

THE JUDGE IN A DEMOCRACY

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*Abaron Barak*

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*Chicago*). The laws of a people should be interpreted on the basis of the assumption that it wants to continue to exist. Civil rights derive from the existence of the State, and they should not be made into a spade with which to bury it.<sup>149</sup>

Similarly, human rights should not be sacrificed on the altar of the state. After all, human rights are natural rights that precede the state. Indeed, human rights protections require preservation of the sociopolitical framework, which in turn is based on recognition of the need to protect human rights. Both the needs of the state and human rights are part of one constitutional structure that simultaneously provides for human rights and allows them to be limited. A unique feature of democracy is that the scope and limits of human rights derive from a common source. Justice Dickson of the Canadian Supreme Court nicely noted this peculiar underpinning of democracy with the following comment about Canada's limitation formula: "The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."<sup>150</sup>

This is the constitutional dialectic. Human rights and the limitations on them derive from the same source, and they reflect the same values.<sup>151</sup> Human rights can be limited, but there are limits to the limitations. The role of the judge in a democracy is to preserve both of these limitations. Judges must ensure the security and existence of the state as well as the realization of human rights; judges must determine and protect the integrity of the proper balance.

<sup>149</sup> E.A. 2/84, *Neiman v. Chairman of Cent. Elections Comm. for Eleventh Knesset*, 39(2) P.D. 225, 310 (citation omitted) (English translation available at [www.court.gov.il](http://www.court.gov.il)).

<sup>150</sup> *The Queen v. Oakes*, [1986] S.C.R. 103, 136.

<sup>151</sup> See Weinrib, *supra* p. xix, note 34 at 127-28.

### Human Dignity

Most central of all human rights is the right to dignity.<sup>152</sup> It is the source from which all other human rights are derived. Dignity unites the other human rights into a whole.<sup>153</sup> It also constitutes a right in itself and is recognized as such in several constitutions.<sup>154</sup> The right of dignity reflects the "recognition that a human being is a free agent, who develops his body and mind as

<sup>152</sup> See Edward J. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States* 1 (2002); *The Concept of Human Dignity in Human Rights Discourse* (David Kretzmer and Eckart Klein eds., 2002); *Human Dignity: This Century and the Next* 3-97 (Rubin Gotesky and Ervin Laszlo eds., 1970); Izhak England, "Human Dignity: From Antiquity to Modern Israel's Constitutional Framework," 21 *Cardozo L. Rev.* 1903 (2000); G.P. Fletcher, "Human Dignity as a Constitutional Value," 22 *U.W. Ont. L. Rev.* 171, 171 (1984) ("No one would question whether the protection of human dignity was a primary task of the contemporary legal culture"); A.I. Melden, "Dignity, Worth, and Rights," in *The Constitution of Rights: Human Dignity and American Values* 29, 46 (Michael J. Meyer and William A. Parent eds., 1992) ("[A]ttention to human rights is of the first importance for the promotion of the dignity and the worth of human beings"); Jordan J. Paust, "Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content," 27 *How. L.J.* 145, 223 (1984) ("[H]uman rights law provides a rich set of general criteria and content for supplementation of past trends in Supreme Court decision[s] about human dignity"); See also Paulo Cesar Carbonari, "Human Dignity as a Basic Concept of Ethics and Human Rights," in *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (Berman Klein Goldewijk et al. eds., 2002).

<sup>153</sup> See William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," 27 *S. Tex. L. Rev.* 433, 438 (1986) ("[T]he 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"); Walter F. Murphy, "An Ordering of Constitutional Values," 53 *S. Cal. L. Rev.* 703, 745 (1980) ("The basic value in the United States Constitution, broadly conceived, has become a concern for human dignity").

<sup>154</sup> The German Constitution, for example, provides that "[t]he dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority." F.R.G. Const. art. 1, translated in *Basic Law for the Federal Republic of Germany* (1991). On dignity in the German Constitution, see Currie, *supra* p. 22, note 9 at 314-16; Eberle, *supra* p. 85, note 152 at 41; Kommers, *supra* p. 22, note 9 at 298. In Israel, Basic Law: Human Dignity and Freedom provides: "2. The life, body or dignity of any person shall not be violated . . . 4. Every person is entitled to protection of his life, body and dignity."

he wishes, and the social framework to which he is connected and on which he depends."<sup>155</sup> Human dignity is therefore the freedom of the individual to shape an individual identity. It is the autonomy of the individual will. It is the freedom of choice. Human dignity regards a human being as an end, not as a means to achieve the ends of others.

When 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. Therefore, the same right of dignity may have a different scope in different constitutions.

In Israel's constitution, the right to dignity includes four elements. First, human dignity is the dignity of each human being "as a human being." This is the source of the viewpoint that human dignity includes the equality of human beings.<sup>156</sup> Discrimination infringes on a person's dignity. Human dignity assumes equality of the (other) rights that people have and equality of opportunity and benefits.

Second, human dignity is a person's freedom of will. This is the freedom of choice given to people to develop their personalities and determine their own fate. People are spiritual entities who enjoy the freedom to develop themselves. This is the source of my view that at the core of human dignity is the autonomy of the individual will.

Third, human dignity is infringed if a person's life or physical or mental welfare is harmed. The death penalty contradicts human dignity.<sup>157</sup> Life imprisonment with no chance of early release contradicts human dignity. Torture contradicts human dignity. Humiliation, blows, confiscation, forced labor—all infringe on human dignity. Human dignity is infringed when a person lives in humiliating conditions that negate his humanity. Human dignity

<sup>155</sup> H.C. 5688/92, *Wechselbaum v. Minister of Def.*, 47(2) P.D. 812, 827 (Isr.).

<sup>156</sup> Louis Henkin, "Human Dignity and Constitutional Rights," in *The Constitution of Rights: Human Dignity and American Values* 212 (1992).

<sup>157</sup> See *S. v. Makwanyane* (1995) 3 SA 391, 437 (c.c.) (S.Afr.).

assumes the guarantee of the minimum conditions of (physical and mental) existence.

A person living in the street, with no home, is a person whose human dignity is infringed; a person who goes hungry is a person whose human dignity is infringed; a person who has no access to basic medical care is a person whose human dignity is infringed; a person forced to live under humiliating physical conditions is a person whose human dignity is infringed.<sup>158</sup>

Fourth, human dignity assumes that the individual is not a means for satisfying the needs of another individual. Every person is a world unto himself, and an objective unto himself. It assumes a society predicated on the desire to protect the human dignity of each of its members. Therefore, the right to human dignity cannot be infringed without an appropriate procedure. Harming a person without first granting a hearing infringes upon human dignity. Many rights of the accused derive from his dignity as a human being. For example, the presumption that every person is innocent until proven guilty by law is part of human dignity; the right of the accused to a fair trial is part of human dignity; the right of the accused to a speedy trial is part of human dignity. The right of a person to know the charges against him or why he has been arrested, and his ability to defend effectively against those charges, are part of human dignity. Thus, imposing criminal liability and criminal imprisonment for behavior that lacks a criminal *mens rea* ("strict liability crimes") infringes on human dignity; imposing criminal responsibility on behavior that did not constitute a crime at the time it occurred infringes on human dignity.

Human dignity is not an absolute right. Unless otherwise provided,<sup>159</sup> it may be infringed upon according to the limitation clause existing in the legal system. Thus, many provisions of the criminal law affect dignity, but they are constitutional, since they comply with the limitation clause.

<sup>158</sup> L.C.A. 4905/98, *Gamzu v. Yeshayahu*, 55(3) P.D. 360, 375. (Barak, P.).

<sup>159</sup> Such a provision is found in Article 1 of the German Constitution.

When human dignity is not mentioned expressly in a constitution, as is the case in the United States, Canada, and many other countries, the question arises as to whether human dignity can be recognized as a human right in these legal systems. A way of recognizing a constitutional right to dignity in those systems is through interpretation of specific rights, mainly the right to equality.<sup>160</sup> It can also be recognized through interpretation of the whole bill of rights, whereby human dignity either is implied by the overall structure of the rights or is derived from their "penumbras."<sup>161</sup>

## CRITICISM AND RESPONSE

### *The Criticism*

I am aware that my theory of the role of a judge in a democracy is not universally accepted. It may be said that legislation and adjudication serve wholly different functions and that a judge is neither a senior nor a junior partner of the legislature. It may also be said that my approach to the judicial role departs from the proper outlook on separation of powers and democracy, for democracy, both formal and substantive, is too important to be left to the protection of judges who are not elected or otherwise accountable to the people. Who will guard the guardians? It may even be argued that my approach is based on judicial "imperialism,"<sup>162</sup> conferring on judges an inappropriately prominent status. These criticisms are important, and I take them seriously. They accompany me always and restrain me always. However, there are proper answers to these criticisms. I do not claim that the court can cure every ill of society, nor do I claim that it can be the primary agent for social

<sup>160</sup> See *Law v. Canada* [1999] 1 S.C.R. 497, 507 (Can.).

<sup>161</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

<sup>162</sup> See Nathan Glazer, "Toward an Imperial Judiciary?" *Pub. Int.*, Fall 1975, at 104, 122.

change.<sup>163</sup> I do not claim that the court is always the most effective branch for the resolution of disputes. My claim is much more limited: I claim that the court has an important role in bridging the gap between law and society and in protecting the fundamental values of democracy, with human rights at the center.

### *The Role of the Judge as Creator of the Common Law*

Within the field of common law, almost a thousand years of history validate my approach. If the common law does not merely declare what has existed since time immemorial—and I do not think that anyone still believes this myth—then it is hard to deny the creative role of the judge in the common law. Judges created and developed the common law.<sup>164</sup> Judges bridged the gap between law and society by giving expression to the fundamental principles of society. And judges are responsible for using the common law to fit solutions to life's changing needs. Naturally, over the years, judges made mistakes. But there were many achievements, too. It is difficult to forget Lord Mansfield's statement, "the black must be discharged,"<sup>165</sup> releasing in 1772 a black slave who fled to England from his American master. Lord Mansfield issued this statement after the court heard from counsel for the slave that "the air of England was too pure for slavery."<sup>166</sup> It was the judge who declared and gave effect to the fundamental values on which the common law is founded. The judge must protect and promote these fundamental values. In these activities, the main responsibility rests with the judge, the senior partner.

<sup>163</sup> See generally Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* 343 (1991) (examining the ability of courts to enact social change and concluding that "[t]o ask [courts] to produce significant social reform is to forget their history and ignore their constraints").

<sup>164</sup> See M.A. Eisenberg, *The Nature of the Common Law*, (1988); Michael McHugh, "The Law-Making Function of the Judicial Process," 62 *Austl. L.J.* 15, 16 (1988).

<sup>165</sup> "The Case of James Sommersett," 20 *How. St. Tr.* 1, 82 (K.B. 1772).

<sup>166</sup> *Id.* at 79.