

HUMAN DIGNITY AS A CHAMELEON

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TABLE OF CONTENTS

I.	INTRODUCTION.....	740
II.	HUMAN DIGNITY IN THE CONSTITUTIONAL LAW OF THE UNITED STATES.....	745
III.	THE INTERPRETATION OF THE RIGHT TO HUMAN DIGNITY IN THE BASIC LAW OF GERMANY	751
	A. Human Dignity in the German Basic Law	751
	B. The Absolute Protection of Human Dignity Under the German Basic Law and its Implications on the Coverage of the Right	752
IV.	THE INTERPRETATION OF THE RIGHT TO HUMAN DIGNITY IN THE CONSTITUTION OF SOUTH AFRICA	755
	A. Human Dignity in the South African Constitution.....	756
	B. The Relationship Between the Constitutional Right to Human Dignity in South Africa and Other Constitutional Rights.....	759
V.	THE INTERPRETATION OF THE RIGHT TO HUMAN DIGNITY IN THE ISRAELI BASIC LAW: HUMAN DIGNITY AND LIBERTY	761
	A. The Change in Status of the Right to Human Dignity in Israel	761
	B. The Coverage of the Right to Human Dignity in Israel and its Relationship with Other Constitutional Rights.....	763
VI.	CONCLUSION.....	769

ABSTRACT

This article offers an innovative argument, according to which courts do not interpret human dignity according to an abstract theoretical position on the nature of the value only, nor subordinate themselves to the subjective purpose of the drafters of a constitution. Thus, courts—whether in the United States, where human dignity is not explicitly mentioned in the Constitution, or in countries where the right is constitutionally enshrined, such as Germany, South Africa, and Israel—interpret and apply human dignity on the basis of the entirety of the provisions of the particular constitution. Human dignity serves as a constitutional chameleon in the sense that courts interpret it in accordance with the constitutional environment in which human dignity is located.

I. INTRODUCTION

The right to human dignity, inspired by the United Nations Charter and the Universal Declaration of Human Rights,¹ is included in many constitutions.² Human dignity is also recognized as a protected

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¹ See Paul Sourlas, *Human Dignity and the Constitution*, 7 JURIS. 30, 31 (2016); U.N. Charter pmbl. ("We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . ."); Universal Declaration of Human Rights, G.A. Res. 217A (III), pmbl. (Dec. 10, 1948) ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."); see also *id.* art. 1 ("All human beings are born free and equal in dignity and rights.").

² See AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 139 (2015) ("It appears that human dignity was first recognized as a right in the Constitution of Finland (1919). Only after the Second World War did the trend of recognizing human dignity as a constitutional right begin. The German Basic Law (1949) was the first to recognize an independent, express constitutional right to human dignity. After this came many constitutions, including the Constitution of Colombia (1991), Israel's Basic Law: Human Dignity and Liberty (1992), the Constitution of Russia (1993), the Constitution of South Africa (1996), the Constitution of Poland (1997), and the Constitution of Switzerland (1999).") (footnotes omitted).

value, although not explicitly mentioned, in other constitutions³ and international human rights documents.⁴ Although in many countries human dignity is linked to the Categorical Imperative of Immanuel Kant (the “Humanity Formula” or “Object Formula”)⁵—according to which we should never act in such a way that we “treat humanity, whether in ourselves or in others, as a means only but always as an end in itself”⁶—human dignity is an open valve and indeterminable concept.⁷

³ See Thompson Chengeta, *Dignity, Ubuntu, Humanity and Autonomous Weapon Systems (AWS) Debate: An African Perspective*, 13 BRAZILIAN J. INT’L L. 460, 480 (2016) (asserting that “[i]n constitutions where the right to dignity is not specifically provided for in a constitution, it is implied in the constitutional value of human dignity”).

⁴ See Adeno Addis, *The Role of Human Dignity in a World of Plural Values and Ethical Commitments*, 31 NETH. Q. HUM. RTS. 403, 413 (2013) (pointing out that “[e]ven though the phrase ‘human dignity’ is not included in its specific form, major international human rights documents also refer to a version of it”).

⁵ See, e.g., Nicoleta-Ramona Predescu, *Human Dignity – A Right or a Principle of Human Rights?*, 2018 CONF. INT’L DR. 137, 139 (2018) (asserting that “we can say beyond any doubt that the philosophy of Emanuel Kant was the one that influenced the contemporary conception of dignity . . .”); ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY 310 (2009) (citing the Kantian demand that people be treated as ends rather than as mere means as one example for the indisputable influence of Kant’s philosophy on contemporary political philosophy); *id.* at 11 (discussing the Categorical Imperative). For the close connection between Kant’s philosophy and the right to human dignity, see G.P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U.W. ONT. L. REV. 171 (1984).

⁶ See Robert Johnson & Adam Cureton, *Kant’s Moral Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (2004), <https://plato.stanford.edu/entries/kant-moral/#CatHypImp> [<https://perma.cc/V6VS-8J5W>] (Jan. 21, 2022). For the Kantian Categorical Imperative, see also John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 677–78 (2008); Izhak England, *Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1918–19 (2000).

⁷ See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 698 (2008) (arguing that “[a]ll that is left of dignity, it might be said, is the relatively empty shell provided by the minimum core, but when the concept comes to be applied the appearance of commonality disappears, and human dignity (and with it human rights) is exposed as culturally relative, deeply contingent on local politics and values, resulting in significantly diverging, even conflicting, conceptions”); Tarunabh Khaitan, *Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea*, 32 OXFORD J. LEGAL STUD. 1, 11 (2011) (asserting that “one cannot ignore the very practical difficulties a judge will face in determining meaning of actions. Indeed, an important element of the indeterminacy complaint against dignity rests on the idea that, at least in practice, it is a ‘subjective notion’”); Charles Robert Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293, 1302 (1988) (“A major difficulty with specifying the proper constitutional role for human dignity is the imprecision of the concept.”); Justin Bates, *Human Dignity – An Empty Phrase in Search of*

There are notable differences between the interpretations and the applications of human dignity in individual countries.⁸ Some have argued that the source of the differences lies in social, historical, and cultural diversities.⁹ It was even argued that “dignity as a legal concept frequently functions merely as a mirror onto which each person projects his or her own values.”¹⁰

This Article claims that courts in different countries do not interpret human dignity only according to an abstract theoretical or normative position on the nature of value,¹¹ nor do courts subordinate themselves to the subjective purpose of the drafters of the country’s constitution. Rather, judges—whether in countries such as the United States where human dignity is not explicitly mentioned in the Constitution¹² or in countries in which the right is enshrined in the

Meaning?, 10 JUD. REV. 165, 166 (2005) (asserting that “[t]he problem, of course, is that until the phrase is defined, it is effectively meaningless. How can values be tested against it? How is an impugned decision to be measured? . . . Until the phrase has a meaningful definition, it is incapable of raising issues for adjudication”).

⁸ See McCrudden, *supra* note 7 (arguing that that the use of “dignity,” beyond a basic minimum core, does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common understanding of what dignity requires substantively within or across jurisdictions).

⁹ See, e.g., Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 211 (2008) (arguing that “[t]he indeterminacy of human dignity in the abstract may require that difficult questions of competing dignities be resolved by cultural understandings of what dignities should count. These judgments may have less to do with human dignity as such and more to do with particular conventional or cultural understandings of the meaning of dignity and the priority to be given to this value in different contexts. The principle of human dignity has little meaning in constitutional adjudication apart from external moral judgments about the varying weights to be given to competing dignities. The application of human dignity to determine the allocation of rights will depend on social, historical, and cultural factors that shape national values. Like all abstract values, human dignity will draw meaning from the ground in which it is planted”).

¹⁰ Luís R. Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT’L & COMP. L. REV. 331, 332 (2012).

¹¹ For a normative proposal of four formal principles for the use of human dignity in judicial decisions (using the concept strictly in relation to written law; defining the concept and its actual meaning in rulings; maintaining consistency in the use of the concept within current and future decisions; and using the concept only to advance human rights), see Doron Shultziner, *Human Dignity in Judicial Decisions: Principles of Application and the Rule of Law*, 25 CARDOZO J. INT’L & COMPAR. L. 435 (2017).

¹² Another notable country where the right to human dignity is not enshrined in its constitutional Bill of Rights is Canada. For a discussion of human dignity in Canadian constitutional law and the affiliation between human dignity and the Canadian Charter of Rights and Freedoms, see, e.g., BARAK, *supra* note 2, at 209–24; R. James Fyfe, *Dignity as Theory: Competing Conceptions of Human Dignity at the*

constitution—interpret the right on the basis of the entirety of the provisions of the particular constitution. Human dignity serves as a constitutional chameleon in the sense that courts in different countries interpret it in accordance with the constitutional environment in which it is located.

This argument will be exemplified by examining the judicial interpretation and application of human dignity in the United States and in three countries—Germany, South Africa, and Israel—whose constitutions explicitly include the right. We argue that: (1) the more inclusive the constitutional bill of rights is, the narrower the interpretation of the right to human dignity, as specific rights are applied instead of human dignity; and (2) an absolute phrasing of human dignity leads to a narrower interpretation.

In the United States, on the one hand, human dignity can be applied only for the interpretation of the rights enshrined in the text of the federal Constitution. On the other hand, the Kantian roots of the value of human dignity, according to which human dignity is absolute,¹³ fit the strict scrutiny protection of fundamental constitutional rights derived from human dignity.

In the German Basic Law of 1949, human dignity is an absolute, untouchable right, the entire scope of which is protected and cannot be limited.¹⁴ German courts grant the right a very narrow scope. Although there is still no agreed upon definition of human dignity, human dignity in Germany is violated only in extreme circumstances in which a person has been treated merely as a means for achieving someone else's ends. For instance, in a situation where the state has sacrificed one innocent person to save other persons.¹⁵

The Bill of Rights of the Constitution of South Africa is comprehensive and includes civil and political rights alongside social and

Supreme Court of Canada, 70 SASK. L. REV. 1 (2007); Rory O'Connell, *The Role of Dignity in Equality Law: Lessons from Canada and South Africa*, 6 INT'L J. CONST. L. 267 (2008).

¹³ See, e.g., IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 46 (Mary Gregor & Jens Timmermann eds. & trans., Cambridge Univ. Press 2011) (1785) (“In the kingdom of ends everything has either a price, or a dignity. What has a price can be replaced with something else, as its *equivalent*; whereas what is elevated above any price, and hence allows of no equivalent, has a dignity.”). For further discussion, see *infra* Section III.B.

¹⁴ Grundgesetz [GG] [Basic Law] art. 1, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (Ger.).

¹⁵ See Frank L. Schaefer, *Human Dignity: Key Principle of the German Constitution?*, in CONSTITUTIONAL VALUES, IN CONTEMPORARY LEGAL SPACE II 18, 25 (2016).

economic rights.¹⁶ All constitutional rights—including the right to human dignity—are relative and can be limited by proportionate laws. The common approach of the South African courts is that where a law infringes upon both the right to human dignity and a specific right, usually the limitation of human dignity does not have much meaning.¹⁷ The right to human dignity has become a residual right and applies only in such cases where no other right is applicable.

In Israel, the two Basic Laws on human rights do not mention all of the commonplace human rights, including, *inter alia*, the right to equality, freedom of speech, and freedom of religion.¹⁸ However, the Israeli Supreme Court interpreted the right to human dignity, enshrined in Basic Law: Human Dignity and Liberty, broadly and as including “daughter-rights” such as equality, freedom of speech, due process, and even social rights.¹⁹ Generally, the right to human dignity and its “daughter-rights,” like all other constitutional rights in Israel, are relative and may be restricted if the limitation is proportionate. At the same time, under Basic Law: The Government, the right to human dignity is absolutely protected from emergency regulations.²⁰ It seems that if the question arises, the Court will interpret human dignity in Basic Law: The Government much narrower than its interpretation in Basic Law: Human Dignity and Liberty, and like the interpretation of the absolute right to human dignity in Germany.

¹⁶ See S. AFR. CONST., 1996.

¹⁷ See Stuart Woolman, *Dignity*, in CONSTITUTIONAL LAW OF SOUTH AFRICA § 36–24 (Stu Woolman & Michael Bishop eds., 2d ed. 2013), <http://www.stuwoolman.co.za/downloads/Closa%20Consolidation%20to%20March%20%202013.pdf> [<https://perma.cc/2T6A-9QUZ>] (pointing out that “the ubiquity of dignity has led the Court to adhere to a relatively restrictive rule regarding the use of dignity as a first order rule: where a court can identify the infringement of a more specific right,” dignity “should not be added to the enquiry”); *Dawood v. Minister of Home Affairs* 2000 (8) BCLR 837 (CC) para. 35 (S. Afr.) (asserting that “[i]n many cases . . . where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right . . .”).

¹⁸ Basic Law: Human Dignity and Liberty, SH 1454 (1992) 90 (Isr.); Basic Law: The Government, SH 1780 (2001) 158 (Isr.).

¹⁹ See H CJ 1892/14 Ass’n for Civil Rights in Isr. v. Minister of Pub. Sec. (unpublished) para. 37 (June 13, 2017) (Isr.), <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/The%20Association%20for%20Civil%20Rights%20in%20Israel%20v.%20Minister%20of%20Public%20Security.pdf> [<https://perma.cc/3422-MBUG>] (“This Court has long held that human dignity comprises a broad field of rights, *inter alia*, and with nuances that this is not the place to elaborate, the right to freedom of religion and freedom from religion, the right to freedom of expression, the right to one’s good name, and the right to family life.”). For further discussion, see *infra* Section V.B.

²⁰ Basic Law: The Government, SH 1780 (2001) 39(d) (Isr.).

This Article proceeds as follows: Part I discusses the role of human dignity in the jurisprudence of the U.S. Supreme Court. Part II discusses the right to human dignity in the German Basic Law, as interpreted by the Federal Constitutional Court. Part III discusses the right to human dignity in the Constitution of South Africa, as interpreted by the South African Constitutional Court. Part IV discusses the right to human dignity in the Israeli Basic Law: Human Dignity and Liberty as interpreted by the Supreme Court of Israel. The various analyses show that despite the similar wording of the right to human dignity and the identical values on which it is based in all four countries, the judicial interpretation of that right by the various courts is different. Like the color of a chameleon, the interpretation and application of human dignity are influenced by the constitutional environment surrounding it.

II. HUMAN DIGNITY IN THE CONSTITUTIONAL LAW OF THE UNITED STATES

Human Dignity is not enshrined as an explicit right in the U.S. Constitution.²¹ Although human dignity seemed marginal in the American constitutional judicial discourse, it gained importance over the years.²² A number of commentators have even argued that the Constitution's wording and purpose point unmistakably to the protection of human dignity as its chief aim.²³

Since World War II, the U.S. Supreme Court has used the term "human dignity" with increasing frequency when interpreting the Bill of Rights.²⁴ The Court treated human dignity as a value underlying, or

²¹ See BARAK, *supra* note 2, at 185. However, human dignity is mentioned in several U.S. states constitutions. For a discussion of the Montana Human Dignity Clause, for example, see Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 23–27 (2004).

²² See Stéphanie Hennette-Vachez, *A Human Dignitas? Remnants of the Ancient Legal Concept in Contemporary Legal Jurisprudence*, 9 INT'L J. CONST. L. 32, 33 (2011).

²³ See Tremper, *supra* note 7, at 1297; see also EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 46 (2002) (pointing out that "[i]n fact, the idea of dignity can be considered as implicit to the American constitutional scheme").

²⁴ See Conor O'Mahony, *There Is No Such Thing as a Right to Dignity*, 10 INT'L J. CONST. L. 551, 554 (2012). For a discussion of dignity as a concept in the American constitutional discourse, see Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 UNIV. PA. J. CONST. L. 669, 681–86 (2005).

giving meaning to, fundamental constitutional rights and guarantees.²⁵ As Justice William Brennan put it, “the Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law.”²⁶ There were even those who claimed that human dignity became a “right or fundamental principle of [U.S.] constitutional law.”²⁷

The U.S. Supreme Court first used the phrase “human dignity” in 1946 in Justice Murphy’s dissent in *In re Yamashita*, which affirmed a death sentence imposed by a military commission.²⁸ In his dissenting opinion, Justice Murphy said that the Fifth Amendment guarantees due process of law to any person who is accused of a crime by the federal Government or any of its agencies.²⁹ He wrote,

[i]f we are ever to develop an orderly international community based upon a recognition of human dignity, it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion, rather than by vengeance.³⁰

Here, Justice Murphy referred to human dignity for the interpretation and application of the right to due process.³¹

In 1970, the Supreme Court ruled in *Goldberg v. Kelly*, in which the Court interpreted the Due Process Clause of the Fourteenth Amendment, holding that the Due Process Clause requires

²⁵ See Maxine Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 743 (2005).

²⁶ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986). For a discussion of human dignity in the legal philosophy of Justice Brennan, see Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL RTS. J. 223 (1998).

²⁷ Jordan Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 148 (1984).

²⁸ See *In re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting). Justice Frankfurter first employed the idea of dignity in connection with constitutional rights in his minority opinion in *Glasser v. United States*, 315 U.S. 60 (1942), which involved a federal defendant’s claim that he had been denied his right to counsel. In the course of his dissenting opinion, Justice Frankfurter noted that “[t]he guarantees of the Bill of Rights are not abstractions. Whether their safeguards of liberty and dignity have been infringed in a particular case depends upon the particular circumstances.” *Glasser v. United States*, 315 U.S. 60 (1942) (Frankfurter, J., dissenting).

²⁹ *In re Yamashita*, 327 U.S. at 26 (Murphy, J., dissenting).

³⁰ *Id.* at 29.

³¹ For the hypothesis that Justice Murphy borrowed the phrase “human dignity” from the United Nations Charter, which was signed about seven months earlier, see Paust, *supra* note 27, at 151.

an evidentiary hearing before a recipient of certain government welfare benefits can be deprived of such benefits.³² Justice Brennan, who delivered the opinion of the Court said, “[f]rom its founding, the Nation’s basic commitment has been to foster the dignity and wellbeing of all persons within its borders.”³³

In *Furman v. Georgia*,³⁴ which examined the death penalty, Justice Brennan said in regard to the Eight Amendment³⁵ that,

[a]t bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is ‘cruel and unusual,’ therefore, if it does not comport with human dignity.³⁶

Then, in *United States v. Windsor*, the Supreme Court struck down a federal law that denied federal recognition of same-sex marriages under the Due Process Clause.³⁷ The Court, in a relatively-short majority opinion delivered by Justice Kennedy that mentioned dignity eleven times, held that a law which interferes with “the equal dignity of same-sex marriages”³⁸ violates the Due Process Clause of the Fifth Amendment and thus “is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”³⁹

Indeed, the U.S. Constitution recognizes a number of constitutional rights designed as “framework rights” or “mother-rights.”⁴⁰ The Supreme Court has applied the concept of dignity to cases arising under the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments,

³² See *Goldberg v. Kelly*, 397 U.S. 254, 260 (1970).

³³ *Id.* at 264–65.

³⁴ *Furman v. Georgia*, 408 U.S. 238 (1972).

³⁵ See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

³⁶ *Furman*, 408 U.S. at 270.

³⁷ *United States v. Windsor*, 570 U.S. 744, 752 (2013).

³⁸ *Id.* at 746; see also Erin Daly, *Constitutional Comparisons: Emerging Dignity Rights at Home and Abroad*, 20 WIDENER L. REV. 199, 201 (2014) (claiming that in its reliance on human dignity, the Supreme Court introduced a new term to the constitutional vocabulary without explanation). For a discussion of the prominent and significant reliance on human dignity in the *United States v. Windsor*, see Michèle Finck, *The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective*, 14 INT’L J. CONST. L. 26, 32–33 (2016).

³⁹ *Windsor*, 570 U.S. at 770, 775. The Supreme Court also referred to dignity in declaring anti-sodomy statutes unconstitutional in *Lawrence v. Texas*. 539 U.S. 558, 567 (2003).

⁴⁰ BARAK, *supra* note 2, at 185.

without a sustained effort to develop the nature or scope of the right.⁴¹ Even the decisions which emphasized the value of human dignity “did not hold that the value of human dignity also constitutes a constitutional right derived from one of the constitutional rights expressly enshrined in the federal Bill of Rights.”⁴²

The influence of Kant’s philosophy on the expressions of human dignity in the U.S. Supreme Court’s jurisprudence is less explicit than its influence on the rulings of courts in other countries.⁴³ However, even without mentioning Kant, the Kantian perception of human

⁴¹ See Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N. UNIV. L. REV. 381, 401 (2011); see also Barroso, *supra* note 10, at 332 (noting that the use of the concept in American law is episodic and underdeveloped, relatively incoherent and inconsistent, and lacking in sufficient specificity and clarity); Stephen Riley, *Human Dignity: Comparative and Conceptual Debates*, 6 INT’L J.L. CONTEXT 117, 128 (2010) (asserting that “[d]etermination, both its quantity and quality, has been considered in dignitarian terms by the United States Supreme Court in the light of both the Eighth Amendment (cruel and unusual punishment) and the Fourteenth Amendment (due process)”).

⁴² BARAK, *supra* note 2, at 187; see also Daly, *supra* note 41, at 382 (claiming, while giving attention to the reasons for the judicial reluctance to embrace individual dignity as a right, that the theoretical foundations of the federalism cases and the interests in the individual rights cases actually converge so that the theory that justifies recognition of state dignity could also serve to give form to the constitutional right to human dignity). Barak suggests four explanations for the Court not deriving human dignity as a right and instead using it as a value underlying the interpretation of other rights:

First, the rules of constitutional interpretation accepted in the US Supreme Court make it difficult to derive a constitutional daughter-right from one of the express rights in the constitution. . . . *Second*, all the importance the American jurisprudence sees in human dignity notwithstanding, that importance is with respect to the constitutional value of human dignity, and is not strong enough to lead to recognition of a constitutional right as well. *Third*, there is concern that recognition of a derived constitutional right to human dignity as part of an express constitutional right in the federal constitution will upset the constitutional balance that the Bill of Rights is built upon, and will weaken the protection of human rights. Thus, for example, it has been argued that the American Bill of Rights is based upon the individual’s liberty vis-à-vis the government, and not upon dignity. . . . *Fourth*, . . . [t]he content and scope of the social and constitutional value of human dignity have not been sufficiently clarified, and it has not reached the level of importance that would allow it to be recognized as a constitutional right derived from one of the existing constitutional rights.

BARAK, *supra* note 2, at 187–88.

⁴³ See Wermiel, *supra* note 26, at 229 (arguing that “Immanuel Kant often is credited with elevating the importance of human dignity on the world stage, but there is no evidence that Kant influenced Brennan”).

dignity is implied in the opinions of several Supreme Court justices. For example, Justice Brennan's determination that "[t]he State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings,"⁴⁴ clearly reflects Kantian views.⁴⁵

The American constitutional environment has, in our view, two major implications on the status of human dignity in U.S. constitutional law. First, since the Federal Constitution does not include a right to dignity, human dignity serves only as a constitutional value underlying the interpretation and application of the enshrined constitutional rights.⁴⁶ The Court interprets rights specified in the Constitution, such as due process and equal protection, in accordance with the value of human dignity,⁴⁷ rather than recognizing a new common law right.

Second, most rights enumerated in the Bill of Rights are expressed in absolute terms, but these rights are generally attributed to three categories, each with different levels of judicial scrutiny attached. These categories are: (1) rights whose limitation invites strict scrutiny, (2) rights whose limitation invites intermediate scrutiny, and (3) rights whose limitation invites minimal scrutiny.⁴⁸ It may be observed that in cases where the Supreme Court relies on human dignity, it tends to apply strict scrutiny. Professor Maxine Goodman pointed out, in reference to *United States v. Windsor*, that:

In American jurisprudence, human dignity underlies the Fourteenth Amendment Equal Protection guarantee that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' The [human dignity] value

⁴⁴ *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

⁴⁵ For a discussion of the intrinsic worth in Kant's thought, according to which "that which constitutes the condition under which alone anything can be an end in itself, this has not merely a relative worth, i.e., value, but an intrinsic worth, that is, dignity," see REINHOLD FRIEDRICH & ALFRED HOERNLÉ, *Kant's Concept of the "Intrinsic Worth" of Every "Rational Being"*, in *STUDIES IN PHILOSOPHY* 311, 313 (Daniel S. Robinson ed., 1952). As Professor Nelson Potter puts it, "Brennan's opinion in *Furman* is particularly interesting because its central argument is so Kantian . . . Brennan's entire discussion . . . has a certain Kantian flavor and undertone . . ." Nelson T. Potter, *Kant and Capital Punishment Today*, 36 *J. VALUE INQUIRY* 267, 276 (2002).

⁴⁶ *Cf. Barroso*, *supra* note 10, at 392 (establishing that human dignity should be regarded as a legal principle, and not as a freestanding fundamental right).

⁴⁷ *Cf. id.* at 386–87 ("There is no other argument stemming from intrinsic value that could reasonably be employed to counter the right of equal protection and respect to which homosexuals are entitled.").

⁴⁸ AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 509 (2012); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 769 (2d ed. 1998).

plays a fairly prominent role in the recent *United States v. Windsor* decision and in cases regarding racial equality with access to education, accommodations, and economic assistance from the government. The Court considers ‘suspect classifications,’ like race under a strict scrutiny review, requiring the distinction to be ‘narrowly tailored’ to ‘achieve a compelling government interest.’⁴⁹

Further, Professor Adam Winkler asserted that although “[t]he [Supreme] Court has not made clear precisely why some rights are to be preferred over others, . . . traditional theories emphasize that some rights are so central to self-government and human dignity as to warrant special judicial protection.”⁵⁰ Admittedly, Winkler notes that strict scrutiny does not apply to all “preferred rights.”⁵¹ It seems that certain basic rights that do not enjoy protection at the level of strict scrutiny, such as the right to privacy⁵² and freedom of expression when infringed by content-neutral laws,⁵³ are not included in the core of human dignity.

Professor Edward Eberle identified the similarity between the narrowest protection of human dignity in German law, as will be discussed in Part II, and the American strict scrutiny applied to fundamental rights.⁵⁴ Eberle proposed to export this American framework to Germany for the purpose of protecting human dignity, and pointed out that in practice, “both Courts have devised similar rationales and methodologies for rights analysis”⁵⁵ to protect dignitarian human rights. As Eberle puts it:

⁴⁹ Maxine D. Goodman, *In the Holocaust’s Shadow: Can German and American Constitutional Jurisprudence Provide a “New Guarantee” of Human Dignity?*, 4 BRIT. J. AM. LEGAL STUD. 303, 336–37 (2015) (citing U.S. CONST. amend XIV; *United States v. Windsor*, 570 U.S. 744 (2013); Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 UNIV. PA. J. CONST. L. 739 (2014)); see also Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 UNIV. PA. L. REV. 1, 18–19 (2000) (asserting that “[t]he only adequate explanation—as both a descriptive and a normative matter—for application of strict scrutiny to classifications based on race must be that the government’s use of race is frequently inconsistent with notions of human dignity”).

⁵⁰ Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 236 (2006).

⁵¹ *Id.*

⁵² *Id.* at 234–35.

⁵³ *Id.* at 237.

⁵⁴ See Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 1029 (1997).

⁵⁵ *Id.*

2022]

HUMAN DIGNITY

751

[I]f dignitarian rights are justifiably viewed as indispensable to German law, then the Constitutional Court might profitably transplant certain of the techniques employed by the Supreme Court to preserve fundamental rights. For example, importation of strict scrutiny analysis would lend a degree of clarity and precision to German rights analysis. To an extent, this already has occurred, evidencing the transplantation of concepts across cultures, albeit with some adjustment.⁵⁶

Human dignity is thus painted in American constitutional colors in two main aspects: First, human dignity is recognized as a constitutional value that underlies certain constitutional rights, although it is not recognized as an independent constitutional right. Second, constitutional rights expressing human dignity in many cases enjoy a high level of judicial protection.

III. THE INTERPRETATION OF THE RIGHT TO HUMAN DIGNITY IN THE BASIC LAW OF GERMANY

A. *Human Dignity in the German Basic Law*

The constitutional guarantee of human dignity is the norm that most characterizes the German Basic Law in the public perception and in scholarly reflection.⁵⁷ Article 1 of the Basic Law for the Federal Republic of Germany provides:

- (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.⁵⁸

The formulation of Article 1(1) of the German Basic Law has been particularly influential in the international community.⁵⁹ Other legal systems turn to German constitutional law for interpretational inspiration when dealing with problems regarding human dignity.⁶⁰

⁵⁶ *Id.* at 1056.

⁵⁷ See Matthias Mahlmann, *The Basic Law at 60 – Human Dignity and the Culture of Republicanism*, 11 GER. L.J. 9, 10 (2010).

⁵⁸ Grundgesetz [GG] [Basic Law] art. 1, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (Ger.).

⁵⁹ See Henk Botha, *Human Dignity in Comparative Perspective*, 20 STELLENBOSCH L. REV. 171, 175–76 (2009).

⁶⁰ See BARAK, *supra* note 48, at 240.

The nature of the right in the German Basic Law, especially its formulation as an absolute right, is unique.

The Kantian Categorical Imperative,⁶¹ which views human dignity as violated if a person is treated like a mere object, serves as a basis for human dignity in the German Basic Law and constitutional jurisprudence.⁶² Indeed, “[t]he drafters of the 1949 Basic Law drew heavily from the ideas of Immanuel Kant, who argued that one should never treat humans as objects of manipulation, but always as ends.”⁶³ The Federal Court of Justice then extended this philosophy to the state.⁶⁴

B. The Absolute Protection of Human Dignity Under the German Basic Law and its Implications on the Coverage of the Right

The right to human dignity in the German Basic Law, like the Kantian Categorical Imperative, is absolute and is not subservient to or paralleled by any other right. The Federal Constitutional Court held that no other basic right could outweigh human dignity, it being the fundamental basic right.⁶⁵ The right to human dignity cannot be limited by balancing it against other rights or interests, and any act that

⁶¹ See Castiglione, *supra* note 6, at 678.

⁶² See, e.g., Evadné Grant, *Dignity and Equality*, 7 *HUM. RTS. L. REV.* 299, 307–08 (2007) (asserting that “there is strong agreement among commentators that the influence of a range of theories is evident in the interpretation of the role and meaning of dignity in the German law. Most notable of these is Kantian moral philosophy”) (footnotes omitted); BARAK, *supra* note 2, at 26 (pointing out that “Kant’s moral theory had particular influence on the understanding of the provision regarding human dignity in the German Constitution”).

⁶³ Marc Chase McAllister, *Human Dignity and Individual Liberty in Germany and the United States as Examined Through Each Country’s Leading Abortion Cases*, 11 *TULSA J. COMPAR. & INT’L L.* 491, 497 (2004).

⁶⁴ *Id.* For the special influence of Kant’s philosophy on the conception of human dignity in German constitutional law, see Riley, *supra* note 41, at 127.

⁶⁵ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1 BvR 357/05, Feb. 15, 2006, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rs20060215_1bvr035705en.html (Ger.) (reviewing a statute authorizing use of military force against an airplane hijacked by terrorists with hostages on board). For the absolute nature of the right to human dignity in the Basic Law of Germany according to the jurisprudence of the German Federal Constitutional Court, see Ariel L. Bendor & Michael Sacks, *The Constitutional Status of Human Dignity in Germany and Israel*, 44 *ISR. L. REV.* 25, 35 (2012). For further discussion of the Aviation Security Case, see *infra* text accompanying notes 79–82.

restricts it is unconstitutional.⁶⁶ The right is inalienable and no consideration or majority can detract from its status.⁶⁷ By appearing as an objective guarantee of good order that sets limitations on individual arbitrariness, human dignity protects the individual even from him or herself.⁶⁸ By virtue of Article 79(3) of the Basic Law, the right to human dignity cannot be revised or encroached upon even by a constitutional amendment.⁶⁹ The Federal Constitutional Court took all other basic rights to be “concretizations” of the right to human dignity, so changes to a basic rights provision are possible only so long as its “human dignity nucleus” remains intact.⁷⁰

The concept of absolute protection of the right to human dignity⁷¹ led to a narrow scope of the right.⁷² “[C]onflict[s] with other basic rights are avoided by the narrow interpretation of what constitutes a violation of human dignity.”⁷³ The right to human dignity usually joins another constitutional right, in the sense that severe violations of other rights may also be perceived as embodying a violation of the right to human dignity. It is difficult to imagine many situations in which only the right to human dignity is violated without any other right being violated. But what makes human dignity unique is that it prohibits

⁶⁶ See BARAK, *supra* note 2, at 227 (being an absolute right in Germany, human dignity “cannot be balanced in order to protect other constitutional rights or to fulfill a public interest”).

⁶⁷ See Mordechai Kremnitzer, Abstract, *Human Dignity – A Supreme and Absolute Right?*, ISR. DEMOCRACY INST., CTR. FOR DEMOCRATIC VALUES & INSTS., at viii, ix (2010).

⁶⁸ See Christoph Enders, *Human Dignity in Germany*, in HANDBOOK OF HUMAN DIGNITY IN EUROPE 281, 300 (Paolo Becchi & Klaus Mathis eds., 2019). However, it has been argued that

[s]ince human dignity is an expression of human autonomy, of the capacity for self-legislation, such a curtailment of freedom – beyond youth protection – is hardly justifiable, so long as a third party is not affected by a certain conduct against his or her will and in violation of the individual’s feeling of shame or psychological constitution.

Id. at 301.

⁶⁹ Grundgesetz [GG] [Basic Law] art. 79(3), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (Ger.); see Bendor & Sacks, *supra* note 65, at 31.

⁷⁰ See *id.* at 40.

⁷¹ However, it has been asserted that the German Federal Constitutional Court “at least considers the possibility that safeguarding the existence of the state and its constitutional order may justify infringements even of human dignity; it also holds that military actions under conditions of war might be considered beyond the reach of the protection of human dignity.” *Id.* at 37.

⁷² See *id.*

⁷³ See Bendor & Sacks, *supra* note 65, at 34.

limitation of various other constitutional rights when those limitations infringe upon human dignity. Therefore, any relative constitutional right faces several absolute prohibitions on the way it may be limited.⁷⁴ At the same time, “[b]ecause of the reduction of human dignity to a small (and loosely defined) ‘core,’ the Federal Constitutional Court has rarely found that a statute violates article 1 of the Basic Law on its face.”⁷⁵

The narrow scope of the constitutional right to human dignity in Germany, combined with the absolute nature of the right, have led to the principle that a person is not entitled to waive his or her right to dignity.⁷⁶ It was held not only that, as a rule, an individual cannot waive her dignity,⁷⁷ “but also that the state must enforce the protection of human dignity even against private parties and even against the will of the protected.”⁷⁸ As such, for instance, the Court found that peep shows violate the dignity of women who voluntarily expose themselves.⁷⁹

Certain human interests for which infringement would constitute a violation of human dignity have been singled out, including integrity of the human body, psychic integrity of the human personality, elementary equality, living conditions worthy of human beings, and free

⁷⁴ BARAK, *supra* note 2, at 235.

⁷⁵ Anat Horovitz & Thomas Weigend, *Human Dignity and Victims’ Rights in the German and Israeli Criminal Process*, 44 *ISR. L. REV.* 263, 273 (2011).

⁷⁶ See McCrudden, *supra* note 7, at 705 (pointing out that “[i]n Germany, the Constitutional Court has held that ‘human dignity means not only the individual dignity of the person but the dignity of man as a species. Dignity is therefore not at the disposal of the individual.’ The obligation on the state to protect human dignity may justify limiting the rights of the person whom the state seeks to protect, irrespective of the preferences of the individual”) (citing Eckart Klein, *Human Dignity in German Law*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 145, 148 (David Kretzmer & Eckart Klein eds., 2002)).

⁷⁷ German Courts have held that human dignity was violated regardless of the consent of the people in question, as in cases concerning peep shows, dwarf throwing, laser domes, and use of lie detectors in criminal procedures. See Bendor & Sacks, *supra* note 65, at 52 nn.103–06).

⁷⁸ Mathias Reimann, *Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States*, 21 *UNIV. MICH. J.L. REFORM* 201, 239 (1987) (citing Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Dec. 15, 1981, 64 *Entscheidungen des Bundesverwaltungsgerichts* [BVerwGE] 274, 279–80 (Ger.)).

⁷⁹ 64 BVerwGE 274, 279–80 (Ger.); see O’Mahony, *supra* note 24, at 570; see also Margarete von Galen, *Prostitution and the Law in Germany*, 3 *CARDOZO WOMEN’S L.J.* 349, 368 (1996) (pointing out that the violation of human dignity by peep shows has been explained as “arising from the fact that a peep show makes a particularly crass impression of depersonalized marketing of the woman and a lack of social control over the viewer, who is alone in the cubicle”).

2022]

HUMAN DIGNITY

755

and equal participation in the political sphere.⁸⁰ This interpretation was adopted by the Court in the Aviation Security Case 2006.⁸¹ The Court examined the constitutionality of a statute authorizing use of military force against an airplane hijacked by terrorists with hostages on board, which allowed a plane in such a situation to be shot down if there is no other way to prevent harm to innocent people outside the plane.⁸² The Court found the statute unconstitutional, reasoning that it limited the hostages' human dignity and resulted in their death serving as merely a means to the end of saving others.⁸³ The absolute character of the right to human dignity prevented an examination of the proportionality of the limitation of the hostages' rights.

A notable consequence of this interpretation of the right is that the individual is the subject of rights and duties, which constitutes his or her dignity. The individual is recognized as a moral person, which has the right to have rights. "If the individual was not subject of specific rights that he or she owed without presuppositions, he or she would be a mere object of the arbitrariness of others."⁸⁴

Interpreting the right to human dignity in accordance with the Kantian Categorical Imperative clarifies why the section on fundamental rights of the Basic Law, the first section of the Basic Law, is introduced precisely with the clarification that "human dignity shall be inviolable."⁸⁵

IV. THE INTERPRETATION OF THE RIGHT TO HUMAN DIGNITY IN

⁸⁰ See Bendor & Sacks, *supra* note 65, at 43.

⁸¹ See 1 BvR 357/05 (Ger.). For further discussion of the 2006 Aviation Security Case, see Nina Naske & Georg Nolte, *Legislative Authorization to Shoot Down Aircraft Abducted by Terrorists if Innocent Passengers Are on Board—Incompatibility with Human Dignity as Guaranteed by Article 1(1) of the German Constitution*, 101 AM. J. INT'L L. 466 (2007); see also Raymond Youngs, *Germany: Shooting Aircraft and Analyzing Computer Data*, 6 INT'L J. CONST. L. 331 (2008); Kai Möller, *Balancing and the Structure of Constitutional Rights*, 5 INT'L J. CONST. L. 453, 466 (2007).

⁸² See 1 BvR 357/05, paras. 4–17 (Ger.).

⁸³ See *id.* paras. 118–27.

⁸⁴ See Christoph Enders, *A Right to Have Rights—The German Constitutional Concept of Human Dignity*, 3 NAT'L UNIV. JURID. SCI. L. REV. 253, 261 (2010).

⁸⁵ Grundgesetz [GG] [Basic Law] art. 79(3); Enders, *supra* note 68, at 284.

THE CONSTITUTION OF SOUTH AFRICA

A. Human Dignity in the South African Constitution

Section 10 of the Constitution of the Republic of South Africa provides, “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”⁸⁶ The Constitution also includes a general limitation clause, which states:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.⁸⁷

The South African Constitutional Court has held that “[l]ike all constitutional rights, [the right to dignity] is not absolute and may be limited in appropriate cases”⁸⁸

Alongside the enshrinement of human dignity as a constitutional right, the value of human dignity is mentioned in the Constitution of South Africa in a series of additional provisions. Thus, according to Section 1(a), the Republic of South Africa is “founded on . . . [h]uman dignity, the achievement of equality and the advancement of human rights and freedoms.”⁸⁹ Section 7(1), which begins the Bill of Rights, states that “[t]his Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”⁹⁰ Section 35, pertaining to “[a]rrested, detained and accused persons,” provides, *inter alia*, that “[e]veryone who is detained, including every sentenced prisoner, has the right . . . to conditions of detention that are

⁸⁶ S. AFR. CONST., 1996 § 10.

⁸⁷ *Id.* § 36.

⁸⁸ *Dawood v. Minister of Home Affairs* 2000 (8) BCLR 837 (CC) para. 57 (S. Afr.).

⁸⁹ S. AFR. CONST., 1996 § 1.

⁹⁰ *Id.* § 7.

consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.”⁹¹ Section 36(1) provides: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors”⁹² Section 39(1) provides, “When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”⁹³ And finally, the right to human dignity is one of only two rights—alongside the right to life—that is non-derogable even in states of emergency.⁹⁴

Indeed, the repeated references to human dignity in the text of the South African Constitution reveal the great importance of human dignity in its contemporary society.⁹⁵ As Justice Cameron pointed out, “there is a sound reason why dignity, for all its indeterminacy, has taken so central a place in the formative jurisprudence of the [Constitutional] Court. It is to be found in South Africa’s past of racial indignity—where racial subordination was both premised on and enacted shamefulness and disgrace.”⁹⁶

The right to dignity has not been defined by the Constitutional Court of South Africa as a determinable rule.⁹⁷ Furthermore, as Stuart Woolman asserted, it seems that the Court’s definitions yield, at best,

⁹¹ *Id.* § 35(2)(e).

⁹² *Id.* § 36.

⁹³ *Id.* § 39.

⁹⁴ *Id.* § 39(1).

⁹⁵ See Kate O’Regan, *Undoing Humiliation, Fostering Equal Citizenship: Human Dignity in South Africa’s Sexual Orientation Equality Jurisprudence*, 37 N.Y.U. REV. L. & SOC. CHANGE 307, 309 (2013) (pointing out that “[t]he repeated references to human dignity in the text of the South African Constitution reveal the great importance of the concept”).

⁹⁶ *Id.* at 310 (quoting Edwin Cameron, Justice, S. Afr. Const. Ct. Appeals, Lecture at The Oxford Conference: Dignity and Disgrace: Moral Citizenship and Constitutional Protection (June 28, 2012)).

⁹⁷ See MAN YEE KAREN LEE, EQUALITY, DIGNITY, AND SAME-SEX MARRIAGE: A RIGHTS DISAGREEMENT IN DEMOCRATIC SOCIETIES 203 (2010) (arguing that, in the South African context, “[d]ignity in a general sense does not settle differences in people’s views as to whether the constraint on liberty is excessive or whether more state intervention is required for achieving equality. The concept alone is not capable of elaborating the vision of a transformed society or the means through which this goal can be achieved. In this respect, critics . . . perhaps make a point when they caution against leaving individual judges to follow their subjective views . . .”) (footnotes omitted).

a partial theory of the right to dignity.⁹⁸ And indeed, Judge Arthur Chaskalson, former President of the Constitutional Court of South Africa, and Chief Justice of South Africa, has pointed out:

The reluctance to give dignity the status of a discrete right in human rights instruments may be due to the breadth of its meaning and the difficulty of defining its limits . . . [T]he . . . implication of a residual right of dignity might be thought to have an open-ended quality which would be unmanageable.⁹⁹

The constitutional right to dignity is defined by the South African Constitutional Court broadly, and is perceived to include a series of elements,¹⁰⁰ including, *inter alia*, a right to not be treated as a mere instrument¹⁰¹ (a Kantian concept¹⁰² based on a notion of inherent human worth);¹⁰³ an entitlement to equal concern and equal respect (including a right to equal treatment which ensures that the law does not irrationally differentiate between classes of persons and guarantees that individuals are not subject to unfair discrimination on the basis of characteristics such as race or gender);¹⁰⁴ a right of every individual to develop freely his or her unique talents;¹⁰⁵ a right to self-governance—participation in the collective decision making processes that

⁹⁸ See Woolman, *supra* note 17, § 36–8.

⁹⁹ Arthur Chaskalson, *Human Dignity as a Constitutional Value*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 133, 134–35 (David Kretzmer & Eckart Klein eds., 2002).

¹⁰⁰ See Woolman, *supra* note 17, §§ 36–6, 36–7.

¹⁰¹ See *State v. Makwanyane and Another* 1995 (3) SA 391 (CC) para. 26 (S. Afr.) (President Chaskalson describing the death penalty as “degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state”).

¹⁰² See Woolman, *supra* note 17, §§ 36–7, 36–9.

¹⁰³ See LAURIE ACKERMANN, *HUMAN DIGNITY: LODESTAR FOR EQUALITY IN SOUTH AFRICA* 98 (2012).

¹⁰⁴ See *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Just.* 1999 (1) SA 6 (CC) (S. Afr.) (holding that laws which criminalized sodomy constituted unfair discrimination using an analysis that focused on the impact of the laws on the dignity of the appellants); see also Woolman, *supra* note 17, § 36–10.

¹⁰⁵ See *Ferreira v Levin* 1996 (1) SA 984 (CC) (S. Afr.). Justice Ackermann pointed out that:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their ‘humanness’ to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual’s human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally.

Id. para. 49; see also Woolman, *supra* note 17, §§ 36–11, 36–12.

2022]

HUMAN DIGNITY

759

determine the ends of the society;¹⁰⁶ and even a collective responsibility,¹⁰⁷ according to which “wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.”¹⁰⁸

B. The Relationship Between the Constitutional Right to Human Dignity in South Africa and Other Constitutional Rights

The South African Bill of Rights is comprehensive. “It includes civil and political rights alongside social and economic rights,”¹⁰⁹ and “arguably protects more fundamental rights than any other constitution in the world.”¹¹⁰ Human dignity is the foundation of most, if not all, of the rights in the South African Bill of Rights.¹¹¹ Human dignity is counted among the purposes underlying the right to

¹⁰⁶ See *August v Electoral Comm’n* 1999 (3) SA 1 (CC) para. 17 (S. Afr.) (“The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts”); see also Woolman, *supra* note 17, §§ 36–12, 36–14.

¹⁰⁷ See *Port Elizabeth Mun. v. Various Occupiers* 2005 (1) SA 217 (CC) para. 18 (S. Afr.) (“It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society is demeaned when state action intensifies rather than mitigates their marginalisation.”); see also Woolman, *supra* note 17, §§ 36–14, 36–17.

¹⁰⁸ *Khosa v. Minister of Social Development* 2004 (6) SA 505 (CC) para. 74 (S. Afr.). For further discussion of the decision, see Catherine Albertyn, *Substantive Equality and Transformation in South Africa*, 23 S. AFR. J. ON HUM. RTS. 253, 256, 273 (2007); Brian Ray, *Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 STAN. J. INT’L L. 151, 161–81 (2009).

¹⁰⁹ See BARAK, *supra* note 2, at 256.

¹¹⁰ See Mary Patricia Byrn, *Same-Sex Marriage in South Africa: A Constitutional Possibility*, 87 MINN. L. REV. 511, 511 (2002). Chapter 2 of the Constitution of South Africa, the Bill of Rights, includes rights to: equality, human dignity, life, freedom and security of the person, freedom from slavery, servitude, and forced labor, privacy, freedom of religion, belief and opinion, freedom of expression, assembly, demonstration, picket, and petition, freedom of association, political rights (forming a political party, participating in the activities of, recruiting members for a political party, campaigning for a political party, free, fair, and regular elections, voting in secret in elections, and standing for public office), freedom from deprivation of citizenship, freedom of movement and residence, freedom of trade, occupation and profession, rights to fair labor practices, environmental rights, property rights, housing, health care, food, water, and social security, children’s rights, education, using the language and participating in the cultural life of choice, access to information, just administrative action, and access to courts.

¹¹¹ See Alon Fagan, *Human Dignity in South African Law*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 401, 404 (Marcus Düwell, Jens Braarvig, Roger Brownsword & Dietmar Mieth eds., 2014).

freedom, freedom of expression, privacy, equality, and social rights.¹¹² Therefore, the constitutional right to dignity overlaps with other constitutional rights.¹¹³ In the common cases where the right to human dignity and other constitutional rights overlap, the approach that prevails in the Constitutional Court of South Africa is that the right to dignity under Section 10 should not be added to the enquiry.¹¹⁴

Although human dignity is rarely invoked in South Africa as a right in itself,¹¹⁵ there is, however, a zone of human conduct that is exclusive to the constitutional right to human dignity, and that does not overlap with other constitutional rights.¹¹⁶ For example, in regard to the constitutionality of a statute restricting the ability of a non-resident spouse who is married to a resident of South Africa to attain South African resident status, the Constitutional Court held, “it cannot be said that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relationships than the right to dignity in section 10.”¹¹⁷

But what is the law when a particular interest is protected by the right to dignity more broadly than the protection that a specific right provides for that interest? In interpreting social rights in the Bill of Rights, the Court held that these rights do not protect the minimum core of subsistence, which should be examined in the framework of the reasonable measures the State must take in order to ensure the fulfillment of those rights within its available resources.¹¹⁸ The argument that the broader right to human dignity stands alongside the social and economic rights was raised in the Constitutional Court, but the Court rejected it.¹¹⁹ It was held:

[A]ny claim based on socio-economic rights must necessarily engage the right to dignity. The lack of adequate food, housing and health care is the unfortunate lot of too many people in this country and is a blight on their dignity. Each time an applicant approaches the courts claiming that his or her socio-economic rights have been infringed the right to dignity is invariably implicated. The appellants' reliance on

¹¹² See BARAK, *supra* note 2, at 257.

¹¹³ See *id.*

¹¹⁴ *Dawood v. Minister of Home Affairs* 2000 (8) BCLR 837 (CC) para. 35 (S. Afr.).

¹¹⁵ See Cameron, *supra* note 97, at 474.

¹¹⁶ See *id.* at 258; see also Woolman, *supra* note 17, §§ 36–19, 36–20.

¹¹⁷ *Dawood*, para. 36.

¹¹⁸ *Jaftha v. Schoeman* 2005 (2) SA 140 (CC) para. 23 (S. Afr.).

¹¹⁹ *Id.* para. 21.

2022]

HUMAN DIGNITY

761

section 10 as a self-standing right therefore does not add anything to this matter making it unnecessary to consider the attempted amplification of their case in this regard.¹²⁰

It seems, therefore, that the relativity of the constitutional right to human dignity enabled the Constitutional Court of South Africa to interpret the right broadly, but at the same time the multiplicity of particular rights in the Constitution led the Court to apply the right to dignity alone in rare cases only. To the extent that applying the right to dignity might have had a different result than the application of a particular right, the Court applies only the particular right.¹²¹

V. THE INTERPRETATION OF THE RIGHT TO HUMAN DIGNITY IN THE ISRAELI BASIC LAW: HUMAN DIGNITY AND LIBERTY

A. *The Change in Status of the Right to Human Dignity in Israel*

Until 1992, most basic human rights in Israel were common law rights and thus developed through case law.¹²² The courts determined

¹²⁰ *Id.* para. 21.

¹²¹ For a critique of the South African Constitutional Court's approach, see BARAK, *supra* note 2, at 263–64 (claiming that “[i]t seems to me that a better approach would be to examine each right separately in every case of complementary overlap between constitutional rights. Human dignity should not be seen as a residual right. The residuality of human dignity does not comport with the centrality of the right in the Bill of Rights. It would prevent it from fulfilling its role in the Bill of Rights, and might lead to a weakening of human dignity within the constitution”). It also has been suggested that:

a higher standard of review will be applied to the negative duty to respect socio-economic rights, especially when other rights (such as . . . dignity . . .) are implicated. A higher standard of review will also be appropriate in relation to the positive duties imposed by socio-economic rights that are restricted to vulnerable beneficiaries (such as children or detained persons) or which secure a minimum core level of subsistence.

Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses*, 20 S. AFR. J. ON HUM. RTS. 448, 460 (2004). However, this suggestion distinguishes between different aspects of socio-economic rights, so that only negative aspects (exemption from state intervention) will be subject to constitutional provisions that apply to the right to dignity, while positive aspects (right to active state intervention) will be subject only to constitutional provisions that apply to socio-economic rights.

¹²² See Michal Tamir & Dalia Cahana-Amitay, “*The Hebrew Language Has Not Created a Title for Me*”: A Legal and Sociolinguistic Analysis of New-Type Families, 17 J. GENDER, SOC. POL’Y & L. 545, 551–52 (2009) (pointing out that “[h]istorically, in the absence of a written constitution, human rights developed through case law. The Israeli Supreme Court has always interpreted statutes with the presumption that the Israeli Parliament . . . intends to uphold basic human rights. Thus,

that human rights could be violated only by statute, and that parliamentary statutes violating human rights would be interpreted, as far as possible, in light of the central position of human rights in democracies.¹²³ The rights developed were not codified in a written constitution and could be violated, without limitation, by means of legislation. Among the human rights developed by judicial decisions was the right to human dignity, which was recognized as a basic right in a small number of Supreme Court decisions.¹²⁴

The status of the right to human dignity and the degree to which it was invoked changed dramatically with the adoption of Basic Law: Human Dignity and Liberty in 1992. The Knesset—serving in Israel as both the constituent assembly and the legislature—enacted the Basic Law within the framework of its role as Israel’s constituent

an extensive body of case law developed that balances basic rights with other rights and interests”) (footnotes omitted).

¹²³ For a Supreme Court decision, dealing with freedom of occupation, given only a few months after the establishment of the State, see HCJ 1/49 Bejerano v. Police Minister, 2 PD 80, 85 para. 5 (1949) (Isr.) (“The natural right of everyone to pursue any business or occupation he desires, so long as it is not prohibited by law, is a principle of the utmost importance . . . [S]o long as the law does not prohibit a particular trade the Petitioners have chosen for themselves, and so long as the law has not placed upon them and those like them a precondition for engaging in such a trade, they have the right to do so, and they cannot be stopped from doing so unless such limitation is sanctioned by law. The Petitioners’ right to work as agents in exchange for payment does not stem, in our opinion, from their license to draft requests . . . Their right is not one that is in the books, but rather one that stems from the natural right of each person to seek a livelihood that will serve as a source of income.”) For discussion of Israeli freedom of expression, see Daniel J. Rothstein, *Adjudication of Freedom of Expression Cases Under Israel’s Unwritten Constitution*, 18 CORNELL INT’L L.J. 247, 248 (1985) (“In cases arising under statutes that restrict expression . . . the Court has interpreted the statutes to narrow their application. It has based its interpretation on unwritten norms that it considers to be superior to statutes. According to the Court, these suprastatutory norms are among the foundations of Israel’s legal system.”); see also Gideon Sapir, *Constitutional Revolutions: Israel as a Case-Study*, 5 INT’L J.L. CONTEXT 355, 361 (2009).

¹²⁴ See HCJ 355/79 Katalan v. Prison Services, 34(3) PD 294, 298 para. 5 (1980) (Isr.) (“Every person in Israel is entitled to the fundamental right of physical wellbeing and to the protection of their right to human dignity. These rights are included in the ‘scroll of judicial rights’ . . . Even detainees and inmates are entitled to these rights. Prison walls do not sever a detainee’s right to human dignity. While the nature of life in prison does infringe upon many of the rights of a free individual, prison life does not require the deprivation of a detainee’s right to physical wellbeing and protection from infringement of his human dignity. His freedom is taken away, not his rights as a human being. The administration of an enema to a detainee without his consent, without any medical reason, violates his physical well-being and infringes upon his privacy and his human dignity.”); see also Bendor & Sacks, *supra* note 65, at 29.

assembly.¹²⁵ Among the rights embodied in the Basic Law was the right to human dignity. Section 2 of the Basic Law states that a person has the right to protect his own dignity, and Section 4 stipulates that all persons are entitled to protection of their dignity.¹²⁶ The purpose of this law is reflected in its name—Basic Law: Human Dignity and Liberty—and articulated in Article 1, which states that, *inter alia*, the Basic Law is aimed at defending human dignity and liberty.¹²⁷

Together with Basic Law: Freedom of Occupation, which was adopted in the same period (1994), Basic Law: Human Dignity and Liberty initiated a “constitutional revolution” in the protection of human rights in Israel.¹²⁸ The Knesset, as a legislature, is obligated to respect the limitations contained in the Basic Laws, which function like a written constitution.¹²⁹ Thus, the Knesset can no longer restrict human rights without considering constitutional limitations. Limitation of rights under the Basic Laws is permitted only by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than necessary.¹³⁰

B. The Coverage of the Right to Human Dignity in Israel and its Relationship with Other Constitutional Rights

In Israel’s two human rights-oriented Basic Laws, not all the human rights previously recognized within the framework of common law were included. The Basic Laws do not mention, *inter alia*, the right to equality, freedom of speech, freedom of religion and conscience, the right to apply to law courts, the freedom to strike, and social rights. Their absence was not the result of arbitrary omission,

¹²⁵ See Ariel L. Bendor, *Is It a Duck? On the Israeli Written Constitution*, 6 YALE ISR. J. 53 (2005).

¹²⁶ Basic Law: Human Dignity and Liberty, SH 1454 (1992) 90 (Isr.)

¹²⁷ *Id.* art. 1; see Bendor & Sacks, *supra* note 59, at 30.

¹²⁸ See Michal Tamir, *The Declaration of Independence as a Transitional Constitution: The Case of Israel*, 8 MIDDLE E.L. & GOVERNANCE J. 57, 61 (2016) (asserting that “[i]t is commonly held that the two Basic Laws, on Human Dignity and Liberty, and on Freedom of Occupation . . . created a ‘constitutional revolution.’ The phrase was intended to indicate that these Basic Laws ‘introduced into Israeli constitutional law, both the Israeli Bill of Rights and the concept of judicial review’, thus granting the courts the authority to declare ‘ordinary laws’ unconstitutional and hence, null and void. Not only were the two Basic Laws the first to deal with human rights, they also included a ‘Limitation Clause,’ imposing substantive (as opposed to procedural) restrictions against the Knesset’s power to enact future laws that infringe protected rights”) (footnotes omitted)).

¹²⁹ See Bendor & Sacks, *supra* note 65, at 30.

¹³⁰ *Id.* at 29–31.

lack of attention, or “forgetfulness.” The Knesset was presented—both before and after adopting the two Basic Laws—with proposals to create a comprehensive constitutional bill of rights, but it rejected this option; it was impossible to reach an agreement on the inclusion of additional rights within the Basic Laws.¹³¹ The inclusion of only a selection of human rights in the Basic Laws was an example of atomization—the political fragmentation of the charter of human rights. Thus, in the Knesset discussions on the bill of Basic Law: Human Dignity and Liberty, several Knesset Members objected to the omission of the right to equality.¹³² In response to these demands, the Basic Law’s proponent, Knesset Member Amnon Rubinstein, stated, “[t]here is no amendment regarding general equality here. This is so because a general equality amendment would be a stumbling block, an obstacle that would make it impossible to accept the general proposal.”¹³³

From a philosophical perspective, there is no doubt that the right to human dignity can apply to many rights that the Knesset decided not to include in the Basic Laws, if not to all basic rights. This is since the source of all human rights lies in human dignity. Indeed, it is the existence of human dignity that makes a person worthy of rights. In interpreting the right to human dignity and its implications for other rights, the Israeli Supreme Court was required to create a balance between the meaning of human dignity and the need to respect the Knesset’s political decision not to extend constitutional protection to those

131

Instead of insisting on a complete Bill of Rights, [the legislators] opted for gradual progress: to anchor at the first stage the rights they had reached agreement on and to defer the continuation of the process for a later stage. Less problematic rights – such as human dignity, property rights, freedom of movement, freedom of occupation and liberty – were included in the Basic Laws. Rights that were more problematic and politically contested in the Israeli context – such as freedom of religion, freedom of expression and equality – were omitted or removed from the Basic Laws during the negotiation stages.

Sapir, *supra* note 123, at 365.

¹³² See DK, 12th Knesset, Session No. 398 (1992) p. 3786 (Isr.), (“I would like to see in this law a proclamation that says, that all human beings are equal, that there is equality before the law. . . . All human beings are free and equal. This thing, unfortunately, did not find expression here.”) (translation by authors).

¹³³ DK, 12th Knesset, Session No. 362 (1991) p. 1532 (Isr.) (translation by authors).

other rights by means of Basic Laws, however fundamental and important they might be.¹³⁴

In two decisions handed down by an extended panel of Israel's Supreme Court in May of 2006,¹³⁵ the Court adopted the position that although the right to human dignity in Basic Law: Human Dignity and Liberty does not include all human rights, it does constitute a wide range of rights. In *Movement for Quality Government in Israel v. The Knesset*, the Court held that

[t]he right to human dignity is a cluster of rights that needs to be preserved in order to maintain dignity. Underlying the right to human dignity is the recognition that man is a free being who develops his own body and spirit according to his own will within the society in which he lives; at the very center of human dignity lies the sanctity of his life and liberty. The basis of human dignity is the autonomy of personal will, freedom of choice and the liberty to act as a free being. Human dignity is based on the recognition of the physical and mental integrity of a person, his humanity, his value as a person, and all this without any relation to the degree of benefit others may derive from him Human dignity may also include discrimination that does not involve humiliation, but only if it is closely linked to human dignity as an expression of the autonomy of personal will, freedom of choice and freedom of action, and similar aspects of human dignity as a constitutional right.¹³⁶

¹³⁴ See Tamir & Cahana-Amitay, *supra* note 122, at 554.

¹³⁵ HCJ 6427/02 *Movement for Quality Government in Israel v. The Knesset*, 61(1) PD 619 (2006) (Isr.); HCJ 7052/03 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Interior*, 61(2) IsrSC 2 (2006). For further discussion of *Movement for Quality Government in Israel*, see Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT'L L. 349, 396–99 (2012); David Ellenson, *The Supreme Court, Yeshiva Students, and Military Conscription: Judicial Review, the Grunis Dissent, and Its Implications for Israeli Democracy and Law*, 23 ISR. STUD. 197 (2018). For further discussion of *Adalah*, see Daphne Barak-Erez, *Israel: Citizenship and Immigration Law in the Vise of Security, Nationality, and Human Rights*, 6 INT'L J. CONST. L. 184 (2008); Adam Shinar, *Israel's External Constitution: Friends, Enemies, and the Constitutional/Administrative Law Distinction*, 57 VA. J. INT'L L. 735 (2018); Tally Kritzman-Amir & Jaya Ramji-Nogales, *Nationality Bans*, 2019 UNIV. ILL. L. REV. 563, 754–55 (2019); Ariel L. Bendor, *Are Immigration Rights Constitutional Rights in Israel*, in 3 CONTEMPORARY CHALLENGES TO THE NATION STATE: GLOBAL AND ISRAELI PERSPECTIVES: NATION STATE AND IMMIGRATION: THE AGE OF POPULATION MOVEMENTS 175 (Anita Shapira, Yedidia Z. Stern, Alexander Yakobson & Liav Orgad eds., 2014).

¹³⁶ *Movement for Quality Government in Israel*, paras. 35–36 (opinion of President Barak) (translation by authors).

By virtue of this approach, the Supreme Court determined that the right to family life,¹³⁷ the right to a minimal standard of dignified life,¹³⁸ and most of the aspects of the right to equality (including the prohibition on granting yeshiva students an exemption from military service)¹³⁹ were included in the right to human dignity under Basic Law: Human Dignity and Liberty. The Supreme Court also held that the establishment of a prison to be managed and operated by a private corporation acting for profit violated the human dignity of the prisoners who would serve their sentences in the privatized prison.¹⁴⁰ This was due to the transfer of authority to operate the prison—including the responsibility to maintain order, discipline, and public security,

¹³⁷ See *Adalah*, para. 32 (opinion of President Barak) (“The premise is that the family is a ‘constitutional unit’ . . . It is entitled to constitutional protection. This protection is found in the heart of the right to human dignity . . . Indeed, the right to live together as a family unit is a part of the right to human dignity. It falls within the scope of the essence of the right to dignity . . . One of the most basic elements of human dignity is the ability of a person to shape his family life in accordance with the autonomy of his free will, and to raise his children within that framework, with the constituents of the family unit living together. The family unit is a clear expression of a person’s self-realization.”).

¹³⁸ See H CJ 366/03 *Commitment to Peace & Soc. Justice Soc’y v. Minister of Fin.*, 60(3) PD 464 (2005) (Isr.), <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Commitment%20to%20Peace%20and%20Social%20Justice%20Society%20v.%20Minister%20of%20Finance.pdf> [<https://perma.cc/2UFN-J7QQ>] (“The Basic Laws protect the right to dignity, which includes the physical existence aspect that is required in order to realize the right to dignity. From this viewpoint, the human right to dignity is also the right to conduct one’s ordinary life as a human being, without being overcome by economic distress and being reduced to an intolerable poverty. This is the outlook according to which the right to live with dignity is the right that a person should be guaranteed a minimum of material means, which will allow him to subsist in the society where he lives.”). For further discussion of the decision, see Daphne Barak-Erez, *Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint*, 3 INDIAN J. CONST. L. 118, 123, 125, 130 (2009).

¹³⁹ See *Movement for Quality Government in Israel*, at 12.

¹⁴⁰ See H CJ 2605/05 *Acad. Ctr. of L. & Bus. v. Minister of Fin.*, 63(2) PD 545 (2009) (Isr.), http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm [<https://perma.cc/X2F7-VT2W>]. For further discussion of the decision, see Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 15 THEORETICAL INQUIRIES L. 1, 24 (2014); Malcolm M. Feeley, *The Unconvincing Case Against Private Prisons*, 89 IND. L.J. 1401 (2014); Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 INT’L J. CONST. L. 690 (2010); Hadar Aviram, *Are Private Prisons to Blame for Mass Incarceration and Its Evils? Prison Conditions, Neoliberalism, and Public Choice*, 42 FORDHAM URB. L.J. 411, 418–20, 434 (2014); Angela E. Addae, *Challenging the Constitutionality of Private Prisons: Insights from Israel*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 527 (2019).

and to prevent prisoner escapes—from the State to a private corporation. Furthermore, the Supreme Court read the procedural rights in criminal process, namely due process and its implications, into human dignity.¹⁴¹

In contrast to Germany, the right to human dignity in Israel, like all other constitutional rights anchored in the Basic Laws, is relative rather than absolute. The relativity of the constitutional right to human dignity in Israel, in addition to the fact that the Basic Laws explicitly include only a limited number of human rights, has allowed the Israeli Supreme Court to interpret the right to human dignity in a broad way. The broad interpretation of the right to human dignity often makes the restriction of rights constitutionally permissible. For example, the Israeli Supreme Court rejected petitions against a law that prevented spouses and children of Israeli residents from reuniting with them in Israel, even though the Court recognized that the rights to equality and family life that the law violated are part of the right to human dignity.¹⁴² The Court also rejected petitions against a law that established a mandatory retirement age, even though the Court recognized that the

¹⁴¹ CrimA 5121/98 Yissacharov v. Chief Mil. Prosecutor, 61(1) PD 461 (2006) (Isr.), <https://versa.cardozo.yu.edu/opinions/yissacharov-v-chief-military-prosecutor> [<https://perma.cc/3BTR-6JXK>]. For further discussion of the decision, see Binyamin Blum, *Doctrines Without Borders: The New Israeli Exclusionary Rule and the Dangers of Legal Transplantation*, 60 STAN. L. REV. 2131 (2008); Binyamin Blum, “Exclude Evidence, You Exclude Justice”? *A Critical Evaluation of Israel’s Exclusionary Rules After Issacharov*, 16 SW. J. INT’L L. 385 (2010); Yuval Merin, *Lost Between the Fruits and the Tree: In Search of a Coherent Theoretical Model for the Exclusion of Derivative Evidence*, 18 NEW CRIM. L. REV. 273, 279–81, 286–88, 311–19 (2015). However, Israel’s Supreme Court determined that the right to environmental quality, as well as some aspects of social rights, did not fall under the right to dignity. HCJ 4128/02 Isr. Union for Env’tl. Def. v. Prime Minister of Isr., 58(3) PD 503 (2004) (Isr.); HCJ 366/03 Commitment to Peace & Soc. Justice Soc’y v. Minister of Fin., 60(3) PD 464 (2005) (Isr.).

¹⁴² See HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rts. in Isr. v. Minister of Interior, 61(2) PD 2, 125 para. 2 (2006) (opinion of Vice President Emeritus Michael Cheshin) (Isr.) (“The basic right to marriage and family life is a basic right that we all recognize as a right derived from human dignity.”); see also HCJ 466/07 MK Gal-On v. Att’y Gen., 65(2) PD 44, para. 27 (2012) (opinion of Vice President Eliezer Rivlin) (Isr.), <https://versa.cardozo.yu.edu/opinions/gal-v-attorney-general-summary> [<https://perma.cc/HL2J-EJM6>] (“The restriction of the constitutional right to family life affects, in the circumstances of the case and indirectly, a defined and distinct group in the Israeli population, which is also a minority group. In any case, this violation also involves a violation of equality. The right to equality is part of human dignity. The violation of equality is wrong . . . whether it is a group violation, whether it is a violation of the individual, whether it is a violation that detracts from human dignity due to the humiliation and shaming of the victim and whether it detracts from the right to enjoy equal rights, in the society in which he lives.”) (translation by authors).

law infringes upon the right to equality as part of the constitutional right to human dignity.¹⁴³

The broad interpretation of the constitutional right to human dignity in Israel also makes it possible—unlike the broad interpretation of the right to human dignity in Germany—to waive the right, certainly as far as those aspects of the right that are not included in the core of human dignity are concerned.¹⁴⁴

The Kantian “object-formula” is also demonstrated in the Israeli Supreme Court’s decisions interpreting human dignity. For example, the Court determined that the State’s use of the incarceration of illegal immigrants (“infiltrators”) for the sake of the deterrence of potential future illegal immigrants constitutes an infringement of human dignity;¹⁴⁵ and that when an administrative detention is executed under circumstances in which the detainee is a “bargaining chip,” there is a severe harm to human dignity, as the detainee is perceived as a means to achieving a goal and not as a goal in and of itself.¹⁴⁶

¹⁴³ See H CJ 9134/12 Gavish v. Knesset, Nevo Legal Database (Apr. 21, 2016) (Isr.), <https://versa.cardozo.yu.edu/opinions/gavish-v-knesset> [<https://perma.cc/5NDL-2R23>].

¹⁴⁴ See Michal Tamir, *Human Rights in Private Law: Hybridization of the Balancing Tests*, in *ISRAELI CONSTITUTIONAL LAW IN THE MAKING* 401, 412 (Gideon Sapir, Daphne Barak-Erez & Aharon Barak eds., 2013) (asserting that “[t]here appears to be a consensus whereby a person cannot be allowed to waive the ‘core’ ripple, even in exchange for a contractual or other benefit she may receive. However, the further one gets from the core, toward more far-reaching circles of dignity, the greater the potential to forego a right in exchange for contractual gain”) (footnotes omitted).

¹⁴⁵ See H CJ 7146/12 Adam v. Knesset, Nevo Legal Database (Sept. 16, 2013) (Isr.), https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\12\460\071\b24&fileName=12071460_b24.txt&type=2 [<https://perma.cc/5UN8-7BDB>]; H CJ 8425/13 Eitan Israeli Immigration Pol’y Ctr. v. Gov’t of Isr., Nevo Legal Database (Sept. 22, 2014) (Isr.), <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54e607184>. For further discussion of these decisions, see Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 *BERKELEY J. INT’L L.* 1 (2016); Michael Kagan, *Limiting Deterrence: Judicial Resistance to Detention of Asylum-Seekers in Israel and the United States*, 51 *TEX. INT’L L.J.* 191 (2016); Rivka Weill & Tally Kritzman-Amir, *Between Institutional Survival and Human Rights Protection: Adjudicating Landmark Cases of African Undocumented Entrants in Israel in a Comparative and International Context*, 41 *U. PA. J. INT’L L.* 43 (2019).

¹⁴⁶ See CrimA 7048/97 John Does v. Ministry of Defence, 54(1) PD 721 (2000) (Isr.), https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\97\480\070\09&fileName=97070480_a09.txt&type=2 [<https://perma.cc/L49L-W699>]. For further discussion of the decision, see Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 *ARIZ. J. INT’L & COMPAR. L.* 721, 722 (2001); Shiri Krebs, *Lifting the Veil of*

Under Article 39(d) of Basic Law: The Government, “[e]mergency regulations may not . . . allow infringement upon human dignity.”¹⁴⁷ This prohibition leads to the conclusion that the right to human dignity is absolutely protected from any temporary regulation that the Government is authorized to enact during a state of emergency. Yet, Article 12 of Basic Law: Human Dignity and Liberty states, *inter alia*, “emergency regulations may be enacted . . . to deny or restrict rights under this Basic Law, provided the denial or restriction shall be for a proper purpose and for a period and extent no greater than is required.”¹⁴⁸

According to this provision, the right to human dignity is relative with respect to emergency regulations. This apparent contradiction can be resolved by interpreting human dignity in Basic Law: The Government as narrower than human dignity in Basic Law: Human Dignity and Liberty. While using emergency regulations to infringe upon human dignity is absolutely prohibited in the narrow sense (for instance, by torture), it is permissible to restrict it by emergency regulations in a broader sense if the restriction abides by the demands of the Limitation Clause in Article 8 of Basic Law: Human Dignity and Liberty.¹⁴⁹

VI. CONCLUSION

Professor Henk Botha has pointed out that alongside the conviction that human dignity places constitutional interpretation on a secure

Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court, 45 VAND. J. TRANSNAT’L L. 639 (2012).

¹⁴⁷ Basic Law: The Government, SH 1780 (2001) 158 (Isr.).

¹⁴⁸ Basic Law: Human Dignity and Liberty, SH 1454 (1992) 90 (Isr.)

¹⁴⁹ See Bendor & Sacks, *supra* note 65, at 38 (noting that “section 12 of the Basic Law: Human Dignity and Liberty states, *inter alia*, that ‘Emergency regulations may be enacted . . . to deny or restrict rights under this Basic Law, provided the denial or restriction be for an appropriate purpose, and for a period and to an extent that do not exceed what is necessary.’ According to this provision, the right to human dignity is a relative right, also with respect to emergency regulations, and can be violated only ‘for an appropriate purpose, and for a period and to an extent that do not exceed what is necessary.’ The only way to resolve this apparent contradiction is to interpret the concept of human dignity as employed in the Basic Law: The Government, that is, in a manner far more restricted than that applied when interpreting the right to human dignity in the Basic Law: Human Dignity and Liberty. According to this approach, while it is absolutely prohibited to violate the narrow essence of human dignity through the application of specific measures (e.g., torture), it is permissible to violate human dignity in its broader sense, for instance by denying freedom of expression, on condition that such a violation abides by the demands of the limitation clause in the Basic Law: Human Dignity and Liberty”).

footing, there exists the opposite view according to which “a dignity-based jurisprudence is the antithesis of principled decision-making.”¹⁵⁰ In his opinion, reliance on human dignity allows judges to resort to (subjective) values rather than (objective) rules.¹⁵¹ Botha asserts that since human dignity has such a wide range of meanings, it can be invoked in defense of multiple, often directly conflicting, outcomes and presuppositions.¹⁵²

Indeed, there is a great deal of ambiguity in human dignity, both as a value and as a human right, that may lead different judges to different interpretations and applications of it; yet the dissimilarities between interpretations and applications of human dignity in different countries cannot be explained merely by the indeterminacy of human dignity or by subjective differences between the views of different judges. The differences are largely due to the diverse constitutional environments in each country. Indeed, as Giorgio Resta puts it, “[t]he notion of dignity . . . is at the same time universal, relying on a shared value of humanity, and context-specific, deriving its meaning from the cultural and institutional frame in which it is embedded.”¹⁵³

Thus, the absolute character of the right to human dignity in the German Basic Law, which is unique to Germany, in conjunction with the inclusion in the Basic Law of many additional human rights, all of which are relative and not absolute, have led to the most-narrow interpretation given by the German judges to the right to human dignity.

In contrast, in Israel, where the right to human dignity is not formulated in Basic Law: Human Dignity and Liberty as an absolute right and many fundamental human rights related to human dignity are not explicitly included in the Basic Law, the main function of the constitutional guarantee of dignity is to fill the gaps and protect unmentioned rights, on the argument that they are implied in the notion of dignity.¹⁵⁴ On the other hand, the provision in Basic Law: The Government, according to which there is an absolute ban on violating human dignity in emergency regulations, is expected to lead the Court to a very narrow interpretation of the right in this context.

In South Africa, the relativity of the constitutional right to dignity enabled the Constitutional Court to interpret the right broadly, but the

¹⁵⁰ See Botha, *supra* note 59, at 171.

¹⁵¹ See *id.* at 171–72.

¹⁵² See *id.* at 172.

¹⁵³ Giorgio Resta, *Human Dignity*, 66 MCGILL L.J. 85, 85 (2020).

¹⁵⁴ See Dieter Grimm, *Dignity in a Legal Context: Dignity as an Absolute Right*, in UNDERSTANDING HUMAN DIGNITY 381, 385 (Christopher McCrudden ed., 2013).

2022]

HUMAN DIGNITY

771

multiplicity of particular rights in the South African Constitution led the Court to apply the right to dignity alone only in rare cases.

In the United States, the right to human dignity is not mentioned in the Constitution, so it does not enjoy the status of an independent constitutional right. However, the value of human dignity, which underlies some of the rights enshrined in the Constitution, justifies broad judicial protection over them, through the strict scrutiny standard, which approaches the absolute protection of human dignity according to Kant's philosophy.

In this sense, Aharon Barak, the former President of the Israeli Supreme Court, is right in his insight that "[w]hen human dignity is expressly mentioned in a constitution, the scope of its application as a right is determined by its relationship with other rights, in accordance with the structure of rights protection in that particular constitution."¹⁵⁵

It seems then that while the theoretical and normative basis of the interpretation of the constitutional right to human dignity by courts from different countries is quite similar and rests to a large extent on Kant's philosophy, the extent of the protection granted to human dignity depends on the constitutional environment in which the right is placed. In constitutional law, human dignity is therefore a chameleon.

¹⁵⁵ Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 45 (2002).