Human Dignity: The Constitutional Value and the Constitutional Right

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The constitutional meaning of human dignity

Human dignity has a long intellectual history. It has spawned conflicting understandings. What should judges do with this wealth of ideas when they are called upon to interpret the concept of ‘human dignity’, as part of a constitutional bill of rights? They certainly cannot ignore the rich history of human dignity. But neither can they be satisfied with the conclusion that it is a vague concept. Their judicial role obligates them to furnish content to vague concepts. This is what they have done in the past, giving meaning to vague concepts such as liberty and equality. They must do so again now when they encounter the concept of human dignity as part of their constitution. But how?

To answer this question, it is appropriate to distinguish, with respect to human dignity, between two fundamental constitutional situations. The first is where human dignity serves as a constitutional value but not as a constitutional right. The second is where human dignity serves not only as a constitutional value but also as a constitutional right.

Human dignity as a constitutional value

Human dignity as an express or implied constitutional value

A constitutional value is a value or a principle that is recognized expressly or impliedly by a constitution. Recognition is express if there is a specific provi-

1 See Matthias Mahlmann, Elemente einer ethischen Grundrechts-theorie (Baden-Baden, Nomos, 2008), 97; Laurie Ackermann, Human Dignity: Lodestar for Equality in South Africa (Cape Town, Juta and Co., 2012), 17.

sion in the constitution regarding that value. For example, the Constitution of Spain (1978) provides that ‘human dignity, the inviolable and inherent rights, the free development of the personality ... are the foundation of political order and social peace’. Recognition is implied when express recognition is absent, yet consideration of the constitutional text in its entirety leads to the conclusion that the value is included within the constitution. For example, the American Bill of Rights and the Canadian Charter of Human Rights have been construed to include an implied value of human dignity.

The role of human dignity as a constitutional value

Human dignity as a constitutional value has several functions in the field of human rights. It provides the theoretical foundation for human rights; it assists in the interpretation of human rights at the sub-constitutional level; it is one of the values that every constitutional right is intended to realize; it plays a role in the limitations to constitutional rights and in determining the limits to

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3 Spanish Constitution (Constitución Española), section 10, 1978.
such limitations; it plays a primary interpretative role in those cases where the constitution does recognize a constitutional right to human dignity.

The meaning of human dignity as a constitutional value

What is human dignity as a constitutional value? The answer provided by most supreme and constitutional courts in modern constitutional democracies is that human dignity means humanity? Human dignity as a constitutional value is the humanity of each person as a human being; it is the freedom of choice of human beings and the autonomy of their will. It is their human identity. It is the freedom of each individual to write the story of his or her life. It is the freedom from humiliation and degradation. It is preventing anyone from turning into a means for the satisfaction of another's will. Human dignity functions within the bounds of society. It represents a holistic approach to the internal and emotional world of human beings, their social identity, and their relationships with others. This, in my opinion, is the modern version of the idea that every man has the status and rank of a king.

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9. Nova Scotia (AG) v Walsh, 2002, 4 S.C.R. 325, 378 (Can.) ('Dignity is by its very nature a loaded and value-laden concept comprising fundamental assumptions about what it means to be a human being in society. It is an essential aspect of humanity, the absence of which is felt by all members of society') (L'Heureux-Dube J); Jordan v S., 2002 (6) SA 642 (CC), para. 74 (S. Afr.) ('Our Constitution values human dignity which inheres in various aspects of what it means to be a human being') (O'Regan J, Sachs J); S v Makwanyane, 1995 (3) SA 391 (CC), para. 308, 326 (S. Afr.); Prinsloo v Van Der Linde, 1997 (3) SA 1012 (CC), para. 31 (S. Afr.); Government of the Republic of South Africa and Others v Groothoom, 2001 (1) SA 46 (CC), para. 83 (S. Afr.); National Coalition for Gay and Lesbian Equality v Minister of Home Affairs, 2000 (2) SA (CC), para. 54 (S. Afr.); Minister of Home Affairs v Fourie, 2006 (1) SA 524 (CC), para. 50 (S. Afr.); NM v Smith, 2007 (5) SA 250 (CC), paras 131-2 (S. Afr.); HCJ 6427/02 Movement for Quality Government in Israel v Knesset 61(1) PD 619, 685 (2006) (Heb.) (Isr.) ('At the foundation of human dignity is the autonomy of the individual will, freedom of choice, and freedom of action of a human being as a free person. Human dignity bases its recognition upon the physical and intellectual integrity of the human being, his or her humanity, and his or her value as a person, without any connection whatsoever to the degree of benefit that he or she provides to others') (Barak P).


This concept of human dignity as a constitutional value, though based on dignity’s long intellectual history, is characterized by its modern nature. We are concerned with the dignity of a person in today’s society. In many respects, there is an “overlapping consensus” between this understanding of humanity and the religious or the Kantian perspective on humanity.

The understanding of human dignity as the humanity of the human being within the framework of society is not based on one or another political or moral theory, although it draws upon several. It is not focused only on the value of human dignity as the underlying purpose of civil and political constitutional rights. It is equally applicable as the underlying purpose of economic, social, and cultural constitutional rights. It gives the legislature discretion, yet it also recognizes the limitations imposed on the legislature (in the framework of proportionality).

In their judgments, judges will take into account the external and the internal contexts characterizing the specific legal system. The external context consists of the historical and social background that led to the recognition of human dignity as a constitutional value. The internal context reflects the constitutional architecture. It comprises the structure of the constitution and the bill of rights, generally, and the normative status awarded to the value of human dignity within these constitutional documents, specifically. Differences in these contexts among the various legal systems can lead to differences in the understanding of the value of human dignity and the implications of that understanding. Having considered the external and internal contexts, judges

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12 HCJ 5688/92 Vieselbaum v Minister of Defense, 47(2) PD 812, 827 (1993) (Heb.) (Isr.); “Human dignity is a complex principle. In formulating it, the attempt to adopt one or another moral or philosophical world view must be avoided. Human dignity must not be turned into a Kantian concept, nor an expression of one of the conceptions of natural law. The meaning of ‘human dignity’ should be determined based on the perspectives of the enlightened public in Israel, against the background of the purpose of the Basic Law: Human Dignity and Liberty. This concept rests upon the recognition that human beings are free to develop their body and spirit according to their will, within those social networks to which they are linked and upon which they are dependent. ‘Human dignity’ encompasses a broad range of aspects characterizing human beings” (Barak P).


14 See Movement for Quality Government in Israel v Knesset, p. 682; “What is the scope of human dignity as a human right? Answering this question is no simple task. It derives both from the complexity of the concept of “human dignity” and from its position within Basic Law: Human Dignity and Liberty. The scope of human dignity shall be determined according to purposive interpretation. That interpretation will take into account, among other things, the structure of the Basic Law, its history, the precedents that have interpreted it in the past, its relations with other Basic Laws and comparative law. That interpretation will benefit from the religious roots of the concept of human dignity which are traced to Judaism ... it will be affected from its philosophical roots, namely from the work of Kant. However, it must always be borne in mind that human dignity should be understood on the background of the social reality in Israel and its basic values” (Barak P). See also, Ackermann, Human Dignity, 18.

15 See Government of the Republic of South Africa and Others v Groothoom, para. 22 (Jacob J).
will express their understanding of how the society in which they are ruling views the concept of human dignity. They thereby express its history and its basic and fundamental values. That is what judges do when they express their society’s concepts of equality, liberty, freedom of expression, and the other values underlying constitutional rights. They are not expressing their own personal outlooks but rather the outlook of the society in which they operate. Judges will also use information drawn from other constitutional documents, such as the preamble to the constitution or the declaration of independence. They will be assisted by the case law dealing with the concept and other similar concepts. They will examine comparative constitutional law and international law. They will focus on the foundational values and concepts, rather than the passing spirit of the times. They will express the long-term beliefs of a society, not the temporary and fleeting. All of these elements together allow judges to give expression to a society’s conceptions about the humanity of the person as a constitutional value.

This approach gives the constitutional value of human dignity a broad reach. Each constitutional right has a special purpose, reflecting its unique nature. Yet alongside these special purposes, constitutional rights also rest upon the general purpose of realizing the value of human dignity. The result is that the purposes of most constitutional rights partly overlap with each other, because what they share in common is the general purpose of realizing human dignity. The majority of this overlap is complementary in nature: the constitutional value of human dignity which is common to most constitutional rights serves to strengthen the unique constitutional value characterizing each specific right. However, to some extent this partial overlap is also contradictory: the general purpose of human dignity in one right may be in conflict with the special purpose of another right. Thus, when two constitutional rights clash, the value of human dignity may be found on both sides of the scale. Sometimes, within a given constitutional right, its special purpose may conflict with the general purpose of human dignity.

How can these cases of conflict be resolved? Must we balance among the conflicting purposes on the constitutional level? This interpretative balancing would have an impact on the scope of the various constitutional rights. In my opinion, this type of balancing approach is inappropriate. Conflicting overlaps are a natural phenomenon in the realm of constitutional values. They do not reflect a mistake in the constitutional text. They reflect the richness of the humanity of the human being with all of its inherent contradictions.

\[16\] On interpretive balancing, see Aharon Barak, Proportionality: Constitutional Rights and Their Limitations (Cambridge, Cambridge University Press, 2012), 92.
Therefore, these conflicting partial overlaps should be left untouched, without a solution at the constitutional level. Let a thousand flowers of constitutional values (either complementary or contradictory) bloom at the constitutional level. Yet, simultaneously, a solution should be sought in the second stage of the constitutional analysis, which takes place at the sub-constitutional level, through the law of proportionality.

Human dignity as a constitutional right

Recognition of human dignity as a constitutional right

Human dignity is recognized as a constitutional right in many modern constitutions. In a few cases, even though there is no independent right to human dignity, such has been derived through interpretation from another independent right. This can be described as a constitutional ‘daughter-right’ to human dignity, derived from a constitutional ‘mother right’, which is specified in the constitution as an independent right. Such a right to human dignity has been recognised by the Supreme Court of India, deriving from the right to life.

In most countries that recognize a constitutional right to human dignity, the right is not absolute. It is relative, and thus can be limited. The ordinary rules that are applicable to limitations on a constitutional right also apply to limitations on the right to human dignity. In most constitutions, the law of proportionality provides that not every limitation of the right to human dignity is unconstitutional. Only a disproportionate limitation of human dignity is unconstitutional. German constitutional law is different, in that the right to human dignity is absolute, and the law of proportionality is inapplicable to it.

In most cases, the constitutional right to human dignity is not an eternal right. Rather, it is subject to change through a constitutional amendment.

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17 On the two-stage analysis, see Barak, Proportionality, 19.
18 See McCrudden, ‘Human dignity and judicial interpretation of human rights’.
19 Francis Coralie Mullin v Delhi, AIR 1981 SC 746 (‘We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this rights would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human’) (Bhangwati J).
20 See Barak, Proportionality, 27, 32.
pursuant to the accepted procedures for doing so. This is not the case, however, under German constitutional law, in which the constitutional right to human dignity is not subject to constitutional amendment. In a number of constitutions, the right to human dignity is both a negative and positive right. The state’s obligations are not satisfied solely by refraining from imposing limitations on the right to human dignity (the negative aspect). The state must also take action to protect human dignity and to facilitate its realization (the positive aspect). The constitutional right to dignity is intended to ensure human beings’ political and civil liberties as well as their social and economic freedoms.

The content of the constitutional right to human dignity: the scope of the right to human dignity

The scope of the human right to dignity

The scope of the constitutional right to human dignity will be determined by its underlying purposes. The central purpose is the fulfilment of the constitutional value of human dignity, that is, the humanity of the person as a human being. The scope of the constitutional right to human dignity is the same as the scope of the constitutional value of human dignity. However, the constitutional architecture may prevent this outcome, and may lead to the conclusion that the scope of the constitutional right to human dignity is narrower than the scope of the constitutional value of human dignity. This is the case of German constitutional law. First, we shall discuss the situations in which there is an overlap between the scope of the right and the scope of the value. Then we shall examine the exceptional case of the right to human dignity in German constitutional law.

The standard case: an overlap between the right and the value of human dignity

Ordinarily, the constitutional right to human dignity is relative. In this case, the constitutional value of human dignity serves as the general purpose underlying the right to human dignity. Against this background, the Supreme Court of Israel has held that the right to human dignity does not extend to cor-

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22 See The German Basic Law, article 79(3).
23 See The German Basic Law, article 1(1); Constitution of South Africa, article 7(2); Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150, article 2, 4, 1992 (Isr.).
porations. It further held, in a long series of opinions, that human dignity extends to all those activities in which human beings must be recognized as free agents, developing their body and mind according to their own free will. Human beings’ free will is an expression of their humanity, and of their desire to shape and guide their own lives and realize themselves. It is the right of all human beings to develop their own personality, character, lifestyle, identity, relationships with others, and world view. It is the right to decide with whom to share one’s life, start a family, and raise children. It is the right to parenthood. It is the right to decide where to be and where to go. It is the right to enter into a contract, choose a name, grow a beard, have sexual relations, say whatever one wants, and speak whichever language one chooses. It is the right to think and to want. It is the right to decide what to believe and what not to believe. It is the right to know who your father is, who your mother is, and where you came from. It is the right to raise, nurture, and educate our own children. It is the right to write the story of our own lives.

Free will is closely related to the autonomy of individual will. Its meaning is that human beings—each individual, and not another; each individual, and not the state—control their own fate. Human beings are the masters of their own bodies and the way they are treated. It is also the right to be left alone.

The humanity of human beings mandates the recognition of their worth as individuals, irrespective of the benefit they provide to society. A human being is not merely a means of generating profits for another person. All human beings are equal, and no one controls another’s freedom of choice. Each person is a world unto herself, an end unto himself. People should not be held responsible for actions they have undertaken which were not of their own free will, and the responsibility imposed upon them for their actions should not

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24 HCJ 4593/05 Bank Haimirzachi v the Prime Minister (20 September, 2006), Nevo Database (by subscription) (Heb.)
be based on vengeance, nor should a person be used only as a means of determining others.

The humanity of human beings is their humanity within the society in which they live. It is not humanity on a desolate island. This is humanity which is built on the mutual relationships between the individual and other individuals, and between them and the state. Thus the need arises to guarantee the minimum subsistence level and the conditions of education, health, food, and work, which enable individuals to realize their free will and their autonomy. Thus the need arises to protect a person’s reputation, and to ensure that people can participate in society by expressing themselves and influencing its direction. Discrimination against people infringes their identity. The humanity of human beings is realized when each is an equal among equals in the society in which they live. The humiliation and degradation of human beings limits their humanity.

The special case of human dignity as a constitutional right in the German constitution

In German constitutional law – as in other constitutions – the value of human dignity means the humanity of the human being. It is the supreme value of the German constitution. It is view human dignity as the spirit and the essence of the entire Constitution; it is the epicenter of the constitutional structure; it is the primary principle governing all parts of the Constitution. This supreme status reflects the idea that Germany has renounced its Nazi past and the grave violations of human dignity which characterized it, and has placed the human dignity, which was desecrated by the Nazis, as its highest priority.

What is the status of the constitutional right to human dignity? It is an absolute right. It is not subject to the rules of proportionality and the balancing which is undertaken in its framework. It is an eternal right. It is not subject to constitutional amendment. Thus, the scope of the constitutional right to

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28 See BVerfGE 12, 45; BVerfGE 17, 1; BVerfGE 30, 173; BVerfGE 45, 187; BVerfGE 82, 60. See also Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd edn, 1997), 298.

29 See BVerfGE 7, 198; BVerfGE 35, 202; BVerfGE 39, 1.


human dignity is narrow and limited. As human dignity is an absolute right, any limitation imposed on it is unconstitutional. Therefore, the scope of the right to human dignity cannot extend to all aspects of the humanity of human beings. Thus, under German constitutional law, the right to human dignity applies only subsistence levels for every person in society. The criterion for understanding the right to human dignity is that it is violated whenever a person is considered as mere means to achieving someone else’s goals. The right to human dignity, in German constitutional law, is limited to always considering each person as an end unto itself to those extreme situations in which the taboos relating to human existence are violated. This framework includes the prohibition of torture, the prohibition of humiliation and the ensuring of minimum and not as a means (an object). This is the ‘object formula’\(^\text{32}\) influenced by Kantian philosophy.

This understanding of human dignity is narrower than the understanding of human dignity as the humanity of the human being. The external interpretive context, encompassing the historical and social background, might have led to the identification of human dignity in German constitutional theory with the humanity of the human being. However, the internal interpretive context, which is concerned with the constitutional architecture, which endows the right to human dignity its absolute and eternal nature, leads instead to the detachment between the scope of the constitutional value of human dignity (humanity of the human being) and the scope of the constitutional right to human dignity (negating the consideration of a person as a mere means). Only those certain aspects of the value of human dignity which are related primarily to the viewpoint that humanity is an end unto itself and not a means, set the scope of the constitutional right to human dignity.

The area covered by the right to human dignity

(1) The area covered and the partial overlap problem

Owing to the broad extension of the constitutional value of human dignity, the constitutional right to human dignity also has a broad extension. This situation raises many questions. I will discuss only three methodological questions: First, is there any area of human behaviour which is exclusively protected by the constitutional right to human dignity? Second, what is the role of the constitutional right to human dignity in areas where there is a partial comple-

mentary overlap between the right to human dignity and other constitutional rights? Third, what is the law when there is a partial conflicting overlap between the constitutional right to human dignity and other constitutional rights?

(2) The area exclusively covered by the right to human dignity

(i) The Architecture of the constitutional Bill of Rights: A comprehensive Bill of Rights (the case of South Africa)

The answer as to whether human dignity has a domain (or ‘normative territory’) to which it is exclusively applicable lies within the structure of each state’s constitutional bill of rights. To the extent that a bill of rights is more comprehensive and richer with respect to the constitutional rights that have human dignity as one of their underlying purposes, the domain which human dignity exclusively applies to as a constitutional right will be diminished. Consider the Bill of Rights in the Constitution of South Africa. It contains most of the (civil and social) constitutional rights recognized in comparative law. As a result, most situations falling within the scope of the right to human dignity also fall within the scope of other constitutional rights. For example, human dignity is one of the important components underlying the right to equality. To the extent that discrimination affects this component, it is prohibited by both the constitutional right to equality and the constitutional right to human dignity. Thus, in the area of discrimination the right to human dignity does not exclusively apply. To what, if anything, then, does the constitutional right to human dignity exclusively apply in South Africa? Is there a ‘normative territory’ which belongs exclusively to human dignity? The answer is that its exclusive coverage applies only to those areas that are included within the constitutional right to human dignity, but do not fall within the scope of any other constitutional right. For example, the protection of a person’s reputation and the right to family life are not recognized in the Constitution of South Africa as independent constitutional rights. These are the exclusive aspects of the constitutional right to human dignity in the South African Constitution.

The exclusive aspects of human dignity in a comprehensive bill of rights, such as South Africa’s, may become broader or narrower in the future through

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35 See *Dawood v Minister of Home Affairs*, 2000 (3) SA 936 (CC), para. 36; *Booysen v Minister of Home Affairs and Another*, 2001 (4) SA 485 (CC), para. 10; *Islamic Unity Convention v Independent Broadcasting Authority*, 2002 (4) SA 294 (CC), para. 10.
interpretation. Thus, changes in the understanding of the scope of the right to human dignity may be warranted because of unforeseeable scientific developments. For example, scientific developments in the fields of genetic engineering, cloning, and stem cell research are at the centre of bioethics. Certain aspects of bioethics are likely to fall within the scope of the right to human dignity, particularly if this right is interpreted as extending not only to an individual’s dignity but also to the dignity of the human race as a whole.\(^{37}\)

Theoretically, there may be a situation in which a constitutional charter of human rights is so extensive that it covers any and all behaviour that limits human dignity, even without a specific right to human dignity. This is likely to occur with a bill of rights that includes a ‘basket clause’, that is, a provision stating that any behaviour that limits the individual’s freedom of choice and that is not covered by the other constitutional rights falls within the category of the basket right. In such a situation, in theory, the right to human dignity does not have any unique ‘territory’ of its own, because any behaviour limiting human dignity which is not included in any of the special rights falls within the bounds of the basket right.

This seems to be the case with the bill of rights in the Constitution of Germany, which recognizes the right to the development of one’s personality.\(^{38}\) This right has been interpreted as a basket right (\textit{Auffanggrundrecht}). Any state action limiting an individual’s freedom of choice not covered by one of the specific constitutional rights recognized in the German Constitution falls within the bounds of the right to the development of one’s personality. This, then, appears to leave a narrow field of operation unique to the right to human dignity in the German Constitution. Essentially, that the right to human dignity in the German Constitution is perceived as protecting against the limitation of one of the other constitutional rights in a way that infringes the right to human dignity. Human dignity is thereby joined to one of the other rights recognized in the Constitution, and operates as a marker for the unconstitutional limitation of such a right. Such limitation is not subject to proportionality, as it reflects the absolute nature of the constitutional right to human


\(^{38}\) See The German Basic Law, article 2(1). For the interpretation of this article see Mahlmann, \textit{Elemente einer ethischen Grundrechtstheorie}, 377.
dignity in German constitutional law. This is the case when the restriction of a constitutional right turns the person who is harmed into merely a means of realizing the public interest (the "object formula"). In other constitutions, it may be the right to liberty or the right to life\(^9\) which fulfils this role of the basket right. However, even then, the existence of a separate constitutional right to human dignity is nevertheless important, for two reasons. First, the future is unknown. Developments may occur which will not fall within the bounds of the basket right, but which may find their place within the scope of the right to human dignity. Second, even if the constitutional right to human dignity does not have unique scope, the fact that a state action limits not only a specific constitutional right but also the right to human dignity carries legal significance. The existence of the constitutional right to human dignity gives special weight to human dignity, precisely because it is an independent constitutional right and not just a constitutional value.

(ii) The architecture of the constitutional Bill of Rights: a partial constitutional Bill of Rights (The Case of Israel)

In comparison to the abundance of constitutional rights in some constitutions, others contain only a partial bill of rights. This usually occurs for historical reasons. Consider a situation in which the rights that are recognized in a partial bill of rights also include the constitutional right to human dignity. Let us also assume that the right is not an absolute right, in other words, that it is subject to proportional limitations. In such a case, the "normative territory" of the constitutional right to human dignity is wide in scope.

This is the normative reality in Israel. The constitutional bill of rights enshrined in the Basic Law: Human Dignity and Liberty, and in the Basic Law: Freedom of Occupation is limited. The reasons for this are historical and the process of constitution-making has yet to be completed. The bill of rights contains only the following express rights: the right to life, the right to the body, the right to human dignity, the right to property, the right to personal liberty, the right to freedom of movement into and out of Israel, the right to privacy, and the right to freedom of occupation. Many of the rights recognized in comparative law have not been recognized as independent constitutional rights. The Supreme Court has interpreted their absence from the bill of rights as having been intended to signal non-recognition of them as independent constitutional rights. However, it has not interpreted this as entirely negating their existence. It has recognized certain of their aspects within the framework

of the right to human dignity.\(^9\) Against this backdrop, the Supreme Court has ruled that human dignity is a 'framework-right' or a 'mother-right'. In one of its cases, the Supreme Court discussed the characteristics of human dignity as such a right:\(^1\)

A feature of this type of right is that its express language does not specify the particular situations to which it applies. Its reach is open-ended ... The situations it covers may be deduced by interpreting the open-textured language of the Basic-Law, in light of its purpose. For convenience, these situations can be grouped into categories, such as the right to a humane existence with dignity ... the right to physical and mental integrity ... the right of an adult to adopt ... and so forth, as 'daughter-rights' derived from the mother-right ... Of course, determining the scope of the daughter-rights raises difficult questions of interpretation. So long as the Knesset has not distinguished these rights from the right to human dignity, as independent rights, there is no alternative to the interpretive process, centered on human dignity, which aims to determine the scope of this right, while trying to categorise the types of situations it covers. Of course, this categorisation can never encompass the full scope of the right to human dignity, nor is it intended to do so. It is intended as an aid in understanding the framework provision of human dignity.

According to this view, various daughter-rights are derived from human dignity (as a mother-right), and their joinder expresses the full scope of the mother-right. Indeed, in its extensive and comprehensive case law, the Supreme Court has derived a considerable number of daughter-rights from the mother-right of human dignity, including the right to protect one's personality; the right to protection of one's personal and social identity; the right to protection from humiliation and degradation; the right to family life and parenthood; the right to education; the right to social security; the right to food; the right to housing; the right to water; the right to health; the right to equality; the right to freedom of expression; the right to freedom of conscience and religion; the right to freedom of movement within Israel; the right to reputation; and the right to minimum subsistence in dignity. All of these daughter-rights—and this is not a closed list—reflect various aspects of the humanity of the human being. These rights have been recognized as both negative and positive rights. They cover both civil and social aspects, and they inherently include both the core of the right and its penumbra. Differences between the right's core and its penumbra are relevant in the second stage of the constitutional analysis, that is, in assessing the proportionality of the limitation. All of the daughter-rights have been recognized as an integral part of the right to human dignity. These

\(^1\) Adalah v Minister of Interior, 293-5.
are not implied rights. They are express rights which bear the same name as their "mother"—human dignity.

The Supreme Court of Israel ruled that rights, which in a comprehensive bill of rights are recognized as independent rights but are not so recognized in its partial bill of rights, would be recognized as dignity daughter-rights only with respect to those aspects of the independent rights which have a close substantive relationship to human dignity. For example, not every form of discrimination that limits an independent constitutional right to equality will also limit equality as a daughter-right of human dignity. The right to live with dignity as a daughter-right of human dignity includes the right to a minimum subsistence level with dignity. This existence is closely related to human dignity. If the right to minimum subsistence with dignity were an independent right, then it would certainly extend over a broader area. This restriction of the scope of the right to human dignity is mandated by the method of purposive interpretation. Human dignity, as one of the constitutional rights in the bill of rights, cannot fill the entire space left uncovered by the partial bill of rights. As the Supreme Court stated in one case: 12

> Human dignity does not refer to everything that is good and beautiful in life. Human dignity is not all human rights. We must distinguish between human dignity as an overall goal underlying all rights and human dignity as a constitutional right. Human dignity is not intended to make all other human rights redundant... It inherently includes that which is intrinsic to it... even if in a complete constitutional arrangement it would be included within the other explicit rights. The concept is that the purpose of the Basic Law cannot be turned into something which it is not, nor can one cram into human dignity all of the civil and social rights, to their full extent, which are accepted in advanced societies.

(3) Complementary overlap between the constitutional right to human dignity and other constitutional rights

Different aspects of the value of human dignity are protected by various constitutional rights. Yet these aspects are also entitled to protection within the scope of the right to human dignity. The result is a complementary partial overlap between the right to human dignity and other constitutional rights. What is the relationship between the right to human dignity and other constitutional rights within this complementary overlapping area? The fact that a complementary overlapping area exists should not result in any changes in the scope of the constitutional rights that overlap. There is no reason to withdraw the overlapping area from the scope of the right to human dignity,

12 See Movement for Quality Government in Israel v Knesset, 684 (Barak P).
just as there is no reason to withdraw it from the scope of the other rights. The complementary overlap does not lead to any changes in the boundaries of any of the constitutional rights, because each right is independent with respect to the scope it requires for its underlying purpose. Each right is reinforced by the support given to it in the overlapping area.

But is it not the case that when there is a complementary overlap we in effect apply only the specific constitutional right, and not the constitutional right to human dignity? This kind of approach can be found in the case law of the Constitutional Court of South Africa. In my opinion, in the case of a complementary partial overlap between the constitutional right to human dignity and other constitutional rights, each right must be considered separately. The constitutional right to human dignity must not be treated as a residual right, because this would be inconsistent with the centrality of the right to human dignity within the constitution, and it is inappropriate from a methodological perspective as well. The specific right does not detract from the general right to human dignity. Both are applicable to the limiting behaviour, each from its own perspective. The complementary overlap is not given normative expression on the constitutional level, but rather at the sub-constitutional level. A statute that limits a constitutional right in an area in which there is a complementary overlap will be constitutional only if it is proportionate. This proportionality must be examined separately for each of the constitutional rights, especially if the proportionality requirements for each right are different. However, even when a general limitation clause applies to all of the constitutional rights, any limitation must be analysed separately from the perspective of each of the constitutional rights. The reasons for this are two. First, the weight given to the public interest that justifies limitation on the constitutional right to human dignity may differ from its weight as a justification for a limitation on the particular constitutional right. Second, the weight given to the protection of the particular constitutional right (where human dignity might be limited at the penumbra) may be different from the weight given to the protection of the constitutional right to human dignity (where the limitation might be close to the core).

I would take a similar approach when the complementary overlap is between certain daughter-rights of human dignity. Thus, for example, the daughter-right to equality and the daughter-right to family life overlap when the limitation on family life is achieved in a discriminatory manner. Similarly, the daughter-right to equality and the daughter-right to education overlap when equality in education is limited. This overlap results in each daughter-right

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strengthening the other. Their integration does not result in new boundaries for the daughter-rights. It acts at the sub-constitutional level, in the framework of the law of proportionality.

(4) Conflicting overlap (collusion) between the constitutional right to human dignity and other constitutional rights

In some cases the constitutional right to human dignity conflicts with another independent constitutional right shaped as a principle. How should this conflict be resolved? At the constitutional level, the clash remains. The conflicting partial overlap does not modify the scope of either of the conflicting constitutional rights, just as in the case of a complementary partial overlap. This is the case whether the constitutional right to human dignity is a relative right (as in South African constitutional law and Israeli constitutional law) or an absolute right (as in German constitutional law). Accordingly, the result of the clash is relevant only at the sub-constitutional level. This follows from the understanding that a conflicting overlap between rights shaped as principles is not the result of a mistake, nor does it reflect a constitutional pathology. We do not expect the constitutional right that is overruled by another constitutional right to be wholly or partially withdrawn from the array of constitutional rights. Nor do we proclaim that the special right prevails over the general right. The conflicting overlap demonstrates the richness of the constitutional arrangement and the ongoing clashes among its components. The Israeli Supreme Court ruled in one case:

The hallmark of democracy is the wealth of rights, values and principles and the ongoing conflicts among them. More than once it has been said that constitutional rights, values and principles are in contradictory pairs. Resolution of these contradictions—which are natural in a democracy and give it its vitality—is not generally done by determining the scope of the rights, values and interests and withdrawing the aspects which do not prevail from the constitutional discourse and constitutional scrutiny. These conflicts are resolved by leaving them at the constitutional level, while determining the degree of protection given to the rights, values and interests that clash at the level of ordinary legislation.

According to this approach, when a statute limits one constitutional right (such as the reputational aspect of the right to human dignity) in order to protect another independent constitutional right (such as the right to freedom of expression) the constitutionality of the statute should be determined in the second stage of the constitutional analysis, where the proportionality of the

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44 See HCJ 1434/03 Anonymous v Haifa disciplinary court of state employees, 58(1) PD 538–9 (2003) (Heb.) (Barak P).
limitation is decided. This determination takes place at the sub-constitutional level. A statute that restricts one right in order to protect another is constitutional if it is proportional. Thus, even if the limiting statute is determined to be proportional, this result does not restrict the scope of the right that is limited, nor does it expand the scope of the right that is protected.

I would take a similar approach when two constitutional daughter-rights of the mother-right of human dignity conflict with each other. This may occur frequently under a partial constitutional bill of rights, which is the situation in Israel. For example, the daughter-right to reputation may conflict with the daughter-right to freedom of expression, when a statute protecting freedom of expression limits the protection of reputation. Similarly, the daughter-right to freedom of movement may conflict with the daughter-right to freedom of worship, when a statute imposes a limitation on freedom of movement in order to protect freedom of worship. Such a conflict, like clashes between independent constitutional rights, is not resolved at the constitutional level. At that level it remains. Human dignity will continue to reflect the various aspects that characterize it, whether complementary or conflicting. Resolution of the conflict takes place at the sub-constitutional level. Within the framework of proportionality, human dignity will be found on both sides of the scale. The main issue in the proportionality analysis will generally be the balance struck by the statute between the marginal social importance of preventing the additional limitation of one daughter-right of human dignity and the marginal social importance of protecting the conflicting daughter-right. This is done in the second stage of constitutional analysis, within the framework of proportionality.

Conclusion

Many legal systems incorporate the constitutional value of human dignity, and a number of constitutions recognize the constitutional right to human dignity. In these situations, judges have no choice but to interpret these concepts. The vagueness of the concepts does not permit judges to ignore them or to deal with them as they wish. The job of judges is to understand and apply them, in accordance with the rules of interpretation in their own legal system.

The accepted approach in some supreme or constitutional courts is that dignity means humanity. The role of judges who interpret the constitutional value or the constitutional right to human dignity is to give meaning to the concept of the humanity. In doing so, they must reflect the fundamental social perceptions underlying their constitution’s structure.
What is the role of comparative law in the understanding of the constitutional value of human dignity and the constitutional right to human dignity? I suggest that two conclusions may be drawn from this chapter. First, comparative law is of great importance for understanding the concept of human dignity and the ideas that are derived from it. Comparative law gives interpretative inspiration to those who are attempting to understand what human dignity is, especially those judges who must give meaning to human dignity on a daily basis. Comparative law expands the interpretative horizon and thus enables each legal system to know itself better. Needless to say, however, that it is not binding. The second conclusion regarding the role of comparative law is that extreme caution should be adopted when referring to it. Every legal system has its own external context, which reflects its own historical and social background; every legal system has its own internal context, which reflects its constitutional structure and the normative status of the constitutional right to human dignity. These contexts influence each legal system’s approach to the normative characteristics of human dignity. As a result, each legal system has its own understanding of the humanity of the person, the scope of the bill of rights, and the architecture that characterizes it. Hence, human dignity in a constitution where it is an absolute and eternal constitutional right (such as Germany’s) differs from human dignity in a constitution where it is a relative right and subject to constitutional amendment (such as that of South Africa or Israel). The constitutional daughter-rights that may be derived from the constitutional mother-right to human dignity are influenced by the scope of the bill of rights. The daughter-rights of human dignity where a bill of rights is comprehensive (such as that of South Africa) differ from the daughter-rights of human dignity where the bill of rights is narrow (such as that of Israel). Constitutional architecture has an impact on constitutional interpretation.

During its long history, human dignity has been considered as a social, religious, and philosophical value. The consideration of human dignity as a constitutional value and constitutional right is relatively young. There is still substantial lack of clarity regarding the concept of human dignity and the conceptions which may be derived from it. There are great apprehensions about handing over responsibility for the interpretation of this concept and its derivative concepts to judges. Ultimately, however, insofar as it concerns the lack of clarity of the concepts and the apprehensions about judges, there is no significant difference between the right to human dignity and the rights to equality or liberty. Constitutional democracy has apparently already become accustomed to the idea that the rights to liberty and equality, for all of their

See Ackermann, Human Dignity, 14, 21.
vagueness, are essential features of every constitutional bill of rights. A similar rule should apply regarding the right to human dignity.

In the coming years, the number of judgements interpreting the constitutional value and the constitutional right to human dignity will multiply exponentially. The current vagueness will be reduced, and limited primarily to peripheral cases or situations in which changes are taking place in society or science. The apprehensions will subside. Human dignity will eventually become a constitutional value and a constitutional right that is seen as self-evident. I hope that the other participants in this book, who are scholars from other disciplines, will discuss the similarities and differences between their views and mine. Through an understanding of each other's viewpoints, a suitable framework may be created for reducing the gaps and narrowing the differences of opinion. Ultimately, we share the common goal of understanding and protecting human dignity. I hope that this chapter has contributed to advancing this goal.