

Human Dignity and Human Security in Times of Terrorism

Christophe Paulussen · Martin Scheinin
Editors

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ASSER PRESS



Springer

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ISBN 978-94-6265-354-2 ISBN 978-94-6265-355-9 (eBook)
<https://doi.org/10.1007/978-94-6265-355-9>

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

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The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

Foreword

Terrorism and the Pursuit of Human Dignity

The global anti-terrorism campaign has taken a heavy toll on human rights and has deformed constitutional safeguards around the world. The International Association of Constitutional Law's Working Group on Constitutional Responses to Terrorism has documented this worrisome side of the anti-terrorism campaign in a series of edited volumes and it is pleased that several of its members could contribute to this book as well, whose initial chapters were discussed during a conference in December 2017 organised by the T.M.C. Asser Instituut's Research Strand on 'Human Dignity and Human Security in International Law' and our own Working Group. In its pages, an exciting roster of authors—organised by a most distinguished team of editors—takes up the urgent question of the role of dignity in the global fight against terrorism.

Human dignity places the individual and her rights at the very centre of public concern. The Universal Declaration of Human Rights begins by announcing in Article 1: "All human beings are born free and equal in dignity and rights".¹ The Constitution of the Republic of Germany begins by proclaiming in Article 1: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority".² The Israeli Basic Law on Human Dignity and Liberty³ has as its central purpose the protection of both. Throughout the wide range of the world's constitutions and human rights instruments, human dignity sits like a beacon at the top of the lighthouse—sending its illumination out far and wide from its elevated position. Respect for human dignity—like the beam of the lighthouse—emanates from the place where many legal, ethical and religious traditions converge.

¹ UN General Assembly (1948) Universal Declaration of Human Rights, UN Doc. A/RES/217 (III), Article 1.

² Germany, Grundgesetz für die Bundesrepublik Deutschland [Basic Law of the Republic of Germany], Article 1.

³ Israel, *חוקתו הקאדם קבוד*: *יסוד חוק* [Basic Law on Human Dignity and Liberty].

And yet, as with most concepts that command such widespread agreement, there is substantial disagreement about the meaning of the concept once one attempts to get more precise. Moreover, like the lighthouse beacon, its clarity and usefulness are more apparent from afar than in its immediate environs. In beaming outward from the spot where many different traditions converge, dignity refracts into many component elements.

All the more reason for those of us whose scholarship focuses on terrorism to subject dignity to scrutiny. Whose dignity is central in the struggle against terrorism? What collateral damage to dignity can be justified as States serve to protect some people from others? What guidance can the very general and multifaceted idea of dignity provide in thinking about how to keep the struggle against terrorism from destroying the key constitutional structures that provide the possibility for a dignified life? Do terrorists have dignity and to what extent do they retain it after they attack? Do State agents degrade their own dignity by using extraordinary measures to eradicate terrorism?

As those questions suggest, and as the chapters in this volume make clear, the place of dignity in thinking about terrorism is far from obvious. In fact, dignity seems to be on all sides of the debate. Of course, those of us who want to ensure that responses to terrorism are kept within constitutional parameters want to fight to protect the dignity of the individual from State intrusion. But the goal of terrorists is to terrorise people, a position from which it is a short slide into rights violations of the sort that human dignity is meant to protect against. And that is true regardless of whether the damage to dignity comes from the State or from non-State actors. Harm to dignity can be caused by terrorists targeting people who are just going about their daily lives—or it can be caused by States using all available measures to find and eliminate terrorists.

Dignity counsels, however, that terrorists themselves cannot simply be treated as weapons to be eliminated without more. Even when States are correct about who is a terrorist, failing to recognise the basic dignity of terrorists degrades not only those whose dignity is infringed but also the dignity of those doing the infringing. When States are wrong about who is a terrorist, the harm to all is even greater and even less justifiable.

National courts charged with giving concrete meaning to the constitutional idea of dignity in the context of terrorism disagree about who is covered and how dignity must be protected. In German federal constitutional law, dignity is not a right; it is the protected essence of the person that makes her the subject of rights. Dignity, then, can never be balanced against rights. In keeping with the idea that dignity is not a legal right but the crucial reason why rights exist, the German Federal Constitutional Court never bases a decision on dignity alone, but on dignity together with the affected right that dignity is meant to amplify with its presence.

When the Federal Constitutional Court held in its 2006 Aviation Security Case⁴ that the German Government was not permitted to shoot down a hijacked passenger plane in order to save people on the ground in a 9/11-like situation, the Court used a

⁴ German Constitutional Court, Judgment, 15 February 2006, 115 BVerfGE 118.

very Kantian conception of dignity that appears both as a shield against State intrusion on dignity and as a rationale for State action to protect it:

Human life is the vital basis of human dignity as the essential constitutive principle, and as the supreme value, of the constitution [...]. All human beings possess this dignity as persons, irrespective of their qualities, their physical or mental state, their achievements and their social status [...]. It cannot be taken away from any human being. What can be violated, however, is the claim to respect which results from it [...].

In view of this relation between the right to life and human dignity, the state is prohibited, on the one hand, from encroaching upon the fundamental right to life by measures of its own, thereby violating the ban on the disregard of human dignity. On the other hand, the state is also obliged to protect every human life. This duty of protection demands of the state and its bodies to shield and to promote the life of every individual, which means above all to also protect it from unlawful attacks, and interference, by third parties [...]. Also this duty of protection has its foundations in Article 1.1 sentence 2 of the Basic Law, which explicitly obliges the state to respect and protect human dignity [...].⁵

Given this balance, the innocent passengers on a hijacked plane that is itself being used as a weapon—those individuals whose dignity the State has pledged to ensure—could not be sacrificed to save some other (hypothetical) people on the ground. The State is also bound to protect the lives of those innocent people who would be hit by an attacking plane but the State is limited in the measures it may take under such circumstances. In particular, the State may not protect people on the ground by sacrificing the lives of those in the air instrumentally in pursuit of that aim. As the Court argued:

A weighing up of lives against lives according to the standard of how many people are possibly affected on the one side and how many on the other side is impermissible. The state may not kill people because they are fewer in number than the ones whom the state hopes to save by their being killed.⁶

That said, if the hijackers were alone on the plane and the State had them in its sights, the State could kill the hijackers by bringing down the plane because the hijackers' own actions had changed the balance of calculations:

[I]t [...] is these people themselves [the hijackers] who, as offenders, have brought about the necessity of state intervention, and [...] they can avert such intervention at any time by refraining from realising their criminal plan. [...] Their killing can only take place if it can be established with certainty that they will use the aircraft that is under their control to kill people, and if they keep to their plan even though they are aware of the danger to their lives that this involves for them. This reduces the gravity of the encroachment upon their fundamental rights.⁷

The end result of this case was that the German State was barred from shooting down a passenger plane in a 9/11 scenario unless the hijackers were alone on the plane. Moreover, the invocation of dignity in the opinion brought Article 1 of the

⁵ Ibid., paras 119–120.

⁶ Ibid., para 38.

⁷ Ibid., para 150.

German Basic Law to bear on the case. Given that Article 1 can never be amended, the Court's decision barred the legislature from passing the law again unless the possibility of killing innocent people was completely removed from the law.

With this tough decision, the Federal Constitutional Court found a way to reconcile the human dignity of each individual—including the terrorists—with the obligation of the State to protect every person. It did so by emphasising the way that each individual possessed of dignity had the right to chart her own life course and to have that course respected, up to the point where that charted course fundamentally affected the rights of others, whom the State was bound to protect.

A different approach was taken by the Israeli Supreme Court which probably has more terrorism cases than any other court in a democracy. In Israeli constitutional law, dignity also has a central place. But dignity in Israeli constitutional law is not the essence of a human person above all balancing calculations. Instead, dignity is treated as a right alongside other rights, subject to direct proportionality assessments. In Israeli constitutional law, dignity may be infringed when the aim of the infringement is justified and the harm done to the dignity of the target of State action is smaller than the benefit that is produced—including the benefit to the dignity of others.

In a case decided in the same year as the German Aviation Security Case and with similar principles at stake, the Israeli Supreme Court assessed the legality of the targeted killing of terrorists.⁸ First the Court established that everyone in the vicinity of a terrorist attack possesses dignity—perpetrators, victims and those caught in the crossfire. Under Israeli constitutional law, terrorists are unlawful combatants who have given up their claim to be protected under the law of war as civilians which does not mean that they have become non-persons:

It need not be said that unlawful combatants are not outside the law. They are not outlaws. They too were created by God in His image; even their human dignity should be respected; they too enjoy and are entitled to the protection of customary international law, no matter how minimal this may be.⁹

However, terrorists give up their claim to State protection by targeting the lives of others: “terrorists who carry out hostilities do not cease to be civilians, but by their actions they have deprived themselves of the benefit of being civilians that grants them protection from military attack”.¹⁰

Thus, the outcome in the German and Israeli cases with regard to the constitutionality of attacking terrorists themselves is similar: those who attack innocent people give up the right of security that the State would otherwise owe them and they can become targets of State violence.

⁸ Supreme Court of Israel (sitting as the High Court), *Public Committee against Torture in Israel and Others v Government and Others*, Judgment, 14 December 2006, Case No. HCJ 769/02 (2006).

⁹ *Ibid.*, para 25.

¹⁰ *Ibid.*, para 31.

The real difference between the German and Israeli cases, however, can be seen in the way that ‘collateral damage’—to the innocent people in the plane in the German case and to those who are living among the terrorists in the Israeli case—is assessed. In Germany, precisely because of the operation of the principle of human dignity, the State may not instrumentalise the lives of some to save others. But the Israeli Court adopted a different and less categorical method for assessing the constitutional acceptability of collateral damage, turning to a proportionality analysis to assess how the Israeli military should act when targeting terrorists whose elimination would also affect innocent people around them:

The test of proportionality stipulates that an attack on innocent civilians is not permitted if the collateral damage to them is not commensurate with the military advantage (in protecting combatants and civilians). In other words, the attack is proportionate if the advantage arising from achieving the proper military objective is commensurate with the damage caused by it to innocent civilians. This is an ethical test. It is based on a balance between conflicting values and interests [...]. It is accepted in the national law of many countries. In Israel it constitutes a main normative test for examining government activity in general and army activity in particular.¹¹

In order for the Israeli Court to reason in this way, the dignity of innocent persons cannot act as a complete bar on State infringement, as it did in the German case. Instead the Israeli Court reasoned that dignity must simply become a right like any other—in which the justifiability of the infringement at issue is assessed through an analysis in which the aim to be achieved, the alternative ways of accomplishing that aim and the balancing of the harm caused to some relative to the benefits brought to others, is the final determinant. As the Israeli Court explained in a prior case, quoted in the targeted killing decision:

The basic injunction of international humanitarian law applicable in times of combat is that the local inhabitants are “[...] at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof...” [...]. What underlies this basic provision is the recognition of the value of man, the sanctity of his life and the fact that he is entitled to liberty [...]. His life or his dignity as a human being may not be harmed, and his dignity as a human being must be protected. This basic duty is not absolute. It is subject to “... such measures of control and security in regard to protected persons as may be necessary as a result of the war” [...]. These measures may not harm the essence of the rights [...]. They must be proportionate [...].¹²

The Israeli Court then went on to provide direction to State officials who would make the calculation of whether killing some innocent people to save others would be proportionate and therefore permissible.

Protecting dignity of all concerned at a time of war or in the fight against terrorism is hard. The German Constitutional Court, despite the intuitive appeal of its more absolutist reading of dignity, came in for a great deal of criticism for failing to allow State officials to act to protect those who might be the victims of a terrorist

¹¹ Ibid., para 45.

¹² Ibid., para 23.

attack. The Israeli Court, by contrast, gave permission to State officials to kill innocents if their sacrifice saved more lives in the long run and were attacked for that as well.

Reasonable courts—as well as reasonable people—may disagree as to which Court gave the better meaning to the idea of dignity and its protection in times of terrorism. For the German Constitutional Court, dignity created an absolute bar on instrumentalising the lives of persons, even when a utilitarian calculation would urge the State to violate the dignity of some to protect the dignity of others. For the Israeli Supreme Court, ruling in a country that has been under a state of emergency since 1948 in a context of permanent war, the protection of dignity was of central importance, but could be balanced against other values and some lives could be sacrificed to save others.

As the authors in this volume examine how dignity hangs in the balance when States calculate how to fight terrorism, we see a variety of different perspectives on offer. One would expect no less from a difficult subject like this.

But just as the lighthouse sends out a beacon to prevent those at sea from losing their way or crashing onto the rocks, so too this volume of excellent chapters will cast light out on the rough seas of the anti-terrorism campaign, attempting to orient the sailors who traverse those waters by providing illumination and some guidance to prevent them from colliding with barriers that they could easily avoid.

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