



Book Review

Dignity and Judicial Authority

Ashok Johnson Rodrigues*

Rachel Bayefsky, *Dignity and Judicial Authority (Theoretical Perspectives in Law)*, Oxford University Press, UK, Oct 2024, pp. 206+xviii, ISBN: 9780197750322

Human Dignity consists of human relationships devoid of humiliation and degradation. Dignity of the individual is central to human experience and the Preamble to the Indian Constitution which secures to its citizens justice, liberty and equality, also promotes fraternity which will assure the dignity of the individual. It is a constitutional value that each one should imbibe. No human being should fall below the floor of human dignity. But we have seen the Indian judiciary itself with its feudal character, making a mockery of human dignity, when it denies a ninety year old incarcerated priest, a straw to sip water; when it sends a wheelchair bound teacher and activist to jail for a decade where his health deteriorates and he dies months after his acquittal; when it grants police custody to a pregnant woman, when it asks the petitioner to be safe in prison than going on a Kashmir tour, when it says tapping the female body is no molestation, when it says that groping minor's breasts is not sexual assault as it did not involve skin-to-skin touch, when it states that a raped Indian woman falling asleep is akin to an unchaste western woman, when it says there is no fundamental right to marry, when it advises adolescent girls to control their sexual urges, when a high court judge calls Muslims with abusive words and calls their Indian habitat as Indian Pakistan, and many more such utterances that abound the daily news and have become a blot on the dignity of Indian citizenry. This book is an eye opener to all the judicial officers who serve in the Indian judiciary as well.

* School of Law, CHRIST (Deemed to be University), Bengaluru, Karnataka, India;
ashok.rodrigues@christuniversity.in

Bayefsky's study focuses on US constitutional and federal courts, civil procedures and deals with how these courts ought to deal with human dignity, and also how to promote and protect it. The author has devised three aspects of dignity namely, respect for status, the absence of domination and control over one's self-presentation to others. In the opening chapter titled *Mapping Dignity*, the author maps the Latin roots of the term dignity and provides taxonomy to categorise the various understandings of the concept of dignity. The author traces its roots to the Roman concept of *dignitas*, which stands connected to office and high status in social and political circles but also a form of self-presentation to the outer world. The author finds that Roman understanding of dignity is akin to today's 'honour', i.e. the dual role honour plays in the present day in that it is honourable status and also the quality of being honourable, in the sense of living up to high ideals. From Cicero's point of view, it has got to do with people as members of humanity than participants in social hierarchy. The author subscribes to Cicero's egalitarian vision of dignity as between human beings and as a quality possessed by human beings independent of social status. (5) But the author has not discussed the medieval work of Fichte's *On Human Dignity* (1794).

Delving upon perspectives of world religions on dignity, the author agrees that it stems from the connection between the human and the divine. In both the Jewish and Christian traditions, the belief that humans have been made in the 'image of God' lends them dignity. For the Islamic account of dignity, the author quotes a Muslim scholar who states that dignity is intricately 'anchored to notions of divine imperative and command'(5) instead of giving exact references from the Quran and Hadith. In the classical Buddhist tradition, inner dignity can be attained by religious practice and it is not inherent. (6). The author finds that religious views of dignity offer both hierarchical as well as egalitarian ideas and heavily relies on Michael Rosen's book *Dignity: Its History and Meaning* (2012) for Catholic and Aquinian versions. As regards Hinduism, the author cites Jens Braarvig, a foreign author's article (6) who states that all living beings possess inherent dignity but it appears in various degrees in the society. Most of the citations are from the Cambridge Handbook of Human Dignity (2014). There is

no mention of the caste system and four *varnas* in the Hindu discourse.

The book then proceeds to look at dignity from the Kantian perspective which finds 'humanity as it is capable of morality is that which alone has dignity' as found in the pages of the *Groundwork of the Metaphysic of Morals* (7). But Kant looks at dignity as autonomy and how autonomous individuals are free to choose their destiny. Finally, the author concludes that Kant wants one who holds dignity to behave in a dignified manner and it is not a matter of being treated respectfully by others. The author then cites various international instruments such as Universal Declaration of Human Rights (1948) and Geneva Convention (1949) and basic laws of Germany and Israel, the African, Swiss and the US Constitutions which all uphold human dignity and asserts that it must be protected. Borrowing the Rawlsian concept, the author calls the 'plus side' of application of dignity as a 'overlapping consensus' that all of them agree on its importance, while on its 'minus side', dignity is viewed as an empty vessel, a holder of values gaining content in specific contexts (11).

The author has catalogued the varieties of dignity, in order to clarify the 'dignity-talk'. Thus the object of dignity could be an individual, position or status, a group or a mere abstract noun. The various bases of human dignity as identified by the author are being a member of the human species, or the capacity to reason or act morally, or stand in particular relation to God. There are various kinds of treatments that dignity demands: it may be in form of rights, or prohibition from torture, minimal decent treatment or equal treatment in economic, political or social spheres. It may be inherent and hence cannot be lost but is also viewed as lost due to harsh treatment or voluntary acts.

Applying the provisions of American constitution, the writer brings out the various conflicts over values in the American constitutional debates. Though not expressly mentioned in the text of the American Constitution, dignity has played an important role in US constitutional interpretation and the interaction between both would showcase the prominent features of dignity surrounding the American constitutional debates. The author brings out the various contexts in which dignity has been invoked by the U.S. Supreme

Court such as equal protection, same-sex relations and marriage, against cruel punishments, against arbitrary exercise of power by government officers, protection from defamation and sovereign immunity, citing a plethora of cases. The author also points out that references to dignity are associated with judges who adhere to more 'purposivist' interpretation than 'textualist' interpretations. C.J. Roberts is added in the latter group, citing justices from both wings, though he has not associated with the originalist group all through his opinions. The author then takes up certain contested constitutional topics and discusses various case laws rendered by U.S. Supreme Court until 2023, on matters pertaining to abortion, affirmative action, anti-discrimination law, religious liberty and free speech.

Chapter two titled as 'Relational Dignity', deals with the relationship between dignity and judicial institutions, which the author terms as 'relational dignity', which creates and sustains conditions that enable social interactions. Initially, the author looks into how the Kantian view of dignity as 'inherent worth' and 'relational dignity' which is socially situated and associated with human rights, diverge. The author finds that the judges will not be able to adjudicate disputes implicating dignity or recognise when dignitary harm is legally relevant by mere Kantian approach and run the risk of reducing it to a mere philosophical discussion (28). The author subscribes to the views of Colin Bird and Jeremy Waldron in rejecting the 'inherent worth' view. (29) The author asserts that the Kantian practice of weighing it against other values like utility and efficiency, will fall foul in judicial decision making by giving examples from the US constitutional law practice. The author further identifies the following three dignitary interests or central forms of social interaction that instantiates relational dignity, namely, respect for status, absence from domination and control over self-presentation, which the author goes on to discuss at length. The author also takes up two general features of the relational dignity account before that: rejection of a subjective view of dignity and the normative weight that dignity would carry. Taking the subjectivity aspect, the author says that violations of dignity are based on individual sensibilities, it could be subjective, when they are based on social understandings, inter subjective and, when the truth lies beyond these social understandings it could be

subjective. Even the present Chief Justice of India, B.R. Gavai, who was bereft of the protocol presence of the Chief Secretary of his home state Maharashtra, Director General of Police and Mumbai police commissioner, decried that he was denied his rightful status. Dr B.R. Ambedkar also had his files flung into his chambers long back. Though this is an American book, the Indian examples substantiate the author's claim that rightful status is related but not reducible to prevailing social understandings. Rachel Bayefsky also acknowledges that dignity can carry varying levels of normative weight. Thus, certain violations may be justified, say infringement of privacy during national emergency. Elaborating upon the status aspect, the author defines it with reference to social position, like that of a teacher treated with the status befitting a teacher. This reminds one, of the episode when Hindustani singer Gangubai Hangal lamented that lower class female singers turn into *bais*, while male singers are revered as *ustads* and *pandits* in Indian musical world. On the non-domination aspect, the author has borrowed insights from Philip Pettit's book *Republicanism: A Theory of Freedom and Government* (1997) and his article titled *The Domination Complaint* published in the *Nomos* (2005). Being at the mercy of someone is a degrading situation which many endure. This permeates our entire political and domestic spectrum. An inferior Indian judge too has to stand in front of the superior Indian judge, or wait for his arrival. Even a retired High Court judge can wield dominion on the lives of living judges in India! In closing this chapter, the author has brought out a distinction between 'dignitary violation' and 'dignitary harm' which is quite useful if studied in the Indian context where citizens endure a lot of harm being unaware of their dignitary violation. The author argues with hypothetical situations to show that one may exist without the other.

Chapter three titled 'Dignity and Constitutional Standing' examines the place of dignitary harm in 'constitutional standing' doctrine. This doctrine has its basis in Article III of the American Constitution which imposes standing limitations on litigants who sue in federal courts. It includes both the factual reality of harm and administrability of suits involving such harms. Richard H. Fallon Jr's writings in Hart & Wechsler's *The Federal Courts and the Federal System* (2015) and his article titled *The Fragmentation of*

Standing (2015) have informed the writer on the courts' practices in deciding with dignitary harm. Thus, injuries are not sealed off from the remedial questions and courts have denied plaintiffs restructuring of government policies or change in arrest and prosecution policies. Further, the author examines the contours of federal judicial authority in adjudicating suits in which dignitary harm is asserted. The twin tests in dignitary violation are that it must be concrete as well as particularized as the Supreme Court precedents have confirmed. The author then brings in the instances where discrimination and Establishment Clause cases as well as reputational harm and privacy violations where courts have accepted and limited dignitary harm. The author then discusses the challenges faced in particularizing dignitary harm. Firstly, there are concerns about judges opening floodgates of litigation as dignitary harm is not tied to particular territory. Secondly, dignitary harm' stemming from membership of a body, say a religious group may magnify the effect of dignitary violation. In the former case, judges tend to use the doctrine of separation of powers to fix jurisdiction but the author argues that a restrictive approach to standing may in fact undermine separation of powers and a practical approach must account for the concern that an expansion of federal jurisdiction will erode the distinction between judicial and political functions. Next, the author takes up the scepticism surrounding some ideological plaintiffs and how they affect courts' approaches. For example, a gay couple had filed a challenge to Mississippi statute which protected businesses that declined wedding services on basis of their religious beliefs. The court had denied standing, saying that they were not personally harmed. Thus, the courts will be entangled with charges of being biased in such ideological grievances, which the author says will lower public assessments of judicial legitimacy. Even in a recent Indian case, a minister, whose communally loaded comments did not warrant his arrest despite a criminal case booked against him, was due to his dignified position, while a posse of police had rushed to the residence of a professor and arrested him, because he lacked dignity. The author also finds that evidentiary issues elicit disfavour towards dignitary harm. Distinguishing between 'tangible' and 'intangible' forms of harms, the author highlights that dignitary harm is prone to be

viewed mostly as intangible and hence would be probed through constitutional standing analysis.

Chapter four titled as 'Dignity and Tort Law' examines the legal recognition of dignitary harm in tort law. Beginning with what comprises 'dignitary torts', its problematics, the author refuses to draw up any fixed category nor create a unified tort. Next the author looks at how tort claims such as battery, privacy invasion and defamation are connected to relational dignity. Further on, the author discusses the US Supreme Court's obsession with 'history and tradition', as also how tort liability has reduced due to social mores. The author argues that the former does not give fixed results. Looking into the role of judges and the bounds of their authority in adjudicating dignitary claims, the author looks into various Restatements of Torts as the community standards involved and argues that these must not be accepted uncritically. Since dignitary wounds are frequently inflicted through language and expression, this relation between dignity in tort law and freedom of expression has been dealt in detail.

The fifth and the last chapter titled as 'Dignity and Judicial Relief' addresses various forms of remediation for dignitary harm namely, compensatory damages, punitive damages, nominal damages and declaratory judgments. It answers the basic question as to why courts offer remedies for dignitary harm by providing two answers, one conceptual and the other empirical. First is the rightful position standard that restores the victim to the original position prior to the harm. The author is of the view that dignitary harm ought to be remediable consequence of legal violation and provides three reasons - firstly dignitary harm being morally wrong, secondly, on account of it being legally cognizable and thirdly, due to the availability of judicial remedies to redress it. The second answer is that the judicial system should not ignore the empirical phenomenon that dignitary considerations such as recognition, respect or vindication do fuel litigation. The author has demonstrated this by providing lawsuits pertaining to medical negligence, consumer class actions, defamation suits, sexual assault actions, land-lord tenant disputes and victim compensation following incidents of mass violence. There is also a discussion as to how dicta in judicial opinions play a role in dignitary relief by

bridging gaps between the written law and fairness, by showing sympathy towards the losing party and by condemning the defendant's conduct.

The book has captured the quintessence of human dignity in American life as ruled by the courts, the travails of harm caused and the remedies available to the victims. It has provided constructive answers to most of the questions surrounding dignity as a human right and has touched upon the problems of judicial authority pertaining to 'dignitary issues' in America. It has also extensively looked into the treatment of 'dignitary harms' by the American courts. *Dignity* also delves into distinctive considerations of remedies involved in civil litigation. It has investigated into how the American federal courts have legitimated the decisions of treating dignitary interest as worthy or not worthy of legal protection. Bayefsky's work will certainly inspire and help researchers to explore this subject in the Indian social and legal context. Many a times, judges in India also lack a dignified life as they are made to be subordinates in the lower judiciary which of course, is not a part of the discourse of this book, but nevertheless, can be a subject for further research in India.