BOOK REVIEW


Justice Ackermann was a member of South Africa’s Constitutional Court for its first decade, between 1994 and 2004. In a major book he has endeavoured to elucidate the meaning, rationale and some of the modus operandi for the central commitment to equality in the Constitution of the Republic of South Africa, 1996. The country’s Bill of Rights, which forms chapter 2 of the Constitution, highlights in its first clause the core values of ‘human dignity, equality and freedom’. Laurie Ackermann proposes that the first two values are fundamentally connected, for dignity provides the key to interpreting equality. To the question ‘equality of what?’ he replies: equality of human dignity, human worth (Menschenwürde in German, menswaardigheid in Afrikaans). The application of this principle of equality of worth (or ‘worthiness’) will, he argues, help to resolve issues in the interpretation of rights and of conflicts between rights.

The book is situated explicitly in a Kantian moral tradition. It even opens with a perhaps far-fetched specification that the essence of humanity is self-definition. However, the analysis is grounded also in the tradition of post-war German jurisprudence that has applied and enriched a Kantian perspective through the intensely cross-examined and detailed work of constitution-building and legal practice. Ackermann cites the German constitution (Basic Law of 1949) with special respect, as ‘paradigmatic for post-Second World War constitutional development’. In much of the book he engages with the provisions in German constitutional law and the discussions ensuing. The research for the book, undertaken since Ackermann’s retirement from the Constitutional Court, included several periods at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. The strong attention to German materials reflects not just respect for the depth of German legal debates and scholarship but a view that the challenge that was faced in post-1945 German state-building provides the most relevant parallel for post-apartheid South Africa: how to understand and transcend an appalling past that involved systematic blindness to and violation of human dignity, and how to embed an understanding of and commitment to human dignity within the structures and practices of a new state. Ackermann insists that there is no reason why ‘the lessons to be learnt from these past [German] horrors [should] be limited to Germany (or to us)’. Indeed, the same may apply now to lessons from the South African experiences.

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2 Ibid 1.
3 Ibid 176.
The central arguments of the book are outlined in a short chapter 1. The subsequent five massive chapters are devoted to underpinning and applying the arguments in various ways. Chapter 2 refers at length to various religious traditions and classic and contemporary philosophies that support, in their diverse ways, a principle of human equality – not as a descriptive assertion of the sameness of different people but as an ethical starting point, a right to equal consideration. The chapter covers Judaism, various strands in Christianity, Islam, Locke, Aristotle, Kant, several 20th century secular philosophers and Ubuntu thought. It is written as an inventory of arguments, tradition by tradition and philosopher by philosopher, rather than as a personal synthesis. This results in an intentional repetition of arguments in order to demonstrate ‘an overlapping consensus’ (John Rawls’s term) on some key issues across many important intellectual strands: they all share the principle of equality (of dignity), sometimes for the same reasons and sometimes for their own distinctive reasons. Even so, Ackermann stresses later that ‘the constitutional concept of dignity is to be explored [ie understood, interpreted, applied] through the Constitution [ie through what is stated there], not defined by a particular cultural or religious view’. He also notes that ‘[a]ll “culture” must be tested against the Constitution and the latter’s rights and values; not the other way around’. The purpose of chapter 2 is simply to show that (many) key strands of our cultural inheritances are well compatible with the guiding principles of the South African Constitution.

Most of the book has the character of a painstaking review and analysis of materials, providing a resource for legal specialists and students. Readers who seek a more integrated development of arguments around ideas of human dignity should consult other sources. The author does not claim to write for a wider audience or to provide his own philosophical synthesis. For example, in reading chapter 2’s extended review of arguments in some strands of Christianity, the reader’s thoughts may turn to grounding those ideas in the notion of all humans as one biological species, a genetic grouping, as well as in the religious theme of ‘There but for the grace of God go I’ concerning how some persons are far less fortunate than others in regard to vitally important but unearned life-determinants: one’s specific genetic inheritance and one’s other inherited life circumstances and encountered contingencies. However, unless arguments arise directly in a particular source reviewed by Ackermann, one does not immediately hear those arguments. Instead, they may arise later in the course of his review of another author or source, as eventually happens for the ideas of shared species-membership and shared basics of being human. The theme of species-unity receives stronger expression much later in the book where the author submits: ‘[w]hat both the German and South African

5 Ibid 175.
7 Ackermann (note 1 above) 50 & 64.
experiences warn against so powerfully are the grave dangers that arise the moment one starts limiting in any way the species concept of the human person by way of particular biological, colour or intelligence criteria. The child born without any conscious cognitive ability, as well as the adult who suffers this as a result of injury or illness, are for purposes of the Constitution members of this species and possess inherent dignity (worth).  

In chapter 3, Ackermann explores in great detail the ways in which human dignity is treated in the South African Constitution and the 1949 German Basic Law. He also examines, for comparison, Canadian law and argues that ‘the fact that dignity is not expressly guaranteed … either as right or as a value … has acted as a disincentive to the development of a really focused and dynamic dignity jurisprudence in Canada’. Canada serves in effect as a case-study that tests whether the dignity orientation in the South African Constitution makes a real difference, and that shows that it does. The same structure – attention in turn to South African law, German law and Canadian law and to associated commentaries and debates – is applied also in chapters 4, 5 and 6, with reference to the understanding of equality, the role of the concept of dignity in ‘horizontal’ operation of the right to equality and non-discrimination, and restitutionary or remedial equality, respectively.

In the 95-page chapter 3 the author replies to those who claim that ‘dignity’ is a vague and overly flexible notion, by demonstrating its meaningful systematic role in the South African Constitution and in 60-plus years of fruitful application of the German Basic Law. This is perhaps the core of the book. The chapter covers the ground also covered in a comparable (if only 50-page long) survey article by Stellenbosch professor Henk Botha. Botha refers to a wider range of countries and underlines a similar finding that: ‘[f]ar from being simply a preoccupation of South African constitutional drafters and judges, human dignity is part and parcel of a shared constitutional vocabulary which cuts across national boundaries’. Ackermann’s chapter is to some extent a dialogue with Botha. It opens with reference to his article and concludes with a nine-page response. Botha argues that the application of a concept of dignity involves grey areas, and that despite talk of its inviolability there must in practice be moments for appropriate limitation and balancing in relation to other values. Ackermann takes issue with a number of the doubts and limitations that Botha expresses, but the differences that he seeks to voice were not always clear to this reviewer. He emphasises, for example, that the application and interpretation of the dignity value must follow what the Constitution specifies rather than follow any separately specified cultural

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8 Ibid 176.
9 Ibid 163.
10 Even so, in Canada too, ‘[t]he jurisprudence of its Supreme Court has … selected human dignity as the criterion of attribution for elucidating legal equality and non-discrimination in their vertical manifestation’. Ackermann (note 1 above) 340.
12 Ibid 177.
inheritance; but Botha’s argument was that different cultural inheritances might bring different interpretations of what the Constitution itself implies.

Ackermann’s analysis of conflicts between different rights could be compared usefully with that in the influential contemporary perspective on fundamental rights from the Irish political philosopher, Philip Pettit, now of Princeton University. For Ackermann the key to resolving conflicts between purported rights is the principle of equality of human worth or dignity, through reference to impacts on dignity; and for Pettit the key is the principle of non-domination. Pettit constructed his views through exploration of the ‘Republican’ tradition of political thought in 16th to 19th century Europe, represented by figures such as Milton, Montesquieu and Jefferson. ‘According to republicans in this … sense (sometimes called “civic republicans” or “neo-republicans”), the paramount republican value is political liberty, understood as non-domination or independence from arbitrary power.’ Pettit’s analyses might or might not be consistent with those of Ackermann, but could still perhaps help to enrich and refine them.

The book culminates with chapters 5 and 6 on horizontal and remedial/restitutionary equality. They address issues of central importance to South Africa, concerning the legacy of apartheid’s far-reaching violations of human dignity, and what should be done in response. In chapter 5 Ackermann argues at length that the Constitution makes ‘provision for the direct horizontal application of certain of the provisions in the Bill of Rights to legal disputes between persons’. He meticulously examines how such application should be conducted, proposing use of the criterion of human dignity to adjudicate cases where rights conflict, such as the declared right of a property holder to determine to whom his property could be sold by his inheritors (say, not to blacks) versus the rights of a black purchaser to whom the current inheritor chooses to sell. Ackermann follows Louis Henkin in explaining how the black purchaser’s rights outweigh the former asserted right, and clarifies why, in terms of the fundamental criterion of human dignity. He also explores implications of diverse circumstances, through a series of hypothetical cases. The author strongly argues that the Constitution instituted an explicit value system, including the human dignity criterion, binding on the judiciary and the executive. He argues that some decisions of the Constitutional Court have failed yet to adequately digest and apply this value system and, instead, passed the buck of weighing rights-conflicts back to the executive and legislature to make ‘public policy’ rulings, as if the Constitution were not applicable.

In the absence of analysis of structural determinants of disadvantage, including of the legacy of longstanding human-instituted systems of privilege or discrimination – sometimes on a greater scale than in the German context

14 Ackermann (note 1 above) 261–62.
which inspired much of Ackermann’s framework – even this rather brave discussion remains incomplete and to wider audiences unsatisfying. It speaks more to South African lawyers seeking to make day-by-day sense within existing legislation and against a heritage of entrenched privilege and conservative common-law, rather than addressing law-drafters, policy-designers and social reformers seeking to operationalise the spirit of the Bill of Rights. Those audiences, especially, require the structural and historical analyses of discrimination and inherited privilege; so too do the day-by-day legal practitioners for their orientation and motivation.

Chapter 6, on restitution, is easily the shortest chapter in the book after the introduction, but constructively addresses its controversial topic. It covers neither the structural and historical settings nor the policy analyses of how to seek restitution. Instead, it considers a series of debated issues in interpretation of the Constitution. Restitution for past violations of human rights (often committed through violence and seizure of resources as well as through discriminatory legislation, taxation, public expenditure and so on) should be a less debatable matter than what are the obligations of those who benefited from undeserved advantages in regard to those living with undeserved difficulties and more generally how far the human rights of the poor should be promoted through redistribution of the resources of the more privileged. Even the libertarian philosopher Robert Nozick in his influential anti-Rawlsian theory of distributive justice included strong provision for rightful compensation in respect of past rights violations – the special, or distinct, case of corrective justice. The South African Constitution provides: ‘[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken.’

Ackermann first clears up confusions that come with the use of the American term ‘affirmative action’, for that label suggests any measure that advances particular persons and thus generates counter-claims of the supposed unconstitutionality (citing s 9(3) of the Constitution) of reducing the freedoms of others in order to do so. He emphasises that s 9(2) considers measures to counteract the effects of unfair discrimination (hence the Afrikaans term regstellende aksie is better than ‘affirmative action’); so such measures, appropriately designed, cannot be unconstitutional. Appropriate design means that the measure does achieve the intended goal; that no (clearly) better alternative measure exists; that goal-achievement is in satisfactory proportion to any costs and foregone freedoms, assessed in terms of human dignity; and that the duly proportionate burdens fall only on those who have been unjustifiably enriched: ‘… not all whites have necessarily been advantaged by past discrimination’.  

15 Through genetic inheritance and inheritance from their parents’ deserved acquisitions, for example.
16 Constitution s 9(2).
17 Ackermann (note 1 above) 346.
Second, Ackermann draws inspiration from private law concerning unjustified enrichment at the expense of others, notably from the book by Danie Visser *Unjustified Enrichment* (2008), to demonstrate that restitutory and remedial action can rightfully impose burdens on all those who have benefited from the injustice, regardless of whether they intended the injustice or were alive at the time of enforcement of the injustice concerned. Similarly, attention must be given to the enduring effects of unjust discrimination, even after the original instruments of discrimination have disappeared.

Third, he establishes that restitutory measures ‘can [justifiably] occur in a multiplicity of ways that do not mirror [those in cases of] private-law enrichment’, depending of course on the circumstances of the case. Unfortunately, while remedying or compensating for human rights violations should be less disputable than other issues of distributive justice, demonstrating who exactly are the illegitimate present beneficiaries of past violations and to what extent is often very difficult. In both the present and coming generations this issue of compensation for damage to poor people’s human rights in Africa via climate change induced by rich people’s greenhouse-gas-emitting-lifestyles will become increasingly urgent, but faces this same difficulty. The issue is already live, as highlighted in the campaign ‘Stop Cooking Africa’. It follows that measures other than compensation via the courts are required to promote the necessary life opportunities for those who suffer harm. Ackermann speaks with special approval of investments in education.

Faced with the difficulty of demonstrating exact chains of violations-and-effects, yet living with the structures of inequality created by past discrimination and with their consequences, attention to human security analysis becomes relevant. Human security thinking has arisen to supplement commitments to human rights, including by thinking beyond conventional individual-focused formats in law, to provide complementary ways of defending dignity. The United Nations General Assembly adopted in 2012 a resolution to confirm an agreed understanding for the concept, which includes that:

... human security is an approach to assist Member States in identifying and addressing widespread and cross-cutting challenges to survival, livelihood and dignity of their people. Based on this, a common understanding on the notion of human security includes the following: (a) The right of people to live in freedom and dignity, free from poverty and despair. All individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential.

Ruth Rubio-Marin and Dorothy Estrada-Tanck argue that human rights law provides criteria for what are important risks and damage but is traditionally highly individualistic in focus, and that human security analysis can

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18 Ibid 345.
19 This campaign is supported by, among others, Desmond Tutu. See for example his contribution to UNDP’s *Human Development Report 2007–2008*.
complement and help to deepen human rights law. They illustrate this using case studies of killings of women and the resulting campaigns for reform. Human security analysis shows whether and how ‘the violations of rights happen as part of a systematic pattern … of structural discrimination and vulnerability’, and looks at the ‘collective conditions necessary for the enjoyment of all human rights’. They propose that such a perspective, looking at structural determinants of vulnerability and of the causation of threats to human rights, guides human rights thinking towards states’ positive obligations to protect rights ex ante, not only to investigate, identify and punish violations ex post. For example, the response to violence and murder should consist not merely of an amount of cash to the victims or their dear ones, but of reforms that help to change a discriminatory and dangerous environment.

The coverage and style of Ackermann’s book make it suitable for jurisprudence scholars and intellectually inclined lawyers and judges. It forms not an easy read, but a monument to the spirit of strong principles and thorough argumentation seen in the work of South Africa’s Constitutional Court during its foundation decade. Here a subtitle for the book that indicates more, or differently, than the present subtitle ‘Lodestar for Equality in South Africa’, could have been helpful. The present subtitle can raise expectations of a manifesto in political philosophy and of a wider scope of concerns than the book in fact addresses. I would like therefore to conclude by drawing the links to further fields which a commitment to human dignity in practice must entail.

The concern for the dignity and worth of each person cannot be left to the judicial system alone. Parallel to the task of appropriate reference to and application of the principle of human dignity in the judicial system, dignity should be embedded throughout a society: in systems of education, socialisation and family life, in business behaviour and economic practices, in cultural media and in forms of everyday interaction. The values should be embodied and expressed by a society’s leaders, in the way that for instance Nelson Mandela so strongly personally exemplified a sense of, and respect for, human dignity. If those other spheres in society do not incorporate such values then the judicial system faces an uphill task, and is in danger of gradually retracting downhill in the face of entrenched forces – some manifest and some hidden in the structures of society and economy – that drive us away from protection and advancement of human dignity. This may be one lesson from modern South Africa’s experiences, to be added to the lessons from the long experiment in racist oligarchy, the struggle against it and the extraordinary negotiated transition.

It is worth reflecting that Germany, centre of post-1945 Kantian-inspired constitutionalism and jurisprudence, is at the same time rather more prominently the global champion of economic and financial policies oriented

to the priority of the interests of banking capital, other lenders and German industry. Germany itself benefited from one of the biggest debt write-downs ever from the western powers in the 1950s, as they sought to convert a defeated enemy into a thriving ally against the Communist bloc.\(^{22}\) Despite this, in the 1980s and 1990s official German voices were amongst the strongest in opposing calls for international debt relief. Many low-income countries had become heavily indebted as oil prices soared in the 1970s while many other primary commodity prices declined in real terms. International banks and financial agencies competed to ‘recycle’ the surplus funds accruing to oil producers, by arranging loans to new clients (vividly described in a book by Mandela’s biographer Anthony Sampson).\(^{23}\) The borrowers entered a crisis when global interest rates rose dramatically, including as side-effect of the United States government’s policy to issue new dollar-denominated assets in order to attract funds from around the world to help finance its huge deficits and military expenditures. Throughout the 1980s and 1990s spending on basic health and education in low-income borrower countries became sacrificed at the altar of priority to servicing or repaying debts to foreign banks and international financial institutions. Only long-running global campaigns for debt relief and restructuring, culminating in the Jubilee 2000 campaign, resulted in elements of debt relief for the poorest and relatively most indebted countries, after years of neglect of basic human rights.

Similarly, in Germany today, the central bank and the banking industry lead in the insistence on austerity agendas and:

> counter-productive European policies which often have negative effects for poor people …

Germany as one example is flaunting a zero-debt fiscal budget, while refugees sleep in tents and overcrowded barracks, while crèches are severely understaffed, teachers overstretched, and public transportation systems lack maintenance and upgrading. As the economic rift widens between the economically lucky and those without decent work and incomes, the social contract is threatened by new forms of racism.\(^{24}\)

It is possible for a society to possess a fine Kantian-inspired constitution and legal apparatus but to be primarily directed and dominated by a logic of calculation which starts from entrenched rights of property, not from a comprehensive respect for human rights and dignity. Globally too, principles of human rights are not embedded as the starting points in policy discussion, despite the Universal Declaration of Human Rights and the daughter conventions and covenants. We see this again in the somewhat disappointing 2014 Synthesis Report from the UN Secretary-General, ‘The Road to Dignity’, intended to orient the negotiations around formulating Sustainable Development Goals.

Promotion of values of human dignity calls for parallel work of several types: in refining and enunciating philosophical underpinnings, in judicial

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22 See, for example, the interview with Eric Toussaint, ‘In February 1953 the allied powers cancelled part of Germany’s debt. What about Greece?’ (27 February 2015) <http://cadtm.org/English>.
leadership and committed legal scholarship, in local, nation-wide and world-
wide campaigns on many fronts, as well as in creative policy thinking and
innovative human-focused technical, business and social entrepreneurship.
In the absence of those facilitators of change, even a national constitutional
court inspired by Kant and human rights principles may become dominated
(including in the reasoning of some of its majority verdicts, as well as in respect
to the influence of its verdicts) by the issues-framings that are conveyed by a
national and global economic order based on other principles and on a power-
balance established partly by past injustices and rights violations.

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