Boekbesprekings

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HUMAN DIGNITY: LODESTAR FOR EQUALITY IN SOUTH AFRICA

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Laurie Ackermann was one of the first constitutional lawyers to develop a distinct substantive understanding of the Constitution of the Republic of South Africa, 1996. This vision, already evident from some of the constitutional court's early judgments, is marked by a strong libertarian bent and a Kantian interpretation of the values of human dignity, equality and freedom. Closely allied to his normative position on these issues are other aspects of his judicial philosophy, such as his belief in and commitment to the development of a rigorous judicial methodology and his conviction that a sustained engagement with comparative law is essential for developing an adequate understanding of South Africa's constitution. Not surprisingly, these themes and predilections are at the heart of this book, in which the author defends and works out the implications of the constitutional court's choice for a dignity-based interpretation of the right to equality.

1 *The basic argument*

The book consists of five substantial chapters. Chapter 2 lays the theoretical groundwork through an examination of the concepts of human dignity, equality and non-discrimination. The chapter argues that debates about the meaning of equality typically fail to come to terms with the "logico-grammatical problem" that is inherent in the concept of equality. This problem entails that equality cannot be used as a predicative noun, but only makes sense if it is used attributively. The statement that all persons are equal is counterintuitive, as we know that human beings differ in almost all respects, including their natural abilities, physical and intellectual attributes and wealth. The concept of equality thus presupposes a criterion of attribution – that is, we must first specify in relation to what human beings are equal. In the author's view, the criterion of attribution must be human dignity, as it is only in relation to their fundamental human dignity and worth that all persons can be said to be equal. The rest of the chapter then considers the role and meaning of dignity in the Abrahamic religious tradition and in secular moral and legal thought. A number of theoretical views on the relation between dignity and equality are examined. The most substantial discussion is reserved for the writings of Immanuel Kant. Bernard Williams and Amartya Sen also feature prominently, as does the indigenous notion of *ubuntu*.

The idea that all persons are equal in dignity, and that human dignity and worth is the proper criterion of attribution in constitutional equality analysis, is further developed in the remaining four chapters. Chapter 3 is concerned with the constitutional meaning of human dignity; chapter 4 deals with the meaning and scope of the right to equality and non-discrimination; chapter 5 considers the role of dignity in the horizontal application of the right to equality and non-discrimination and chapter 6 examines the concept of remedial or restitutionary equality. The four chapters have a similar structure: in each case, an analysis of the South African constitution is followed by a comparative study of the position in Germany and Canada. They also have a unity of purpose: to explicate the meaning and role of dignity in questions concerning equality and non-discrimination, and to defend the proposition that dignity can guide principled decision-making in terms of sections 9(1) and (3) (chapter 4), section 9(4) (chapter 5) and section 9(2) (chapter 6).

Chapter 3 seeks to refute the criticism that dignity is too vague and indeterminate to guide principled decision-making. The chapter espouses a Kantian understanding of dignity, which is developed through a careful exposition of the meaning of dignity in terms of the common law and under the South African constitution, the German *Grundgesetz* or constitution and, to a lesser extent, the Canadian Charter of Rights and Freedoms. The Kantian idea that dignity requires a person always to be treated as an end in itself and never as a disposable object is central to the chapter and is elaborated with reference to the jurisprudence of the South African constitutional court and its German counterpart, as well as Dürig's famous analysis of article 1 of the German constitution. Other aspects of dignity that feature prominently in the chapter include individual freedom, privacy and personality rights. Considerable emphasis is placed on the right of the individual to the free development of the personality and establishment of an own identity.

Chapter 4 refers to an impressive range of authors and judgments as authority for the proposition that dignity is the proper criterion of attribution in equality cases. Again, the comparative study is of a

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high standard, and I found the analysis of articles 3(1) to 3(3) of the German constitution particularly instructive. Far from merely relating the most important judgments and views of authors, the study does quite a bit of interpretive work (*eg* in developing a link between human dignity and article 3(1)'s guarantee of equality before the law) and shows sensitivity to context. At times, though, I felt that the heavy emphasis on the logico-grammatical difficulty and the role of dignity as criterion of attribution inhibited the development of a more balanced appraisal of a dignity-based equality jurisprudence. What is missing is an engagement with the actual work done by dignity in equality judgments. The author refers at length to judgments in which the link between dignity and equality was recognised, but does not ask how this insight impacted on the courts' reasoning and the outcomes of cases. The question, which is often raised in the literature, whether a dignity-based jurisprudence is sufficiently sensitive to material and systemic forms of disadvantage, is consequently not addressed. In my view, a proper contextualisation of the courts' reasoning in some of the most prominent equality cases in which a dignity-based frame of analysis was used (in South Africa and Canada) would have strengthened the author's analysis of the role and meaning of dignity in the interpretation of the equality guarantee.

Chapter 5 considers dignity's role in the horizontal application of the right to equality and non-discrimination. The chapter makes important points about the general methodology to be used in cases involving the application of the bill of rights to disputes between natural or juristic persons. First, it argues (in my view persuasively) that, whenever the direct horizontal application of the bill of rights is not excluded under the proviso contained in section 8(2), a court has no choice but to apply the provisions of section 8(3). Judges do not have the freedom to choose between direct and indirect horizontal application, and the constitutional court was wrong to evade direct horizontality in *Barkhuizen v Napier* (2007 5 SA 323 (CC)). Secondly, since the horizontal operation of the bill of rights will always involve a conflict between different rights, section 8(3)(*b*) must invariably kick in, which requires a court to limit one or more of the opposing parties' rights, provided that the limitation is in accordance with the general limitation clause in section 36(1). However, the section 36 test has not been tailor-made for cases involving the horizontal application of the bill of rights, and needs to be modified in cases which involve a conflict between different rights, rather than between a right and a state interest. Thirdly, in the author's view, this is best achieved through an evaluation and weighing up of the impact on the human dignity of the parties to the dispute. By focusing on dignity, courts will be able to mediate the tension between equality and freedom in a neutrally principled manner, that is, with reference to general legal principles that transcend the exigencies of a particular case. The author uses a number of hypotheticals to show how such a dignity-based balancing test can help to i) distinguish between serious infringements of equality and less serious ones, ii) separate limitations that go to the heart of individual freedom and privacy from ones that have a more peripheral effect, and iii) weigh up the impact of different outcomes on the dignity of the respective parties.

The final chapter examines the implications of a dignity-based approach for our understanding of restitutionary or remedial equality. (For reasons explained in the chapter's introductory section, the author prefers these terms to "affirmative action".) The purpose is twofold: to provide a principled justification for remedial programmes, and to consider the constitutional limits of such measures. He uses the analogy of private-law unjustified enrichment to justify the use of restitutionary equality. In both cases, remedial measures are based on the unjustified enrichment of some at the expense of others, even if the former may not personally have been at fault. This analogy, in his view, explains the role of remedial measures in restoring the equal dignity of those disadvantaged in the past. It enables us to understand the unity of section 9, as the remedial measures authorised by the second sentence of section 9(2) should be seen to augment, rather than detract from the ideal of equal dignity that underlies section 9 as a whole. There is a slight ambivalence about the use of the analogy: the author points out that it serves simply as an explanatory or justificatory device which does not seek to subsume public-law restitutionary equality under private-law rules (345, 385), but nevertheless submits that the same principles underlying the private-law remedy could be used to develop a public-law remedy of unjustified enrichment under section 9(2) (386).

2 *Some thoughts and comments*

One of the main points of critique against the constitutional court's dignity-based equality jurisprudence has been that dignity is too vague and indeterminate to constrain constitutional decision-making (see *eg* Davis "Equality: the majesty of Legoland jurisprudence" 1999 *SALJ* 398 413). The author responds to this criticism with an extensive analysis of dignity's theological and philosophical underpinnings and its constitutional meaning. He relies in particular on the sophistication and rigour of the German jurisprudence as an antidote to the scepticism of critics who aver that dignity can mean almost anything. In his view, the Kantian underpinnings of the German constitutional court's dignity jurisprudence, the absolute nature of the ban on the reduction of human persons to mere objects, the meticulous way in which dignity has been used to interpret and harmonise different and often conflicting rights, and its

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centrality to the objective normative value order proclaimed under the German constitution are clear indications that dignity can guide a principled constitutional jurisprudence.

The debate between dignity advocates (those who view human dignity as indispensable to legal and moral thought) and dignity sceptics (those who doubt whether the concept of human dignity is coherent enough to shed light on vexed legal and moral issues) has been going on at least since the nineteenth century, and is unlikely to be resolved any time soon. Even though the author's rigorous analysis of the constitutional meaning and uses of dignity may not convince all sceptics, it does require them to raise their game. Sweeping and unsubstantiated claims about dignity's indeterminacy and vagueness ("dignity can mean whatever the interpreter wants it to") will no longer do. What is needed is a careful analysis of the tensions inherent in the concept, which can enable a more nuanced appreciation of the possibilities and limits of a dignity-based jurisprudence. In fact, such an analysis may also assist dignity advocates in refining their understanding of the concept, and in weeding out ideas that have become out of touch with contemporary understandings of equal dignity. As Rosen (*Dignity: Its History and Meaning* (2012)) shows, dignity has acquired different strands and shades of meaning over time, including the ideas of dignity as a status, dignity as inherent value, dignity as dignified behaviour and dignity as a right to respect. These different meanings continue to exist alongside each other, and there is a danger that the overlap between them might blind us to the breaks and discontinuities that characterised the evolution of present-day understandings of dignity, as well as the disagreements that persist to this day (Rosen 8). The author, who grounds his understanding of dignity in a variety of traditions, including religious beliefs, Roman law, Kantian philosophy and *ubuntu*, arguably overlooks these tensions, and thus forfeits the transformative potential that is inherent in a critical awareness of the transformations and ruptures that helped forge our normative vocabulary.

A second criticism of the constitutional court's equality jurisprudence is that, by focusing on dignity, it has neglected other values such as equality, diversity and democratic participation. The author responds to this by pointing to the logico-grammatical difficulty and claiming that it is only in relation to their dignity and worth that all persons are equal. On the basis of this, he concludes that dignity is the only meaningful criterion of attribution in equality cases. His argument that dignity and equality are intimately connected is powerful and persuasive. However, it could be asked whether it inescapably follows from this that dignity should be the only value underlying the right to equality. A possible counter-argument is that there is necessarily a gap between the "onto-anthropological" (95) claim that all human beings are equal in dignity and actual legal institutionalisations of that ideal. It is unlikely that legal tests for equality could simply reflect the abstract equal dignity of every human person, as our understanding of equality is, inevitably, filtered through various distinctions in legal status. Forms of unequal treatment that would be considered an outright denial of the equality rights of a certain cross-section of adult citizens may well be thought to be unproblematic when applied to children or temporary residents. The point is not that these categories of persons lose their claim to dignity on account of their age, citizenship or immigration status, but, rather, that our understanding of the rights that they are entitled to by virtue of their dignity is mediated by concepts related to status, agency and membership in the legal and political community. This suggests that, in order to concretise the abstract idea of dignity, we need to have recourse to other concepts and values that are consistent with the constitutional vision of an open and democratic society based on human dignity, equality and freedom. On one view, dignity and equality need to be articulated with other values, such as democratic citizenship and participation (for the outlines of such an approach, see *August v Electoral Commission* 1999 3 SA 1 (CC) par 17; and *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) par 60). On another, the capacity of a dignity-based jurisprudence to challenge inequality and exclusion is contingent on a critical awareness of the ways in which distinctions in legal status keep reinserting themselves into positive-legal guarantees of human dignity, and of the potential of dignity-based claims to evoke alternative distributions of wealth, power and membership (see Botha "The rights of foreigners: dignity, citizenship and the right to have rights" 2013 *SALJ* 837).

Implicit in the criticism that the constitutional court should have paid more attention to other values is the idea that certain forms of disadvantage that the constitutional equality provision aims to eradicate are not easily captured in the language of dignity. It has been argued that a dignity-based approach, in focusing on "individual personality issues", does not pay sufficient attention to the groups-based and systemic nature of material disadvantage (Albertyn and Goldblatt "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality" 1998 *SAJHR* 248 258), or does not always respond adequately to the subtle ways in which misrecognition, material disadvantage and political marginalisation overlap and intersect to reproduce relations of inequality and subordination (Botha "Equality, plurality, and structural power" 2009 *SAJHR* 1). Even though the author does not reply to these criticisms in his analysis of case law decided under sections 9(1) and 9(3), his views on the horizontal operation of equality and on remedial or restitutionary equality measures provide important hints as to his position on the relation between the dignity of the individual and the need to undo groups-based and structural disadvantage.

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The author, as indicated above, favours a robust approach to the interpretation of sections 8(2) and 9(4), which does not shy away from the full direct horizontal application of the right to non-discrimination. His approach nevertheless has strong libertarian leanings. This is clear from, *inter alia*, the analysis of cases involving a conflict between equality and freedom of testation. The author is critical of the judgment in *Minister of Education v Syfrets Trust Ltd NO* (2006 4 SA 205 (C)), in which the Cape high court found that a testamentary provision which limited bursaries to students who were of European descent, not Jewish and not female constituted unfair discrimination and were invalid. In the view of the author, this is a case where the impairment of the testator's dignity, in the event of the invalidation of the conditions in the will, outweighs the impairment of the dignity of students who are excluded from consideration by virtue of the discriminatory clauses. In fact, he argues, with reference to authors like Dürig, Stern and Henkin, that "generally speaking, one can start with the proposition that an agent's right to freedom … and privacy would trump the other's right to equality and non-discrimination in the horizontal sphere" (340). To this he adds an important qualification, namely that, "once the legal relations of the private agents move out into the public domain, and private social power becomes more predominant, the infringement of human dignity involved in discrimination will become more severe and reach a point where, when evaluated proportionally, will trump opposing rights of freedom and privacy" (341).

The author does not flesh out the meaning of the qualification, and it is not clear when, in his view, that point will be reached. A consideration of a few cases in which the right to equality of, say, an individual client or consumer had to be weighed against the freedom or privacy of an economically more powerful business or juristic person might have been instructive. The judicial debate between the majority and minority in the *Barkhuizen* case comes to mind. Even though the author engages with, and is critical of, the general approach to horizontal application taken in the *Barkhuizen* case, he declines to comment on the court's substantive reasoning on issues relating to contractual freedom, public policy and unequal bargaining power. It is not clear from this whether he agrees with the courts' tendency to use dignity to back up claims based on contractual autonomy and *pacta sunt servanda*, rather than to set limits to these principles in the name of equity and fairness. The chapter as a whole suggests that he would recognise that dignity has an important role to play both in promoting and constraining contractual freedom, but that, in his view, the former function would usually trump the latter.

The final chapter embraces remedial or restitutionary equality as a natural extension of, rather than an exception to, the constitution's commitment to equality and non-discrimination. As the unjustified enrichment analogy suggests, the author understands section 9(2) to focus on the restoration of benefits to individuals who were disadvantaged in the past. He stresses that the provision refers to "persons, or categories of persons", rather than groups, and argues, with reference to Sachs J's judgment in *Minister of Finance v Van Heerden* (2004 6 SA 121 (CC)) and the German literature, that remedial measures must comply with a proportionality test which assesses the impact on the dignity of those sought to be advantaged, and weighs it up against the impact on the dignity of those disadvantaged by the measures in question. This results in a demanding set of requirements for the validity of restitutionary measures. Such measures must be restorative – or corrective – in nature, and cannot be based on notions of distributive justice (353). They must be designed to benefit individuals who were – and still are – disadvantaged by unfair discrimination that occurred in the past, and must not confer benefits simply on the basis of membership of a previously disadvantaged group. They must be reasonably capable of achieving their purpose, must not unnecessarily infringe the human dignity of those excluded from their ambit, and must attain a reasonable balance in respecting the equal dignity of beneficiaries and those at whose expense the measures are implemented.

Not everyone will agree with the author's contention that dignity should be at the heart of constitutional equality analysis. Indeed, some may question whether the approach favoured here, with its strong emphasis on individual liberty, can fully come to terms with the systemic nature of disadvantage. But whether one agrees with the author's views or not, the clarity of his normative vision and the sophistication of his legal-comparative analysis make this book essential reading for anyone who seeks to come to terms with the nature and meaning of the constitutional equality guarantee and/or the relationship between human dignity, equality and freedom. I know of no other study in the English-speaking world that engages the relationship between human dignity and the constitutional right to equality in so much depth and with such academic rigour. *Human Dignity: Lodestar for Equality in South Africa* is set to become a standard reference, both in South Africa and in other jurisdictions.

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