

CONTENTS

Preface page xvii
Acknowledgements xxvi
Table of cases xxvii

PART I Fundamental concepts and sources 1

1 The various aspects of human dignity 3

1. Theology, philosophy and constitutional law 3

A. The difference between the intellectual history and the constitutional interpretation 3

B. The similarity between the intellectual history and the constitutional interpretation 4

2. Criticism of the use of the concept of human dignity and response to it 8

A. The criticism 8

B. The response 10

3. Human dignity – a social value, a constitutional value and a constitutional right 12

2 The intellectual history of the social value of human dignity 15

1. The ancient world 15

A. History of ideas 15

B. The Stoics and Cicero 17

C. The world religions 18

(1) Judaism 18

(2) Christianity 21

(3) Islam 23

2. Philosophical approaches 24

A. Philosophical approaches until Kant 24

(1) The Renaissance 24

vi	CONTENTS
	(2) The Enlightenment 25
	B. Kant 26
	C. Dworkin 28
	D. Waldron 30
	3. The lessons learned from the intellectual history 33
3	Human dignity as a value and as a right in international documents 34
	1. Human dignity in legal discourse 34
	2. Human dignity in international conventions 37
	A. Human dignity discourse in international conventions 37
	B. United Nations conventions 38
	(1) The UN conventions on human rights of 1966 38
	(2) United Nations conventions on particular issues 39
	(3) Conventions of the United Nations' specialized agencies 41
	C. Conventions on particular issues 42
	D. Regional conventions 44
	(1) Europe 44
	(2) America 45
	(3) Africa 47
	(4) The Arab League 48
	(5) The Organization of Islamic Cooperation 48
4	Human dignity as a value and as a right in constitutions 49
	1. Pre-Second World War developments 49
	A. Pre-First World War developments 49
	B. Development from the First World War until the Second World War 49
	2. Development from the Second World War until the present 51
	A. The scope of the development 51
	B. Development of human dignity in the constitutions of the European states 52
	(1) The 1940s 52
	(2) The 1950s – the European Convention for the Protection of Human Rights and Fundamental Freedoms 54
	(3) The 1960s, 1970s and 1980s 54

CONTENTS vii

(4) The 1990s	56
(5) The start of the twenty-first century	58
(6) In retrospect	59
C. Development of human dignity in the constitutions of Latin American states	59
(1) Until the end of the 1940s	59
(2) Human dignity in modern constitutions	61
D. Development of human dignity in the constitutions of African states	62
E. Development of human dignity in the constitutions of Asian states	64
PART II Human dignity as a constitutional value	67
5 Purposive constitutional interpretation	69
1. Constitutional uniqueness and its influence on constitutional interpretation	69
A. Human dignity as a constitutional value and constitutional interpretation	69
B. A constitution as a supreme norm	70
C. The uniqueness of a constitution and its purposive interpretation	72
D. Purposive interpretation of a constitution – comparative law	72
2. Constitutional meaning	73
A. Express and implied meaning	73
B. Express meaning	74
C. Constitutional silence	76
D. Implied meaning	77
E. Constitutional structure	80
3. The constitution’s subjective purpose	82
A. Its essence	82
B. Its sources: structure	83
C. Its sources: constitutional history	84
4. The constitution’s objective purpose	84
A. Its essence	84
B. The sources of the objective purpose	85
(1) Internal sources: the constitution as a whole and the search for constitutional unity	85
(2) External sources: other constitutional provisions	86

- (3) External sources: post-constitutional history 87
 - (4) External sources: precedent 87
 - (5) External sources: fundamental values 89
 - (6) External sources: comparative law 90
 - C. Determining the ultimate purpose of the constitution 95
 - (1) The approach of purposive interpretation 95
 - (2) The subjective purpose of the constitution is not decisive 96
 - (3) The objective purpose and protection of the individual 98
 - (4) “A living constitution” and “a living tree” 99
 - (5) Interpretation with a spacious view 100
- 6 The role of human dignity as a constitutional value 103
 - 1. Three roles of human dignity as a constitutional value 103
 - 2. Human dignity as a constitutional value that lays a foundation for all of the rights 104
 - 3. The interpretational role of human dignity as a constitutional value 105
 - A. General interpretational role 105
 - B. Particular interpretational role: interpretation of the right to human dignity 110
 - 4. Human dignity as a constitutional value in the limitation of constitutional rights 112
- 7 Three types of model for determining the content of the constitutional value of human dignity 114
 - 1. Theological models, philosophical models and constitutional models 114
 - 2. Theological models 114
 - 3. Philosophical models 116
 - A. Assessment of the philosophical models 116
 - B. Human dignity and Kant 117
 - C. Human dignity and Dworkin 118
 - D. Human dignity: Margalit and Statman 119
 - 4. Constitutional models 120
 - A. The characteristics of the constitutional models 120

CONTENTS ix

(1)	An interpretational approach with a spacious view	120
(2)	Interpretation of the constitutional value of human dignity and the constitutional rights with a spacious view	122
(3)	The multiplicity of constitutional models	123
B.	The content of the constitutional value of human dignity	124
(1)	The humanity of the person as a human being	124
(2)	The humanity of the person as a free being	127
(3)	The humanity of the person as autonomy of will	129
(4)	The humanity of the person as rejection of the person as a mere means	130
(5)	The humanity of the person in the framework of a society	130
(6)	The humanity of the person and the human race	131
C.	Criticism of the constitutional model of humanity	132
PART III	Human dignity as a constitutional right	137
8	Recognition of the constitutional right to human dignity and its content	139
1.	Constitutional recognition	139
A.	Express recognition of a constitutional right to human dignity	139
B.	Recognition of a constitutional right to human dignity by implication	141
C.	Recognition of human dignity as a constitutional right by filling a lacuna in a constitution	142
(1)	The lacuna	142
(2)	A lacuna in a constitution?	143
2.	The content of the constitutional right: the realization of the constitutional value	144
A.	The general approach	144
B.	The unique case of the German Basic Law	145
3.	Purposive constitutional interpretation and human dignity	147
A.	Interpretation with a spacious view	147
B.	A spacious view is not a limitless view	148

- C. Purposive interpretation of human dignity and limitation of a different right 149
- D. Purposive interpretation of human dignity and limitation of the public interest 150
- E. Criticism of this view and response 153

9 Human dignity as a framework right (mother-right) 156

- 1. Human dignity as a framework right 156
 - A. Framework rights 156
 - B. A bundle of rights 158
 - C. Framework rights and rights with no special name 159
- 2. Daughter-rights of human dignity 160
 - A. Daughter-rights fulfill the mother-right's purpose 160
 - B. The various aspects of the humanity of a person 160
 - C. Deriving a daughter-right from the mother-right of human dignity 161
 - D. Daughter-rights and those same rights as independent rights 162
 - E. The relationship between the daughter-rights of human dignity 163
 - (1) Lack of overlap, complementary overlap and conflicting overlap 163
 - (2) Lack of overlap 163
 - (3) Complementary overlap 163
 - (4) Conflicting overlap 164
 - (a) Conflicting overlap between two principles 164
 - (b) Conflicting overlap between a principle and a rule 167
 - F. The relationship between daughter-rights and independent constitutional rights 167

10 The area covered by the right to human dignity 170

- 1. The area covered and the overlap problem 170
- 2. The area covered exclusively by the right to human dignity in a comprehensive bill of rights 170
- 3. The constitutional right to human dignity and the complementary overlap with independent constitutional rights in a partial bill of rights 174

CONTENTS xi

4. Architectural difficulty: the right to human dignity and the right to personal liberty	175
A. Presenting the problem	175
B. South Africa	176
C. Canada	177
D. Israel	178
5. Human dignity is not a “residual right”	181
PART IV Human dignity in comparative law	183
11 Human dignity in American constitutional law	185
1. A constitutional right to human dignity is not recognized in the federal constitution	185
A. The lack of a special express provision on human dignity in the federal constitution	185
B. Human dignity is not part of a framework right in the federal constitution	185
C. Human dignity and <i>Griswold v. Connecticut</i>	189
2. Human dignity as a constitutional right in the state constitutions	190
3. Human dignity as a constitutional value in the federal constitution	192
A. Human dignity and the dignity of the state	192
B. The history of human dignity as a constitutional value	193
(1) Pre-Second World War	193
(2) The 1940s and 1950s	193
(3) Continued use of human dignity in the Supreme Court	197
(a) Expanding the application of human dignity to most of the Bill of Rights	197
(b) The contribution of Justice Brennan	199
(c) The contribution of Justice Kennedy	201
C. The assessment of human dignity as a constitutional value in the US Constitution	205
(1) The status of human dignity as a constitutional value	205
(2) The essence of human dignity in American common law	206

12 Human dignity in Canadian constitutional law	209
1. The Canadian Charter does not recognize a constitutional right to human dignity	209
A. The lack of an independent right to human dignity	209
B. Rejection of human dignity as a derived (daughter) constitutional right	209
C. Human dignity as a sub-constitutional value	211
2. Human dignity as a constitutional value in the Canadian Charter	212
A. The centrality of human dignity as a constitutional value	212
(1) In the Canadian Charter in general	212
(2) In certain constitutional rights	213
(a) The right to equality	213
(b) The right to freedom of expression	214
(c) The right to life, liberty and security of the person	215
(d) Legal rights	215
B. The content of human dignity	217
(1) Human dignity as the humanity of the person	217
(2) The various expressions of human dignity	218
(a) Human dignity in <i>Law</i>	218
(b) Human dignity in <i>Morgentaler</i>	219
(c) Human dignity, free will and individual autonomy	220
(d) Human dignity and viewing a person as an end unto himself	221
(e) Human dignity within a society	221
C. The role of human dignity as a constitutional value	222
(1) Human dignity as an interpretational standard for determining the scope of a constitutional right	222
(2) Human dignity in the limitation of constitutional rights	223
13 Human dignity in German constitutional law	225
1. The normative traits of human dignity	225
A. The provisions of Article 1(1) of the German Basic Law	225
B. Human dignity as an absolute right	227
C. Human dignity as an eternal right	229

CONTENTS xiii

- D. Human dignity as the supreme value in the German constitution 230
- E. The area covered by human dignity as a constitutional right 231
- F. The uniqueness of human dignity in German constitutional law 232
- 2. Human dignity as a constitutional value and a constitutional right 233
 - A. Human dignity solely as a constitutional value 233
 - B. Human dignity as a constitutional right 234
- 3. The definition of human dignity 235
 - A. Negative and positive definitions 235
 - B. Shared and conflicting elements of the various definitions 236
- 4. The scope of human dignity 237
 - A. The dignity of every person as a human being 237
 - B. Human dignity's beginning and end 238
 - (1) Human dignity's beginning 238
 - (2) Human dignity's end 239
 - C. Human dignity and bioethics 239
- 5. Human dignity in German constitutional law and comparative law 240
- 14 Human dignity in South African constitutional law 243**
 - 1. The normative traits of human dignity 243
 - A. The provisions of sections 10 of the South African Constitution 243
 - B. Human dignity as a relative right 244
 - C. Human dignity as a constitutionally amendable constitutional right 248
 - D. Human dignity as a supreme value 252
 - E. The area covered by human dignity as a constitutional right 256
 - (1) A zone of exclusive application of human dignity 256
 - (2) Human dignity and the residual right to freedom 259
 - F. The uniqueness of the right to human dignity in South African constitutional law 261

- (1) Human dignity as a constitutional right that covers all conduct that falls within human dignity as a constitutional value 261
 - (2) The overlap between the right to human dignity and the other constitutional rights 262
 - (3) The minimum core problem 264
- 2. Human dignity as a constitutional value and a constitutional right in South African constitutional law 266
 - A. Human dignity as one of the human rights 266
 - B. The relationship between the constitutional value of human dignity and the constitutional right to human dignity 267
- 3. The scope of the constitutional value of human dignity 267
 - A. Definitional difficulties 267
 - B. Human dignity as seeing a person as an end and not a mere means 268
- 4. The scope of the constitutional right to human dignity 271
 - A. Overlap and conflict between human dignity and other constitutional rights 271
 - B. The parties to the constitutional right to human dignity 272
 - C. The content of the constitutional right to human dignity 273
 - (1) The external context and the internal context 273
 - (2) The content of human dignity as a constitutional right in light of the Constitutional Court's jurisprudence 275
 - (3) Human dignity and the autonomy of individual will 277
- 15 Human dignity in Israeli constitutional law 280**
 - 1. The normative traits of human dignity 280
 - A. Articles 2 and 4 of the Basic Law 280
 - B. Human dignity as a relative right 281
 - C. Human dignity is not an eternal right 283
 - (1) There is no express eternity clause 283
 - (2) Is there an eternity clause by implication? 284

CONTENTS XV

D. Human dignity as a supreme value	285
E. The area covered by human dignity as a constitutional right	286
2. The daughter-rights of human dignity	288
A. The right to personality	288
B. The right to dignified human subsistence	288
C. The right to reputation	292
D. The right to family life	292
E. The right to equality	295
F. The right to freedom of expression	296
G. The right to freedom of conscience and religion	296
H. The right to freedom of movement	298
I. The right to education	299
J. The right to employment	299
K. The right to due process	300
3. Parties to the right	301
A. The bearer of the right to human dignity	301
(1) A person	301
(2) Groups	303
(3) A corporation	303
B. Obligee	304
4. Temporal application	305
A. Active application of the Basic Law	305
B. A normative anomaly	306
<i>Bibliography</i>	308
<i>Index</i>	347