



University
of Wrocław



ISSN 1392–6195 (print)
ISSN 2029–2058 (online)
JURISPRUDENCIJA
JURISPRUDENCE
2009, 3(117), p. 111–127

HUMAN DIGNITY AND THE RIGHT TO DIGNITY IN TERMS OF LEGAL PERSONALISM (FROM CONCEPTION OF STATIC DIGNITY TO CONCEPTION OF DYNAMIC DIGNITY)

Alfonsas Vaisvila

Mykolas Romeris University, Faculty of Law,
Department of Philosophy of Law
Ateities 20, LT-08303 Vilnius, Lithuania
Phone (+370 5) 2714 697
E-mail tfk@mruni.eu

Received 30 May, 2009; accepted 25 September, 2009

Annotation. *The article critically analyzes the conservative conception of passive or static human dignity in accordance with which human's value is seen as value coming from the exterior (from God or from a biological human's nature), or value seen as existing per se. In opposition to this conception, a conception of active or created dignity is being developed, which aims at treating human's dignity not like a social relationship, but rather like a person's individual ability to live properly in the society (participate in barter relations on the ground of equivalence) and using this propriety to create own individual social value (dignity), as a personal contribution towards maintenance of concord and collaboration in the society.*

Keywords: *human dignity, right to dignity, legal personalism, conception of human dignity, passive dignity, static dignity, active dignity, dynamic dignity.*

1. Human Dignity

Actual protection of human rights requests logically clear legal concepts, legally established or thoroughly discussed in legal doctrine that would be equally understood in different applicable situations and would presuppose rights and duties of unambiguous behavior. “Human dignity” and “right to dignity” are essential concepts for this discussion.

The right to dignity is nowadays accepted as “the highest human right”, “the source of rights.”¹ However, the transfer from emphasis of the right’s meaning to revelation of its content discloses immense variety of opinions both in the philosophical and legal literature.² Moreover, dignity has often been inseparable from the right to dignity, as the right itself is not differentiated in the terms of capacity and subjective right; dignity and its origin has been rarely linked to the cultural human activity. It strengthens the uncertainty of the concepts of dignity and of the right to dignity and makes their application in practice more difficult.

The framework of this paper evades broader discussion of the problem, related research and criteria that make human dignity recognizable in legal practice. An extensive amount of literature in various languages is available on the issue. The author of this paper aims to present a specification of the concept of human dignity viewing it in terms of subordination of rights and duties, as well as differentiating the right to dignity in terms of capacity and subjective law.

The right to dignity has been usually explained through its objectively understood origin: it has been claimed that this right has neither been granted by the state nor created by the person himself or herself but exists “*irrespectively of sex, race and nationality, as well as from life style. Every human being has been provided (ausgestattet) with it... Dignity is related to human subsistence (Mensch-Sein) itself; no one can take this right to dignity away. This right is owned not only by the honest, but also by dictators, children molesters or other asocial individuals... Even an unborn life in the body of a mother, mortally ill (...) have the matter-of-course dignity.*”³

This implies that an individual himself or herself is not involved in creation of his or her dignity. Dignity is enclosed into the person like a ready-made conformation from aside, which means it is like a biological human property that may neither be given, nor created or lost; it is characteristic even to the “unborn life in the body of a mother”.

-
- 1 Segado, F.F. *Godnosc czlowieka jako najwyzsza wartosc porzadku prawnego w Hiszpanii*. Godność człowieka jako kategoria prawa. Wrocław, 2001, p. 179.
 - 2 Kettner, M. Menschenwürde als Begriff und Metapher. *Hamburger Institut für Sozialforschung Diskussionspapiere*. 1994, January; Schultz, I. Soll die “Würde des Menschen” politisch oder philosophisch begründet werden? *Hamburger Institut für Sozialforschung Diskussionspapiere*. 1994, January; Balzer, P.; Rippe, K.P.; Schwaber, P. *Menschenwürde versus Würde der Kreatur*. Freiburg-München, 1998; Benda, E. Erprobung der Menschenwürde als Problem der sozialen Wirklichkeit. *Aus Politik und Zeitgeschichte*. 1985, 3; Brugger, W. *Menschenwürde, Menschenrechte, Grundrechte*. Baden-Baden, 1997; Edelman, B. La dignité de la personne humaine, un concept nouveau. *Droit*. 1997, 1; *Godność człowieka jako kategoria prawa*. Complak, K., ed. Wrocław, 2001.
 - 3 Richter H. P. *Juristische Grundkurse*. Band 20. 2007; Zenthöfer, J. *Rechtsphilosophie*. Berlin. 2001, p. 75.

Such ontologization and absolutization of some objective features lying in the essence of dignity comes from the Christian tradition that has introduced and justified the concept of passive dignity. According to the tradition, dignity is neither a creation of the society nor of the person himself or herself; it rises from the presumption that human being has been created following the picture of God and thus it has a divine immortal soul that gives unmeasured worth called dignity to every human being. Therefore, if dignity is not provided to a person by people, it means it can neither be taken away nor limited by people. At this point we come across the so-called one-dimension personal worth.

The above described traditions of passive or static dignity have one way or another affected various legal acts, international declarations and conventions. The Virginia declaration (Virginia Bill of Rights, 1776.VI.1) provided: “All people are born equal, free and have certain **inborn rights** (emphasis added by the author) that, as soon as individuals accept the status of society, may not be taken away by any later agreements made by their descendants” (Article 1). The same tradition of “inborn rights”, although in a weaker form, has been continued in the Universal Declaration of Human Rights (1949): “All human beings are born free and equal in dignity and rights” (Article 1).

The above statements ignore the fact that birth may become a source of rights only if society in which the birth took place is ready to recognize *a priori* each person as a value. This is not, however, a universal fact. History names primitive societies that, forced by their survival needs and low economic possibilities that could assure such needs, were killing “*the born free and equal in dignity and rights*” but weak babies, powerless old people as if they did not know that these babies and old people “*were born equal in dignity and rights*” to other members of the society. In slaveholding and feudal societies only the noble were taken as dignified; the right to dignity was not recognized for slaves and villains “*born free and equal in dignity and rights*” and “*created by the same God*”- the latter people were only granted a status of “talking labor instruments”. The Jewish and gypsies in Germany during Nazi times were also treated as not eligible as subjects of the right to dignity.

This proves that the right to dignity is a historical and social category of the (democratically oriented) positive law. The theological and biological views on human dignity coincide in that in both human dignity (worth) is distinguished from society and from cultural activity of the person on grounds of the concept of the passive or the static dignity. However, the dignity of persons who genetically appear beyond the society and cultural activity, became inapproachable and therefore mystical for scientific cognition. Explaining it critically, dogmatism had to be taken into regard.

But if the right to dignity is nevertheless a right, then it should be noted that a right always begins with a permission to obtain a certain good or to use such owned good for the performance of certain duties (orders, obligations). Therefore, talking about a right, a question where does a person get a permission to treat himself as good and why is he or she is regarded as good (virtue) by other persons may not be avoided. The answer to the first part of the question is the following: the permission to consider a person “good” is received from a society organized into a state because law exists only in an organi-

zed society where universally accepted virtues exist in a territory of a certain society. There are no permissions and orders beyond society, therefore there is no law. Robinson Crusoe does not know law and the right to dignity not because he has not been “created by God” and because he has not inherited “human nature” but clearly because he lives beyond the boundaries of society: there is nobody who could be addressed and proven to one’s worth and from whom recognition of such worth could be requested. Thus, claiming that a human being “*has the right to dignity irrespective of any social legal order*” is related to anything but law.

But if we do not know what is law, how can we know what is “the right to dignity” as a special issue of law in general? In order for the “unborn life in the body of a mother” to have the right to dignity, that “body of a mother” must exist in a society organized as a state, a society that follows appropriate virtues and their hierarchy. But in this case, a society must solve a collision: how acknowledgment that “an unborn life in the body of a mother has the right to dignity” can be combined with the universally accepted subjective mother’s right to her body?

Lithuanian laws in force do not define the concept of dignity. This function has been left for the competence of legal doctrine and legal practice. The Senate of Judges of the Supreme Court of Lithuania defined honor and dignity in their Ruling No. 1 of 15 May 1998 as “person’s self-evaluation that is determined by society’s evaluation.”⁴ It is a dominating definition of dignity not only in Lithuania. Philosophical literature summarizing the research on the relevant topic basically supports the same conception of passive dignity: it defines human dignity as personal awareness of own social value, as the right to request respect from society based on human worth accepted by the society.⁵

The origin of social human dignity was defended by an English philosopher Thomas Hobbes already in the 17th century: “Human dignity the public worth of a man, which is the value set on him by the commonwealth.”⁶ However, as we will see later, Hobbes also recognized the role of the person himself or herself in creating one’s worth, by which he raised assumptions for formation of the concept of active dignity.

The tendency to define human dignity as “self-evaluation determined by societal evaluation” expresses an idea about existence of objective and subjective dignity features, about their interaction where probably the identity of human dignity should be looked for.

Dignity as human worth rising from an individual’s ability to live properly in a society.

To avoid dogmatism in the definition of the dignity concept it is important to understand which feature of the concept should be essential for an explanation. This can be shown by the nominal meaning of the term itself. In all national languages human dignity is linked to human worth and the way the human being understands one’s worth. Dignity in Latin – *dignitas* – *worth, noble appearance, value, dignatio* – *respect for*

4 Decree No. 1 of the Senate of the Supreme Court of Lithuania (1998.V.15). *Teismų praktika*. 1998, 9: 52.

5 *Философская энциклопедия* Т. 2. [Encyclopedia of philosophy, Volume 2]. Москва, 1962, p. 58.

6 Hobbes, T. *Leviathan*. Vilnius: Pradai, 1999, p.104.

someone, in Russian – “*dostoinstvo*”, in German - “*die Menschenwürde*”, in English – dignity. However, not all meanings of the concept relate to the origin of dignity because they describe the essence of dignity through final result, the worth, instead of describing it through its reason (source) or technologies creating it. In this definition one uninformative abstraction (dignity) is defined by another abstraction with the same level of unformativeness (worth) evading the main question on who/what creates this human worth, if it is multidimensional and if there is a criterion that would let human being individualize as value? If dignity is not differentiated, can then society make a difference between a violator of the right and a person respecting the right?

The search for technologies creating dignity can benefit from a nominal meaning of a Polish term “*godność*,” which means suitability (*godnie – nobly, worthily, properly*) together with the meaning of *worth* and *honor*. The Polish law theorists do not directly relate dignity to appropriateness, they still uphold the above mentioned tradition to define dignity through an abstract worth. Mariusz Jablonski basically repeats a definition proposed by the Supreme Court of Poland: “(...) dignity is that field of personality that is specified by human being’s understanding of own worth and waiting for respect from other human beings (...)”.⁷

An attempt to derive human dignity technologically from human being’s suitability is for the first time found in the already mentioned “Leviathan” by Hobbes: “Worthiness is a thing different from the worth or value of a man, and also from his merit or desert, and consisteth in a particular power or ability for that whereof he is said to be worthy; which particular ability is usually named *fitness*, or aptitude.”⁸ Hobbes talks about “fitness” (suitability) as of human being’s “inborn ability” to perform certain duties important for the society properly (with quality). Thus, this attitude at some level still relates to the above mentioned theological and biological opinions that view human worth as based on socio-cultural activity. However, dignity itself is now treated instrumentally, therefore should be understood not as a feature (not as an “inborn ability”) but as human being’s relation with the interests of the state or the society in terms of implementation of the above mentioned approach. Hobbes is trying to combine the traditional attitudes of theology or biology (the objective absolutization of features of dignity) with the instrumental (subjectivist) approach of the New Times to human powers, which he wishes to treat as instruments used by the same person to settle in nature and in society.

But if dignity is a human being’s relation with the society (other human beings), then it cannot be treated as “inborn subsistence” – a biological feature of a human being. Although related to inborn biological powers of human beings, it is still dignity, while the powers themselves are not dignity (human worth) because a person can use the same “inborn powers” both for and against the society. That is why they can at the same time be valued both as useful and harmful, therefore – impossible to evaluate for the society.

7 Jablonski, M. *Pojęcie i ochrona godności człowieka w orzecznictwie organów władzy sądowniczej w Polsce. Godność człowieka jako kategoria prawa*. Wrocław, 2001, p. 295–296.

8 Hobbes T., p. 111.

However, explaining human dignity based on person's social suitability, Hobbes' method is undoubtedly promising and presents a possibility to create the conception of active dignity – to explain rationally the origin, content and social purpose of dignity.

The right to dignity in terms of capacity and subjective right. Uncertainty of reasoning on dignity also is caused by the fact that human dignity is often confused with the right to dignity. Moreover, the right to dignity itself is treated notionally, disregarding two levels of its possible existence: capacity and subjective right. Without making this difference, it is unclear where does human right to dignity originate and what is dignity itself as an object of the right to dignity. Is each person valuable only because he or she was born as a human being or does that initial worth of the human being exist because the society *a priori* recognizes each person as a subject of law and undertakes to protect his or her vitally important interests, thereby indirectly acknowledging person's worth and the right (permission) to that worth? In fact, if the society recognizes every human being's right to life, health, freedom, personal immunity, and etc., it thereby accepts each person as worthy. Every person acquires this general (formal) worth without any personal efforts (it is enough to be born in a civilized society to acquire this level of worth). This is why such worth is called static or passive: it cannot be increased or reduced; tradition, as it has been mentioned above, identifies it with human dignity. This tradition avoids the question of what is the role of human being himself or herself in creating his or her own social worth as an object of the right to dignity. In my opinion, this is the weakest part of the tradition.

Two levels of human worth – the passive and the active. Relating dignity to the cultural activity of a person, a possibility to distinguish two levels of human worth appears: 1) worth that originates from each person's recognition as a subject of law in general, which is the same to everyone because it is acquired from the society without personal effort (performance of duties), and 2) individual social worth of a person that can be created by the person only through fulfillment of obligations in respect of one's neighbor, which following the logics of exchange commits other persons to reciprocal services.

The distinction these different levels requests specification of the "right to dignity" itself, identifying two possible ways for existence of such right – capacity and subjective right:

The right to dignity in terms of capacity. If the right to dignity is a right, then it cannot be inborn because it may not be acquired outside society. Therefore the right to dignity at level of capacity is a permission granted to a person by the society or state from the moment of birth to exist properly in the society, i.e. to implement one's ability to use granted permissions for fulfillment of obligations. This permission originates from person's recognition as a subject of law in general and signifies society's obligation not to jeopardize person's vitally important interests and to protect them. At this point a person's worth completely coincides with the person's recognition as a subject of law in general, i. e. with recognition of his or her rights to life, health, freedom, personal immunity, and etc., along with the society's commitment to accept the above goods as social and personal values. That is why this level of worth is recognized equally to eve-

ryone: no person stands above or below others. It is formal worth that is recognized to persons by international declarations, conventions and national constitutions. Therefore, person's right to dignity at this level "does not depend on person's sex, race, social status and lifestyle" because this, as mentioned above, is not a recognition of individualized worth but only a recognition of a formal permission to acquire it to a person. I.e. a person may take up any activity (performance of duties) not banned legally, thereby create existential means, exchange them with a neighbor on the grounds of equivalency and thus form one's individual social worth, the content of which shall consist not of biological person's properties but of services provided to a neighbor based on such biological properties.

This right at level of capacity may neither be taken away nor lost because it does not give to a person any particular good; it only gives a permission to create such good or acquire it through exchange. The society itself is interested in granting such permission to a human being because it is important for the society that the person would develop as useful (valuable) personality, both for himself or herself and the society taking the following assumptions into consideration: life, health, freedom... Limiting, inhibiting this permission (right) would mean preventing of person's possibilities to develop one's ability to live properly (under conditions of peace and cooperation) and thereby increase the general level of society's humanity.

But if the person for whom general (formal) worth has been recognized is still requested to use permissions (rights) for performance of appropriate duties, it shows that general worth of the person is insufficient because it is recognized for a person prior to him or her taking up any activity and does not depend on the social content of the activity: whether the activity is aggressive or respectful towards another persons. It is only the worth of a passive human being granted for another person based on a fact that this human being has been born in a civilized society. Meanwhile, the right to dignity relates to the worth of an active person (using the rights and performing appropriate duties). And the worth of an active person must be something more than the formal worth and that "more" may not appear from anything else but from the person's positive actions in respect of neighbors that increase and specify the general worth of a person.

The right to dignity in terms of subjective right. The unity of rights and duties is a legal formula of human dignity

The right to dignity in terms of a subjective right is absolutely different because it implies realization of the right to dignity at the level of capacity, i.e. the necessity for the person himself or herself to create his or her individualized, therefore, purposeful and differentiated social worth by performing duties and to acquire the subjective right in respect of it. Such self-creation demands for person's purposeful worth to be derived from person's ability to live properly in a society following specific values.

But what does the person have to be suitable for to make the society provide him or her with more than formal recognition of the person as a subject of law in general commits the society and to have the person acquire proper reason to feel such worth and the cause of it?

a) ***A duty is the source of individualized social worth.*** Because a human being is a social being (lives in a society and it is only the society where he or she maintains his or her identity), his or her social suitability cannot express itself in anything but the person's ability to live in harmony with his neighbors. And only those who use rights (permissions) for performance of appropriate duties are suitable for such harmony, which comprises of restraining from actions that may cause danger to neighbors and use of services provided by other persons by means of equivalent exchange.

However, performance of duties does not automatically by itself create person's individualized social worth.

b) ***Only performance of free person's duties creates human dignity.*** For the process of acquiring dignity it is important whether, by fulfilling duties, the person acquires the proprietary right to the good that he or she has created. Moreover, it is important whether that is the right protected from other persons' infringement to gratuitously use or convert it. If performance of duties does not create such right, then it does not increase person's social worth either. In case results of performance of duties can be gratuitously used by other persons, they are not valued by those other persons, therefore the performer of the duties is not valued as well. An opportunity emerges for other human being to treat the performer of duties (to be precise – obligations) not as the target but as the means for implementation of targets set by those persons or the state. Other persons using the services provided by such person are not reciprocally committed in his or her respect or are committed out of proportion. Somebody who does not commit reciprocally is of smaller or no value at all. Such performance of duties starts to deny and enslave the performer of duties instead of increasing his or her human worth. This helps to understand why in history a slave, a villain or a subordinate of totalitarian regimes was neither valued nor considered respectable despite being turned into performers of duties to their masters or the state. Performance of duties did not create appropriate subjective rights for the performer to request performance of duties from other persons, therefore it was negation of worth instead of increase of worth (dignity). It could also be considered enslavement of worth instead of liberation of the performer of duties.

Meanwhile those that are committed to reciprocal services understand the difficulty and complexity of performance of duties, the results of which he or she has used. Thus based on that awareness, a person starts to appreciate and value those to whom he or she has to provide reciprocal services. Thereby, the social worth of the duties' addressee is increased. Individuals participate in creation of each other's dignity through reciprocal services.

Therefore only dignity of a free person can be discussed because only performance of duties executed by such a person creates individual social worth as the new social and psychological reality. Furthermore, it creates the subjective right to request similar reciprocal services from other persons or the state, which uses the results of performance of duties executed by this person and thereupon treat the performer of duties as an addressee of reciprocal duties and a social virtue. This means that subjective right acquired by a free person to the good created through performance of one's duties and in order to appropriate a degree of social worth is also characteristic of the meaning of a proprietary

right. I.e. nobody can use the results of performance of a person's duties without permission of the performer in question and free of repayment in reciprocal services. Namely, the possibility to acquire the subjective proprietary right to the values created by performance of duties and to maintain it in exchange relations renders meaning and value to the performance of duties, turns it into source of human dignity as individualized social worth, gives a reason for such person to consider oneself as worthy and request appropriate respect from society that he or she has provoked by expressing one's actual respect for that society (by performance of duties). At this point all that the society can do is recognize personal proprietary right to a person's degree of individual worth that he or she has created by the performance of duties. This new social and psychological reality created by the person himself or herself to increase the person's self-creation (socialization) turns into a reason for value-related differentiation of persons (in terms of suitability to live in a society). This is a proof that society does not and cannot grant differentiated social worth to human beings; all it can do is record it socially and commit in respect of that worth. It also proves that the right to dignity is characteristic of the meaning of the proprietary right. If there is no proprietary right, there is no dignity and the right to dignity.

This leads to a conclusion that neither person's rights, nor his or her duties separately create dignity as an individualized meaningful social worth; it is their unity that makes all human rights rational and comprehensible and places a human dignity into individual, meaningful, dynamic social and legal category: dignity is created and increased through performance of duties and is reduced and lost by using rights without performance of appropriate duties, i.e. threatening the rights of other people.

It means that only those can be considered as suitable to live in a society, who render the form of rights' and duties' unity for their behavior, which means realization of mutual benefit. A person behaving in this way is treated as socially useful and therefore valuable (helping or not disturbing other people in realizing their own rights) by the society (other persons), and the person himself or herself understands this worth as recognition of his or her suitability to live in a society.

Thus, the increase of a person's social worth created through performance of one's duties becomes **an object of the right to dignity**, and the protection of the worth created turns the person's relation to society into the subjective right to dignity.

This means one more independent human right should appear in the catalogue of human rights – the right to dignity appears next to the rights existing on the grounds of persons' general (formal) worth.

Human dignity is a unity of objective and subjective features. Derivation of the right to dignity from performance of duties shows that human dignity cannot be only a subjective category (willful aspiration of own worth) because suitability to live in a society demands that the person himself or herself can neither identify nor change, all he or she can do is accommodate to them, thereby proving his or her suitability to live in this society. This accommodation, as it has been mentioned, can only take place by performance of appropriate duties – creation of goods meaningful both for oneself and for the society. Therefore, at this point it is not enough to introduce oneself as respecta-

ble (worthy); one's necessity (worth) must be constantly proven to others by creation of meaningful goods and participation in equivalent exchange. Hobbes, who is cited non incidentally, wrote that *"And as in other things, so in men, not the seller, but the buyer determines the price. For let a man, as most men do, rate themselves at the highest value they can, yet their true value is no more than it is esteemed by others."*⁹

This means it should be said that in terms of dignity, the person is not valuable by himself but only in respect to other people and by providing of services beneficial for other persons' needs; other people value him or her as a provider of services, a colleague and a respecter of a foreign right. Therefore taking a person away from his or her lifestyle (performance of duties) would mean taking him or her away from personal ability to participate in relations of an equivalent exchange, i.e. from the ability to live in harmony with a neighbor. This kind of dignity would become mystic, unrecognizable and basically worthless.

Performance of duties and real good created thereby defines the objective base of dignity. The subjective proprietary right of the creator to that good is the subjective feature of dignity because it forces other people who want to use that good to commit in response, i.e. to recognize the worth of the good and of the creator by action instead of word. Therefore property, the size of salary or pension acquired through performance of duties is at the same time a material expression of individualized worth. Such worth is actually recognized by the society, differentially certifying the quality and scope of duties performed by the owner of the property in respect of a neighbor. This scope of duties becomes a reason to receive services of the same scope in return; such services are a material expression of the public recognition. Thus, a person understands why he or she is useful both for himself or herself and the society and how those other persons externally express (repay) the recognition of his or her worth. Such awareness allows him or her evaluate oneself properly and thus "uplift" in sense on value. By creating publicly meaningful thorough performance of duties, a person creates his or her dignity as an object of the subjective right to dignity.

"You will be what you will make yourself." Dignity created by human cultural activity was also discussed by the Renaissance tradition that is related to the work called *"Oration on the Dignity of Man"* presented by a great thinker of the time, Giovanni Pico della Mirandola. Mirandola understood human dignity (worth) as social reality created expressly by the person himself or herself. He did formally recognize the Christian tradition on the divine origin of a man but explained it taking the needs of the time into consideration, i.e. following the general approach to a man as creator of his happiness, destiny and individualized social worth. The divine creation of man is never finished; the man has to constantly create oneself and his specific historical forms of humanity (worth). God was saying: *"We have given you, O Adam, no visage proper to yourself, nor endowment properly your own, in order that whatever place, whatever form, whatever gifts you may, with premeditation, select, these same you may have and possess through your own judgment and decision. The nature of all other creatures is defined*

9 Hobbes T., p.104.

*and restricted within laws which We have laid down; you, by contrast, impeded by no such restrictions, may, by your own free will, to whose custody We have assigned you, trace for yourself the lineaments of your own nature. I have placed you at the very center of the world, so that from that vantage point you may with greater ease glance round about you on all that the world contains. We have made you a creature neither of heaven nor of earth, neither mortal nor immortal, in order that you may, as the free and proud shaper of your own being, fashion yourself in the form you may prefer. It will be in your power to descend to the lower, brutish forms of life; you will be able, through your own decision, to rise again to the superior orders whose life is divine.”*¹⁰

Every person is invited to take up various duties and through their performance to increase one’s individual social worth with no limits attached (“*through your own decision, to rise again to the superior orders whose life is divine*”) or, in case of avoiding the duties, to reduce it (“*to descend to the lower, brutish forms of life*”). It is a hypothesis of dignity as a dynamic category.

The unity of rights and duties demystifies human dignity. Human dignity explained through the unity of rights and duties may be an additional proof of the fact that human dignity is of social and cultural origin. It is not an “inborn” nor a granted feature, it is a relation based by social value that originates from equivalent exchange of services performed by persons with equal rights. If dignity is a legal category, not a legitimate category, then law protecting it must only take a form of the equilibrium between rights and duties. Its source must be the cultural life of the person, and social conditions – person’s freedom and proprietary right to the publicly meaningful good created through performance of duties (cultural activity). Only within dependent societies person’s right to dignity may be a purely legislative category as it can be granted as a privilege by law. In terms of worth, a person is distinguished from the circle of other individuals not by merits but on the grounds not related to personal cultural activity (background, party-favor, level of nationality...).

Therefore statements claimed by authors who think that “dignity is granted (*ausgestattet*) to every human being irrespective of sex, race or nationality as well as lifestyle”¹¹ should not be taken for granted. The fact that human right to dignity at capacity level does not depend on race, sex, nationality and even on lifestyle is comprehensible and we have just proved it. But it would be absolutely impossible to understand whether this approach is also applied to the subjective right to dignity because it would be unclear how this right can “depend on lifestyle.” It should be noted that “lifestyle” is nothing more than relation of one person with other people: the fact whether the person commits crimes or leads an honest life has essential importance to the degree of a person’s suitability and his or her individualized social worth. Dignity should not be affected only by lifestyle matters, such as whether a person drinks tea or coffee in the morning because this cannot neither help, nor harm other people. If the right to dignity existed next to lifestyle in general, it would not be possible to define it based on person’s suitability

10 Della Mirandola, G. P. *Oration on the Dignity of Man. Reader of philosophy history. Renaissance.* Vilnius: Mintis, 1984, p. 123-124.

11 Richter H. P., p. 75.

to live in a society. *After all, lifestyle is nothing more than a way of a person's specific existence in a society.* It is important how a person exists in that society – in a peaceful or an aggressive way. Next to the society and lifestyle, a human being can neither be respectable nor unrespectable because there is no reason for such distinction.

Dignity as foundation legitimating and creating the system of human rights. The Helsinki Final Act 1975 says that human rights “derive from the inherent dignity of the human person”, and “recognition of dignity (...), equal sovereign rights shall be foundation for freedom and justice.”¹² It means that here, an attempt is made to qualify dignity as foundation of all human rights. But it can exist in such form only if human dignity is understood as person's suitability for harmony and cooperation, in other words, if human rights themselves are treated as social, as well as individual good. Only thus understood person's social suitability may encompass all human rights and their legality. In this case, human right to life, health, freedom and ownership, the right to acquire qualification and other rights do not only assure personal autonomy, they also become means and conditions for the formation of human dignity. Therefore violation of the specified person's rights reduce or block the person's biological, material or qualification powers to perform duties that legalize his or her rights. Weakening of the ability to perform duties must also mean hindering the ability to properly live in a society. For example, in case of violation of human right to health (injury of a person's body), physical possibilities of the person to perform certain duties are restricted for some time, duties through performance of which the person has been proving actual suitability to live in a society. A person incapable of performing one's duties sooner or later degrades economically, e.g. is not able to pay for some utilities, and therefore is becoming aggressive, prone to conflicts and thus, less respectable and less suitable to live in a society based on equality. At the same time, he is gradually becoming more in need of social care, which means official recognition and compensation of such person's partial non-suitability.

On the other hand, if a person is using his or her main rights not for maintenance and strengthening of his or her suitability to live in a society, then legitimacy of all his rights is put in doubt. In this case violation of human rights is a fact of such person's non-suitability to live in a society in respect of a certain situation, and performance of justice is restriction of his or her subjective right to dignity. Imprisonment means recognition that the convict appeared to be disrespectful by committing crime, i.e. non-suitable to live in a society of persons loyal to law, therefore he or she, by sanction assigned by court, is transferred to the society of individuals with limited dignity (prisoners) for a certain time. Restriction of the right to freedom in this case accompanies restriction of the subjective right to dignity.

It shows that the right to dignity integrates all human rights and legalizes them only because it gives a possibility to value them in one generalizing way – person's suitability to live in a society. It creates possibilities to treat individual rights and their system as a force creating human dignity, respectively, to treat commitment of crime as a case of

12 *Human Rights. Collection of regional international documents.* Vilnius, 1993, p. 232.

person's non-suitability to live in a society and execution of justice – as restriction of the subjective right to human dignity.

Children's right to dignity in terms of unity of rights and duties. Discussing the right to dignity in terms of suitability and subjective rights, it is possible to understand, which meaning is rendered to the right to dignity when dignity of people and the disabled is taken into question, i.e. dignity of persons who cannot objectively participate in exchange relations, therefore, do not create their personalized social worth. Their right to dignity does not supersede the capacity level, i.e. does not supersede that level of worth, which originates from their recognition as objects of law in general.

Children's "dignity" is considered as such only according to that degree of their worth, which coincides with the society's obligation to protect their life, health and to realize their need for studies, and etc. I.e. the recognition of the mentioned children's needs as social values is anticipatory because they are children's biological and legal assumptions to develop their abilities to create consumable values and participate in relations of equivalent exchange in the future based on those values (i.e. to properly live in a society). Thus, the society's and a child's view on human dignity (self-evaluation) differ. A child may think that the fact that society forces him or her to go to school until the age of 16 violates his or her right and thus, humiliates his or her dignity because a child is forced to go somewhere where quite possible he or she does not want to go at the moment. Society disregards this kind of understanding of "dignity" because follows both the child's and its own perspective interests. The society needs to develop not just any kind of person; it needs a respectable person, i.e. a healthy person with qualifying, voluntary-virtuous powers assuring his or her abilities to properly live in a society following certain values. A child who avoids going to school on the grounds of protection of his or her assumed dignity and thereby acquires qualification, could become less respectable against his or her will in the future because he or she would appear to be less capable of performing more complicated duties and therefore would be less suitable to live normally in a society based on exchange relations. Therefore, his or her dignity would be humiliated in much more painful ways because such person could find fewer situations where he or she could meaningfully prove to others his or her worth.

The fight of the disabled for integration into society is a fight for the right to participate in creation of one's individualized social worth (dignity). Distinction of two levels of human social worth explains the question why the disabled are not content with the formal worth recognized in their respect. The disabled seek integration into society and understand it as retrieval of the ability to perform accessible duties and thereby, to create their individual social worth. They understand that social allowances do not create human dignity but only guarantee that level of human dignity (worth), which originates from recognition of a person as an object of law in general. I.e. their right to life, health and other essential goods without which a personality would not exist are assured at minimum level. The right to dignity of a person incapable of performing duties remains at capacity level and may never become the subjective right. Therefore, integration of the disabled into society allows them to come back to exchange relations based on mutual performance of duties.

Conclusions

1. The article critically analyzes the conservative conception of passive or static human dignity in accordance with which human's value is seen as value coming from the exterior (from God or from a biological human's nature), or value seen as existing *per se*. In opposition to this conception, a conception of active or created dignity is being developed, which aims at treating human's dignity not like a social relationship, but rather like a person's individual ability to live properly in the society (participate in barter relations on the ground of equivalence) and using this propriety to create own individual social value (dignity), as a personal contribution towards maintenance of concord and collaboration in the society.

2. Consequently, there are two levels of person's social value:

- a) **General or passive one, which results from the right of any person to be acknowledged as a subject** (it has been considered as human's dignity so far); each person reaches this level of value without any efforts besides barter relations; it is common to all persons because it is coincident with state (social) acknowledgment of right to life, health, freedom, person's inviolability for every and each person, and etc. Moreover, it consists with the state's commitment to protect these rights in case of their infringement; acknowledgement of the same rights for everybody presumes equal value of all persons. However, this value is just a mechanical generalization of the above-mentioned rights and, consequently, a person receives nothing besides those rights, and if does not involve any new social-psychological reality, which may exist besides the above-mentioned goods and which could become a separate object of the right to dignity. Therefore, there is no reason to differentiate persons in accordance with their value. However, if speaking about dignity we mean something more than the above-mentioned rights as a whole and if the right to dignity is treated as a separate, independent right besides the right to life, health, freedom, and etc., this logic obliges us to associate dignity with a person's cultural activity (fulfillment of his obligations). Thus it could be claimed that general person's value is not dignity itself because it is just a legal assumption of its emergence.
- b) **Individualized or active social value of a person**, which is created by a person himself/herself for fulfillment of his/her obligations to family members, but only in such a case, which obligates other persons (the society) to provide reciprocal obligations. Fulfillment of obligations really proves that the person properly lives in the society and on this base he/she creates his/her individual social value. This person's value is a new social, psychological reality created by the person himself/herself, like a growth of person's social utility (getting more social), which becomes a base for differentiating persons in accordance with their value (in terms of their suitability for living in the society). With such subdivision of own value, the person has the reason to require an official authorization (right) from the society to appropriate this social reality, which has been created by himself/herself, and which he or she wants to rely on as his/her own individu-

al social value or, if speaking in short, as dignity (valuable self-raise), and to require the society to acknowledge this social reality created by himself/herself and to behave properly in terms of him/her. With fulfillment of own obligations, subdivision of own social value created by a person becomes an object of the right to dignity, while due to its usage, the relation between the person and the society is the right to dignity. Therefore, on the basis of the person's cultural activity, another individual human right is determined in the catalogue of human rights – the right to dignity appears besides other rights, which have existed on the base of person's value.

3. By specifying the right to dignity, it is determined in terms of capacity and subject law. In the first case, the right to dignity is an authorization, which the society (state) gives to a person, to be in the society and based on his/her own ability to live properly (not aggressively) in it. It is a permission, as it was said above, emerging from acknowledgement of a person's right as a subject as a whole. Therefore, in accordance with the right to dignity at capacity level, all persons are equal (considered to be equally valuable). In the second case, the right to dignity is an authorization to a person to make a use of that individualized social value, which the person has created by fulfillment of his/her own obligations in favour of other people and therefore, he or she has obtained the right to require the society to acknowledge him or her, and to behave adequately in terms of him/her. Fulfillment of own obligations and its quality become a reason for differentiating social value of persons, for emerging of a conception of person's individualized value, as well as for differentiated public acknowledgment of this value.

4. Thus, the unity of rights and obligations emerges as a legal formula of the subjective right to dignity, which proves that dignity is not just a social but also a legal category (it determines not only what dignity is, how it emerges and develops, but also what form of behavior it may take).

5. Social value of children and disabled people, who objectively are not able to participate in barter relations, does not exceed the value, which emerges from the right to be acknowledged as subjects as a whole. It also defines why disabled people are not satisfied with this and strive to integrate into the society, i.e. strive to get back to barter relations (to give their behavior some sort of a form, which balances their rights and obligations) and with this return, to create their own individualized social value (dignity). Social allowances do not create any person's dignity and just guarantee such level of a person's value, which emerges from acknowledgment of the right to live, health, and inviolability.

6. This is the reason for claiming that dignity is first of all a conception of personalized and not common value, and it does not exist outside barter relations. This is not just any person's value, but only the value, which is created by the person himself/herself by the fulfillment of obligations in favour of other people, which obligates other persons to commit to reciprocal obligations.

7. The main weakness of the conservative conception of dignity is that it makes human's dignity independent of person's cultural activity, and consequently it devalues this activity and the conception of dignity itself becomes dogmatic and mystic.

References

- Balzer, P.; Rippe, K. P.; Schwaber P. *Menschenwürde versus Würde der Kreatur*. Freiburg-München, 1998.
- Benda, E. Erprobung der Menschenwürde als Problem der sozialen Wirklichkeit. *Aus Politik und Zeitgeschichte*. 1985, 3.
- Brugger, W. *Menschenwürde, Menschenrechte, Grundrechte*. Baden-Baden, 1997.
- Godność człowieka jako kategoria prawa*. Complak, K. (ed.). Wrocław, 2001.
- Decree No. 1 of the Senate of the Supreme Court of Lithuania (1998.V.15). *Teismų praktika*. 1998, 9: 52.
- Della Mirandola, G.P. *Oration on the Dignity of Man. Reader of philosophy history. Renaissance*. Vilnius: Mintis, 1984, p. 123-124.
- Edelman, B. La dignité de la personne humaine, un concept nouveau. *Droit*. 1997, 1.
- Hobbes, T. *Leviathan*. Vilnius: Pradai, 1999, p. 104.
- Human Rights. Collection of regional international documents*. Vilnius, 1993, p. 232.
- Философская энциклопедия* Т. 2. [Encyclopedia of philosophy, Volume 2]. Москва, 1962, c. 58.
- Jablonski, M. *Pojęcie i ochrona godności człowieka w orzecznictwie organów władzy sądowniczej w Polsce. Godność człowieka jako kategoria prawa*. Wrocław, 2001, p. 295-296.
- Kettner, M. Menschenwürde als Begriff und Metapher. *Hamburger Institut für Sozialforschung Diskussionspapiere*. 1994, January.
- Richter H. P. *Juristische Grundkurse*. Band 20. 2007.
- Segado, F. F. *Godność człowieka jako najwyższa wartość porządku prawnego w Hiszpanii. Godność człowieka jako kategoria prawa*. Wrocław, 2001.
- Schultz, I. Soll die "Würde des Menschen" politisch oder philosophisch begründet werden? *Hamburger Institut für Sozialforschung Diskussionspapiere*. 1994, January.
- Zenthöfer, J. *Rechtsphilosophie*. Berlin, 2001, p. 75.

ŽMOGAUS ORUMAS IR TEISĖ Į ORUMĄ TEISINIO PERSONALIZMO
KONTEKSTE (NUO STATIŠKO ORUMO IKI DINAMIŠKO
ORUMO KONCEPCIJOS)

Alfonsas Vaišvila

Mykolo Romerio universitetas, Lietuva

Santrauka. Šiame straipsnyje pateikiama kritinė statistiško žmogaus orumo koncepcija, pagal kurią žmogaus vertė yra laikoma verte, kurią suteikia išorė (Dievas ar biologinė žmogaus prigimtis), arba per se egzistuojanti vertė. Priešingai šiai, formuojama aktyvaus ar sukuriamo orumo koncepcija, kurios šalininkai vertina žmogaus orumą ne kaip socialų santykį, bet kaip asmens individualų sugebėjimą tinkamai gyventi visuomenėje (dalyvauti mainų santykiuose lygiavertiškumo pagrindu) ir pasinaudojant šiuo tinkamumu kurti individualią socialinę vertę (orumą) kaip asmens indėlį palaikant santarvę ir bendradarbiavimą visuomenėje.

Pagrindinis konservatyvios orumo koncepcijos trūkumas yra tai, kad žmogaus orumas suvokiamas kaip nepriklausomas nuo asmens kultūrinės veiklos, taigi ši veikla yra nuvertinama ir pati orumo koncepcija tampa dogmatiška ir mistinė.

Straipsnyje daroma išvada, kad orumas visų pirma yra koncepcija, susijusi ne su bendra, bet su personalizuota verte, ir jis neegzistuoja už mainų santykių ribų. Tai nėra bet kurio asmens vertė, bet tik vieno asmens vertė, kurią sukuria pats asmuo, vykdydamas savo pareigas kitų asmenų atžvilgiu, o tai įpareigoja kitus asmenis vykdyti atsakomuosius įsipareigojimus.

Reikšminiai žodžiai: žmogaus orumas, teisė į orumą, teisinis personalizmas, žmogaus orumo koncepcija, pasyvus orumas, statiškas orumas, aktyvus orumas, dinamiškas orumas.

Alfonsas Vaišvila, Mykolo Romerio universiteto Teisės fakulteto Teisės filosofijos katedros profesorius, habilituotas daktaras. Mokslinių tyrimų kryptys: teisės teorija, teisinės valstybės raida, Lietuvos dvarų istorija, filosofinė žmogaus samprata ir ugdymo idealas.

Alfonsas Vaisvila, Mykolas Romeris University, Faculty of Law, Department of Philosophy of Law, professor. Research interests: theory of law, development of legal state, history of Lithuanian manors, philosophical conception of human and ideal of education.