CONTENTS

	Ac	eface page xvii knowledgements xxvi ble of cases xxvii
PART	I	Fundamental concepts and sources 1
1	Th	e various aspects of human dignity 3
	1.	 Theology, philosophy and constitutional law 3 A. The difference between the intellectual history and the constitutional interpretation 3 B. The similarity between the intellectual history and the constitutional interpretation 4
	2.	Criticism of the use of the concept of human dignity and response to it 8 A. The criticism 8 B. The response 10
	3.	Human dignity – a social value, a constitutional value and a constitutional right 12
2	-	e intellectual history of the social value of human gnity 15
		The ancient world 15 A. History of ideas 15 B. The Stoics and Cicero 17 C. The world religions 18 (1) Judaism 18 (2) Christianity 21 (3) Islam 23
	2.	Philosophical approaches 24 A. Philosophical approaches until Kant 24 (1) The Renaissance 24

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

56

(4)

The 1990s

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

		(3)	External sources: post-constitutional history	87
		(4)	External sources: precedent 87	
		(5)	External sources: fundamental values 89	
		(6)	External sources: comparative law 90	
		C. Det	ermining the ultimate purpose of the constitution	95
		(1)	The approach of purposive interpretation 95	
		(2)	The subjective purpose of the constitution is not decisive 96	
		(3)	The objective purpose and protection of the individual 98	
		(4)	"A living constitution" and "a living tree" 99	
		(5)	Interpretation with a spacious view 100	
5	Th	e role o	f human dignity as a constitutional	
		lue	103	
	1.	Three i	roles of human dignity as a constitutional 103	
	2.		n dignity as a constitutional value that lays ation for all of the rights 104	a
	2			
	3.		terpretational role of human dignity as a tutional value 105	
			eral interpretational role 105	
		B. Part	ricular interpretational role: interpretation of the riginal dignity 110	ght to
	4.		n dignity as a constitutional value in the	
	1.		ion of constitutional rights 112	
7	Th	ree type	es of model for determining the content of	the
	CO	nstitutio	onal value of human dignity 114	
	1.		gical models, philosophical models and utional models 114	
	2.	Theolo	gical models 114	
	3.	Philoso	ophical models 116	
			essment of the philosophical models 116	
			nan dignity and Kant 117	
			nan dignity and Dworkin 118	
			nan dignity: Margalit and Statman 119	
	4.		tutional models 120	
			characteristics of the constitutional models 120	0

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

9

10

		C.	limitation of a different right 149	
		D.	Purposive interpretation of human dignity and	
			limitation of the public interest 150	
		E.	Criticism of this view and response 153	
Ηι	ıma	n di	gnity as a framework right	
(m	oth	er-ri	ight) 156	
1.	Hı	ıman	n dignity as a framework right 156	
	A.	Fran	nework rights 156	
	B.	A bu	ndle of rights 158	
	C.	Fram	nework rights and rights with no special name 159	
2.		_	ter-rights of human dignity 160	
			ghter-rights fulfill the mother-right's purpose 160	
			various aspects of the humanity of a person 160	
	C.	Deriv dign	ving a daughter-right from the mother-right of human ity 161	
	D.	Daug right	ghter-rights and those same rights as independent is 162	
	E.	The r	relationship between the daughter-rights of human ity 163	
		(1)	Lack of overlap, complementary overlap and conflicting overlap 163	g
		(2)	Lack of overlap 163	
		(3)	Complementary overlap 163	
		(4)	Conflicting overlap 164	
			(a) Conflicting overlap between two principles 164	
			(b) Conflicting overlap between a principle and a rule 167	
	F.		relationship between daughter-rights and independent titutional rights 167	
Th	e ai	ea co	overed by the right to human dignity 170	
1.			a covered and the overlap problem 170	
2.			• •	
4.			a covered exclusively by the right to human in a comprehensive bill of rights 170	
3.			nstitutional right to human dignity and neplementary overlap with independent	
			utional rights in a partial bill of rights 174	

PART

4.	Architectural difficulty: the right to human dignity and the right to personal liberty 175 A. Presenting the problem 175	
	B. South Africa 176 C. Canada 177 D. Israel 178	
5.	Human dignity is not a "residual right" 181	
RT IV	Human dignity in comparative law 183	
11 Hı	man dignity in American constitutional law 185	
1.	A constitutional right to human dignity is not recognized in the federal constitution 185 A. The lack of a special express provision on human dignity in	
	the federal constitution 185	
	B. Human dignity is not part of a framework right in the federal constitution 185	al
	C. Human dignity and Griswold v. Connecticut 189	
2.	Human dignity as a constitutional right in the state constitutions 190	
3.	Human dignity as a constitutional value in the federal constitution 192	
	A. Human dignity and the dignity of the state 192	
	B. The history of human dignity as a constitutional value 193	
	(1) Pre-Second World War 193	
	(2) The 1940s and 1950s 193	
	(3) Continued use of human dignity in the Supreme Court 197	
	(a) Expanding the application of human dignity to most of the Bill of Rights 197	0
	(b) The contribution of Justice Brennan 199	
	(c) The contribution of Justice Kennedy 201	
	 The assessment of human dignity as a constitutional value in the US Constitution 205 	n
	(1) The status of human dignity as a constitutional value 205	
	(2) The essence of human dignity in American common law 206	

12	H	um	an d	lignity	in Canadian constitutional law	209
	1.	Th	ne C	anadia	n Charter does not recognize a	
					al right to human dignity 209	
					an independent right to human dignity	209
		B.			f human dignity as a derived (daughter)	
					nal right 209	
		C.	Hu	man dig	nity as a sub-constitutional value 211	
	2.	H	uma	n dign	ity as a constitutional value in the	
				lian Ch		
		A.	The	central	ity of human dignity as a constitutional	
			valu		12	
			(1)	In the	Canadian Charter in general 212	
			(2)	In cer	tain constitutional rights 213	
				(a)	The right to equality 213	
				(b)	The right to freedom of expression 2	14
				(c)	The right to life, liberty and security of the	he
					person 215	
				(d)	Legal rights 215	
		В.	The	content	of human dignity 217	
			(1)	Huma	an dignity as the humanity of the person	217
			(2)	The va	arious expressions of human dignity 2	218
				(a)	Human dignity in Law 218	
				(b)	Human dignity in Morgentaler 219	
				(c)	Human dignity, free will and individual autonomy 220	
				(d)	Human dignity and viewing a person as unto himself 221	an end
				(e)	Human dignity within a society 221	
		C.	The		numan dignity as a constitutional value	222
		-	(1)		an dignity as an interpretational standard	
			1-7		nining the scope of a constitutional right	222
			(2)		an dignity in the limitation of constitution	al
				rights	•	
13	H	ıma	an d	ignity	in German constitutional law	225
					ve traits of human dignity 225	
	-'				ons of Article 1(1) of the German Basic	
			Law	-		
		В.	Hur	nan dig	nity as an absolute right 227	
					nity as an eternal right 229	

		D.	Human dignity as the supreme value in the German constitution 230
		E.	The area covered by human dignity as a constitutional right 231
		F.	The uniqueness of human dignity in German constitutional law 232
	2.		ıman dignity as a constitutional value and a
			nstitutional right 233
		A.	Human dignity solely as a constitutional value 233
		B.	Human dignity as a constitutional right 234
	3.	Th	e definition of human dignity 235
			Negative and positive definitions 235
		В.	
		Б.	definitions 236
	4.	Th	ne scope of human dignity 237
			The dignity of every person as a human being 237
		В.	1
		Д.	(1) Human dignity's beginning 238
			(2) Human dignity's end 239
		0	
	_		111111111111111111111111111111111111111
	5.		uman dignity in German constitutional law and imparative law 240
			•
14	H	uma	an dignity in South African constitutional
	lav	W	243
	1.	Th	ne normative traits of human dignity 243
		A.	The provisions of sections 10 of the South African Constitution 243
		В.	Human dignity as a relative right 244
		C.	Human dignity as a constitutionally amendable
			constitutional right 248
		D.	Human dignity as a supreme value 252
		E.	The area covered by human dignity as a constitutional
			right 256
			(1) A zone of exclusive application of human dignity 256
			(2) Human dignity and the residual right to freedom 259
		F.	The uniqueness of the right to human dignity in South
			African constitutional law 261

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

CONTENTS

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