
Human dignity and public law

We live in a legal world in which the idea of human dignity is everywhere invoked and everywhere contested.

As a matter of *constitutional practice*, in the decades since the end of World War II, human dignity has emerged as the organizing idea of a groundbreaking paradigm in public law.¹ In jurisdictions around the world, human dignity is invoked as a right or value that imposes an overarching obligation on all public authority,² as the underlying basis of

¹ Arthur Chaskalson, “Human Dignity as a Foundational Value of Our Constitutional Order,” *South African Journal on Human Rights* 16 (2000): 196: ‘The affirmation of human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the second world war.’ On the connection between human dignity and postwar constitutionalism, see 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; Judge Christian Byk, “Is Human Dignity a Useless Concept? Legal Perspectives,” in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, ed. Marcus Düwell (Cambridge: Cambridge University Press, 2014), 362–7; Paolo G. Carozza, “Human Dignity in Constitutional Adjudication,” *Comparative Constitutional Law*, ed. Tom Ginsberg and Rosalind Dixon (Cheltenham: Edward Elgar, 2011), 459; C.J. Friedrich, “The Political Theory of the New Democratic Constitutions,” *Review of Politics* 12 (1950): 217; Catherine Dupré, “Human Dignity in Europe: A Foundational Constitutional Principle,” *European Public Law* 19 (2013): 319–40; Matthias Mahlmann, “Human Dignity and Autonomy in Modern Constitutional Orders,” in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 371–5; Lorraine Weinrib, “Human Dignity as a Rights-Protecting Principle,” *National Journal of Constitutional Law* 17 (2004): 325–45.

² Basic Law of the Federal Republic of Germany, 1949, article 1(1) [hereinafter Grundgesetz]. See also Armenia, 1995, article 14; Bulgaria, 1991, article 4(2); Dominican Republic, 2010, article 38; Greece, 1975, article 2(1); Peru, 1993, article 1; Poland, 1997, article 30; and Sweden, 1974, article 2. See also Paolo G. Carozza, “Human Rights, Human Dignity, and Human Experience,” in *Understanding Human Dignity*, ed. Christopher McCrudden (Oxford: Oxford University Press, 2013), 620; Aharon Barak, “Human Dignity: The Constitutional Value and the Constitutional Right,” in *Understanding Human Dignity*, 361–80.

constitutional rights,³ as an interpretive principle for determining the protections that particular constitutional rights afford,⁴ as a constraint on the kinds of constitutional amendments that may be lawfully enacted,⁵ and as a standard against which limitations of constitutional rights must be justified.⁶ From the standpoint of constitutional practice, the significance of human dignity cannot be overstated.⁷

As a matter of *constitutional theory*, however, the idea of human dignity remains enigmatic. When human dignity is the subject of theoretical exploration, it typically arises within the context of religious or philosophic worldviews formulated in abstraction from constitutional concerns. This leaves the idea open to the charges that it is empty or dangerous: either it lacks resources for resolving constitutional disputes or the resources that it brings are hostile to the very rights and freedoms that a just constitutional order seeks to secure. Consequently, a chasm separates the practice of modern constitutionalism from the prevailing theoretical approaches. In this context, this new paradigm in constitutional governance has had to develop not merely without a guiding theory but also in opposition to established theoretical frameworks.

The purpose of this book is to formulate a general theory of public law that not only captures the distinctiveness of modern constitutional practice, but also delineates the obligation of all states to bring themselves

³ Armenia, 1995, article 14; Grundgesetz, article 1; Kenya, 2010, article 19(2); Kosovo, 2008, article 23; Poland, 1997, article 30; *S. v. Makwanyane and Another* (1995) 3 SA 391 (CC), para. 328. In the Canadian context, see, for example, *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, para. 120; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, para. 76.

⁴ Dieter Grimm, “Dignity in a Legal Context: Dignity as an Absolute Right,” in *Understanding Human Dignity*, 385. See also Stu Woolman, “The Architecture of Dignity,” in *The Dignity Jurisprudence of the Constitutional Court of South Africa*, 87.

⁵ Grundgesetz, article 79(3); Angola, 2010, article 236; Greece, article 110(1). See also Yaniv Roznai, “Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea,” *American Journal of Comparative Law* 61 (2013): 684–5 and 692 (describing human dignity as a judicially recognized constraint on constitutional amendments in Peru and India).

⁶ Drucilla Cornell and Sam Fuller, “Introduction,” in *The Dignity Jurisprudence of the Constitutional Court of South Africa*, 19; *R. v. Oakes*, [1986] 1 SCR 103, para. 64.

⁷ *S. v. Makwanyane and Another*, para. 328: ‘The importance of dignity as a founding value of the new Constitution cannot be overemphasised.’ On the centrality of dignity in German constitutional law, see *Lüth*, 7 BVerfGE 198, 205 (1958): ‘[T]his value system, which centers upon the dignity of human personality developing freely within the community, must be looked upon as fundamental constitutional decision affecting all spheres of law.’ Translated in Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 2012), 444.

within its parameters. The animating idea of this theory is human dignity, conceived of in terms of the right of each person to equal freedom. By systematically unpacking the normative, institutional, and doctrinal ramifications of this simple idea for the public law relationship between rulers and ruled, a theory illuminating modern constitutional practice materializes.

By *modern constitutional practice*, I refer to the sum of conditions that legal systems in the postwar era have introduced to make the exercise of public authority accountable to the human dignity of all who are subject to it. These conditions include a constitution that establishes the terms for the lawful exercise of all public authority; a set of constitutional rights that bind all branches of government; an accessible judicial body authorized and obligated to respond to constitutional complaints by reviewing the conformity of government conduct to constitutional norms; substantive constraints on the amending power that preserve the essentials of the constitutional order; and doctrines that determine both the protections that constitutional rights afford and the limits to which rights are subject in reference to the overarching idea of human dignity. Together these conditions create, sustain, and refine a legal order in which the human dignity of each person forms a justiciable constraint on the exercise of all public authority.

At issue in this book is the idea that justifies and guides modern constitutional practice. As I argue below, this idea is captured neither by the meanings that have, as a historical matter, been associated with the word *dignity* nor by the meanings that various philosophic traditions attribute to this term. Just as the word can appear in the absence of the idea, so too the idea can appear in the absence of the word. It is therefore not surprising that some are eager to reject *human dignity* as a superfluous notion that can be expressed using more familiar and less exalted terminology. But even if one acknowledges that there are other ways of referring to the idea, the task of explaining the connection between the idea and the constitutional practices that invoke it remains. It is to the challenge of expounding this connection that I now turn.

1.1 Dignity's dilemma

A dilemma awaits any constitutional theory that appeals to the idea of human dignity. This dilemma stems from the fact that the idea can be

formulated as either a concept or a conception.⁸ Each possibility brings its own difficulty.⁹

In constitutional jurisprudence, the *concept* of human dignity usually refers to the constraint that the intrinsic worth of each free and equal person imposes on how individuals may be treated. If the virtue of the concept is that it is relatively uncontroversial, its vice is that it is uninformative: it offers no account of what exactly human dignity consists in or what kind of treatment human dignity requires, prohibits, or permits. Thus, human dignity has been called a ‘vacuous concept’ bereft of any boundaries,¹⁰ a subjective idea that varies ‘radically with the time, place, and beholder,’¹¹ an indistinct idea that ‘masks a great deal of disagreement and sheer confusion,’¹² a noble sentiment that ‘can have no place in an attempt at rational persuasion,’¹³ and an ‘impossibly vague’¹⁴ idea that fails to ‘provide a universalistic, principled basis for judicial decision-making in the human rights context.’¹⁵ In the eyes of its critics, the concept is too hollow to fill the constitutional jurisprudence that invokes it.¹⁶

To render the *concept* of human dignity determinate, other scholars have developed *conceptions* of human dignity. These conceptions invariably appeal to some religious or philosophic worldviews to make the case that human beings have intrinsic worth and to set out the beliefs that they should affirm and the conduct that they must undertake. Such

⁸ On the distinction between a concept and a conception, see John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 5–10.

⁹ Here I follow Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights,” *European Journal of International Law* 19 (2008): 679–80.

¹⁰ Mirko Bagaric and James Allan, “The Vacuous Concept of Dignity,” *Journal of Human Rights* 5 (2006): 269.

¹¹ Stephen Pinker, “The Stupidity of Dignity,” *The New Republic* (May 28, 2008).

¹² Rosen, *Dignity: Its History and Meaning* (Cambridge: Harvard University Press, 2012), 67. For a similar view, see Dennis Davis, “Equality: The Majesty of Legoland Jurisprudence,” *South African Law Journal* 116 (1999): 413 (criticizing the South African Constitutional Court for affording ‘dignity both a content and a scope that make for a piece of a jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer’).

¹³ Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), 6. But see 79.

¹⁴ McCrudden, “Human Dignity and Judicial Interpretation of Human Rights,” 723.

¹⁵ *Ibid.*, 655.

¹⁶ For an early formulation of this attack on dignity as a concept in ethical philosophy, see Arthur Schopenhauer, *The Basis of Morality*, trans. Arthur Brodrick Bullock (New York: MacMillan, 1915), 101 (denouncing the conception of human dignity that appears in Kantian ethics as ‘hollow hyperbole’ and the ‘shibboleth of all perplexed and empty headed moralists’).

conceptions can be found in the Jewish, Catholic, and Islamic religious traditions, as well as in various philosophic frameworks.¹⁷ While such conceptions of human dignity are sometimes challenged for lacking the determinacy necessary to resolve constitutional disputes,¹⁸ they would generate a serious problem even if they were perfectly determinate.

This problem is that these conceptions of human dignity inevitably clash with the very concept that they purport to explicate. These conceptions typically proceed by, first, identifying the kinds of beliefs and actions that make up a good or valuable life and, then, enlisting the coercive authority of the state to bring them about. The illiberalism of leading conceptions thereby comes into conflict with the liberal commitments of the concept to the freedom and equality of each individual.¹⁹ These conceptions violate freedom by compelling individuals to conform to a particular conception of the good life. These conceptions violate equality by elevating what some persons understand to be the good life into a standard that others are forced to follow. Instead of specifying the liberal concept of human dignity, they subvert it.

Thus, whether defenders of the idea of human dignity appeal to a concept or a conception, a difficulty ensues. For some, the concept of human dignity is empty; it offers no resources for resolving concrete constitutional disputes. For others, conceptions of human dignity are dangerously illiberal; they violate the concept of human dignity by

¹⁷ For an overview of various conceptions of human dignity, see Anne Hughes, *Human Dignity and Fundamental Rights in South Africa and Ireland* (Pretoria: Pretoria University Press, 2014), 36–49, and Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, forthcoming), ch. 2.

¹⁸ Rosen, *Dignity: Its History and Meaning*, 9.

¹⁹ On the appropriation of the term *dignity* by proponents of illiberal ideologies, see Rosen, “Dignity: The Case Against,” in *Understanding Human Dignity*, 152 (asking ‘how could it be legitimate for democratic societies, in which the fact of moral pluralism appears to be fundamental, to plump for either one of these controversial comprehensive moral theories and impose it on their citizens?’); Pinker, “The Stupidity of Dignity” (responding to those who, in the biomedical context, conceive of dignity in terms of a religious comprehensive doctrine by emphasizing that a ‘free society disempowers the state from enforcing a conception of dignity on its citizens’); and Horst Dreier, “Human Dignity in German Law,” in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, 383 (warning against the dangers of paternalistic misconceptions of human dignity, which pit the concept ‘against its actual foundations, namely, individual autonomy and self-determination over one’s own life and the way it is lived. [Human dignity] then mutates from a promise of freedom and equality for all persons into a rule giving the state the power to intervene in people’s lives. This would lead to the opposite of what was intended’).

subjugating the freedom and equality of individuals to some higher cause. Each of these possibilities poses a fundamental challenge to modern constitutionalism. If human dignity is an empty notion, then constitutional jurisprudence that relies on it must be a sham.²⁰ If human dignity subordinates freedom and equality to a particular conception of the good life, then the idea stands in opposition to the very rights that modern constitutionalism seeks to secure.²¹

Accordingly, the question that any theory of modern constitutional practice must answer is clear: Can an account be formulated that refrains from violating the freedom of persons to determine their own commitments, whether religious, philosophic, or otherwise, and that nevertheless possesses the resources to explain how the idea of human dignity directs the resolution of constitutional disputes? The same question can be put in terms of the dilemma to which it responds: What would a conception of human dignity look like that adhered to the liberalism of the concept? This book offers an answer to this question.

On the one hand, I develop an account that sidesteps the illiberalism of prominent *conceptions* of human dignity. Proceeding from a concept of human dignity evident in modern constitutional practice,²² I reject the view that human dignity concerns the relationship between an individual and some particular end – whether religious or philosophic – to which his or her thoughts and actions must conform and that the state would be

²⁰ Ibid.

²¹ On this point, see Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, ch. 7; *R. v. Morgentaler*, [1988] 1 SCR 30, 166, Wilson J.: ‘The idea of human dignity finds expression in almost every right and freedom guaranteed in the [*Canadian Charter of Rights and Freedoms*]. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.’

²² See, for example, Drucilla Cornell and Sam Fuller, ‘Introduction,’ in *The Dignity Jurisprudence of the Constitutional Court of South Africa*, 14 (attributing to Justice Ackermann the view that freedom is the ‘ordinary right of all human beings, and therefore the basis of their dignity’). On the general right to freedom, see Edward J. Eberle, ‘Human Dignity, Privacy, and Personality in German and American Constitutional Law,’ *Utah Law Review* (1997): 965 (arguing that ‘each person should be free to develop his own personality to the fullest, subject only to restrictions arising from others’ pursuit of the same’). See also Christoph Enders, ‘A Right to Have Rights – The German Constitutional Concept of Human Dignity in German Basic Law,’ *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* 2 (2010): 4.

justified in coercively enforcing. Instead, the concept concerns the equal right of each person to freedom. As free, each person has the right to determine the purposes that he or she will pursue. As equal, each person has a duty to pursue his or her purposes in a manner that respects the right of others to freedom. Taking these aspects together, human dignity means that no one may rightfully compel you to direct your freedom to a purpose that is not your own. If this concept of human dignity forms the organizing idea of public law, then the basis and boundaries of public coercion must be reconsidered. Any exercise of public authority – indeed, public authority itself – would have to be justified in terms of its fidelity to the equal right of each person to freedom. A legal system that operated in accordance with this idea would ‘be in keeping with the purest liberalism’ insofar as the persons within it would not be ‘coercible by any ancestral tradition, being vassals neither of their race, nor to their religion, nor to their condition of birth, nor to their collective history.’²³

On the other hand, I offer an account that explains how the *concept* of human dignity gains the specificity to guide the development of constitutional jurisprudence in jurisdictions around the world. Critics of human dignity attack the concept for failing to provide a ‘clear test or set of criteria that leads from fundamental value to appropriate action – something to compete with the simple maximizing principle of utilitarians.’²⁴ The utilitarian theory of the good represents one way of proceeding from an abstract principle to a determinate moral conclusion. That theory begins by positing a principle – bring about the greatest happiness of the greatest number – and then explores how this principle can be most fully realized in the circumstances in which we find ourselves. The more knowledge one has about these circumstances, the more determinate guidance the theory provides.

The conception of human dignity that I elaborate introduces determinacy in a different way. I begin with the abstract concept of human dignity as independence, that is, the right to interact with others on terms of equal freedom. Instead of following the utilitarian approach by applying this concept directly to the contingent circumstances that experience presents, the theory develops the concept into an increasingly determinate conception as the argument progresses through a series of sequenced stages. I will refer to these stages as *dimensions*. Each

²³ Pierre Elliot Trudeau, *The Essential Trudeau*, ed. Ron Graham (Toronto: McClelland and Stewart, 1998), 80. Trudeau was the Canadian prime minister who was responsible for the constitutional reforms that brought Canada into the modern constitutional paradigm.

²⁴ Rosen, *Dignity: Its History and Meaning*, 155.

dimension distills what human dignity means for some aspect of the public law relationship between rulers and ruled. Within this sequenced argument, each dimension both presupposes and is more specific than the one that preceded it. Together, the dimensions of dignity constitute a conception that traverses public law, beginning with the most general features of the relationship between rulers and ruled and proceeding to fine-grained problems involving the institutional structure and doctrinal commitments of a modern constitutional state.

Unlike the principle of utility, human dignity is not a monolithic principle that makes the same demands of all agents in all circumstances.²⁵ The implications of the right of each person to equal freedom both justify and direct the authority of the public institutions that together comprise a legal system. These public institutions have rights that no private person possesses and duties that no private person owes. Thus within the public law relationship, what one must do reflects the position that one occupies. To understand what human dignity demands, we must attend to its dimensions.

By conceiving of the dimensions of the public law relationship between rulers and ruled as comprising a conception of human dignity, I depart from a range of conceptions in which human dignity is presented as a concept that can be fully specified without referring to the relationship between the individual and the state. Consider Christopher McCrudden's approach. On his view, the concept of human dignity emerges as an ontological claim about 'what the intrinsic worth of the individual human being consists in.'²⁶ This concept, McCrudden explains, is then specified through a further claim concerning the 'forms of treatment' that 'are inconsistent with this worth.'²⁷ Once the idea of human dignity is rendered determinate, it can then be applied to a range of subjects. Thus, he suggests that when human rights jurisprudence arose, it applied these earlier understandings of what human dignity requires to 'the relationship between the state and the individual.'²⁸ The assumption that underlies McCrudden's approach is that the concept of human dignity can be fully specified by a conception that does not refer to the public law relationship.

²⁵ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1879), 3 (c. I, 7th para.) (holding that a 'measure of government (which is but a particular kind of action, performed by a particular person or persons) may be said to be conformable to or dictated by the principle of utility, when in like manner the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it').

²⁶ McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," 680.

²⁷ *Ibid.* ²⁸ *Ibid.*

On this view, human dignity makes no essential reference to the authority of public institutions, the fundamental norms or institutional arrangements promulgated by a constitution, or the legal doctrines through which those normative commitments are brought to bear on disputes that arise contingently in experience. Of course, this is not to say that the idea of human dignity, once specified through a conception, cannot be applied to aspects of the public law relationship. Rather, it is to say that what human dignity means for public law is derivative of what human dignity would mean even if there was no such thing as public law. An exhaustive conception of human dignity need not mention public law.²⁹

This book contrasts with this approach in two respects. First, because the concept of human dignity has implications for the normative, constitutional, and doctrinal dimensions of the public law relationship, the subject matter of the conception that I offer is public law. Of course, this is not to deny that human dignity may have a central role to play in our understanding of private or international law, but to insist on its centrality to our understanding of public law. While the claim that the concept of human dignity cannot be fully explicated without engaging with public law might seem trite, it orients us away from a range of conceptions that focus on the relation of persons to something other than the state³⁰ – whether the values that a successful life instantiates,³¹ the duties that a rational will gives to itself,³² the natural world,³³ or the supernatural.³⁴

²⁹ For a parallel discussion of how utilitarians think about the relationship between law and morality, see Martin Stone, “Legal Positivism as an Idea about Morality,” *University of Toronto Law Journal* 61 (2011): 319.

³⁰ On the gulf between the constitutional meaning of human dignity and philosophic conceptions, see Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, ch. 7 (asking ‘[h]ow is it possible to base a constitutional understanding of the value of human dignity upon a philosophic view that has nothing to do with the constitutional character of that value?’).

³¹ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011), 191–218.

³² Immanuel Kant, *Groundwork of the Metaphysics of Morals*, in *Practical Philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996).

³³ See, for example, George Kateb, *Human Dignity* (Cambridge: Harvard University Press, 2011); Hubert Cancik, “‘Dignity of Man’ and ‘Persona’ in Stoic Anthropology: Some Remarks on Cicero, *De Officiis* I 105–107,” in *The Concept of Human Dignity in Human Rights Discourse*, 19–39. As one of the fathers of Germany’s postwar constitution remarked about the stoic conception: ‘Epictetus once expressed that even the slave chained to his oar was free if he had the right attitude. But, comrades, we do not want to be satisfied with this freedom of the galley slave. We do not only want the opportunity to have this inner freedom.’ Christoph Goos, “*Würde des Menschen*: Restoring Human Dignity in Post-Nazi Germany,” in *Understanding Human Dignity*, 89.

³⁴ *Genesis* 1:27; *Psalms* 8:5–6; *Ephesians* 4:24.

Second, instead of formulating a theory to justify the concept of human dignity, my argument moves in a different direction. I begin with the idea that human dignity is a *juridical* concept, that is, a concept that concerns not the public laws that happen to have been posited in a particular time and place, but the moral possibility and purpose of public law conceived of as a relationship between rulers and ruled. The remaining chapters develop a corresponding juridical conception by working out the implications of the concept for the public law relationship between rulers and ruled. This conception explains why human beings must interact under the public authority of a legal system, why a legal system has an overarching obligation to respect and protect the dignity of each person subject to its authority, and why this obligation cannot be fully satisfied in the absence of the constitutional structure and doctrinal commitments that characterize modern constitutional governance. The task, then, is not to offer a justification of the concept of human dignity, but rather to show how the concept justifies modern constitutional practice and generates the duty of all legal systems to bring themselves within its parameters.³⁵ By delineating the conditions under which each person can be free from the choice of another rather than the good that each person should pursue, a conception emerges that is true to the liberalism of the concept.

1.2 The antinomy of public law

The claim that the dilemma of dignity can be unraveled by formulating a theory of public law may seem to simply relocate the problem it aims to address. The dilemma consists in the opposition between two unsatisfactory accounts of human dignity: those that present a concept devoid

³⁵ Conceptions of human dignity often proceed by identifying a particular capacity for exercising intellectual or moral virtue and then arguing that this capacity forms the basis for acknowledging human dignity and fundamental rights. These conceptions have been criticized for being underinclusive. Since there are human beings who do not have the capacity to exercise the relevant virtues, these conceptions withdraw legal protection from the most vulnerable among us. On this point, see Sigrid Graumann, “Human Dignity and People with Disabilities,” in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, 486 and Christoph Goos, “*Würde des Menschen*: Restoring Human Dignity in Post-Nazi Germany,” in *Understanding Human Dignity*, 81–2. This book offers a more inclusive approach, in which human dignity enters not as a consequence of a capacity that some possess but others lack, but as a normative assumption about human persons *as such* that renders the normative, constitutional, and doctrinal dimensions of public law intelligible.