitutive norms that can constrain political activity, but is reason-giving and authoritative in private or horizontal relationships between all individuals in a given state. Moreover, although there is no pure corrective justice in modern legal institutions (most legal processes have clearly distributive elements as well) the continuance of the possibility of corrective justice, the openness of legal institutions to private citizens and to respecting interpersonal conflicts and wrongs, is a resistance to the encroachment of politics in law and justice. ‘Internally’ speaking holism does not, then, relate only to adjudication on consistent grounds but consciousness of the possibility, and the attendant dangers, of law’s regulatory reach.

‘Externally’ (meaning in terms of law’s relationship with other social practices) we are concerned with the justice of aspiring to justification, in particular what justifies the coercive power of the state. In that sense we can see a link to the harm principle and the legitimate limits to legal regulation. Human dignity does not provide an answer to how the harm principle should be applied in practice (judicially or legislatively) but it does point to its justification, namely the free choice of autonomous individuals with regard to their life plans and preferences. A legal system retains its own integrity by overseeing the use of coercion by other systems and ensuring that attempts at justification are made (and made in good faith). Legal systems cannot prevent the abuse of power, but they can demand that an attempt is made to justify such abuses. Here we might recall Luhmann’s understanding of the co-constitution of politics and law as the essence of the rule of law. Law benefits from stability – there is no legality without minimum levels of social order – but for moral (and undoubtedly ‘ideological’ reasons) political systems gain legitimacy from the use of coercion being overseen and administered by a different, dedicated, social system. Here then is the precise meeting point of human dignity and the rule of law *as virtue*: no principle can prevent the abuse of power or anticipate its forms, but the aspiration to justification is the virtue that law demands of politics.

4. Conclusion

Shklar’s dichotomy of the rule of law as ‘rule of reason’ and ‘institutional restraints’, and Raz’s concern with law’s instrumentality and self-correction, both act as cautionary warnings for the kind of enquiry undertaken here. Shklar cautions against inflated and ideologically suspect claims; Raz cautions against confused and morally expansive claims. From this, two specific concerns might be directed towards the present analysis.

First, we might ask following Shklar whether too much value has been attached to law and legal institutions, i.e. too great a tendency to support the ‘rule of reason’? The ‘rule of reason’, as the consigning of difficult principle and policy questions to judges of constitutional courts, is problematic in two respects

59 See Neumann’s discussion of natural justice in Raz and Rawls: M. Neumann, *The Rule of law: Politicizing Ethics*, 2002, pp. 7 et seq.

60 R. Dworkin, *Law’s Empire*, 1986.

61 An aspect of Waldron’s recent work on human dignity: J. Waldron, *Dignity, Rank, and Rights*, 2012.

both of which are fully acknowledged here. First, it fails to capture law's institutional arrangements as a whole. Most legal activity is not adjudication of hard cases in constitutional courts, it is relatively routine and non-controversial application of rules with the possibility of such decisions being overturned if they are wrong on the facts or the law. Second, at the opposite extreme, there is a temptation to treat the anthropological aspects of human dignity as demanding radical anthropologisation of the law where, for instance, decisions in hard cases precisely parallel the major existential decisions faced by an individual. That is, human dignity is not just attunement to the individual but exact, Platonic, parallel between the structure of the individual and that of a legal system.⁶² It is hoped that the present piece has avoided either unreflective valorisation of courts or exaggerated claims about the anthropological nature of judicial practices.

Second, following Raz, has there been a failure to distinguish the formal self-correction of law from the substantive goals of politics? My contention is that there is, even in the most basic accounts of the interaction of institutions and actors in a constitution, a complex dance of regulative and constitutive forces: politicians make the law that binds them, but the law also constitutes the range of possibilities open to political actors. The co-constitution of law and politics must muddy the instrumental purity of law defended by Raz.

One general conclusion to be drawn from the foregoing is that we should be hesitant before too quickly couching policy goals in the language of the rule of law and of human dignity. Connection with the rule of law draws out the negative or remedial aspect of both human dignity and the rule of law. They both concern prevention of the denial of agency, resistance to common forms of abuse, and the importance of consistency and justifiability in governance. This has strongly anti-utilitarian aspects but it is not the core of a substantive political position. Accordingly the qualifications I initially expressed with regard to the scope of the rule of law – it can be the centre of gravity for political theories, but not the substance of political theories – holds too for human dignity. Equally, both notions face the difficulty of verification; there are no clear criteria to demonstrate that either virtue or principle has been fully achieved. Nonetheless, like empirical research into (comparative) rule of law accomplishments, the achievement of human dignity in a system has, at least, correlatives in justice and in human rights, both of which we have little hesitation in comparing and monitoring.

The intention of the paper has been to show that human dignity and the rule of law have been connected legitimately, if not always clearly, in literature on the rule of law. Put negatively, both share a concern with condemning and neutralising the kinds of harms that can flow from misuse of power. Positively, human dignity goes beyond the rule of law's demand for self-constraint on the part of the powerful. It speaks more widely to the moral scope and moral orientation of law: the legitimate expansion of law across our public and private affairs, and the necessary contraction of law to make space for choice and self-constitution. Thus human dignity reflects a normative understanding of law, but predominantly one concerning law's proper scope, rather than law's content. Nevertheless, the concept has consequences for law as a practice (for legislation and adjudication) and for law as a set of norms (particularly, but not exclusively, in defence of human rights). The resulting vision of human dignity, it is hoped, is of a concept founded in philosophical anthropology – the human person – that from its inception had strongly legal meaning (formal, legal, equality) and that when used in legal contexts is not to be thought of as a norm, but as a systemic orientation to that conception of the human. ¶

62 W. Brugger, 'Dignity, Rights, and Legal Philosophy within the Anthropological Cross of Decision-Making', 2008 *German Law Journal* 9, no. 10, p. 1243. Brugger's own anthropological conjunction of human dignity and law is attractive but over-reliant on Dworkin's model of law.