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Aharon Barak

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HUMAN DIGNITY

Human dignity is now a central feature of many modern constitutions and international documents. As a constitutional value, human dignity involves a person's free will autonomy, and ability to write his life story within the framework of society. As a constitutional right, it gives full expression to the value of human dignity, subject to the specific demands of constitutional architecture.

This analytical study of human dignity as both a constitutional value and a constitutional right adopts a legal-interpretive perspective. It explores the sources of human dignity as a legal concept, its role in constitutional documents, its content and its scope. The analysis is augmented by examples from comparative legal experience, including chapters devoted to the role of human dignity in American, Canadian, German, South African and Israeli constitutional law.

AHARON BARAK is a faculty member at the Interdisciplinary Center (IDC) Herzliya, Israel, and a visiting professor at Yale Law School. In 1975 he was appointed Attorney General of the State of Israel, becoming Justice of the Supreme Court of Israel in 1978 and serving as President from 1995 until his retirement in 2006. He has also served as a lecturer, professor and Dean at the Law School of the Hebrew University of Jerusalem.

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The Constitutional Value and the Constitutional Right

AHARON BARAK

Translated from the Hebrew by

DANIEL KAYROS



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P R E F A C E

The concept of human dignity has a 2,500 year history.¹ As it has moved through history, the concept has been influenced by different religions which held it as an important component of their theological approach. It was also influenced by the views of philosophers who developed human dignity in their contemplations. In the twentieth century, the concept encountered a new phenomenon. The atrocities of the Second World War, and particularly the Holocaust of the Jewish people, brought human dignity into the forefront of legal discourse. As a result, constitutional and international legal texts began to adopt the concept, and jurists appeared alongside the theologians and the philosophers. Legal scholars were called upon to determine the theoretical basis of human dignity as a constitutional value and as a constitutional right. Judges were required to solve practical problems created by the constitutionalization of human dignity, as a value or as a right.

This book discusses the legal-constitutional aspect of human dignity. It makes no theological or philosophical contribution. I do not argue with Jewish or Christian religious sages; I have no dispute with Kant. I attempt, through legal analysis, to explain human dignity as a constitutional value and as a constitutional right. Of course, law is not detached from life. Legal understanding is influenced by theological and philosophical views. It is not, however, identical to them. Aquinas and Kant were not dealing with the interpretation of a constitutional bill of rights in which the value of human dignity, or the right to human dignity, is entrenched. Of course, the legal solutions for practical problems at times overlap the solutions that theologians or philosophers promote. This is the Rawlsian phenomenon of “overlapping consensus.”² However, the theoretical points of departure are different: the point of departure for understanding human

¹ See Bodo Pieroth and Bernhard Schlink, *Grundrechte Staatsrecht II* (Heidelberg: C. F. Müller Verlag, 2006).

² See John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 144.

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dignity in a constitutional bill of rights is the constitution, not theological or philosophical considerations.

A constitution is a legal text. The language of the constitution is not a metaphor. Legal interpretation is the tool utilized by jurists to give meaning to human dignity in a constitution. In the absence of a “true” meaning,³ each legal system must independently determine the interpretation it finds appropriate. In modern interpretational theory we find three main systems for understanding constitutional texts:⁴ Intentionalism, Originalism and Purposivism. The first understands the constitutional text according to the intent of the framers. The second understands the text based on its public understanding at the time of framing. The third understands the text based on the purpose that it is intended to fulfill. Purposive constitutional interpretation lies at the foundation of this book.⁵ This interpretation considers the language of the constitutional text, its architecture and the purpose underlying its provisions. On the basis of all these factors, constitutional language is imbued with meaning that fulfills its purpose and allows it to meet the needs of the present. Constitutions are interpreted with a spacious view.

In many constitutions human dignity is not a constitutional right. Nonetheless, it is recognized as a constitutional value either expressly (such as in Spain⁶) or implicitly (such as in the USA⁷ and Canada⁸). The value of human dignity has several roles within a constitution. It serves as a foundation for the constitutional rights. It serves as a value by which the constitutional rights are interpreted; for example, the right to equality may be interpreted based on the value of human dignity.⁹ It influences

³ Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005), 30.

⁴ See Chapter 5.

⁵ See *ibid.*

⁶ See Constitución Española, B.O.E. n. 311, December 29, 1978, §10.

⁷ See Walter F. Murphy, ‘An Ordering of Constitutional Values’ (1979–80) 53 *Southern California Law Review* 703; Louis Henkin, ‘Human Dignity and Constitutional Rights’, in Michael J. Meyer and William A. Parent (eds.), *The Constitution of Rights: Human Dignity and American Values* (Ithaca, NY: Cornell University Press, 1992), 228; Maxine Goodman, ‘Human Dignity in Supreme Court Constitutional Jurisprudence’ (2006) 84 *Nebraska Law Review* 740; Leslie Meltzer Henry, ‘The Jurisprudence of Dignity’ (2011) 160 *University of Pennsylvania Law Review* 169; Erin Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (Philadelphia: University of Pennsylvania Press, 2012). See also Chapter 11, section 3.

⁸ See Dierk Ullrich, ‘Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany’ (2003) 3 *Global Jurist Frontiers* 1. See also Chapter 12, section 2.

⁹ See Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Cape Town: Juta, 2012).

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the various factors that determine whether a limitation of a constitutional right is constitutional. What is human dignity in constitutions that recognize it solely as a constitutional value? This book's answer is that human dignity is the humanity of a person as such. Underlying that humanity is a person's free will and autonomy. It is a person's freedom to write her life story. This humanity always sees a person as an end unto herself and not merely as a means. It is the humanity of a person in the framework of the society in which she lives.

In a number of constitutions human dignity is not solely a constitutional value. It is recognized as a constitutional right. Examples are the Constitutions of Germany,¹⁰ Colombia,¹¹ Russia,¹² Switzerland,¹³ South Africa¹⁴ and Israel.¹⁵ According to purposive interpretation, the content of the right to human dignity is the fulfillment of the constitutional value of human dignity. Therefore, the purpose of the right to human dignity is fulfillment of the humanity of a person as such. Human dignity as a constitutional right is a person's freedom to write her life story. It is her free will. It is her autonomy and her freedom to shape her life and fulfill herself according to her own will rather than the will of others. This humanity is expressed in the framework of the society in which she lives.

The conception of the constitutional right to human dignity as the humanity of a person leads to a spacious view of the right. There is considerable overlap – complementary or conflicting – between the right to human dignity and the other constitutional rights. Complementary overlap is a welcome phenomenon. It reinforces each one of the overlapping rights. However, this spacious view of human dignity often leads to conflicting overlap between the right to human dignity and other constitutional rights (such as the rights to privacy and personal liberty) or the public interest (such as security and public welfare). Should that not narrow the scope of the right to human dignity? According to my approach, that conflict is natural to human existence. It does not reflect a constitutional mistake. It does not narrow the scope of the right to human dignity or the scopes of the other rights. At the constitutional level, the conflict

¹⁰ Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I, § 1(1). See also Chapter 13, section 1A.

¹¹ Constitution of Colombia, 1991, § 21.

¹² Constitution of Russia, 1993, § 21.

¹³ Constitution of Switzerland, 1999, § 7.

¹⁴ Constitution of South Africa, 1996, § 10. See also Chapter 14, section 1A.

¹⁵ Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150 1992, § 2, 4. See also Chapter 15, section 1A.

will continue without a constitutional solution: let a thousand flowers bloom. The solution to the conflict will not be found at the constitutional level. It will be found at the sub-constitutional level. A sub-constitutional norm (statute or common law) that limits human dignity in order to protect another conflicting constitutional right or to fulfill a conflicting public interest will be constitutional only if it is proportional.

This spacious view of the right to human dignity is of course subject to another interpretational conclusion, resulting from the constitutional structure and architecture. This is the case in the German Basic Law. The right to human dignity in the German Basic Law is an absolute right.¹⁶ It is not subject to the rules of proportionality. Any limitation of the right is unconstitutional. The right to human dignity in such a constitutional structure requires that a narrower construal of the value of human dignity be applied in understanding the constitutional right of human dignity. The right must be interpreted narrowly, because otherwise social life would be impossible. Thus the Constitutional Court of Germany uses the object formula (*Objektformel*) in order to understand human dignity as a constitutional right. According to this formula, human dignity is limited when a person is seen as a mere means for fulfilling someone else's ends. This formula reflects the absolute character of the right to human dignity in the German Constitution. This formula will not apply where human dignity, as a constitutional value, fulfills its task regarding the other constitutional rights recognized in the German Basic Law.

Interpretation of the right to human dignity with a spacious view, and understanding that right as the humanity of a person, grant the right to human dignity a broad application covering many issues. In most constitutions it constitutes both a negative right and a positive right. It covers aspects that are at the core of the right and aspects that are at its periphery. It covers both civil and social aspects. It applies to all conduct of the state vis-à-vis every person. The right to human dignity is seen as a framework right and a mother-right. Daughter-rights gather together under its wings. These daughter-rights express the various aspects of human dignity on different levels of generality. In a constitution with a comprehensive bill of rights, there will be complementary overlap between these daughter-rights and the independent freestanding rights recognized in the constitution. This does not make the right to human dignity superfluous, and should not turn it into a residual right. A statute that limits the constitutional right to human dignity and another independent constitutional

¹⁶ See Grundgesetz, § 1(1). See Chapter 13, section 1B.

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right will be constitutional only if it fulfills the requirements of proportionality that apply to human dignity as well as those that apply to the other right. However, the main role of the right to human dignity in a constitution with a full bill of rights is reinforcing the other, independent constitutional rights and serving as a source of daughter-rights where they are not recognized as independent rights. Thus, for example, in South Africa the constitution does not recognize a freestanding right to reputation. That right is recognized as a daughter-right of human dignity.¹⁷ Of course, in a constitution with a comprehensive bill of rights, the right to human dignity will at times conflict with other constitutional rights. A conflict among daughter-rights of human dignity might also occur. Such conflict will not be solved at the constitutional level. The solution is found at the sub-constitutional level. A statute or common law that limits a constitutional right in order to protect human dignity will be constitutional only if it is proportional.

The spacious view of the constitutional right to human dignity is of course subject to criticism. Many critics point out that human dignity is a vague and flexible concept; they claim it grants the interpreter – the judge – undesirably broad discretion. My response to that criticism is that most constitutional rights “suffer” from similar traits. The right to equality and the right to liberty – like the right to human dignity – are vague and flexible rights that grant a judge broad discretion. Professional judges are accustomed to this phenomenon, and have the interpretational tools to handle it. What appears to the theologian and the philosopher as a limitless right appears to the judge as a right that is hemmed in by the rules of interpretation. These rules of interpretation do not prevent judicial discretion. Such discretion is innate to the judicial process, and constitutes an inseparable part of it.¹⁸ Indeed, the problem of the scope of judicial discretion is not unique to human dignity, and it exists wherever there is a constitutional bill of rights based upon “majestic generalities.”¹⁹

Another, intra-constitutional, criticism is that the spacious view of human dignity will ultimately lead to limitation of human rights. Protection of human dignity, which constitutes a positive right, will justify limitation of the negative constitutional rights. This criticism is not unique to human dignity. The conflict between constitutional rights is

¹⁷ See *Khumalo v. Holomisa* 2002 (5) SA 401 (CC), para. 27. See Chapter 14, section 1E(1).

¹⁸ See Aharon Barak, *Judicial Discretion* (Yale University Press, 1989); Marisa Iglesias Vila, *Facing Judicial Discretion: Legal Knowledge and Right Answers Revisited* (Dordrecht: Kluwer, 2001).

¹⁹ See *Fay v. New York*, 332 US 261, 282 (1947) (Jackson J).

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a healthy physiological phenomenon, not a negative pathological condition. Solution to the conflict will be found at the sub-constitutional level. This is made possible, of course, only if all of the constitutional rights are relative, and only if human dignity is not an absolute right. A great majority of constitutions are constructed in this way. German constitutional law is the exception, and there indeed human dignity as a constitutional right has a narrow scope.²⁰

This book, like my book *Proportionality: Constitutional Rights and their Limitations*, is the product of both legal scholarship and legal practice. It reflects my thoughts on human dignity as I expressed them in articles and judgments I wrote. I served for twenty-eight years as a justice in the Supreme Court of Israel. The enactment of Basic Law: Human Dignity and Liberty, which granted constitutional status to the value and the right to human dignity, marked the beginning of the second half of my term. Along with my colleagues in the Supreme Court, I wrote scores of judgments dealing with human dignity. The theoretical analysis of the constitutional value and the constitutional right to human dignity is the result of their practical implementation.

This book focuses on human dignity as a constitutional value and a constitutional right. It is the first part of a larger volume on human dignity originally written in Hebrew. The second part of the Hebrew volume is dedicated to the eleven daughter-rights of human dignity that have been recognized in Israel so far: the rights to personality, dignified human subsistence, reputation, family life, equality, freedom of expression, freedom of conscience and religion, freedom of movement, education, employment and due process. This reflects vast judicial activity, which is based entirely on human dignity. This book is of course not limited to Israeli law; it is based upon comparative law. It can provide assistance to every legal system that has a constitution recognizing human dignity – whether as a value or as a right – in understanding its own approach to human dignity.

Like proportionality, human dignity as a constitutional right underwent particularly extensive development in German constitutional law. It seems that we all owe thanks to the German Constitutional Court and the German legal literature, which enriched our collective knowledge regarding human dignity. Nonetheless, we must be cognizant of the great difference between human dignity as a constitutional right in most modern constitutions and human dignity in German constitutional law. While

²⁰ See Chapter 13, section 1F.

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in most constitutions human dignity is a relative right and is thus subject to proportional limitation, in the German Basic Law the right to human dignity is absolute and is thus not subject to proportional limitation. Every limitation is a violation. Despite this difference, understanding the German judgments and literature regarding the constitutional value of human dignity is very worthwhile. This value continues to have a broad meaning in German constitutional law. The German legal literature will likely be of great benefit to every legal system that has a similar approach.

The literature on human dignity is most extensive. Is another book on the subject really necessary? Many of the books and articles on the subject deal with human dignity from a perspective of theology or general philosophy. As noted, these are not the perspectives I examine in this book. The focus of this book is human dignity as a constitutional value and a constitutional right. The legal literature on this aspect of human dignity is sparse. Again, the German legal constitutional literature is exceptional, particularly the volumes by Enders²¹ and Mahlmann.²² The books by Ackermann,²³ Waldron,²⁴ Eberle²⁵ and Daly²⁶ stand out in the English landscape. Most of the literature is edited books.²⁷ They do not present

²¹ Christoph Enders, *Die Menschenwürde in der Verfassungsordnung: zur Dogmatik des Art. 1 GG* (Tübingen: Mohr Siebeck, 1997), 501.

²² Matthias Mahlmann, *Elemente einer ethischen Grundrechtstheorie* (Berlin: Nomos, 2008).

²³ Ackermann, *Human Dignity*.

²⁴ Jeremy Waldron, *Dignity, Rank, and Rights*, ed. by Meir Dan-Cohen (Oxford University Press, 2012).

²⁵ Edward J. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States* (Santa Barbara: Praeger, 2002).

²⁶ Daly, *Dignity Rights*.

²⁷ The most important among these are Michael Meyer and William Parent (eds.), *The Constitution of Rights: Human Dignity and American Values* (Ithaca, NY: Cornell University Press, 1992); David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002); Berma Klein Goldewijk, Adalid Contreras Baspineiro and Paulo Cesar Carbonari (eds.), *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002); Robert P. Kraynak and Glenn E. Tinder (eds.), *In Defense of Human Dignity: Essays for our Times* (University of Notre Dame Press, 2003); Silja Vöneky and Rüdiger Wolfrum (eds.), *Human Dignity and Human Cloning* (Leiden: Brill, 2004); Jeff E. Malpas and Norelle Lickiss (eds.), *Perspectives on Human Dignity: A Conversation* (Dordrecht: Springer, 2007); Paulus Kaufmann, Hannes Kuch, Christian Neuhäuser and Elaine Webster (eds.), *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Dordrecht: Springer, 2011); Christopher McCrudden (ed.), *Understanding Human Dignity* (Oxford University Press, 2013); Marcus Düwell, Jens Braarvig, Roger Brownsword and Dietmar Mieth (eds.), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press, 2014).

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a coherent constitutional thesis focusing upon the constitutional value and right to human dignity. It is in this area that I see the contribution of this book.

The book is divided into four parts: Part I is dedicated to fundamental concepts (Chapter 1) and the intellectual history of human dignity (Chapter 2). This part also includes a review of human dignity in international documents and the constitutions of various states (Chapters 3 and 4). Part II is dedicated to human dignity as a constitutional value. The scope of this value and its role are determined through interpretation of the constitution. Thus, Part II opens with an analysis of the method of purposive interpretation, which serves as the legal mechanism for understanding human dignity (Chapter 5). On the basis of purposive interpretation I analyze the various roles of the constitutional value of human dignity (Chapter 6). The central role of the value is the interpretational task of revealing the meaning of the various rights, primarily the meaning of the right to human dignity. The seventh chapter, which is the central chapter in this part, deals with the content of human dignity as a constitutional value. This is not theological or philosophical content. It is the content of human dignity as a constitutional value with a constitutional role. According to this view, human dignity is the humanity of a person. It is her humanity as a free being, with unbridled autonomy. It is her freedom to write her life story. This humanity expresses the conception of a person as an end, and rejects viewing her as mere means. This humanity is humanity in the framework of society.

Part III deals with the constitutional right to human dignity. It examines the various ways of recognizing human dignity as a constitutional right (Chapter 8). The central chapter in this part is Chapter 9, which examines the content of the constitutional right to human dignity. The point of departure is that it is intended to fulfill the constitutional value of human dignity. This broad interpretation raises problems regarding the relationships between the right to human dignity and other constitutional rights. Various aspects of these relationships are examined in this chapter. The broad interpretation of human dignity as a framework right or mother-right sees human dignity as a bundle of rights that includes daughter-rights of human dignity. The chapter examines both the relationships between these daughter-rights and the relationships between them and the other constitutional rights. Chapter 10 focuses on the question of whether the right to human dignity covers an exclusive area of application.

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Part IV examines human dignity's place in five constitutions. It opens with an examination of two constitutions – the US Constitution (Chapter 11) and the Canadian Charter of Rights and Freedoms (Chapter 12) – in which human dignity is solely a constitutional value. It then examines three additional constitutions – the German Basic Law (Chapter 13), the South African Constitution (Chapter 14) and the Israeli Basic Law: Human Dignity and Freedom (Chapter 15) – in which human dignity serves both as a constitutional value and as a constitutional right. In these three legal systems, it examines the traits of human dignity as a constitutional value, as well as its traits as a constitutional right, both as an absolute right (in German law) and as a relative right (in South African and Israeli law). In this light it examines the scope of the constitutional right to human dignity in these constitutions.

I am neither a theologian, nor a philosopher. I am a legal scholar and judge interested in comparative constitutional law. This is not a book on jurisprudence or political theory. It is an analytical book on constitutional law regarding the constitutional value and the constitutional right to human dignity. The book is intended for legal scholars, judges and practitioners. I hope that the comparative analysis enriches the readers and brings them closer to the fundamental value and right of human dignity.

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