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978-1-107-09023-1 - Human Dignity: The Constitutional Value and the Constitutional Right

Aharon Barak

Excerpt

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## PART I

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### Fundamental concepts and sources

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## The various aspects of human dignity

### 1. Theology, philosophy and constitutional law

#### A. *The difference between the intellectual history and the constitutional interpretation*

The roots of the English term “dignity” are found in the Latin word  *dignus, dignitas*. In romance languages the words  *dignité* (French),  *dignità* (Italian),  *dignidade* (Portuguese) and  *dignidad* (Spanish) are used.<sup>1</sup> In English dictionaries the definitions of dignity appear as honor, glory and respect.<sup>2</sup>

This abundance of meanings stems from the complexity of the concept of “human dignity.”<sup>3</sup> Over the course of its long history, it has been used primarily as a social value.<sup>4</sup> The appearance of human dignity as a constitutional value and as a constitutional right is new: it is only as old as modern constitutions. Human dignity benefitted from special

<sup>1</sup> See Margareta Broberg, ‘A Brief Introduction’, in Margareta Broberg and J. B. Ladegaard Knox (eds.),  *Dignity, Ethics and Law* (Copenhagen: Centre for Ethics and Law, 1999) 7, 8.

<sup>2</sup> In the Oxford English Dictionary there are five definitions of dignity:  *The New Shorter Oxford English Dictionary*, ed. by Lesley Brown (Oxford: Clarendon Press, 1993). See also Aurel Kolnai, ‘Dignity’ (1976) 51  *Philosophy* 251; Gloria L. Zúñiga, ‘An Ontology of Dignity’ (2004) 5  *Metaphysica* 115.

<sup>3</sup> See  *Egan v. Canada*, [1995] 2 SCR 513, 545 (“Dignity being a notoriously elusive concept”); David Feldman, ‘The Developing Scope of Article 8 of the European Convention on Human Rights’ (1997) 3  *European Human Rights Law Review* 265;  *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6 (CC), para. 28: “Dignity is a difficult concept to capture in precise terms” (Ackermann J); Michael Meyer, ‘Dignity as a (Modern) Virtue’, in David Kretzmer and Eckart Klein (eds.),  *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 195.

<sup>4</sup> For the differentiation between a social value and a social ideal, see Drucilla Cornell, ‘Bridging the Span toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence’ (2008)  *Acta Juridica* 18.

development in light of the severe violations that took place during the Second World War.<sup>5</sup>

Those dealing with human dignity – whether theologians (like Thomas Aquinas) or philosophers (such as Immanuel Kant) – did not deal with the constitutional value of and right to human dignity as part of a constitutional bill of rights. This is because there was no constitutional bill of rights whatsoever at the time, and there certainly was no discussion of the constitutional meaning – whether as a value or as a right – of human dignity. That discussion has been underway for only a short time, and is still at its very early stages. Of course, the modern discussion of the constitutional value and constitutional right rests upon the long theological and philosophical history of human dignity. However, the constitutional discussion is unique, and is decisively influenced by its constitutional character. This is the source of both the importance of the intellectual history to the constitutional discourse, and its limited applicability. Justice M. Cheshin, of the Israeli Supreme Court, discussed this difference between the legal-constitutional and other points of view in one case<sup>6</sup> in which he examined the question of whether freedom of expression is part of the constitutional right to human dignity:

The subject incorporates not only the meaning of the concept of “human dignity” in its linguistic, moral, political, historical and philosophical senses, but also – or should we say, mainly – the meaning of the concept in the special context of the Basic Law: Human Dignity and Liberty. This special context – which is bound up with the relationship between the organs of the State – can also directly affect the sphere of influence of “human dignity.”<sup>7</sup>

Indeed, the intellectual process of understanding the meaning of the constitutional value and the constitutional right to human dignity is a process of constitutional interpretation.

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

Despite the essential difference between the long theological and philosophical history of the concept of human dignity and its short

<sup>5</sup> See James Q. Whitman, ‘On Nazi “Honour” and the New European “Dignity”’, in Christian Joerges and Navraj S. Ghaleigh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism* (Oxford: Hart Publishing, 2003) 243.

<sup>6</sup> See PPA 4463/94 *Avi Hanania Golan v. Prisons Service*, 1995–1996 12 IsrLR 489 (1996).

<sup>7</sup> *Ibid.* at 550.

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constitutional history, there are a number of similarities between these two “histories.” First, they both involve an intellectual process with a moral<sup>8</sup> and ethical<sup>9</sup> basis that is entrenched in the culture of a society. Human dignity in a western culture is not the same as human dignity in a non-western culture;<sup>10</sup> human dignity in one western culture is not the same as human dignity in another western culture.<sup>11</sup> It is a concept that is in a constant state of development.<sup>12</sup> Justice Brennan correctly noted that “the demands of human dignity will never cease to evolve.”<sup>13</sup> In a similar spirit the German Constitutional Court noted in *Life Imprisonment*:

Recognizing what the command to respect human dignity requires cannot be separated from history. A judgment regarding what corresponds to human dignity can only be based on the current state of knowledge and cannot lay claim to interminable validity.<sup>14</sup>

<sup>8</sup> See Bertram Morris, ‘The Dignity of Man’ (1946) 57 *Ethics* 57. For a different approach, see Meyer, ‘Dignity as a (Modern) Virtue’. See also, Rachel Bayefsky, ‘Dignity, Honour, and Human Rights: Kant’s Perspective’ (2013) 41 *Political Theory* 809.

<sup>9</sup> See Abraham Edel, ‘Humanist Ethics and the Meaning of Human Dignity’, in Paul Kurtz (ed.), *Moral Problems in Contemporary Society: Essays in Humanistic Ethics* (Englewood Cliffs: Prentice-Hall, 1969) 232; Thomas W. Platt, ‘Human Dignity and the Conflict of Rights’ (1972) 2 *Idealistic Studies* 174; Paulo C. Carbonari, ‘Human Dignity as a Basic Concept of Ethics and Human Rights’, in Berma K. Goldewijk, Adalid C. Baspineiro and Paulo C. Carbonari (eds.), *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002) 35; Jeff Malpas and Norelle Lickiss, ‘Human Dignity and Human Being’, in Jeff Malpas and Norelle Lickiss (eds.), *Perspectives on Human Dignity: A Conversation* (Dordrecht: Springer Publication, 2007) 19.

<sup>10</sup> See Jack Donnelly, ‘Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights’ (1982) 76 *American Political Science Review* 303; Stephen Angle, *Human Rights and Chinese Thought: A Cross Cultural Inquiry* (Cambridge University Press, 2002); Man Yee Karen Lee, ‘Universal Human Dignity: Some Reflections in the Asian Context’ (2008) 3 *Asian Journal of Comparative Law* 1932. See also Raul S. Manglapus, ‘Human Rights Are Not a Western Discovery’ (1978) 21(10) *Worldview* 4.

<sup>11</sup> See Giovanni Bognetti, ‘The Concept of Human Dignity in European and US Constitutionalism’, in George Nolte (ed.), *European and US Constitutionalism* (Cambridge University Press, 2005) 85; Stéphanie Henneke-Vauchez, ‘When Ambivalent Principles Prevail: Leads for Explaining Western Legal Orders’ *Infatuation with the Human Dignity Principle* (2007) 10 *Legal Ethics* 193.

<sup>12</sup> See Alan Gewirth, ‘Human Dignity as the Basis of 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) 10.

<sup>13</sup> See Stephen J. Wermiel, ‘Law and Human Dignity: The Judicial Soul of Justice Brennan’ (1998) 7 *William & Mary Bill of Rights Journal* 223, 239.

<sup>14</sup> BVerfGE 45, 187, 229 (1997). See also the First Abortions case (BVerfGE 39, 1 (1975)).

Indeed, human dignity is a contextually dependent value. It is a changing value in a changing world.<sup>15</sup> It may be that the concept of human dignity in a given society was initially based upon the religious view that sees God's image in man. Eventually a change may have taken place in that society's view, and it now bases human dignity upon Kantian rationality. This view as well might change. Indeed, any understanding of human dignity is based upon a given society's understanding at a given time, which might change as times change.<sup>16</sup> Therefore, I do not accept the opinion that human dignity is an axiomatic, universal concept.<sup>17</sup> In my opinion, human dignity is a relative concept,<sup>18</sup> dependent upon historical,<sup>19</sup> cultural,<sup>20</sup> religious, social<sup>21</sup> and political<sup>22</sup> contexts.<sup>23</sup> This relativity of

<sup>15</sup> See Matthias Mahlmann, *Elemente einer ethischen Grundrechtstheorie* (Berlin: Nomos, 2008) 5.

<sup>16</sup> See David P. Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago Press, 1994) 315.

<sup>17</sup> See Abraham I. Melden, 'Dignity, Worth, and 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) 29; Nazeem M. Goolam, 'Human Dignity – Our Supreme Constitutional Value' (2001) 4 *Potchefstroom Electronic Law Journal* 1, 5; Anton De Baets, 'A Successful Utopia: The Doctrine of Human Dignity' (2007) 7 *Historein* 71.

<sup>18</sup> See Jackie Jones, "'Common Constitutional Traditions': Can the Meaning of Human Dignity under German Law Guide the European Court of Justice?' (Spring 2004) *Public Law* 167.

<sup>19</sup> See Henk Botha, 'Human Dignity in Comparative Perspective' (2009) 2 *Stellenbosch Law Review* 171, 178; Juliane Kokott, 'From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization – With Particular Reference to the German Basic Law', in Christian Starck (ed.), *Constitutionalism, Universalism and Democracy: a Comparative Analysis* (Baden-Baden: Nomos Publication, 1999) 71.

<sup>20</sup> See Rhoda E. Howard, 'Dignity, Community, and Human Rights', in Abdullahi Ahmed An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives – A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 81; David Weisstub, 'Honor, Dignity and the Framing of Multiculturalists Values', in David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 263; Kokott, 'From Reception and Transplantation'.

<sup>21</sup> See Kokott, 'From Reception and Transplantation'; Doron Shultziner, 'Human Dignity – Justification, not a Human Right' (2007) 11 *Hamishpat* 527 (Heb.); Antonio S. Cua, 'Dignity of Persons and Styles of Life' (1971) 45 *Proceedings of the American Catholic Philosophical Association* 120; Paolo G. Carozza, 'Human Dignity in Constitutional Adjudication', in Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011) 459.

<sup>22</sup> See Rhoda E. Howard and Jack Donnelly, 'Human Dignity, Human Rights, and Political Regimes' (1986) 80(3) *American Political Science Review* 801; Mette Lebech, 'What is Human Dignity?', in Mette Lebech (ed.), *Maynooth Philosophical Papers* (National University of Ireland Maynooth, 2004) 59.

<sup>23</sup> See Cua, 'Dignity of Persons and Styles of Life'; Kokott, 'From Reception and Transplantation', at 81; Carozza, 'Human Dignity in Constitutional Adjudication'. See also Shultziner, 'Human Dignity'.

human dignity does not diminish its importance. On the contrary: this relativity intensifies the position of human dignity in each society, while expressing the special experiences of the society and influencing its conclusions. Thus, for example, human dignity in post-Second World War Germany expresses disgust toward Nazism and constitutes the basis for the development of German post-war society. Similarly, human dignity in post-apartheid South Africa reflects the detachment from that regime and the lodestar by which the new South Africa wishes to progress. Furthermore, despite the relativity of human dignity and its dependence upon social context, human dignity in various societies – certainly in societies based upon liberal democracy<sup>24</sup> – has common foundations. It can therefore be said that despite the fact that there are different conceptions of human dignity, they all express a similar concept.<sup>25</sup>

Second, the intellectual history of human dignity as a social value is based upon different theological and philosophical approaches. As human dignity as a constitutional value and a constitutional right developed, the constitutional aspect joined this history. Despite the difference in approaches, the social and constitutional values often lead to overlapping results and share a common core.<sup>26</sup> Thus, for example, different, and even conflicting, traditions lead to the conclusion that human dignity preserves the physical and psychological integrity of a person,<sup>27</sup> their personal identity<sup>28</sup> and their basic subsistence, and ensures equality between people.<sup>29</sup>

<sup>24</sup> See Jeremy Waldron, 'The Dignity of Groups' (2008) *Acta Juridica* 66; Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655.

<sup>25</sup> See McCrudden, 'Human Dignity and Judicial Interpretation'; Howard and Donnelly, 'Human Dignity, Human Rights, and Political Regimes', at 801; Ernst L. Winnacker, 'Human Cloning from a Scientific Perspective', in Silja Vöneky and Rüdiger Wolfrum (eds.), *Human Dignity and Human Cloning* (Leiden: Martinus Nijhoff, 2004) 55; Meir Dan-Cohen, 'A Concept of Dignity' (2011) 44 *Israel Law Review* 9.

<sup>26</sup> See Carozza, 'Human Dignity in Constitutional Adjudication'; Horst Dreier, *GG Grundgesetz Kommentar* (Tübingen: Mohr Siebeck, 2006) 20.

<sup>27</sup> See Daniel Statman, 'Humiliation, Dignity, and Self Respect', in David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 209; Aart Hendriks, 'Personal Autonomy, Good Care, Informed Consent and Human Dignity – Some Reflections from a European Perspective' (2009) 28 *Medicine and Law* 469, 472.

<sup>28</sup> See Steven Wheatley, 'Human Rights and Human Dignity in the Resolution of Certain Ethical Questions in Biomedicine' (2001) 3 *European Human Rights Law Review* 312.

<sup>29</sup> See Statman, 'Humiliation, Dignity, and Self-Respect'.

Third, all of the meanings of human dignity – the theological, philosophical and constitutional meanings – deal with human dignity within society. Indeed, it does not exist in a void. Human dignity is the dignity of a person in a given society.<sup>30</sup> It is not the human dignity of the solitary Robinson Crusoe. It is the human dignity of a person in his or her relations with others. It is a “relational” concept.<sup>31</sup>

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

### A. *The criticism*

The concept of human dignity is the subject of sharp disagreement.<sup>32</sup> On the one hand, there are those who see it as one of the most important social concepts<sup>33</sup> and as a concept that serves as a basis and justification for all human rights.<sup>34</sup> On the other hand, there are those who hold that it is an elusive concept,<sup>35</sup> devoid of all content.<sup>36</sup> Criticism of human dignity comes from various directions. Philosophers criticize it. Schopenhauer’s statement is well known:

<sup>30</sup> Edward J. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States* (Santa Barbara: Praeger Publishers, 2002) 42.

<sup>31</sup> See Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Cape Town: Juta, 2012) 75.

<sup>32</sup> See Botha, ‘Human Dignity in Comparative Perspective’.

<sup>33</sup> See Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011); Walter F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Baltimore: The Johns Hopkins University Press, 2007).

<sup>34</sup> See Gewirth, ‘Human Dignity as the Basis of Rights’; Christoph Enders, *Die Menschenwürde in der Verfassungsordnung: zur Dogmatik des Art. 1 GG* (Tübingen: Mohr Siebeck, 1997) 501; Christoph Enders, ‘A Right to Have Rights – The German Constitutional Concept of Human Dignity’ (2010) 3 *NUJS Law Review* 253.

<sup>35</sup> See Edward J. Eberle, ‘Human Dignity, Privacy and Personality in German and American Constitutional Law’ (1997) 4 *Utah Law Review* 963, 965; Michael Rosen, *Dignity: Its History and Meaning* (Cambridge, MA: Harvard University Press, 2012).

<sup>36</sup> See Joern Eckert, ‘Legal Roots of Human Dignity in German Law’, in David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 41; Ruth Macklin, ‘Dignity Is a Useless Concept’ (2003) 327 *British Medical Journal* 1419; Mirko Bagaric and James Allan, ‘The Vacuous Concept of Dignity’ (2006) 5 *Journal of Human Rights* 257; Reiner Anselm, ‘Human Dignity as a Regulatory Principle of Bioethics: A Theological Perspective’, in Nikolaus Knoepfler, Dagmar Schipanski and Stefan L. Sorgner (eds.), *Human-Biotechnology as Social Challenge: An Interdisciplinary Introduction to Bioethics* (Aldershot: Ashgate Publishing, 2007) 109.



The expression, dignity of man, once uttered by Kant, afterward became the shibboleth of all the perplexed and empty headed moralists who concealed behind that imposing expression their lack of any real basis of morals, or, at any rate, of one that had any meaning. They cunningly counted on the fact that their readers would be glad to see themselves invested with such a dignity and would accordingly be quite satisfied with it.<sup>37</sup>

Jurists claim that the concept of human dignity is dangerous for human rights.<sup>38</sup> In the opinion of the jurist-critics, human dignity can be seen as a Trojan horse that will lead to severe limitation of human rights.<sup>39</sup> According to that approach, it is inappropriate to use human dignity in the rights discourse.<sup>40</sup> The use of the concept grants judges the power to do with it as they please.<sup>41</sup> All the critics – and even some of the supporters – point out that human dignity is an equivocal,<sup>42</sup> vague<sup>43</sup> and flexible<sup>44</sup> concept that grants the interpreter wide discretion.<sup>45</sup>

<sup>37</sup> Arthur Schopenhauer, *On the Basis of Morality* (Indianapolis: Bobbs-Merrill, 1965) 100.

<sup>38</sup> See Carozza, 'Human Dignity in Constitutional Adjudication', at 459; Neomi Rao, 'On the Use and Abuse of Dignity in Constitutional Law' (2008) 14 *Columbia Journal of European Law* 201; Matthias Mahlmann, 'The Basic Law at 60 – Human Dignity and the Culture of Republicanism' (2010) 11 *German Law Journal* 9; Neomi Rao, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 *Notre Dame Law Review* 183.

<sup>39</sup> See Mahlmann, *Elemente einer ethischen Grundrechtstheorie*, at 11; Anselm, 'Human Dignity as a Regulatory Principle of Bioethics', at 110.

<sup>40</sup> Shultziner, 'Human Dignity'; Eberle, 'Human Dignity, Privacy and Personality', at 963; Macklin, 'Dignity Is a Useless Concept', at 1420; Lorraine E. Weinrib, 'Human Dignity as a Rights-Protecting Principle' (2004) 17 *National Journal of Constitutional Law* 325, 339; Dreier, *GG Grundgesetz Kommentar*, at 17; Hennette-Vauchez, 'When Ambivalent Principles Prevail'; Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6 *International Journal of Constitutional Law* 267; Susanne Baer, 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' (2009), 59 *University of Toronto Law Journal* 417, 465.

<sup>41</sup> D. M. Davis, 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 *South African Law Journal* 398, 413 ('The Constitutional Court ... has given 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').

<sup>42</sup> O'Connell, 'The Role of Dignity in Equality Law'; Rao, 'Three Concepts of Dignity in Constitutional Law'.

<sup>43</sup> Mahlmann, *Elemente einer ethischen Grundrechtstheorie*, at 11.

<sup>44</sup> Botha, 'Human dignity in Comparative Perspective', at 187.

<sup>45</sup> Botha, 'Human dignity in Comparative Perspective'; Feldman, 'The Developing Scope of Article 8'.

*B. The response*

There is no doubt that human dignity is a complex concept.<sup>46</sup> This complexity stems, inter alia, from the lack of consensus regarding its essence. The lack of consensus is found primarily on three levels: there is no consensus regarding human dignity's content;<sup>47</sup> there is no consensus regarding human dignity's underlying rationale beyond a common core;<sup>48</sup> and there is no consensus regarding the results to which human dignity leads.

This complexity is not a sufficient reason to justify a negative approach toward human dignity. Equality, liberty and life are also complex concepts, and their content, underlying rationales and results are also controversial. That cannot justify ignoring them.<sup>49</sup> Similarly, proportionality is a complex concept, but that does not prevent its use. Quite the opposite: it is an expression par excellence of laws' migration from one system to another.<sup>50</sup> This is the case regarding human dignity. Its complexity does not make it useless. Indeed, equality, liberty and life are concepts that have been with us for centuries, whereas human dignity is a new concept in constitutional law.<sup>51</sup> This novelty passes quickly; society gets accustomed to the new concept, with all its problems. What in the past appeared vague and unclear becomes natural and accepted in the present.

In any case, what philosophers consider to be unclear and vague is not necessarily unclear and vague to jurists. Judges do not enjoy the extent of discretion granted to theologians and philosophers. They live in a legal framework, which determines rules on whose opinion is decisive and whose is not. The judge who must give meaning to human dignity in a constitution does not have the freedom of the philosopher to agree with Kant or to reject his approach. The original complexity of the concept disappears, replaced by concepts that must be implemented. This complexity,

<sup>46</sup> Meyer, 'Dignity as a (Modern) Virtue', at 196; O'Connell, 'The Role of Dignity in Equality Law'; Rao, 'Three Concepts of Dignity in Constitutional Law', at 192.

<sup>47</sup> McCrudden, 'Human Dignity and Judicial Interpretation', at 712.

<sup>48</sup> See section 1B of this chapter.

<sup>49</sup> Arthur Chaskalson, 'Human Dignity as a Constitutional Value', in David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 133, 135; Paolo G. Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) 19 *European Journal of International Law* 931.

<sup>50</sup> Aharon Barak, *Proportionality: Constitutional Rights and their Limitation*, Doron Kalir trans. (Cambridge University Press, 2012) 181.

<sup>51</sup> Rao, 'Three Concepts of Dignity in Constitutional Law', at 190.