

Human Dignity: Lodestar for Equality in South Africa

By: Laurie Ackermann

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In the 1950s, former African National Congress (ANC) President Chief Albert Luthuli said that the struggle in South Africa was not so much about the ANC coming into power, as it was the recognition and realisation of human dignity for African people, who were brutalised first under colonial rule and then under apartheid.

Through his own realisation, former Constitutional Court Justice Laurie Ackermann gives expression to Chief Luthuli's thoughts in this book. It came as no surprise that, at the dawn of democracy in 1994, President Nelson Mandela invited the author to join the first Bench of the Constitutional Court.

The book traces the theoretical background to human dignity, equality and non-discrimination as constitutional legal concepts; provides a provocative treatment of human dignity and equality in the Constitution; locates the role of human dignity when the equality and non-discrimination rights in the Constitution are applied horizontally between subjects of the state; and concludes with a remedy in the sphere of restitutionary or remedial equality.

The central theme is around a hypothesis, which the author posits as the 'logico-grammatical criterion of reference or attribution', to give intelligible meaning to the concept of 'equality'. In terms of this hypothesis, legal concepts such as equality and non-discrimination, when applied to human beings, invariably raise the questions: Equality of what? In respect of what are all human beings equal and in respect of what may no one be discriminated against? In the view of the author, the answer is human worth or human dignity.

In essence, the author makes the point that the legal concepts of equality and non-discrimination as basic constitutional human rights, accorded to all citizens, would be meaningless unless their practical application and limits are spelt out.

To support his hypothesis, the author refers to certain theological views in the so-called Abrahamic religions (Judaism, Christianity and Islam), German and Canadian jurisprudence ('to establish the norms that apply in open and democratic societies based on freedom and equality') and the works of philosophers such as Immanuel Kant, Bernard Williams, Amartya Sen, Ronald Dworkin and John Rawls to demonstrate the resultant influence on the concept of human dignity and the legal development of equality and freedom.

The author justifies the link between law and philosophy and his reliance on Kant's ethical thought of human dignity because, through Kant, he was able to discover what was so obscene about apartheid.

Following on the development of personality rights, the author puts forward compelling arguments to locate human dignity, together with freedom and equality, as founding values in the Constitution, although he admits that the main difficulty would be where to draw the outer limit of the right and value of human dignity.

He devotes an entire chapter to the tension or conflict between rights of private subjects in the horizontal application of the Bill of Rights and argues that, although the rights to freedom and privacy would trump the right to equality and non-discrimination in the horizontal sphere, this could change once the legal relations of private subjects move into the public domain.

Finally, the author argues that the private law principles of unjustified enrichment could provide a remedy for restitutional equality under the Constitution in favour of those who are still disadvantaged by unfair discrimination that occurred in the past at the expense of 'innocent' beneficiaries who were unjustifiably enriched.

A single line in the report of a Prussian police agent who broke into Karl Marx's London flat, which read: '[T]he whole world comes and goes through his room,' inadvertently became one of the greatest tributes to the intellect of the revolutionary German philosopher. Retaining the analogy, the author's systematic and theoretically enriching arguments on equality jurisprudence are revolutionary and create a tiny eye in a needle through which the evolution of South African society must pass in the search for and realisation of human dignity.

This book is compulsory reading for constitutional law practitioners, jurists, legal academics and those who wish to take up the author's invitation to contribute to the development of South Africa's constitutional jurisprudence.

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