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BOOK REVIEW

Human Dignity and Fundamental Rights in South Africa and Ireland
Anne Hughes (Pretoria University Law Press, South Africa 2014)
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Rule of Law Reform and Development – Charting the Fragile Path of Progress
Michael J Trebilcock and Ronald J Daniel (Edward Elgar Publishing Inc, Cheltenham, UK/Northampton, MA, USA 2008)
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These two scholarly and accessible works stand in their own right, whilst being complementary. Each affirms and expands on what Magna Carta is believed to embody. They engage with the struggle to ensure that law is a living branch of learning and praxis, advancing not only notions of rights but fixing them firmly into the interstices not only of legal decision–making, but throughout the legal systems they address and the societies thereby regulated. *Rule of Law* is the more straightforward of the two. *Human Dignity and Fundamental Rights* is more complex. Yet both acknowledge the vital importance of law and justice as the basis of a good, decent and just society. Each questions how best this can be achieved.

Michael J Trebilcock and Ronald J Daniels commence by discussing and analysing "rule of law" and its role – and potential role – in development. Chapter 1 "The relationship of the rule of law to development" sets the scene. The authors note the difficulty of determining what comes first – a "good" legal system leading to positive economic and social development, or positive economic and social development generating a "good" legal system. They reflect upon the difficulty of fixing precisely what is meant by "rule of law", quoting Rachel Kleinfeld's proposition that it has many meanings, with different meanings for different people and societies, and Matthew Stephenson's observation that "rule of law" "means whatever one wants it to mean", a phrase that when used in the context of development ensures project

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finance from the World Bank, United Nations (UN), International Monetary Fund (IMF), or private foundations. A "thick" conception of rule of law encompasses notions of democracy and liberty, incorporating Friedrich Hayek's idea of its importing "universal moral principles" inherently "liberal in character", whilst a "thin" conception limits it to "those few spare features common to most, though not all, legal systems". The authors settle on a "thinner" conception of the rule of law, seeing rule of law "as both a set of ideals and an institutional framework", comprising "elements of … 'formal' and, 'substantive' theories …" Next, they look at impediments to rule of law reform, including resources (it is here that their chapter on Tax administration is vital), social–cultural–historical factors, and political economy–based obstacles (vested interests clashing with ineffective political demand for reforms).

Having set themselves a challenging brief – they address the "developing world" of Asia, Africa, Latin America and Eastern Europe – Trebilcock and Daniels outline a "cluster of features" making up a rule of law "*minimally* compatible" with "divergent theories of development":

- Process values – transparency in law making and adjudicative functions, predictability, stability and enforceability;
- Institutional values – incorporating judicial independence and professional independence of law enforcement officials including prosecutors and police, lawyers – including public defenders, and legal educational institutions;
- Legitimacy values – "capacity [for institutions] to engender … obedience and respect", or "justification for the exercise of authority" and a "broad empirically determined societal acceptance of the system.

This in turn sets the scene for the following chapters (2–9):

- The judiciary – looking at normative benchmarks, experience with judicial reforms, and conclusions as to success, partial success, or failure;
- Police – covering normative benchmarks, experience with police reforms, and (similarly) conclusions;
- Prosecution – addressing normative benchmarks, experience with prosecutorial reforms and (again) conclusions;
- Correctional institutions – looking at normative benchmarks, experience with corrections reform and (once more) conclusions;

- Tax administration – what are the normative benchmarks, what of experience with reforms in tax administration, and what conclusions can be drawn;
- Access to justice – here, a normative framework, experience with access to justice reforms, and (following on) conclusions;
- Legal education – its normative benchmarks, experience with legal education reforms, and conclusions as to success, partial success, or failure;
- Professional regulation – addressing normative benchmarks, experience with professional regulation reforms, and conclusions as to these efforts.

The concluding chapter reviews empirical evidence, looks at "stylized political formations, options for the international community, and reform strategies in political context" – all under the title "Rethinking rule of law reform strategies".

This is an ambitious book, generally meeting its goal well. Providing a backdrop against which the information and analysis in the following chapters can be measured or at least considered, it sets out in an Appendix to chapter 1 statistics relevant to "rule of law" for named "developing" and "developed" countries:

- World Bank rule of law indicators for 1996 and 2002;
- Freedom House "freedom ratings" for 2004;
- Transparency International "corruption perceptions index for 2004.

As an example of the book's scope, chapter 2 – "The judiciary" acknowledges the "tension between the importance of reform on the one hand, and the plurality of approaches to judging on the other". Judicial reform "as a necessary part of the rule of law reform" is the subject of considerable emphasis by "leading development theorists" (referencing Amartya Sen at the 2000 World Bank Legal Conference in Washington, DC), and is "reflected prominently in international consensus" (citing 1985 UN "Basic Principles on the Independence of the Judiciary" adopted at the 7th Congress on Prevention of Crime and Torture and endorsed by the General Assembly), yet "it remains difficult, if not impossible, to identify an accepted gold standard of the judiciary" (referencing Jeremy Waldron's "Moral Truth and Judicial Review"). The chapter reflects on normative benchmarks, then identifies judicial reforms, their operation and prospects in Latin America – Argentina, El Salvador, Peru, Costa

Rica, the Dominican Republic, Chile, noting that similar criminal procedure reforms have been sponsored by USAID "throughout Latin America, including Guatemala, Bolivia, Honduras, … Ecuador, Colombia, Nicaragua, Venezuela … and Mexico …"; considers Central and Eastern Europe – Russia, Ukraine, Poland, Belarus, Hungary; Africa – Botswana, Cameroon, Kenya, Tanzania, Liberia, Malawi, Ethiopia, Mozambique, Mali, Uganda; and Asia – China, the Philippines, Korea, Cambodia, Viet Nam and Singapore. It concludes by addressing impediments to "the realization of an independent, yet accountable and legitimate, judicial branch". Obstacles "come in a variety of forms" – including "levers of influence" at various levels, threats to accountability, resource constraints, and impact of cultural, historical and social values. As an example, close historical relationships between executive and judicial branches "can hamper the development of popular legitimacy", the public remaining "sceptical of the judiciary as a site for fair dispute resolution". A solution could be creating alternative dispute resolution forums to break with a judicial culture inimical to rule of law reform.

Subsequent chapters follow the same pattern and generally have a similar country–scope. It is only towards the last chapters: access to justice and legal education – that there seems not quite the same breadth of countries considered. This is a small criticism, however, in light of the authors' substantial undertaking. In addition to providing a significant degree of information about a range of countries in each of the areas pinpointed as "developing", there is analysis of the impact of the methods undertaken and future prospects, together with indications as to why and how different approaches might be implemented. The book is easy to read and fascinating in its insights and reach. Anyone working in the field of development and those teaching law students from a range of countries, as well as those keen to contribute usefully to development would be well advised to read and retain this book as a reference work.

Anne Hughes' *Human dignity and fundamental rights* is a tour de force. As with *Rule of Law Reform* the scope of the work is substantial. Hughes addresses "dignity" in the context of the Irish and South African Constitutions, as well referencing cases from "developed" and "developing" countries, some of which feature in *Rule of Law Reform*. To read the cases and outcomes from Argentina, Botswana, The Gambia, Ghana, Hungary, India, Kenya, Latvia, Lesotho, Malawi, Malaysia, Namibia, Nigeria, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe provides insights that are unlikely to be gleaned from any other single work, whilst against the backdrop of *Rule of Law Reform* simultaneously supplies an added dimension to the scholarship and conclusions reached by Trebilcock and Daniels. *Human*

Dignity and Fundamental Rights also highlights how a "developing" country can not only renounce constructively its own dysfunctional history, but provide valuable insights and directions for countries that have prided themselves on substantiating the rule of law, too often seeing their legal systems as "superior". In referencing case law from Australia, Canada, Finland, France, Germany, Ireland, Italy, Aotearoa/New Zealand, Portugal, Spain, Switzerland, the United Kingdom and the United States of America, as well as again presenting material unlikely to be found in any other single source, *Human Dignity and Fundamental Rights* illustrates well how assumed superiority is so often misplaced.

Hughes' book begins with an Introduction, "Framework of study and relevance of the proposition" that "dignity" can be a valuable tool for the making of a legal system which recognises and affirms the egalitarian principles seen to be embodied in "the rule of law". Today, considering this from the perspective of a *Denning* review in the year celebrating 800 years of Magna Carta is the irony that Magna Carta spoke for an elite – yet is now seen as the foundation of freedoms, rights, and equality for all. "Dignity" in the South African Constitution was incorporated from the outset to speak of the humanity of every human being, whatever her or his background, origins, race, ethnicity, sex or gender, class or status. And, as Hughes points out, the Irish Constitution of 1937 was the first to incorporate "dignity" with this meaning. Finland was earlier – but as Hughes again observes, the Finnish Constitution's "dignity" was founded in class, status and a patrician concept: no notion of equality for all in its constitutional inception.

Human Dignity and Fundamental Rights then moves on, chapter 2 considering "The Role of Dignity in Contemporary Jurisprudence", followed by chapter 3 on "Dignity in the South African Constitution". Chapters 4 and 5 cover "The Right to Dignity" and "Association of Dignity with Other Rights", whilst chapter 6 addresses "Socio–Economic Rights" as a context for dignity and dignity rights. Chapters 7 and 8 focus on Ireland – "Irish Case Law on Dignity" and "Remedies and Scope of Fundamental Rights in Ireland". The book ends with Chapter 9, "Summary of Conclusions", as well as a substantial Bibliography – 45 pages in length.

Apart from everything else, for this reviewer, as someone committed to human rights and their incorporation into Constitutions and constitutional law, Hughes' chapter 2 has been extraordinarily influential. The "elitist" and "classist" perspective of dignity – as in "dignified", dignitaries, etc has troubled me whenever dignity has been advanced as an important extension of human rights discourse. Hughes' analysis and explication of the way it has been and is employed to relate to all human

beings – with all human beings included under its umbrella and within its philosophical and practical scope – by various "equality" or "equal rights" philosophers is compelling. Together with her analysis and explication of its employment by South Africa, in particular, and other countries' courts and human rights courts (for example the European Court of Human Rights (EHCR)), it has persuaded this (somewhat) sceptic of the importance of including dignity as an essential expression in written and unwritten constitutions. The Australian Constitution, for example, has no Bill of Rights – although Attorney–General Lionel Murphy (later of the High Court) tried … as did some of his Labor successors (Lionel Bowen, Gareth Evans) although with less vigour. Any campaign for changing this egregious lack should ensure that, like South Africa, "dignity" is a central element, with the Australian High Court having it made clear that South African jurisprudence needs to be given due regard.

All people are entitled to dignity and to its affirmation through the law. Whether they are aware of their own dignity as human beings, or aware even of their own existence, everyone is so entitled. Hughes observes that Waldron (the same Waldron referred to by Trebilcock and Daniels in *Rule of Law Reform*):

> … suggests that the issue of how human dignity applies to infants and to the profoundly disabled can be addressed by applying the rank of equality to all humans by virtue of their unrealised potential rationality (albeit that the subject's rationality is evolving or may even be impossible to achieve by virtue of his or her condition).[1]

She references also L'Heureux–Dube J of the Canadian Supreme Court and Robins JA of the Ontario Court of Appeal. In *Fleming v Reid*,[2] Robins JA "highlighted the equal dignity of the mentally ill and the importance of their autonomy", whilst in *Quebec (Public Curator) v Syndicat national des employes de l'hospital St–Ferdinand*,[3] L'Heureux–Dube J acknowledged that while "some mentally ill patients may have "a low level of awareness of their environment because of their mental condition", which may influence their own conception of dignity, "an objective appreciation of dignity" prevails and there could be

[1] Anne Hughes, *Human Dignity and Fundamental Rights in South Africa and Ireland* (PU Law Press 2014) 44, n 57.
[2] (1991) 82 DLR (45th) 298.
[3] [1996] 3 SCR 1211

"interference with the safeguard of their dignity" [requiring redress], despite the fact that the patients might have "no sense of modesty".[4]

Chapters 4 and 5 of the book are particularly important for practising lawyers as well as academics and students of human rights. Chapter 4 explains, through case law, how the South African Constitution valorises, through "dignity", the notion and practice of "equal respect". This leads into analysis of cases addressing punishment – the corporal punishment of children and the punishment of adults; family; defamation, sexual violence; and children – through the application of the principle and practice of dignity–as–right. Chapter 5 recounts the way in which the "Association of Dignity with Other Rights" advances human rights, again under the South African Constitution: freedom and security, looking at persona. Freedom, damages for breach of fundamental rights, and bodily and psychological integrity; fair trial and imprisonment – criminal trials and human detention conditions; privacy and autonomy – looking at common law *dignitas*, the scope of constitutional privacy, the rationale for privacy protection, the contextual extent of privacy, and conflicting interests; freedom of expression – its rational, exclusions from protection, and limits to protection; and equality – as to gender, marital status, sexual orientation, group identity, and comparative equality jurisprudence.

Chapter 6 is vital in its recognition of the crucial nature of the development of socio–economic rights, a newly burgeoning field. Hughes looks here at the interpretation of economic and social rights, their enforceability, the separation of powers, the International Covenant on Economic, Social and Cultural Rights – justiciability, and judicial enforcement in Europe and under the African Charter; "progressivity" and judicial enforcement in South Africa, particularly looking at housing, healthcare, water and social security.

Moving to Ireland, Hughes emphasises that the Irish judiciary "could give a deeper meaning to human dignity by seeing it in a relationship context, rather than adopting a restricted individualistic view of it".[5] This could, she says, result in a "mutually supportive and respectful relationship" developing "between the judiciary and the executive" as has occurred in and for South Africa. Sadly, despite its early affirmation of "dignity" in the Constitution, the Irish judiciary has failed, generally, to embrace the potential for advancing human rights whether in discourse, jurisprudence or practice. As Hughes says:

[4] Hughes (n 1).
[5] Hughes (n 1), xi.

> The depth of philosophical assessment by the judiciary of the meaning of dignity has been shallow with a handful of expectations. Frequently the courts have avoided dealing with the dignity factor at all, particularly if there is another value, right or express constitutional provision giving an answer to the problem. This attitude has prevented a holistic view of the Constitution …[6]

Nonetheless, "a trawl of judgments does bear some fruit". This includes an acknowledgement of the "unique value of each person irrespective of parentage" by Keane J in *IO'T v B*, albeit dissenting;[7] judicial recognition of the "human personality doctrine" in *Foy v An t'Ard Chlaraitheoir*[8] by McKechnie J, observing "the right of everyone to human dignity" with each person having "the freedom to express [her or his] own personality" and recognising as essential the "need to forge one's own identity and the rights to self–determination and autonomy".[9] Dignity in the context of family and companionship relationships have been acknowledged by Finlay, CJ in *AG v X*[10] and in *Equality Authority v Portmarnock Golf Club* by O'Higgins, J, the latter noting that friendships "are based on delight in others' company, which cannot be analysed logically".[11] McCarthy J is recognised by Hughes for his "evident humane approach" in *JK v VW,*[12] "where he took greater cognisance than the majority of the position of the uncommitted unmarried father" with an "evident commitment to equality" also in *McKinley v Minister for Defence* 1992],[13] a case relating to the extension to a wife of a husband's common law right to sue for loss o*f consortium and servitium* .

These examples – and more in this chapter (chapter 7 – "Irish case–law on dignity") are not enough, however, to overcome Hughes' critique of the narrow focus of the Irish courts and judges' general omission to affirm "dignity". She concludes that the Irish judiciary would be well–advised to pay attention to the decisions of South Africa's judiciary on dignity and South African judges' capacity for making dignity a central focus of South African jurisprudence and practice. This call can be echoed

[6] Ibid, 386.
[7] [1998] 2 IR 321 (SC).
[8] [2002] IEHC 116; [2007] IEHC 40
[9] Hughes (n 1) 386-87.
[10] [1992] IESC 1; [1992] 1 IR 1.
[11] [2009] IESC 73; [2010] 1 ILRM 237, aff'g [2005] IEHC 235.
[12] [1990] 2 IR 437 (SC), Hughes (n 1) 377, n 16.
[13] [1992] 2 IR 333 (SC), Hughes (n 1), 392.

in relation to the other countries, courts and judiciaries to which *Human dignity and fundamental rights* refers – and of course, any it does not.

Clearly more could be said about each of these books. Apart from a sole criticism – the absence of a subject index which would be immeasurably helpful in referring to *Human Dignity and Fundamental Rights* – a fitting conclusion is that, just as with *Rule of Law Reform*, Hughes' book is a "must" for a range of readers. *Human Dignity and Fundamental Rights* should be read and retained for reference by all working in the field of human rights and the law or contemplating entering it – and not only lawyers. Bearing the promise of Magna Carta in mind and 800 years of the struggle for law and rights to have meaning and be meaningful, it is essential reading for judges who, taking their job seriously, wish to become more attuned to rights discourse and the way their power may be exercised far more responsibly in pursuit of "law as justice" and legal decision–making.