

Dignity and the Political Right to Freedom

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In the case of *Ferreira v Levin NO*, Justice Laurie Ackermann seemed to make the assumption that the political right to freedom is best explained, and its content therefore best determined, by the fact that all human beings have dignity.¹ That is, he seemed to assume that dignity and the fact that human beings necessarily possess it provide the key to an understanding of the political right to freedom. This is, I think, an assumption made by many. The aim of this essay is to question its validity.

Let me concede straight away that it is *possible* to provide a dignity-based explanation of the political right to freedom. One way of doing so is as follows:

- (1) All human beings have dignity – either because they are human or because, being human, they possess some dignity-conferring property, such as rational agency.
- (2) To have dignity is, as Kant explains in the *Groundwork of the Metaphysics of Morals*, to have ‘intrinsic value’.²
- (3) Because human beings have intrinsic value, they have equal value. This is so either because the intrinsic value of human beings is incomparable or because the reason for human beings having intrinsic value, for example their rational agency, entails that all have it to the same degree.
- (4) Because human beings have equal value, governments are under a duty to treat their subjects with equal respect. Governments are under a duty to treat their subjects with respect because their subjects, as human beings, have value, and respect is the appropriate response to anything of value. Since a government’s subjects all have equal value, the respect due to each must be equal respect.
- (5) Because governments are under a duty to treat their subjects with equal respect, they are under a duty to remain neutral between their subjects’ differing conceptions of the good life, that is, of what gives value to life. For a government does not treat two subjects with equal respect if it prefers one’s conception of the good life to that of the other.
- (6) Because governments are under a duty to remain neutral between subjects’ conceptions of the good life, they are under a duty to

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¹ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at 1012D–14C.

² I Kant *Groundwork of the Metaphysics of Morals* translated by H J Paton (1948) at 96.

refrain from imposing costs (such as incarceration, fines, the stigma of criminalisation, possibly even taxation) on the choices and activities of their subjects, on the basis that those choices and activities lack value.

(7) The correlative of this latter duty is the political right to freedom.

The dignity-based explanation of the political right to freedom, as I have just set it out, should be a familiar one. Ronald Dworkin adopted an explanation more or less along these lines in his essay 'Liberalism'.³ Whether Ackermann J had this kind of dignity-based explanation in mind in his *Ferreira* judgment is less clear, for he placed less emphasis on the intermediate notion of 'equal respect' and more on that of 'self-realisation'.⁴ However, since it seems to me to be the most compelling among the dignity-based explanations of the political right to freedom, I will use it as my foil in the discussion that follows.

If, as I have conceded and in fact just demonstrated, it is possible to provide a dignity-based explanation of the political right to freedom, how can I possibly object to such an explanation? I can object to it because some explanations are better than others. They are better if they better reveal or illuminate the central features of the object that they aim to explain. In my view, the dignity-based explanation of the political right to freedom is for this very reason a poor explanation. It fails to capture what is at the heart of the political right to freedom. It fails to show why the political right to freedom matters, as much as it does, to those who hold it. Let me put this metaphorically. It is possible to follow a path that starts at dignity, which passes by equality of respect and neutrality between conceptions of the good, and which ends up at the political right to freedom. It is possible to walk that walk to freedom. But it is, if I may coin a phrase, 'the *wrong* walk to freedom'. It is the wrong walk to freedom because it does not account for the fact that we care about freedom as much as we do.

Some people may object to the dignity-based explanation on the ground that it gives the wrong content to the political right to freedom. As Ackermann J accepted in the *Ferreira* judgment, the dignity-based explanation tends to restrict the political right to freedom to negative freedom, that is, to freedom from state interference.⁵ However, this is not an objection that I will raise. I will not raise it because it begs the question. It may of course be true that the political right to freedom is best understood as a right not only to negative, but also to positive, freedom. But if that is true, it is true by virtue of the fact that the best

³ In R Dworkin *A Matter of Principle* (1986) at 181.

⁴ *Ferreira v Levin NO* (n 1) at 1013H–14B.

⁵ *Ibid* at 1016D, 1018F–19A.

explanation of the political right to freedom entails or supports it. It is true, in other words, only if the dignity-based explanation is a poor one. To attack the dignity-based explanation by assuming that the political right to freedom must be a right to positive and not merely negative freedom, is thus to put the cart before the horse.

The point of departure for my objection to the dignity-based explanation is the nature of political rights. A person has a right if one or more of his interests warrant or justify the imposition of a duty or duties on others. Rights, that is, protect interests through the imposition of duties.⁶ It follows that, if persons have a political right to freedom, it is because they have some interest or interests that warrant the imposition of certain duties on the government or state. The problem with the dignity-based explanation of the political right to freedom is that the political right to freedom, so explained, seems to protect a rather queer interest.

What is that interest? In other words, what interest does the political right to freedom protect, if the dignity-based explanation is a sound one? It cannot be an interest in dignity per se. The dignity-based explanation supposes that a person's dignity cannot be diminished, even less extinguished. But if a person's dignity cannot be diminished, if nothing anyone does can affect how much dignity one has, then one's dignity is not in need of protection. Of course, if one's dignity is not in need of protection, then it cannot be the aim of the political right to freedom to protect one's interest in one's dignity.

If the dignity-based explanation is a sound one, the interest protected by the political right to freedom is not an interest in any property possessed or potentially possessed by the holders of that right. It is, instead, an interest in how others – specifically the government or state – behave towards the holders of the right. It is an interest in being treated in the way that accords with one's dignity or intrinsic value, namely with respect. To put it in the negative, it is an interest in *not* being treated with contempt or, more simply, in *not* being insulted, by others.

To simplify matters, let us call this interest, that is the interest protected by the political right to freedom if the dignity-based explanation is a sound one, one's 'dignitary' interest. And let me emphasise again that this interest, that is one's dignitary interest, is not an interest in having dignity. Nor is it an interest in the non-diminution of one's dignity. It is rather an

⁶ I am aware that I am here taking sides in the ongoing dispute between proponents of the so-called 'interest theory', and the so-called 'will theory', of rights. This is not the place to defend my partisanship to the former. For a compelling exposition and defence of the interest theory, see J Raz *The Morality of Freedom* (1986) at 165–92. See also M H Kramer, N E Simmonds and H Steiner *A Debate over Rights* (1998).

interest in having others behave in a way that is appropriate to one's having dignity, namely with respect or without contempt.

There is something odd about the idea that the political right to freedom aims to protect one's dignitary interest. To grasp the oddity of this idea, consider first an example from the South African law of delict. According to the South African law of delict, one commits a delict vis-à-vis another if one assaults him, wrongfully arrests or imprisons him, maliciously prosecutes him, defames him, insults him or invades his privacy. On the face of it, these delicts are very different in nature. Yet the South African law of delict regards all of them as being of a kind. All, that is, are *iniuriae*.

What constitutes these divergent delicts a single kind? Why are all *iniuriae*? One explanation is that they all involve *contumelia*. That is, a person committing any one of these delicts treats his victim with contempt or without respect. Notwithstanding their obvious differences, the delicts of assault, defamation and invasion of privacy thus are of a kind because they all share the same aim, namely to protect people's interest in not being treated contumeliously, their interest, in other words, in being treated with respect.

While an appeal to the notion of *contumelia* provides a possible way of unifying the *iniuriae*, it is not a particularly good way of doing so. It is of course true that the *iniuriae* have in common the fact that a person committing any one of them treats his victim contumeliously or with contempt. But it is false that contempt, or *contumelia*, provides the glue that cements the divergent *iniuriae* into a single kind. It is false, in particular, that what unifies the various *iniuriae* is that they all aim to protect people's interest in not being treated contumeliously.

Consider, for example, the *iniuria* of assault. Can it really be so that the point of the *iniuria* of assault is to protect people from being insulted? Admittedly, a person committing assault does treat his victim with contempt. But he does so, surely, only because he disregards his victim's interest (or right) to physical integrity. At the heart of the *iniuria* of assault, therefore, lies the interest in one's body or *corpus*. It is that interest, the interest in one's *corpus*, not the interest in not being insulted, that the *iniuria* of assault aims to protect. True, the *iniuria* of assault does protect people against insult. But protection against insult is not the *iniuria*'s aim. It is merely a necessary by-product, a fortunate side-effect, of the protection that it affords the interest in bodily integrity.

Just as it is a mistake to try to explain the unity of the *iniuriae* by invoking the fact that they all involve *contumelia*, so it is a mistake to try to explain the political right to freedom by appealing to the fact that it protects people's dignitary interest. Yes, the political right to freedom does protect people's dignitary interest – just like the *iniuria* of assault

protects their interest in not being treated contumeliously. But the protection of one's dignitary interest is not the aim of the political right to freedom – no more than the avoidance of *contumelia* is the aim of the *iniuria* of assault. The fact that the political right to freedom protects one's dignitary interest is simply a fortunate by-product of the protection that it affords to an altogether different interest.

I will get to the nature of that interest in a moment. But first I want to present two further examples, both whereof provide further support for the claim that it is not one's dignitary interest that lies at the heart of the political right to freedom. They are both taken from Joseph Raz's book, *The Morality of Freedom*.⁷

The Man in the Pit. A person falls down a pit and remains there for the rest of his life, unable to climb out or to summon help. There is just enough ready food to keep him alive without (after he gets used to it) any suffering. He can do nothing much, not even move much. His choices are confined to whether to eat now or a little later, whether to sleep now or a little later, whether to scratch his left ear or not.

The Hounded Woman. A person finds herself on a small desert island. She shares the island with a fierce carnivorous animal which perpetually hunts for her. Her mental stamina, her intellectual ingenuity, her will power and her physical resources are taxed to their limits by her struggle to remain alive. She never has a chance to do or even to think of anything other than how to escape from the beast.

How does consideration of these two examples support the contention that the political right to freedom is not essentially concerned with the protection of one's dignitary interest? Well, it is natural to describe the circumstances of both the man in the pit and the hounded woman by saying that they are not free. It is also obvious that both have an interest in having their circumstances changed: the man has an interest in getting out of the pit, the woman has an interest in getting off the island. Since, as we have said, their circumstances can be described by saying that they are not free, their interest in having those circumstances changed can be described by saying that they have an interest in being freed, or simply in being free. But what is that interest? For the moment, let us restrict ourselves to what it cannot be. It cannot be a dignitary interest. It cannot be an interest in how others behave towards them. In particular, it cannot be an interest in being treated with respect or without contempt.

If it is not one's dignitary interest which lies at the heart of one's political right to freedom, what interest does? The answer to that question is to be found, again, in Raz's *The Morality of Freedom*. The interest that lies at the heart of the political right to freedom is one's

⁷ Raz (n 6) at 373–74.

interest in an autonomous life. According to Raz, a person leads an autonomous life in so far as he determines the shape of his life through his own choices. As Raz puts it:⁸

The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.

One's interest in an autonomous life is different in nature to one's dignitary interest. One's dignitary interest, as was explained above, is an interest in how other people behave towards one. One's interest in an autonomous life, by contrast, is an interest in one's life having a particular character or quality. Precisely because of this difference, the man in the pit's interest in getting out of the pit and the hounded woman's interest in getting off the island, which, as we have said, can properly be described as their interest in freedom, can be their interest in an autonomous life but not their dignitary interest.

The argument so far establishes that one's primary interest in freedom is one's interest in an autonomous life rather than one's dignitary interest. Freedom matters mainly because its absence entails the impossibility of an autonomous life. It does not matter, or matters only marginally, because its absence entails that one has been insulted or treated with contempt: for it is possible to lack freedom even though one has never been insulted or treated with contempt by anyone. Is this enough to show that the dignity-based explanation of the political right to freedom is a poor one? Not quite.

Rights, to recall, protect interests through the imposition of duties. The discussion so far has focused on the interests protected by the political right to freedom. It has shown that the political right to freedom cannot be understood to be aimed at protecting one's dignitary interest. Instead, it should be understood to be aimed at protecting one's interest in an autonomous life. However, that falls short of showing that dignity has no role to play in an explanation of the political right to freedom. It is not sufficient, for persons to have a political right to freedom, that they have an interest in being free. In addition, their interest in freedom must warrant or justify the imposition of duties on government or the state. Could it not be the case that people's interest in freedom warrants or justifies the imposition of duties on government or the state only because the state has a duty to respect them? In short, even if dignity fails to explain the interest-aspect of the political right to freedom, could it not have a role in explaining its duty-aspect?

⁸ Ibid at 369.

Before answering that question, I should point out that this attempt to smuggle dignity in through the back-door of duty – the attempt to get it in through the front-door of protected interests having failed – might not get those who support the dignity-based explanation what they want. Most supporters of the dignity-based explanation, I think, want dignity to explain not only the existence but also the content of the political right to freedom. They want it to explain not just why people's interest in freedom warrants or justifies the imposition of duties on government or the state, but what those duties are. For dignity to do that, for it to determine the content of the political right to freedom, it must be one of the interests which the right aims to protect. For there is no way to determine the content of a right, there is no way to determine the duties justified or warranted by a right, other than by considering the interest which the right aims to protect. To give up the idea that the political right to freedom aims to protect our dignitary interest is thus to give up the idea that dignity has a part to play in determining the content of that right.

However, the answer to the question posed a moment ago is in any event a negative one. Dignity no more has a role to play in explaining the duty-aspect of the political right to freedom than it has a role to play in explaining its interest-aspect. It might be that a person's interests justify the imposition of duties *on other persons* only because we all have a duty to respect each other. It might be, therefore, that dignity has a crucial role to play in explaining the rights, including the right to freedom, that persons have against other persons. But political morality is not inter-personal ethics writ large. Unlike the relationship between me and my neighbours, the relationship between my government and me is one of authority. That is a critical difference. A government's authority over its subjects is legitimate in so far as it serves their interests. People's interests therefore justify the imposition of duties on governments, not because governments have to treat their subjects with the respect that their dignity or intrinsic value demands, but because a government that is not subject to those duties would lack legitimate authority.

I will conclude this essay by returning to a point made near its start, when discussing what I rejected as a question-begging objection to the dignity-based explanation of the political right to freedom. The objection, to recall, was that the dignity-based explanation gives the wrong content to the political right to freedom, because it restricts it to negative freedom. As I said earlier, it may indeed be true that the political right to freedom is best understood as a right not only to negative, but also to positive, freedom. But if it is true, it is true by virtue of the fact that

the best explanation of the political right to freedom entails or supports it. It is true, in other words, only if the dignity-based explanation is a poor one.

I have tried to show that the dignity-based explanation *is* a poor one, and that the political right to freedom is better explained as aimed at protecting our interest in leading autonomous lives. If I am right, if what lies at the heart of the political right to freedom is autonomy rather than dignity, what implications, if any, does that have for the content of the political right to freedom? If Joseph Raz is to be believed, then what follows is that the political right to freedom is best understood not, as Ackermann J suggested in the *Ferreira* case, as a right merely to negative freedom, but as a right also to positive freedom.⁹ As Raz explains, since an autonomous life is one determined by one's choices, it is self-contradictory to suppose that one can *make* a person lead an autonomous life. The duties on government which are justified by people's interest in an autonomous life are at best, therefore, duties to provide or create the conditions in which people are able to lead autonomous lives, if they so choose. Those conditions certainly include the conditions of negative freedom: for a person cannot have an autonomous life if his choices are constrained. But they also include some conditions of positive freedom. A person's life was not autonomous unless it could have been different, unless there were available to him options which he chose not to pursue. People's interest in autonomy thus justifies an obligation on their government, not merely to refrain from constraining their choices, but also to make available to them a variety of options from which to choose. In sum, an autonomy-based conception of the political right to freedom is a conception not merely of negative, but also of positive, freedom.

⁹ Ibid at 407–12.