

Jurisprudential Analysis of the Right to Life and Dignity: A South African Perspective

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Abstract: *The purpose of the study is to analyse the jurisprudence of the right to life and dignity as fundamentally protected rights in a South African perspective since the dawn of democracy and Constitution of 1996 hereafter referred to as the Constitution. This paper argues that South Africa as a state in applying the Bill of Rights and the Constitution might have encroached or applied laws that may have compromised justice in so far as the impact from the decisions of the courts are concerned. This paper will therefore examine how the courts have interpreted the law and the protection of the non derogable rights of life and dignity post constitutional democracy. The democratic government has a duty to reverse apartheid policies that stemmed from colonial laws. Apartheid laws segregated people and rights were clustered, and selectively applied along racial lines with a tiny majority of European-Africans as sole beneficiaries of rights while the African majority wallow in rightlessness. The authors will examine how the state interprets these fundamental principles of the constitution since the dawn of democracy. The authors hope that the arguments presented in this paper would assist in understanding the moral justification of the decisions in human rights cases in South Africa as the courts battle their way into the realisation of especially non derogable rights as set out in the Bill of Rights.*

Key Words: *Jurisprudence; Human Dignity; Equality; Constitution; Democracy; Bill of Rights; South Africa.*

Introduction

“But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair. Thus it is not enough

just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.” Lyndon B. Johnson, *To Fulfill These Rights*, Commencement Address at Howard University, 1965.

This paper will attempt to answer the question as to how the courts have applied the constitutional elements of life and dignity and attempt further to weave such interpretation while focusing on the philosophical underpinnings of South Africa’s understanding and application of these fundamental concepts.

This research goes further to suggest damages that ought to accrue to people who at some stage experienced the gruesome acts since the Constitution of 1996 came into existence where courts evoked the principle of life and dignity. Apartheid system was very brutal. Human rights issues only mattered when they adversely affected whites. Courts were run by the South African Constitutional system which was based on the doctrine of parliamentary sovereignty where parliament was supreme to all laws and above all arms of the state. There was no democratic rule. When people stood firmly against human rights violations, the State reacted against the masses,¹ 69 people were killed and 180 injured by police gunfire.² In justifying this, this paper will investigate the following incidences post-apartheid and how the courts have grappled with the issues and thus building the jurisprudence protecting life and dignity.

The Constitutional Court delivered a judgement in the case of *S v. Makwanyane and Another* (hereinafter referred to as the “Makwanyane”)³ where Makwanyane challenged the constitutionality of the capital punishment in the constitutional dispensation. The Constitutional Court ruled in favour of Makwanyane in that the punishment was cruel and degrading violating the Bill of Rights which respects human dignity and against cruelty. The court decided in favour of Makwanyane due to the new constitutional order which rejected laws that brutalised and diminished respect for human life.⁴ In *President of the Republic of South Africa*

¹ Sharpeville Massacre on the 21 March 1960 occurred because of unarmed blacks who marched against apartheid policies especially the pass laws.

² See FRANKEL, Ph. H. *An Ordinary Atrocity: Sharpeville and Its Massacre*. 1st ed. New Haven: Yale University Press, 2001. 263 p. ISBN 0-300-09178-8.

³ *Case of S v. Makwanyane and Another* [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94.

⁴ *Case of S v. Makwanyane and Another* [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 391.

*and Another v. Hugo*⁵ where Mr Hugo challenged the then President Mandela after signing a Presidential Act which provided a special remission of sentences which was granted to certain categories of prisoners who were mothers with minor children under the age of 12 years. Section 82(1)(k) of the Interim Constitution empowered the President to exercise his rights and pardon mothers with children under the 12 years of age.⁶ Hugo had a son under the age of 12 years. He decided to challenge the decision on the basis that it discriminated him and his son and cited section 8(1) of the Interim Constitution⁷ and his son according to section 8(2).⁸ Mr Hugo sought an order declaring the presidential Act unconstitutional and directing the 1st Appellant to correct it in accordance with Interim Constitution. Goldstone J noted that the presidential pardon was not to an individual to correct a miscarriage of justice but to a group to confer an advantage upon them as an act of mercy at a time of historical significance. Our contention is that the mercy should have been applied across the board especially since for the first time in a long time, the South African judicial decisions on constitutional matters were being decided based on new constitutional order. The decision that males play a secondary role somehow discriminated Hugo who at the time was the only surviving parent to the child. Though the constitutional court's decision to pardon mothers was not intended to discriminate, the criteria could have been more open to all persons to give heed to the equality clause in section 8(1) of the Interim Constitution.

In *Harksen v. Lane NO and Others*⁹ where Ms Harksen was insolvent and challenged the constitutionality of certain provisions of the Insolvency Act¹⁰ citing discrimination. Harksen maintained that the provisions¹¹

⁵ *Case of President of the Republic of South Africa and Another v. Hugo* [1997-04-18]. Judgement of the Constitutional Court of South Africa, 1997, CCT 11/96.

⁶ *Case of President of the Republic of South Africa and Another v. Hugo* [1997-04-18]. Judgement of the Constitutional Court of South Africa, 1997, CCT 11/96, para 2.

⁷ "Every person shall have the right to equality before the law [...]" *Interim Constitution of the Republic of South Africa Act No. 200* [1993] (hereinafter referred to as the "Interim Constitution"), para 3, section 8(1).

⁸ No person shall be unfairly discriminated against directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular, race, gender, sex, ethnic, or social origin, colour, sexual orientation, conscience, belief, culture or language.

⁹ *Case of Harksen v. Lane NO and Others* [1997-10-07]. Judgement of the Constitutional Court of South Africa, 1997, CCT 9/97.

¹⁰ *Insolvency Act No. 24* [1936], section 20(1).

¹¹ *Insolvency Act No. 24* [1936], para 8.

unfairly discriminated against insolvent individuals treating them differently from the solvent persons, violating the equality clause which prohibits discrimination on various grounds.¹² In this case the Court found that the Insolvency Act indeed differentiated between insolvent persons and the solvent. However, the Court held that the differentiation in the end did not amount to unfair discrimination. The court's rationale was premised on a legitimate purpose which aimed at protecting the interests of creditors only and thereby maintaining the integrity financial systems. Despite the court's decision refuting the discrimination, we argue that Harksen's arguments were valid in that the court when referring to the solvent spouse considered it a female. Essentially, the Court wore blinkers in that the category of the property that was acquired by the solvent spouse during marriage referred to section 22 of the Matrimonial Property Act 88 of 1984 and therefore the differentiation is in our view discriminatory on one or more grounds listed in section 9 such as sex.

Similarly, in the case of *Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others*¹³ the Court decided that section 417 of the Companies Act¹⁴ was unconstitutional and invalid as it forced a person to be summoned to an enquiry to testify and produce documents despite such persons seeking to evoke the privilege against self-incrimination. This section together with section 25(3) of the Constitution violated a person's right to a just and equitable terms of payment to all affected persons. A confirmation of the right to dignity was affirmed by the Constitutional Court in *Dawood and Another v. Minister of Home Affairs and Others; Shalabi and Another v. Minister of Home Affairs and Others; Thomas and Another v. Minister of Home Affairs and Others*¹⁵ when a couple challenged the constitutionality of section 25(9)(b) of the *Aliens Controls Act*¹⁶ which provided that a foreign spouse of a South African citizen who wished to secure an immigration permit must be in possession

¹² *Constitution of the Republic of South Africa Act No. 108* [1996] (hereinafter referred to as the "Constitution"), section 9 protects people on various grounds, race, gender, sex, ethnic, or social origin, colour, sexual orientation, conscience, belief, culture or language.

¹³ *Case of Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others* [1995-12-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 5/95, para 28.

¹⁴ *Companies Act No. 61* [1973].

¹⁵ *Case of Dawood and Another v. Minister of Home Affairs and Others; Shalabi and Another v. Minister of Home Affairs and Others; Thomas and Another v. Minister of Home Affairs and Others* [2000-06-07]. Judgement of the Constitutional Court of South Africa, 2000, CCT 35/99, paras 2 and 4.

¹⁶ *Aliens Control Act No. 96* [1991].

of a valid temporary residence permit failing which the spouse would have to leave outside South Africa or the South African spouse would have to leave South Africa and accompany the foreign spouse in order to avoid separation or family break up. The applicants challenged its constitutionality and the constitutional Court ruled in favour of the applicants and stated that the provision violated the applicants right to dignity and that the provision was inconsistent with the Constitution.

The Constitutional Court held in *Carmichele v. Minister of Safety and Security* (hereinafter referred to as the “Carmichele”)¹⁷ that the State was obliged to protect the human dignity after the applicant stake a claim against the State for delictual liability damages arising from the unlawful omissions by the officers of the state. The applicant was brutally attacked by a man who was awaiting trial for attempted rape. The Constitutional Court found that the state had an obligation in terms section 39(2) in conjunction with section 10 of the Constitution and further that the state is obligated by the Constitution and international law to protect the dignity and security of women and in the circumstances, the police recommendation for the assailant’s release could amount to wrongful conduct giving rise to liability.¹⁸ In *Freedom of Religion South Africa v. Minister of Justice and Constitutional Development and Others*¹⁹ the Constitutional Court held that the child had a right to be treated with dignity and protected from any harm or maltreatment.²⁰ The court ruled against chastisement and that it was unconstitutional as it purports violence and abuse, and it is inconsistent with the values which the Constitution and the bill of Rights represent.

By championing to overcome pre-democratic struggles, people anticipate a society that is free of violence or other forms of indignity. The transition into the democratic South Africa that is inclusive of the freedom of all races, transparent in nature, without discrimination and unjust laws, was widely welcomed by the greater society within South Africa

¹⁷ *Case of Carmichele v. Minister of Safety and Security* [2001-08-16]. Judgement of the Constitutional Court of South Africa, 2001, CCT 48/00.

¹⁸ *Case of Carmichele v. Minister of Safety and Security* [2001-08-16]. Judgement of the Constitutional Court of South Africa, 2001, CCT 48/00, para 35.

¹⁹ *Case of Freedom of Religion South Africa v. Minister of Justice and Constitutional Development and Others* [2019-09-18]. Judgement of the Constitutional Court of South Africa, 2019, CCT 320/17.

²⁰ *Case of Freedom of Religion South Africa v. Minister of Justice and Constitutional Development and Others* [2019-09-18]. Judgement of the Constitutional Court of South Africa, 2019, CCT 320/17, para 43; and section 28(1)(d) of the Constitution.

and beyond its borders. A society that embraces *Ubuntu* and its values as stated in chapter 2 of the Constitution of the Republic of South Africa.

However, the grand expectation of a discrimination and inequality free society developed cracks overtime as injustice and equality rare their ugly heads again and again. One way or the other, the State violates the fundamental rights of the very people it sought to protect. The State ought to play a pertinent role in applying the principles that are aimed at restoring the human dignity and preserving the fundamental right to life enshrined in the Constitution. What we see as a practice is a total opposite of our expectations of a democratic South Africa where clearly the state or its officials fail to protect the people. The case of *Carmichele* is one of many.²¹ In this case the victim was brutally attacked by a convicted rapist who had been let loose by the state albeit the state was warned of the anticipated danger the perpetrator could cause. *Carmichele* would mark the unfolding of the state's incapacity to realise the non derogable rights to life and dignity.

1 South African Courts and the Human Rights imperatives

South African Courts are empowered by the Bill of Rights and the Constitution to heal the scars of the past and help build a liberated society. Amongst its many roles is to enforce law against all human rights violations directed to society and the members of the public.

In *Ex Parte Minister of Safety and Security and Others: In Re S v. Walters and Another*,²² Kriegler J made a point about the nature of law in our democratic dispensation. After referring with approval to an observation made by the United States Supreme Court and by Langa J in *Makwanyane*²³ that the government is the "potent, omnipresent teacher" and that for "good or for ill, it teaches the whole people by its example".²⁴ Kriegler J stated:

²¹ See *Case of Carmichele v. Minister of Safety and Security* [2001-08-16]. Judgement of the Constitutional Court of South Africa, 2001, CCT 48/00.

²² *Case of Ex Parte Minister of Safety and Security and Others: In Re S v. Walters and Another* [2002-05-21]. Judgement of the Constitutional Court of South Africa, 2002, CCT 28/01, para 6.

²³ In paragraph 222, Langa J had written: "Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear. For Good or for worse, the State is a role model for our society."

²⁴ *Case of Olmstead v. United States* [1928-06-04]. Opinion of the Supreme Court of the United States, 1928, 277 U.S. 438, p. 485.

“We have a history of violence – personal, political and institutional. Our country is still disfigured by violence, not only in the dramatic form of murder, rape and robbery but more mundanely in our homes and on our roads. This is inconsistent with the ideals proclaimed by the Constitution. The State is called upon to set an example of measured, rational, reasonable and proportionate responses to antisocial conduct and should never be seen to condone, let alone to promote, excessive violence against transgressors. Its role in our violent society is rather to demonstrate that we are serious about the human rights the Constitution guarantees for everyone, even suspected criminals. An enactment that authorises police officers in the performance of their public duties to use force where it may not be necessary or reasonably proportionate is therefore both socially undesirable and constitutionally impermissible.”²⁵

The new democratic order brought hope to the masses. It was expected that the new government of National Unity would be an explicit transformation: the notion that the South African state and society would change fundamentally if South Africa was to move away from racism, autocracy, poverty, and inequality that characterised the apartheid era.²⁶ Courts would treat every human being with dignity and honour embracing every person’s constitutional rights. One of the court’s role and mandate, amongst many others is to make sure of the acceleration of democracy, advancement, and enforcement of the Constitution.²⁷ Kriegler J believes that role of promoting a culture of respect for human life and dignity lies with the state. He took the view that:

“Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new

²⁵ *Case of Ex Parte Minister of Safety and Security and Others: In Re S v. Walters and Another* [2002-05-21]. Judgement of the Constitutional Court of South Africa, 2002, CCT 28/01, para 47.

²⁶ *Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)* [online]. 1st ed. Johannesburg: South African Human Rights Commission, 2006. 203 p. [cit. 2024-02-29]. ISBN 0-620-36364-9. Available at: https://www.sahrc.org.za/home/21/files/Reports/Reflection%20of%20democracy%20and%20human%20rights_10%20year%20review_%20200.pdf.

²⁷ *Legislative and Other Mandate*. In: *The South African Judiciary* [online]. 2024 [cit. 2024-02-29]. Available at: <https://www.judiciary.org.za/index.php/ocj/legislative-and-other-mandate>.

context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society. A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead. In acting out this role, the State not only preaches respect for the law and that the killing must stop, but it demonstrates in the best way possible, by example, society's own regard for human life and dignity by refusing to destroy that of the criminal. Those who are inclined to kill need to be told why it is wrong. The reason surely must be the principle that the value of human life is inestimable, and it is a value which the State must uphold by example as well."²⁸

Brandeis J was quoted as saying:

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."²⁹

The State is compelled to preserve human life consequent to their deeds, law does not allow retribution. Brennan J in *Furman v. Georgia*³⁰ expresses these sentiments:

"[...] even the vilest criminal remains a human being possessed of common human dignity."³¹

Section 7(2) of the 1996 Constitution bears similar view with Kantian philosophy and ruling on rights and their reciprocal duties. Fletcher reflected that Human dignity shall be inviolable and concluded that: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."³²

²⁸ *Case of S v. Makwanyane and Another* [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 222.

²⁹ Brandeis J was quoted in a dissenting opinion in *Case of Olmstead v. United States* [1928-06-04]. Opinion of the Supreme Court of the United States, 1928, 277 U.S. 438.

³⁰ *Case of Furman v. Georgia* [1972-06-29]. Opinion of the Supreme Court of the United States, 1972, 408 U.S. 238, pp. 290-291 (Brennan J concurring).

³¹ *Case of Furman v. Georgia* [1972-06-29]. Opinion of the Supreme Court of the United States, 1972, 408 U.S. 238, p. 273.

³² FLETCHER, G. P. Human Dignity as a Constitutional Value. *University of Western Ontario Law Review*. 1984, vol. 22, no. 2, p. 178. ISSN 0703-900X.

This order by the Constitution was also confirmed in the case of *Carmichele v. Minister of Safety and Security*³³ regarding parallel operations of the Bill of Rights. Human dignity as one of the founding values of the Constitution is reflected in many judgments like that of *Makwanyane* among others, including when Chief Justice Chaskalson said:

“The affirmation of [inherent] human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the Second World War.”³⁴

In the same token, Kantian ruling puts an emphasis but not only on human dignity alone. The ruling also encompasses the inviolable inherent and intrinsic worth³⁵ or values of everyone. Kantian ruling suggests that the worth of a person has no price, admits of no substitute, cannot be traded off for anything in the world.³⁶

Ackermann J elucidates Kant’s philosophy with respect to “intrinsic worth” and he quotes:

“On the highest level, dignity is a quality of worth or excellence, and when used in the compound term ‘human dignity,’ it suggests all that for Kant is inherent in the human ‘personhood’ of every human being.”³⁷

Similarly, Judge Sachs affirms the idea in *S v. Lawrence*:

³³ *Case of Carmichele v. Minister of Safety and Security* [2001-08-16]. Judgement of the Constitutional Court of South Africa, 2001, CCT 48/00.

³⁴ CHASKALSON, A. The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order. *South African Journal on Human Rights* [online]. 2000, vol. 16, no. 2, pp. 193-205 [cit. 2024-02-29]. ISSN 1996-2126. Available at: <https://doi.org/10.1080/02587203.2000.11827594>.

³⁵ Human dignity and human worth are interchangeable expressions according to Kantian philosophy. Hence, the reference “intrinsic and worth”.

³⁶ WALDRON, J. The Dignity of Groups. *Acta Juridica*. 2008, vol. 2008, no. 1, pp. 66-90. ISSN 0065-1346.

³⁷ ACKERMANN, L. W. H. The Legal Nature of the South African Constitutional Revolution. *New Zealand Law Review*. 2004, no. 4, pp. 633-679. ISSN 1173-5864; and KLAAREN, J. The Constitutionalist Concept of Justice L Ackermann: Evolution by Revolution. In: N. BOHLER-MULLER, M. COSSER and G. PIENAAR, eds. *Making the Road by Walking: The Evolution of the South African Constitution* [online]. 1st ed. Pretoria: Pretoria University Law Press (PULP), 2018, pp. 27-43 [cit. 2024-02-29]. ISBN 978-1-920538-75-0. Available at: https://www.pulp.up.ac.za/images/pulp/books/legal_dialogues/making_the_road_by_walking/Chapter%20%20Making%20the%20Road.pdf.

“Indeed, there is a core to the individual conscience so intrinsic to the dignity of the human personality that it is difficult to imagine any factors whatsoever that could justify its being penetrated by the state.”³⁸

Former Chief Justice Pius Langa links the appreciation of the Individual’s dignity’s respect for his community:

“Dignity and identity are inseparably linked as one’s sense of self-worth is defined by one’s identity. Cultural identity is one of the most important parts of a person’s identity precisely because it flows from belonging to a community and not from personal choice or achievement.”³⁹

Equitably, the Constitutional Court in *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* (hereinafter referred to as the “National Coalition for Gay and Lesbian Equality”)⁴⁰ confirmed the interrelatedness between dignity and equality when it found that the criminal offence of sodomy did not only unfairly discriminate against gay men, however, in addition, LGBT males face disproportionate and discriminatory treatment. This unfair discrimination was destructive to their dignity, since it stigmatised them as criminals plainly because they seek to engage in sexual conduct which is part of their experience as human being.⁴¹ This direct act of discrimination is amongst the grounds listed as a right under section 9(3) of the Constitution. Section 9(4) of the Constitution states clearly that no person may unfairly be discriminate directly or indirectly against anyone one or more grounds as listed in section 9(3). It continues that Legislation must prevent and prohibit unfair discrimination. In this landmark judgement, the court found that criminalisation of sodomy violated gay men’s right to equality as it unfairly discriminated against them on those grounds listed in the equality clause, sexual orientation. The court emphasised that the right to

³⁸ *Case of S v. Lawrence* [1997-10-06]. Judgement of the Constitutional Court of South Africa, 1997, CCT 38/96, para 168.

³⁹ *Case of MEC for Education: KwaZulu-Natal and Others v. Pillay* [2007-10-05]. Judgement of the Constitutional Court of South Africa, 2007, CCT 51/06, para 53.

⁴⁰ *Case of National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* [1998-10-09]. Judgement of the Constitutional Court of South Africa, 1998, CCT 11/98.

⁴¹ *Case of National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* [1998-10-09]. Judgement of the Constitutional Court of South Africa, 1998, CCT 11/98, para 28.

dignity was a cornerstone of our Constitution⁴² which played a part in equality analysis, and therefore, the criminalisation of sodomy successfully takes away from gay men their dignity and self-worth by labelling them deviant for acts which formed a great part of their identity, and which were committed in private. Consequently, the court found the crime not only as a breach of equality but also as a breach of dignity and privacy. Sachs J acutely describes the connection between dignity and equality:

“At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. [...] To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality.”⁴³

Pre-constitutional era was an anti-black racist era characterised by laws with no regard to human rights. Hence O’Regan J agreed with Chaskalson J in that the death penalty constituted a violation of section 11(2) of the Constitution of the Republic which could not be saved by the section 36 limitation clause. The judge held further that the punishment also violated the rights to human life and human dignity.⁴⁴ O’Regan J referred to the right to life as being “antecedent”⁴⁵ to all other rights in the Constitution, as without life no other rights could be exercised. She advanced this view describing her interpretation of the content to the right to life.

“It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. [...] The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life

⁴² *Case of National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* [1998-10-09]. Judgement of the Constitutional Court of South Africa, 1998, CCT 11/98, para 20.

⁴³ *Case of National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* [1998-10-09]. Judgement of the Constitutional Court of South Africa, 1998, CCT 11/98, para 129.

⁴⁴ *Case of S v. Makwanyane and Another* [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 318.

⁴⁵ *Case of S v. Makwanyane and Another* [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 326.

are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.”⁴⁶

She stated that respect for dignity is especially important given South Africa’s history of a “denial of a common humanity”.⁴⁷ She confirms the nature of dignity as being inherent in all human beings, thus rejecting outrightly the argument that criminals relinquish their right to be treated with dignity upon committing a crime.⁴⁸ O’Regan J concluded that the death penalty was a breach of the rights to life and dignity. Not only that but she also described the process in gruesome detail and found it to be a breach of dignity. She argued that dignity was infringed during the time spent on death row awaiting execution.⁴⁹ After carefully looking at the limitation clause under section 36 of the Constitution. O’Regan J emphasised that:

Death penalty was an unjustifiable infringement of the rights in section 11(2) which says that “No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment”, section 9, equality clause, 9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(2) Equality includes the full and equal enjoyment of all rights and freedoms, 9(3) which clearly states the specified grounds of prohibited discrimination and section 10, human dignity “Everyone has inherent dignity and the right to have their dignity respected and protected”.⁵⁰

In *Makwanyane* the Constitutional Court dealt with the distinction of an issue which saw the court heavily criticised on its decision. In a minority judgement O’Regan and Sachs JJ clenched on the view that a prosti-

⁴⁶ *Case of S v. Makwanyane and Another* [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 326.

⁴⁷ *Case of S v. Makwanyane and Another* [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 329.

⁴⁸ *Case of S v. Makwanyane and Another* [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 331.

⁴⁹ *Case of S v. Makwanyane and Another* [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 336.

⁵⁰ *Case of S v. Makwanyane and Another* [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 327 which is the interpretation sections 9 and 10 of the Constitution. Look at this footnote, it doesn’t read nice.

tute's dignity was reduced due to her conduct that commercialises her as a commodity due to a law which criminalises the conduct of the prostitute and not that of her client. Criminalising the act of prostitution was unfair since it excluded the patronage to the services. They are quoted:

“The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished [...] by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.”⁵¹

In this instance, the Court used the immanent dignity measure to help protect dignity in painful and unexpected situations, as well as to put an end to treating condemned people as objects to be legally punished. The Bill of Rights is clear on the rights of all human beings and the courts are empowered to enforce the rights imposed on natural and juristic persons by the Constitution. In *Makwanyane* the Court held that from this the third respondent has failed to accord the applicant the dignity inherently forthcoming to him.⁵²

2 Protection of Victims of Crime and administration of justice

Before the commencement of the constitutional state, the greater population had no rights to be protected. Black people were subjected to all kinds of humiliation and torture. The transition that was initiated by the Constitution of the Republic presented opportunities for the recognition of the wrongs and the correction of apartheid disparities. The new systems nullified the laws that discriminated people on grounds of race, sex, or their origin. The right to human dignity and equality is guaranteed under the new constitutional order and the Bill of Rights.

The State protects life by preventing murders and where life has been taken, punishing a perpetrator is a must. The State is obligated to deploy the police to prevent crime and not to end people's lives.⁵³ The

⁵¹ *Case of S v. Jordan and Others* [2002-10-09]. Judgement of the Constitutional Court of South Africa, 2002, CCT 31/01, para 74.

⁵² *Case of S v. Makwanyane and Another* [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 26 (Chaskalson J).

⁵³ *South African Police Service Act No. 68* [1995], see also *Case of Rail Commuters Action Group and Others v. Transnet Ltd t/a Metrorail and Others* [2004-11-26]. Judgement of the Constitutional Court of South Africa, 2004, CCT 56/03.

Marikana killings therefore reflects an absence of clarity within the South African Police Service on questions of principle regarding the use of force. The case of *Sivuka & 328 Others v. Ramaphosa and Others*⁵⁴ reveals the lack of clarity for the SAPS. In his judgement delivered on 30 June 2022 Van Jooste J elucidated that the police tactical response unit shot and killed 34 striking workers and seriously wounded and arrested many others who were part of the peaceful gathering on public land at Marikana. While this was a peaceful gathering as allowed by the Gatherings Act⁵⁵ as well as section 17 of the Constitution, police shot and killed unarmed workers leaving many of them wounded. South African citizens anticipated a more protective government through state police in the democratic era. However, to the contrary, they are not sure if that is the case since the Sharpeville massacre especially considering the Marikana tragedy in 2012.

It is very clear that the principles governing SAPS members caused the unfortunate incident at Marikana. Indeed, this research echo the words by Council for the Advancement of the South African Constitution that (hereinafter referred to as the "CASAC"),⁵⁶ "the South African government has also tended to use 'talking tough on crime' in response to calls by citizens for 'something to be done about crime' or the complaint that 'in South Africa, criminals have more rights than their victims'."⁵⁷ Ackerman J has explained that, in the constitutional scheme of the new South Africa, human dignity itself is not conferred, but rather accepted categorically as an attribute of humankind.⁵⁸ However, certain constraints on people like the Marikana miners' strike as deeply inconsistent or dissonant with the respect they are due. O'Regan J asserts:

"The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human be-

⁵⁴ *Case of Sivuka & 328 Others v. Ramaphosa and Others* [2022-06-30]. Judgement of the High Court of South Africa, 2022, 36879/2015.

⁵⁵ *Gatherings Act No. 205* [1993].

⁵⁶ Council for the Advancement of the South African Constitution (CASAC).

⁵⁷ *Submission by CASAC to the Marikana Commission of Inquiry: The Role of the South African Police Service in the Marikana Massacre on 16 August 2012* [online]. 1st ed. Cape Town: Council for the Advancement of the South African Constitution, 2013, p. 7 [cit. 2024-02-29]. Available at: <http://www.casac.org.za/wp-content/uploads/2016/11/CASAC-submission-to-Marikana-Commission.pdf>.

⁵⁸ ACKERMANN, L. W. H. The Legal Nature of the South African Constitutional Revolution. *New Zealand Law Review*. 2004, no. 4, pp. 643-647. ISSN 1173-5864.

ings: human beings are entitled to be treated as worthy of respect and concern.”⁵⁹

Ackerman J concurring in *National Coalition for Gay and Lesbian Equality* said:

“Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.”⁶⁰

Marikana tragedy explicitly illustrate the underlying relational concept of human dignity at work. The decision in the *Minister of Health and Others v. Treatment Action Campaign and Others* (hereinafter referred to as the “Treatment Action Campaign”)⁶¹ confirmed the significance of one’s dignity when the state was asked to provide a relatively cheap or affordable anti-retroviral drug (Nevirapine)⁶² to citizens afflicted by the pandemic. The manufacturers of the treatment, Nevirapine had offered to make it available to the South African government free of charge for a period of five years. The treatment was for the purposes of reducing the risk of mother-to child transmission of HIV.⁶³ In the case of *Ngomane and Others v. City of Johannesburg Metropolitan Municipality and Another*⁶⁴ for example, the court dealt with the destruction and confiscation of the property of a group of homeless people living under the bridge in the city of Johannesburg. After it was found that the removal and destruction of their personal effects was an arbitrary deprivation of their right to privacy as per section 14(c) of the Constitution, which included the right not to have the property seized, the Court ordered compensation. The Court

⁵⁹ *Case of S v. Makwanyane and Another* [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 328.

⁶⁰ *Case of National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* [1998-10-09]. Judgement of the Constitutional Court of South Africa, 1998, CCT 11/98, para 28.

⁶¹ *Case of Minister of Health and Others v. Treatment Action Campaign and Others (No. 2)* [2002-07-05]. Judgement of the Constitutional Court of South Africa, 2002, CCT 8/02.

⁶² *Case of Minister of Health and Others v. Treatment Action Campaign and Others (No. 2)* [2002-07-05]. Judgement of the Constitutional Court of South Africa, 2002, CCT 8/02, para 19, read with paras 71 and 80.

⁶³ *Case of Minister of Health and Others v. Treatment Action Campaign and Others (No. 2)* [2002-07-05]. Judgement of the Constitutional Court of South Africa, 2002, CCT 8/02, para 19, read with paras 71 and 80.

⁶⁴ *Case of Ngomane and Others v. City of Johannesburg Metropolitan Municipality and Another* [2019-04-03]. Judgement of the Supreme Court of Appeal of South Africa, 2019, 734/2017.

ruled that the City of Johannesburg could have used other appropriate remedies at its disposal to assist in the applicant's desperate circumstances in an effort not to deter his human dignity. The conduct of the City of Johannesburg was unconstitutional. Equally, in Mr. Qolani case,⁶⁵ the Court directed the City of Cape Town to return all building materials seized by the Anti-Land Invasion Unit (ALIU) between the period of 1 May 2020 till the 25 August 2020 which was the date when the order was granted. Article 22 of the Universal Declaration echoes:

“Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”⁶⁶

In an *orbiter dictum* Zondo J (as he then was)⁶⁷ repeat this principle when he wrote a dissenting judgment in the case of *Malan v. City of Cape Town*:

“Having a home is very important to the dignity of any person.”⁶⁸

The State has that compelling duty to take rational decision and provide reasonable steps to allow the lessee to correct a breach in lease agreement before applying for an eviction order. Similarly, Constitution⁶⁹ approved that socio-economic rights can be protected by courts even though they may not fully be conditional on legislation. In the case of *Government of the Republic of South Africa and Others v. Grootboom and Others* (hereinafter referred to as the “Grootboom”),⁷⁰ the Court elucidated specifically that for the state to be reasonable, it must be directed at protecting applicant's human dignity:

⁶⁵ Naked Man Eviction Case: Officers Cleared of Misconduct Charges, Court Hears. In: *News24* [online]. 2021-10-13 [cit. 2024-02-29]. Available at: <https://www.news24.com/news24/southafrica/news/naked-man-eviction-case-officers-cleared-of-misconduct-charges-court-hears-20211013>.

⁶⁶ *Universal Declaration of Human Rights* [1948-12-10].

⁶⁷ *Case of Malan v. City of Cape Town* [2014-09-18]. Judgement of the Constitutional Court of South Africa, 2014, CCT 143/13.

⁶⁸ *Case of Malan v. City of Cape Town* [2014-09-18]. Judgement of the Constitutional Court of South Africa, 2014, CCT 143/13, para 127.

⁶⁹ Rights include access to land (section 25 of the Constitution), housing (section 26), health care, food, water, social security (section 27) and education (section 29).

⁷⁰ *Case of Government of the Republic of South Africa and Others v. Grootboom and Others* [2000-10-04]. Judgement of the Constitutional Court of South Africa, 2000, CCT 11/00.

“It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.”⁷¹

The above jurisprudential onslaught notwithstanding, the philosophical driver underpinning the right to life and dignity in South Africa remains the principle of *Ubuntu* which is translated to mean “I am what I am because of who we all are”, it simply implies humanity to others. *Ubuntu* was expressly referred to in the 1993 Interim Constitution but not in the 1996 Constitution. However, *Ubuntu* is implied in the 1996 Constitution by its frequent reference to human dignity and forms part of the emerging South African and African jurisprudence.

Conclusions

In review of its efforts, this paper highlighted the drive by the judicial system in South Africa to realise the fundamental ambition of the Constitution of 1996 by advancing the non-derogable rights to life and human dignity post-apartheid. While judiciary’s effort has registered its own controversy and its stride is a work in progress and is still going to be for time, the totality of its ambition in consonance with other branches of government is to help heal the wounds of more than three centuries of human indignity of the African majority from colonialism, apartheid, and serious economic and social dispossession.

Violations of the right to life and human dignity poses a danger to the very Constitution and the rule of law we ought to respect and protect in post-apartheid South Africa. The philosophy that underpins the right to life and dignity in South Africa is rooted in the deeper understanding that human dignity cannot be distinguished from human existence and that

⁷¹ *Case of Government of the Republic of South Africa and Others v. Grootboom and Others* [2000-10-04]. Judgement of the Constitutional Court of South Africa, 2000, CCT 11/00, para 83.

such inalienable right rest on the soul of every mortal regardless of their race, culture, and national origin (*Ubuntu*).

The landmark cases discussed above from *Carmichele*, *National Coalition for Gay and Lesbian Equality*, *Makwanyane*, *Treatment Action Campaign to Grootboom* and others cited in this paper, it is evident that the judiciary has helped situate the right to life and human dignity at the center of human rights jurisprudence in South Africa as the struggle continue to realise most of the rights encapsulated in the Bill of Rights steeped in the African philosophy of *Ubuntu*.

References

ACKERMANN, L. W. H. The Legal Nature of the South African Constitutional Revolution. *New Zealand Law Review*. 2004, no. 4, pp. 633-679. ISSN 1173-5864.

Aliens Control Act No. 96 [1991].

Case of Carmichele v. Minister of Safety and Security [2001-08-16]. Judgement of the Constitutional Court of South Africa, 2001, CCT 48/00.

Case of Dawood and Another v. Minister of Home Affairs and Others; Shalabi and Another v. Minister of Home Affairs and Others; Thomas and Another v. Minister of Home Affairs and Others [2000-06-07]. Judgement of the Constitutional Court of South Africa, 2000, CCT 35/99.

Case of Ex Parte Minister of Safety and Security and Others: In Re S v. Walters and Another [2002-05-21]. Judgement of the Constitutional Court of South Africa, 2002, CCT 28/01.

Case of Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others [1995-12-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 5/95.

Case of Freedom of Religion South Africa v. Minister of Justice and Constitutional Development and Others [2019-09-18]. Judgement of the Constitutional Court of South Africa, 2019, CCT 320/17.

Case of Furman v. Georgia [1972-06-29]. Opinion of the Supreme Court of the United States, 1972, 408 U.S. 238.

Case of Government of the Republic of South Africa and Others v. Grootboom and Others [2000-10-04]. Judgement of the Constitutional Court of South Africa, 2000, CCT 11/00.

- Case of Harksen v. Lane NO and Others* [1997-10-07]. Judgement of the Constitutional Court of South Africa, 1997, CCT 9/97.
- Case of Malan v. City of Cape Town* [2014-09-18]. Judgement of the Constitutional Court of South Africa, 2014, CCT 143/13.
- Case of MEC for Education: KwaZulu-Natal and Others v. Pillay* [2007-10-05]. Judgement of the Constitutional Court of South Africa, 2007, CCT 51/06.
- Case of Minister of Health and Others v. Treatment Action Campaign and Others (No. 2)* [2002-07-05]. Judgement of the Constitutional Court of South Africa, 2002, CCT 8/02.
- Case of National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* [1998-10-09]. Judgement of the Constitutional Court of South Africa, 1998, CCT 11/98.
- Case of Ngomane and Others v. City of Johannesburg Metropolitan Municipality and Another* [2019-04-03]. Judgement of the Supreme Court of Appeal of South Africa, 2019, 734/2017.
- Case of Olmstead v. United States* [1928-06-04]. Opinion of the Supreme Court of the United States, 1928, 277 U.S. 438.
- Case of President of the Republic of South Africa and Another v. Hugo* [1997-04-18]. Judgement of the Constitutional Court of South Africa, 1997, CCT 11/96.
- Case of Rail Commuters Action Group and Others v. Transnet Ltd t/a Metrorail and Others* [2004-11-26]. Judgement of the Constitutional Court of South Africa, 2004, CCT 56/03.
- Case of S v. Jordan and Others* [2002-10-09]. Judgement of the Constitutional Court of South Africa, 2002, CCT 31/01.
- Case of S v. Lawrence* [1997-10-06]. Judgement of the Constitutional Court of South Africa, 1997, CCT 38/96.
- Case of S v. Makwanyane and Another* [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94.
- Case of Sivuka & 328 Others v. Ramaphosa and Others* [2022-06-30]. Judgement of the High Court of South Africa, 2022, 36879/2015.
- CHASKALSON, A. The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order. *South African Jour-*

nal on Human Rights [online]. 2000, vol. 16, no. 2, pp. 193-205 [cit. 2024-02-29]. ISSN 1996-2126. Available at: <https://doi.org/10.1080/02587203.2000.11827594>.

Companies Act No. 61 [1973].

Constitution of the Republic of South Africa Act No. 108 [1996].

FLETCHER, G. P. Human Dignity as a Constitutional Value. *University of Western Ontario Law Review*. 1984, vol. 22, no. 2, pp. 171-182. ISSN 0703-900X.

FRANKEL, Ph. H. *An Ordinary Atrocity: Sharpeville and Its Massacre*. 1st ed. New Haven: Yale University Press, 2001. 263 p. ISBN 0-300-09178-8.

Gatherings Act No. 205 [1993].

Insolvency Act No. 24 [1936].

Interim Constitution of the Republic of South Africa Act No. 200 [1993].

KLAAREN, J. The Constitutionalist Concept of Justice L Ackermann: Evolution by Revolution. In: N. BOHLER-MULLER, M. COSSER and G. PIENAAR, eds. *Making the Road by Walking: The Evolution of the South African Constitution* [online]. 1st ed. Pretoria: Pretoria University Law Press (PULP), 2018, pp. 27-43 [cit. 2024-02-29]. ISBN 978-1-920538-75-0. Available at: https://www.pulp.up.ac.za/images/pulp/books/legal_dialogues/making_the_road_by_walking/Chapter%20%20Making%20the%20Road.pdf.

Legislative and Other Mandate. In: *The South African Judiciary* [online]. 2024 [cit. 2024-02-29]. Available at: <https://www.judiciary.org.za/index.php/ocj/legislative-and-other-mandate>.

Naked Man Eviction Case: Officers Cleared of Misconduct Charges, Court Hears. In: *News24* [online]. 2021-10-13 [cit. 2024-02-29]. Available at: <https://www.news24.com/news24/southafrica/news/naked-man-eviction-case-officers-cleared-of-misconduct-charges-court-hears-20211013>.

Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996) [online]. 1st ed. Johannesburg: South African Human Rights Commission, 2006. 203 p. [cit. 2024-02-29]. ISBN 0-620-36364-9. Available at: https://www.sahrc.org.za/home/21/files/Reports/Reflection%20of%20democracy%20and%20human%20rights_10%20year%20review_%20200.pdf.

South African Police Service Act No. 68 [1995].


Submission by CASAC to the Marikana Commission of Inquiry: The Role of the South African Police Service in the Marikana Massacre on 16 August 2012 [online]. 1st ed. Cape Town: Council for the Advancement of the South African Constitution, 2013. 36 p. [cit. 2024-02-29]. Available at: <http://www.casac.org.za/wp-content/uploads/2016/11/CASAC-submission-to-Marikana-Commission.pdf>.

Universal Declaration of Human Rights [1948-12-10].

WALDRON, J. The Dignity of Groups. *Acta Juridica*. 2008, vol. 2008, no. 1, pp. 66-90. ISSN 0065-1346.


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