THE LEGALITY OF HUMAN DIGNITY:

DEVELOPING THE LEGAL PHILOSOPHY OF

LON L. FULLER

By

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ABSTRACT

This dissertation examines the ways in which Kantian conception of human dignity can reshape and develop the course of legal philosophy Lon L. Fuller under the thesis of the legality (the rule of law) of human dignity (LHD). The overarching purpose is to bring to the surface the deeper connection between Fuller's model of the rule of law (formal legality) and human dignity as a moral value. In particular, the LHD entails that the formal legality serves and protects human dignity from the exercise of arbitrary, social, and political power in the framework of human interactions. In this context, the value of human dignity (especially in Kantian conception) is worth inserting into the picture of the moral reason served by Fuller's formal legality. Human dignity synthesizes into a harmonious whole the distinct values upheld by the rule of law. The initial plausibility of this claim derives from the fact that formal legality establishes and maintains law as intelligible, some degree of predictability, stability, and certainty of the social and political environment in which a person can interact and live with dignity. The LHD thus involves more than a change in terminology. It presents a novel account of what the rule of law (in Fuller's model of formal legality) necessitates, why we should care, and how it would change our attitude about the moral conception of law.

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CHAPTER 1

INTRODUCTION

1.1 An Overview

In a thought-provoking statement, Hannah Arendt declares: "Human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities."[1] It is certainly no accident Arendt invites us to rethink human dignity in the structure of a legal and political understanding. Her statement reflects experience of the tragedy of an undignified life under an unhealthy legal system, such as in Nazi Germany (or in my experience under Saddam Hussein's regime in Iraq). In these regimes, where the legal and political structure was weak, authoritarians governed the people, the legal order changed its real form into a brutal order, and the rule of law or legality was absent.[2] In these cases, the humiliation basically replaces the consideration and requirements respect of human dignity. This leads us to deliberate whether there is some connection between the rule of law and human dignity.

In light of this, if we hypothetically accept that there is some connection between human dignity and governance through the rule of law, how should we correctly understand the nature of this connection? To put it differently, how is the idea of human dignity, so central to the sphere of morality, recast in the sphere of law and legality? This is the key question that frames this thesis. In principle, the legal philosophy of Lon L. Fuller is one source to consult for the answer. In the

[1] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich, 1973) ix.

[2] Following Lon L. Fuller, I hereafter use the terms 'legality', 'formal legality' and 'the rule of law' as synonyms referring to the ideal that Fuller thinks is moral integral to the nature of law. See for insightful exploration of this connection, Nigel Simmonds, *Law as a Moral Idea* (OUP, 2007) ch 6; David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (2ed., Oxford University Press, 2010); Kristen Rundle, *Forms Liberate, Reclaiming The Jurisprudence of Lon L. Fuller* (Hart Publishing, 2012) 196-198; also Chapter 4 of this study.

core of his argument of the internal morality of law, for example, Fuller proposes that any neglect of formal legality is not only breaching the rational ground to obey the law and destroying the trusteeship between ruler and people, but it further condemns and humiliates the dignity of the person as a free and responsible agent, a self-determining centre of action, and possessing inherent dignity.[3] In another important text, Fuller explicitly says that the value of human dignity, over other extra-legal and substantive values, must be embodied within the structure of the legal system.[4]

However, there are several issues and investigations that must be addressed. These investigations can be seen as threefold: (i) what is formal legality? (ii) what is the nature of human dignity? and, (iii) how does formal legality connect to human dignity? The objective of this thesis is therefore to provide a comprehensive analysis of these issues and investigations, where they arise in Fuller's context, in order to develop his legal philosophy; which is mainly focused on the rule of law, under the thesis of the legality of human dignity. To look deeper into this thesis, I will adopt six lines of arguments as follows.

First of all, I remind the readers that Fuller's program cannot be easily categorized. This is because Fuller's thoughts did not always develop systematically.[5] This makes Fuller's thoughts notoriously open to multiple interpretations, even on fundamental issues, such as whether Fuller is a realist. While Fuller sided with the legal realists and vigorously rejected formalism,[6] he rejected legal realism's basic contention that law was either instrumental politics or mere sociology.[7] Whether he sided with a natural law tradition against positivism is also ambiguous; because although he attacked legal positivism for being consistent with a one-way authority of

[3] Lon L. Fuller, *The Morality of Law* (rev. ed., Yale University Press, 1969) 162-163.
[4] Lon L. Fuller, 'A Reply to Professor Cohen and Dworkin' (1965)10 *Villanova Law Review* 655, 665-6.
[5] Winston has captured this point; see, 'Introduction', in, Kenneth I Winston (ed.) *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Portland, Hart Publishing, 1981).
[6] Lon Fuller, 'American Legal Realism', (1934) 5 *University of Pennsylvania Law Review* 82.
[7] Lon Fuller, *The Law in Quest of Itself* (Chicago: The Foundation Press, 1940), 52-55.

law that leads to totalitarianism, such as in Nazis' rules,[8] he also rejected a great deal of natural law traditions.[9] Instead Fuller has been called indirectly an advocate of a new trend of natural law - procedural natural law. One may take this as a sign of weakness, but I take it to be a sign of the richness of Fuller's thoughts. From this, there is the possibility of new developments under the promise of a Fullerain revival.[10] This revival significantly attempts to develop Fuller's program to be more than a footnote in the history of jurisprudence inquiry.

Second, this study undertakes Fuller's conception of the rule of law as the main target to develop. This task takes place in the context of an account of the revisiting and reclaiming of Fuller's jurisprudence and his theory of the internal morality of law. The argument that develops here is broadly in favour of Fuller's moral conception of law; although it offers a different interpretation and a reconstruction, the basis of which is the main structure of Fuller's argument.

Third, I will examine a case study to support my claims. My case study addresses the Iraqi legal system under the period of Saddam Hussein and his party's (Ba'th) authoritarian regime (1968-2003). Bringing this case into this study has three goals: (i) it aims to open a new avenue to read the status of law and the legal system of Saddam's rule of Iraq within the framework of legal philosophy. (ii) It reflects the view of how the case of Saddam's rule of Iraq within the Fullerian framework of the rule of law may help us to reveal and prove the significance of Fuller's insistence that legality has an intrinsic, non-instrumental moral value. It also discusses the abiding concern for the circumstances of the reciprocity and respect of human dignity that animates his moral conception of law. (iii) It is a practical way to start, before turning to a

[8] Lon Fuller, Positivism and Fidelity to Law-A Reply to Professor Hart, (1958) 71 *Harvard Law Review* 630, 659. See also the Chapter 2 of this study.
[9] See e.g., Fuller, *Quest* (n 7).
[10] For the chronology of this Fullerain turn and its development, see, e.g., Willem Witteveen & Wibren van der Burg (eds.), Rediscovering Fuller. Essays on Implicit law and Institutional Design (Amsterdam: Amsterdam University Press 1999); Wibren van der Burg , 'The Work of Lon Fuller: A Promising Direction for Jurisprudence in the 21st Century (May 13, 2013). Erasmus Working Paper Series on Jurisprudence and Socio-legal Studies, No. 13-02 (2013) Available at https://ssrn.com/abstract=2264020 ; Kirsten Rundle, 'Fuller's Internal Morality of Law', (2016) 11 *Philosophy Compass* 9.

theoretical reflection of the idea of human dignity. From this practical method, we can acknowledge what it would be like if someone lives a negative experience of an undignified life under an unhealthy legal system, such as Saddam Hussein's rule of Iraq.

From the third point, my argument also contains an attempt to show that Fuller's theory can be developed further under the thesis of the legality of human dignity. This thesis is first and foremost, how Fuller's project for legal inquiry might be understood in its own right, and then, how that program could provide a fresh start for the paths of legal theoretical inquiry.

This leads us to the fourth point: what do I mean by the legality of human dignity? The legality of human dignity primarily concerns an inquiry broadly within the theorizing tradition of the rule of law, and which more specifically aligns the normative objective and the moral value of the rule of law with the protection of human dignity from the exercise of arbitrary, social and political power. It is from this inspiration that I will come to consider how Fuller's project contributes, and that the tradition of the rule of law explicitly will be more fruitful if we may connect his theory to the Kantian conception of human dignity. But given that Fuller and Kant are rarely sighted as companions in the same inquiry, the proposed move requires some explanation and defence.

The fifth point forms a plea for the question of methodology, asking how it is possible to bring Fuller into the conversation with Kant. The proposition I wish to defend is that there are nonetheless several striking linkages between Fuller and Kant, when we confront Fuller's dialogue with Kant's model of the Kingdom of Ends, appealing to Jürgen Habermas's theory. The Kantian model of the Kingdom of Ends includes not just the element of human interaction in shaping the idea of the legal order, but also how human dignity can be the moral foundation to explain the moral structure of the human interaction approach to the law. This confrontation

reveals several structural similarities between the two authors, and explains how human dignity provides the morality reason for the idea of the rule of law.

I then progress towards identifying how Fuller's project can be developed in light of Kantian dignity, under the thesis of the legality of human dignity. This progress is finalized with the sixth and last point. The most interesting way to progress, in my opinion, is to revisit one of the most important, but almost ignored, part of Fuller's work, his system of the moralities of duty and aspiration. Fuller's structures of these two moralities provide a proper place for human dignity and its application in the classification of basic philosophical and ethical theories used according to their types of study of the genesis of morality: a priori, based on the principles of moral duty; and a posteriori, the presumption of receiving moral aspirations and achievement. Since formal legality embraces the two aspects of morality, the former encompasses the most obvious and essential moral duties to a narrow sense of the condition of human dignity as autonomous agency; without which a legal system, and law creation, is almost impossible or it is unhealthily structured and functioned. This is the morality that must be maintained for the law to fulfil its purpose, and it provides the minimum requirements of the legality of human dignity as an autonomous agency. The morality of aspiration, on the other hand, pertains to the highest open-ended achievements of people and institutions. It is the morality of striving and progressing for excellence, human flourishing, and achievement, including the broader conditions of living with dignity - human dignity.

This thesis is an original study in the way that it assesses the moral reason of the rule of law in the light of the value of human dignity. This is a major contribution for re-examining the idea of human dignity in the framework of legal philosophy, and its relation to the nature of law and the rule of law. Under this rubric, this study is part of the project that aims to develop the legal philosophy or jurisprudence of human dignity. It precisely provides a deeper connection

between the nature of law and human dignity; by explaining how the very idea of law as a good or moral idea can be possibly and truly related to the protection of the conditions of a person's dignity, when the rule of law operates and governs human life. This study is also unique to the legal philosophy of Lon Fuller for several reasons. It initially brings the Kantian concept of human dignity into the framework of Fuller's argument. This connection allows us to understand not only the limit of Fuller's argument, but also how to support Fuller's proposal of the rule of law for a greater degree of credibility. This study also demonstrates that there are gaps in the existing understanding of the scope of human dignity, its afforded explanation towards the morality of legality, and its role in Fuller's moral conception of law; which has attracted little examination by legal scholars reflecting on Fuller's work. Furthermore, the examination of the case study of the Iraqi legal system under the governance of Saddam's rule of Iraq should be considered as a ground-breaking study, because it is the first time this case has been closely investigated under both the vein of a legal philosophy inquiry and the doctrine of the rule of law, more particularly in the light of the legal philosophy of Lon Fuller. In return, the outcomes of my inquiry in this case study offer a new contribution to how considering the practice might illuminate our legal and philosophical deliberation regarding the nature of law and legality.

Finally, this thesis will be a contribution to the field of Fuller's legal philosophy and where his moral conception of the morality of law may be ahead in practice. When this thesis coincides with the conclusion of the issue, after substantial efforts were made in this work to embrace the connection between the rule of law and the conditions of human dignity according to some empirical studies, the results are as follows. Many of the successes and failures in the treatment of the conditions of living with dignity and good order under good governance positively associate with the conditions of governance through the rule of law. This view, in turn, will open up the path towards more harmonizing between the internal and external moralities of law in Fuller's thought. I believe this was one aim that Fuller was looking forward to attaining when he

declared that legal order (under the formal legality), coherence, and clarity have an affinity with human goodness and moral behaviour.[11]

1.2 Structure of the Thesis

This thesis comprises six chapters. Chapter 1 is this introduction. This chapter highlights and maps out the framework of this study. Chapter 2 will be devoted to reconsider the rule of law or legality in Fuller's thesis. I explore Fuller's argument of the eight principles as the idea of the rule of law or formal legality to which every healthy legal system should abide. Furthermore, I challenge H.L.A Hart and his inspired legal positivists, such as Joseph Raz, who advanced instrumental objection against Fuller's thesis. To support my argument, I employ the Fullerian theoretical framework of the rule of law to illustrate the immorality of Iraqi rules under the period of Saddam Hussein and his party's (Ba'th) authoritarian regime (1968-2003). This chapter concludes with the open possibility to take Fuller's notion of human dignity within his formal legality into another domain of studies, where one can discern a deeper answer and a better resolution. In doing so, I attempt to bring this issue into the Kantian human dignity that is advocated in Chapters 3.

In Chapter 3, I elaborate on the idea of human dignity in the tradition of Kantian moral philosophy. This chapter proceeds by closely highlighting a theoretical observation on the way we should think of the Kantian idea of human dignity as a moral value in the following points: (i) Kantian human dignity is a moral value about the inherent worth of a human being; (ii) such a value is a precondition and has incomparable worth that applies equally to all human beings due to the unique feature of their rational nature and capacity (humanity); and (iii) the moral status of human dignity demands the normative signification that entails treating every human being with respect, concern, and protection, by never treating people as merely instrumental, but rather

[11] Fuller, 'Replay to Professors' (n 4) 666

always as having an end-value in themselves (the formula of human dignity). While Kantian morality increasingly orients itself around the normative structure of human dignity, it has subjected the concept to extensive criticism. I will examine and defeat three accounts of Jeremy Waldron, Oliver Sensen, and Andrea Sangionvanni. Then, I argue why Kantian dignity is still valid for exploring the idea of human dignity within the thesis of its legality. This chapter concludes with a suggestion to solve the inconsistency in the Kantian conception of human dignity in two aspects of human dignity. These aspects navigate the way we should employ Kantian dignity in the rest of the study.

Next, I will bring the two ideas of the Kantian conception of human dignity and Fuller's formal legality together to make sense of the thesis of the legality of human dignity, in particular, in the landscape of Fuller's legal philosophy. This is the topic of Chapters 4 and 5. Chapter 4 begins by discussing the prevalence of methodological challenges when we aim to bring Fuller and Kant into the conversation. In particular, I will develop the Kantian model of the Kingdom of Ends (KoE) to support the consistency of dialogue between Fuller and Kant. Then, I will also discuss the progress in which Fuller's project can be developed in light of Kantian dignity under the thesis of the legality of human dignity (LHD). The most interesting way to progress, in my opinion, is to revisit one of the most important parts of Fuller's concept, his proposal of the moralities of duty and aspiration. Fuller's structures of these two moralities can provide a proper place for the Kantian formula of human dignity in the a priori classification, based on the principles of moral duty; and a posteriori, the presumption of receiving moral aspirations.

To some extent, Chapter 5 seeks to make further sense of the apparently different ways in which Fuller's model of the rule of law can serve, protect and promote Kantian human dignity. I develop two routes for LHD. First, I argue the fundamental task of legality is to set out eight ways in which a system of law must conform to the morality of duty - a minimum standard that

all must adhere to in human interaction, with the basic respect for human dignity as an autonomous agency: as citizens with real and equal possibilities for free self-chosen, capacity of planning, interacting and participation without domination. I model this connection: the postulate of the legality of human dignity (PLHD). A fruitful result of the PLHD leads to the rephrasing of Fuller's notion of the "internal morality of law" in the idea of "the dignitarian or dignified conception of law" (DCL); which determines not only the legitimacy of law in its most fundamental level of law and the legal system, but it also determines the level of the validity of legal norms and legal contents to some degree. Second, I build the argument for the maximal task of legality to the aspiration of legal system. This is by insisting on the progress that formal legality may conform to the morality of aspiration - an ideal standard to guide law-making that the good draftsmen and good governments must aspire to follow if they aim to reach human flourishing in the virtue of broader or maximal conditions of human dignity. I will label this: the aspiration of legality of human dignity (ALHD).

Finally, the study will be reviewed and concluded in Chapter 6. In this chapter, I will illustrate the overall purpose of this study to revival the dignity jurisprudence- building a new understanding of the law on earth that guarantees human dignity. This ambition is significant: the aim is to offer a deeper inquiry about the conceptual connection between law, legality, and human dignity.

CHAPTER 2

LON L. FULLER ON THE RULE OF LAW: RECONSIDERED

2.1 Introduction

The idea of the rule of law lies at the heart of Fuller's legal philosophy. This idea has been manifested by using the term "legality"[1] and developed throughout the phrase "the internal morality of law" in Fuller's argument. Yet Fuller's claim has also been the subject of different interpretations, and the target of considerable challenges. The forthcoming argument in this chapter aims to assess what Fuller took to be the theoretical underpinnings of the rule of law or as it is sometimes called, Fuller's model of formal legality.[2] In undertaking this project, my argument includes both interpretative and constructive methods. I shall try to analyze Fuller's claim of the eight principles as the idea of the rule of law, to which every healthy legal system should conform; and I shall reconstruct Fuller's argument for this claim. This argument concerns: (a) compliance with the principles of legality is necessary for the existence and function of law in any legal system; (b) the principles of legality intrinsically uphold moral values such as reciprocity and human dignity. Therefore, there is some necessary connection between law and morality.

I also intend to show this argument has a special significance for both Fuller's agenda in jurisprudence and his position in the debate with legal positivists. I specifically argue that when we consider this interpretation more carefully, as the task of a healthy legal system, we can

[1]Although Fuller often used the term legality to express 'the rule of law', he also expressed to use directly the rule of law at various points of his works, see, for example, Lon L Fuller, *The Morality of Law* (rev. Yale University Press, 1969) 209–210 [hereafter ML]; Lon L. Fuller, 'The Forms and Limits of Adjudication', (1978) 92 Harvard Law Review 353.

[2] I use interchangeably the notions of "the rule of law", "legality" and "formal legality" referring to the ideal that Fuller thinks is moral integral to the nature of law. See, Nigel Simmonds, *Law as a Moral Idea* (Oxford; Oxford University Press, 2007) ch 6; David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (2ed., Oxford University Press, 2010); Kristen Rundle, *Forms Liberate, Reclaiming The Jurisprudence of Lon L. Fuller* (Hart Publishing, 2012) 196-198.

reconstruct from it a simple but powerful argument that clearly challenges H.L.A Hart and his inspired legal positivists, such as Joseph Raz, who advanced instrumental objections against Fuller's thesis. Perhaps this is because the legal positivists' analysis of Fuller's principles of legality is ultimately ambiguous and confused, both in terms of the relationship between law and legality, and the moral value of legality. To support my claim, I will discuss the case study of Iraq under Saddam Hussein's rule as an example of a wicked legal system. This case study examines the wicked Iraqi legal system in the light of the Fullerian framework of the rule of law. One merit of this case study is that it shows how the Fullerian thesis draws attention to understanding the impact that ignoring legality had, causing the workability of Iraqi legal order because the Iraqi legal system under Saddam's rule was functioning in an unhealthy mode. Furthermore, I consider how this unhealthy mode of this system also impacted on both the legal status of law and the moral dimension of legality in Iraq. In line with this case, we can observe how the absence of the rule of law affronts people's dignity (human dignity) in everyday life. Thus, the example of Saddam's rule of Iraq helps us to reveal the meaning of Fuller's insistence that legality has intrinsic, non-instrumental moral value, as well as the abiding concern for the circumstances of the reciprocity and respect of human dignity that animates the moral conception of law.

To proceed, the next section outlines and reconstructs Fuller's eight principles of legality and explains the morality of legality. The third section employs the Fullerian theoretical framework of the rule of law to illustrate the immorality of the Iraqi rules under the period of Saddam Hussein and his party's (Ba'th) authoritarian regime (1968-2003). The fourth section considers an instrumental objection to Fuller's thesis. According to this objection, although Fuller's analysis of legality accurately describes the nature of the requirements for a law come into existence, it offers a mistaken account of the moral nature of legality. The instrumental objection argues that legality is morality neutral, and if it has any value it is only instrumentally significant for the law. Finally, section five contains some concluding remarks.

2.2 Fullerian Jurisprudence: the internal morality of law

The jurisprudence of Fuller remains interesting because of the vitality of the issue being addressed.[3] Fuller invites us to think about the law from the legal morality point of view. He profoundly argues that to understand and produce some norms that can guide human conduct, any enterprise of law-making, law-administrating, and judging must live up to the rule of law.[4] He marked this idea under the task of legality, as a sort of practical art or craft that corresponded to the eight principles or desiderata.[5] These principles together constitute the proposal which Fuller called the internal morality of law. Fuller spends a considerable amount of time in his different works fleshing out the content of each of these principles of legality.[6] By setting these principles out explicitly, Fuller hopes to bring to the surface the key elements of legality that are often passed over in accounts of law as too obvious to warrant comment.[7]

The tale of King Rex, who failed in eight ways to make law, is the best way to grasp the eight principles of legality.[8] According to the tale, King Rex came to the throne with a legal reform agenda. He hoped to make his name in history as a great ruler who successfully made a law.[9] Unfortunately, Fuller's entire plan to make a law fails in different ways. Consequently, he never manages to make something that could be called a law at all, good or bad.[10] At his first official act, he tries to rule his subjects without general rules, giving individual cases their specific rules. By this way of ruling, he struggles to achieve generality. Then, he tries to resolve this problem by

[3] See generally Robert S. Summers, *Lon L. Fuller* (Stanford University Press, 1984); Willem Witteveen and Wibren van der Burg, 'Introduction' in Willem Witteveen and Wibren van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press, 1999); David Luban, 'Rediscovering Fuller's Legal Ethics", in Witteveen & Van der Burg (eds.) *Rediscovering Fuller*, 193; Kristen Rundle, 'Fuller's Internal Morality of Law', (2016) 11 Philosophy Compass 499; Wibren van der Burg, 'The Work of Lon Fuller: A Promising Direction for Jurisprudence in the 21st Century', (2014) *University of Toronto Law* Journal available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2264020#.

[4] Fuller, ML.

[5] Fuller, ML, 91.

[6] ibid, see also, Lon L. Fuller, 'Human Interaction and the Law', (1969) 14 *American Journal of Jurisprudence 1*, 24. Reprinted also in Kenneth I Winston (ed.) *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Hart Publishing, 1981).

[7] Fuller, ML, 33-34.

[8] ibid.

[9] ibid 34

[10] ibid.

creating a new code, but he fails again because the content of the code was kept officially secret. Next, he publishes the general rules, but after his legal code becomes available, it appears all provisions of the code were full of obscurity. After the deficiency of clarity, he engages a staff of experts to revise the code on the model of clarity. But, the revised code comes out full of inconsistency and contrast. These unfortunate plans lead King Rex to follow an unusual plan. He creates a new code that includes a long list of crimes of human behaviour. The sound of revolution and resistance against this code arises because the people believe it is impossible to obey the rules of the code as it requires conduct beyond the powers of the human agency. Finally, Rex produces a clear code, but its contents were impossible. It seems the more King Rex planned to succeed on his course of action as a draftsman lawmaker, the more he suffered from one problem or another. Death came to him and yet he hadn't earned the medal of the great lawgiver. The first action of his successor, King Rex II, Fuller tells, was to announce that he was taking the powers of government away from the lawyers and placing them in the hands of psychiatrists and experts in public relations.[11]

From these failures, Fuller derives eight principles that any enterprise of law should meet in order to produce law at all. In brief, the principles or desiderata are these: (1) The legal system should make general rules; (2) Law should be published; (3) Law should be prospective; (4) Law should be clear; (5) Law should be non-contradictory; (6) Law should not require the impossible; (7) Law should be stable and constant through time; (8) Finally, there should be congruence between official action and the declared rules.[12] Fuller's eight principles have been widely

[11] Fuller, ML, 38. For fictional character of King Rex II, see, Jeremy Waldron, 'The Concept and the Rule of Law', (2008) 43 *Georgia Law Review* 1, 16; Thomas Schultz, 'King Rex II', (2012) 3 *Journal of International Dispute* Settlement, 1–5.

[12] Fuller, ML, ch 2; for similar list see also: Joseph Raz, 'The Rule of Law and Its Virtue' in *The Authority of Law: Essays on Law and Morality* (OUP, 1979) 214–18; John Finnis, *Natural Law and Natural Rights* (OUP, 1980), 270–3; Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James E. Fleming (ed.), *Getting to the Rule of Law* (New York University Press, 2011) 5–7; Tom Bingham, *The Rule of Law* (Penguin, 2010) chs 3–9.

accepted as an account of the basic elements of a formal conception of the rule of law, or as it may be called, the formal legality (Fuller's model of the rule of law).[13]

Alongside these principles, Fuller's argument can be broken down into two main stages or premises:[14]: (a) compliance with the eight principles of legality is internal in the idea of law; (b) these eight principles of legality imbue law with moral value: "internal morality". Therefore, there is a necessary connection between law and morality- legal morality. The main reason for this connection between law and formal legality also relates to Fuller's consideration of law as a purposive or functional concept.[15] Law, Fuller tells us, cannot be seen as "an amoral datum to be described in the same way that one describes a stone; scientifically, pointing only to certain facts of texts, official behaviour, or state power."[16] Law rather should be understood as "the enterprise of subjecting human conduct to the governance of rules."[17] Certainly, governance of people can be achieved without the rule of law. The rulers, for example, can merely frighten people by enforcing them to obey the rules, or the ruled can be faithful to the ruler. The rulers could achieve their goals without conforming to formal legality in these circumstances, but these forms of governance will be without the real form of law.[18] Rex's subjects, for example, remained faithful to Rex's crown throughout his long term of governing his realm. However, they were not faithful to his rules because he never made any form of governing that could be considered

[13] Robert S. Summers, 'A Formal Theory of the Rule of Law', (1993) 6 *Ratio Juris* 127, 129-30; Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', (1997) *Public Law* 466; Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004); Jeremy Waldron, 'The Importance of Procedure' (n 12) 3-31.

[14] For more on the basis of these two points in Fuller's argument see Lon L. Fuller, 'A Reply to Critics' in Fuller, ML, 197-202; Simmonds, *Law as a Moral Idea* (n 2) 65; Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83 *New York Law Review* 1152, 1137-44; Dan Priel, 'Reconstructing Fuller's Argument against Legal Positivism Reconstructing Fuller's Argument against Legal Positivism', (2013) 26 *Canadian Journal of Law & Jurisprudence* 399, 411-13; Noam Gur, Form and Value in Law (2014) 5 Jurisprudence 85, 88-92; Mark J. Bennett, 'The Rule of Law' Means Literally What it Says: The Rule of the Law': Fuller and Raz on Formal Legality and the Concept of Law' (2007) 32 *Australian Journal of Legal Philosophy* 90, 95-99.

[15] Fuller, ML,

[16] ibid

[17] ibid 91, 162,

[18] Waldron, 'The Concept' (n 11) 17-19.

as law.[19] As Fuller concluded, such a system would not be a system of law, for conduct within the system could not be guided by general rules. In other words, such a system that is not guiding human behaviour through the rule of law has intuitive merit because that system would not qualify as a government subject to the rule of law.[20] It follows then for something to qualify as a law that is able to guide human conduct and an institution that functions as a legal system, it must conform to the eight requirements of Fuller's legality. Adhering to the eight principles is a condition of the existence of law and the legal system. The above discussion has thus consisted of the first premise (a): there is an essential connection between the eight requirements of legality and law.

Regarding the second stage (b) in Fuller's argument, Fuller claims that conformity with these eight principles has a moral significance or is morally valuable. The nature of moral value that relates to the conformity of legality criteria is necessarily an inner morality. Accordingly, the moral status of legality is not an external end that someone may pursue, it is something inside the nature of conformity to legality.[21] Observing the principles of legality make an affirmative difference to the moral quality of a system of rules.[22] Fuller has a deeper insight to offer regarding the explanation of why the conformity to legality criteria is morally valuable. One reason is the idea of reciprocity. The eight requirements hold "a kind of reciprocity between government and the citizen…Government says to the citizen in effect these are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct."[23] Reciprocity here means that the official government abides by the rule of law requirements and, in return, people follow and obey the law.[24] When the official government abides by the legality, this implies there is a legal restriction on the exercise of

[19] ibid .
[20]Dyzenhaus, *Hard Cases* (n 2) 19.
[21] Fuller, ML
[22] ibid
[23] ibid 39-40
[24] Colleen Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24 *Law and Philosophy* 239, 249

power. This reciprocity is also the matrix of grounding social practices and human interactions, which are in turn necessary to create a workable legal order. The legal order is workable via reciprocity as it is an important way to open the channels of communication between the law and citizens. Citizens should be at least able to observe how the law works: whether the rules are intelligible; whether the rules are contradicted by another rule of the same system; whether the police respect the rights of suspects; whether the lawmakers obey the rules they have created; whether judges apply the rules independently from any personal influences.[25] Once this happens, we can say that the law secures the line of fidelity, and therefore it is workable.[26] The moral point here is not that it is necessarily impossible, in practical terms, to obey such a rule, though it might well be because the ruler may use brute force in different ways in order to gain obedience to their authority. The point is rather that people's obligation to obey the law only arises in the first place in response to a corresponding effort on the part of the ruler-official government.[27] Thus, these corresponding efforts create a reciprocal relationship of mutual respect between people and rulers.

The second reason behind the morality of legality in Fuller's argument refers to human dignity; in Fuller's words a "person's dignity as a self -determining agent".[28] This stems from the idea that the foundation of the reciprocity relationship must build on an implicit view of a person: "man is, or can become, a responsible agent, capable of understanding and following rules, and

[25] Rundle, *Form* (n 2) 89

[26] For the discussion of the centrality of fidelity in Fuller's theory of law, see Jeremy Waldron, 'Why Law: Efficacy, Freedom, or Fidelity?' (1994) 13 *Law and Philosophy* 263; Rundle, *Forms Liberate* (n 2) 58-59.

[27] Rundle, *Form* (n 2), 89; Evan Fox-Decent, 'Is the Rule of Law Really Indifferent to Human Rights?' (2008) 27 *Law and Philosophy* 533, 539 and 548-9.

[28] Fuller, ML, 162; see also Lon L. Fuller, 'A Reply to Professors Cohen and Dworkin', (1965) 10 *Villanova Law Review* 655, 665; David Luban, 'The Rule of Law and Human Dignity: Re-Examining Fuller's Canons' (2010) 2 *Hague Journal on the Rule of Law* 29; Mark J. Bennett, 'Hart and Raz on the Non-Instrumental Moral Value of the Rule of Law: Reconsideration' (2011) 30 *Law and Philosophy* 603, 607.

answerable for his defaults."[29] In this account, the law is an enterprise that respects people's dignity as self-determining agents (autonomy), not a "one-way projection of authority."[30]

One merit of Fuller's proposal through the two stages provides a "bridge between philosophical questions about the nature of law and lawyerly questions about the law", as David Dyzenhaus suggests.[31] This bridge deflects the charge of having a narrow outlook in regards to the law, because it helps to explain why in particular, immanent legal orders are moral resources on which a legislator should rely for producing and making statutes;[32] or on which judges should rely in deciding hard cases.[33] The rule of law is best understood as a key doctrine underlying "the fundamental standards or rationales of the legal order". This idea can determine "legal obligations and legal validity", which shows the respect of the values of human dignity is intrinsic to law.[34] By following the rule of law's principles as necessarily embedded moral principles in the law,[35] the law-making task and judicial task become those of fidelity, not to a rule of recognition, but to the idea of law itself; so that it is always part of the legal obligation of both the lawmaker and the judge to uphold them. Such principles are the justification principles of validity and constitutionality of any legal order.[36] Once a judge, for example, confronts a legal rule that derogates from the rule of law, the judge is not just faced with an immoral rule, but a legal pathology of the legal system.[37]

In the light of this, the Fullerian theoretical framework of the rule of law can be applied to a number of different legal situations, and justifies the legal status and the moral wrong of wicked

[29] Fuller, ML, 162.
[30] ibid 207.
[31]David Dyzenhaus, 'The Legitimacy of the Rule of Law', in David Dyzenhaus, Murray Hunt, and Grant Huscroft, (eds.) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 33-54, 34.
[32] Kenneth Winston, "Legislators and Liberty", (1994) 13 Law and Philosophy 389; Wibren van der Burg, Lon L. Fuller's Lessons for Legislators (2014). Available at SSRN: https://ssrn.com/abstract=2460614.
[33] Dyzenhaus, 'The Legitimacy' (n 31) 34.
[34] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, 2003) 61, 67-72.
[35] ibid, 75-76, 218; Simmonds, *Law as a Moral Idea* (n 2) 157; Dyzenhaus, *Hard Cases* (n 2) 167–168 and 251.
[36] Dyzenhaus, *Hard Cases* (n 2) 251.
[37] ibid 167-168.

legal systems. Fuller himself has applied his theory to Nazi Germany.[38] Furthermore, it has been shown how lawyers and judges in South Africa should have used it against Apartheid.[39] Fullerian theory has also been considered for contributing to the process of legal decision-making regarding the state's responses to terrorism in a state of emergency.[40] In the next section, I employ Fuller's thesis to illustrate the status of legality and the immorality of Iraqi rules under the period of Saddam Hussein and his party's (Ba'ath) authoritarian regime (1968-2003).

2.3 Inside Saddam Hussein's Rule of Iraq

Saddam's rule of Iraq is one of the most brutal examples of a wicked legal system after Nazi Germany. Yet the legal philosophers pay little attention to the wickedness of Saddam's rule of Iraq.[41] For most, the discussion of the wickedness of Saddam's rule of Iraq provides only a telling counter-example of the abuse of human rights and the humanitarian crisis. This aspect is no doubt one of the most important that we can learn from that brutal regime. However, there is a silent feature that shall be considered beyond this wicked system. This feature is the consideration of the rule of law inside Saddam's rule of Iraq.

For more than thirty years of the Ba'th's party and Saddam Hussein's rule of Iraq (1968-2003),[42] a report shows about a quarter of a million Iraqis had been disappeared and murdered under the Ba'th and Saddam's rules.[43] Between March 1987 and April 1989, for example, the Iraqi

[38] Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630; Kristen Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust' (2009) 59 *University of Toronto Law Journal* 656.
[39] Dyzenhaus, *Hard Cases* (n 2).
[40] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006).
[41] The regime of Saddam Hussain is exemplified as the wicked legal system without appealing to its detail. See for example, Waldron, 'The Concept' (n 11) 14; Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds.), *Re-locating the Rule of Law* (Hart Publishers, 2008) 57.
[42] For more on this period of Iraq see, e.g, Kanan Makiya, *Republic of Fear: The Politics of Modern Iraq* (University of California Press, 1998); Charles Tripp, *A History of Iraq*, (Cambridge University Press, 2007); Adeed Dawisha, *Iraq: A Political History from Independence to Occupation* (Princeton University Press, 2013); Joseph Sassoon, *Saddam Hussein's Ba'th Party: Inside an Authoritarian Regime* (Cambridge University Press, 2011).
[43] Human Rights Watch, "War in Iraq: Not a Humanitarian Intervention" (Human Rights Watch, 2004) available at https://www.hrw.org/news/2004/01/25/war-iraq-not-humanitarian-intervention.

government and military leaders eliminated an estimated 182,0002 Iraqi Kurds, including children, as part of the "Anfal campaign";[44] 1.5 million Kurds were forcibly resettled, and 60,000 Kurds fled from their cities and villages.[45] Iraqi scholar Kanan Makiya has described the condition of what was happening in this period of Iraq as living in the "republic of fear".[46] The torture became an art that had been developed with many methods under the rule of Saddam's brutal regime. As Nicholas Kristoff commented: "Police in other countries use torture, after all, but there are credible reports that Saddam's police cut out tongues and use electric drills. Other countries gouge out the eyes of dissidents; Saddam's interrogators gouged out the eyes of hundreds of children to get their parents to talk."[47]

When the post-Saddam court, called the Iraqi High Tribunal (IHT),[48] convicted Saddam Hussein and other former Iraqi high officials of these brutal behaviours and criminal actions,[49] they consistently denied responsibility for the disappearances or mass murders, or for torturing people during their period governance of Iraq.[50]However, Iraqi officials' actions against the Iraqi people generally, and against Kurds particularly, under Saddam's rule were widely and internationally approved and condemned. For example, Saddam's Anfal campaign against the Kurds in Iraq was flagrantly recognized as a crime of torture, genocide and a crime against humanity by any definition of the term. In fact, the Iraqi High Tribunal delivered its verdicts

[44] Al Anfal, Case No.Al Anfal, Case No. l/CSecond/2006, Judgment, 501 (Iraqi High Trib., 2007), available at http://www.internationalcrimesdatabase.org/Case/1233/Al-Anfal/.
[45] Human Rights Watch, "Genocide in Iraq: The Anfal Campaign against the Kurds" (Washington, DC: Human Rights Watch, 1993), available at https://www.hrw.org/reports/1993/iraqanfal/.
[46] Makiya, Republic of Fear (n 39).
[47] Nicholas Kristoff, "Try Suing Saddam" (2002-03-26) *The New York Times*, available at https://www.nytimes.com/2002/03/26/opinion/try-suing-saddam.html.
[48] The Iraqi High Tribunal (IHT), or the Iraqi High Criminal Court Law, was established with the express goal of bringing personal accountability to Saddam Hussein and other Ba'athists who were responsible for crimes against Iraqi people. For further see, Michael P. Scharf, 'The Iraqi High Tribunal: A Viable Experiment in International Justice?' (2007) 5 Journal of International Criminal Justice 258, 258-260; Mark A. Drumbl, The Iraqi High Tribunal and Rule of Law: Challenges, Proceedings of the Annual Meeting, (2006) 100 American Society of International Law 79, 80- 83.
[49] They were accused according to Articles 11 to 14 of Statue of The Iraqi High Criminal Court No. (10) 2005.
[50] For details of defendant Statements, ICTJ Update – The Anfal Trial Defense Phase and Closing Stages (January 2006), available at: https://www.ictj.org/publication/anfal-trial-and-iraqi-high-tribunal-update-number-three-defense-phase-and-closing-stages.

against Saddam Hussein and several of the former of Iraqi high officials and sentenced them either to multiple life sentences or the death penalty for a crime against humanity.[51]

There is no doubt that the brutal evil ends that Saddam's regime has pursued over a period of three decades of governing Iraq, is something from which every decent Iraqi recoils, the memory of these horrors and nightmares. It is also this perspective that could be most commonly taken when explaining the wrongness of the former Iraqi officials in Saddam's regime. The evaluation of Saddam's rule of Iraq could be focused on those crimes against humanity and the abuse of human rights in terms of its impact on the direct victim. Yet there is one salient feature of Saddam's rule of Iraq. This feature is that it represented an obvious departure from governance through the rule of law. Along with the substance of brutal Saddam's tyranny came sustained violations of legality. From Fuller's legality, the systemic qualities of the Iraqi legal system under Saddam's rule were radically corrupt and changed its form. The use of the secret statute and the issue of a retroactivity regulation to cure past irregularities were among several obvious violations to the requirements of legality under Saddam's rule of Iraq.[52] Outside Iraqi constitutional provision, Iraqi officials adopted a council to issue orders, named the Revolution Command Council (RCC).[53] This council was the supreme body of the state, which constituted a collective leadership of senior and powerful members of the Ba'th's party.[54] This council exercised both executive and legislative powers by proposing legislation and passing administrative decrees and orders. The overwhelming majority of these administrative decrees frequently contradict other written laws and even the principles contained in the Iraqi constitution itself. In the meantime, Saddam himself was sending instructions to the

[51] See, e.g., the Anfal case (n 44).
[52] See, e.g., The Evolutionary Command Council (RCC) order No. 1357 of 1971 stipulated the effective of death penalty to all past cases" for any military personnel participating in a prohibited political party or carrying out prohibited political activity with the purpose of recruiting principles or trends detrimental to the Arab Ba'ath socialist party."
[53] Dawisha (n 42) 211; Tripp (n 42) 164; cf. also Stacy E. Holden, *A Documentary History of Modern Iraq* (University Press of Florida, 2012) 195-198
[54] Dawisha (n 42) 211.

government's draft-lawmakers or the RCC. The policy rationale behind Saddam's rules was never subject to anything approximating the kind of deliberation that is common to juridical review or even parliamentary democracies. More disturbing was the fact that the Iraqi judicial system did not possess the power to review such administrative orders.[55]In effect, this council issued many orders in secret and retroactive that are brutal in content.[56] For example, while the Articles 1 and 26 of the Iraqi Interim Constitution of 1970 appear to be defining Iraq as a "democratic republic" where individuals' freedom of expression, association, opinion, demonstrations and formation of political parties are protected,[57] several orders were issued by the RCC that not only banned those political freedoms, but also indicated that "any person would face execution even if he left the official party of government (Ba'th)."[58]

Moreover, the actual activities of Iraqi former officials were radically against the official behaviour sanctioned by the enacted legal rules and offered by officials' rulers themselves in Iraq. For instance, Article 218 of the Iraqi Criminal Procedure Code No. 23 of 1971 prohibits the use of coercion, torture, and abuse of someone in custody. But the political prisoners and detainees were subjected to systematic torture and inhuman treatment in the time of Saddam's government.[59] Although Iraq Criminal Procedure Code [60] ensures the right of accused persons to have legal counsel present during investigation and hearing, unfair trials or even formal trials

[55] International Commission of Jurists, 'Iraq and rule of law' (1994), available at https://www.icj.org/iraq-and-the-rule-of-law/.
[56] ibid.
[57] The Article 26 of Iraq Interim Constitution of 1970 states: "The Constitution guarantees freedom of opinion, publication, meeting, demonstrations and formation of political parties, syndicates, and societies in accordance with the objectives of the Constitution and within the limits of the law. The State ensures the considerations necessary to exercise these liberties, which comply with the revolutionary, national, and progressive trend."
[58] For example, the order No. 145 of 1977 by RCC states "The death penalty to whoever has been a member or shall be a member of the Arab socialist Baath party and whose relationship with the party has ended, if it can be proved that he has a connection with any other party or political grouping or that he works for it or in its interest". The RCC order No. 840 of 4th of November 1986 also indicates "To sentence to life imprisonment and confiscate the movable and immovable property of any person who insults in any fashion the president, or anyone acting on his behalf, or the revolutionary command council, or the Arab Baath socialist party or the national assembly, or the government; to sentence him to death if the insult or attack was of barefaced nature and was intended to incite public opinion against the authorities".
[59] Amnesty International, Amnesty International Report 2002–Iraq (2002) available at: http://www.refworld.org/docid/3cf4bc140.html.
[60] Article 123 of Iraq Criminal Procedure Code No. 23 of 1971.

without any legal counsel were very common under Saddam's order.[61]The Iraq Penal Code "stipulates that juveniles up to the age of twenty may not be sentenced to the death penalty",[62] and yet minors and children under the age of eighteen were sentenced to death and executed under the government of Saddam.[63]

We learn from the Fullerian analysis that these sorts of actions of the Iraqi officials had impacted upon the institutional and functional quality of the legal system. The Iraqi legal system under Saddam had never been in a healthy mode. Private laws such as family law might not have been affected, but the issues that relate to public law and the political system were dramatically affected. Fuller's judgment upon the Nazi rule can be also applied to Saddam's rule. To borrow from Fuller's own words:

> "There is nothing shocking in saying that a dictatorship [e.g. Saddam's regime] which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality, - when all these things have become true of a dictatorship, it is not hard, for me at least, to deny to it the name of law."[64]

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[61] Amnesty International, Amnesty International Report 2002–Iraq (2002) available at: http://www.refworld.org/docid/3cf4bc140.html.
[62] Iraq Penal Code, Art. 79, No. 111, 1969.
[63] Amnesty International, Iraq: The death penalty, AI Index: MDE 14/01/1989, February 1989; Amnesty International: Iraq: Children: Innocent Victims of Political Repression, AI Index: MDE 14/04/89, February 1989
[64] Fuller, 'Fidelity' (n 38) 660. Fuller's point has thoughtfully explained by Rundle. See, Rundle, *Form Liberate* (n 2) 83.

This unhealthy structure of the Iraqi legal institution has also impacted dramatically the moral quality of law that stems from the legality requirements. Saddam's rule missed out what Fuller highlighted as the idea of the reciprocity relationships between officials and Iraqi citizens, and the dignity of Iraqis as autonomous agents under Saddam's regime has been an affront. All kinds of brutalities, humiliations, and violations of human dignity under Saddam's rule have been so much part of the everyday life of the Iraqi citizen. Iraqis' official torturing, murdering, and making Iraqi citizens disappear violated the reciprocity at the heart of the relationship between government officials and citizens. Iraqi government officials obviously undermined part of the basis upon which any moral duty of obedience depends. Thus it was neither the quality of the legal system well-structured for the political community of Iraq under the requirements of legality nor did they obey those enacted laws that bind the government to respect the Iraqi people.

Iraqi citizens who witnessed such a nightmare of rules and disaccord between enacted rules and Iraqi official action had little reason to believe that other written or publicly espoused policies reflected the policies enforced by the state government. In fact, it is also unsurprising that Iraqis always feel anger when government officials dishonestly violate the rule of law. Iraqis were very aware of the fact that Iraqi officials were responsible for the disappearances, with a great possibility those who kidnapped were tortured and killed in secret. In the Iraqi republic of fear, thus, the most ordinary citizen expected from the official was to be tortured or kidnapped, under certain circumstances.[65] When people's viewpoints had not been taken seriously, and the dignity of the Iraqi as the autonomous agent had not been taken into account, the possibility of a healthy system in which citizens voluntarily orient their attitude and behaviour towards general rules had been missed inside Saddam's rule of Iraq.

[65] Makiya, *Republic* (n 42).

As a result, Iraqi authorities had introduced new decrees and widening the number of extra-legal violence and increasing capital punishment, such as the death penalty unreasonably to cover fourth-degree felonies and misdemeanours.[66] For example, the death penalty even covers at least eighteen new offenses to make people obey the rules in the 1990s.[67] To paraphrase Hannah Arendt, violence was the essence of Saddam's form of government.[68] Fear and violence replaced the governance through the rule of law under Saddam's rule. For fear to be truly ubiquitous, Saddam's regime had to use force and terrorize the population. Iraqi citizens never knew when they might be arrested or kidnapped by the authority, who would inform on them, and worst of all, whom they would trust.[69] This was a sign of what Fuller referred to as the failure of making and maintaining the law. [70] Saddam as a ruler who attempted creating workable legal order at some point was compromised by his failure to establish the conditions that enable the order to be brought into being. Instead, he took a different path and adopted a different form of ruling: the rule of terror. In return, the resistance among Iraqis had increased, and revolutionary groups had led more sustained and effective military operations against Iraqi government positions. In the meantime, between three and four million Iraqis, about fifteen percept of the Iraq population escaped and fled their homeland rather than live under Saddam Hussein's rules.[71]

2.4 A Reply to an Instrumental Objection

The basic intuition underlying many critiques of Fuller is that it turns Fuller's eight principles into an instrumental character. Fuller's principles have been seen as increasing law's effectiveness both in guiding human conduct and in achieving whatever goal for which the law is used, rather than serving any moral values in themselves. It is argued these principles are instrumentally

[66] Amnesty International Report, Iraq: State cruelty: branding, amputation and the death penalty, April 1996, AI Index : MDE 14/03/96.
[67] ibid
[68] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich, 1973).
[69] Sassoon, *Inside an Authoritarian Regime* (n 42) 197.
[70] Fuller, 'Fidelity' (n 38) 603; Fuller, ML, 34-41.
[71] Shafeeq N. Ghabra, 'Iraq's Culture of Violence' (2001) 3 Middle East Quarterly. Available at https://www.meforum.org/articles/other/iraq-s-culture-of-violence.

necessary for the law to serve any purpose but equally open to moral and immoral uses. Despite the internal connection between law and the principles of legality being accepted in point (a) from the Fuller's argument, the most common question asked in the debates between Fuller and his critics is, thus, whether Fuller's principles amounted to morality at all. Thus, the debate is on the stage (b). This, of course, was the basis of H.L.A. Hart's critique,[72] and those who also followed in his footsteps like Joseph Raz.[73] One point of this critique is to avoid Fuller's conclusion that the law has moral status.[74] As Fuller himself thought, Hart and other critics were "intent on maintaining the view that the principles of legality represent nothing more than maxims of efficiency for the attainment of governmental aims."[75]

Hart has acknowledged that for the law to guide human behaviour effectively, it must satisfy, to some degree, Fuller's eight principles. Although he expresses denial that the law should be understood as living up to any particular moral ideal, some of Hart's more specific arguments about legality seem to accept that there is a necessary connection between law and legality.[76] IIn *The Concept of Law*, for example, Hart argues that any system of social control that operates by setting out general rules for the population to apply to their conduct could not function unless the rules were intelligible, possible to obey, and non- retrospective.[77] In this context, the point for Hart is that the law must conform to the eight principles, if it is to function effectively in guiding conduct.[78]

[72] H.L.A. Hart, 'Review of The Morality of Law' (1965) 78 *Harvard Law Review* 1281. This review has been reprinted in H.L.A. Hart, *Essays Jurisprudence and Philosophy* (OUP, 1983) 343-365.
[73] Most recent legal positivists share Hart's critique of Fuller with different argument. See,e.g., Matthew Kramer, 'Scrupulousness without Scruples: A Critique of Lon Fuller and His Defenders' (1998) 18 *Oxford Journal of Legal* Studies 235; John Gardner, *Law as a Leap of Faith: Essay on Law in General* (OUP, 2012) ch 8; Andrei Marmor, 'The Rule of Law and its Limits' (2004) 23 Law and Philosophy 1.
[74] Andrei Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' (2006) 26 *Oxford Journal of Legal Studies* 683, 683.
[75] Fuller, ML, 214 and generally 200-219.
[76] Bennett, 'Hart and Raz' (n 28) 619.
[77] H.L.A. Hart, *The Concept of law* (2 ed., Clarendon Press, 1994) 202.
[78] ibid 206-07.

Hart defines these features of "social control by rules" which are "closely related to the requirements of justice which lawyers term principles of legality".[79] When we confront Hart's statements in line with Fuller's claim, we can conclude then that Hart accepts that certain principles of Fuller's eight principles, must be fulfilled to some degree if the law is to be effective at guiding human conduct through rules. In this context, Hart's position follows the stage (a): there is some necessary or internal connection between law and eight principles. Nevertheless, these connections between Hart's concept of law and Fuller's eight principles were not fully developed in Hart's work.[80] There seems to be in these arguments an acceptance that Fuller's arguments were more compelling than Hart's critique of them in his review of Fuller's *The Morality of Law*. If this were the case, Hart would have to explain how his concessions to Fuller's thesis do not lead to the abandoning of legal positivism. I believe the answer lies in his response to the stage (b) of Fuller's thesis. Hart's main interest in this connection seems cutting losses when he turns to the moral character of Fuller's claim of legality (b).

In contrast to Fuller, Hart thought the principles of legality did not hold anything like what Fuller calls internal morality of law. Hart argues although Fuller is right to present these principles as "principles of good craftsmanship"[81], Fuller is wrong to call these principles a "morality".[82] They are not moral because they are "derived, not from principles of justice or other external moral principles relating to the law's substantive aims or content"[83]. However, here there is some confusion in Hart's expression. Although, Hart accuses Fuller by describing these principles as "morality", because Hart believes these principles are not really driving from

[79] ibid
[80] Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83 *New York University Law Review* 1135, 1144; Gardner, (n 73) ch.9
[81] Hart, Essays (n 72) 347.
[82] Ibid
[83] ibid; cf. Bennett, ' Hart and Raz' (n 28).

any "principles of justice", Hart himself describes these principles "requirements of justice".[84] It follows, as Gardner observes,[85] what are principles of legality and moral in character according to lawyers like Fuller are requirements of justice according to Hart himself.[86]The question that Hart would need to answer here is that: if these principles are requirements of justice, is not really justice part of morality?[87] After all, Hart would have explained why his expression of justice is different from Fuller's expression of morality regarding the principles of legality.

In the classic statement of the problem, Hart offers an example of the purposive activity of poisoning. According to Hart, the activity of poisoning also contains "internal principles" relevant to the pursuit of its objects.[88] Yet, Hart argues, to call these principles of the poisoner's art the "morality of poisoning" seems "to blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned."[89] Hart's point here appears to say that internal principles are not necessarily moral in any cases, especially in case of Fuller's argument. This is so because the morality of these internal principles depends on the outcomes ends that the uses of these principles may accomplish. After all, Hart argues Fuller's claim has confused "purposive activity" with "morality."[90] Furthermore, Hart believes these principles could be morally accounted as neutral because it is possible to be "compatible with very great iniquity".[91]

In answering Hart's charge, I believe his argument against the "internal morality" of law by comparing it with an "internal principles of poisoning" wrongly overlooks the difference between two kinds of human practices and activities we may engage in: good and evil or bad

[84] Hart, *The Concept* (n 77) 207; Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83 New York University Law Review 1135; Gardner (n 73) 223-224.
[85] ibid
[86] Hart, *The Concept* (n 77) 207
[87] Gardner, (n 73).
[88] Hart, *Essays* (n 72) 350
[89] ibid
[90] ibid
[91] Hart, *The Concept*(n 77) 207.

activities.[92] All human activities have their internal principles of efficiency to some degree, but they are not necessarily moral. In case of torture, for example, although the standards and principles may be conducive to maximizing or minimizing the pain of the victim, there can never be 'morality of torture' because torturing people is not a good deed itself, it is evil. Whatever the goal to which the internal principles of torturing are conducive for example getting information to avoid terrorist attack, it is not something that will change the status of torture from a bad deed in itself. Like torturing people, poisoning is not a good deed but is wicked, whatever the nature of the internal principles, or even the goals, that are making poisoning people more effective; such as avoiding vomiting or measuring the drug by a careful scale in order to make a formula that has more effect.

However, the internal principles in the case of law and legality, perhaps in some other social practices as well, are moral in itself. In fact, the value such as the reciprocity and the respect of a person's dignity are two of those moral reasons that have been mentioned by Fuller himself. In addition to these reasons, we can add that the internal principles of legality are also moral because moral here means the constraints which the values of sound morality, hovering above the law, impose on any individual including those who hold power, law-making power. These principles have a significant role in justifying why the idea of law as subjection of human conduct should be to the governance through rule of law, not to the rule of arbitrary power imposed by others in the first place.[93] The eight principles force rulers, whether they are lawmakers, law-administrators, and judges who would make and apply the legal rules, even bad or evil rules in content, to reconsider seriously keeping communications and interactions with those who are subject to their laws.[94] In this context, we can recognize then these principles enforce the standard to think carefully about how the legal rules become a rule of behaviour to

[92] cf. Sean Coyle, *Modern Jurisprudence: A Philosophical Guide* (Hart Publishing, 2014) 199-202.
[93] Viner has highlighted this point, see S. Viner, 'Fuller's Conception of law and its Cosmopolitan Aims' (2007) 26 *Law and Philosophy* 1,14-18.
[94] ibid 14.

the extent that is workable, meaningful, and what "kinds of rules are most likely to be accepted and followed by those who are to be affected by those rules."[95] This concern is not important in the case of other practices like poisoning or torturing.

For example, we think about the publication of some of the evil rules of Saddam's regime. But it is clear that attempting to govern Iraqis people effectively. But this task was never being an easy one. Saddam's rules faced the difficulty of promulgating, publishing, enforcing and maintaining throughout his governance of Iraq. In his early period of governing Iraq, Saddam resisted publishing the rules. Rather, they were hidden behind some facade of another form such as the orders of the RCC.[96] One reason was to keep these rules fits what Fuller explains the "requirement of publicity has a tendency to fight or resist the promulgation of immoral or bad laws."[97] Once Saddam's regime promulgated some of his evil rules, the effective governing of human conduct was never going to be easy. Resistance and opposition increased among Iraqi people.[98] International sanctions were implied upon Saddam's regime for humanitarian reasons.[99] Yet, it was certainly not impossible to make people obey and comply with Saddam's rules because the regime adopted extra measures and violence to earn a great deal of obedience by the people.[100] However, the cost of this obedience came with great violation of the requirements of legality.

Hart would disagree with this point and argue that although the eight principles are respected, it still does not secure any firm connection with justice.[101] However, the fact that there are no guarantees between legality principles and justice does not demonstrate that these principles have

[95] ibid
[96] Dawisha (n 42) 212.
[97] Fuller, ML, 158-59.
[98] Dawisha (n 42) 212.
[99] Tripp (n 42), 234-239; Sassoon (n 42) 221-226.
[100] ibid; cf. also Lisa Blaydes, *State of Repression Iraq under Saddam Hussein* (Princeton University Press) 31-60, 133-305.
[101] Hart, *The Concept* (n 77) 207.

not any inherent moral value. Simmonds has captured this point: "The fact is that compliance with the eight principles is logically consistent with the pursuit of evil aims in very much the same way that armed robbery is logically consistent with a scrupulous concern for paying one's debts. They are indeed logically consistent, but they are very unlikely to be found together."[102] The reason is that the moral status of any value is different from the personal reasons of why the agent's participants, such as rulers, or the ends that used in any social practice engage in this practice. Consider gambling; the immorality of gambling does not depend on the personal reasons why people play the lottery or cards. Even though people do gambling for good reasons for example for ensuring some fortune for their children to live well, gambling and the lottery would not become morally considered. This also applies to the immoral activity of torturing people or armed robbery. Using torture for some good purposes does not change its evil deed. Using torture for getting information from a terrorist to avoid a terrorist attack does not make torture a good thing in itself. Similarly, some moral deed doses not change its morality if it is used for bad purposes. For example, the morality of justice does not depend on the personal reasons of why we are endorsing justice for some ends. It may be used for self-interest reasons for political agenda. But the idea of justice eventually remains as a high moral value, whether it has been used for good or bad reasons.

More surprisingly, none of the regimes mentioned by Fuller, and more generally those unhealthy systems absent from the governance through the rule of law, are in existence any longer. The examples of Nazi Germany and lately Iraq's Saddam, in one way or another have all collapsed and crumbled down because they did not have support to be a healthy legal system. Of course, other factors were involved in the collapse of these systems. But once these systems missed a sufficient degree of reciprocity in their citizen's practical commitment to law,[103] and their dignity

[102] Nigel E. Simmonds, *Central Issues in Jurisprudence: Justice, Laws, and Rights* (Sweet & Maxwell, 2013) 123.
[103] The theme of reciprocity or interaction, which is sustained in Fuller's jurisprudence, has been widely implied by some legal theorists and lawyers in the filed of constitutional law and international law see ,e.g., Pavlos Eleftheriadis,

was not respected, these systems were no longer capable of functioning and continue legal order. This is not just a coincidence, but significantly relevant. The main point that we can learn from Fuller's claim is that "the foundation of a legal system is the relevant moral tests of reciprocity"[104] and the respect of peoples' dignity must be met within this foundation. The overall situation of any healthy legal system must show some respect to legality and its principles. This task is incomplete if it is fitted with the very idea of moral foundation of legality: reciprocity and the respect of human dignity. In return, we can say we have a workable legal order. Certainly, such a system may be imperfect to attaint all human goods or justice, but it still morally valuable. It follows then we may not be sure about a perfect result of following the legality with its moral foundation, but we certainty sure about what happens if the governing people lack the rule of law. For sure, no regime violating the principles of legality can continue to exist, since the very moral foundation of the legal order has collapsed.

After decades, Joseph Raz has developed Hart's line of argument further.[105] Raz, like Hart, accepts that there is some connection between the eight principles and law (a),[106] and, Raz accepts Hart's claim that these principles are instrumental (b).[107] Consequently, Raz believes Fuller fails to make a necessary connection between law and morality.[108] In the course of his argument, however, Raz makes some adjustments to Hart's argument in challenging Fuller and develop his own theory of the rule of law.[109] Regarding stage (a), the connection between Fuller's principles and law, Raz identifies the nature of this connection. On the face of it, he

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Legality and Reciprocity: A Discussion of Lon Fuller The Morality of Law' (2014) 10 *Jerusalem Review of Legal Studies* 1; Wibren van der Burg, *The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism* (Ashgate, 2014); Brunnée and Toope (n 60; also below Chapter 4 at section 4.2.

[104] Eleftheriadis (n 103) 3.

[105] Bennett ' Hart and Raz' (n 28) 625.

[106] Raz, 'The Rule of Law and Its Virtue'(n 12) 221.

[107] ibid 218; Andrei Marmor "The Rule of Law and its Limits" (2004) 23 *Law and Philosophy* 1; Fox-Decent (n 27) 533; Murphy (n 24) 246-249.

[108] Raz, 'The Rule of Law and Its Virtue' (n 12) 224.

[109] Raz, 'The Rule of Law and Its Virtue' (n 12); Joseph Raz,'The Politics of the Rule of Law' in *Ethics in the Public Domain Essay in the Morality of Law and Politics* (OUP, 1994); Joseph Raz, 'Formalism and the Rule of Law' in Robert P George (ed.), *Natural Law Theory* (Oxford: Clarendon Press, 1992).

demonstrates these principles constitute the ideal rule of law.[110] Raz expands Fuller's eight principles and adds several principles to this list that relate to certain procedural and institutional elements, such as independent courts. By this, he clearly shifted the focus from Fuller's eight requirements into the ideal of the rule of law. This shift allows Raz to approach Fuller's claim in a dualistic way.[111] While the law is a form of human institution and social organization, which instrumentally can be used for different purposes,[112] the rule of law as the ideal is different from the nature of law. The rule of law is an ideal that may fail to become a reality.[113] As a result, he approaches stage (a) in two different ways: the minimal conformity to Fuller's principles necessary for the existence of rules (a1); and, the "substantial conformity" to the ideal of the rule of law might be satisfied, and the moral value it creates to be secured (a2). The outcome of his different approaches to (a) make Raz modify the nature of the connection between law and Fuller's claim (a) into (a3) as following: the ideal of the rule of law is not part of the existing conditions of law and a legal system, even if there is necessary a "minimal conformity" to Fuller's principles is part of the conditions. Thus, only the "minimal conformity" to the rule of law principles is necessary if the law is to guide human conduct and secure the purposes of the law.[114]

Although Raz acknowledged that law is a functional concept when he says, "establishes an essential connection between the law and the rule of law",[115] Raz dismisses the idea that the law must live up to the ideal of the rule of law. Here there is a dilemma in Raz's claim. If the rule of law is of the essence of law that it constitutes of rules that can guide human conduct, and if the rule of law principles have to be followed for this to happen, then how can we say that the ideal

[110] Raz The Rule of Law and Its Virtue'(n 12) 214.
[111] Simmonds, *Law as a Moral Idea* (n 2) 47-51; Waldron, 'The Concept' (n 11) 11; Martin Krygier, 'The Hart-Fuller Debate, Transitional Societies and the Rule of Law' in Peter Cane (ed.), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing, 2009) 117; Nigel Simmonds, 'Reply: The Nature and Virtue of Law' (2010) 1 Jurisprudence 277, 285.
[112] Raz, 'The Rule of Law and Its Virtue'(n 12) 226.
[113] ibid 224.
[114] ibid 224–225.
[115] ibid 224.

of the rule of law does not fall within any sensible concept of law?[116] In my view, Raz's inconsistency lies in the point that if there is no significant compliance with the rule of law substantially, the law will be less effective in guiding human conduct. As a result, the law's claim to authority is suspect due to its failure to set out legal rules that people use to determine what they ought to do.[117] In other words, when the non-compliance with Fuller's principles reaches a certain threshold, a rule directive human conducts will not be law because it cannot guide human behaviour intelligibly and invite them to engage with the legal norms. Hence, if the law to be really guiding human conducts, it must be understood as possessing such principles of legality and always live up both minimally and substantially to the moral ideal of the rule of law.[118] Otherwise, we are besides changing the real and healthy form of law into other forms of social order. However, Raz did not accept this conclusion.

This dualism between law and the rule of law also allows Raz to treat the morality quality of Fuller's claim (stage b) differently.[119] When he approaches the question of whether there is a necessary moral inherent value in every legal system in light of conformity to the rule of law principles, Raz answers that there is not.[120] However, his argument is complex and ambiguous. On its surface, Raz admires that there is a moral value about the rule of law such as respecting human dignity,[121] which he characterises in terms heavily indebted to Fuller's connection the eight principles with the dignity of a person as a responsible agent.[122] Raz writes: "More important…. is the fact that observance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning

[116] Simmonds also raises similar questions against Raz's claim see Simmonds, *Law as Moral Idea* (n 2) 47-51.
[117] Anton Fagan, 'Delivering Positivism From Evil' in David Dyzenhaus (ed.) *Re-crafting the Rule of Law: The Limits of Legal Order* (Hart Publishing, 1999) 103-108.
[118] ibid 104; Bennett, 'The Rule of Law" (n 14) 99, 101, 103.
[119] Simmonds, 'Reply' (n 112) 285.
[120] Raz 'The Rule of Law and Its Virtue' (n 12) 224.
[121] ibid 221.
[122] Fuller, ML.

and plotting their future."[123] Here it seems Raz agrees with Fuller that the rule of law principles have "non-instrumental moral value."[124]Yet, he thinks this does not bring any moral character into the law and the legal system. One reason is that the rule of law (even if it upheld the respect of human dignity) is either "a purely negative value… merely designed to minimise the harms to freedom and dignity which the law might cause in its pursuit of its goals however laudable these might be",[125] or it only makes the law into a more "effective instrument" for "guiding the action of those subject to the law."[126] Therefore, although the rule of law could be a virtue of law, Raz tells us, it is like the virtue of the sharpness of a knife. Whether it issues morally well or not depends on the outcomes ends and purposes to which the tool, law or the knife, is employed.[127] Hence, Raz concludes "the rule of law is an inherent virtue of the law, but not a moral virtue as such."[128] Here Raz's statement that the rule of law is "not a moral virtue" is widely interpreted as the instrumental objection to the view that the rule of law is morally valuable.[129]

There are several distinct errors in Raz's claim. Typically, the harms to human dignity for which the rule of law may be curing and reducing are not merely the abuses or uses of law, but the abuses of exercising power.[130] There are many ways in which power can be employed wrongly and arbitrarily without the idea of law is involved.[131] Inasmuch as the source of power can be outside the domain of legal restriction through the rule of law, the abuse of power is still on to be in any arbitrary form whether the public or private alike practises it. In context like this, the rule of law is the role of "the law" that employs to exclude all those arbitrary ways from the

[123] Raz 'The Rule of Law and Its Virtue' (n 12) 221.
[124] Bennett, 'Hart and Raz' (n 28) 625-635.
[125] Raz, 'The Rule of Law and Its Virtue' (n 12) 228.
[126] ibid.
[127] ibid 226.
[128] ibid 226.
[129] See ,e.g., Murphy (n 24) 248; Andrei Marmor "The Rule of Law and its Limits" (2004) 23 *Law and Philosophy* 1; Evan Fox-Decent (n 27) 533; Bennett, 'Hart and Raz' (n 28) 607.
[130] For a largely similar point about Raz in a somewhat different context, see Martin Krygier, Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares? in James E. Fleming (ed.), *Getting to the Rule of Law* (New York University Press, 2011) 88-89.
[131] Krygier, Four Puzzles (n 130) 88-89

start.[132] From a social and horizontal level of human interaction, for example, observing the morality of legality can be captured when we look at the importance of law as a protection of human dignity among people themselves. As Krygier correctly observes, sometime "great threats and realizations of an unconstrained social arbitrary exercise of power" comes with the problem of social power. The social power certainly does not have problem with the vertical or public interaction between officials and citizens. But it has a big problem with horizontal human interaction between citizens themselves at the same level.[133] The exercise of social arbitrary can become an enemy of the rule of law. It becomes a big threat to people's dignity and rights. Consider for example when people live under the power of a non-state or powerful group within a weak and unstable state, such as having terrorist groups (e.g., ISIS in Iraq) or cartels and mafias (e.g. drug cartel in Colombia), in cases like these it necessities the effective governmental interventions, "interventions to realize the rule of law" in order to impasse the rules of other men and private groups.[134] For this, the rule of law is significantly part of a cure for reducing the abuse of power that is possibly stemming from both private and public uses of power, not merely from the abuse of law as Raz suggests.[135]

Raz might reply that the abuse of the law that he means is an abuse of political or public power that exists because of law when they give legal power for those who are in a legal position such as lawmakers to abuse it.[136] It implies then the law is only a tool behind who is on the public power in the ways he likes to use the law for good and bad alike. While it is correct the law is the source of political and public power-legal power, it is misleading to re-join the abuse of political power with abuse of the law on the same level. This is misleading because of two reasons. Firstly, when we speak of the abuse of a thing, we imply that the normal use of that thing

[132] Rundle, *Form Liberate* (n 2) 152
[133] Krygier, Four Puzzles (n 130) 89.
[134] ibid
[135] ibid 88-89; Fox-Decent (n 27) 561-62. 2.
[136] Raz 'The Rule of Law and Its Virtue' (n 12).

possibly achieves something good by its nature.[137] Hence, the abuse of the thing is the uses of the thing against its nature and goodness; the thing is used for something else. However, the different uses of that thing do not add anything to the very nature of that thing and its goodness. For example, a knife would not be described as good because it is a sharp knife that is used to torture someone or to murder someone. It is simply good because it is good, whether it is used for other good or evil purposes. The category of knives and their nature is true to the specific virtue of knives and their nature of sharpness whatever the knives are used for. Similarly, when we speak of the misuses of law, we speak of the specific virtue and goodness within the law, which is the rule of law, rather than speaking of the use of law, which refers to something outside and external to the law. For example, by saying that law is an instrument of evil or good is what makes the law a good or evil thing.

Secondly, we should look at the law itself as a part of the remedy and solution to a problem, rather than the basis of the problem. It seems Raz presents the law as something different from the model of the governance of the rule of law.[138]But the problem that the rule of law aims to fix is replacing the rule of "something" by the rule of "law". More particularly, the rule of law formulates a model of governance through "the law". This model of governance through the law is important because it necessarily stands against the dangers of other forms of governance, such as the rule of commands and terrors. And this is the core idea of the rule of law that Raz himself agrees. This claim does not mean that all human goods can attain under the governance of the rule of law, it might be progressively,[139] or that the government through law can truly rule a political community in which all conditions of people's dignity and fundamental rights are never flouted. It means by the governance of the rule of law that the structure of legal system and the life of the political community is less in danger and more in a healthy mode when we are

[137] For this point see Dyzenhaus Daivd "The Morality of Legality", Berkeley, Jurisprudence Colloquium, 19 papers delivered 2011.
[138] Waldron, 'The Concept' (n 11) 10-11.
[139] See below Chapter 5 at section 5.3.

comparing it to other forms of governance by the non-the rule of law. Those dangers that stem from the nature of governance by anything except the rule of law are often various because they stem from the arbitrary use of public power. Life under the example of Saddam's rule of terror is an obvious one.

The above mistake arises because Raz pushes us to, as Fuller says, be wrong with a positivist view of law. That is positivism reducing the law to a "one-way projection of authority", in which "the role and importance of people in a reciprocal relationship with the official government are all but obliterated."[140] For Raz, the rule of law could have an inherent virtue of the law because "it enables the law to perform useful social functions",[141] but this does not have a moral value as such: inherent in the morality to the law.[142] By this, Raz divides the idea of governance according to the law into different types: governance by law and governance with the rule of law.[143] The "governance by the law" exists as long as all of those who in the position of public power have a "basis in some positive legal authority"[144] to act- by enacting the status, interpreting the rules and forces to imply the policies and regulations. However, the idea of "the governance with the rule of law" exists when it is public, in addition to the public power, it is adherence to the rule of law.[145]

Accordingly, Raz would agree that the examples from Saddam's regime in Iraq that were examined above constitute the obvious violations for the rule of law and its requirements. But I can imagine Raz would still insist that this fact could not entail anything to the illuminating of the internal morality of law in light of the rule of law. The ground claim of Raz is that "the rule

[140] Fox-Decent (n 27).
[141] Raz, 'The Rule of Law and Its Virtue' (n 12) 226.
[142] ibid 226
[143] Dyzenhaus, *Hard Cases* (n 2) 224
[144] ibid
[145] ibid 224

of law does not restrict the ends that law and legal system can serve",[146] and therefore it does not tell any internal morality into the nature of law. As long as the law enables the guiding of human conduct, the violating of the rule of law does not make any moral significance to the law. Even Raz, like Fuller, admires that there some moral values such as respect for human dignity within the idea of legality,[147] these morals (respecting human dignity) do not always amount to any moral significance to the law. It could be some possibility to the virtue of the rule of law. But it is a very thin virtue. It ultimately has a "negative" virtue that is intended only to minimize the danger of arbitrary power inherent in the institution of law.[148] The rule of law is thus "contingently, rather than conceptually," related to virtue of the law.[149] As a result, it is even possible, in Raz's view, to respect the principles of the rule of law as consistent with all kinds of terrible behaviour and evil ends, as long as there are legal rules that are capable of guiding human behaviour.

This claim is also false because the moment we accept that the rule of law is essential to the law; it brings moral concern and positive value to the idea of law.[150] Any system is capable of attaining the rule of law requirements the closer the system gets to attaining these requirements, the more chance it has of becoming a healthy legal system. One positive value that stems from governance through the rule of law brings the idea of respecting human dignity into the idea of law itself. As Fuller asserts, governance through the rule of law by itself implies "certain built-in respect for human dignity" that other forms of direction and order presumably lack.[151]Once we can build the enterprise of law in light of the rule of law requirements with respecting human dignity, we can observe then the rule of law has an "affinity with the good" more than with

146 Murphy (n 24).
147 Raz, 'The Rule of Law and Its Virtue' (n 12) 223.
148 ibid 224.
149 Nicola Lacey, 'Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate' (2008) 593 *New York University Law Review* 1059, 1066.
150 Martin Krygier, 'Rule of Law' in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 242-246.
151 Fuller, 'A Reply to Professors' (n 28) 665.

evil.[152] This claim means that legal systems with this formal legality are more likely also attending the laws with fair, just content, and human goods.

An indirect argument of this claim can also be captured in the thesis of coherence and goodness that Fuller claimed in the different places.[153] Fuller argues that there is an infused relation between "coherence and goodness" in human activity, more than between coherence and evil. As he declares: "I shall have to rest on the assertion of a belief that may seem naive, namely, that coherence and goodness have more affinity than coherence and evil."[154] He adds further: "when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are."[155] The core implication of coherence and goodness stands, first, on the view that argues good order, coherence, and clarity are manifested by animating human dignity within the structure of formal legality. Then, this animating has an affinity more with goodness and moral behaviour, rather than with evil purposes. Government and officials might be able to use unclear, muddled and incoherent projects or means towards evil ends, but this can never be considered as a final form of law that orders effectively and legally from legality and respect of human dignity. That official action rather should be considered as lawless, using power towards some evil ends because it lacks a requirement of the clear implication of the rule of law that enhances the conditions of human dignity within itself. Their mode of governance by rules is everything except the law.[156]

By rejecting the Fuller's reading of the morality of law in light of the rule of law, as Raz did, we are overlooking the moral foundation of the legal order. In the case of the volition of the rule of law legal order, which does not function anymore as a law that enables human, conduct, it

[152] Fuller, Fidelity (n 35) 636.
[153] ibid; Fuller, ML, ch 4; Fuller, "A Reply to Professors' (n 28) 655.
[154] Fuller, Fidelity (n 35) 636.
[155] ibid.
[156] For developing the " coherence and goodness" or ' internal and external moralities of law see Chapter 5 Section 5.3 of this study.

changes its real shape into another form of control that is based only on fear or reward, rather than on the stable legal system of such rules as the criminal and civil laws. For the governance through the rule of law to flourish in a political community healthily, it is not enough that those in power rule by law in the terms that they enable the exercising of their power for the most part through the instrumentality of the law.[157] This is so because the rule of law demands restrictions not only upon those who the law has addressed but also upon those rulers who enacted the law, and who must likewise be subject to it.[158] At some point, it might be possible that the law becomes an instrument of political power, but the law itself also constrains power. In this context, law and power could be to some degree opposed, or it is better to say the law is a checkpoint of power. Governance through the law (the rule of law) is designed to channel public and political power; the law also enables power to be rightly exercised healthily.[159] One may object this by saying: Law is also the product of political power, and thus of power and contingency. This is correct, but the law also makes a claim that goes beyond politics power and contingency: it claims the right to demand the obedience of those subject whether the rules or people to it by backing its injunctions with sanctions in the event of non-compliance. The law claims, in short, authority but it demands the restriction on everyone. As a result, the law is a source of internal critique for the exercise of power.[160] The governance through the rule of law may not give us the perfect result, but it frequently protects us from an uncertain form of other governance.

At some point, it is possible to observe some dictators could account for at least partial recognition of a few principles of the rule of law; such as publicity, consistency, clarity, and possibility of performance to acknowledge concern for efficacy. This step comes from the belief

[157] Gerald J Postema, Fidelity in Law's Commonwealth, in Lisa M Austin and Dennis Klimchuk (ed.) *Private Law and the Rule of Law* (Oxford University Press, 2013) 18-19
[158] ibid 30
[159] Martin Krygier and Evald John, 'Tempering Power' in Adams, Ballin and Meuwese (eds.), *Bridging Idealism and Realism in Constitutionalism and Rule of Law* (Cambridge University Press, 2017) 40.
[160] ibid

that in any system of rules, whether it is a legal system or not, to perform some function, there must be some "fidelity to these principles."[161] On this account, we may say Raz would think that it could even make sense of brutal Saddam's regime by realizing the rule of law. As he states: "A non-democratic legal system, based on the denial of human rights on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies."[162]

Here is again some misleading in Raz's claim. Firstly, the rules of these systems could not be considered as part of a healthy legal system until they conform to other important requirements, such as generality, prospective, and the incongruence of official actions with enacted rules. These three requirements in Fuller's view are the core idea of bringing moral concern into the idea of law.[163] Consider an example from Saddam's rule of Iraq. When the Iraqi people lived under "human tragedy and economic deprivation"[164] that was caused by the international economic sanctions in the 1990s,[165]the behaviour of gambling, theft, robbery, bribery and prostitution had been dramatically increased in Iraqi society.[166] Saddam's government passed several rules with capital punishment to reduce these crimes and behaviour.[167] Such rules have been clearly issued and promulgated therefore, they were compatible with some requirements of the rule of law. Yet, in effect, only Iraqi citizens were being held responsible for their failure to comply with these rules because these rules were never applied generally and equally to everyone. The

[161] Fox-Decent (n 27) 539.
[162] Raz, 'The Rule of Law and Its Virtue' (n 12) 211.
[163] Fuller, ML
[164] Ahmed Shehabaldin and William M. Laughlin Jr, 'Economic Sanctions against Iraq: Human and Economic Costs' (1999) 3 *The International Journal of Human Rights* 1, 11.
[165] According to some study: "The United Nations Security Council sanctions of Iraq regime (Resolutions 660 to 687), which has been in place since August 1990, had caused catastrophic for the people and the economy of Iraq. Just in the fall of 1996, for example, at least 4,500 Iraqi children died each month, an average of 150 children a day. The January 1998 figures showed that 14,040 children had died; about half of these children were less than five years old." See Shehabaldin and Laughlin (n 164) 11.
[166] ibid, 12-13.
[167] e.g., the orders No. 39, 76, 92, 51, 91, 59 issued by The Evolutionary Command Council (RCC) in 1994.

members of Saddam's family and his military officers were exempt from legal responsibility for their behaviours.[168]

Also, the sociological exploration of the rule of law entails that throughout history and socio-political observation, there are cases when we find authoritarian and totalitarian rulers who endorse some moral virtue and political value for self-interest and prudential reasons.[169] However, when it comes to establishing a healthy legal system based on the rule of law, this ruler resists. This is because there has always been a fundamental tension between the rule of law and absolute power to pursue wicked ends.[170] For instance, it is common that rulers endorse a serious of matters that have moral ground and political reform, such as elections, and economic development such as increasing of open trading and marketing, promoting some level of human rights such as allowing women to drive a car, reduction of inequality such as equal wage between men and women, and calling for the free press; this is happening in the middle eastern countries e.g. Saudi Arabia, Egypt, and Iraq. In the processes of political transition from autocratic regimes, however, the main motivation was always to remain in power. It is even possible to build a democracy without democrats. Consider also the fake election in Iraq under Saddam's rule. In the 2002 referendum, Iraqi officials declared that Saddam re-elected as President to another round of presidency, seven-year, to continue to rule Iraq by a 100% unanimous vote of all Iraqi people, eclipsing the 99.96% received in 1995.[171]

But when it comes to adopting the rule of law, the case is different and it is never an easy task for the ruler. But why is governance through the rule of law never an easy task for the authoritarian ruler? The main reason is obvious, to recall it here briefly, is that binding by the

[168] Shehabaldin and Laughlin (n 164) 9
[169] Martin Krygier and Adam Czarnota, (eds.), *The Rule of Law after Communism*, (Aldershot, Ashgate, 1999); Krygier, Legality, Teleology, Sociology (n 41); Murphy (n 24) 251-260; Niall Ferguson, 2012. Reith Lectures: The Rule of Law and Its Enemies 3. The Landscape of the Law, available at: https://www.belfercenter.org/node/89317.
[170] Murphy (n 24) 260.
[171] Benjamin Isakhan, *Democracy in Iraq: History, Politics, Discourse* (Routledge, 2012)

rule of law eliminates the abuse use of power, or at least the best chances of tempting power and determining the arbitrary exercise of power by checking, limiting, and channelling the use of power.[172] Governance through the rule of law is the ideal, and rulers show resistance to abide by it because they lose their privileged in controlling and misusing the elements of public power such as political, economic, and social position according to this moral ideal.[173]

This claim leads to recalling the point that the commitment to legality has several values. Most importantly, legality rests upon a deeper moral claim and that is the reciprocity and respect to the dignity of the person. Fuller's version of the rule of law significantly supports the line of this argument. It has limited the power of those who wish to rule by legal morality. The rule of law is the correct channel to tame the abuse of power because the legality determines what accounts as dignified law; the law that respects human dignity, that must rule a political community in order to follow the ideal of the rule of law.[174] As Krygier argues the practical ideal, such as "the rule of law lends itself to such abuse precisely because it is thought to be good to have, and rulers tend to boast of it."[175] In such circumstances, there might be a leeway to use the name of the rule of law as the fake legal reform, but again the rule of law should be "invoked critically to expose false claims in its name and use."[176] This is of course the major difference between governance through the rule of law and other forms and types of command.

Once the extreme power-holders decide to avoid governance through the rule of law, their real face appears. They certainly terrorize the system of rules and corrupt the character of law, and

[172] Krygier, Tempering Power (n 159) ch.2.
[173] Ferguson (n 169).
[174] Martin Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures', UNSW Law Research Paper No. 2016-31. Available at SSRN: https://ssrn.com/abstract=2781369, 16.
[175] ibid.
[176] ibid 16.

naturally, they get away from legal morality.[177] On this account, one of the most important tactics in the hand of a wicked regime is its capacity to restructure the social matrix in such a way that it is hard for individual persons to oppose the regime and its rules.[178] Following the strategy that the fear and reward replace the system of liability and punishment in civil and criminal laws is one of the best methods that can be done under the wicked regime. A ruler makes sure that everyone has a strong prudential interest or fear in the expression of support for the regime: "dissenters and critics will be brutally punished, and blind loyalties to the regime will be rewarded."[179] Spies, informers and a variety of agencies assist in following episode of the series nature of the threat, and in "robbing potential dissenters of any sense of secure domains within which opposition may safely be voiced", as Simmond observes.[180] By such a method, regimes like Saddam and his Ba'th party could govern the Iraqi people for about three decades. For instance, Saddam's regime created many security forces in an extensive security network.[181] All these agencies were systemically functioning for surveillance, instilling fear into the population, and using violence to extract information, rewarding loyal members of the Ba'th party in order to enforce obedience and following the regime's rules.[182] They employed secret security in almost every corner in the country. They were everywhere: in the schools and universities, public offices, parks, markets, cafes, and restaurants, as well as in mosques and holy sites. These agencies were trained to terrorize the population.[183] Terrorizing the people came to the point that fathers could not say a word on official policies and actions at home in front of their children because they were afraid the young people might reiterate the same opinions outside the

[177] Waldron, 'Why Law?' (n 26) ; Murphy (n 24) 239; Rundle, 'The Impossibility of an Exterminatory Legality', 66-70.
[178] Nigel E. Simmonds, 'Straightforwardly False: The Collapse of Kramer's Positivism' (2004) 63 *Cambridge Law Journal* 98; Stewart, 104.
[179] ibid.
[180] ibid 104
[181] See Sassoon, *Inside an Authoritarian Regime* (n 42) 193-201.
[182] ibid; also Blaydes Lisa, Compliance and Resistance in Iraq under Saddam Hussein: Evidence from the Files of the Ba'th Party (paper presented at the annual Meeting of the Association for Analytic Learning on Islam and Muslim Societies, Rice University, April 2013).
[183] ibid

house.[184] Sometimes the family members could not trust one another because a person would be executed if she or he failed to inform the government about any person suspected of anti-government actions and anti-Ba'athist ideologies: fathers, brothers, sisters, or other relatives or neighbours. In fact, there were many cases about distrust between husbands and wives that cause many problems. Gatherings people were almost prohibited if it was not organised by the Ba'th's party.[185] In many cities such as south cities of Iraq even gathering for prayer was impossible due to fears of government arrest. [186] Therefore, a dictator like Saddam Hussein was able to govern people and stay in power for decades because he established a sort of personal autocracy and terrorized people in a very systematic way. But he did never build a healthy legal system designed on the rule of law where people's dignity was protected and respected.

2.5 Concluding Thoughts: the experience of undignified life

Fuller suggests it is sometimes easier to know what an imperfect idea (e.g. unjust or undignified conditions[187]) of life entails, than to declare what the perfect idea (e.g. justice or human dignity) would be like.[188] Here, I think Fuller's point is that before turning to a theoretical reflection of any idea, acknowledging the reality of those negative experiences which one has lived through would be a good starting point. This point is a key fragment of Fuller's connection between formal legality and human dignity, shown in his most remarkable statement: "Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent."[189] Without describing his idea of human dignity, Fuller declares that the negative consequence of avoiding the requirements of legality disrespects people's dignity. Fuller's reason

[184] ibid.
[185] ibid .
[186] ibid .
[187] To say people were undignified, or their living in undignified conditions, it means the respect by other people or institutions, which must be showed to people's intrinsic dignity, has been shown incorrectly. Thus the respect about the condition to live with human dignity can be understood as the second aspect of human dignity; but it comes only after the first and prior aspect of human dignity, namely human dignity as a value. See below Chapter 3.
[188] Fuller, ML, 12.
[189] ibid, 162-3.

is that in avoiding the requirements of legality, this reduces the chances of being a legal subject- to be ready for and capable of the demands of legal rules that come with an engagement with legal enterprise. The experience of not being seen as a responsible and legal agent could be one way to experience of undignified life. This experience is then one way to see how the violation of human dignity has performed. Grasping the picture of this experience can be achieved more obviously when people live under an unhealthy legal system. It is within this same context that the case of Iraq under Saddam's rules has been examined. When the condition of the rule of law under Saddam's rule of Iraq had been extremely violated, the conditions of living with dignity were widely betrayed. The quality of Saddam's relevant regulations and policies, the judicial decisions, and actions taken by the power-holders, all eventually attacked the moral status of law. Consequently, Iraqi people witnessed the rule of terror where their conditions of living with dignity had been infringed almost in everyday life.

However, the main question about the nature of human dignity is still before us in its full force: how should we understand the nature of human dignity in Fuller's proposal of legality? If we do not know what the nature of human dignity is, likely, we do not know what human dignity entails. Consequently, we have a difficult time clarifying why and when human dignity exceeds strong normative considerations under the rule of law. It may not be impossible to come up with an answer to this and other similar questions with a negative result. For this reason, Luban, who is a Fullerian, dismisses the idea of human dignity in Fuller's legality in the current form.[190] Luban asserts that the main problem with Fuller's idea of human dignity lies in the celebration of dignity with "the autonomy of citizens" to plan their life, without asking whether legal autonomy suffices to guarantee human dignity.[191]

[190] Luban, 'Re-examining' (n 28), 40-41.
[191] ibid.

So, when Fuller, and even those who have commented on Fuller's work, attempt to observe any connection between the rule of law and human dignity, they did not spell out what is crucial about the worthiness of humans. Features or values like freedom,[192] autonomy,[193] self-determination,[194] and agency[195] or similar are often cited, but this cannot be the right path to start with, for two reasons. Firstly, it says relatively very little about the nature of these values. Nevertheless, these values are a complex idea, especially when applied to practical questions such as the rule of law. It is even the case that some of them heavily and conceptually overlap, such as the concepts of freedom and autonomy. In the case of autonomy, for example, we need to answer the question that asks how are we autonomous? Are we autonomous only when we enable our choices concerning the course of life? Or are we autonomous in the sense that we are independent of the interference and domination of other power-holders? Secondly, even granting that we can celebrate this connection at the same level, the problem of the significance of these values in the context of human dignity remains untouched. Perhaps the key roles of these values in the special worth of human dignity result in two separate categories: the value of dignity; and other values. Between the value of human dignity and the value of autonomy, for example, it is not clear whether dignity is the source of autonomy or autonomy is the source of dignity. Even if we could prove we are autonomous because we have dignity, being autonomous is not the only application of human worth and dignity. Thus, these values, even if considered as relevant to the idea of the worthiness of humans, cannot alone make the full sense of human dignity and its protection under the rule of law. When we set out any incorrect connection between those values and dignity, we are led to wonder whether human dignity could be replaced with features such as autonomy or agency.

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[192] Simmonds, *Law as a Moral Idea* (n 2) 99-104; Allan, *Constitutional Justice* (n 34) esp. ch3 ; Allan, T. R. S, The Rule of Law as the Rule of Private Law, in Lisa M Austin and Dennis Klimchuk (ed.) *Private Law and the Rule of Law* (Oxford University Press, 2013) 70-71; David Dyzenhau, Liberty and Legal Form, in Lisa M Austin and Dennis Klimchuk (ed.) *Private Law and the Rule of Law* (OUP, 2013) 95-104.
[193] Murphy (n 24) 239.
[194] Nadler (n 67), 23-30.
[195] Waldron, 'The Concept' (n 11); Waldron, 'How Law Protects Dignity', 80; Fox-Decent (n 27) 536, 551-555; Rundle, *Form Liberate* (n 2) 97-102.

Reconsider the experiences of the undignified conditions of the Iraqi people under Saddam's rules. It was more than ignoring people's dignity as a responsible agent to be subject to duties imposed through the promulgation of authoritative rules. In the relationship between rulers and the ruled under these arbitrary and authoritative rules, such forms of domination that involve the violation of persons to be governed following norms of equal freedom, can take shape in more or less personalized experiences of undignified life. As Arendt observes, the roads to total domination under extreme and arbitrary rulers such as Nazi Germany or Saddam's rule of Iraq who demanded unlimited power, destroy the conditions of people's dignity in the wider sense.[196]The moral personality of people can be destroyed, for example by ruining the moral boundary among the member's family, in informing the authority about each other's ideology differences.[197] Also, by killing human identity and turning humans into beasts who can easily murder and torture kills personal individuality.[198]

In my view, without a correct theoretical explanation of the nature of human dignity, any discussion of it in regards to Fuller's work, particularly among the commentators on his legal philosophy, will be indeterminate, incomplete and rhetorical. In particular, what is missing lies in the idea that there is something worthy and extraordinarily valuable about humans that requires recognition and protection under the governance of the rule of law. The idea of human dignity, in other words, is relevant to the moral status of humans as valuable creatures who require many protractions and concerns. Accordingly, there are various forms of legal protection to human dignity across several fields of legal principles and regulations.[199] The rule of law is one way to see how the law protects human dignity when humans are recognized both as a natural human

[196] Arendt (n 68) 447-55.
[197] ibid, 451-54.
[198] ibid, 454-55 see also, Jeffrey C. Isaac 'A New Guarantee on Earth: Hannah Arendt on Human Dignity and the Politics of Human Rights' (1996) 90 *The American Political Science Review* 61.
[199] Stephen Riley, 'Human Dignity and the Rule of Law', (2015) 2 *Utrecht Law Review* 91, 99.

and legal person. This kernel of the normative value of human dignity, which I will specify along Kantian lines in the next chapter, serves as the exploration of the place of human dignity in Fuller's legality, but also the premises we can develop in the discourse of human dignity and the rule of law.

This suggests then the concept of human dignity within Fuller's idea of the rule of law could benefit from reframing. This reframing could have a conceptual benefit to make a connection between formal legality and human dignity. To make this connection, we may start by arguing the rule of law is a necessary condition of human dignity as respect for agency and autonomy- a person should not be dominated to another power (this needs to be explored). Alternatively, we could argue that the rule of law is the formal commitment that aligns legal systems not only to human agency and human autonomy, but also to other human forms of life, human physical embodiments, and human social needs, in light of broader human dignity implications. For support, either way, one needs to set out the nature of human dignity from Kantian conception. Then this task depends on, on the one hand, how the law and the rule of law are connected, and on the other hand, how we should deploy the correct conception of human dignity. I will go on to link this and develop it in the final two chapters under the thesis of the legality of human dignity. In the meantime, I will examine what sort of conception we need to explore the nature of human dignity - this is the task of the next chapter.

CHAPTER 3

THE NATURE OF HUMAN DIGNITY: KANTIAN PERSPECTIVE

3.1 Introduction

To seriously examine how the idea of human dignity is related to Fuller's model of the rule of law (formal legality) requires a substantive task. This task aims to explore how we should understand the nature of human dignity. We can helpfully, if somewhat analytically and philosophically, elaborate the proper account of human dignity from the Kantian moral philosophy. In the present chapter, thus, I offer a sketch of the account of human dignity, inspired basically by Kant. My analysis leads to many conclusions in the following ways: (i) dignity is the absolute value; (ii) humans have dignity by virtue of a common specific feature- this is the Kantian humanity (capacity to set ends); (iii) since all humans belonging to the human species share that property more or less, then every individual has dignity equally; (iv) our dignity demands respect to each human individual in the way that they are never used as a mere means but always as ends in themselves; and finally, (v) human dignity is the normative value that openly gives primacy to certain principles that guide and restrict the permissible treatment of individual humans by official government, as well as by each other (section 3.2). Then, I shall focus on three accounts that set up powerful challenges to this approach. The accounts by Jeremy Waldron, Oliver Sensen and Andrea Sangionvanni will be analyzed and criticized (section 3.3).

3.2 Kantian Perspective

To understand human dignity from a Kantian perspective, I shall explain firstly the connection between the idea of dignity and the Kantian idea of humanity. My aim is to grasp the answer to

the questions: (i) what is dignity, and (ii) why do humans have dignity? Secondly, I shall seek the answer to the question: what does human dignity imply in practice?

3.2.1 Dignity and Humanity

In the Kantian framework, there is a hint that Kant conceived dignity as the value that all humans possess.[1] Probably the text when Kant comes closest to expressing dignity is when he contrasts dignity with a price.[2] A price expresses the value of a thing for us, while dignity expresses our own worth. A price, whether it has a fancy or market worth, is a kind of relative value or state of affairs (end) that must be produced for it mean something has value and meaning for us. Those things that have a price are only of relative worth, exchangeable and of a conditional value because their assigned value arises from the very possibility of an end in itself, which gives an evaluation and appreciation to all other things in the world.[3] Unlike price, dignity is a kind of value that appears in conjunction with absolute worth.[4] It is a kind of value that is characterized as "an unconditional and incomparable worth."[5]

To begin with, dignity is an "unconditional" worth because it is a value not dependent upon contingent facts in its existence. It is rather the end that exists in itself, and therefore it must be considered as a type of moral fact.[6] Whatever has "dignity has value independently of any effects,

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[1] See, e.g., H. J. Paton, *The Categorical Imperative: A Study in Kant's Moral Philosophy* (University of Pennsylvania Press, 1947) 189; Allen Wood, *Kant's Ethical Thought* (Cambridge University Press, 1999) 115; Michael Meyer, 'Dignity, Rights, and Self-Control' (1989) 99 *Ethics* 99, 520–534. For the extensive overview to the topic of human dignity in Kantian tradition, see generally, Thomas E., Jr Hill, *Dignity and Practical Reason in Kant's Moral Theory* (Cornell University Press, 1992);; Allen Wood, *Kantian Ethics* (Cambridge University Press, 2008); Thomas E. Jr. Hill, *Respect, Pluralism, and Justice* (OUP, 2000); Thomas E. Jr. Hill, *Virtue, Rules, and Justice: Kantian Aspirations* (Oxford University Press, 2012); Stephen Darwall 'Kant on Respect, Dignity, and the Duty of Respect' in Monika Betzler (ed.), *Kant's Ethics of Virtues* (Walter DeGruyter, 2008).

[2] Immanuel Kant, *Groundwork for the Metaphysics of Morals*, Arnulf Zweig (tr.) and Thomas E. Jr. Hill (eds.) (OUP, 2003. Original work published 1785) G 4: 434.

[3] Hill, Dignity (n): Thomas E. Jr. Hill, 'Humanity as an End in Itself' (1980) 91 *Ethics* 84, 93-5.

[4] Kant, G 4:434.

[5] Kant, G 4: 436.

[6] Wood, *Kant Ethical* (n 1) 85; Wood, *Kantian Ethics* (n 1) 107.

profit, or advantage that it might produce."[7] Unlike a market price, the worthiness of dignity cannot be got from others in exchange on account of its capacity to satisfy universal needs and inclinations.[8] Unlike the value of a fancy price, the value of dignity is also "an independent of what one could get in exchange for it on account of someone's happening to want it quite apart from its utility in satisfying universal human needs and inclinations."[9] Accordingly, when we say a person has dignity (human dignity), we mean a person has an unconditional worth whether that person has been valued by anyone or not. Human dignity is a kind of worth of which its existence does not depend on social and political positions such as class, culture, popularity, or social utility. Human dignity, to borrow from Debes, is something that is "unearned worth, and not social merit-based."[10] Someone's dignity does not depend upon the actions, attitudes, or judgments of others. Consequently, a person with dignity does not have to show gratitude back to those who bestow it and show respect to their dignity. A person can definitely claim that their dignity shall be respected and protected when others affront their dignity. Secondly, dignity is an "incomparable" worth, exalted above all price, and admits of no equivalent.[11] As Thomas Hill has demonstrated, dignity in this definition cannot be measured against other values.[12] This means dignity is an absolute worth because the worth of dignity trumps all other values and is not trumped by any value; and thus dignity cannot be compared to anything with a mere price, no matter how high that price. Whenever there is an option to choose between something with the value of dignity and something with the value of a mere price, the former must always be chosen because dignity can never be traded away for anything at all. As a result, dignity denotes uniqueness, a quality that is irreplaceable because it "admits no equivalence."[13]

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[7] Hill, 'Humanity' (n 3) 93.
[8] ibid .
[9] Kant, G 4: 434- 351; Hill, 'Humanity' (n 3) 93.
[10] Remy Debes, 'Dignity's Gauntlet',(2009) 23 *Philosophical Perspectives* 45, 61- 65.
[11] Kant, G 4: 434-351.
[12] Hill, 'Humanity' (n 3) 93.
[13] ibid .

Bringing human dignity into the territory of value has its practical merit. It stresses human dignity is not just a descriptively distinct concept, it is also both an ethically and normatively distinct concept.[14] This implies that when human dignity is applied in any practical deliberations, it sounds an alarm signal, drawing our attention to how human dignity needs to be protected and respected. This value gives a normative reason to promote it. It gives us reasons and duties to respect it, to bow down before it, to treat it with concerns and special treatments. It precisely gives humans a moral status that demands duties and rights.

But "why do humans possess dignity?" The Kantian answer is that humans have dignity by virtue of our humanity.[15] Generally speaking, Kant refers to the notion of humanity as a predisposition[16] or rational nature[17] that characterises the human capacity for setting ourselves ends (any end whatsoever) - whether or not they are moral ends.[18] This means the source of our dignity lies in our humanity - the capacity to turn ourselves into whatever we decide to become. Our humanity is what makes us find our place half-way between earth and heaven. It makes us be creative and innovative, introducing the radically new into the world, with the design and realization of new things and new ways of doing. This is why humanity grounds our dignity. It gives us the superiority of our species over the rest of the universe; we have a special authority to be respected.[19]

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[14] Oscar Schachter, 'Human Dignity as a Normative Concept', (1983) 77 *American Journal of International Law* 848, 848-854.

[15] See e.g., Kant, G 4:428-9, 434-6; Immanuel Kant, *Critique of Practical Reason*, Mary J. Gregor (tr.), in Immanuel Kant, Practical Philosophy (New York: Cambridge University Press, 1996) [hereafter .KpV] 5:87-8; Immanuel Kant, *The Metaphysics of Morals,* in Mary Gregor (tr.), *Immanuel Kant Practical Philosophy* (Cambridge University Press, 1996. Original work published 1797) MM6 :434-5, 442-4.

[16] Immanuel Kant, *Religion within the Boundaries of Mere Reason*, George di Giovanni (tr.), in Immanuel Kant, *Religion and Rational Theology*, Allen Wood and George di Giovanni (eds.) (Cambridge University Press, 1996) Rel:27

[17] Kant, G 4: 437-39

[18] Kant, MM6: 387, 392,239.

[19] This is similar to Pico's thought: "We have made you neither of heavenly nor of earthly stuff, neither mortal nor immortal, so that with free choice and dignity, you may fashion yourself into whatever form you choose." Pico Della Mirandola, G., Oration on the Dignity of Man, R. Caponigri, (tr.) (Washington: Gateway, 2012), also cf. Kant's reasoning of the place of person in-between the two worlds: *homo noumenon* and *homo phaenomenon* MM6:434–5.

One may object to this way of grounding human dignity by saying Kantian humanity is too limited to include all human persons, because it excludes certain humans such as infants, young children and the mentally impaired, with their undeveloped or non-rational capacity.[20] This claim is misguided because it misunderstands the nature of humanity and its connection to human dignity. To overcome this limitation, then, I shall emphasise that humans have the value of dignity not because they have perfectly[21] or actually[22] exercised their humanity (setting ends) now. Rather, they have dignity because people have a practical predisposition of humanity or potential rational capacity, whether they actually use it now or not. Human dignity is an egalitarian status. It is held by humans by virtue of their general features of them (humanity), and not due to any social rank and social role within existing social structures. A person with dignity can measure himself on a footing of equality with all other rational beings in the universal.[23] In this sense, all humans have dignity by virtue of humanity, if one could now or maybe in the future, following the right support and training, actually exercise that capacity. This is true even if one cannot exercise that capacity now and may never be able to do so, since one may fail to get the right support or training and the right courses, or fail to make the required effort. Drawing on the theory of biological and psychological theory of Kant, Patrick Kain expands this view. In his reading of Kant, Kain argues each member of a human species from the moment of his or her birth inherits a species-specific set of biological predispositions and seeds.[24] Kain continues to argue that the predispositions that a biological species is said to have formulated in the light of

[20] Many have raised this sort of challenge see, e.g., Martha C. Nussbaum, *Frontiers of Justice* (Harvard University Press, 2006) 127-140; Martha C. Nussbaum, 'Human Dignity and Political Entitlements' in Adam Schulman (ed.), *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (President's Council on Bioethics, Washington, 2008) 351-357; Avishai Margalit, Human Dignity between Kitsch and Deification, in Christopher Cordner & Raimond Gaita (eds.), Philo*sophy, Ethics, and a Common Humanity: Essays in Honour of Raimond Gaita. Routledge* (Abingdon, 2011).
[21] Richard Dean, *The Value of Humanity in Kant's Moral Theory* (OUP, 2006) 91-105.
[22] Paul Formosa, 'From Discipline to Autonomy: Kant's Theory of Moral Development' in Klas Roth and Chris Surprenant (eds.), *Kant and Education: Interpretations and Commentary* (Routledge, 2011).
[23] Kant, MM6:435.
[24] Patrick Kain, 'Kant's Defense of Human Moral Status', (2009) 47 *Journal of the History of Philosophy* 59, 99-100. Other Kantians also responded to this problem but in a different way. See, e.g., Wood, *Kantian Ethics* (n 1) 95–100.

the features and capacities are "characteristic of its normal, mature members." [25] The predisposition that is the basis of what Kain calls our moral status, human dignity, is the predisposition to personality, that is, in his view the predispositions to rational capacities for morality.[26]

Kain's view thus invites us to rethink about Kant's account of moral status (human dignity) in a different way. Every member of the human species gets the exact same set of biological seeds and predispositions through all stages of human ages, beginning from the early age of human life until after death, but they have different ways of developing this capacity. This means that every member of the human species has the exact predisposition feature for rational capacity, or Kain's term of moral personality, including for example infants, young children, seriously cognitively disabled human adults, and elderly people with dementia. I share the same view of Kain's conclusion that when we say that human dignity is based on the feature of humanity- rational capacity, it holds everyone has this feature equally from the beginning despite the different degrees of our rational development.

It can also be argued that the feature of the human nature of humanity is a sort of basic feature that every human has whether it has been really exercised or not. For instance, any child, but not a cat or a stone, has the seed of the capacity to speak any language such as Kurdish or English. Accordingly, it is part of a human's possession of a latent capacity to speak any language as long as they belong to the human species, whether it is exercised or not, to be rational it determines the rationale of human dignity. We can explain this point more in the following example.[27] Dary is a one-year-old and cannot speak a word of Kurdish or English. In the context of comparing Dary to a native English speaker, it would be correct to say that he has the capacity to speak

[25] Kain, (n 24) 99-100.
[26] ibid 100.
[27] The idea of this example has been borrowed from Paul Formosa and Catriona Mackenzie. 'Nussbaum, Kant, and the Capabilities Approach to Dignity', (2014) 17 *Ethical Theory and Moral Practice* 875, 884.

English but that Dary does not. But in the context of comparing Dary to a cat or a stone, on the contrary, it would be correct to say that Dary has the capacity to speak English but the cat or stone does not.[28] In the first context, comparing Dary to an English speaker, a capacity roughly means: "something that one could do now, barring certain circumstances."[29]A capacity in this sense is equivalent to what Nussbaum calls an internal implication of capability,[30] that is, a capability in a mature condition of readiness which, when combined with the appropriate and external effort such as political, social and economic conditions, constitutes a combined capability. In the context of later comparing Dary to a cat or a stone, however, a capacity roughly means: something that humans have which may be imperfect and that one could put into practise if one spent time training and developing one's powers with the relevant help and assistance.[31]Dary, unlike a cat or a stone, holds the capacity of speaking English, or at least symbolizes it, if he puts the effort into learning the language and gets the right help and support. A capacity in this sense is equivalent to what Nussbaum calls variously innate or inherent equipment,[32] innate powers that are either nurtured or not nurtured, and basic capabilities. Given our Kantian claim of human dignity on the grounds of humanity, it seems most plausible to interpret the requirement of humanity for the rational capacity of both morality and non-morality in the sense of a basic capability rather than an internal capability. If there is a comparison of the human nature of rational capacity between someone who fails to exercise it properly, such as an infant, with someone else who can actually exercise it such as adult human, the conclusion is that the infant does not have a power of rational capacity, and therefore the infant lacks human dignity.[33] But this conclusion is placed on the wrong comparison because humanity, as a basic capability, is something everyone has, and that makes a person differ from

[28] ibid.
[29] ibid
[30] ibid;Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press, 2011) 1-20.
[31] ibid; Fromosa and Mackenzie (n 27) 884.
[32] ibid 884.
[33] ibid 885.

other things and creatures, whether the person really has a chance to develop it or ever exercise it.[34]

Another point can be added to the above argument. The crucial feature of our approach is that humanity is not construed as a peculiar and exceptional feature of human beings, which carries the weight of grounding the dignity of each human being by virtue of its peculiarity and exceptionality. There are also many things peculiar to human species that enable us to substantive any respect or dignity. What matters about humanity is that it is a worth-conferring feature, something that forces us to see every human being as endowed with a potentiality for creativity and goodness in itself. This approach does not also endorse the premise that we are interested in humanity (the capacity to set ends) and for that very fact we are logically bound to take the feature of humanity seriously and as the only condition for which to respect people. The individuals that belong to the human species, including those that have that capacity impaired temporarily or permanently by fortuitous circumstances, have the peculiarity to be able to put aside self-serving interests in the name of what they consider obligation. For this, I declare that every individual person is an inherently worthy creature (has dignity) and for that reason they ought to be treated in a certain way with dignity. Humans are worthy creatures that deserve respect regardless of whether we recognize the value of the feature of humanity. Hence, approaching human dignity on the grounds of humanity does not entail that humanity is the source of the objective value in human nature and therefore it must be respected. Humanity is the explanation of how humans have the moral status of dignity, why humans should be treated with respect by virtue of their dignity.

In the Kantian framework, the expression of "capacity to set ends" divides into several

[34] ibid.

capacities: practical freedom, rational agency, and moral autonomy.[35] To say that humans have the practical freedom[36] implies that they can make voluntary actions happen intentionally and for reasons, where this is ultimately understood by reference to the purposes, ends, and underlying rational principles. When someone raises his hand for some purpose, the relevant practical explanation is not just about the physical forces that caused his hand to rise but also about his rationale for doing it. Second, the Kantian sense of capacity to set ends comes close to what one would call the rational agency. Under rational agency, humans can adapt and choose from different rational norms to self-governing and actions guiding our behaviours. There are, in Kant's theory, rational principles that provide a rational ground for the setting of ends by agents. These principles may be hypothetically imperative or categorically imperative. A hypothetical imperative guides an agent to act in a certain way if he has some particular end hypothetically and conditionally.[37] For example, the rule of paying the bills when they come if you want to avoid late fees is hypothetical and optional because I might rather choose a late fee than pay a bill on time. A categorical imperative, however, always represents a certain type of action as a good in itself and unconditionally.[38] It expresses those practical principles that are necessary and universal for all rational agents. It not only accurately describes the actions one must undertake to realize some end, but it describes and demands actions all human agents must undertake even if they do not like them because they serve the absolute end we all must adopt if we want to live in a moral community with mutual respect. This, for Kant, constitutes the principle of morality that limits the agent's pursuit of ends, on the grounds that is of honouring and respecting our worth as humans who have rational capacity. [39]

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[35] For details, see e.g., Henery Allison, *Kant's Theory of Freedom* (Cambridge University Press, 1990); Lewis White Beck, "Five Concepts of Freedom in Kant," in, T. J. Srzednick and Stephen Korner, eds., Philosophical Analysis and Reconstruction (Dordrecht: Martius Nijhoff Publishers, 1987); Paul Guyer, *Kant on Freedom , Law , and Happiness*(Cambridge University Press: 2000) 118-20.
[36] Kant, KpV:562.
[37] Kant G4:414
[38] Kant, G 4:414.
[39] Kant, KpV 5:19, 20; G 4:420, 426, 428; MS 6:385.

A third capacity to which the expression "capacity to set ends" refers is Kant's idea of moral autonomy. What constitutes Kantian moral autonomy is the ability to be governed by the authoritative force of morality. In Kantian tradition, moral autonomy has several features: (i) it is a property of will as a form of causality of rational beings;[40] (ii) it is freedom in a negative sense, as not being determined by prior physical or psychological causes; and most importantly[41] (iii) it is freedom in a positive sense, by being able to act out moral law.[42] This sense of moral autonomy does not mean only the ability to distance ourselves from inclinations, but also the capacity to act out of morality. The reason for this is that moral autonomy expresses independence from external causes such as contingent and variable causes. Such independence can be achieved only by replacing determination of the will by sufficiently strong motivation with determination from universally and necessarily valid reasons - this is by following the moral law. Thus, Kantian humanity, as it stands for self-imposed ends, relates to the different but three overlapping ideas: practical freedom, rational agency, and moral autonomy.

Among Kantians,[43] however, there is a view that argues the actual practise of Kantian moral autonomy should be the only candidate that grounds human dignity.[44] This view repeatedly comments on Kant's statement: "Now morality is the condition under which alone a rational being can be an end in itself, because only through it is it possible to be a legislative member in the realm of ends. Consequently, it is morality and humanity, insofar as it is capable of it, that alone has dignity."[45] The term humanity in this text is then taken to mean: the only person who

[40] Kant, G 4:440;. See the most novel Kantians on this view Onora O'neill, *Bound of Justice* (Cambridge University Press, 2000), 29-49; Thomas E. Hill Jr, 'Kantian Autonomy and Contemporary Ideas of Autonomy', in, Oliver Sensen (ed.) *Kant on Moral Autonomy* (Cambridge University Press, 2012) 15- 21; Paul Formosa , 'Kant's Conception of Personal Autonomy' (2013) 44 *Journal of Social Philosophy* , 193- 195.
[41] Hill, Kantian Autonomy (n 40), 18.
[42] ibid 18-20.
[43] On a conceptual taxonomy and survey over the range of different Kantian views on this issue see: Kain,(n 24); Lara Denis, 'Kant's Formula of the End in Itself: Some Recent Debates' (2007) 2 *Philosophy Compass*, 244–57.
[44] For sharing this view but much different in argument see e.g., Jens Timmermann, *Kant's Groundwork of the Metaphysics of Morals: A Commentary* (Cambridge University Press, 2010) 114; Henry E. Allison, *Kant's Groundwork for the Metaphysics of Morals: A Commentary*, 209–22; Dean (n 21).
[45] Kant, G 4: 435.

realizes his moral capacity and acts morally by virtue of their moral autonomy becomes a moral person.[46] This view is problematic. Grounding human dignity on actual moral autonomy alone excludes many persons. If we adopt this view, we may conclude that criminals are not worthy of respect with dignity because they have desecrated their moral autonomy. For example, those people who set evil goals for themselves, such as Nazi or terrorist goals do not have dignity. Those people who fulfil their goals by sending other humans to death camps or terrifying others with torture should be degraded as fully as possible. The danger of this conclusion is that the value of dignity becomes something that we should earn and not have. But what makes dignity an appealing moral idea is that it is supposed to be something that everyone has, from the scoundrels to the moral saints, and this is something that cannot be made sense of in this view.

We need, therefore, to think about humanity differently. Kantian humanity, in my view, should be read in a broad sense that includes several human capacities under the expression of setting ends, including the capacity of practical freedom, rational agency, and moral autonomy alike.[47] Approaching humanity this way is attractive in part because it straightforwardly implies that all humans deserve basic and equal concern and respect as in virtue of their dignity.[48] While Kant recognizes a crucial moral difference between good and bad conduct on the basis of moral autonomy[49], respect and concern of human dignity is not owed to persons only when they do the right thing or act morally.[50] But this respect and concern is common and general for everyone despite their personal actions. There is also a modest understanding of humanity in Kant's thoughts and textual evidence that supports my reading. For example, although Kant identifies our humanity with our rational nature, a capacity to set ends as distinctive of human beings;[51] he also locates humanity as modest among the three original predispositions of human nature.

[46] Allison, *Kant's Groundwork*(n 44), 209–18.
[47] Denis, (n 43) 137.
[48] ibid.
[49] Roger J. Sullivan, *Immanuel Kant's Moral Theory* (Cambridge University Press, 1989), 120.
[50] ibid 203-08.
[51] Wood, *Kant's Ethical* (n 1) 118-120.

Along with 'animality', which includes human instinctual desires promoting our survival, reproduction and sociability,[52] there is also a 'personality', which is about the human moral nature to establish moral laws and obey them.[53] Humanity is the rational nature of human beings between the two predispositions.[54] It reflects the realization of both human natural capacities and human moral powers, as expressed in human culture, and observed by John Rawls.[55] This view tells us that humanity represents human beings in the mode of progressive and active and as they are characterized with a special power and capacity of rationality that lead them to be a moral person. Then, this argument brings us back to the first point; Kant regards humanity as the rational nature of human capacity to set ends - whatsoever ends they are. The reference to 'any end whatsoever' in this definition suggests clearly that Kant means our capacity of setting different forms of ends, whether this capacity is the capacity of practical freedom or rational agency or moral autonomy.

3.2.2 The Formula of Human Dignity

After all, humanity is the trait that is justifying the view there is something unique and special about human nature and therefore it has the great value of dignity. In turn, it is human dignity that demands the requirement of treating all humans with respect and concern. Kant defines respect as expression "for the estimate of it [dignity] that a rational being must give."[56] In another text, Kant declares that "but a human being regarded as a person, that is, as the subject of a morally practical reason, is exalted above any price…he possesses a dignity (worth) by which he exacts respect for himself from all other rational beings in the world…. Humanity in his own person is the object of the respect which he can demand from every other human being, but

[52] ibid 118.
[53] ibid.
[54] These kinds of human traits and capacities can be found in Immanuel Kant, *Anthropology from a Pragmatic Point of View*, Mary J. Gregor (tr.) (The Hague: Martinus Nijhoff, 1974) (7: 117-333). A further discussion is provided in Wood, *Kant's Ethical* (n 1) 118–122.
[55] John Rawls, *Lectures on the History of Moral Philosophy*, Barbara Herman (ed.) (Harvard University Press, 2000) 188-200.
[56] Kant, G4: 432–36.

which he must also not forfeit."[57] Human dignity is therefore the object of respect. This respect is not earned but it is the requirement that shows the fulfilment of human dignity. A duty to respect people's dignity is not grounded in social rank, or individual talents, accomplishments, social position, or even on moral goodness.[58]

Within Kant's morality, in my view, to treat a person respectfully with human dignity is to treat them according to the formula of human dignity, which entails never treating the person as a mere means, but always at the same time as an end in themselves.[59] This means respecting people due to their human dignity makes us abide by two subsidiary principles: the mere means and the ends in themselves.[60] The notion of treating persons not merely as a means is termed as merely instrumental treatment, and reflects a negative standard; whereas the notion of treating persons as ends in themselves, called end treatment, refers to a positive standard.[61] One the one hand, the negative principle entails a person is treated as a mere means when she or he is treated as an objects, machine, animal, subhuman (which includes treating adults as children) or (treating children as adults), treating them as a non-legal person. These treatments are in one way or another abusing someone's physical or emotional being or agency, because human dignity demands every person should live in a dignified way without fear for his or her life and well-being. The specific examples of this measure are the forbidding of slavery, and torture. On the other hand, the positive standard[62] generates positive concerns and duties that associate with everyone. This includes those positive treatments that need to protect people's body or physical

[57] Kant, MM 6; 434-5.
[58] Hill, *Respect* (n 1) 64.
[59] The idea of articulating the formula of human dignity has rephrased the formula of humanity. See Kant, G 4: 429-36. Also, Sullivan directly expresses the formula of humanity as the formula of " respect the dignity of person" Sullivan (n 49) 193-211; Paul Formosa, 'Dignity and Respect: How to Apply Kant's Formula of Humanity' (2014) 1 *Philosophical Forum* 49.
[60] Kant, G 4: 429–30; Wood, *Kant's Ethical* (n 1)152-55; Onora O'Neill, *Constructions of Reason* (Cambridge University Press, 1989) 126-55; Samuel J. Kerstein, *How to Treat Persons* (OUP, 2014).
[61] The seed of the respecting people's human dignity can be grown from Kant's second formulation of the categorical imperative as commonly apprehended as the Formula of Humanity (FH), which is, as some Kantians define it, the most useful formulation of Kant's supreme principle of morality. Kant, G 4: 429-36. Sullivan (n 49) 193-211; Wood, *Kantian Ethical* (n 1), esp. Ch 4.
[62] O'Neill (n 60) 139; Kerstein (n 60) 53.

or even emotional being and agency, to maintain, develop, or exercise their valuable capacities and to recognize their social identity and skills.

To this point, the following question remains to be answered: how precisely should human dignity be deliberated in the law? The inference is less direct than one may think, and things are complicated by the fact that Kant's philosophy intersects between law and molarity. In particular, deliberating the idea of human dignity in the law faces the challenge of how the idea of human dignity, so central to the sphere of morality, can be recast and relocated in the sphere of law. It is precisely connected with the nature of relation between Kant's moral theory and his legal theory, which is a matter of lively scholarly debate among Kantians. In fact, Kantian positions vary widely from one extreme to the other regarding the relationship of dependence on or independence from the Kantian philosophy of law (rights) and his moral theory. Yet there has been less to consider the role of human dignity within this connection. Some Kantians have defended the independence thesis. They state the normativity of the universal principle of law, or principle of right, which considers an act to be right or lawful as long as its guiding maxim permits one person's freedom of choice to be conjoined with everyone's freedom in accordance with a universal law, is independent of that of Kant's morality[63]- the categorical imperative and other notions such as autonomy.[64] Other Kantians defend a dependence thesis between law and morality, and assert a deduction of the principle of right from the categorical imperative through the notion of freedom or autonomy.[65] Given that supporters of these views are commentators

[63] Kant, MM6:

[64] See e.g., E. J Weinrib, 'Law as Idea of Reason', in H. Williams (ed.), *Essays on Kant's Political Philosophy (Cardiff: University of Wales Press*, 1992) 15–45, Allen Wood,' The Final Form of Kant's Practical Philosophy', in M. Timmons (ed.) Kant's Metaphysics of Morals (OUP, 2002) 1-22; Thomas W. Pogge, "Is Kant's Rechtslehre a 'Comprehensive Liberalism?," in, *Kant's Metaphysics of Morals: Interpretative Essays*, Mark Timmons (ed.) (OUPress, 2002), Katrin Flikschuh, "Justice Without Virtue" in Kant's ;Metaphysics of Morals: A Critical Guide, ed. Lara Denis (CUP: 2010), pp. 51-71.

[65] See eg., Mary Gregor, Laws of Freedom (New York: Barnes & Noble, 1963) 12-49; Paul Guyer, 'Kant's Deductions of the Principles of Right', in, M. Timmons (ed.) *Kant's Metaphysics of Morals* (OUP, 2002)23-55; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009); Stefano Bertea, *The Normative Claim of Law* (Hart Publishing, 2009) 277-288.

versed in both Kant's morality and his philosophy of law, the most plausible account of this diversity of views is that Kant's system is inconsistent or at least ambiguous.

Thomas Pogge, for example, defends the independence thesis. He argues for the coexistence game of law, that is, by asserting the main task of Kant's *Rechtslehre* (doctrine of law) would be to come up with a set of legal rules enabling the coexistence game of equal citizens, under the specified limitation and restriction. For him, this legal restriction is already contained in the definition of the game and is not imported from any previous condition of morality, including Kant's morality.[66] However, Pogge's reading seems to be hardly compatible with the idea of why free individuals should play the *Rechtslehre* game. It seems Pogge rationalizes leaving the state of nature towards living under the law on prudential reasons. However, these transformations were happen for other reasons. For Kant, I think, the reasons why human individuals leave the state of nature and enter the civil condition to live under the law are not for prudential and self-interests reasons; ultimately it is for moral reasons- protecting our equal moral status with human dignity. One can track the basis of rationale in Kant's model of Kingdom of Ends.[67] Note here, Pogge, among other defenders of the independent thesis, does not only insist on the possibility of separation between law and morality (or between rights and ethics) in Kant's system, he also ignores the idea of human dignity playing any role within this system.

Moving to the dependent thesis, the defenders of this thesis argue that Kantian legal philosophy (both law and right) implies the possibility of derivation, or at least the presupposition of Kant's morality and other related notions such freedom and autonomy, are prior to the law. Mary Gregor, for example, asserts that a right to external freedom (as expressed in the universal principle of right in Kant's legal philosophy) is presupposed in the very concept of Kantian

[66] Pogge (n 64) 141-2.
[67] See below Chapter 4 at section 4.2.

autonomy.[68] For humans to be autonomous requires securing the condition that is necessary for them to be given the possibility to choose between alternative courses of actions and choices.[69] The main task of Kantian judicial duty, Gregor thinks, is to provide external freedom for the condition to become autonomous. Although this account of external freedom might be dependent on autonomy, it is wrong to justify the former as the only condition of the possibility of the latter. A person can be partly autonomous even if they are deprived of external freedom. In fact, external freedom to purse one's life is one among other dimensions of autonomy.[70] Take the example of a happy slave. A happy slave may have some choices, and yet he is not fully autonomous because he has been arbitrarily treated and dominated by the master.

I think what justifies any connection between morality and law in light of Kantian philosophy must be something deeper, not directly from humanity or freedom and autonomy, but from the peculiar respect and concern we are entitled to by virtue of human dignity, that is based on humanity. At this point, we can say human dignity plays a normative structure in the following ways:

i. Humans have the absolute value of dignity in virtue of humanity (in the Kantian sense- the capacity to set ends).
ii. Dignity is the property that expresses an intrinsic worth, exalts humans above any price in this world, dignifies them and therefore entitles them to respect and concern.
iii. The respect to human dignity must be measured by the formula of human dignity that demands a person not be treated as a mere means but always as an end in themselves in any human interaction, such as morality and law.
iv. Any constraint or coercion that limits the human interactions is a failure to respect people in the required manner of their dignity: to be treated as person.

[68] Gregor (n 65),20-25; also Ripstein (n 65) esp. Ch.1.
[69] These is a disagreement among Kantians to how interpret the external freedom, see Jennifer K. Uleman, External Freedom in Kant's *Rechtslehre*: Political , Metaphysical, (2004) 3 *Philosophy and Phenomenological Research* 68, 578–601
[70] For exploring the dimensions of autonomy see below Chapter 5 section 5.3.1.

v. The only a priori limitation of human behaviour (e.g. by the law) permitted is that which is necessary to ensure a person lives in a dignified way and the same for all other people in the same community of human interaction: the moral or legal community.

vi. Every human individual has a pre-legal inborn entitlement to live with dignity before entering to the realm of law and therefore people's dignity should maintain its protection and respect under the law.

From this perspective, the appeal to the Kantian conception of human dignity fills the gap that one can notice in the two above views regarding the connection between law and morality. Unlike the first view, we have a sense of dependence between law and morality on the idea of dignity. Human dignity grounds the legal realm as coexisting with human interaction. Human dignity ties the pre-legal human condition to the legal person who has is normatively significant; humans have inherent value or worth (dignity), therefore, we have distinctive foundations and take distinctive forms and rights.

Unlike the second view, where a sense of independence is between law and morality, our view makes a connection between them. Although the law and morality have different contents, provide different incentives, and belong to different spheres of human experience and practices, they necessarily share a common foundation. This foundation refers to the idea of human dignity. The law and morality are both conceived in reason and owe to this source their capacity to give rise to duties, obligations, and rights by virtue of people's dignity. For example, Kantian juridical (legal) duties,[71] on the one hand, define those duties that are coercively enforced from an external condition of the person through such as the rule of civil or criminal or procedural laws;[72] and yet this relates to the core idea of respecting and the implication of human dignity.

[71] Gregor (n 65) esp. Ch.3 & 4.
[72] For outlining Kant's system of duties, see, Wood, Allen W., "Duties to Oneself, Duties of Respect to Others" in Thomas E. Jr. Hill (ed.) *The Blackwell Guide to Kant's Ethics* (Blackwell Publishing, 2009) 228-33.

Under these Kantian juridical duties, the moral imperative of human dignity finds its most universal empirical manifestation in the idea of legal protection of freedom as independence and equal rights.[73] Kantian ethical duties, on the other hand, are an internal feeling, conscience and motivation that make one act on moral reasoning with oneself or others without any external and coercive force.[74]

To describe this another way, the respect owed to people's dignity generates a different form of concerns and duties in both realms of morality and law. In a moral relation, we have a duty to ask ourselves what we owe to another person independently of their social relation to us, as part of respecting human dignity.[75] But in the legal relation, people who stand in a legal position to one another are concerned about potential claims they expect others to make on them. In the legal realm, thus, person A acquires obligations as a result of claims that person B makes on them on the grounds of human dignity.[76] Any constraints on human behaviours thus can be best understood in terms of a Kantian morality of human dignity, which gives primacy to certain principles that guide and restrict the permissible treatment of individual humans by official government as well as by each other. Developing Fuller's legality can benefit from this inspiration of Kantian human dignity, into a better position. This will be the task of the following chapters; meanwhile, let us address some challenges to Kantian human dignity.

3.3 Three Critiques

In this section, I shall look at three recent accounts of human dignity. Two of them represent a cluster of thought that shares an emphasis on the rejection of human dignity as a value. Instead,

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[73] Kant, MM 6: 230. To reconstructive point of Kant's idea of law and judicial duties, and its logical conclusion with the implication of human dignity relatively to legal freedom and legal equality see, for example, Ripstein (n 65); Katrin Flickshuh, *Kant and Modern Political Philosophy* (Cambridge University Press, 2000); Rainer Forst,'The Justification of Basic Rights. A discourse-theoretical approach', 45 (2016) *Netherlands Journal of Legal Philosophy*3; also our thought below Chapter 5 at section 5.3.

[74] Kant, MM 6: 399-404;Wood, 'Duties to Oneself' (n 71) 229.

[75] Habermas, Jürgen, The Concept of Human Dignity and the Realistic Utopia of Human Rights, 41 (2010) *Metaphilosophy* 464.

[76] ibid 474.

they revisit the aristocratic dignity as a rank or elevation. Jeremy Waldron and Oliver Sensen, who have been inspired by the prototype of remodelling the aristocratic dignity, hold these two views. Beyond them, I shall also consider the third theory that ultimately rejects the idea of human dignity both as a rank and as a value. This is captured in Andrea Sangiovanni's proposal of humanity without dignity.

3.3.1 Waldron

Waldron's theory of human dignity[77] can be rightly described as against the value reading of this concept.[78] Two ideas are central to Waldron's theory of human dignity. The first is concerned with the matter of methodology. While Waldron acknowledges that dignity is a principle of law and a principle of morality at the same time, he insists that we should distinguish between two approaches for understanding human dignity; one proceeds from moral philosophy to the law,[79] and the other from the law to moral philosophy.[80] The former approach, Waldron illustrates, looks at the sense that moral philosophers have made of dignity as worth or value; and then how adequately the moral idea of dignity (human dignity) has been represented in the work of the drafters of legal statutes, constitutions or human rights' conventions. He rejects this approach, but according to the later approach, which Waldron endorses, the idea of dignity like any other legal concept, such as contract and criminal concepts, has its "natural habitat" in the law.[81] On this basis, Waldron reveals his methodology of human dignity starting from how the idea of

[77] Jeremy Waldron's work on dignity can be traced back to 1995 when he published an article applying the concept to legislation. Then, he followed this with several substantive works devoted to the topic of human dignity. See, e.g., Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999); Jeremy Waldron, 'Dignity and Rank: In Memory of Gregory Vlastos (1907–1991)' (2007) 48 European Journal of Sociology 201; Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in JE Fleming (ed), *Getting to the Rule of Law* (NYU Press 2011); Jeremy Waldron, *Dignity, Rank, and Rights, The Tanner Lectures on Human Values*, Meir Dan-Cohen (ed.) (Oxford University Press, 2012), 4-5. (Hereinafter Waldron, DRR); Jeremy Waldron, Dignity and Rank," Archives Européennes de Sociologie 48: 201-23 Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' (2013) NYU School of Law Public Law Research Paper No 12-73; Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 *Cambridge Law Journal* 200; Jeremy Waldron, 'All Kings in the Kingdom of Ends', (2018) NYU School of Law, Public Law Research Paper No. 13-39.

[78] Meir Dan-Cohen, dignity(dis)content, in Waldron, DRR, 4-5.

[79] Waldron, DRR, 14

[80] ibid 15-16

[81] ibid 47

dignity as a legal concept works in its legal territory. The second idea of Waldron's theory of human dignity gives much weight to dignity as a status rather than as a value or worth. Dignity is, Waldron claims, a matter of status, and status is a legal concept.[82] From this perspective, he tackles dignity by looking at the laws that relate to status, and rights and privilege. For him, this provides the bedrock for understanding the modern idea of human dignity.[83]

Waldron's theory, however, is problematic. This problem begins from a historical perspective. While Waldron claims that he adopts a legal starting point for understanding human dignity, he essentially turns to a historical analysis for dignity. However, Waldron should be aware of the historical fact that the aristocratic dignity, which he referred to, is hardly linked to the current idea of human dignity. Historically speaking, when the word dignity was linked with elevated status, it had precisely formed in the rank standing, or social position, or political and official role.[84] However, this meaning of dignity is principally linked and attended only through "a noble birth, an honorific office, or even an especially worthy institution."[85]. Those who held high social and political status or rank could possess *dignitas*.[86] It was also used to qualify prominent institutions and an office, such as the crown, the empire, or the state, in reference to the supremacy of their political powers.[87] On some level, this understanding defines dignity as a political idea rather than a moral idea, because it linked dignity as an intensely hierarchical notion within the political aristocracy and social rank. As a result, it is said the Roman political aristocracy had *dignitas*, while the "lower-ranking plebeians" did not.[88] Gender also made a difference to who may or may not have dignity. While men could possess *dignitas* in ancient

[82] ibid,14-15, 48-50.
[83] Ibid, 14.
[84] ibid,11,163; Ben A. McJunkin, 'Rank Among Equals' (2015) 113 *Michigan Law Review* 855, 107.
[85] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', (2008) 19 *European Journal of International Law* 655, 657.
[86] Hubert Cancik, ' "Dignity of Man" and "Persona" in Stoic Anthropology: Some Remarks on Cicero, De Officiis I, 105–107' in David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 20–21, 27.
[87] McCrudden (n 84)657.
[88] Leslie Meltzer Henry, 'The Jurisprudence of Dignity', (2011) 160 *University of Pennsylvania Law Review* 169, 190-191

Rome, women were treated as lower and therefore they could not have *dignitas*.[89] From this tradition, the idea of a contrast between conduct that is dignified as being of high rank and that, which is undignified in a lower rank, was drawn.[90]

This means any reference from the aristocratic dignity confronts the issue of inequality. On this basis, it is hard to be convinced that everyone has dignity equally. Someone must take a high rank or has a social nobility to earn personal dignity, which was political and social. Once someone had this dignity, distinctions and privileges would be determined between individuals and how they should be treated and respected.[91] However, a few in a privileged position could have dignity because it was a few who earned a social and political rank. Being excluded from dignity and respect was dependent on the obligation to fulfil the proper role or take a position in Roman political and social life. This kind of dignity could be gained, for instance, by appointment to the political role and public office, but could also be lost.[92] What this entails so far about the people's dignity in an aristocratic-historical sense is that it was a hierarchical notion closely linked to the restricted sense of only a few have dignity. It was based on honouring that is typically hierarchical and external to the person, reflecting not only the social stratification but also "constituting socially".[93] The dignity of a person was not considered a value in its existence that is equal for everyone, it is rather treated as an end that depends only on the social constituting and social recognition. As long as social rank is the source of any personal dignity, it was only constructed as social facts about the idea of human dignity. Consequently, superiority

[89] ibid.
[90] ibid.
[91] Manuel Toscano, 'Human Dignity as High Moral Status' (2011) 6 *Les ateliers de l'éthique* 4, 9-10.
[92] ibid 10.
[93] Stephen Darwall, 'Respect as Honor and as Accountability' in *Honor, History, and Relationship: Essays in Second-Personal Ethics II* (OUP, 2013) 16-17; Dan-Cohen, 'Introduction' in Waldron, DRR 6; Ariel Zylberman, 'Human Dignity' (2016) 11 *Philosophy Compass* 201, 203-4.

and inequality among people and their dignity was attached to this aristocratic-historical account.[94]

If the above fact shows the idea of dignity in its historical context has a difficulty, how could someone like Waldron, who takes the idea of equality seriously,[95] attempt to solve the threat of hierarchical inequality for the current idea of human dignity? How could any aristocratic conception of dignity explain the equal dignity that it is supposed everyone possesses in modern days? Answering this challenge brings Waldron to a very difficult task.[96] To solve this puzzle, Waldron endorses indirectly the theme of universalization and equalization from the idea of dignity as a moral value, and adds articulate dignity as a rank to all human beings (human dignity).[97] For his argument, he claims the use of dignity has undergone a "transvaluation"[98] which is about "…the common people now get the benefit of an idea associated originally with rank and stratification."[99] The movement of transvaluation happened in the late eighteenth-century romantic poetry and underlined the idea of nobility and rank for the common man equally; what once applied to only a few nobles, now applies to all people. Based on this, Waldron assumes, since the current idea of human dignity involves an upwards equalization of rank, we should now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to the nobility.[100] Along this line Waldron proposes to level up and expand a notion of honour-base in social and external terms, dignity-as-rank is capable of underwriting a universal and equal dignity for all, human dignity. [101]

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[94] ibid.
[95] See, e.g., Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (Cambridge University Press, 2002); Jeremy Waldron, *One Another's Equals. The Basis of Human Equality,*(Harvard University Press, 2017).
[96] Waldron, Jeremy, The Dignity of Groups (2008) NYU School of Law, Public Law Research Paper No. 08-53, 6.
[97] Meir Dan-Cohen, *Normative Subjects: Self and Collectivity in Morality and Law* (Oxford University Press, 2016) 152-153.
[98] Waldron borrows the transvaluation from Nietzschean-style, see, Friedrich Nietzsche, *Beyond Good and Evil*, trans. R.J. Hollingdale (Penguin Books, 2003) 46, 203; Jeremy Waldron, The Dignity of Groups (n 95), 7-9.
[99] Waldron , DRR, 33-34; Waldron, The Dignity of Groups (n 95) 7-8.
[100] ibid 34.
[101] Dan-Cohen, *Normative Subjects* (n 54) 156-7.

Here, I raise concern about this argument. Waldron misses the reason for the change in our thought about dignity in the modern days. He just describes the possibility of how this change has happened in respect of dignity, but he does not offer any explanation of why the transvaluation dignity occurred. Did this change happen like the understanding of the concept of dignity, or have other external elements such as law or social movement participated in this change? The main error lies in the point when he sees the change of equalizing dignity has been happening because of something socially and externally in the nature of dignity. But what is socially, or even legally, granted can be socially withdrawn.[102]There is indeed the difficulty of seeing someone has dignity because of his or her position in any social condition only when he could live in a dignified way. What if the social condition fails to respect our dignity, does that not mean people lose their dignity once they lose their positions, and thereby we cannot make a claim of living with our dignity once we set off from a social role?

This leads to the suggestion that only those persons who occupy some social or legal position with the appropriate social recognitions possess human dignity, whereas other persons do not. Even for those who currently happen to possess human dignity as equal rank, they might be deprived of it at any moment if social conventions took a different turn. It might be correct to say the concept of' human dignity evolved historically out of the idea of social rank or honour. It is also right to think the term dignity comes from the Latin *dignitas*. Social honour or rank is thus prior to intrinsic worth of humans, but the priority is only historical, not a conceptual development.

[102] ibid, 154; Zylberman, (n 93) 204; Jacob Weinrib, 'Human Dignity and its Critics' in Gary Jacobsohn and Miguel Schor (eds.) *Comparative Constitutional Theory* (Elgar Publishing, 2018)175-178.

To this point, the "aristocratic dignity" was associated with the aristocracy. It was a privileged ticket to enable the class of persons to be above anything, including the law. In his careful reference to the history of aristocratic dignity, Don Herzog has captured this point.[103] In Herzog's view, Waldron's starting point of aristocratic dignity as expanding specifically aristocratic entitlements to all was wrong. The aristocratic dignity was an entitlement for a few that has historically operated as 'immunity' for a free pass from the legal processes that might hold them answerable for their failings.[104] Hence, the inquiry to human dignity has to be more than offering everyone the kind of "legal-like dignity" once enjoyed by aristocrats in a particular historic time. Instead, we have to reconstruct or reject that dignity because "we have no interest in casting dignity as the haughty business of behaving badly and refusing to be held accountable for it."[105] While Waldron attempted to understand dignity as an extension to all human beings of the privileges connected with rank, that were formerly attributed to a restricted group, he could turn directly to the feature of humanity (in the Kantian sense). This feature is the one main feature that we all share. It identifies what is so important about humans and thereby have dignity - this is the human capacity for reason, understood as the capacity to setting ends, in terms of practical autonomy, agency and moral autonomy. [106]

In the connection between human dignity and the rule of law, Waldron made a significant contribution.[107] However, he fails to confront a distinctive challenge. If the rule of law demands that a legal system must respect and protect human dignity regardless of that legal system's conventions, then a theory of human dignity would have to explain why human dignity binds not only legal systems that have committed themselves to it, but law and legal systems generally. To put the challenge differently, why and how does human dignity formulate the immanent and

[103] Don Herzog, Aristocratic Dignity? ,in, Walrdon, DRR, 104-106
[104] Walrdon, DRR, 106
[105] ibid
[106] Habermas carefully exams some historical aspects of why Roman *dignitias* fails to explain the idea of human dignity as equal normative claims. See, Habermas (n 75), 473.
[107] See e.g., Waldron, 'The Rule of Law (n 77); 'How Law Protects Dignity' (n 77).

moral standard for legal systems as such? This theory must also explain the basis on which people have dignity. Waldron's theory of dignity is unable to answer these questions. It gets things backward. Instead of explaining why human dignity forms the relevant standard for morally assessing the legal system, he argues that human dignity is itself the product of legal conventions. By explicating human dignity in terms of the ancient notion of *dignitas*, Waldron's theory clashes with the morality of human dignity. He makes dignity empty from its normative foundation. In my approach, however, I seek to explain the significance of human dignity in light of Kantian morality, because it explains why humans have this absolute value of dignity before they enter any social and legal realms. Then I will submit it to the idea of how the rule of law facilitates the conditions of protecting and respecting human dignity.

3.3.2 Sensen

Like Waldron, Sensen[108] is opposed to consider human dignity as a value that all human beings possess, more particularly the absolute value that can be found in Kant's morality. Like Waldron, he also reclaims the aristocratic dignity. His reasons for the rejection of a value understanding of dignity nevertheless differ from Waldron's argument. Sensen endorses a version of the aristocratic use of dignity to redefine Kant's idea of human dignity. This version is a stoic tradition of dignity. Following stoic cosmopolitanism, Sensen attempts to solve the threat of inequality of dignity as a rank for a few. He argues all humans have dignity because their nature elevated them over animals in the universe. He also takes a different turn when it comes to the matter of human dignity's practice. Sensen does not associate human dignity with the discourses of morality and law, especially human rights' laws. Another point crucially determining the difference between Waldron's and Sensen's approach is their understanding of Kant's human

[108] Sensen's major view on Kant's human dignity is underlined in his book; Oliver Sensen, *Kant on Human Dignity* (Berlin/Boston: Walter de Gruyter, 2011) [hereinafter Dignity]; 'Dignity and the Formula of Humanity', in Jens Timmermann (ed.) *Kant's Groundwork of the Metaphysics of Morals: A Critical Guide*, (Cambridge University Press, 2009) 102-118; 'Kant's Conception of Inner Value' (2011) 19 *European Journal of Philosophy* 2, 262-280; 'Kant on Human Dignity Reconsidered' (2015) 106 *Kant-Studien* 107.

dignity. Waldron argues that there seems to be both a value view of dignity at work in Kant's earlier *Groundwork* and a traditional rank view of dignity at work in Kant's later *The Metaphysics of Morals*.[109] On the contrary, Sensen argues that Kant does not use the word dignity as the value in any way at all, but more likely uses it as rank or elevation. He also claims that dignity is less central for Kant's ethics and his conception of dignity is more stoic. To sum up, I believe Sensen's argument has two steps.

The first step concerns the way that Sensen enters into dialogue with Kantian interpreters, suggesting that their understanding of human dignity in Kant's framework of morality is at odds with Kant's thought. According to Sensen, Kantian interpreters fail in holding the view that Kant employs dignity as an absolute and inner value all human beings possess, because, Sensen argues, Kant articulates a different conception of value.[110] They also wrongly base the respect of others on human dignity, because Kant's morality gives a different reason for why we should respect others,[111] which is in Sensen's view a direct command of the reason.[112]

According to Sensen's reading, Kant's moral philosophy is committed, more or less, to a form of constructivism, and hence to a form of anti-realism in meta-ethics.[113] While constructivists vary, in one way or another, each one of them shares the standing against realism in Kantian literature.[114] Realism here is the meta-ethical method that invokes that morality is mind-

[109] Waldron, DRR 219–220.
[110] Sensen, Dignity (n 108), 27-30, 39.; Sensen, 'Kant's Conception of Inner Value' (n 108) , 263-266
[111] In chapter 3 of his book, Sensen has closely examined several Kantians on the formula of humanity and respect. See Sense, dignity (n 107), Ch.3
[112] ibid 98, 100-104.
[113] In fact, Sensen explicitly endorses constructivism; see e.g., Oliver Sensen, Kant's Constructivism, in Elke Elisabeth Schmidt & Robinson dos Santos (eds.), *Realism and Antirealism in Kant's Moral Philosophy: New Essays* (De Gruyter, 2017) 197-222.
[114] Constructivism's approach to Kant's moral philosophy began with Rawls's important work 'Kantian Constructivism in Moral Theory', 77 (1980) Journal of Philosophy 9, 515–572. Following Rawls's step, several Kantians have developed Kantian constructivism, see, e.g., O'Neill, *Constructions* (n 60), 206-219; Thomas Hill, 'Kantian Constructivism in Dignity and Practical Reason in Kant's Ethics (Cornell University Press, 1992), 226–250; Christine M. Korsgaard, *The Sources of Normativity*. (Cambridge University Press, 1996)5, 37. In contrast, other have asserted realism reading to Kant's morality, e.g., Wood, *Kantian Ethics* (n 1); Rae Langton, (2007), 'Objective and Unconditioned Value', (2007) 116 *Philosophical Review*, 116: 157–85; Robert Stern, 'The Autonomy of Morality and

independent.[115] From this perspective, realists think that there are moral truths that are obtained independently of any preferred perspective.[116] Ultimately there is always moral value out there, whether we are as successful agents able to identify it or not. Thus, any particular personal attitudes or reflections towards a putative moral standard are not what makes those standards correct; and thereby they not affect the reality of those moral facts which may be identified through the moral standards.[117] On this basis, Kantian realism claims that for there to be the moral law it must be derived or grounded from "something the existence of which in itself has an absolute worth".[118] This absolute worth is the worth of persons or rational agents (or human dignity) that comprise an independent value, which precedes and grounds the moral law.[119]

On the contrary, constructivism argues moral values are not independently out there. Values are rather constructed by human agents through the activity of reason.[120] Human agents construct and plan out of principles of practical reason, agreements, and commitments for a particular purpose. The value of something is good because it is planned by human activity.[121] Following this, Kantian constructivism basically emphasizes the priority of the moral law (sometimes reason),[122] which implies that value, is derivative, rather than fundamental. That is to say that reason is a "self-legislative activity"[123] which is governed by one unconditional norm, which Kant presents in the concept of the "categorical imperative". The categorical imperative expresses the rational procedure where human agents can construct valid maxims and self-given ends. Kant is

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the Morality of Autonomy', (2009) 6 *Journal of Moral Philosophy*, 395–415; Kari Ameriks, Interpreting Kant's Critiques (OUP, 2003). For an overview of the debate see, e.g., Patrick Kain, 'Realism and Anti-Realism in Kant's Second Critique', 5 (2006) *Philosophy Compass* 449; Paul Formosa, 'Is Kant a Moral Constructivist or a Moral Realist?' 21 (2003)*European Journal of Philosophy* 2, 170–9.

115 Russ Shafer-Landau, *Moral Realism: A Defense* (OUP, 2003) 15.

116 ibid 15-16.

117 ibid 17-18.

118 Kant, G4: 428.

119 Wood, Kantian Ethics (n 1); Langton, 'Objective' (n 114), 395–415.

120 Sharon Street, 'What Is Constructivism in Ethics and Metaethics?' (2006)5 *Philosophy Compass* , 363–84, 370-1.

121 ibid; also Shafer-Landau (n 115),42-45; Christine M. Korsgaard,"Realism and constructivism in Twentieth Century Moral Philosophy" In The Constitution of Agency (OUP, 2008), 302-326.

122 Kant states: "…the moral law that first determines the concept of good and makes it possible, insofar as it deserves this name absolutely" KpV: 62, 63, 64.

123 Kant, G4:

committed to the "constitutive view" that the source of the categorical force of morality lies in the constitutive features of rational agency.[124]

Similarly, Sensen's revision of Kantian constructivism is set mainly on a basic thesis against Kantian realism, but he also focuses more on the value conception of human dignity. He argues Kant should not be classified as value realism because Kant has never had such an idea as a metaphysical property of any value, such as human dignity, which can ground Kant's morality. Kant's morality is based on "a priori law of one's reason". [125] Sensen begins to challenge the view that adheres Kant to a version of moral realism that is often ascribed to G. E. Moore's thesis of value realism.[126] The central idea of the Moorean version of value realism endorses the view there is an objective moral value. Hence, the objective value is an inner, absolute, and non-relational property. In light of this, Kant's dignity is defined as a distinct metaphysical property that human beings possess.[127] For Sensen, this is a false reading to Kant's theory because Kant never upholds this understanding of value realism.[128] Kant precisely did not think that moral values are natural properties or substances or objects that are given to human beings through a special form of intuition. It is thus an error to read Kant's human dignity in the terms of a distinctive property that all human beings possess. Alternatively, Sensen suggests values such as human dignity are only "prescribed or recommended by reason" alone within Kant's system.[129]

Sensen's revision of Kantian constructivism also suggests that the underlying concept in Kant's moral philosophy is that of the moral law and it is a priori. It is an activity of reason and it is a priori because the moral is not based on any intuition or experience. Morality is thus the outcome of the process of pure reason. It is an inborn principle that is constitutive of how pure

[124] Rawls, *Lectures* (n 55)263–265; O'Neill, *Constructions (*60*)* ; Korsgaard, *the Source* (n 114), 236.
[125] Sensen, Kant's constructivism (n 113)217.
[126] ibid, 15, for similar critique of Moore's thesis of value, see also Korsgaard, 'Realism' (n 121) 306-310.
[127] Sensen, Dignity (n 108), 148.
[128] Sensen, Dignity (n 108), 35, 148.
[129] ibid, 29, 35.

reason operates in the functional mode. At this stage, Sensen tells us the reason why we should respect each other, as the moral action is not because others have a moral value of human dignity independently that demands us to respect them, but it is because one should respect them for being important and having a dignity according to the activity of reason- the moral law.[130] This claim likely says every value (including human dignity) within Kant's system is only prescribed and passed by the moral law. To have dignity simply means to be elevated, and hence "Has value"' is merely another way of saying "Should value".[131]

This view is wrong because while it only claims that a certain action or thing is rationally good, it cannot explain why we should perform it in the first place. The denial or failure of our knowledge about the goodness of something such as human dignity, does not follow necessarily that the thing or action does not have any moral property. Sensen enters the wrong path when he suggests any norm or value must be constituted by our volitional act in reason activity. This path allows us to say that our rational will does not just create the content of moral law, but it also creates the authority of any normativity of moral law. Consequently, this claim is a call for the existence of value depending only on our rational activities. By this, Sensen's claim leads to replace the normativity of morality into the more empiricist and suspicious, to borrow Wood's words, 'a version of meta-ethical antirealism'; i.e. subjectively and relatively.[132]

This view claims our moral opinions are correct when they are only in virtue of our reasoning activity and endorsements.[133] I think this makes the moral law converted to human laws, made by, and for, humans- the positive laws. In linking the moral law to the positive law, whatever reservations we have about the authority of the latter it is transferred to the former.[134] This is

[130] ibid 28,32,174 -176.
[131] ibid 30-32.
[132] Wood, *Kantian Ethics* (n 1), 107.
[133] Shafer-Landau, (n 115),1-3, 45-46.
[134] ibid 3.

strange to Kant's conception of morality. In Kant's view, the moral law and its content are objectively, out there, and valid for everyone. The only way to consider ourselves as acting truly morally is when we reconsider ourselves as self-legislating to the moral law, only in terms of we obeying it, or at least judging our actions according to it.[135] Also, there is a paradox in Sensen's claim. If reason is a source of moral value because it brings value into the actualization, doesn't that mean we commit Kant's concept of reason into a sort of metaphysical claim? If he did so then there is inconsistency with Sensen's methodological claim emerges. On the one hand, he declines the place of the metaphysical property in Kant's morality; on the other hand, however, he commits Kant's reason to a sort of metaphysical property because reason is a prior inborn fact.

There is also textual evidence in favour of the realist view in Kant's work. In one text, Kant explicitly echoes the conception of the value of the "good will" as the good without limitation. This good will is later connected with the rational will that acts with respect to the moral law- the categorical imperative. The nature of goodness of the " good will" is not because of what it affects or accomplishes or depends upon, but only because of "its volition, that is, it is good in itself and, regarded for itself, is to be valued …".[136] Therefore it is "like a jewel, it would still shine by itself, as something that has its full worth in itself".[137] However, Sensen reinterprets this passage differently. He asserts that using a jewel analogy does not commit Kant to an ontological claim about the nature of value, because Kant uses analogies to express the imperfect similarity and relations between two different things.[138] I think Sensen misinterprets Kant here. If we read a few sentences within the same context, we see how Kant warns us about the possibility of some who may misinterpret the idea of "absolute worth" in this text. He asserts

[135] Wood, *Kantian Ethics* (n 1), 119-120.
[136] Kant, G4:393–4.
[137] ibid 394.
[138] Sensen, Kant's Constructivism (n 113) 71-2.

that to some, the value of good will may appear strange and suspicious.[139] Later, Kant responds to this "suspicion" by emphasizing what it implies in the very idea of reason. For Kant, the vocation of reason must be to produce a will that is good, no matter whether or not it is used as the means for other goods; whereas a good will holds the idea of "good in itself" for which " reason is absolutely necessary".[140] The expressions of " good in itself" and " absolute worth" clearly refer to the value of realism.

The second place where Kant appealed to the value of realism appeared in his discussion of the Formula of Humanity. There Kant argues what he calls "subjective ends" can only have a "relative worth". Hence, such relative worth cannot ground the moral law. Kant then draws our attention to the possibility of the sort of value that has an "objective end", "existence end" and "absolute worth", in which the moral law shall be grounded.[141] Kant expresses " human beings" as that objective end and therefore humans should be always respected.[142] It is important to note here how Kant does say that a "human being and in general every rational being exists as an end itself" means that they are "the existence of which is in itself an end" and thereby have an " absolute worth". More importantly, at any attempt to ground the moral law without this objective and absolute worth, then the sense of morality is impossible. On this account, the objective end is an existing person whose "absolute" or "incomparable" worth "marks them out as an end in itself" and therefore they have dignity.[143] This means that Kant, committed as he is to the existence of unconditionally objective ends, not only can be but must be, a realistic.

Now I turn to the second step of Sensen's argument. This is his entry to the second dialogue with a historical understanding of the uses of dignity that could be found in what he called the

[139] Kant, G4: 394.
[140] ibid 496
[141] ibid 494
[142] ibid 428
[143] ibid 428, 435–6.

traditional Roman paradigm of *dignitas*, more particularity the stoic elevation notion of dignity.[144] He identifies the redefining features of the paradigm of dignity in Cicero,[145] Leo the Great[146], and Pico della Mirandola.[147] The insights he gathers here become central to his reinterpretation of Kant's human dignity. Sensen characterized four features of dignity from this paradigm: (i) dignity does not denote any specific property, but merely a higher rank[148]; (ii) dignity has two stages – an initial stage, where dignity denotes an ability, and a realized stage, where it picks out the proper development of that ability[149]; (iii) dignity yields not rights but duties[150]; (iv) dignity primarily entails duties to oneself.[151] These features, Sensen argues, are also distinctive to adhere Kant's view to this paradigm.[152] Even in those texts where Kant connects dignity with value, it still lines up with stoic dignity as elevation.[153] Here, I shall level up two objections.

First, when he analyses those famous texts where Kant uses dignity relatively to "worth" or "inner value", Sensen deliberately avoids the connection between dignity and value. He tells us although it is impossible to make a connection between value and dignity in all 111 places where Kant uses dignity in his works, he ensures his readers that it is possible to observe that all those value passages just mean only an "elevation" rather than "value". I do not think this is an appropriate interpretation of Kant's conception of human dignity. Kant uses dignity as inner value in this place for a specific meaning that different from other uses. Kant defies dignity as a highest, ultimate and basic value. As a worth of this value, he contrasts 'dignity' with 'price'.[154] When Kant states that the value has a price, he means that the nature of other values in action not in its existence can be equivalent and relatively replaceable by something else. In contrast,

[144] Sensen, Dignity (n 108), 143-47.
[145] ibid 155-57
[146] ibid 157-59
[147] ibid 159-161
[148] ibid 165-8
[149] ibid, 168-9
[150] ibid, 169-170
[151] ibid, 170-2
[152] ibid 164, 180.
[153] ibid Ch. 5.
[154] Kant, G4:434

the value of dignity is in its inner and absolute worth and therefore it is the only value that is beyond all price, featured as an "incomparable" worth, "above all price," and "no equivalent".[155] Although Kant puts a clear definition of dignity as "inner worth" within his conception of value as I indicated, Sensen attempts to misplace Kant's own use of dignity. Sensen tells us that while dignity may have a definition of "inner worth", yet this usage would be contrary to the "vast majority" of passages in which Kant uses dignity in his other works.[156] Dignity expresses only that something is raised above all else. In Sensen's view, Kant wants to say morality is "elevated and special".[157] This is a misreading. Kant assigns dignity to two things, "humanity" and "morality", in the same sentence, but Kant explicitly assigns dignity to human beings in the end of his discussion of the Kingdom of Ends, as follows: "the dignity of human nature and of every rational nature being".[158] Another text outside the *Groundwork* supports this claim. Kant states: "a human being regarded as a person, that is, as the subject of morally practical reason, is exalted above all price...as an end in himself he possesses dignity by which he exacts respect for himself from all other beings in the world".[159] Here, it is human beings who have the inner value of dignity that makes them above all other values and prices, and therefore they should be respected.

The second objection considers the minimalist view of Sensen on Kant's human dignity. Sensen's minimalism lies in two points: (i) Kant's paradigm of human dignity is primarily concerned with the dignity of the agent, and not with the dignity of others and of rights; and (ii) the fact that dignity is less central to Kant's morality does not make Kant's morality less important in any practice.[160] By this, I think Sensen sets the role of Kant's human dignity either in a very narrow sense (duty to oneself), or even dismissing it from any moral and legal practice,

[155] Kant, G4: 434, see above section 3.2.1.
[156] Sensen, Dignity (n 108), 185.
[157] ibid 191.
[158] Kant, G4: 436.
[159] Kant, MM 6:434-435.
[160] Sensen, Dignity (n 108), 203.

for example in the discourse of human rights' laws. In the first sense,[161] Sensen assigns Kant's dignity to a perfectionist framework, which expresses the duty to make proper use of one's own capacities in virtue of being free – not necessarily determined by one's inclinations.[162] By this, Sensen sets aside the application of human dignity only in a very minimum sense – this is the ethics of virtue where human dignity is used predominately in the context of duties towards oneself rather than the duties and respect towards others, and also the entitlement to claim rights.[163]

The main problem with this approach is that it might not be correct to consider the merit of duties to oneself as the only defining feature of the aristocratic/stoic usage of the Roman *dignitas*, as Sensen claims. Take the example of Cicero as the most important example of aristocratic usage of the Roman *Dignitas* in Sensen's view. Cicero's dignity is not always understood in the terms of duty-basis, as Sensen suggests. It has also been suggested that Cicero's dignity is closer to modern conceptions of rights than duties.[164] One reason for this thought is seen when Cicero emphasized on the recipient, not just on the material for the agent's exercise of virtue – duty to himself. It is also about a right and entitlement that imposes a duty on agents because of something about the recipients.[165] This is the recipients' dignity to claim rights on others. Even if we accept Sensen's endorsement of Cicero's dignity to speculate how the idea of dignity can be extended for all people, and it is the source of duties towards oneself, Cicero seems not to take it seriously that all human beings "actually" have more dignity than animals. It was Cicero who made "a joke about some human beings being human in name only".[166] If someone fails to fulfil his duty in virtue of his dignity, as a superior creature over the animals, he is thus no longer

[161] ibid 170-173
[162] ibid
[163] ibid 164, 153-164; Oliver Sensen, 'Human dignity in historical perspective: the contemporary and traditional paradigms', (2011) 1 *European journal of political theory* 10, 75.
[164] See, e.g., Richard Sorabji, *Animal Mind and Human Morals* (London: Duckworth, 1993), 44-47.
[165] Remy Debes, *Dignity: A History*, (OUP, 2017) 57-58.
[166] Andrea Sangiovanni, *Humanity without Dignity. Moral Equality, Respect, Human Rights* (MA: Harvard University Press, 2017) 19.

having dignity; but he is like an animal of a lower rank. In Cicero's thought, thus, dignity was still something people are lose if they are not acting in a dignified way.

Conceptually, we should also consider that dignity has a relative aspect and cannot be reduced to an internal attribute of one personal behaviour and role. While dignity certainly involves self-respect – the way we live with dignity, for most of us, living with dignity involves the regard in which we are held and how we are treated by others in any human interaction. Having dignity is manifest in how we act towards each other, and in how others act towards us. Dignity is strongly a matter of recognition and respecting people according to one another. It is because we live in communities, structured by rules and norms, that the moral question about living with dignity becomes a question for external and moral interaction. As individuals, our lives will go well only if we can, together, create and preserve the relevant dignified conditions. A dignified condition mandates the ways we should respect each other– to be protected and respected, and not to be insulted by others. For the same reason, this study attempts to make a connection between the rule of law and human dignity. It is from this perspective, our reading from Kantian human dignity supports this view. When dignity relates to one's own behaviour to others in the social and political interaction, when dignity comes to the way one is treated by others, the element of power is involved, whether it is public or private powers. At this moment, our way to live with dignity is not only about our duty to choose an ethical life, but it is our life in public which in any moment could be affected by others, and therefore dignity needs protection by the rule of law from the rule of men.

Secondly, although Sensen announces that despite human dignity being less important for Kant's morality, he tells us Kant's morality is still relative to the contemporary view that values humans

as important creatures.[167] On this basis, I think Sensen attempts to disconnect between the contemporary value of human dignity and Kant's human dignity. Yet he endorses the importance of Kant's morality. However, what is not clear is how is Kant's morality without dignity relative? Sensen never answers this question. Instead, he turns to offer three brief reasons: (1) there is a justification for the contemporary conception of dignity that is convincing to all. But Kant's ethics seem to start from a more realistic starting point not with dignity-i.e. Kant's categorical imperative; (2) Kant's categorical imperative is an important normative condition for the coordination of a plurality of agents; and that (3) there is some indication that the imperative really is embedded in common moral cognition.[168] However, none of these reasons ((1), (2), and (3)) are comprehensive without the discourse of Kant's human dignity as a value. Let us take each item on this list. With respect to (1), the justification of human dignity will not be convincing to all,[169] as Sensen hopes. Human dignity, like any other concept such as law and justice, remains controversial and there is always more than one conception for understanding human dignity. What is important in regard to this concept is offering the best or better conception of human dignity that philosophically and analytically has its root and support.

Hence, the point of turning to Kant's moral philosophy is not to avoid the current human dignity or to replace it with an alternative idea such as the categorical imperative. Rather, the point is to offer a suitable justification for the current usage of human dignity in light of Kant's morality. More relative to this study, the point is to seek how Kantian theory makes human dignity connect to Fuller's legality. As a matter of fact, the starting point from Kant's morality is not always with the categorical imperative, as Sensen claims. We should be also aware reading Kant's texts notoriously opens up to multiple interpretations of even fundamental issues. Consequently, the answer to any concept such as human dignity is not straightforward in Kant's

[167] Sensen, Dignity (n 108), 203; see also Sensen, Dignity in Historical Perspective (n 163), 75.
[168] Sensen, Dignity (n 108) 203-4.
[169] ibid 204-7.

morality. One way to progress any idea in Kant's framework is to analyze the independent philosophical merits of the various interpretive options and practical advantages. It is not enough to refer to the texts alone. Since Sensen silently accepts the importance of dignity as a value, he has thus two options: (i) he either accepts the Kantian value interpretation of dignity to support contemporary (value) human dignity, or, (ii) he explicitly tells us that he rejects the idea of human dignity entirely from its current and contemporary meaning and usages as a value, and replaces it with an alternative idea. Sensen rejects the first option clearly, but he is not clear on how we should deal with the second option.

With respect to (2)[170] and (3)[171], Sensen justifies Kant's concept of categorical imperative both as the normative coordination of plurality agents and as the moral order in human life. I agree with this, but I am not convinced about how people are to be interested and moved by such a Kantian model of moral law. If the categorical imperative, as the form of moral law, remains formal and abstract from any reason or motive to obey, this would be a serious philosophical worry about Kant's morality.[172] Hence, grounding the moral law is necessary. It is so because (i) it provides the reason why to obey the moral law, and, (ii) it identifies the character of the moral law and how it differs from other laws; such as evil rules and causal law. The appeal for such a justification can be traced if we revisit Kant's strategy in the *Groundwork*.

Kant begins his exposition of moral law, or establishing the categorical imperative, by considering it from the point of "form" which consists with universality.[173] But then he proceeds to consider it from the side of its "matter" – by which Kant defines the "objective end" that grounds and motivates the obedience to moral law.[174] Later, he unites them closely to the idea of

[170] ibid 205
[171] ibid, 208
[172] ibid 117
[173] Kant, G 4: 424, 436.
[174] Kant, G 4:436.

human dignity.[175] For Kant, what makes moral law unconditional, objective and universally valid for everyone constitutes the representation of an end, which, as an end in itself, is necessarily an end for everyone. Grounding the form of moral law on an end itself also makes moral law differ from other laws such as the law of nature. This is mainly because the end that grounds the categorical imperative must be a different kind of end, an objective end, for which Kant uses the term "end in itself." It is not the end that is produced subjectively or externally to the moral law.[176]

To put it differently, moral law is an objective principle constituted from the representation of an end, which, as an end in itself, is necessarily an end for everyone. But what is the nature of this basis? The Formula of Humanity "Act that you use humanity, whether in your own person of in the person of any other, always at the same time as an end, never merely as a means"[177] justifies this basis. This impression may be reinforced by two facts: (i) the Formula of Humanity express the "matter" aspect of the moral law; and, (ii) the discussion of "end in itself" and the form of the moral law occurs just before Kant offers the Formula of Humanity. When Sensen discusses this passage, he suggests that it is not an indication of a relation of mutual normative dependence between "end in itself" and the moral law. In his view, there is an indication of the normative priority of the former over the latter, not a mutual connection.[178] He concludes the 'end in itself' has only a descriptive, not a normative sense.[179] In my view, this is another place where Sensen misreads Kant's word. Kant explicitly argues if there is to be any moral law, it must be one such that what is *necessarily* an end for everyone because it is an end in itself, it *constitutes* an objective principle of the will and thus can serve as a universal practical law.[180] The expressions of "necessarily" and "constitutes" suggest if we expect the final form of the moral

[175] ibid
[176] Kant, G4: 428.
[177] ibid 421.
[178] Sensen, Dignity (n 108), 110.
[179] ibid, 114.
[180] Kant, G4: 431.

law, it depends on its ground and content, which is necessary for everyone as it is explained later in the Formula of Humanity. Note here the value of "end in itself" is a normative element for the moral law as much as its universality is a form of the moral law. To be sure, Kant himself later reminds us that: "[the] principle of humanity… as an end in itself… is not borrowed from experience; first because of its universality...; second because in it humanity is represented… as an objective end".[181] Also, it is worth noting that it is not that we discover first the form of the moral law, and then it produces the humanity as an "end in itself" to be based on the moral law. Rather, to have the sense of acting morally in the light of the moral law "is to act only on the basis of maxims which can be universal laws for all rational beings, and in legislating such laws we must take each person to have the absolute value that goes with being an equal normative co-authority, that is, that goes with being a person."[182]

Later, Kant's formula of the Kingdom of Ends brings both "form" and "matter' aspects of the moral law into unity. This is by building the political community of human interaction where everyone's dignity is protected by the common laws.[183] This Kingdom, for Kant, is a community, which is made up of rational beings in a certain relationship and they are mutually respectful under the condition and command of the common laws. A collection of subjective ends and interests constitutes the "Kingdom" without conflicting self-interests. People can live together as long as they share one common end that exists in itself - as the dignity of everyone. The laws of the Kingdom of Ends are those that, if followed, would combine the ends of rational beings, both the rational beings themselves as existent ends, according to Formula of Humanity, and the ends set in the maxims chosen by those rational beings, into a universal validity. In other words, the common law which is the moral law allows everyone to seek his personal interest autonomously but under the condition of being fair and respectful to everyone's capacity to

[181] ibid .
[182] Formosa, 'Is Kant…?' (n 114) 184-5.
[183] Kant, G4: 433.

follow his or her personal ends, since we all share one common value (human dignity) that gives us a moral standing and status in any community.[184] After all, Sensen's presentation of the categorical imperative is incomplete with Kant's strategy. He misses out on the importance of the matter, and this the end in itself that is expressed in the Formula of Humanity. This formula gives a more humanization aspect to Kant's morality. He also ignores taking the inspiration from Kant's Kingdom of Ends, where is it based on the common law with great appeal to the idea of human dignity. He would give more credit to Kant's morality if he would finish from the point where Kant left us in the *Groundwork*. This is the possibility of establishing the community of human interaction through the Kingdom of Ends where we have at least some answers as to how to understand and apply the idea of human dignity as a foundational value that is shared equally by everyone. Developing this point is one aim that I will turn to in the next chapter.

3.3.3 Sangiovanni

Like Waldron and Sensen, Sangiovanni shares a common concern to criticise the idea of human dignity as a moral value (Kantian version). Unlike them, however, Sangiovanni makes a stronger claim. This is mainly because he radically dismisses the idea of human dignity from both its core meaning and its morality role. In particular, Sangiovanni presents several criticisms against dignity.[185] Two of which relate directly to our Kantian approach of human dignity.[186]On the one hand, Sangiovanni argues Kantian dignity cannot explain the relational structure. [187] In Sangiovanni's view, the trouble is that the idea of inherent worth (explained by Kantians) does not justify: how to have a right. He supports his argument by the example that the dignity of a great painting gives us duties to refrain from burning the painting, the duties to preserve and

[184] For detail and development of this Kingdom see below the Chapter 4 at section 4.2.
[185] Sangiovanni, *Humanity* (n 166) 13-72.
[186] Sangiovanni presents several criticisms to the idea dignity and human rights in Kantian tradition…see, Sangiovanni, *Humanity* (n 166) 36-60; Human Rights in a Kantian Key, (2019) 24 *Kantian Review* 2, 249-261; Why there Cannot be a Truly Kantian Theory of Human Rights, in, Rowan Cruft, S. Matthew Liao, and Massimo Renzo (eds.), *Philosophical Foundations of Human Rights* (OUP,2015).
[187] Andrea Sangiovanni, Human Rights (n 186), 252.

maintain it; but these duties are not sufficient to establish the existence of a right unless paintings also have claims on us.[188] On the other hand, Kantian dignity, in Sangiovanni's view, cannot explain the sense in which we are equal in dignity.[189]This is because as long as people's capacities for setting ends (Kantian humanity) vary, our dignity varies too. According to Sangiovanni, if humans have the absolute value of dignity in the virtue of their capacity for setting ends, then it must also be true that variations in human capacities will produce variations and degrees in human value (dignity). Consequently, those who have a greater capacity of humanity ought to be treated as having greater intrinsic value, and hence dignity, than those with a lesser capacity.[190]

To begin with Sangiovanni's first criticism, Sangiovanni fails to see the lack of the relational structure of Kantian human dignity. First of all, he oddly submits dignity to a painting. This is basically odd because dignity (in Kantian framework) is the absolute value that is attributed to humans only. The value that a great painting has is in its price - for example its market value. Hence, the quality of the great painting is not value in terms that it has dignity, but it is valuable in the category of market price that has an exchangeable value or at least a price for us. To recall the value of human dignity, the point of someone's dignity gives that person the condition of living with dignity in the sense of to make a "claim" against everybody to be treated with respect. It may not be simple to identify what sort of actions or omissions are required to esteem human dignity in the proper manner up to the point of protecting people's dignity through a set of rights.[191]

[188] Sangiovanni, Human Rights (n 186), 253.
[189] ibid 254-5; Sangiovanni, *Humanity* (n 166), 14-15, 46-50.
[190] ibid 46-47.
[191] Although Sangiovanni insists that the broad human rights morally most urgent claims or universal moral rights, but he does not want to commit himself to the claim that they are "possessed in virtue of our humanity". This makes his conception of broad rights empty. It is empty because he could not provide normative reasons for the universal concern. This would lead to the danger of arbitrariness and contingent determination. Sangiovanni, ibid 191-205. See on this point, Rainer Forst, 'Human Rights in Context: A Comment on Sangiovanni', in Adam Etinson(ed.), *Human Rights: Moral or Political?* (OPU, 2018), 202-5.

But our approach of Kantian dignity invites a key advantage we can exploit. To recap it briefly, the premise of Kantian human dignity starts by saying that human beings are inherently worthy creatures and for that reason, they ought to be treated in a certain way. This gives us a moral status. Humans are valuable creatures and occupying a place in the universe rules out certain forms of treatment as incompatible with that moral status. These forms and conditions of treatment are manifested in the Kantian formula of human dignity: never use persons as mere means but always as ends in themselves, and at the same time do not engage in the sorts of abuses, humiliation, discriminations, and offenses we usually understand as human rights' violations. Human dignity thus gives us a right against everybody to be treated in a certain manner and condition. In contrast to Sangiovanni, Kantian human dignity has clearly a relational structure in the following: all humans have a right against all other humans to be treated with respect by virtue of their human dignity. In consequence, when it comes to torturing someone, for example, the same meaning applies, that everyone has a right against another not to be tortured by virtue of their dignity.

Additionally, there is an important feature that reflects our approach to Kantian dignity - this is a deontological feature. This deontological feature allows seeing Kantian dignity as a formal, universal, and abstract attribution of dignity to humans by virtue of their humanity, that cannot be lost to empirical contingency. To put it differently, according to Kant we must assume that all humans have equal dignity, in order for us to be bound to treat people with equal respect. This idea of human dignity importantly underpins the idea of a need for a conditional claim in such systems as constitutional and rights' systems. According to the deontological feature of dignity, our dignity is never lost, no matter how degraded and base the condition humans find or put themselves in. We (as human individuals and institutions) need to adopt the conditions of

respect to the moral status of humans (human dignity) because they are entitled to by the fact that they have the absolute value of dignity.[192]

This point can be further reinforced by referring to Spiegelberg's approach.[193] In his approach to human dignity, Spiegelberg notes that there is something confusing and incoherent in the discussion of human dignity; that is human dignity is an intrinsic value and yet it is something that must be achieved and requires a relation element.[194] He argues that to solve this problem we should apply the method of "linguistic phenomenology",[195] which is a method of analysis of concepts, such as the concept of human dignity. In short, as Spiegelberg highlights,e linguistic phenomenology consists of a linguistic analysis of the ordinary meanings and speaking that provide the preliminary means to access the phenomena. Then, language and the use of words furnish the means to direct our attention to the facts that constitute our real experience, which, without this we would tend to overlook.[196] More importantly, linguistic phenomenology allows us to remove the inconsistencies in our everyday conversation about concepts that hold inconsistency, such as human dignity.[197] Through applying linguistic phenomenology, thus Spiegelberg introduces some relevant distinctions when we talk about human dignity.[198]

Spiegelberg argues that "talking about human dignity as unassailable and yet as violated is not inconsistent",[199] because it means two different things in two different contexts of talking, while they are related to the concept of human dignity. In the first case, it means that in an ultimate sense human dignity cannot be destroyed by any attacks; while in the second case, it means that

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[192] These two categories or aspects of dignity are often made in the literature on dignity. See e.g Formosa and Mackenzie (n 27); Jan-Willem van der Rijt, 'Inherent Dignity, Contingent Dignity and Human Rights: Solving the Puzzle of the Protection of Dignity' (2017) 82 *Erkenntnis* 1321; Gilabert, *Human Dignity* (n 7) 114-121.
[193] Herbert Spiegelberg, 'Human dignity: A Challenge to Contemporary Philosophy' (1971) 2 World Futures: The Journal of New Paradigm Research 39, 53-54.
[194] ibid
[195] ibid
[196] ibid
[197] ibid 53.
[198] ibid 55.
[199] ibid.

violations are in conflict with human dignity since they do not fulfil the claim to respect issuing from it.[200] Then, Spiegelberg warns us what makes us confused about human dignity is when we talk about two aspects of human dignity in ordinary speech:

1. Human dignity itself
2. Claims issuing from human dignity[201]

He further investigates the distinction between (1.) and (2.); noticing that they become a source for two special connotations of the word "human dignity" in ordinary speech, rather than a contrast of the concept if we reformulate them as the following:

1. * Human dignity as intrinsic worth
3. Human dignity as worthiness of respect[202]

Human dignity as intrinsic worth (1.*) means then inner, self-sufficient worth of beings by themselves; an end in itself, which does not call for any outside achievement and recognition. Human dignity as the worthiness of respect (3.) refers to an attitude that demands a compliment and achievement. It is in virtue of worthiness of respect that human beings have a type of claim for respect, attention, approval, support, and right; and they all need to be fulfilled. A claim is the activities directed towards certain treatments due to the worth of the human individual. Whilst human dignity as intrinsic worth is a matter of mere contemplation, human dignity as the worthiness of respect calls for action.[203]

Now turn to Sangiovanni's second criticism. According to Sangiovanni, if there is a comparisong of the human nature of rational capacity between someone who fails to exercise it properly with someone else who can actually exercise it, the conclusion is that the former does not have a power of rational capacity, and therefore lacks human dignity.[204] My answer is articulated in the

[200] ibid 53-62.
[201] ibid 54.
[202] ibid.
[203] ibid 60-62.
[204] Formosa and Mackenzie (n 27) 885.

following argument. To speak of Kantian humanity, which grounds human dignity, is to speak of something everyone has. This humanity makes a person differ from other things and creatures, whether the person really has a chance to develop it or ever exercise it. However, this conclusion is placed on the wrong comparison. A person has the value of dignity, first and foremost, because that person belongs to the human species who hold inherently the seed of humanity (setting ends) whether used or not; and then because it is possible to say that that person may act, now or in the future, as the result of developing that capacity, in different forms, with the right help and support. This proposition allows us to include all humans equally under the umbrella of the Kantian idea of human dignity based on humanity - setting ends. As I argued above, even very young children and infants, and disabled adult, as much as human adults have the germ of rational capacity in the basic sense of humanity, and therefore have the value of dignity. Even though this capacity may take many years to develop, or even if it never does develop into an actual rational capability, everyone has the germ of this feature. Accordingly, all members of the human species do have a full moral worth of human dignity, because all of them do have a germ of rational nature despite many of them not being able to immediately exercise this capacity now, or even in the future.[205]

Another point can be added to the above argument. One may think that according to human dignity, those of a degree in their humanity (capacity to set ends) to the level of the lack of rational capacity are somehow vulnerable to harm and injury which makes them less dignified. Or the possible degree in human rationality makes people lack the worth of human dignity. As a result, we can use them as a mere means or a less dignified variety of dignity, as Sangiovanni indicates. In contrast, the core of human dignity demands that those who lack actual rational capacity are required to receive more care and protection by virtue of their moral status of

[205] cf. Patrick Lee and Robert P. George, The Nature and Basis of Human Dignity, (2008) 21 *Ratio Juris* 173, 176.

human dignity.[206] The contrasting difference between those who are with actual rational capacity and those who are without rational capacity within the human species is not a contrast between those with the worth of human dignity and those without any worth of human dignity whatsoever. Rather, it is a contrast between those who lack rational capacity, but they require extra care and more positive duties by virtue of their moral worth of human dignity, and those who have actual rational capacity and status of human dignity requiring a standard duty, perfect and imperfect duties, towards them.

In fact, this view is also part of what Kant claims: that the happiness and needs of others are the key obligatory general ends, that under the Kant's theory of duties we are morally required to adopt when we deal with those who are lacking rational capacity.[207] While we always have a perfect duty to obtain the possible consent of others, when we interact with people in morally significant ways according to Kant's ethics of human dignity; when dealing with the vulnerable or those who lack rationality, getting that consent, can require more work or be more serious.[208] In terms of Kant's judicial duties, for example, one can observe that Kant is explicit that a child or a new-born is a person, has moral status to be cared for by his or her parents, and cannot be treated as a thing that is made or as property. Kant also suggests that parents have a moral duty to educate and develop their children both as rational and moral people.[209] This implies the circle of positive duties towards vulnerable or undeveloped rational capacity such as with infants and children becomes broader in virtue of human dignity, and therefore they have more rights and less responsibility and duty; while the case with an adult person is different. The standard practice of both negative and positive duties in respecting human dignity applies for adult persons, and therefore they become both a right holder and responsible persons, except in those

[206] Paul Formosa, *Kantian Ethics, Dignity, Perfection* (Cambridge University Press, 2017) ch 4.
[207] Kant, MM6: 203-493.
[208] Paul Formosa, 'The Role of Vulnerability in Kantian Ethics' in Catriona Mackenzie, Wendy Rogers, and Susan Dodds (eds.), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2014).
[209] Kant, MM6: 280–282.

circumstances that a person becomes vulnerable such as with temporary mental illness. For these reasons, there can and should be strong legal protections and positive rights for all humans by virtue of human dignity, including for those who lack rational capacity. As such, denying that some humans have the rational capacity or cannot exercise their rational capacity does not commit us to also denying them the extra moral status of human dignity. [210]

Finally, it is also important to note that central to Sangiovanni's analysis is to offer an alternative to the idea of human dignity. Instead of positive inquiring into the basis and nature of human dignity, Sangiovanni begins with a different approach, which he terms the "Negative Conception". In his view, if we look closely at those practices, such as discrimination, torture, and genocide, that treat the other person as morally inferior, we conclude how those treatments portray moral wrongdoing and they violate someone's status of moral equality. Treating someone as morally inferior is indeed associated with social cruelty and is part of several forms of wrongful treatment. He singles out at least five paradigmatic ways of treating others as moral inferiors: (a) treating them like animals (dehumanizing); (b) treating them like children (infantilizing); (c) treating them like objects (objectifying); (d) treating them like tools (instrumentalizing); and (f) treating them as polluted (stigmatizing).[211]But Sangiovanni's negative conception remains ambiguous. One can adopt the negative method without dismissing the idea of human dignity as a moral foundation for our moral equality, as Sangiovanni claims. In fact, there is a widespread discussion among scholars of human dignity that argue the negative approach could be one way to restore "the conception of human dignity", rather than dismissing it in favour of a positive way or any alterative concepts. This negative slant argues that instead of attempting to derive a conception of human dignity from some normative ethics or anthropology theories, we should choose a negative approach, i.e. start from behaviours or

[210] cf. Angela Taraborrelli "Dignity, Autonomy and Integrity of Self", (2018) 2 *Philosophy and Public Issues* 8, 45-61.
[211] ibid 74-76,79-82.

conditions (such as humiliation, degradation, instrumentalization, dehumanization) and cases (such as slavery, torture, discrimination, rape, extreme poverty) which we are inclined to describe as violations of human dignity, and then ask what it is that makes it so appealing to use this concept.[212] After all, humiliation may be one appropriate way of understanding the meaning of human dignity. However, it is eventually like other wrongdoing acts, such as degradation and dehumanization, concerning the negative treatment of someone's dignity under the aspect of human dignity as a status of respect. We thus would do best to construct human dignity as primarily a moral normative status of the human person, which should be elaborated and respected through specific norms and outcomes in various interpersonal, political, and legal terrains.

3.5 Concluding Remarks: navigating human dignity

Some concluding thoughts may be presented here. It is possible to say there are two related aspects within the Kantian structure of human dignity: human dignity as an objective worth or value, and the condition of human dignity. It is in light of the first aspect, namely human dignity as an intrinsic worth, that the dignity of a person is worthy of respect and protection, and prohibits all sorts of humiliation and degradation in relation to the second term- the condition of human dignity. The intrinsic or objective worth of human dignity provides the basis for the claim to have the status of respect and concern that is demanded to be fulfilled through duties and rights. On this account, understanding human dignity as an intrinsic value refers to the worth of people in themselves. This worth is not a matter of degree because all people have this property.

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[212] See e.g., Paulus Kaufmann, Hannes Kuch, Christian Neuhäuser, and Elaine Webster (eds.),*Human Dignity Violated: A Negative Approach* (Springer, 2010); Margalit, Human Dignity (n 20), 106-120; David Luban,, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) 88-90.

[213] For example, the formula of human dignity can be restructured in the morality system of duty and aspiration. See

To have the inherent worth of human dignity is to have the condition of a dignified life in relationships with other people, and this is the second aspect of human dignity. The respect for human dignity refers to the social condition or claim of the rights of a person and the normative outcome of human dignity. This second aspect is not inherent property but it appears in a related term that takes different forms and conditions. The outcome of human dignity can occur differently by degrees because it either depends on the ways other people show respect, or fulfil the respect of human dignity differently from one social condition to another; as well as even being different from one person to another. To say people lost their dignity, their dignity was undermined, they were undignified, or their dignity has been attacked, means the respect by other people, which must be showed to their dignity, has been shown incorrectly. Respect of the necessary condition to live with human dignity can be understood as the second aspect of human dignity; but it comes only after the first and prior aspect of human dignity, namely human dignity as a value. This respect gives each one of us the sense to make a claim of rights in the face of everyone. For example, when someone has been humiliated, we might say she has been treated in an undignified way, such as responding by victimizing her personhood. That person has a claim to not be humiliated. However, human dignity without the second aspect is still maintained, because it is about someone's inherent worth of human dignity and that can never be lost.

The various conditions which may specify how to appropriately respond to human dignity. Some focus on outer behaviour, others on internal attitudes; some focus on coercively enforceable acts, others on behaviour that cannot or should not be enforced externally; some specify duties attached to roles within certain institutions, others that are held generally. But the formula that binds all of this is the formula of human dignity- never use a person as means but always as ends. We may also distinguish between the most general and fundamental dignified conditions and their application as specific requirements for institutions within the system of any practice.

The latter addresses the necessity of dignity within a system of human interactions, taking into account relevant empirical claims about human beings' nature, a social condition in more or less procedurally specific contexts.[213]

This understanding of human dignity, first as a moral fact, then as a claim of rightful and respectful treatment in related conditions (by following the formula of human dignity), adds something fruitful to Fuller's thesis. This conception of human dignity provides a precondition to this moral value that underpins the very idea of law's subjectivity as a precondition to the idea of law and legality. Human dignity as a moral value is a preconditional normative value to which certain forms of respect are demanded and concerns for people are necessary under the rule of law. Various conditions, including formal legality, state the relevant forms of respect and concern for how to secure a dignified life for people. This means the normative status of the law's subject has a legal and moral status that was marked by Fuller under the idea of legality; and therefore the human dignity has a high priority. Any legal norms coming from it normally outweigh competing considerations. Human dignity marks a peak in the normative landscape of legal practice. Under the sphere of the connection between legality and human dignity, the main focus will be how legality targets the forms of the condition of human dignity in the sense people are entitled in their social and legal relations to live with dignity in the framework of the law. The morality of legality matters because it contributes to the fulfilment and implication of the conditions of human dignity. This is a more general and basic moral exploration of why the law itself under the rule of law is a good site for dignified conditions. For this navigation, the next two chapters proceed.

[213] For example, the formula of human dignity can be restructured in the morality system of duty and aspiration. See next chapter.

CHAPTER 4

THE LEGALITY OF HUMAN DIGNITY I

4.1 Introduction

This chapter aims primarily to bring Fuller into conversation with Kant. More specifically, it attempts to show how Kantian human dignity, which was presented and defended in Chapter 3, can fit Fuller's legality, which was reconsidered in Chapter 2. It is my conjecture that this connection can be developed under the thesis of the legality of human dignity. To develop this thesis, it is important to consider three points. Firstly, by "the legality of human dignity" I do not mean it only in the sense of the analytical enterprise that seeks to legalize the conditions for the idea of human dignity through legal codification; or the understanding of the function of human dignity's role in judicial activity. Rather, in speaking of the legality of human dignity, I am primarily concerned with the inquiry that works broadly within the tradition of the rule of law theorizing, and which more specifically aligns the normative objective and moral value of the rule of law with the protection of human dignity from the exercise of arbitrary, social and political power. Fuller has been widely regarded as a leading scholar in the doctrines of the rule of law, with the eight principles of legality, considered and defended here in Chapter 2. It is from this inspiration that I came to consider how Fuller's project contributes, and that the tradition of the rule of law explicitly will be more fruitful if we may connect his theory to the Kantian conception of human dignity. This task is a matter not only for revisiting Fuller's project, but also for developing it further. But given that Fuller and Kant are rarely sighted as companions in the same inquiry, the proposed move requires some explanation and defence.

The second point forms a plea for the question of methodology, and how it is possible to bring Fuller into the conversation with Kant. The proposition I wish to defend is that there are

nonetheless several striking linkages between Fuller and Kant when we confront Fuller's dialogue with Kant's model of the Kingdom of Ends. To begin with, however, I should soften the attitude that has been submitted to both Fuller and Kant. Fuller appears as a pragmatic lawyer who has less interest in theorizing the law. But when we are mapping him on his main project of *eunomics*, he departs in many levels from the pragmatic. Regarding Kant, to overcome the problem of his metaphysical idea it needs a friendly injection of the sociology of human communication and interaction. But I also develop a Kantian model of the Kingdom of Ends, which includes not just the element of human interaction in shaping the idea of the legal order, but also how human dignity can be the moral foundation to explain the moral structure of human interaction. This confrontation reveals the view that each agent is an author engaged in a complex attempt to mediate between the real world of social interaction and political life, and the normative and moral worth of possibilities. The outcome of this similarity shows how the idea of human dignity through the mutual respect of human interactions provides the morality reason to the idea of the governance by the rule of law. This is considered in section 2.

Next, I move towards identifying the progress in which Fuller's project can be developed in light of Kantian dignity under the thesis of legality of human dignity. This progress is finalized with the third point in section 3. The most interesting way to progress, in my opinion, is to revisit one of the most important parts of Fuller's aspect, and this is his proposal of the moralities of duty and aspiration. Fuller's structures of these two moralities can provide a proper place for the Kantian formula of human dignity in the classification of a priori - based on the principles of moral duty, and of a posteriori- the presumption of receiving moral aspirations. Since formal legality embraces the two moralities, I argue legality also relates to the conditions of human dignity. In principle, legality encompasses the essential moral duty to a narrow sense of the condition of human dignity as an autonomous agency, without which a legal system is almost impossible. Optimistically, legality also pertains to the highest achievements and open-ends to

people and institutions. In this way, legality inspires us towards the morality of striving and progressing for excellence and human flourishing, including the broader conditions of living with dignity. Finally, section 4 contains the conclusions of this chapter.

4.2 Fuller and Kant: A comparison of inquiry

The forthcoming discussion attempts to set the conversation between Fuller and Kant. However, it seems Fuller and Kant have proposed two accounts of tradition that run in two different directions, opposed to each other. Fuller, like other American legal theorists,[1] seems apparent as the lawyer who is more likely to follow American pragmatism developed by the classical pragmatics.[2] The classical pragmatics here refers to the late nineteenth-century movement in American philosophy, which characterized the meaning of pragmatic as practical, social, and experiential methods with the purposes and consequences.[3] Kant, in contrast, has often been known for being least likely to support the claim that social interaction and the empirical study of human nature have necessary and important contributions to make sense of a moral world-view.[4]

But such a focus might soften by considering different ways in which we read Fuller and Kant. To get started on this task, it is useful to refer to the dialogue of Fuller's jurisprudence as it is not a direct encounter of pragmatism. Fuller's jurisprudence may refer to the pragmatists, but it includes other elements that make Fuller's thought different from pragmatism in many levels.

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[1] According to Riachard Rorty, all American legal theorists are some sorts of pragmatist, Richard Rorty, 'The Banality of Pragmatism and the Poetry of Justice, (1990) 63 *Southern California Law Review* 1811; Charles L. Barzun, 'Three Forms of Legal Pragmatism', (2018) 95 *Washington University Law Review* 5, 1005.

[2] Kenneth I Winston, 'Is/Ought Redux: The Pragmatist Context of Lon Fuller's Conception of Law', (1988) 8 *Oxford Journal of Legal Studies* 3; Karol Soltan, 'A Social Science That Does Not Exist', in Willem J. Witteveen & Wibren van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 394-7.

[3] Susan Haack & Robert lane (eds.) *Pragmatism, Old and New* (New York, Prometheus Books, 2006) 15-57; Richard Warner, "Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory", (1993) *University of Illinois Law Review*, 535-60.

[4] Kant himself declares that his morality is not based on any empirical and that belongs to anthropology, Kant, Immanuel Kant, *Groundwork for the Metaphysics of Morals*, Arnulf Zweig (tr.) and Thomas E. Jr. Hill (eds.) (OUP, 2003) G4: 389, see also, Robert B. Louden, *Kant's Human Being: Essays on His Theory of Human Nature* (OUP, 2011) Ch.6.

Let me examine Fuller in light of the two commitments of classical pragmatism.[5] First, as a methodological matter, pragmatism is a shift from the big wholesale questions of metaphysics in philosophy to the empirical and scientific approaches that retail the ultimate picture of reality (all knowable reality) in experience. Second, pragmatism is the attitude that orientates us to looking away from the first principles and supposed necessities, and looking instead towards outcomes and consequences (purposes). Therefore, it is the philosophy of the "instrumentalist" that retails the business of clarification, criticism, and adjudication from the means to external goals.

Of the first commitment, it seems Fuller acknowledges the pragmatic view that theorizing about any idea, such as law, is answerable to the reality of experience. He also thinks the idea constructs that experience.[6] Consequently, the adequacy of a theory must be tested by the reference to its effect on practice and action. However, I think Fuller refers to his own approach of jurisprudence as practical with a good reason and thereby departs from pragmatism in many levels. The task of legal philosophy, Fuller suggests, should be adjudicated by asking, "[w]ould the adoption of the one view or the other affect the way in which the judge, the lawyer, the law teacher, or the law student, spends his working day?"[7] For this, Fuller is less interested in the proposal of definitions of law if they are not accompanied by the admission that definitions are "direction posts for the application of human energies",[8] never purely descriptive, always potentially prescriptive. Accordingly, he hopes that the future legal philosophers will shift away from a descriptive model because this model would cease to be descriptive to represent legal phenomena and will turn instead into an analysis of the social processes that constitute the reality of the law.[9]

[5] These commitments derive from Haack & Lane, (n 3), 15-50.
[6] See, Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing, 2012), 46-7.
[7] Lon Fuller, *The Law in Quest of Itself* (Chicago, The Foundation Press, 1940), 2–3.
[8] Lon Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart',(1958) 71 *Harvard Law Review* 630, 632.
[9] Lon Fuller, *The Morality of Law* (rev. ed., Yale University Press, 1969) (Hereafter Fuller, ML), 242.

There is some truth in this view. The descriptive model of law is unproductive. It is hard to distinguish between what is the law and what ought to be in the legal practice, and that in a well-functioning practice there can be no neat division between a sphere of law and a sphere of morality. In interpreting legal status or judicial activity, for example, to understand legal texts interpreters do not deal merely with words (what the law is), but also with the purposes or the points of rules and words.[10] In teaching and training students at law school, Fuller calls for a "philosophic awakening" that introduces law in its proper place for the human struggle, to achieve order, justice, and enabling us to live and work together in harmony.[11]Fuller also believes that our moral experience can serve as a genuine guide for practical and juridical decision-making. In particular, he sought a human institution such as a law built on some basic facts and values of human existence; this is the common interest that brings people to live together and maintain the institutions that uphold society.[12] For these reasons, when Fuller turns to a practical approach to understand the nature of law, he does not necessarily adopt a pragmatic view by rejecting the first facts or principles that may come a prior to the nature of understating the law. He attempts to grasp the nature of law from both the facts and values that participate in shaping and applying the laws. Hence, Fuller's sense of the task of legal philosophy is normative and has a procedural feature.[13] He seeks to illuminate our understanding of law as a social practice by working through the practice itself to gain an understanding of what counts as an effective legal order.[14]

[10] Fuller, *Quest* (n 7), 103, 110; cf. Fuller, 'Fidelity' (n 8).
[11] Lon Fuller, 'Philosophy for the Practicing Lawyer',in,Kenneth I Winston (ed.). *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Hart Publishing, 2001) 305.
[12] Charles L. Barzun, 'Three Forms of Legal Pragmatism', (2018) 95 *Washington University Law Review* 5, 1027-8
[13] Fuller's approach may also present as proponent of distinctive procedural or formal natural law jurisprudence. See Rundle, 'Opening the Doors of Inquiry: Lon Fuller and the Natural Law Tradition' in George Duke & Robert P. George (eds.), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press, 2017).
[14] There are some similarities between Fuller and those legal philosophers who advocated normative jurisprudence. The surveys of their approaches have been carefully discussed in J Dickson, Methodology in Jurisprudence: A Critical Survey, (2004) 10 *Legal Theory* 117; Andrew Halpin, 'Methodology' in Dennis Patterson (eds.) *A Companion to Philosophy of Law and Legal Theory*,607-620.

There is one more point that shows how Fuller departs from pragmatism: his endorsement to the necessity of different forms and prior criteria to understand the law. This thought grew essentially from Fuller's education in the tradition of common law, where the practice and custom is so central. For Fuller, then, the challenge offered by understating the nature of law in the modern era is not to be answered by burying wide experiences of common law and denying its existence, and turning instead to the datum facts about the law. Rather, he sought to proceed by understanding the law in light of common law, or the forms of common law. These forms have its structures and contents and therefore these forms needed to be expanded and adapted to meet the demands of modern life and administration. More interestingly, even the form of legislation (enacted rules), which is the central form of law in traditional civil law, is seen by Fuller as one of the forms of the common law.[15]For him, common law is not the work of one judge, but of many, collaborating through time and guiding us to how a social institution may derive its integrity and vitality from the same spirit of consultation as that which animates the discussion of two friends sharing a problem together.[16]

Then, if in any way Fuller turns to grasping the nature of law from experience, as known by pragmatism, he does this with different methods. To be more precise, Fuller's task of legal philosophy, as Simmonds suggests, belongs to a lost tradition.[17] That tradition is not pragmatism. Rather that tradition is characterized by a concern to understand the human world of values and practices: the domain of morality, politics and law. Accordingly, the civil, political and legal structures were viewed as containing in human activity: a full realization of human nature, rather than as being descriptive of human experience or a distortive imposition upon it. For this tradition, thus, an understanding of the nature of a fully human life requires careful reflection upon the significance of actual human institutions and their morality.

[15] To some extend Sundram Soosay stresses this point carefully see his, 'Rediscovering Fuller and Llewellyn Law as Custom and Process' in Maksymilian Del Mar (ed.) *New Waves in Philosophy of Law* (Palgrave Macmillan, 2011), 40-47.
[16] Lon Fuller, 'Human Purpose and Natural Law',(1956) 53 *The Journal of Philosophy* 697, 74.
[17] Simmonds E. Nigel, *Law as a Moral Idea* (OUP, 2007), 56.

The second feature of pragmatism, which is 'instrumentalist' towards the purposes and ends, is also evident in Fuller's jurisprudence. Fuller often speaks of all of the purposes, and law as instrumental of something else, which could be counted as an example of an instrumental approach in Fuller's work.[18] However, he rejects the structure of the instrumentalism of social ordering that is divisible into two distinct stages; first is the setting of ends and goals, and then devising technical means to achieve them.[19]In Fuller's view, taking this approach is misleading because he thinks means and ends interact. According to Fuller, as much as ends tentatively point to means, means also, in return, indicate the reformulation of ends. In contra to pragmatic instrumentalists, thus, Fuller thinks that it is not only the ends that determinate the means, it is also the means that determinate the ends.[20]

The implications of Fuller's views for interaction between means and ends are profound in his *eunomics* project, which is the "science, theory, or study of good order and workable social arrangements".[21]In this project, he finds that human institutions are likely to do better from the well-structured institutions and their purposes as well as their moral and social functions.[22] Thus, in his project of *eunomics*, Fuller sought to determinate the contention between means and ends (orders and goods or facts and values). One feature of *eunomics* is related to the sociology because it reflects how we are not the observer but also are the designer of the structure of social order. Another aspect of *eunomics* is that it profoundly has a moral commitment. He also does not make a sharp distinction between means-ends structure, as most pragmatists and positivists

[18] See e.g., Fuller, ML; Lon Fuller, 'Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction', (1975) 1 *Brigham Young University Law Review* 8.
[19] This structure is articulated in John Dewey's formulation of "means and ends". See Lon Fuller, 'American Legal Philosophy at Mid-Century', (1954) 6 *Journal Legal Education* 457, 479.
[20] Lon L Fuller, 'Means and Ends', in Kenneth I Winston (ed.) *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Portland, Hart Publishing, 1981).
[21] ibid 47-64; Fuller, 'American'(n 19) 477.
[22] ibid; also, Summers (n 5) 437-439.

alike often do.[23] Instead, he considers there is a necessary harmony between means and ends. There is not a point of the means if they are not severable to some ends. In the meantime, these ends are not recognizable without reliance on the well-structured means with the precondition of some goodness. Such explanations are potentially relevant to moral justification because there are two senses of morality commitment lying behind the good order. Firstly, the idea of law as good order is morally good because it can recognize the good and moral ends. Secondly, there is the idea of morally good that animates within the process of constructing the social and legal order. Here, unlike pragmatism, Fuller does not dismiss possible metaphysical or causal explanations as irrelevant to social practice.

At first glance, the idea of "good" in the good order in Fuller's *eunomics* can be parallelized to Aristotle's idea of good as an end to any human activity.[24]In the very opening of his *Nicomachean Ethics*, Aristotle announced any human activity is not random, rather should be viewed as undertaken in furtherance of some "human good".[25] Consider the similarity between this thought and some of Fuller's works. In one place, for example, Fuller argues the law generally and the legal rules in a field of contract law can be understood properly with references to the purpose that they serve.[26] Similarly, Fuller believes it is not only a statute or a specific legal rule that may serve to some ends, but also the law does have a purpose as a whole.[27]So like Aristotle, Fuller here sees what makes the law as mean meaningful for serving the ends. If we do not see the point of the legal end of the legal rules, we find it difficult to see how the law directs and mange human activity.

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[23] See e.g., Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of* Law (Cambridge University Press, 2006); Leslie Green, 'Law as a Means' in P Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing, 2010).

[24] Rundle traced the evidence to this claim in personal copy of Fuller's works; see Rundle, *Form* (n 6) 32.

[25] Aristotle, *The Nicomachean Ethics*, J.A.K. Thomson (tr.) (Harmondsworth: Penguin 1976) 1.

[26] Lon L. Fuller & W.R. Jr. Perdue, 'The Reliance Interest in Contract Damages' (pts.1),(1936) 46 *Yale Law Journal* 52, 52.

[27] Fuller, ML, 146.

In the first line of the definition of *eunomics*, Fuller also declares that he was not interested merely in order, but he was interested in the type of "good" order that is "just, fair, workable, effective, and respectful to human dignity".[28] For Fuller, thus, one key difference between good legal order and bad order rests in respect of the moral value of justice and human dignity. Any form of social ordering that is designed to consider the status of its participants and be workable in a healthy mode, must commit to treating people with justice and human dignity. Professor Sean Coyle thoughtfully argues that one of the most distinctive points of Fuller's dialogues is, even before John Finnis, bringing an important idea to the very centre of jurisprudential inquiry.[29] This idea is how the human institution of law can secure the human good. Both Fuller and Finnis connected this distinctiveness of form with the issue of practical deliberations of the manifestation and respect of human agency or practical reason.[30]But Coyle suggests what makes Fuller's project different, and more particularly Fuller's eight standards of the rule of law for formulating the form and function of a legal system, is by focusing more on "examining the meaning and import of the variety of legal (social) forms", instead of exploring the nature of the basic good or common good, which has been explored widely and clearly in Finnis's work.[31]

Although I concur with Coyle's comparison of Fuller with Finnis, I contend that this comparison differ in one crucial respect. It is necessary to explore more the reasons why Fuller is placing the focus upon the means as "practical wisdoms" by which the other ends (e.g. common goods) are explored and pursued in society.[32] Certainly, there are some significant reasons one can explore from the sketch presented in Fuller's work, focusing on the means (forms). But most notably, one can present these reasons because there are also ends that are located or animated in the structure of means- legal and social forms. These ends are not simply those goods and

[28] Fuller, 'Means' (n 20) 54-56.
[29] Sean Coyle, *Modern Jurisprudence: A Philosophical Guide* (Hart Publishing, 2014), 194-5.
[30] ibid 194.
[31] ibid.
[32] In fact, Coyle highlighted some aspect of this reason, but he was not calling it a "moral reason", see ibid 211.

ends (e.g. common goods) that happen to be pursued by law (as social order); they are good or moral ends, in which we cannot form a clear conception of law as social order, except by reference to its realization in law. These ends thus are the immanent ends in the structure of means, such as the law (especially law as legality), its own telos, the point of the enterprise, purposes and goals internal to it.

One more point can be added here. For Fuller, similarly to Kantian ethics, there is no list of virtues or common goods. I think this is because it allows us to see that the virtues and goods needed by a person differ with their ends and plans of life, which vary too much from person to person to make any generalized list pertinent to all of us. As a result, there is always room for the possibility of plural life and diversity of culture, where people across history and cultural backgrounds give a variety of meanings to goods and virtues. It seems the Fulleran destination between the two terms of ends is not acceptable to Finnis. Like Fuller, Finnis agrees that there are ends that are necessarily animated within the procedure of making and applying the law in light of the rule of law, when the law is used as a tool (means) in order to bring other moral ends and common goods.[33] Unlike Fuller, however, Finnis regards these ends as the "technical ends", whose vocabulary should not be seen as a travel idea from the moral discourse, or even common goods. [34]At this point, Finnis takes Hartian legal positivism's side on the critique of Fuller.

At this point, we should turn to see the good that animates in good order as means. This end importantly highlighted through the human interaction approach to legal order; whereas the idea of human dignity is animated in shaping good order. The idea of human interaction as reciprocity essentially transfers the dialogue of Fuller's jurisprudence into a new phase.[35] Fuller's

[33] John Finnis, 'Natural law and legal reasoning', (1990) 38 *Cleveland State Law Review* 1, 142.
[34] ibid.
[35] Outside Fullerian, Rawls asserts that reciprocity comes to the force as a normative principle when individuals seek to reach agreement about the terms of joint actions and interactions, either when entering into it or when

approach is utterly social and practical but has a moral foundation. He wanted to show that legal order as social order is not only to make some human good, but it also enables humans to organize their lives and their relationships with each other while limiting the potential abuse of authority, by insisting on the legality that constrains arbitrary exercises of power and grounds on reciprocity towards upholding the respect of people's dignity. In the meantime, this analysis of human interaction as the foundation of legal order could provide an interesting starting point for an analysis of the affinities between Fuller and Kant's model of the Kingdom of Ends. First, let us return to the problem with Kant.

It seems Kant is less interested in the view that social interaction has important contributions to make to a sense of practice. Consequently, the discourses of any practice, such as morality and law are framed only by reference to a very metaphysical sense. Jürgen Habermas once summarized the central problem of Kant's thought in this way: Kant's approach is purely monological and exists only in relation to an isolated individual, independent of its location and place in a social context.[36] It takes place within a relationship, between knowing private subjects as a main object without any considerations to social practice and human participations. This in turns leads to missing the point of how to transfer any idea of morality such as human dignity from a private subject to other subjects (in the public sense), in order to have the reality dimension in any social interaction. For this, Habermas has attempted to overcome Kant's weakness.

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renegotiating its terms. John Rawls, 'Justice as Reciprocity', in Samuel Freedman (ed.) *Collected Papers*, (Harvard University Press, 1999), 208.

[36] For Habermas's criticism and developing of Kant, see e.g., Jürgen Habermas, "Discourse Ethics: Notes on a Program of Philosophical Justification," in *Moral Consciousness and Communicative Action* (MIT Press, 1990), 43–115; "Remarks on discourse ethics," in his *Justification and Application* (MIT Press, 1993) 19–112; *The Inclusion of the Other: Studies in Political Theory* (MIT Press, 1998) 3–46; *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996) 10-11, 22-34, 66-81, 89-94.

However, I should start with a different path. In my view, Kant's figure of the human interactions and the appeal of relationships' structure may be explored with one of the most practical models: Kant's formulation of the Kingdom of Ends (KoE).[37] I thus proceed to explore this model by showing that what emerges from Kant's reflections on the interactions to establish a system of law based on human dignity, is not only normatively substantial in its own right, it also registers the closer nexus between Kant's model and some of the dialogue of Fuller's jurisprudence. Kant begins to introduce the KoE in this way: it is a kingdom[38] or realm[39] that constitutes a systematic union of people by making the law that arises and is maintained basically from the fact of the human interaction. Three ideas in this model seem to me significant: (i) human interaction explains the social foundation of law; (ii) human interaction supports the normativity force of legal order; and, (iii) human dignity is the moral foundation of such a model.

Let me begin with (i). For Kant, the KoE is good model[40] in which one can inspire to elaborate how "a systematic union" of various beings can be managed through the common laws, and it unites the whole of all ends in systematic connection.[41]Here, the KoE invites us to image the members of a community who are diverse in their identity and their plans of life, and yet they live together in a pluralistic and a peaceful way. It is a plural community because each individual as a member of that community has by his or her nature, a different meaning of good life, and yet they joint to live under one roof. Another point here is that this community is created by human interaction but it is not limited among selected members of the group. It might be a state

[37] Kant, G4: 432-6. Much writing on Kant's work gives the KoE a semi-legal or political interpretation, and other reads it only as the metaphysical metaphor. See e.g., Barbara Herman, 'A Cosmopolitan Kingdom of Ends' in B. Herman, C. Korsgaard and A. Reath (eds.), *Reclaiming the History of Ethics: Essays in Honour of John Rawls* (Cambridge University Press, 1997) 187–214. 3; Katrin Flikschuh, 'Kant's Kingdom of Ends: Metaphysical, Not Political' in Jens Timmermann (ed), *Kant'S Groundwork of the Metaphysics of Morals: A Critical Guide* (2009); Thomas E. Hill; "Kantian Normative Ethics," in David Copp (ed.), *The Oxford Handbook of Ethical Theory* (OUP, 2006), 480–514.

[38] There is a view among Kantian that Kant has drawn this idea of kingdom from theological idea of Kingdom of Gods Paton, H. J., *The Categorical Imperative: A Study in Kant's Moral Philosophy*(University of Pennsylvania Press, 1947), 186-188.

[39] There is a point of difference in terminology here. The phrase 'Kingdom' does not literary means a 'Kingdom', as Paton noticed, but it means a ' realm' or 'commonwealth' or ' systemic union'. ibid, 187.

[40] Kant, G4: 433.

[41] ibid.

sized-population who interact and join together into a political and legal community with the common and social orders (laws) that are assigned to each other's rights and obligations.

But how do people decide to live peacefully while each individual possibly pursues different goods and happiness? How do people come to share the values and ideals under the threat of possible conflicts between personal ends and entering social life? The conflicts arise because people want or need to live together but they are all hard to get along with for personal reasons. Kant offers the solutions to this conflict through the proposal of "unsocial sociability".[42] Accordingly, we have a propensity to enter into society; but we also have a thoroughgoing resistance to this tendency, so that we are always liable to isolate ourselves and tear society apart.[43] Two aspects in the proposal of social unsociability can be identified.

First, there is an informal or causal aspect. This aspect requires actual inclusive participation in communication to have successful interactions. Communication provides the baseline for how to enter into any negotiation to solve any conflict. It also guides us to cooperate until we can come to an agreement and find our way through a shared life. This aspect is interestingly the one envisaged in Habermas's theory of commutative action.[44] Habermas argues in the everyday we share with others, what he calls "lifeworld",[45] a bulwark against social disintegration, resisting the fragmentation of meanings and preventing the eruption of conflicts of human interaction. This is supported through communicative actions that are symbolically mediated on the basis of the

[42] For useful surveys of the problem of sociability in early modern moral and legal philosophy see, Allen W. Wood, Unsociable Sociability: The Anthropological Basis of Kantian Ethics, (1991) 1 *Philosophical Topics* 19; J.B. Schneewind, 'Kantian Unsocial Sociability: Good Out of Evil' in A. Rorty & J. Schmidt (eds.), *Kant's Idea for a Universal History with a Cosmopolitan Aim* (Cambridge Press, 2009) 94-111; Onora O'Neill, *Constructions Of Reason: Explorations of Kant's Practical Philosophy* (Cambridge University Press 1989) 39.
[43] Immanuel Kant, Toward Perpetual Peace,in, *Kant's Practical Philosophy*, Mary J. Gregor (tr.) (Cambridge University Press, 1996) 8: 18-20.
[44] Jürgen Habermas, *The Theory of Communicative Action,* Volume 1 & 2, Thomas McCarthy (tr.) (Boston, Beacon Press, Vo1. 1984, Vo.2 1988).
[45] ibid Vo 2,113-154.

use of language through speech-act.[46] A brief summary of Habermas's theory so far entails that the meaning of a speech-act depends on its validity claim.[47] Validity claims function as a guarantee that the speaker could adduce supporting reasons that would convince the interlocutor to accept the utterance. Most of the time, the guarantee is tacitly accepted by the hearer and suffices to coordinate their interactions. This makes for a successful communicative action. When someone understands and complies with a simple verbal request, both speaker and hearer, by reaching a consensus, move seamlessly from communication to interaction and solving the conflicts, and actions are tacitly coordinated by validity claims.

There is a curious point of the view put forward by Habermas. His focuses on participation in human communication supports the close links between living in the public life and deliberative conception of that public sphere, in which, people (citizens) solve problems, exchange views and seek an agreement. To put it differently, once we enter in any interaction, going through the communicative actions causes us to coordinate our actions on the basis of mostly implicit shared understandings. These include agreements on the truth of facts about the empirical world, and on the validity of norms regulating the social world and conflict resolution. For example, if we face difficulty over how best to manage a particular ill threat or imminent storm, imagine a council debating how to deal with an imminent flood—we have a better chance of reaching agreement if we have to resolve an empirical question about the effectiveness of some competing strategies, and do not also have to argue over fairness criteria, or what would count as a successful outcome. In short, reaching agreement communicatively requires a large background consensus on matters that are unproblematic for group members.

Although the idea of communication may be achieved in the small community or even in large

[46] ibid, Vo 1,99, 302-309& Vo 2, 119, 144, 204-5.
[47] ibid, Vo 1, 75-99; Jürgen Habermas, Actions, Speech Acts, Linguistically Mediated Interaction, and Lifeworld, in Maeve Cooke (ed.) *On the Pragmatics of Communication*, 214–255.

groups, without some forms of practice and constructing norms (such laws) the communication may collapse at any moment. It is therefore necessary we should turn to the second aspect of Kant's proposal of social unsociability. This aspect is formal because it seeks to formulate some practices and norms (or common laws) that make human interaction possible to solve conflict and live a plural life peacefully. Thus, it is about what Kant spells out as the "common laws" that unites us. Here, the common laws hold more than one form of social practice. They could be rules of social and legal order; standards of professional etiquette and of daily civility; or any ethical rules that embody clear signals of recognition of other's communications; even when there is disagreement or failure of communications.[48]

From the legal and social point of view, thus, the Kantian view of the law in the KoE can be read as that the rule of legal order deals with two points. Firstly, it is about the possibility of solving conflicts among human interactions and coming to share values in a life of pluralism. Second, it is about a practical guide that increases a number of areas in which people are left free to pursue their ends and plans for life. The aim of the legal form of a contract, for instance, is to protect the expectations of the promisee between two parties or more and settling any disagreement that arises between the parties in fulfilling the terms of the promise. The job of administrative rules is to organize the public role in the activity of government and its administrations; and to address the possibility of conflicts among public agencies, on the one hand, and between people and public agencies, on the other hand. In this kind of interpretation of Kant's model of KoE, it appears as a legal system comprising legal orders based upon human interaction, to ensure all people's freedom to set ends in the way they are coordinated and governed with less conflict, and more with coordination towards shared values.

[48] O'Neill, *Constructions* (n 42), 31; cf. Onora O'Neill, *Constructing Authorities: Reason, Politics and Interpretation in Kant's Philosophy* (Cambridge University Press, 2015), 137-150.

Like Kant's model, Fuller also thought the foundation of social and legal order could begin with the ways of how people come to interact and expect certain behaviours from each other. This understanding can settle and resolve the disputes under the forms of law, as Fuller called them, the forms of social ordering.[49]In Fuller's view, people cannot live and work together without some organizing principles, systems, and orders that will resolve conflicts and promote cooperative action.[50] It seems that he, similarly to Kant's model, advocates a two-track of a distinction between the informal and formal aspects which make contributions in the social ordering of human interaction. But rather, Fuller grouped these two aspects under two basic principles of human interaction or associations: interaction to achieve common needs, and interaction by reciprocity.[51] The former is more commonly found in small settings such as neighbourhoods, clubs, families and non-profit associations.[52] In larger groups, however, it is the latter interaction as reciprocity that formalizes our way to live together on a large scale. By "reciprocity" Fuller meant mutual predictions in those day-to-day activities that continually shape people's conduct, concerning what they expect others to do and what others expect of them.[53] These mutual predictions lead to share understandings that are reinforced through several forms of social ordering. For the same reason, Fuller thought that the law is the enterprise that should be maintained through continuing struggles of social communication.[54] It is the work of its everyday participants through the interaction and cooperation that is "a continuous effort to construct and sustain a common institutional framework to meet the

[49] Fuller uses the social order broadly to include rules, procedures, and institutions-all the ways, in short, in which the relations of human beings to one another are subjected to a formal ordering, whether by consent, habit, or command, Fuller, 'Human Purpose' (n 16), 75.
[50] Lon Fuller, *The Problems of Jurisprudence* (Brooklyn: Temporary edition, The Foundation Press, 1949), 694.
[51] ibid, 694, 711-15.
[52] ibid
[53] Lon Fuller, 'Human Interaction and the Law' in Kenneth Winston (ed.) *The Principles of Social Order: Selected Essays of Lon Fuller*, (Durham: Duke University Press 1981) 211-46.
[54] Fuller, ML, 128-130; 186, also cf., Peter R. Teachout, "'Uncreated Conscience": The Civilizing Force of Fuller's Jurisprudence', in Willem J. Witteveen and Wibren van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press, 1999).

exigencies of social life in accordance with certain ideals".[55]In this context, people are not merely subjects or inferior, but are interacting agents creating law and observing it; for example by holding the condition of obeying it through specific processes of communication. Fuller believes an assumption about human nature, which is that the main goal of human life is not mere survival, but "maintaining communication with our fellows".[56] For him, the possibility and time that we accomplish communication with one another can expand or contract the boundaries of life itself.[57]

The idea that human interaction is a source of the legal order is a remarkable view. It entails that not all types of law are enacted or made into law: there are implicit forms of law, which are characterized by interactional structure.[58] Fuller, in particular, argues this type of law is termed implicit law because it often emerges in the horizontal interaction and originates around contracts and covenants between various parties such as people, businesses, non-governmental organizations, and state actors. Unlike enacted or made law, thus, the implicit law comes into existence through a gradual process of interaction, in which a standard of conduct emerges that is considered to give rise to legal rights and obligations.[59] Both customary and international laws are example of this type of legal order.[60]

This insight is fundamental for those cases in which events and changes have happened in a society where enacted law is slow to respond to rapid developments and changes. This is often happening in the professional codes and covenants among market traders. More importantly,

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[55] Kenneth I. Winston, 'Three Models for the Study of Law', in Willem J. Witteveen and Wibren van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press, 1999) 69-70.
[56] ibid 58, Fuller, ML, 185-6.
[57] Fuller, ML, 186.
[58] Fuller's jurisprudence recognizes a vast reservoir of both types of law, namely made and implicit law, see e.g., Lon Fuller, *Anatomy of the Law* (New York: Encyclopedia Britannica, 1968); Fuller, 'Human Interaction' (n 53); also Postema identifies important features of these types of legal order in Fuller's jurisprudence, Gerald J. Postema, 'Implicit Law' (1994) 13 *Law and Philosophy*, 361.
[59] ibid
[60] Fuller, ML, 233; Jutta Brunnée & Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010), 42-52.

even in enacted law when it is the explicit formulation by an enactment of a legislature the interactional element is still present and essential. It is present because there is implicit mutual reinforcement of interactional structure that is still jointly connected with the enacted law. In contracts, for example, parties are bound because enacted law (statues) demands it, as it is usually often a provision in most codes of civil law traditions. And yet, the real fact that makes contracts binding is because the parties explicitly formulate what was already implicitly understood and agreed as a set of mutual obligations based on a cooperative relationship.[61] The very idea of interactions must support the normative force of enacted law by providing a context of practices, which make sense of legal norms. To explain this, we should turn to aspect (ii).

The most obvious examples of social orders seem to manifest in enacted law. According to aspect (ii), human interaction explains the normativity force of enacted law. But how is that possible? The Kantian answer, according to the KoE model, is that the members of KoE are all co-legislators of the order. This means every person whose life is governed by a given social order under the KoE is a combination of authors (sovereignty) and addressees (subject). In the part of the people are the authors of the public sovereignty, because each member conceives of the authorship of the law as in himself. As Kant states: "A rational being belongs as a member to the kingdom of ends when he gives universal laws in it, but is also himself subject to these laws. He belongs to it as sovereign when, as lawgiving, he is not subject to the will of any other".[62]This entails each of us having to think of himself as equal qualified co-legislators to the laws of this system.[63] Once each one of us has recognized in this way the authorship of public sovereignty, the law is justified in how to take us a legal subject- how the law can claim authority and fidelity over us to obey.

[61] Fuller, *Anatomy* (n 58), 57–82; Roderick A. Macdonald, 'Legislation and Governance' in Willem J. Witteveen and Wibren van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press, 1999) 284–92.
[62] Kant, G4: 433.
[63] Paul Guyer, *Kant on Freedom, Law, and Happiness* (Cambridge University Press, 2000), 142.

From Kant (also Rousseau), Habermas highlights the idea of how people both as the addressee and the author of the law can solely justify a legitimacy source for democratic law-making to regulate their common life by the law.[64] In general, Habermas's point is that a legal order is legitimate to the extent that its norms are authored and made by their addressees (people). He refers to this idea, interchangeably, as there is incorporation between two senses of autonomy: public autonomy and private autonomy. The public autonomy maintains the principle of popular sovereignty by giving the means to shape the legal norms with which we organize the way we live together in the political community. The private autonomy is about the idea of human rights, and in a general sense as a right to exercise freedom of choice within the sphere of what is not legally regulated.[65]Alongside these ideas of autonomy, Habermas develops the system of basic rights to show that these two aspects of modern law are not only compatible but "co-original".[66] According to him, the procedure of democratic self-legislation by free and equal citizens in a constitutional state is characterized and grounded by a system of basic rights. As the most important categories of those, the rights are providing the greatest possible measure of equal individual liberties -private autonomy and rights providing equal opportunities of participation in the law-making processes - public autonomy or civic autonomy.

The importance of this thought should not be underestimated. It connects the rise of the procedure of law-making with a shift in the source of the final authority or power, based on which society is organized under the enacted law. This shift replaces the one-way sources of authority (top-down government) with the authority of human deliberation and human participation in the law-making process. It allows, in particular, that people are not simply the subjects of laws, but that they are, at the same time, the source of law's authorship. Those laws

[64] Habermas, *Between* (n 36), 82-131; Jürgen Habermas,'On the Internal Relation between the Rule of Law and Democracy,' in, *The Inclusion of the Other* (MIT Press, 1998)260-62.
[65] Habermas, *Between* (n 36)120.
[66] ibid 127.

are not simply there by the demand of one enacted ruler who could subject people to his demands. Instead, the laws are necessarily declared as the outcome of a coordinated process and communicative actions, in which citizens recognize each other as free and equal members of social interaction. It follows thus; Habermas's perspective on law-making procedure has some answers to the important question. If having the form of law that must be exercised by public power is unavoidable to manage our social interaction, how can that power be justified? Or how can law make a claim on us to obey in a non-arbitrary way?[67] The major building block by which Habermas addresses this issue is the idea of letting anyone who is affected by the law to participate in the process of law-making for governing society.[68] These laws enacted by such an agent, must be always able to gain the agreement of all members of this community of ends.[69] We can say the laws in the KoE are enacted by agents and for agents. This understanding illustrates the concept of the KoE, as it is a self-governing society, a connected system of rational agents under common self-imposed, and yet objective, laws.[70]

Similarly, in framing his argument in many places, Fuller acknowledges that the idea of law based its normativity of reciprocity among equal citizens. The heart of this argument lies in the idea all citizens undertake to one another to achieve the moral aims set by the law, especially when they are its joint authors. We observe the law but we also use it as a reason to explain ourselves to our fellow citizens.[71] There is one further sense in which Fuller holds a remarkably similar view but adds an important point. In Kant's model, it may seem it is not clear to denote the role of a king or the ruler or the lawgiver. While there is the idea of authorship in the concept of public sovereignty making the law, there is not a distinguishable structure between sovereignty and government. It is possible to imagine the sovereignty in this kingdom as being vested in the

[67] David Dyzenhaus, 'The Legitimacy of Legality',(1996) 46 *The University of Toronto Law Journal* 1, 165-69.
[68] This is also part of Habermas's the discourse principle, Habremas, *The Inclusion* (n 36), 42.
[69] Christine Korsgaard, 'Creating the Kingdom of Ends: Reciprocity and Responsibility in Personal Relations' in, *Creating the Kingdom of Ends* (Cambridge University Press, 1996), 193.
[70] Paton (n 38),186-7.
[71] Fuller, ML, 210.

united body of members because they all share the point of making the law. But we are left without explaining the nature of the relationship between a government, for example, an executive authority or legislator, and the people. The necessity of this point comes with the fact that the official governments in modern society have created vast numbers of statutory rules and other types of regulations, usually in the form of legislation and policy. Leaving this point behind may lead to the possibility of reading Kant's model as a positivist's view of the one-way authority of law.[72]

Fuller provides the structure of lawgiving through the process of legality maintaining there are two ways of communication between the ruler and people. For Fuller, the normativity of a legal order (especially in the form of enacted law) depends on effective interaction and cooperation between citizens and the law-making and law-applying official.[73] This interaction flows from the reciprocity fulfilments of duties between both rulers and people. The rulers must present the enacted law and its application in the way in which people come to accept it and obey it; and in return, people can participate in making the law possible.[74] As a result, we can say there is a boundary between the rulers and people in the legal system that makes the law possible.[75] In light of this, we can also add the normativity of legal order certainly depends on obedience to the law. But this obedience is not just something that has to be secured for a legal order to be effective; obedience is constitutive of such order. Law has to secure obedience by appearing to those subjects to it not just as an order, but as a norm, as a prescription with a justified claim to be understood and communicated. Though the law is authoritative, this is only when it is mutually constructed and mutually applied.[76] This means the normativity of legal order is not simply a

[72] See, e.g., Lon Fuller 'Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory', 47 (1949) *Michigan Law Review* 1157.
[73] Fuller, human interaction (n 53)233-235 234; Fuller, ML, 39-40, 192-93, 209, 219.
[74] Fuller, ML, 209
[75] ibid 216
[76] Brunnée and Toope (n 60), 24-5.

matter of factual word of enforcement – who has power can make the law, but it is also one subjective recognition- the consideration to whom the law is addressed.

This line of interactive argument is evident in three broad contexts of modern law.[77] The first context is essentially horizontal, where interaction occurs between parties related as equals. In the simplest cases these relations are either bilateral, as in contractual arrangements or business partnerships, or they can be complex, multilateral relations, as in relations amongst people in a political community- e.g. a social club or non-government organization. The normativity of any order in this context depends on mutual exchanges between the parties as they are equally agreed on its terms. In the society that rules by customary law, the deeper sense of this reciprocity is even more powerful because people are both subjects and lawmakers, as the authors of the rules are often unknown.

The second context involves vertical interaction among related parties because there is a level between the main authorities and their subordinates; for example, as officials and players, judges and litigants, and law-makers and citizens under the sovereign state. The idea of sovereignty, as it's understood as shared authorship, must show consistency in how the powers in the state claim and exercise, most notably, powers of legislation, administration, and adjudication. Through legislation, the state determines the form and content of each person's rights and obligations. Through administration, officials implement public law regimes to give effect to legislation and through adjudication; the judiciary interprets legislation and settles disputes over rights and duties. To ensure that legal order prevails, the state assumes a monopoly on the use of coercive force. These general attributes of the state point to a non-consensual relationship of proclaimed authority between state and subject, notwithstanding democratic channels, at least in democratic

[77] See for detail Fuller, ML, 204; Human Interaction (n 53), 234-35; Postema (n 58), 368-73.

states, through which the people's voice may be heard.[78] What keeps this interaction possible is the trusteeship between the authorities of a sovereign state to make their messages or rules reasonable and possible (Fuller also conveyed this through the eight principles of legality), and the subjects must obey those rules in virtue of the fidelity of law. From this thesis Fuller draws the important corollary that law is "the product of an interplay of purposive orientations between the citizen and his government ... [not] a one-way projection of authority originating with government and imposing itself upon the citizen".[79] The point that citizens obey the rules as part of their legal and moral obligation does not arise, because it is necessarily practically impossible to obey such a rule. It instead arises from how a citizen's obligation to obey the law is generated in the first place, in response to or in anticipation of the ruler's corresponding effort.

In the third context, interaction occurs between or among officials themselves. Here relations may be vertical, as between constitution framers and law-givers, or higher and lower courts; or horizontal, as between sovereign states in international law, or between courts at the same level, or a complex mixture of both, as between lawmakers and courts.[80] In the case of international law, for example, the central insight of the kind of reciprocity that is considered is not about interactions between human individual actors. Rather, reciprocity is created and maintained collectively. It might not be necessary that all members of the international community must be engaged in this enterprise. And yet, the fact that reciprocity requires collective effort also serves to underscore how officials governments rule those sovereign states or no-states actors.

Alongside these attempts to provide the foundation and normativity of legal order, there is a morality line for this justification. This line goes back to the Kantian conception of human dignity. It deals with the idea that the members' role (such as co-legislators) and their lives in the

[78] Evan Fox-Decent, *Sovereignty's Promise The State as Fiduciary* (OUP Oxford, 2011) 29.
[79] Postema (n 58), 368-373.
[80] ibid 368.

KoE are bound by mutual respect of each other's dignity in the virtue of the formula of human dignity; this is the core idea of feature (iii). It appears from the model of the KoE that the structure of human interaction towards shaping and applying the legal order requires that the members of the community should treat each other with significant concern. Without this concern it is impossible to communicate and interact, come to an agreement, build the forms of law, even obey the laws. This concern is the matter of mutual respect and mutual recognition that each has for others, not only with having personal freedom to choose his ends, but also to allow each other equally to participate in the practices determining the social and legal orders. This idea implies then the human interaction within the KoE is not merely the narrow connection of political and legal relations, but rather has a moral relation generally and a moral grounding. This moral grounding expresses the respect of each member of the political community as an autonomous agent in virtue of his or her human dignity.

This thought is best seen in the way I have already explored the Kantian formula of human dignity, that demands a person not to be treated as a mere means but always as an end in themselves in any human interaction. In the present context, human dignity demands that persons not to be subjected to a social order that denies them basic standing as equal and free in social interaction. This means not to be an agent who is dominated by others' will, but to participate equally in public life. More broadly speaking, human dignity demands to be an equal normative authority when it comes to the basic legal, political and social arrangements and rights in social interactions – including those rights that determine a person can live a dignified life and to be allowed to flourish. The point of these rights is not only to participate in public life (human interaction making and maintaining legal order), but it is also to improve on the justifications for all definitions of rights that keep the integrity of humans now and in the future, and for progressing the human interaction towards more human goodness and achievements.

This thought inherently implies that the KoE, as Allison notes, includes two radically different types of ends. All existent persons, as ends in themselves with the status of human dignity, and the lawful self-given personal and subjective ends of those persons that make them live a good life now or in the future.[81] The first end is the objective end and fundamental value, this is namely human dignity; which grounds the power of law and determinates a kind of reciprocal moral relationship between its members. In this context, it is the narrow idea of human dignity, as the respect of an autonomous agency that defines our membership rights must reside in a discursive procedure of reciprocal and general justification, in which all participants are justificatory equals participating in making the laws of the KoE. The second ends are those subjective and personal ends that each member of the Kingdom has and they flourish differently due to the cultural background of the people's way of life and human aspirations. The latter ends depend on the former because without respecting each other's dignity as someone with an autonomous agency, it is always possible to harm each other's membership in the context of human interactions. Consequently, the full recognition of our membership will be impossible and therefore the human interactions towards the possibility of making law and applying the law are ineffective. In contra, once the members of the KoE behave so they respect each other's dignity, they can pursue their self-chosen ends or goals and act on morally valid maxims without harming any other membership. To join with others as an equal citizen in the KoE, the agent's own ends and private goals must be the possible objects of universal legislation, subject to the vote of all- the moral validity of the action. This is how members of the KoE realize their autonomy. [82] In this respect, the only way that all members have autonomy is to follow the law that contents the respect of each other's dignity. Therefore, the authority of human dignity, at least as in the respect of an autonomous agency, embodies the supreme end and common value that bounds the human interactions of the members of the KoE.

[81]Henry Allison, *Kant's Groundwork for the Metaphysics of Morals: A Commentary* (OUP, 2011), 242.
[82] Korsgaard, (n 69), 188–224.

These thoughts have found several indirect expressions in Fuller's work. One may, for example, track Fuller's discussion of the moral community, which he defines as a community within which people owe duties to one another and can meaningfully share their aspirations, but also gives access to the essentials on which a satisfactory and dignified life can be built.[83] Fuller maintains that the question of inclusion or membership of the moral community is a decision of the community itself, and that the nature of this decision is first of all, aspirational; in other words, based on a form of the generosity of the in-group, which cannot be exacted from outside.[84] However, the question of including other humans within the moral community may occasionally transform into a moral of dignity that we show mutual respect to each as a communicator in building the system of laws in virtue of human dignity. This idea is perhaps more directly expressed in a fine passage where Fuller replies to his critics.[85] For Fuller, the orders in the system of laws formulate and administer "certain built-in respect for human dignity", because any ordering by which humans are united such laws depend on the mutual respect in virtue of their dignity to everyone who participates in making and maintaining this order.

One merit of this view is that the task of continuous human interaction from the foundation into the normativity structure of legal order is not an economic standard to substitute a wealth or welfare maxima that are usually known in the game theory of human interaction.[86] It is the morality of human dignity that generates mutual respect from the perspective of what we owe each other as a dignified person, despite the differences we have in personal and cultural backgrounds. Giving respect for people's dignity generates paying them full attention; hearing, validating, and responding to their concerns, feelings, communications, and experiences in their relationships in the family, community, organization, or nation. So, human dignity is the source

[83] Fuller, ML, 183.
[84] Fuller, ML, 183-186.
[85] Lon Fuller, 'A Reply to Professors Cohen and Dworkin', (1965) 10 *Villanova Law Review* 655, 665-6.
[86] Soltan (n 2),394-7.

of building the human community that suits plural and diverse cultures, but shares one moral end, that is human dignity. Treating others with dignity, then becomes the baseline for our legal interactions. We must treat others as if they matter, as if they are worthy of care and attention. In the same manner, Fuller declares if the law must take a quest for the successful living together of persons it must depend on the principle of reciprocity that he insists is necessary for the consideration of human dignity.[87]Otherwise, our social and legal interaction faces unhealthy consequences.

Up till now, I have been emphasizing the structural similarities between Fuller's theory of human interaction and Kant's model of the Kingdom of Ends. Both share a theme of interaction as the foundation of law, exploring the most ordinary processes in our social life: the processes of communication and reciprocity towards building the common forms of social and legal ordering. In the same way, both share the view that law must be seen as a continuing and dynamic process of human interaction and this explains the normativity of legal order. Morally speaking, both allow the realization of a moral commitment to each actor of human interaction at all levels. Starting from communication up to the process of making and applying the laws, in virtue of people's dignity, never using a mere means, but always a person who can understand and participate in making and applying the law.

Despite these structural similarities, two points seem particularly relevant that must be connected. First, whereas Kant's model may seem to seek to illuminate how people can participate in the authorship of law based on interactions at a general level, Fuller's argument aims to show the practical guide to this interaction through the legality of law-making. Consequently, if Kant's model invites us to see how the legitimacy relates to the process of creating the idea of law, Fuller's formal legality powerfully spells out how the legitimacy must

[87] Lon Fuller, 'On Teaching Law' (1950)3 *Stanford Law Review* 35, 46.

continue every day in the law-making and applying the rules of law. Secondly, there is a possibility of presenting the idea of human dignity within both Kant's model and Fuller's thought. However, the Kantian conception of human dignity is heavily a substantive moral value that needs to be navigated with all its applications in the orientation of a human interaction approach to the law. For connecting these points, I shall turn to the thesis of the legality of human dignity.

4.3 Human Dignity and The Two Moralities

Early in *The Morality of Law*, Fuller addresses a key problem in modern ethics before the discussion of the relation between law and morals.[88] This is by structuring a single field of morality into two different but related areas: the morality of duty and the morality of aspirations. According to Fuller, the morality of duty, on the one hand, is elementary and began at the bottom of human conduct.[89] It lays down the basic foundations without which "an ordered society is impossible".[90] It is concerned not with utility and goals but with reciprocity and exchange.[91] The morality of aspirations, on the other hand, aims at the very top of human achievement. It is concerned with the "morality of the Good Life, of excellence, of the fullest realization of human powers."[92] Fuller thinks we sometimes fail to determinate the morality of aspirations because it implies some open conceptions of the highest good in human life.[93]

Fuller's structures may easily be associated with a classification of those basic ethical theories that are used according to their types of study of the genesis of morality, such as Kantianism, one the one hand, that concerns a priori - based on the principles of duty and obligation; and on

[88] Fuller, ML, 3-4.
[89] ibid 5.
[90] ibid 19.
[91] ibid 19-27.
[92] ibid 5
[93] ibid 17-18

the other hand, Aristotelian ethics that a posteriori aims to attend those ideals, virtues and good ends of human flourishing. One obvious difference between these two moralities in these different traditions is in terms of the two ways of understanding the relationship between the right and the good. Kantianism typically affirms the morality of duty because to consider the actions as correct it must be independent of and on condition of one's good. Kantianism is often viewed as a part of deontological ethics.[94] Aristotelian ethics, on the other hand, seems paradigmatically derived from the morality of aspiration because it originated from an agency-based point of view in the idea of a well-lived and flourishing life, and then drives the notion of right or wrong from that view. Accordingly, to act correctly is to act from one's highest good.[95] As a result, this approach can be viewed as a part of a teleological theory because it defines the right conduct as that which maximizes or produces the best state of affairs.

Despite the possibility of any differences between the two moralities in those traditions, Fuller rightly proposes to think of the two moralities as a union of two halves.[96] These halves can be represented, in Fuller's view, as an imaginary vertical scale[97] where the bottom half expresses the duty that minimizes the necessary conditions in order to avoid harm to each person when we enter in any social ordering of human interactions and reciprocity[98]; and the top ends up as the achievement of human excellence that give us a decent and good life.[99]Consequently, Fuller insists there is always a continuum between the two moralities. But the most remarkable point in Fuller's structure of these moralities is the suggestion that the idea of law as legality can confront both moralities.[100] Law as the legality, to be more precise formal legality, can be compared to a

[94] Samuel Freeman, "Utilitarianism, Deontology and the Priority of Right', (1994) 23 *Philosophy and Public Affairs*, 314–45.
[95] Rosalind Hursthouse, *On Virtue Ethics* (OUP, 1999) Esp. Ch. 4.
[96] For similar attempt to minimize the differences between Aristotle and Kant, I am thinking in particular of Christine M. Korsgaard, 'Aristotle and Kant On The Source of Value', (1986) 3 Ethics 96; Manfred Kuehn, 'Kant and Aristotle on Ethics' in Jon Miller (ed.), *The Reception of Aristotle's Ethics* (Cambridge University Press 2013).
[97] Fuller, ML, 9.
[98] ibid 9,42
[99] ibid 9, 27
[100] ibid 42

stepladder that maps out the steps in the scale, beginning from the first demands of social living of human interactions of duty up to the top of human achievements.[101]

I want to submit, however, that this analysis of the nature of the two moralities and its relations to the legality may invite us to another crucial point. This point is that if we accept the proposal that Fuller seriously (but undeveloped) takes the idea of human dignity to be side by side with the moral value of formal legality, is it possible to observe human dignity (especially Kantian formula of human dignity) as one key aspect of moral vocabulary in-between the two spheres of morality? At first attempt, it is important to observe how the Kantian formula of human dignity, which entails that a person must not be treated as a mere means but always as an end in themselves, can be reconsidered within the spheres of both moralities. From the morality of duty, one might employ Kantian formula upon the proposal that, as much as necessary, we have to realize the dignity of a person here and now for the possibility to build and maintain any human interactions. The result of such an approach presents the idea of principle as a deontological priority. Accordingly, the morality of dignity demands that the rightful condition of action must respect the value of human dignity. This principle is not just any mere principle, it is the foundational principle.[102] Human dignity as the foundational principle (dignity as foundation hereafter) here is the highest standard that grounds our everyday human interaction in normative practices such as morality, politics, and laws. This gives weight to the dignity of the person in normative reasoning and restriction actions without referring to any specific norm or

[101] ibid 9, 42.

[102] Formulations human dignity in the terms of principles arise a number of specific foundational discourses on dignity, see generally, Robert Alexy, *A Theory of Constitutional Rights* (trs. Julian Rivers) (OUP, 2002) 64-62, 233-236; Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006) 36-9, ch.3; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011), esp. Ch.9; Luís R. Barroso, (2012) 'Here, There and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse', Boston College International and Comparative Law Review 35, 331-93; 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); Stephen Riley, 'Human Dignity as a Sui Generis Principle', (2019) 4 *Ratio Juris*. 32.

policy.[103] Such a principle belongs to the sphere of the morality of duty because it is impossible to interact accordingly all the time without taking each other seriously. If we should shape our practices and institutions on human interaction that lets everyone participate or at least have their voice heard, we do have to take each practice as a matter with dignity, central to understanding and interaction.

However, we can also take a different perspective, from the morality of aspiration. Rather than focusing on the here and now, we can see the Kantian formula of human dignity as an ideal[104] for a good society, towards which we should try to move, where every person can live a decent and a good life. The result of this approach is the policy-based[105] rules of reaching the Kantian formula of human dignity as goals or *telos*. By saying that if we aim to make our practices and institutions embody such as ideal, our policy must aspire to making those rules support every person in their pursuit of a flourishing life in virtue of their dignity. Reaching such an ideal thus is the action of the progress of policymaking that would give us many different conditions regarding the future recognition of people's dignity. Such conditions of reaching human dignity improve in some economic, political, or social features of the human community. A direct concern for human flourishing and well-being is already involved in Kant's recognition of the positive dimension of the formula of human dignity and in our defence of duties of beneficence, which precisely focuses on furthering other people's happiness.[106]

To this point we can say the Kantian formula of human dignity can be restructured in the sphere of both moralities: it presents from the very foundational duty up to the highest aspirations and achievements. While the various levels of abstraction could be a different degree of the

[103] Riley (n 102),447.
[104] Some Kantian regards the formula of humanity, which is the core version of the formula of human dignity, as an ideal, see e.g., Richard Dean, 'Humanity as an Idea, as an Ideal, and as an End in Itself', (2013) 18 *Kantian Review* 2.
[105] Here I follow Dworkin's definition of policy as it is used a stranded that sets out a goal to be reached, Ronald Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977), 14-22.
[106] Kant, MM 6:385, 393-4.

application of the Kantian formula of human dignity, there might be a continuous process of mutual adjustment. Thus, it is important to understand this is a matter of presentation to a coherent approach for one formulation of human dignity. It goes from the foundational principle to policies up to ideals. This thought can also be presented in another way. We can say the Kantian formula of human dignity generates a two-tiered morality in any human interaction. At the very minimum, human dignity demands the most urgent condition to have a decent life in any human interaction. To some extent, human dignity can and should demand more and wider conditions of access to a flourishing life in any human institution. Once we succeed to secure the basic foundation to live with dignity, we can and should go on further to more achievements; but without the former, it is impossible to reach a full life of flourishing in virtue of our dignity. Thus, reclaiming the formula of human dignity in the sphere of both moralities calls for both the minimal and maxim or narrow and broader conditions of human dignity. There is thus a corresponding difference and continuity between basic and maximal dignity.

Apart from the last point, to the extent that people are treated in an appropriate way when it comes to their conditions of living with dignity, they have conditions of human dignity. The conditions of human dignity can be distinguished from the aspect of human dignity as an intrinsic value in the point that the conditions are a state of affairs in which dignified norms are fulfilled towards the protection of personhood.[107] This is a more contingent situation; human beings come to enjoy the life of dignity and this includes certain treatment by others.[108] The condition of human dignity could stand for one particular value or one specific human capacity and condition, such as autonomous agency or equality, as long as it is about the respect of human beings. In the meantime, the condition of human dignity is also widely used to refer to different aspects of personhood. For example, we may say a person has been subjected to

[107] Pablo Gilabert, 'Facts, Norms, and Dignity',(2019) 22 *Critical Review of International Social and Political Philosophy* 34.
[108] ibid.

indignity to the extent that he or she is targeted for punishments or treatments that have seriously demeaned or injured him or her physically or psychologically, such as rape and torture. Hence, we can thus distinguish between narrow and broad implications to the conditions of human dignity. An account of the former is provided by a conception of a particular value that relates in one way or another to the worth of the personhood; while the later involves more general implication of human dignity that is connected to the protection and respect of the whole aspect of personhood in various dimensions, such as physical, emotional, and social being and identity of the person.

A second attempt is to show how the two moralities connect with the specific functions of law. Even though Fuller himself made clear that this connection was under-developed,[109] one may trace some hints in Fuller's thought.[110] In respect of law, Fuller suggests the morality of duty is something we can readily grasp; it "lays down the basic rules without which an ordered society is possible", [111]and thereby it more naturally resembles the foundational function of law.[112] It is calling on human interaction that requires the support of the ethos of the actors and participators according to the principle of reciprocity; therefore, this is the minimum a sound legal system can provide. This minimum is foundational and essential, because when they disregard the demands of this foundation the participators will be condemned "for failing to respect the basic requirements of social living."[113] This implies then the morality of duty connects with the more foundational function of law; and this is providing people with

[109] For the discussion of this point see e.g., Rundle, *Forms* (n 6), 86.
[110] See e.g., Fuller, ML, 6-9, 15, Fuller also speaks of the functions of law in his essay: Law as an Instrument (n 18) see also Wibren van der Burg, The Morality of Aspiration: A Neglected Dimension of Law and Morality, in, Willem J. Witteveen & Wibren van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press, 1999) 169-92.
[111] Fuller, ML, 5-6
[112] ibid, 15
[113] ibid, 5-6

protection and a framework, within which they can organize their relations with one another in such a manner as to make possible peaceful and profitable coexistence and human interaction.[114]

Aligning Kantian formula of human dignity, at least as the respect of an autonomous agency within the morality of duty functions as a foundational principle in the law. This is because it commits us to a certain level of respect of the basic status of individuals within the legal normative orders. As a result, it is something immanent to the idea of governance by the law, if we should present the minimum requirement for a well-functioning and healthy system based on human interaction. This foundational idea of dignity may either encompass certain formal arrangements to justify the foundational normative order as a whole, or concerns the foundation for the necessary inclusion of certain classes of norms within a system.[115]The examples of the most certain formal arrangement of dignity as foundational can be seen in the idea of legal principle.[116]

It is worth noting that this point is entirely consistent with several of Fuller's texts when he refers to Kant and human dignity. For example, Fuller quotes Kant: "We must not expect a good constitution because those who make it are moral men. Rather it is because of a good constitution that we may expect a society composed of moral men [persons]."[117] There is an interesting circularity in this line of statement, the core of reciprocity, which is the baselines for the function of the legal order in a modern society,[118]depends on mutual recognition of each other as a moral agent who should be respected in the way we treat our fellow humans, always as end in themselves never as a means- the Kantian formula of human dignity. For Fuller, this

[114] Fuller, Law as an Instrument (n 18), 89.
[115] Stephen Riley, 'Human Dignity and the Rule of Law', (2015) 2 *Utrecht Law Review* 91, 99-100; Riley (n 102) 444-452.
[116] ibid
[117] Fuller, ML, 152.
[118] Fuller, ML, 205

formula is one most of the noble expressions of Kant's philosophy.[119] More explicitly, it is Fuller's view in treating human dignity as moral foundation. Fuller argues since mutual respect is the core idea behind the effectiveness of any united social and legal ordering that is based on human interactions, human dignity is the main moral value that must be respected in formulating and administrating any ordered system of law over other substantive ends of law.[120]

The morality of aspiration, however, is much wider to grasp, and therefore it hardly connects with the function of law. Indeed, Fuller has doubts about how to connect between the morality of aspiration and law because the former refers to aesthetics - the artistic expression of excellence and perfection.[121] So, speaking of human aspiration, not as minima but as excellence in the human efforts of maxima achievements, it is much more difficult to specify as well as to achieve especially in a modern and plural society. One way to comprise this connection is to say the morality of aspirations fits the purposes and policy goals of the law. Therefore it connects with the legislative or regulative function of laws that deals with the higher aims in human life, being excellence and the top of human achievement and good.[122] In this process of realizing aspirations or ideals, the function of law is more likely instrumental in one way or another in aiming to control human behaviour to live a good life.

It is within this same context that the Kantian formula of human dignity in the light of aspirations has to be appreciated. It can be said the achievement of human dignity is one the highest aspirations of law.[123] It is made possible by insisting on the regulative role of human dignity, for example in the human rights' laws, as the accomplishment of good governance;

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[119] ibid 25
[120] Fuller, A Reply (n 85)665-666.
[121] Fuller, ML, 15
[122] This how Willem Salet reads Fuller's morality of aspirations, see *Public Norms and Aspirations: The Turn to Institutions in Action* (Routledge, 2019) esp. Ch3.
[123] cf. Myres S McDougal and F Feliciano, *Law and Minimum World Public Order: the Legal Regulation of International Coercion* (New Haven, Yale University Press, 1961) esp. Ch. 1; Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing, 2009) Ch. 5 & 10.

which normatively selects some of the conditions of human dignity as a goal.[124] This comes quite close to the counter text presented by Fuller in his definition of good order. Fuller announces that the "good" legal order is one that aims to realize the ideal of human dignity.[125] In conjunction with the same thought, Fuller also tells us that there is a tendency that considers the law as the ultimate end of human dignity.[126] Did Fuller consider himself as one of those who see human dignity as the ultimate end of the law? There is no clear answer in the context of Fuller's argument. In another text, however, he seems to believe that there is an optimistic hope to bring law and democracy as a quest together to formulate the way of living together in which the condition of respecting the value of human dignity is realized.[127]

4.4 Concluding Thoughts

Having reclaimed the Kantian formula of human dignity within Fuller's proposal of two moralities and their connection to the law's function, I should turn to an important question: how does formal legality matter for human dignity in the context of the two moralities and the functions of law? The answer I propose is that Fuller's formal legality, through the eight principles, is squarely an attempt to specify the practical demands of the ethos where the realization of the aspirations is likely to depend on the foundational duty of human interaction. For this, I think Fuller clearly states that the legality confronts us "with the problem of knowing where to draw the boundary below which men will be condemned for failure, but can expect no praise for success and above which they will be admired for success and at worst pitied for the lack of it."[128] At the very bottom, legality sets out eight ways in which a system of law must conform to the morality of duty- a minimum standard that all must adhere to human interaction,

[124] W. Reisman, *The Quest for World Order and Human Dignity in the Twenty-first Century Constitutive Process and Individual Commitment* (Martinus Nijhoff Publishers, 2013).
[125] Fuller, Means (n 20) 54-56.
[126] Fuller, *Anatomy* (n 58) 9.
[127] Fuller, On Teaching (n 87), 46.
[128] Fuller, ML, 420.

with narrow respect for human dignity as an autonomous agency. At the top, legality also must conform to the morality of aspiration- an ideal standard as the guidance of law-making that the good draftsmen[129] must aspire to follow if we aim to reach human flourishing in the virtue of the broader conditions of human dignity.

As a minimum standard, any failure in the eight directions does not simply result in a bad system of law, but it results in something that is not properly called a legal system at all.[130] So it is about the foundation and creation of law. On this ground, if Fuller's formal legality is the necessary conditions of law-making -or governance by rule, and, on the other hand, moral requirements of respect for human dignity, we have established a necessary connection between law and morality, or law and human dignity. Insofar as our concept of law assumes formal legality (the rule of law), the applicable requirements of formal legality amount to the moral foundation of governance in respect of human dignity- at least as respect for dignity as an autonomous agency.[131]When we develop a minimal account of human dignity under the formal legality in this way, we are trying to determine the minimum conditions of dignity that have to be met before actual processes of discursive justification can get off the ground. A minimum account of human dignity at the first level is, therefore, an a priori reconstruction of the conditions of possibility of the discursive practices of justification. At the second level, these provide more specific content to these a priori requirements of dignity that links to the future aspirations to live a dignified life. This point has a deontology aspect and there is a crucial idea behind it; this is placing human dignity as a preconditional idea of how law gives persons a moral status that `is always to be valued fundamentally for themselves, and never only as ways of reaching (or preventing) possible consequences, regarded as their actions. Although formal legality is indeed a necessary condition of human dignity- at least in a narrow sense, we can also begin to identify what remains

[129] ibid
[130] ibid 39.
[131] For similar conclusion see also T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP, 2015) 110-111.

outstanding to be sufficient for human dignity- discovering more about the conditions of human dignity.[132] These sufficient conditions will be, in part, dependent on how we insist on building good governance that adopts more regulations and policies on the rule of law, to let people live a good and dignified life. This reflects legality as an aspirational standard towards reaching the maxima conditions of human dignity. Investigating these connections will be detailed in the next chapter.

[132] Indirectly Fuller marks this point see Fuller, ML, 183.

CHAPTER 5

THE LEGALITY OF HUMAN DIGNITY II

5.1 Introduction

Having laid down the bedrock to the proposal of the "legality of human dignity" (LHD) by opening the conversation between Fuller and Kant in the previous chapter, the present chapter expands and develops this proposal. The LHD entails formal legality to serve or protect human dignity from the exercise of arbitrary, social, and political power in the framework of human interactions. In this context, the value of human dignity (especially in the Kantian conception) is worth inserting into the picture of moral reason served by formal legality. Human dignity harmonizes the whole of the distinct values upheld by the rule of law. The initial plausibility of this claim stems from the way that formal legality presents the law. Formal legality establishes and maintains the law as convictable, intelligible, and predictable. This stabilizes the social and political environment in which a person can live with the conditions of human dignity.

I propose to advance the LHD in two ways. First, I argue the fundamental task of legality is to set out eight ways in which a system of law must conform to the morality of duty- a minimum standard that all must adhere to human interaction with narrow respect for human dignity as an autonomous agency. This fits the most basic promise or function of law as it provides "guideposts for human interaction",[1] which is founded on the respect of human dignity.[2] In this structure, LHD may be a minimalist connection but it is essential. It ensures each person has an effective status of autonomous agency: as citizens with real and equal possibilities for free self-chosen capacity of planning, interacting and participation without domination. This connection can be called the postulate of the legality of human dignity (PLHD). A fruitful result of the

[1] Lon Fuller, *The Morality of Law* (rev. ed. Yale University Press, 1969) [hereafter ML] 222.
[2] Lon Fuller, 'A Reply to Professors Cohen and Dworkin', (1965) 10 *Villanova Law Review* 655, 665-6.

PLHD marks an invitation to rephrase Fuller's notion of the "internal morality of law" in the idea of "the dignified conception of law" (DCL). This conception determines not only the legitimacy of law in its most fundamental level of the law and legal system, but it also determines the level of the validity of legal norms and legal contents to some degree.

Second, I elaborate the argument for the maximal task of legality to the aspiration of the legal system. This is by insisting that in its progress formal legality may conform to the morality of aspiration: an ideal standard as the guidance of law-making that the good draftsmen and good governments must aspire to follow. Here, this ideal aims to reach human flourishing in the virtue of broader or maximal conditions of human dignity. The LHD suits the aspiration function of law as a good order that aims to secure the human goods and achievements- a good order that promotes being "just, fair, workable, effective, and respectful to human dignity".[3] This connection can be labelled as the aspiration of the legality of human dignity (ALHD).

The structure of this chapter is as follows. Section 2 restructure the formula of human dignity into both the minimal and maximal or narrow and broad conditions of human dignity. Section 3 develops the first way of connection between legality and human dignity as an autonomous agency, namely the PLHD. Section 4 expands Fuller's thesis and argues for the second way of connection between legality and human dignity, progressively towards a broader implication to the conditions of human dignity. This is under the title ALHP. Section 5 provides the conclusion.

5.2 The Structure of Human Dignity: minimal and maximal conditions

I have argued that the Kantian formula of human dignity can be reread in the sphere of both Fuller's moralities of duty and aspiration: it is presented from the very foundational duty up to

[3] Lon Fuller, 'Means and Ends', in Kenneth I Winston (ed.) *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Portland, Hart Publishing, 1981), 54-56.

the highest aspirations and achievements.[4] This thought can also be presented in another way. We can say the Kantian formula of human dignity generates a two-tiered morality in any human interaction. At the very minimum, human dignity is the most vital condition for decent life. To some extent, human dignity can and should necessitate more conditions to access a flourishing life, or just life in any human institution. Now, I elaborate further the structure of human dignity.

To begin with, the formula of human dignity is about general normative outcomes. It concerns the way of treating individuals who have inherent worth. This formula demands that persons must be treated as an end, and never as a mere means to another's will. While the notion of do not treat persons as mere means reflects the negative standard, the notion of treating persons as ends in themselves refers to the positive standard.[5] These two criteria may be formal, but at least they guide us on how to respect of human dignity. The negative standard is established on the prohibition of those treatments that are at odds with the dignity of persons, by using others or ourselves as mere means. As a consequence, the negative standards prohibit the measure of not harming or blocking any aspect of a person and their capacities. A person may be subjected to the disrespect of their dignity to the extent that they are targeted for inhuman or degrading treatment. These treatments seriously damage our physical, psychological, and social aspects. The specific examples of this measure are extermination, torture, forced disappearance, arbitrary imprisonment, and discrimination. These treatments abuse someone's body or emotions. Thus, this principle demands every person should live in a dignified way without fear for their lives, body and well-being. The positive standard harmonizes the condition of human dignity. It aims to reach a positive agreement towards persons as ends in themselves. We fail to respect people's human dignity if we do not make these positive treatments. These positive duties generate thus

[4] See above Chapter 4 at section 4.3.

[5] Immanuel Kant, *Groundwork for the Metaphysics of Morals*, Arnulf Zweig (tr.) and Thomas E. Jr. Hill (eds.) (OUP, 2003. Original work published 1785) G4: 429–30; Allen Wood, *Kant's Ethical Thought* (Cambridge University Press, 1999) 152-55; Onora O'Neill, *Constructions of Reason* (Cambridge University Press, 1989) 126-55; Samuel J. Kerstein, *How to Treat Persons* (OUP, 2014); Paul Formosa, *Kantian Ethics, Dignity, Perfection* (Cambridge University Press, 2017) 72-119.

protection for everyone's body, agency and emotional being. They also develop and exercise the worthiness of humans to recognize their personal and social needs and identities.

Keeping this in mind, the formula of human dignity can be also expressed in the vocabulary of rights and human rights. One can find these expressions in international documents and charters of rights and human rights, and also in national constitutions and the bills of rights.[6] For example, those documents prohibit all sorts of negative treatments and demand all necessary positive treatments relating to the condition of human dignity.[7] Examples of the negative duties to the conditions of human dignity in the discourse of human rights includes references to forbidding all conditions of humiliation and degradation of a person, particularly modern slavery, slave trade, torture, cruelty, violence, inhuman and degrading treatments and punishments.[8] Examples of the positive treatments to the condition of human dignity in the human rights' discourse include all the conditions of helping and developing that support conditions to live with dignity in the areas of economic, social and cultural rights.[9] This includes the right to security in the event of unemployment, sickness, widowhood, and old age.[10]

The distinction between the two levels of dignity can be also thematized in the territory of rights: basic and broad rights.[11] To begin with, there are basic rights that express foundational justifications and they reflect the status of each person as a moral and autonomous agent in our

[6] For illuminating surveys of appeals to human dignity in various legal frameworks and human rights, see,e.g., Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', (2008) 19 *European Journal of International Law* 655; Roger Brownsword, 'Human Dignity from a Legal Perspective', in M. Düwell, J. Braaving, R. Brownsword, and D. Mieth, (eds.), *The Cambridge Handbook of Human Dignity* (Cambridge University Press, 2014) 1–22; Paolo Carozza, 'Human Rights, Human Dignity, and Human Experience', in Christopher McCrudden (ed.,) *Understanding Human Dignity*, (OUP, 2013) 615–2.

[7] cf. Pablo Gilabert, 'Human Rights, Human Dignity, and Power' in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.), *Philosophical Foundations of Human Rights* (OUP, 2015) 207-212.

[8] See, e.g., International Covenant on Civil and Political Rights, 999 UNTS 171 (December 16, 1966) Art..7; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (American Convention) Art.5; African Charter on Human and Peoples' Rights (adopted 26 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 Rev. 5 (Africa Charter) Art.5; European Convention for the Protection of Human Rights (1950) UNTS 221(European Convention) Art.3;

[9] See e.g., *Universal Declaration of Human Rights,* GA Res 217A (III), UN Doc A/810 at 71 (1948) UDHR Art. 22.

[10] See e.g., UDHR, Art. 25.

[11] Compare with Robert Alexy, *A Theory of Constitutional Rights* (OUP, 2002) esp. Ch. 3.

interactions. To be an autonomous agent or person means to have the capacity of self-determination, self-chosen ends and participating equally without domination in the structure of human interactions.[12] The examples of basic rights include any rights that protect our autonomous agency, such as: the right of physical and personal integrity,[13]personal liberty, political participation, equality before the law, non-discrimination, the right to citizenship. To claim such rights means to use these to give us normative powers in a contested space of interaction and to be able to use them as an absolute principle. They provide a guarantee to our standing in social interaction, to have a voice and to veto any false norms that do not allow us to exercise our autonomous agency.

The place of these rights is at the foundational level of the system of legal interactions. They are basic but of the greatest importance and urgency. They are not only grounded on human dignity, but they also present the minimal condition of human dignity. First, they are grounded on human dignity because human dignity provides the moral source to all. Thus, basic rights derive their sustenance from human dignity.[14] Human dignity is a moral value in the sense that it is of a higher order, authoritative and unwavering. These basic rights (as the part of rights) are the legal tools that subsequently developed for the defence of the pre-existing concept of human dignity.[15] Second, they present the condition of human dignity at a minimal but foundational level. They are necessary to institutionalize and to secure the very status of being as autonomous being who can engage in practices of reason-giving and reason-taking by virtue of human dignity. Through these basic rights, one can conclude that the place of protection of human dignity is at the foundational level of any system. Therefore, it is of the greatest importance and urgency.

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[12] See below at section 5.3.1.

[13] In case of the Aviation Security Act, for example, the German Constitution Court clearly connects personal integrity to Kantian view of dignity-as-autonomy, see Adeno Addis, 'Human Dignity in Comparative Constitutional Context: In Search of an Overlapping Consensus', (2015) 2 *Journal International and Comparative Law* 1, 17.

[14] Jürgen Habermas, The Concept of Human Dignity and the Realistic Utopia of Human Rights, (2010) 41 *Metaphilosophy* 464, 466-7.

[15] ibid 470.

It is interesting to note that human dignity as a minimal foundation, like basic rights, as stated in legal documents, it has a higher-order status, though one that is not immune to revision. For example, the Preamble of the Universal Declaration of 1948 starts with the principle that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[16] The terms 'inherent' and 'inalienable' in relation to dignity are supposed to be the foundation of freedom- an autonomous agency.[17] Here, this indicates that respect for each person as an equal who need not qualify for this status or respect in any other way except by being human. To be respected in that way is, as Kant says, an "innate right" of humans.[18]

The German Basic Law also states that "[t]he dignity of man is inviolable. To respect and protect it is the duty of all state power."[19] Here, the formulation of dignity as a foundational principle manifests in the idea of a legal principle. It states that as the absolute principle that can never be balanced against other values and realized to a greater or lesser extent than the law.[20] This reasoning is evident in several cases decided by the German Constitutional Court. In the *German Airliner* case, for example, the Court held that the duty to respect and protect human dignity generally forbids making any human being a mere object of the actions of the governments. Any treatment of a person by the governments that lacks respect for the value that is inherent in every human being would call into question his or her quality as a subject, their status as a subject of law, is strictly forbidden.[21]

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[16] Preamble, UDHR.
[17] Rainer Forst, The Point and Ground of Human Rights: A Kantian Constructivist View', in, David Held Pietro Maffettone (ed.), *Global Political Theory* (Cambridge: Polity, 2016) 30-1.
[18] ibid 32.
[19] The German Basic Law,Art.1.
[20] Alexy, (n 11) 62-5; Luís R. Barroso,'Here, There and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse', (2012) 35 *Boston College International and Comparative Law Review*, 331-93.
[21] See for the detail of the case of German Airliner Naske, Nina and Nolte, Georg, 'Legislative Authorization to Shoot Down Aircraft Abducted by Terrorists if Innocent Passengers Are On Board – Incompatibility with Human

Whereas the task of basic rights is to construct a basic structure of right, the task of broad rights is to expand and give detail to a basic structure. This calls for certain regulations and positive laws, such as the human right laws, to intervene, expand, and exercise the basic rights into wider rights. The question of what is included in this maximal is the open list of all of the rights and human rights' regulations. This list even has room for the possibility that some cases might become specific human rights in the future as the feasibility and costs of their implementation change. Hence, the broad rights are not only to identify the most immediately regulative rights in legal documents and legal norms, but also to shape human dignity as an aspiration of human achievements. These rights link to human dignity in two ways: first, they reflect the maximal dignity because they respond to the regulative role of human dignity from various aspects; and second, human dignity grounds these rights. Both historically and conceptually, human rights have always been the product of resistance to oppression, humiliation, and domination of our basic rights by virtue of our human dignity.[22]

Now, the distinction between basic and broad dignity in the context of formal legality has two places. At the foundation, we can say that basic human dignity, similar to basic rights, affirms our basic standing as autonomous agents in which we communicate and lead decent lives; and these include access to effective and equal participation in framing the legal system as a human institution. One could also say that basic dignity tracks the conditions that must be in place for a legal and social order to be legitimately based on human interaction. At this level, legality necessarily and internally serves the narrow condition of human dignity, as I model it in the PLHD. As an aspiration, maximal dignity, like broad rights, is more about the realization of the substantive norms than about the protection of human dignity. Thus, this can in turn, be seen as

Dignity as Guaranteed by Article 1(1) of the German Constitution', 2 (2007) *American Journal of International Law* 101, 467–71.

[22] Habermas, ' Dignity' (n 14) 466.

also covering the further rules and norms that the legal order must generate and aim for if its structuring of the lives of its members is to be fully justified and legitimate. At this long-term level, legality aims progressively and externally to prompt the conditions of human dignity, as I label it in the ALHD.

But to be able to strive for the ALHD, the PLHD is necessary. While the PLHD is determined with reference to the necessary and most urgent condition of human dignity for fair opportunities to exercise our autonomous agency under the sphere of a legal system, deliberations and progressives about the ALHD also entertain other substantive, society-relative and considerations of access to a flourishing, decent and just life under good orders. How goods such as well-being, the common good, health, good education, equal opportunity, and so on are to be distributed must be determined according to wider conditions of dignity; always first and foremast of all with a focus on the functional requirements of the PLHD. This implies as long as the PLHD is possible, we make more sense of why the rule of law is a matter in our social interaction, and how the rule of law is possible. Then in the long process, we can produce a sense of good law to which we can aspire under the ALHD.

5.3 The Postulate of the Legality of Human Dignity (PLHD)

This section begins with the argument for the content of the PLHD, and then it seeks to offer a hint to the moral conception of law that can be modelled in the 'Dignitarian or Dignified Conception of Law' (DCL).

5.3.1 The Content of PLHD

The first way to see the relationship between formal legality and human dignity is in the idea that legality includes the minimal amount of protection of the condition of human dignity as an

autonomous agency. One can sketch this connection indirectly from Fuller's thought. For any an ordered system of law built if it is formulated and administered conscientiously through legality, Fuller tells us, there is certain bedrock in respect for human dignity.[23] This statement implies the form of law to govern human interactions matters because it presupposes respect of persons with dignity. Put more straightforwardly, the respect for human dignity is not a mere result of the law. It is already presupposed and grounded in the public condition and the public form of making, administrating, and adjudicating the law. Accordingly, the morality of law is not an external end that law may pursue or not, it is something inside the nature of law. It depends on the valuing of the capacities of human beings in terms of the dignity of an autonomous agency, as they are embodied in the institutionalized practice such as a law that builds on the human interaction. Without this minimal amount of protection to human dignity, the legal system is impossible. In brief, I model this idea in the postulate of the legality of human dignity (PLHD), which entails conforming to the formal legality, rulers or officials, to ensure the possibility of a reciprocal relationship in which a person can exercise their autonomous agency by virtue of human dignity.

Leaving the argument for PLHD aside for a moment, some clarification of the nature of the formula of human dignity as narrow protection of an autonomous agency is important. In the following, I attempt to suggest that the best way to explain an autonomous agency can be found in a multi-structure or multidimensional autonomy comprised of an adequate integration with human dignity.[24] Multi-structure lies on a different plane from that entitle persons as both the freedom-users and the freedom-grantors,[25] or at the same time the authors and the addressees in

[23] Fuller, 'A Reply' (n 2), 665-6.
[24] My inspiration of this approach drives from both; Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (New York: Columbia University Press, 2012), esp. Ch.5; Meir Dan-Cohen, *Normative Subjects: Self and Collectivity in Morality and Law* (OUP, 2016), esp. Ch. 1 & 5.
[25] Fuller also attempts to make mediation between freedom to and freedom from see, Lon Fuller, 'Freedom as a Problem of Allocating Choice, (1968) *112 American Philosophy Society* 101; Lon Fuller, 'Freedom: A Suggested Analysis', (1955) 68 *Harvard Law Review* 1305.

any normative order such as law.[26] This understating of autonomy diverges from Habermas's taxonomy of private and public autonomy.[27] Habermas's argument lacks the appreciation of how the value of human dignity can unify the normative ground for the co-originality of private and public autonomy.[28] According to Habermas, the combination of the medium of law with the discourse principle stating that the validity of norms is constituted by the consensus that could be reached through reasonable deliberation.[29] By this, he provides the dual source that grounds the abstract scheme to both the forms of autonomy. Here Habermas fails to appreciate that the normative lifting in this reconstruction is essentially done by the discourse principle, and then it protects by the medium of law.[30] Moreover, the discourse principle can only do this work if it is understood as a genuinely moral foundation rather than, as Habermas sees it, a mere principle of validity. In my view, this moral foundation is found in the idea of human dignity. In particular, the result is a pitch for a revised conception of Kantian human dignity, as the master value in which other normative values such as autonomy are answerable as well. Lately, it seems Habermas also accepts the idea of Kantian human dignity as a foundational concept for other values and rights, but he has not made a connection with dignity and the co-originality of private and public autonomy.[31]

Now, I should define an autonomous agency as one essential condition for human dignity. To respect a person as an autonomous agent is to see a person as an end in himself and never as a

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[26] Forst,*The Right* (n 24),

[27] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996) 84-104; Jürgen Habermas, 'On the Internal Relation between the Rule of Law and Democracy,' in, *The Inclusion of the Other* (MIT Press, 1998), 260-62.

[28] See Jon Mahoney, "Rights without dignity? Some critical reflections on Habermas's procedural model of law and democracy," 27 (2001) *Philosophy & Social Criticism*, 21–40; Stefan Rummens, 'Debate: The Co-Originality of Private and Public Autonomy in Deliberative Democracy,' 4 (2006) *The Journal of Political Philosophy* 14; Rainer Forst, 'The Justification of Basic Rights. A discourse-theoretical approach', 45 (2016) *Netherlands Journal of Legal Philosophy* 3, 17-21

[29] Forst, *The Right* (n 24), 126

[30] Rummens, 'Debate' (n 28), 47-77, Forst 'A discourse- theoretical' (n 28), 20.

[31] The idea of human dignity did not play a significant role in most of Habermas's early works. It was only in the late 1990s, when he considered bioethical topics. See, Jürgen Habermas, *The Future of Human Nature*, trans. Hella Beister and Willima Regh (Cambridge: Polity Press, 2003); Habermas, 'Dignity' (n 14).

mere means. We learn from the Kantian model of the Kingdom of Ends that to treat a person in this way is to respect him as the author and addressee of co-legislations to the law that govern our social and moral interactions.[32] Here, human dignity is a matter of respect for a person's ability of self-determination in choosing, deliberating, and equally participating without domination in the structure of human interactions. Autonomous persons or agents in this context are self-determining beings and accountable persons who can justify their actions based on reasons. Four dimensions relate to the structure of the autonomous agency. Each dimension can be justified in the moral context of human dignity.

The first dimension of autonomous agency refers to a person's ability to pursue some self-chosen ends- personal freedom.[33] In this sense, a person is autonomous when he plans and determines what is important for himself based on reasons that most adequately take his well-being into account.[34] This dimension, for example, may be compatible with the autonomous choice to lead someone's life in line with some long-term business and economic goals, choices, and plans. However, there are always constraints or interferences to a person's self-chosen freedom. People cannot live without food because their body is constrained by the laws of nature. To survive our body needs food. People also cannot enter in to any social interactions (e.g. with the neighbours, husband, teacher, contractor and so on) without their choices being constrained by social norms such as the rules of manners, religions, and laws. Any constraints or interferences either in the form of negative force or positive force from others, to be valid must give a person the predications to manage his plans and actions. This is so because when someone behaves in a way we find reinforcing in arbitrary ways, we make him more likely to do so again by praising or commending him, without considering his personal planning as someone

[32] See above Chapter 4 at section.
[33] Joseph Raz, *The Morality of Freedom*, (OUP, 1986) 369-41.
[34] ibid

who can be free to choose his plans- a person worthy to be treated as an end in himself with dignity (e.g. a freedom chooser) and never as mere means (e.g. not be chosen for).[35]

The second dimension of autonomous agency reflects neo-republican freedom as non-domination. According to this view, an agent is unfree not when someone actually interferes with his choices, but when someone has been dominated.[36] Domination is the subjection of an individual to the instrumental or arbitrary will of another; whether it's the will of the state or government or of some private person or group; and freedom, on its best understanding, is freedom from dependence on the will of another.[37]In contrast, non-domination is simply the status associated with living among other people within a society, none of whom dominates you.[38]A slave with a benevolent master might be given lots of latitude to make choices and plans (first dimension); but the slave remains unfree in the sense of autonomy, as non-domination, because the master is entitled to interfere arbitrarily at any moment in the slave's decisions. The adequacy of non-domination reflects the safeguarding of the condition of human dignity.[39] This is clearly observed when we face the domination, our personal ability to command attention and respect and so of our standing among persons as self-mastery is deprived.[40] This means to be dominated means to be vulnerable, less in control and more powerless, and therefore used as a mere means to other's wills and plans.[41] Non-domination leads us to represent a person as an autonomous agent who has not been an inferior or a slave to other mastery. However, it is only a

[35] For the accommodation between this idea of freedom and dignity see, B. F. Skinner, *Beyond Freedom and Dignity* (Hackett Classics, 2011) esp. Ch.3.
[36] See e.g., Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP, 1999), 51; Q Skinner, *Liberty Before Liberalism* (Cambridge University Press 1998) Ch 2.; also for a full exploration of this idea in Fuller, see Nigel Simmonds, *Law as a Moral Idea* (OUP, 2007) 141–3; TRS Allan, 'The Rule of Law as the Rule of Private Law' in Dennis Klimchuk Lisa M. Austin (ed), *Private Law and the Rule of Law* (2014); David Dyzenhaus, 'Liberty and Legal Form' in Dennis Klimchuk Lisa M. Austin (ed), *Private Law and the Rule of Law* (2014).
[37] Pettit, *Republicanism* (n 36) 31-35.
[38] ibid 65.
[39] Jan-Willem Van Der Rijt, Republican Dignity: The Importance of Taking Offence, (2009) 28 *Law and Philosophy* 465, 460-70.
[40] ibid; Pettit, *Republicanism* (n 36), 34.
[41] ibid 471

passive status because it is against the wronged person by the wrongdoing of other's wills. It is this sort of freedom-claimer in the face of other wrongdoing.

However, the third dimension goes beyond the second dimension. It is relatively about the capacity of participation. Participation is the actual activating and exercising of the agency. It is about being the co-determiners and the contributor to the structure of one's society and public life.[42] The importance of this participation generates pressures on public life. This makes institutions more open and inclusive in their public decision-making that relates to all sectors of life starting from political life, educational institutions, and social workplaces up to all legal institutions. Participation makes us the authors and the addressees of the law. This dimension relates to human dignity because it respects us as someone who belongs to the humankind community and who has an active role in the collective decision-making processes that determine the ends of our community. It could be said in the case of voting to public office, for example, our autonomous participation is taken seriously not only for nationhood and democracy, but it is also a badge of our dignity in the sense that everybody counts.[43]

The fourth and final dimension is equality. Equality completes the picture of our autonomous agency. This dimension has crucial importance. It establishes that neither a priori discrimination nor naked preferences between individuals are allowed. We all have the same opportunities for self- choosing goals, non-domination, and participation. Each one of us has a normative and authoritative standing of autonomous agency. The equality feature relates to our dignity because

[42] For highlighting this differences see Rainer Forst, 'A Kantian Republican Conception of Justice as Non Domination, in, *Republican Democracy*, ed. Andreas Niderberger and Philipp Schink (Edinburgh: Edinburgh University Press, 2013) 154-60.
[43] See above the model of Kingdom of ends Chapter 4 at section 4.2.

the only value that we can all share is that we all have dignity. The absolute value of dignity is the independent value from the social and the political matrix of rank.[44]

A glance at Kant's legal philosophy confirms similar dimensions of autonomous agency, but it expresses them in the language of rights. For Kant, the rightful condition for interaction between people as free agents depends on respecting of each other's freedom.[45] Later Kant expands this idea by saying that there is "one innate right"[46] for framing our coexisting interaction. This right is the freedom that is understood as "independence from being constrained by another's choice" by virtue of our humanity.[47] Arthur Ripstein reminds us that this freedom looks very similar to the neo-republic freedom of non-domination.[48] I think this freedom is similar to our idea of an autonomous agency. It involves more than non-domination. Freedom as non-domination only suits the negative sense of our autonomous agency. Non-domination requires that nobody should be subjected to the order that denies their basic standing as an equal and free agent.[49] However, it cannot explain the necessity of a positive sense of us as participators. This participation necessarily presents us as an active and an authorised agent in our social arrangements. Thus, freedom from domination, or being independent not only means being respected as someone who enjoys a non-dominated equal status in our interaction, it also means that we could be part of deciding the terms of our interactions.

This point can be also stressed when we revisit Kant's model of the Kingdom of Ends (KoE).[50] There we find the connection between the dignity of a person as a prior and inviolable value that

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[44] Thomas E. Jr. Hill, *Respect, Pluralism, and Justice* (OUP, 2000) 61-118, see also, Roger J. Sullivan, *Immanuel Kant's Moral Theory* (Cambridge University Press, 1989) 15.
[45] Immanuel Kant*, The Metaphysics of Morals* in Mary Gregor (tr.), *Immanuel Kant Practical Philosophy* (Cambridge University Press, 1996. Original work published 1797) MM6: 230.
[46] ibid 237
[47] ibid
[48] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (MA: Harvard University Press, 2009), 15-19.
[49] See e.g., the discourse theory's critique to republic freedom, Forst, Non-Domination (n 42), 155-67; Forst 'A discourse- theoretical' (n 28) 8-9.
[50] Kant G4: 439: see above Chapter 4 at section 2.

grounds the autonomous agency of the person as an activist and a law-maker and not merely a recipient of law.[51] It is also important to note the context where Kant employs the idea of autonomous agency in the KoE, he characterizes precisely the four features in the following way. The status of persons as ends in themselves and never mere means according to the formula of human dignity entails that they are: beings whose purposes must be accorded equal respect in pursuit of his ends; beings who must not be dominated by others; and more importantly, beings as active law-givers who have a normative authority subject to no one or no laws other than those laws which can be justified by the formula of human dignity.[52] We can conclude from this that the value of human dignity is a master value. It brings the several values or dimensions of autonomous agency together.

For the present question of the PLHD, it is important to see how the moral task of eight principles of formal legality supports human dignity through the four dimensions of autonomous agency. This point enables us to reformulate the structure of this PLHD as follows: if it is true that every departure from the eight principles of legality is a violation of a person's dignity,[53] then human dignity is the key value that represents the moral content of these principles. Fuller claims for the first part of this proposal – the departure from legality is an offense to human dignity. However, I am arguing for the second part of this proposal. This is a positive connection between legality and human dignity as the core of the PLHD. To comply with the principles of legality (the rule of law) is to express the attitude that a citizen is capable of autonomous agency by virtue of human dignity.

[51] This argument rephrased Rainer Forst's thought to Kantian idea of autonomous agency and dignity, see Rainer Forst, *The Right* (n 24) esp. part one; see also my reading to Kant's model of the Kingdom of End above Chapter 4 at section 4.2.
[52] Kan, G4: 429-30; less similar to the four dimensions, one may also obverse that Kant interestingly infers from the sole innate right, in a way that seems to be analytical, four more innate rights among which: formal equality, self-mastery, the right to be beyond reproach, and self-chosen of happiness see MM6: 237-8.
[53] Fuller, ML, 162-63.

These eight principles are generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, stability, and the one which Fuller took to be the most complex, congruence between official action and declared rule.[54] These principles emphasize the forms of governance and the formal qualities that constrain the discretion of government officials.[55] This is by insisting that officials must conform to these principles as the rational standard before and during the activity of the legislature, to the executive administration, and the judicial decisions if they want to govern people with the rule of law. This conformation also holds officials accountable during and after their legal and judicial actions. As a result, this conformation reduces the possibility of arbitrary power as long as the power is bound by these principles in some meaningful sense.[56] This holds that the principles of legality can enhance the stability of the environment in which autonomous agency is possible. To govern people bound by the rule of law (eight principles) is to treat those people as the end in themselves (according to the formula of human dignity) who can exercise the autonomous agency. But to govern people unbound by the rule of law is to treat those people as inferiors and mere means whose cannot exercise their autonomous agency by virtue of human dignity.

Let me start with the first of the eight principles, *generality*. This principle requires that the law takes the form of general rules in (at least) several ways:[57] (i) class generality: legal rules must address and reach all persons or class of persons whose conduct is affected by those rules; (ii) timeless generality: legal rules must apply occasionally across time over similar cases until they expire according to their terms; (iii) territorial generality: legal rules must reach the entire

[54] Fuller, ML, Ch. 2; also see above Chapter 2 at section 2.2.
[55] Jeremy Waldron , 'The Concept and the Rule of Law', (2008) 43 *Georgia Law Review* 1, 62.
[56] Although the arbitrary power is a difficult notion, there are many ways in which power can be said to be arbitrary which all stands against the rule of law. see e.g., William Lucy, 'The Rule of Law and Private Law', in Lisa M. Austin and Dennis Klimchuk, eds., *Private Law and the Rule of Law*, (OUP, 2014)44-54.
[57] A list of these ways to make sense of generality of law is thoughtfully acknowledged in, Timothy Endicott, "The Generality of Law", in Luis Duarte d'Almeida (ed.), *Reading HLA Hart's The Concept of Law* (Hart Publishing, 2013), 35-42.; Gregor Kirchhof, The Generality of the Law, in, K. Meßerschmidt and D. Oliver-Lalana (eds), *Rational Lawmaking under Review*, (Springer, 2016), 99-100.

jurisdiction area where the conduct is required or permitted or prohibited; (iv) impersonal generality: legal rules must prevent privileges and exceptions, and retain and apply the same standard for all, particularly those who make and enforce it; (v) instrumental generality: legal rules must demand a clear regulatory structure which avoids exceptions and detailed stipulations, and consequently brings legal issues to a solution of impersonal generality; (vi) abstracted generality: which appears to refer to law that does not give overly detailed directions to its subjects or too closely specifies its circumstances of application.

In principle, these ways provide guidelines. They carry out the formation of regulations to achieve the standard of generalization. To criminalize any action according to the criminal law, for example, the officials must express the general application of a rule. This criminal rule must be generalized to a class of persons and actions that both occasionally and equally can be applied to everyone. But I think the principle of generality is not just about these practical guides, which are necessary to formulate any legal rules. Most importantly, the principle of generality seeks to present the law as it is orientating as a system of abstract, equal, and general rules. This presentation of law aims to determinate the idea that when judges interpret the law, and when the administration applies it, the law closely binds their discretion. As a result, this provides a certain guarantee against arbitrariness or discriminatory action by the powerful (official or private) against the powerless. This in turn serves to insulate the citizen from arbitrariness from both the public authority and private actions.

There is a morality about the principle of generality. This is its moral implication at least to a minimum form of human dignity, namely autonomous agency. In respect to autonomy as personal freedom of planning, for example, generality offers the baselines for the conduct of

personal affairs. It enables the person to plan his life and to adjust his relations with his fellows;[58] which depends on the predictability that generality offers. Predictability is important because it supports people's environments and sketches the general zone where they can exercise their personal plans and choices. Moreover, generality does not seek to impose particular collective goals on society, other than the goal of providing the framework of law that makes it possible for every person to pursue his own good.[59] Sometimes, legal rules might decrease our freedom. They prohibit the number of specific freedoms we have; but, the generality of rule can also create a new area of freedom. For example, prohibiting murder under criminal law promotes safety. Being not free to commit murder is offset by the creation of new specific freedoms. People who would otherwise have stayed at home guarding their families can now leave their homes and engage in numerous activities they could not have done before. When it comes to non-domination, generality makes sense of how we are governed by the rule of law independently from the will of others. In a democratic regime, when we obey the laws in the sense of general abstract rules laid down by our rulers which represent our voices, we are not subjected to another man's will. We have governed the general rule of the laws, and therefore we are not dominated.[60] Besides, generality implies participation. It reflects the inclusion of all members of society in the association of free and equal persons corresponding to the system of law.[61] Generality supports the idea of equal participation in collective self-rule and involves the co-lawmaker of human interaction. Under the formal principle of generality, officials have to be subject to the same law as everyone else.[62] Thus, generality requires the officials to produce only laws that treat citizens as equals before the law. It keeps the principle of alike cases being given alike treatment.

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[58] Cf. Joseph Raz, *The Authority of Law – Essays on Law and Morality* (Clarendon Press, 1979), 220; also Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing, 2012), 133; Steven Wall,"Freedom, Interference and Domination."(2001) 2 *Political Studies* 49, 221-22.
[59] F. A. Hayek, *Law,Legislation and Liberty* (London: Routledge & Kegan Paul, 1982), vol I, 107. 27; *The Constitution of Liberty* (University of Chicago Press,1960).
[60] Hayek, *Constitution* (n 59), 153.
[61] Habermas*, Facts* (n 27*)* 75, 107.
[62] Hayek, *Constitution* (n 59), 155.

I think Fuller insists that the generality of law is the main element that makes the form of the legal order; in the sense of legality, it differs from the form of managerial direction.[63] The latter form of social order is a "one-way projection of authority, originating with government and imposing itself upon the citizen".[64] This is contra to what is properly a so-called law. It depends upon the interaction between ruler and citizens on the one hand, and among citizens themselves on the other hand. Fuller believes that we only grasp the managerial order if the law ignores the generality. The generality of law generates the social dimension of law. It exhibits distaste for phenomena of interaction. [65] Interaction has a different logic, as we explained in the previous chapter. Unlike managerial direction, interaction requires adherence to legal morality as a matter of principle and mutual duty, not contingent, and revisable practice. This connects to the fidelity and the loyalty of law. People might obey the published and non-general rules, but they would not feel or have an obligation of fidelity to them. In any moment, this kind of law-like can cause disobedience. This creates certain rightful expectations on the part of the citizen that the government cannot violate without at the same time threatening the foundation of the citizen's obligation to obey its laws. If the bond of reciprocity is broken, Fuller argues, nothing remains to ground the citizen's duty to obey the law. Therefore, the nature of human participation in the legal system implies more than the peoples' absorption of rules for allocating power. It also suggests the existence of tacit expectations and requirements relating to the exercise of that power, in a way that accounts for a person's dignity as an autonomous agent, as equal as much as the ruler; which is in turn generating fidelity to laws in a system that relies only derivatively on the use of coercion.[66] As Jennifer Nadler rightly puts it: "the generality of law not only respects

[63] Fuller, ML 207.
[64] ibid
[65] ibid
[66] For unpacking the interaction as the source and normativity of law see above Chapter 4 at section 4.2.

free agency; it presupposes it. Law presupposes human freedom and so too the dignity that flows from that freedom."[67]

To sum up, both the idea of reciprocity and generality are essential to the law which respects human dignity as an autonomous agency. The former means that nobody claims special privileges and everyone grants others all the claims one raises for oneself, without projecting one's own interests, values, or needs onto others and thereby unilaterally determining what counts as a good reason. The latter means that no affected person's objections may be excluded to achieve general agreeability and to share the idea of legal power.[68] This idea stems from the Kantian formula of human dignity that entails: the respect for moral persons as ends in themselves and never as an instrumental to the demands of officials and privates requires: each person must be respected as autonomous persons having equal and full participation in the legal relations.

The principles of promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, and stability make the law more intelligible.[69] The intelligibility makes the law not only mere understanding, but it also makes the law a channel of communication. This communication brings trusteeship between officials and citizens. It is the duty of officials to citizens in a way that makes sense to the people concerning their subjections to the law; that is, their subjections are necessary to establish the relationship of reciprocity that serves and respects the autonomous agency of a person by virtue of human dignity. Generally speaking, these principles express several distinct forms of respect for human dignity towards those over whom the law is to be addressed. Firstly, they express the recognition that the officials have to offer

[67] Nadler, "Hart, Fuller, and the Connection Between Law and Justice," 27 (2007)*Law and Philosophy* 2.
[68] Forst,*The Right* (n 24), 66.
[69] Fuller comes to suggest that some of these principles, especially the principles of generality and congruence, occupy a particularly central place within his understanding of what it means to have and to sustain a condition of legality. Fuller, ML, 207-11.

reasons. The subjects of law are immune from the casual or unreasonable or unaccountable use of power by officials. Under the rule of men, however, there is no such thing as offering reasons through these principles. For example, the masters need not offer any reason to beat or sell their slaves. Secondly, these principles express respect for personal power of practical reasoning and deliberating. This explains why the laws give the opportunity to understand. To be given reasons is to be treated as a person and not as a thing or a non-rational being. Lastly, these principles associate with a necessity for mutual expectations. These mutual expectations bring certainty, predictability, security and even cooperation in the framework of interaction from both levels: horizontally among people, and vertically between people and government.

The principle of *promulgation* requires that the legal rules under which officials use power must be published to citizens.[70] When we are assured that the enterprise of law is announced in the public form, a person can know for certain where his behaviour stands in respect of the behaviours of others and the behaviours of their government. However, it would be impossible to satisfy this condition completely for every person. Promulgation of the law does not mean that every person will be able to read or even understand the law. To allow citizens to figure out more about the legal rules, there must be something more to the promulgation: (i) it must be accessible and available for citizens to learn and use it; and (ii) offer an opportunity to make a connection with legal experts, e.g. solicitors, lawyers, judges and administrators, whom the people can turn to for advice on the source and applying the law. By publishing the law, the rules restrict themselves to guaranteeing public order; preventing what is perceived as abuses of social behaviours and economic liberty; and identifying those rules that precisely define the possibilities and scope of officials' interventions. The morality behind the publicity is that if we know what a law permits or prohibits, we can properly plan our self-chosen activities and lives.[71] Accordingly, publicity

[70] Fuller, ML, 50-51
[71] See e.g, Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012) 53.

demarcates the legal rules' knowable domain of permissible action, in which persons may formulate, develop, and pursue their own purposes in relation to one another. One needs to know in advance what the criminal law is to avoid being prosecuted for one's actions. In the civil laws, one cannot claim rights or perform obligations or remedies if one does not know what are these rights and obligations. In commercial laws, successful trading and businesses are enhanced if we have access to and knowledge of those legal rules which govern commercial relations. If that person is relatively certain that his contracts, for example, are enforced by the announced rules, that his safety is protected by the traffic codes, then he is more likely to enter into any legal relations with the predication of consequences.

The principle of publicity also reduces domination and increases the chance of our participation. It reduces domination when the rules are identifiable by the public. People can critique the contents of those published rules which highlight the self-interest of rulers (e.g. exemption from the laws) or their contents of immoral materials (e.g. allowing the trading of slaves or child pornography). In saying that the officials enact secret and unpublished rules, it means the officials attempt to hide their political agenda from citizens. As I already explained in the case study of Saddam Hussein's rule of Iraq, the secret rules are marks of tyrants who govern people by the rule of terror and fear.[72] Consequently, it is possible these sorts of rules can be challenged or resisted by the people through a variety of channels such as judicial review, mass media, voting to change their law-makers, or even by resistance and revolution. In the meantime, publicity increases our participation in the idea of making and applying the law. Publicity opens the platform for what Waldron called "self-application", that is people's capacities for practical understanding, for rule-following, and for self-control of their own behaviour, in relation to legal rules that they can grasp and are accessible.[73] This is also akin to the conception of the good

[72] See above Chapter 2 at section 2.3.
[73] Waldron, The Concept (n 55) 27-28; Waldron, Jeremy, Self-Application, (2016) NYU School of Law, Public Law Research Paper No. 16-46. Available at SSRN: https://ssrn.com/abstract=2848578 .

citizen as an active participant in the constitution of the legal order. A good citizen is not just running his own life; he is also running public life. If we want citizens to participate through giving or withholding consent to any legal rules, we must let them know what those rules entail.[74] Furthermore, the publicity of legal rules offers those whom they coerce some opportunity to participate in their application to their own circumstances. This occurs via an opportunity to make arguments for a particular interpretation of those rules in the courtrooms. In court, the defender may even defend his claim by relying on some standard practices of the rule of law concerning publicity in particular: such as prohibition against secret laws; the requirement that subjects of law have notice and an opportunity to be heard before being coerced; the stranded to be represented by counsel; and similar practices that allow subjects to observe that officials are constrained by publicity of the procedures.

Next, the principle of *non-retroactivity* or *prospectivity* offers intelligibility to the law. It requires that the legal rules must apply from the date they are made forwards, they do not apply backwards in time. For the law to be an action-guide and predicable, citizens should be guided by the laws that exist now or tomorrow, not those that do not exist yet. This principle makes the law very predictable in society, both in predicting the actions of fellow citizens and in predicting the actions of the officials- police, courts, and administrators. The morality of prospectivity increases our freedom for self-choice and planning. In criminal law, for example, there is no crime or punishment except in accordance with law. People are presumed as innocent. Unless people can know what the law entails now, penal sanctions should not apply to them. As a result, people are given a fair opportunity to take its directives into account.[75] In civil law, people who enter into any contracts and buy property, do so with the expectation that the laws at the time they enter into those arrangements will remain in place to protect their property and contract rights. Non-

[74] Rundle,(n 58) 97-101.
[75] John Rawls, *A Theory of Justice* (first published 1971, Harvard University Press 2003) 241.

retroactivity also offers essential security against arbitrariness that may dominate people for different reasons. The extreme rulers, for example, use the retroactive rules as an instrument to amend mistakes to their self-interests or even enacting their monstrous rules.[76] Therefore, the principle of non-retroactivity provides an important guarantee against arbitrariness and political manipulation of the law.

Clarity is another principle that enables citizens to understand the law easily. The law must be clear either from being nonsensical and ambiguous or more likely, from being overly complex. The principle of clarity is crucial to human dignity as an autonomous agency. For example, clarity contributes substantially to the freedom of self-choice and planning that people enjoy. It increases the ability to understand the law and allows us to plan our lives around the law so that we can live while avoiding sanctions. Additionally, the ability to understand the laws brings new areas of freedom. It allows us to know what new legal abilities we have, and how to exercise them. Hence, like promulgation, clarity provides citizens with the ability to predict and expect official actions, and thus plan our lives accordingly to avoid sanctions. More importantly, generality and promulgation mean nothing if the publicised legal rules are vague and unclear. Failure to understand the legal rules may result in legal judgments being imposed on human actions for reasons unknown to the citizens. When the legal rules are vague, the consequences are that people's rights and duties are indeterminate and arbitrary. As a result, the rules that are unclear, obscure, and incoherent can make the law inaccessible for anyone.[77]

In addition, the principle of *non-contradiction* reduces the unintelligibility of the law. This principle demands that the legal rules must not be requiring or permitting and prohibiting at the same time.[78] Even if the rules are general, promulgated, understandable, and prospective, if the rules

[76] Fuller, ML, 53.
[77] ibid 63.
[78] ibid 66-69.

conflict with each other, people do not know how to act under the rules. Hence, this principle completes the other principles in affording essential security for honouring human dignity as an autonomous agency, basically by reducing the arbitrary use of power and increasing the possibility of predication in which the environment of the autonomous agency is possible.

The principle of stability is another form of law's intelligibility. It requires that the laws must not change too much, and when they do change, the effect of the change must be known at any given time along with the reason for the change. Yet, this does not mean that people cannot expect the law to remain static because laws eventually respond to changing social realities. Constant changes make the law unstable. These changes lead to people not knowing the laws with any certainty and prediction. Consequently, the law is neither understandable nor possible to carry out. If laws change too frequently, citizens no longer take laws seriously. This principle has special importance in commercial, economic and administrative laws. For example, if we cannot reasonably foresee what the tax rate regulations will be in the next months or even years, we cannot make long-term investments.

For Fuller, the last principle of legality, which is *congruence* between official actions and declared rule, is the most complex of the eight.[79] The main reason, I think, is because congruence has a different character, as it focuses on the legal practise in which the laws function. It involves the other important doctrines of judicial and constitutional activity, such as: due process, judicial proceedings, judicial independence, interpretation, access to courts, and separation of powers.[80] In each one of these doctrines, there must be an appreciation, on the part of the relevant officials (e.g. executives and administrative actors, judges, and polices) of the purposes that the

[79] ibid 81.

[80] Fuller, ML 81; 'The Forms and Limits of Adjudication',(1978) 92 *Harvard Law Review* 353, 111. Although Fuller marks some of these points, he does not say enough about congruence. Both Raz and Walrdon, however, offer a far better job of unpacking what the congruence entails. See, Raz, (n 58), 200-202; Waldron, "The Rule of Law and the Importance of Procedure" in J. Fleming (ed.), *Getting to the Rule of Law* (New York 2011).

legal orders are intended to fulfil. The core idea is that they should interpret and enforce the law as announced, in order to make official actions reliable and predictable, illustrating how far officials keep their loyalty to the promise of legality that is servable to human dignity. The principle of congruence also implies that no one is above the law, not even power-holders, the politicians, the judges, or even the military. As it is necessary to make general guidelines for human interactions rather than individual commands, it is difficult to make rules that do not apply to the powerful holders themselves and they must take accountability for their actions. By this, the legality limits the scope of power and its exercises for quality purposes.

In summary, the PLHD entails the morality of legality is not only the technical questions of practical governance and efficiency, which may be closely attuned to the perspective of legislators, but it is more about the moral and legal foundation of human interaction under the enterprise of law. The foundation here emphasizes the protection that the rule of law affords to the citizen's dignity as an autonomous agency. Those citizens who are experiencing their lives under the condition of the rule of law may experience the real recognition of their dignity, seen as someone who has the status of the legal agency autonomously practiced under the demand of law alone, rather than the demand of the interest of power-holders. The recognition of a human individual as a legal person with the autonomous agency before the law is the recognition that an individual possesses needs, interests, and commitments that merit vindicating, just like those of others that are protected. This is partly the condition of living with dignity; being treated as the reality of who you are as a human being, and not an object. Accordingly, the moral value of legality stems from a constitutive aspect of the condition of legal personality, as autonomous agents who are recognised as a member of a particular human community with needs, interests, and projects as valid as those who are so formally recognized. The legality is the means through which the legal and moral status of persons as autonomous agents is affirmed, as an initial and formal matter for the constituting of the narrow condition of human dignity.

5.3.2 The Dignitarian Conception of Law (DCL)

The most fruitful outcome of the PLHD is that there is a conceptual connection between law and human dignity through the PLHD. I model this connection as the "Dignitarian or Dignified Conception of Law" (DCL). [81]The DCL requires that the law contents in itself respect the condition of human dignity and echo with the form and content of law at both fundamental and doctrinal legal levels.[82]

The fundamental level is about the existing conditions of law (what is law?) and legal systems. That is, the condition that must be satisfied in order for a system of rules (or norms) regulating affairs and human interactions to count as a legal system. At this level, the DCL entails that PLHD is part of our idea of law or legal order, so that derogation from it means a normative system is less legal and that, at a certain level, a system should not be considered as a law at all. According to the DCL, for the enterprise of law to live in the PLHD it is accepted as legitimate insofar as it guarantees human dignity as an autonomous agency. It must guarantee the demarcating areas in which persons can exercise their free choices and plans. It also must guarantee the non-domination conditions of those subjects to the legal rules, to not live as inferiors at the mercy of power-holders. Legal enactment and applications must be such that they secure the public and equal participation of those subject to it in the following ways: (i) the legal order can be seen as issuing from the collection of citizens' rational self-legislation, so they are the original authors of law; (ii) the legal order is an argumentative and commutative idea which allows citizens with legal interests and obligations at stake to be able to speak for those interests, whether they accuse or are accused; and, (iii) citizens have to see the legal order as it

[81] I borrow this term from Waldron, 'The Concept' (n 55) 1-61; 'How Law Protects Dignity' (2012) 71 *Cambridge Law Journal*, 206-208.

[82] For mapping these two levels and its connection with legality or the rule of law inside and outside the Fullerian theory see generally; David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (2ed., OUP, 2010), 194-198; TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, 2003); 61-77 and 218; Simmonds, *Law as a Moral Idea*, 191; Jules Coleman, *The Practice of Principle* (OUP, 2003) 152–153; Jules Coleman, 'The Architecture of Jurisprudence' (2011) 121 *Yale Law Journal* 2, 28-29.

generates their capacity or voice to signal their commitment to or rejection of legal order, and the stability of the system depends on that signalling. Therefore, the DCL presents the law as a morality idea that successfully governs the healthy legal system. To say that the law is not successful implies that the governance of people by those rules fails. These rules are either not the mode of governance by the rule of law, defective as law, or not the law in the full sense.

At this fundamental level, the DCL resists the view that applies a legal norm to a human individual, like deciding what to do about "a rabid animal or a dilapidated house- as thing".[83] It rather involves paying attention to the autonomous agency of ordinary human individuals and respecting their capacity of rationality, understanding and following within a non-domination condition.[84] In particular, the DCL embodies a crucial dignitarian idea through respecting the dignity of those to whom the legal norms are applied and counting them as having the "capacities for practical understanding, for self-control, for self-monitoring and modulation of their own behaviour in relation to norms that they can grasp and understand."[85] It resists the enterprise of building a system of domination under the arbitrary power of a public or private power-holder. The society that lives under the DCL is not a slave-owning society whose slaves are no more subject to the rule of law than are animals or tools. According to the DCL, thus, the enterprise of law has a commitment to institutionalizing the recognition by all citizens of each other as autonomous agents by virtue of human dignity. That commitment in and of itself imposes a structure on the way that citizens relate to each other in setting the terms of their common life and interactions. Most important of all, they must attempt to create and sustain a culture in which they try to justify to each other what they hold should be done in the name of the common good of human dignity under the rule of law.

[83] Waldron, 'Dignity' (n 81), 206-208.
[84] ibid.
[85] ibid .

The DCL at the doctrinal legal level is about the conditions of legal validity and answering what is the proposition of legal rule to a particular case. In this level, for any single norm to count as among a community's law, it must conform to the PLHD. This implies the PLHD posits a measured test for legal validity.[86] The legal validity of any of the content of legal norms is always determined to some extent by the PLHD. This account also defines the legal and moral obligation of law-makers and judges that is manifested in the idea of fidelity to the rule of law. In particular, this claim affects the way that law exists in any legal culture, including the practices of judges, other officials and legal administration, and citizens. If the law-makers, for example, enact the legislation, they have to consider that legislation in correspondence to the PLHD. If judges, for example, are not interpreting legal content in the methods that give impact to the PLHD, they are not faithfully complying with their legal obligations. The DCL demands that the PLHD is the measure of a legal order to which judges must be faithful in identifying and interpreting the content of valid law.[87]

A challenge may be put for us in an imaginary task of a regime whose officials decided to treat seriously undignified rules (the rules that disrespect human dignity) as valid and binding. One can find this task in the examples of a system of radical inequality between white and black in the South Africans.[88] Should one consider as law all rules regardless of the task of the PLHD? What would one say in such a situation: that this was an unwise, most likely even an immoral way to run a legal system; or that the officials think that the rules were valid, but they were all morally too wrong?

[86] Dyzenhaus (n 82) 248; Allan, *Constitutional Justice* (n 82) 107.
[87] For similar connection but in the context of justice and law see generally, Gustav Radbruch 'Statutory Lawlessness and Supra-Statutory Law (1946)', (2006) 26 *Oxford Journal of Legal Studies*, 1–11; Jovanovic Miodrag, 'Legal Validity and Human Dignity: On Radbruch's Formula' in Winfried Brugger and Stephan Kirste (eds.), *Human Dignity as a Foundation of Law* (Franz Steiner Verlag, 2009) 145–6.
[88] This case has been examined in Dyzenhaus, (n 82) 34-43.

One reply might be that the point here is not to assert that the officials were all simply mistaken in holding that such laws were valid, because the very fact that they accepted and practiced them, together with the social source-based character of laws, was decisive for determining their legal validity according to "the social fact thesis" of legal positivism.[89] Instead, the real point in cases like this is to remind ourselves of the ultimate wisdom of entire legal positivism and re-ask: if any content whatsoever (e.g. undignified rule) that may be called "legal" should be really obeyed? We learn from this then that if any rules may be called law but are too evil or too undignified to be obeyed, why should we call them the "law" in the first place? The point here is that if we have a doubt about the workability of a rule that is not obeyed due to missing out the rule of law recruitments, or it has too evil a contents, what is the point in insisting that this rule still remains a law or a valid law?[90]

More importantly, some rules may look like the law and they even may still keep some property of the eight principles, but it issued at the cost of the DCL, as it should be going through the full task of the PLHD. Then we should not conceive of every regime that does not substantially live up to the rule of law, as legal systems neither regard the specific rule a valid rule if they fail to respect human dignity in its content. Otherwise, we are beside what Waldron calls it the "casual positivism". [91] We should not be too casual about the idea of law and the legal status of any rule in any system to the extent that any authority official "with the power to dominate all other systems of command in a given society and demands people forcibly, where the chain of

[89] Taking its lineage from Hans Kelsen and carrying through to H.L.A Hart until recent legal positivists, despite of many forms, the core idea of legal positivist social thesis has thought the ultimately the existence and content of law is a matter of social fact concerning what humans do in society not ultimately determined by morality reasoning. See generally, Raz, (n 58)38; Coleman, *The Practice* (n 82) 152–153; Coleman 'The Architecture' (n 82), 5–9; Julie Dickson 'Legal Positivism: Contemporary Debates' in Andrei Marmor (ed.) *Routledge Companion to Legal Philosophy* (Routledge, London, 2012) 50-51.

[90] Recalling the obeyed of legal rule in this context inspires from Fuller's his argument for the fidelity to law as part for the qualification of law. In fact, he opens the chapter two of *The Morality of Law* by saying: "law which a man cannot obey, nor act according to it, is void and no law: and it is impossible to obey contradictions, or act according to them." Fuller, ML, 14; Timothy J. Stostad, 'An Unobeyable Law is Not a Law: Lon Fuller's 'Desiderata' Reconsidered' (2015) *Dexel Law Review* 366, 389-399.

[91] Waldron, 'The Concept' (n 55)13-19.

effective command can be traced to a single politically ascendant source."[92] In this case, we are about to observe law only as "a one-way projection of power", to use Fuller's phrase.[93] This is a mistake not because a one-way projection of power is impossible, which it is not, nor because it is morally objectionable and wrong, though it is, but because it fails to acknowledge the conditions of its offering normative guidance to the public, where people are respected with dignity as autonomous agents.

There is also a practical way to replay the above challenge. Following Dyzenhaus's proposal, the legislators who wish to address the people to their power but at the same time they disrespect people' dignity, for example by adopting discrimination rules, face a practical challenge.[94] They have to adopt one of two ways: (i) they can explicitly state that project, or (ii) they can remove the power to officials that permit the officials to achieve the same end, not because this end is explicitly stated in the statute, but because official implementation of the statute is explicitly stated to be unreviewable by other official powers- the judges.[95] Both ways use the enterprise of law to disrespect person's dignity by place the person beyond the reach of the law.

However, the legislators do so in a way that does not comply with the PLHD. In the first case by neglecting the principle of generality and its implicit commitment to formal equality before the law (principle of generality); in the second case by ensuring that there is no law with which official action has to be congruent (the principle eight).[96] If the legislators adopt one or both of the ways, the judicial powers and judges are under a duty to treat the law with the task of the PLHD and reject the undignified rule. Judges may justify their decision by recalling the slogan

[92] ibid 14.
[93] Fuller, ML
[94] David Dyzenhaus, 'Process and Substance As Aspects of the Public Law Form', (2015) 74 *Cambridge Law Journal* 28, 303-4.
[95] ibid, 303
[96] ibid; also David Dyzenhaus, 'Dignity in Administrative Law: Judicial Deference in a Culture of Justification' (October 1, 2011). 23rd McDonald Lecture, 2011. Available at SSRN: https://ssrn.com/abstract=2029818 , 4-5.

that the principle's rule of law provides with something qualitatively different from the arbitrary rules of men. Judges may use the judicial review to override the rule by depending on the provisions of dignity in the constitution or charter of Bill of Right if it states a clear protection of human dignity. For example, the Article 1 of German Basic Law states that: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." But even there is not any constitutional provision of dignity, the judges may ground their decisions in this way: something goes wrong when a particular rule seems to create an opportunity for completely arbitrary decision-making, so wrong that the judicial power is entitled to ignore the problematic part of the law. The arbitrariness here is that the individual has no idea of what kind of decision to expect from officials. It is an affront to human dignity because it removes from those subject to the law, the ability to participate, to be treated equally, and to plan their lives, and the ability to plan one's life in this way is a necessary condition for a basic dignified life.

To sum up, I attempted to build a positive connection between formal legality and human dignity through the PLHD, seeing the respect of the dignity of a person in a basic sense (the autonomous agency with its dimensions) which legality protects. Thus, this becomes the basis for a healthy legal order, a valid rule, and the source that should contain the moral task to the governance of human interactions through the rules of law. In the context of Fuller's legal philosophy, we can also declare that the DCL, which stems from the PLHD, rephrases Fuller's internal morality of law as follows: human dignity underpins determinately the notion of law's subjects as autonomous agents; the idea of equal freedoms to self-chosen, non-domination, and participation. It establishes the notion of the human individual as an equal bearer of rights and holder of responsibilities before and within the law. The DCL idea translates human dignity into the law imperative of treating persons always as ends never as means, genuine and moral agent, and avoiding ruling, e.g. legislation and adjudication, according to a purely utilitarian metric. The absolute value of human dignity points towards the proposition that human dignity requires

interaction and recognition for its actualization as status, that it is the government and official's moral duty to protect human dignity precisely by conformity to the eight principles of legality. This is a particular recognition of the human individual as an equal yet unique member of the legal and social community of human interactions. To bring the idea of human dignity into this legal world so to speak, as a limiting principle for law-making, requires reconfiguring it for the purpose of legal practice and legal procedure. This is so because human dignity is vulnerable to misrecognition and that such protection requires the equal consideration of persons when it comes to the justification of law-making, law-administrating, and adjudications. For this what constitutes the internal morality of law can be examined through the model of PLHD, and this is in turn, can be reformulated in the DCL.

However, the promise of the rule of law, as it is a formal legality, could give more benefit to human life and achievements. It could also be the promise of the moral aspiration of dignity. This sort of connection ethos can increasingly inform certain kinds of substantive commitments towards humans' flourishing, having foundations in the nature of those governed and ruled due to their dignity. This is the task of the next section.

5.4 The Aspiration of Legality of Human Dignity (ALHD)

The ALHD is the second way that makes the moral value of human dignity more relevant to formal legality by virtue of the following proposition. Since formal legality is part of the discourse of the rule of law, it relates to better and broader human dignity protection. The rule of law is not associated only with the reduction of arbitrary power and endorsing the narrow sense of the condition of human dignity as an autonomous agency (PLHD), but also with promoting good governance and producing good orders, which is a key determinant in the performance of bringing a more dignified, decent and good life for the citizens. In this context,

the law and the legal system under formal legality are serving wider social functions and seeking to maintain their own integrity as an independent system; but human dignity can play regulative and aspiration ends within this system.[97] Formal legality can be seen as directly integral to the broader condition of human dignity. Without formal legality, there is not a distinctive form of law and a sense of good governance. In turn, the detailed implication of human dignity remains a lifeless idea. It remains a promise rather than a reality for many throughout the world. This indeed would be one of the aspirations and ideals that good governments must aim to reach. Good governments bring a more dignified life for their citizens.

The ALHD makes a case for moving beyond attempts towards the PLHD in favour of adopting a more substitutive morality of law that generates multiple protections of the condition of human dignity. As Fuller's legality can be expanded, so have the definitions of the rule of law and the normative goals in such a substantive norm of human dignity that the rule of law is supposed to promote. Fuller's legality, as I showed above, offers a fine base of understanding of the form of law and the way that this form constitutes the possible respect of human dignity in a narrow sense, under the formal legality (PLHD). However, this model should not be ended at this point. To meet the formal legality, a state must not only adhere to the formal rule of law and minimum protection to human dignity, it must also promote the broader condition of human dignity, human goods, and social welfare. This is by taking affirmative steps, through the use of the formal legality, to improve the dignified lives of its citizens. This is also apt to Fuller's faith, that there is an infused relationship between 'coherence and goodness' in human activity, including the law. As Fuller declares: "I shall have to rest on the assertion of a belief that may seem naive, namely, that coherence and goodness have more affinity than coherence and evil."[98]

[97] Stephen Riley also acknowledges two separate functional modes of human dignity in law, but in different names and contents. These functions are functionalist and genealogical modes see, Stephen Riley, 'The Function of Dignity' (2013) 5 *Amsterdam Law Forum* 90.

[98] Lon Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart',(1958) 71 *Harvard Law Review* 630, 632., 636.

He adds further: "when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are."[99] This means that order, coherence, and clarity have an affinity more with goodness and moral behaviour, rather than with evil purposes. To put it differently, the respect of formal legality, as the morality that keeps law's integrity and coherency, is likely to: (i) prevent the law from producing evil aims and inhuman enterprises; (ii) improve and enhance the foundation of human interactions by protecting each one of us as effective and autonomous persons with dignity; and (iii) prompt a better condition of external morality and substantive aims of the law. This implies that recognition of legality is what makes the law in a good shape and may give and support efficiency to wider substantive aims about human goods and values.[100]

In light of this, there is a possibility to expand the connection between legality and dignity into more aspiration and implication to the condition of human dignity through the model (ALHD). In short, the ALHD might be directly beyond Fuller's claim, but it can progressively draw from his thought. In particular, this is a point of harmonizing the internal and external moralities of law. This is presumably because the progressive role of human dignity sets it out as substantive norms or ends that can be functioned like any other legal norms within a system of regulations and legal practices (the external morality of law) through formal legality. What I mean by the broader condition to the implication of human dignity is the concern of the human being as much as with the wholeness of the human personhood and not only to one particular value, such as the autonomous agency.

To look into this proposal further, one may grasp the ground of ALHD by adopting the third factor, and that is the idea of good governance. By good governance I mean that the

[99] ibid.
[100] Fuller, ML, 153.

"government must be not only representative but responsive as well to the needs of governed."[101] Good governance has several characters and elements,[102] but the rule of law is one of the most essential.[103] The rule of law establishes a formal and legal framework in which good governance can function properly in the ways that enable it to produce good order. Here, good order refers to the sort of order that not only avoids disorder and bad order but also enables it to produce good things.

The good order, first opposes disorder in the sense that it resists the consequences of disorder such as chaos, instability and violence. Contrary to disorder, the good order that is produced under the condition of the rule of law facilities geopolitical stability, balance of power, civilizing power and peaceful life.[104] In light of this, we can say that the rule of law is about the morality of duty that prevails the foundation of the legal system insofar as "private individuals and governmental officials generally behave in ways that law affects, constrains, and successfully contributes to keep within civil bounds and without civil war" in any political society.[105] The PLHD partially associates with this because it underlines the healthy legal system that stands against the rule of men and arbitrariness.

Secondly, good order is different from the bad order in the sense that the latter refers to the order that serves evil ends. Under the extreme regimes, for example, the order may be in its

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[101] Meetika Srivastava, 'Good Governance - Concept, Meaning and Features: A Detailed Study' (2009). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1528449 .

[102] Ved P. Nanda, 'The "good governance" Concept Revisited' (2006) 1 The Annals of the American Academy of Political and Social Science 296, 296-7; Yu Keping , 'Governance and Good Governance: A New Framework for Political Analysis' (2017) 11 *Fudan Journal of the Humanities and Social Sciences* 1, 5-7.

[103] Meetika Srivastava, 'Good Governance - Concept, Meaning and Features: A Detailed Study' (December 26, 2009). Available at SSRN: https://ssrn.com/abstract=1528449; Amir N. and Goldschmidt, Chanan and Schwartz, Shalom H., 'Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance' (December 12, 2006). Available at SSRN: https://ssrn.com/abstract=314559 or http://dx.doi.org/10.2139/ssrn.314559.

[104] Randy Peernboom, 'Human Rights and Rule of Law: What's the Relationship? (2005)36 *Georgetown Journal of International Law* 1, 4-6.

[105] Martin Krygier, Evald John and Mason, Whit P., 'Violence, Development and the Rule of Law' (March 13, 2008). UNSW Law Research Paper No. 2008-8. Available at SSRN: https://ssrn.com/abstract=1392055 or http://dx.doi.org/10.2139/ssrn.1392055, 12.

place, but it is never denoting a good order under the mode of the rule of law since the wicked order serves only brutal and wicked ends. For example, the order is bad when it reflects the worst agenda of those who in the chain of public power control the public. The order is also bad when it demands the arrest and punishment of individuals on charges based on ethnicity or political difference. Again, the PLHD probably supports it because it sketches a very basic boundary to channelize the uses of public powers.

In the third sense, the good order is good because this sort of order under the rule of law enables the realization of good things into reality by protecting and supporting these good things. The theorists and promoters of the rule of law assert a long list of human goods with which the rule of law is associated, including human development, economic growth, poverty reduction, democratization and legal empowerment.[106] Thus in this way, we have a sense of good governance. It seems the World Justice Project (WJP) on the Rule of Law broadly asserts the view that the rule of law is not only essential for tamping down every evil, but also it produces the condition of every good. In one statement, the WJP declares that:

> "Without the rule of law, medicines do not reach health facilities due to corruption; women in rural areas remain unaware of their rights; people are killed in criminal violence; and firms' costs increase because of expropriation risk. The rule of law is the cornerstone to improving public health, safeguarding participation, ensuring security, and fighting poverty."[107]

Along the line of this list of goods under good governance, I think it is not wrong to say that the rule of law also facilities the substantive and broad conditions of human dignity. More precisely,

[106] Randy Peernboom, 'The Future of the Rule of Law: Challenges and Prospects for the Filed', (2009) *3Hauge Journal on the Rule of Law* 1, 2.
[107] Mark David Agrast, Juan Carlos Botero and Alejandro Ponce, The World Justice Project Rule of Law Index 2011, (Washington D.C.: The World Justice Project) 1-2.

the formal legality is part of the larger promise of the rule of law, and this thicker, this expanded PLHD speaks of protecting human dignity as an autonomous agency. It responds to the wider values that can be realized and promoted, not merely protected, within the long process of the legal codification of human dignity.[108] The Universal Declaration of Human Rights emphases this connection when it states:

> "There is no doubt that nurturing good governance is essential to ensuring respect for human rights. Without the rule of law, independent courts and other institutions of the modern society - essential components of good governance - the promise of human rights may remain just that: a promise unfulfilled. Enforcement of fundamental freedoms when it matters may be impossible. The lesson of history is that transparent, responsible, accountable and participatory governance is a prerequisite to enduring respect for human dignity and the defence of human rights."[109]

With this in mind, however, it should be considered that this connection between the rule of law and human dignity through the idea of good governance is progressive. It is a progressive connection because it depends on the long term and other facts of good governance. A political community in which both officials and citizens are bound and abide by the law[110] is a political community that lives under the model of good governance; which is more likely to produce good order, avoiding disorder and bad order, towards more protection of human dignity. Furthermore, a society can live under the condition of good governance and even has the rule of law, yet still suffer from poor public health, poverty, and threats to personal security;[111] which in turn, abuse the condition of living with dignity. Following Martin Krygier, one reason for this is

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[108] Philip Selznick,'Legal Cultures and the Rule of Law', in,Martin Krygier and Adam Czarnota (eds), *The Rule of Law after Communism* (Routledge, 1999), 26.
[109] Preamble, UDHR.
[110] Tamanaha defines this the core idea of the rule of law in this way. Brian Tamanaha, 'The History and Elements of the Rule of Law' (2012) *Singapore Journal of Legal Studies* 232, 233.
[111] Peernboom,'Human Rights and Rule of Law'(n 104), 15.

that a single-minded focus on the law and legal institutions through legality or the rule of law as the only source of constraints on the abuse of power is sometimes unlikely to be successful.[112] If the point of the rule of law is to control the use and abuse of power towards the production of good order, different translations of the concepts and facts such as economic growth, culture designs and historical complexities definitely involve different societies. From this point, Krygier argues that we need to investigate more what mechanisms will actually operate as restraints on power, rather than assuming that law, or at least specific, familiar, legal institutions, will always play such a role.[113] Krygier contends that legal institutions under the ideal of legality by themselves are not capable of curbing abuses of power and avoid disorder and bad order; they "always need supporting circumstances, social and political structures and cultural supports, which are not always available and are difficult to engineer."[114] Notwithstanding, Krygier made an important mark on the limits of this connection. We aresure about one point: the good governance, at best, involves not the maintenance of a perfectly just and good order but the ongoing approximation of one. The ALHD is the aspiration and ideal of good governance to law in its primary sense, the sense in which it enforces a scheme of the regulation of the human rights' safeguarding and promoting the broad conditions of human dignity. Consequently, sometimes this connection between formal legality and broad conditions of human dignity is expressed under the connection between the rule of law and human rights.[115]

To conclude, the ALHD is an optimistic hope and aspiration ideal that aims to bring the law as a quest to formulate the way of living together in which the condition of respecting the value of human dignity is fully realized and promoted.[116] But to reach this point, we should first secure

[112] Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds.), *Relocating the Rule of Law* (Hart Publishing, 2008) 59, 68-69.
[113] ibid 59-61.
[114] ibid 52.
[115] See e.g., Evan Fox-Decent, 'Is the Rule of Law Really Indifferent to Human Rights?' (2008)27 *Law and Philosophy* 533; Stephen Riley 'Human Dignity and the Rule of Law', (2015) 2 *Utrecht Law Review* 91.
[116] Lon Fuller, 'On Teaching Law' ,(1950)3 *Stanford Law Review* 35, 46.

the PLHD as the very foundation task for building and maintaining the legal system. This is a task of any healthy and good government, to be able to claim governing people on the rule of law.

5.5 Conclusion

This chapter has proposed to develop the LHD- the connection between Fuller's model of the rule of law and human dignity (under the Kantian understanding of human dignity). This development has been approached in two ways: the fundamental task of formal legality is to protect a basic or narrow condition of human dignity (PLHD); and the maximal task of formal legality is to promote a fully or broad condition of human dignity (ALHD). At its foundational level, Fuller's legality refers to establishing a system in which the law is able to impose meaningful requirements to make the law supreme, and maintain equality between ruler and people before the law. Under this condition, the rule of law constitutes a narrow protection of the condition of human dignity- as the autonomous agency; with (i) freedom of self-chosen ends, (ii) non-domination, (iii) participation in public life, and, (iv) equality. At the aspiration level, the promise of the rule of law, as it is in Fuller's formal legality, is the promise of the moral aspiration of dignity. This sort of connection ethos certain kinds of substantive commitments towards human flourishing, having foundations in the nature of those governed and ruled due to their dignity - that is by increasing the regulative rules to promote human dignity.

CHAPTER 6

CONCLUSION

After World War II, and in the movement[1] against the horrors of Nazism and other forms of totalitarian regimes that governed people by the rule of men, human dignity has emerged as an established idea underlying modern legal systems and the central principle in the paradigm of law. The Basic Law of Germany 1948 makes human dignity a supreme principle of governance: "Human dignity shall be inviolable".[2] In the same year, the Universal Declaration of Human Rights established the inherent human dignity of all persons as the fundamental principles for freedom, justice, and peace in the world.[3] Both the International Conventions on Civil and Political Rights and on Economic and Social Rights in 1966 employed human dignity as the backbone of modern human rights. From that time, the concept of human dignity has been used in a variety of legal contexts and attached to different types of legal entities, which are held to be worthy of respect and protection. Human dignity appears across domestic and regional domains, and in public international law and charters of fundamental rights.[4] As Christopher McCrudden correctly points out, the concept of human dignity has probably never been so omnipresent in

[1] Carl Friedrich has named this movement the "negative revolution, Carl Friedrich, Carl Friedrich, 'The Political Theory of the New Democratic Constitutions', in Arnold J. Zurcher (ed.), *Constitutions and Constitutional Trends since World War II* (New York University Press, 1951) 13-35; Jürgen Habermas also expresses this movement the "revulsion thesis", 'The Concept of Human Dignity and the Realistic Utopia of Human Rights, (2010) 41 *Metphilosophy* 464, 465-6.

[2] German Basic Law 1948, Article 1

[3] Universal Declaration of Human Rights (UDHR) Preamble, Article 1.

[4] See for tracking this legal development of dignity, David Feldman, 'Human Dignity as a Legal Value I' (Public Law, Winter 1999), 683-700; Roger Brownsword, Human dignity from a legal perspective in Marcus Düwell, Jens Braarvig, Roger Brownsword, and Dietmar Mieth (ed0, *The Cambridge handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press, 2014); Arthur Chaskalson, "Human Dignity as a Foundational Value of Our Constitutional Order," (2000) 16 *South African Journal on Human Rights* 16, 196; Roger Berkowitz, "Dignity Jurisprudence: Building a New Law on Earth," in The Dignity Jurisprudence of the Constitutional Court of South Africa, ed. Drucilla Cornell et al. (New York: Fordham University Press, 2013), 65–72; more generally see Samuel Moyn, "The Secret History of Constitutional Dignity", in Christopher McCrudden (ed.), *Understanding Human Dignity* (OUP, 2013); Aharon Barak, Human Dignity: The Constitutional Value and the Constitutional Right (New York: Cambridge University Press, 2014), esp. Ch.3 & 4.

everyday speech, or so deeply embedded in political and legal discourse.[5] Nowadays, more than 150 nations invoke inviolable human dignity in their constitutional jurisprudence or their bodies of Basic Law.[6] In jurisdictions around the world, human dignity has also been stated invoked as a principle that is 'the very essence of the law;[7] the principle that applies unreservedly to all areas of the law;[8]or the super principle that overrides other values and principles of law.[9] The appeal of the idea of human dignity is still associated with the expressive function of restoring the dignity of people who have suffered in a period of prolonged dictatorship or conflict under an unhealthy legal system with an absence of the rule of law. After Iraq was governed at any given time by the caprice of a single man (1968-2003), for example, Iraq's first constitution in 2005 embraced the principle of honouring people as the expression of respecting human dignity.[10]

One main root of this widespread references to human dignity in constitutional laws and legal documents lies in what Hannah Arendt tells us: the dignity jurisprudence- building a new law on earth that guarantees human dignity.[11] My hope in writing this thesis was to shed light on this new understanding of the law that secures our human dignity. In doing so, I proposed to bring new life to how to make the connection between the law and human dignity while power is limited to the rule of law only. By introducing the thesis of the legality of human dignity (LHD) I illustrated that this connection can grow and develop from the legal philosophy of Lon Fuller. However, the focus of the LHD is not on the analytical enterprise that seeks to legalize the conditions for the idea of human dignity through legal codification; or on the understanding of the function of human dignity's role in the judicial activity.[12] The latter approach explains the

[5] McCrudden, Christopher, In Pursuit of Human Dignity: An Introduction to Current Debates, in *Understanding Human Dignity* (OUP, 2013).
[6] Thomas Weatherall, Jus Cogens: International Law and Social Contract (Cambridge University Press, 2015) 41-6
[7] see e.g., Pretty v The United Kingdom: ECHR (29 Apr 2002).
[8] see e.g., the Aviation Security Case, BvR 357/05, vom, 15.02.2006, Absatz-Nr. 124; BverfGE, 45, 187 (1977)
[9] see e.g., the German Airliner case, BvR 357/05 115 BVerfGE 118 (2006).
[10] The constitution of Iraq (2005), Preamble,Articles 22 & 37.
[11] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich, 1973) ix; Berkowitz (n 4), 65.
[12] See e.g., Christopher McCrudden, 'Human Dignity and the Judicial Interpretation of Human Rights', (2008) 19 *The European Journal of International Law* 4; Leslie Meltzer Henry, 'The Jurisprudence of Dignity', (2011) 160 *University*

nature of the relationship between human dignity and law from the perspective of analyzing a list of legal texts, case laws, and judicial decisions, in national and international law, in which the idea and concept of human dignity appears.

There is no doubt that such human rights' provisions and constitutional jurisprudence are the most obvious ways that enforce the protection of human dignity. The difficulty, however, begins when we face the hard cases where there is no mention of human dignity in the legal provisions, while the nature of those hard cases directly relates to the respect and protection of it. Moreover, more challenges are faced when the worst violations of human dignity take place in cases where political structures are wicked or weak because the rule of law is absent. In these cases, where the violations of human dignity occur, whether caused by public officials, powerful groups or private persons, they are so basic, so profound that theoretical discussion of what human dignity means and how it relates to the law seems utterly misplaced and confused. It sometimes could be believed that the law is the source of evils, including the violations of people's dignity. It is even a truism to say that more or less well-ordered societies and developed systems are meant to provide a measure of protection from the most egregious violations of human dignity, through adopting a powerful provision of human rights and constitutional rights. And yet interestingly, when violations of human dignity occur in those well-ordered societies, whether under the auspices of making policy and judicial activity, they involve a very specific and sense of wrongfulness that increases the actual harm to the dignity of human individuals. If all human rights are founded on the recognition of human dignity, how do we explain it when we observe that a certain positive law violates human dignity? Is it possible that the idea of law takes the blame, because its coercive traits and commands have been considered as the main feature of the law; that along with its claim to legitimate authority, it opens up the possibilities to render injury

of Pennsylvania Law Review 169; Dieter Grimm, Alexandra Kemmerer & Christoph Möllers (eds.), *Human Dignity in Context* (Nomos/Hart, 2018).

to human dignity? Furthermore, even worse, is it possible to believe that the law itself may become a profound sense and instrumental agenda of injustice when acute dissonance occurs between the legal and political authority that is exercised by the official rulers, such as law-makers, judges and police officers? Then we have the very real experience of misrecognition of standing with dignity. Thus, the legal doctrine study of human dignity may provide us with a fine understanding. It has advanced our grasp of the idea of human dignity as a legal and judicable concept, along with some of its legal implications. However, this strategy fails to provide a deeper connection between the nature of law and human dignity. It falls short of explaining how the very idea of law can be possible and truly relates to the protection of a person's dignity when the rules of law operate and govern human life.

The LHD is the thesis that aims to overcome the above challenges. It brings a deeper inquiry about the conceptual connection between the rule of law and human dignity. It offers a contribution to the discourse of human dignity in the legal world. It starts from the foundation of legal system up to the regulation of legal rules. It entails that the formal legality (Fuller's model of the rule of law) serves or protects human dignity from the exercise of arbitrary, social, and political power in the framework of human interactions. In this context, the value of human dignity (especially in the Kantian conception) is worth inserting into the picture of the moral reason served by formal legality because it synthesizes into a harmonious whole the distinct values upheld by the rule of law. The LHD thus involves more than a change in terminology. It presents a novel account of what the governance of the rule of law entails, why we should care to live under the rule of law, and how it would change our attitude about the moral conception of law. The initial plausibility of this claim derives from the fact that formal legality establishes and maintains law as convictable, intelligible, having some degree of predictability, stability, and certainty of the social and political environment in which a person can live with the conditions of human dignity.

In this context, this study sought to address the meaning and place of human dignity in Fuller's model of the rule of law (formal legality) by developing an analytical framework that contends with the Kantian conception of human dignity. To sum up, the arguments I developed in the course of the discussion can unfold in the following points:

1. I refined Fuller's model of the rule of law (formal legality) as follows: Fuller's legality presents the law as a system of general rules operating by recognizing the essential humanity of people as legal subjects, who bear dignity, harnessing their capacity for rational self-determination and voluntary self-control in their relation to norms they can understand. Consequently, the design of a system of general rules should be understood, formulated and administrated through formal legality in a way that promotes a practical condition or public form for protecting human dignity. This is the sense of a healthy legal system. I also developed the argument that once the enterprise of governance through the law has ignored formal legality, it causes the production of an unhealthy legal system. Under this unhealthy condition, I argued the legal order openly changes its form into anything except the law.

2. I investigated the legal and moral status of law and legality for the case study of Saddam Hussein's rule of Iraq, in order to show how the Iraqi legal system certainly transferred from the rule of law into the rules of terror under the republic of fear of Saddam rules, where the condition to live with dignity was at risk in the everyday life of Iraqi people.

3. Although Fuller presents human dignity as a self-determination agency that seeks to describe and justify the morality of legality, his account cannot stand as an interpretation of the prevailing meaning and function of human dignity in the rule of law. For this, I suggested the concept of human dignity within Fuller's idea of the rule of law could benefit from reframing.

4. This reframing could have a conceptual benefit to make a connection between formal legality and human dignity. To make this connection, first and foremost I suggested the concept of Kantian human dignity.

5. I demonstrated that Kantian human dignity provides a brilliant and a watertight philosophical foundation of human dignity. I presented his account of human dignity as a moral and normative value that has the following structure:

vii. Humans have the absolute value of dignity by virtue of humanity (in the Kantian sense- the capacity to set ends).

viii. Dignity is the property that expresses an intrinsic worth, exalts humans above any price in this world, dignifies them and therefore entitles them to respect and concern.

ix. The respect to human dignity must be measured by the formula of human dignity that demands a person not to be treated as a mere means, but always as end in themselves in any human interaction, such as morality and law.

x. In Kantian human dignity, there is room for two aspects of human dignity. The first aspect is about intrinsic or objective worth of human dignity. The second aspect is about the condition to live with human dignity; but it comes only after the first and prior aspect of human dignity, namely human dignity as an intrinsic property.

6. I challenged three accounts of human dignity from: Jeremy Waldron, Oliver Sensen and Andrea Sangionvanni.

7. I argued that several justifications are required in order to set a platform that brings Fuller and Kant into the conversation:

i. In terms of methodology, Fuller appears as a pragmatic lawyer who has less interest in theorizing the law, but when we are mapping him on his main project of *eunomics*, he departs in many levels from the pragmatic. Regarding Kant, to overcome the problem of his metaphysical idea some friendly injection of the sociology of human communication and interaction has been added to his theory.

ii. I developed Kant's model of the Kingdom of Ends (KoE). Throughout the KoE, I confronted Fuller with Kant. This confrontation reveals that both

authors share the view that: each person as an equal agent is an author who can engage in a complex attempt to mediate between the real world of social interaction and political life, and the normative and moral worth of possibilities. The outcome of the model shows how the idea of human dignity through the mutual respect of human interactions provides the moral reason for the idea of the governance by the rule of law.

iii. Jürgen Habermas's thoughts have also been useful in providing us with important highlights in developing the model of the KoE.

8. Since it seems the Kantian conception of human dignity is a heavily substantive moral value, I restructured the application of this conception (especially the part of the formula of human dignity) in the orientation of Fuller's system of two moralities of duty and aspirations. This task allows us to see human dignity, at the very foundations, as the most vital condition for a decent life. To some extent and aspirations, human dignity can and should necessitate more conditions to access a flourishing life, or just life in any human institution. Consequently, the structure of the formula of human dignity has both minimum (basic) and maximum (broad) levels.

9. Since Fuller's formal legality embraces both the moralities of duty and aspiration, legality is the practical process that protects and promotes the conditions of human dignity at the two levels: basic and broad. I dissemble this proposal into four formulae as follows:

i. The legality of human dignity (LHD) is the main thesis that makes a connection between Fuller's legality and Kantian human dignity.

ii. The postulate of the legality of human dignity (PLHD) is the first undertaking of the LHD. It entails: the fundamental task of legality is to set out eight ways in which a system of law must conform to the morality of duty- a minimum standard that all must adhere to human interaction with narrow respect for human dignity as an autonomous agency. I defined the autonomous agency as

one essential and basic condition for human dignity. The autonomous persons or agents in this context have been interpreted as the self-determining persons who can justify their actions based on reasons in four related dimensions: freedom of self-chosen ends, non-domination, participation in public life, and, equality.

iii. I also proposed the dignitarian or dignified conception of law (DCL) which determines the status of law both in legal systems and legal doctrine levels. At the fundamental level, the system of law should always live up the postulate of the legality of human dignity (PLHD). I showed a system of normative guidance and mode of governance for human conduct should not be counted as a legal system unless the concept of law includes significant conformity to the rule of law and respect to human dignity. This is a point of departure between governance through the law and governance by other modes. At the level of the validity of law (doctrinal level), I advocate the legality of human dignity is also an intrinsic part of any legal order - the criteria of legal validity. This means legal validity or the content of legal norms should be always determined to some extent by the legality of human dignity.

iv. The aspiration of the legality of human dignity (ALHD) demands the maximal task of legality to the aspiration of the legal system. This is by insisting that the progress of formal legality may conform to the morality of aspiration: an ideal standard as the guidance of law - made so that the good draftsmen and good governments must aspire to follow it. Here, this ideal aims to reach human flourishing by the virtue of broader or maximal conditions of human dignity.

Finally, the main outcomes of this study reveal that the idea of law as the rule of law or legality (as it is in Fuller's argument) and the idea of human dignity (as it is in the Kantian conception of human dignity) are closely associated with each other conceptually. The rule of law protects

humans against the illness of social and political arbitrariness, and human dignity requires the protection of persons from disrespect and humiliation from others in the context of legal, social, political, and everyday life. Therefore, the law as legality serves and promotes the conditions to live with dignity. When the law is founded on the idea of human interaction within the framework of the rule of law, rather than as the idea of one-way public power or private power, and when the law rules and operates, in the way that it presents its formal and procedural requirements of legality to be observed by those to whom the requirements are primarily addressed, the law treats individual humans as dignified persons. This dignified life of a person is about the conditions of human dignity that stand as the objective worth of a human being – human dignity as an inherent value. Under the rule of law, the conditions of human dignity could be in the narrow sense of an autonomous agency, the equal self-determination responsibility, non-dominated and independent from the will of others. Presented in this way, the law as legality is also open to producing good orders under good governance for those who live in the aspiration of the legality of human dignity (ALHD), in order to produce the more substantive and condition of protecting and respecting human dignity.

In nutshell, I hope the thesis of the legality of human dignity that I have offered and developed in this study provides a valuable foundation and scholarly contribution; not only to push forward Fuller's legal philosophy into better shape, but also to have aided and advanced the project of recasting the jurisprudence of human dignity onto a new path.

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