

The Constitutional Right to Dignity

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In recent years, there has been a veritable explosion in the number of constitutional texts explicitly recognizing the right to dignity and in constitutional court cases vindicating that right in a variety of settings. The number and range of cases in which courts enforce or refer to the right to dignity raises questions about what dignity is doing in all these cases: why does it seem useful in so many cases to litigants and judges alike, and what role is it playing in all these diverse factual situations even though another right might be more particular and equally, if not more, effective? Ultimately, these cases force us to consider what is the meaning of human dignity?

I. A jurisprudence of dignity

There are so many constitutional cases involving the right to dignity that it is impossible to count or review them all. Courts around the world have ruled on the right to dignity, although some courts – including Germany, India, Canada, South Africa, Hungary, and Israel – have been more deliberate in their development of a jurisprudence of dignity than others. But the cases defy easy categorization because they arise from such a broad range of factual settings. Moreover, there is no clear connection between the status of dignity as a textually protected right and its prominence in the country's jurisprudence: Canada's Charter does not mention dignity at all, India's mentions it several times but primarily in the section on unenforceable directive principles; Hungary's constitution mentions it as one of many rights; Israel's evolving Basic Law emphasizes it, as does South Africa's 1996 post-apartheid constitution which calls it a founding principle, while in Germany it is fundamental and non-derogable. Many other countries whose constitutions protect dignity have not developed jurisprudence about it. There is no clear correlation between constitutional text and caselaw.

Nonetheless, some patterns present themselves. Many of the cases from around the world fall into three broad categories. One category – conceptually the most interesting – treats dignity as a mechanism for protecting individuality. This individuation principle starts from the premise (most prominently articulated in the Universal Declaration of Human Rights) that each individual human being is unique and in that uniqueness lies dignity.

The individuation principle has varied applications. In some cases, the court will find that the state's objectification of individuals violates their individual dignity. For instance, in a notable German case, the Federal Constitutional Court invalidated the Air Transport Security Act because, in empowering the government to shoot down a passenger plane upon a showing that the aircraft would be used against the life of others, it violated the passengers' right to

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dignity insofar as the government would be sacrificing their lives in order to achieve another goal.² In other instances, courts will rely on the right to dignity to protect the individual decisions a person makes, such as the choice of intimate partner and lifestyle, selection of names, religious choices, occupational opportunities, and decisions relating to reproduction. (Dignity has been used to support *both* the fetal right to life and the woman's right to choose). Courts have also found that the right to protect one's reputation rests on the right to dignity, as does the right to travel.

Somewhat ironically, the individuation principle also has application in equality and affirmative action cases. The Canadian Supreme Court, for instance, has found that the purpose of constitutionally guaranteeing equality is to "prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration,"³ Through this equality jurisprudence, courts have recognized the "inherent" dignity of women, lesbians and gays, people with disabilities and others who were previously not held to enjoy the same respect in law as privileged groups. All of these cases suggest that the constitutional right to dignity requires the government to respect the individuality and individual choices of citizens as against majoritarian control.

A second category of cases protects socio-economic interests. In these cases, courts consider whether the state violates the right to dignity when it fails to provide an appropriate level of medical care, shelter, education, or other basic needs to its citizens and residents. These cases, in general, tend to posit that the right to dignity demands that the individual have the means by which to live independently. Courts in poor and developing countries, such as South Africa and India, struggle mightily to make the right to dignity meaningful even in the face of significant fiscal constraints. The Indian Supreme Court has repeatedly insisted that the right to life includes the right to live with human dignity and "all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."⁴ The Court has also likened the right to life to the right to live in dignity, meaning "free from exploitation"⁵ or not dependent on others.

The third category into which dignity cases tend to fall concerns the right of those who are legally dependent on the state. These cases are inherently difficult because so much of the

² Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Feb. 15, 2006, 59 Neue Juristische Wochenschrift (NJW) 751 (F.R.G). See Oliver Lepsius, Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-Transport Security Act, 7 GERMAN L.J. 761, 771 n.27 (2006), available at www.germanlawjournal.com

³ Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur [2003] 2 S.C.R. 504, 55 9; 2003 SCC 54 ; 2003 S.C.R. LEXIS 57 2; [2003] S.C.J. No. 54, quoting Law v. Canada [1999] S.C.R. 497, 500.

⁴ Francis Coralie v. Union of India A .I.R. 1981 S.C. 746 (Bagwhati J.)

⁵ Id.

meaning of dignity elsewhere is the endeavor to ensure the independence of individuals. Where individuals are dependent for their care on the state, their dignity is to that extent compromised.

But courts have held that the right to human dignity nonetheless imposes *some* limits on what states can do to individuals within their control in terms of care, treatment, and punishment. In these cases, the state is obligated to recognize the “inherent” dignity of *every* person, including defendants, prisoners, suspected terrorists, and others whom states have traditionally treated as without dignity.

Thus, one of the most dramatic constitutional shifts in the last few decades is the judicial recognition of the inherent, *and equal*, humanity of each individual. Moreover, courts in these cases have tried to invest the concept of dignity with real content and to ensure, at least to some extent, that the values encapsulated in that right are judicially enforceable. Indeed, what is perhaps most interesting about these cases is that courts are often more emphatic than they need to be in relying on and expounding the meaning of dignity. The question is then: what work is dignity doing in all these cases?

II. The Constitutional Work of Dignity

If there is any coherence to dignity jurisprudence across the globe it may be encapsulated in the notion of autonomy – i.e. self-rule. The fundamental interest protected in these cases is the interest of the individual to control some portion of his or her life and (in the style of the US Supreme Court) destiny.⁶ This is obviously not an absolute right, nor a unilateral right; it must be moderated by the competing interests of other individuals and of the state. However, the dignity cases insist that, notwithstanding the fierce competition, there is some portion of one’s life over which one maintains control.⁷ Thus, the state can not force individuals to adopt a particular religion, or to work (or not work) in a particular industry; it can not demean prisoners to the point where they have literally nothing left, but must allow them to hope, and to live.⁸ And, to the extent possible, but more controversially, it must ensure that individuals have the means by which to live with some degree of independence, so that they are not absolutely controlled by the need to satisfy basic needs.

In this sense, dignity rights are different from and more fundamental than other constitutional rights. In many cases, when courts enforce the right to dignity, they are saying

⁶ *Planned Parenthood v Casey*, 505 U.S. 833, 852: “The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.” (Joint opinion).

⁷ This idea might be termed the “sovereignty” of the individual, and to that extent is comparable to the residual sovereignty that states in the American and some other federal systems retain even against the competing sovereignty of the central government. This is the notion of sovereignty that the U.S. Supreme Court has resurrected in its series of state sovereignty cases in the 1990s.

⁸ The right to dignity has been used in South Africa and Hungary to abolish the death penalty. See also *Life Imprisonment Case*, Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] June 21, 1977, 45 BVerfGE 187, (F.R.G) (abolishing the punishment of life imprisonment without the possibility of parole).

something important not only about what dignity means (comparable to a meaningful opinion that elucidates equality or health care); they are also saying something important about what it means to be an individual (or in rare cases a community) in the particular contemporary society in which the Court sits. A case about medical care, for instance, becomes not only about what health care rights are available under the constitution at issue, but – in the hands of judges concerned about dignity – becomes a case about what care an individual – who, by definition is imbued with *inherent dignity* – is entitled to. Is every individual entitled to dialysis on demand? In some countries, perhaps. In others, individual dignity requires the provision of emergency treatment, and, if the country can not afford to provide treatment for chronic illness to all who need it, the government is at least required to take action to enhance the availability of health care for all.⁹ Likewise, where judges tap into the right to dignity, a limit on inheritance in polygynous marriages not only violates equality rights (because it treats unequally individuals who are similarly situated for relevant purposes), but also violates the *dignity* of the marital partners who are disinherited.¹⁰ The cases then become cases not just about a particular right, but also about the respect that is due to individuals *per se*. In the relevant society, how is an individual expected to live? What kind of respect is he or she due from the state and from others? What kinds of things do individuals have a right to expect? Over what areas should individuals have control?

But the judicial question of individual autonomy – the scope of self-rule – is not to be understood in a philosophical vacuum, but in a court in a particular nation with competing economic, historical, social, and political strains. Although dignity is inherent and often “inviolable,” it can never be absolute. Even in countries where dignity is constitutionally protected, the inviolable dignity of millions of people is severely compromised by inadequate health care, food, shelter, education, and so on. But even in there, the state is subject to competing demands; it can not be expected to – and no court would insist that it – provide every individual with the means to live with the dignity of kings. Rather, the constitutional obligation is to progressively realize the right to health care or housing, to avoid disproportionate or unnecessary incursions into an individual’s dignity, meaning that the government should not excessively limit the scope of authority that one has over oneself. Thus, even though individual dignity is recognized, the scope of *state* authority still has salience.

Where these kinds of claims are at issue, courts around the world have taken on twin roles. First, courts identify the scope of individual autonomy – that is, they define the areas in which the individual maintains control, such as in decisions relating to intimacy, the right of a prisoner to pray, etc. Second, by enforcing these rights, courts are prohibiting states from insisting on the unwilling surrender of control in these areas; they are thereby circumscribing the areas in which states have authority to rule.

⁹ See *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) (From South Africa: Constitutional Court; 27 November 1997; 106 KB).

¹⁰ *Hassam v Jacobs NO and Others* (CCT83/08) [20 09] ZACC 19 (15 July 2009) (From South Africa: Constitutional Court; 15 July 2009; 1 21 KB): “The dignity of the parties to polygamous Muslim marriages is no less worthy of respect than the dignity of parties to civil marriages or African customary marriages.” at p. 46.

The courts in these cases, then, may be using dignity not simply as a right that may be enforced in specific circumstances as against overreaching state authority, like the right to equality or religion or housing. Rather, dignity is being used to demarcate the line between individual autonomy and state rule in contemporary society. The right to dignity denotes the area that the individual controls – ie the areas where the self rules. Where the claim of dignity fails, or the court concludes that the right to dignity does not prevail, the state (in the name of the majority of the other citizens) may impose its own rule. In these cases, the right to dignity has become the sphere in which individuals enjoy self-rule, at the limits of the law.