

Human Dignity Principle

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1 The constitutional approach to human dignity

“Respect for dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common dignity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution...The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognising a right to dignity is the acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched.”¹

South Africa’s well-known transition from an apartheid state to one based on respect for the rule of law was largely accomplished through the introduction of a new constitution. Following a short period during which an interim Constitution² was in place, the “final” Constitution of the Republic of South Africa, 1996, promised to recognise the injustices of the past, to heal those divisions and to establish a society in which government would be based on the will of the people and every citizen would be equally protected by law. The quality of life of all citizens would be improved and the potential of each person freed in a united, democratic South Africa.³

¹ *S v Makwanyane and another* 1995 (6) BCLR 665 (CC) par 328-329.

² Act 200 of 1993.

³ Preamble to the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

The Constitution is the supreme law of the country and law or conduct inconsistent with it is invalid.⁴ It is built on a set of foundational values, starting with human dignity, and including the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the constitution and the rule of law.⁵

The Constitution includes a Bill of Rights, which is considered to be the cornerstone of the country's democracy, and which affirms the democratic values of "human dignity, equality and freedom".⁶ In addition to serving as one of the core, underlying constitutional values, human dignity is protected by section 10 of the Constitution, which provides that "Everyone has inherent dignity and the right to have their dignity respected and protected."

The concept of "dignity" accordingly needs to be understood, in the South African context, from two perspectives: as one of the foundational values, contributing to the interpretation of other values, and rights, and informing an understanding of the entire constitutional scheme, on the one hand, and as an independent, self-standing right, on the other.⁷ While the general importance of human dignity has been emphasized time and time again, the meaning of the notion has proven to be difficult to pinpoint, even for the Constitutional Court, which has generally shied away from defining the concept with any level of precision.

2 The content of "human dignity"

"The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a

⁴ Section 2 of the Constitution.

⁵ Section 1 of the Constitution.

⁶ Section 7 of the Constitution,

⁷ See Cheadle, MH *et al South African constitutional law: The Bill of Rights* (2005) ch 5.

value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.”⁸

As indicated above, human dignity is considered to be a broad notion, difficult to define with any level of certainty or precision. It is closely linked with the treatment of fellow human beings with basic respect, implying respect for autonomy and free choice, recognition of human equality and protection against abuse.⁹ It has been argued that “The natural-law concept of inalienable rights of human beings finds a constitutional anchor in the recognition that the right to dignity is not a privilege granted by the state. It is a foundational value on which the new Republic is founded...An endeavour to repeal the right to dignity (or any of the rights based on it) would strike at the foundations of the Constitution, let alone the Bill of Rights.”¹⁰

The notion is also introduced in the section of the Constitution dealing with the limitation of rights, which provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and taking into account various factors.¹¹ Courts and tribunals are further directed to promote

⁸ *Dawood and another v Minister of Home Affairs and others* 2000 (3) SA 936 (CC) par 35.

⁹ See *Ferreira v Levin NO and others and Vryenhoek and others v Powell NO and others* 1996 (1) BCLR 1 (CC) at para 149.

¹⁰ *Cheadle et al* 5.2.1.

¹¹ Section 36 of the Constitution.

the values that underlie an open and democratic society based on human dignity, equality and freedom when interpreting the Bill of Rights.¹²

In terms of the Roman-Dutch-based common law of the country, dignity is synonymous with self-esteem and insulting or offensive conduct would be considered to impair dignity.¹³ Dignity has been included as an issue in a variety of cases, involving, for example, political rights, equality, punishment, privacy, family life and defamation, and is arguably best understood through a brief survey of the manner in which the concept has been relied upon in cases involving these other rights.

3 Human dignity and its interpretation in the constitutional jurisprudence

The Constitutional Court of South Africa has allowed itself to be guided by a developing understanding of the notion of dignity, as a core value and fundamental right, when determining the scope and breadth of rights in the Bill of Rights.

In *S v Makwanyane*, the Constitutional Court held that the death penalty was unconstitutional, with many of the concurring judgments linking the right to dignity to the right to life and informing the understanding of the constitutional prohibition against cruel, inhuman or degrading punishment.

Similarly, in *S v Williams and others*¹⁴ the highest court ruled that corporal punishment in the form of whipping juvenile males violated the right to be free from cruel, inhuman or degrading punishment and that this diminished the dignity of both the victim and the person administering the punishment.

¹² Section 39(1)(a) of the Constitution.

¹³ See *Du Toit and another v Minister for Welfare and Population Development and others* 2002 (10) BCLR 1006 (CC). In *Gardener*, it was held that “the right to respect for and protection of human dignity in section 10 of the Constitution is one that also appears in international human rights instruments and seems to encompass something broader than the Roman-Dutch concept of dignitas...the right to someone’s good name or reputation has been interpreted in German law as forming part of the right to human dignity...I can see no reason why the same approach should not be adopted in South Africa: *Gardener v Whitaker* 1994 (5) BCLR 19 (E). Also see *Khumalo and others v Holomisa* 2002 (8) BCLR 771 (CC) par 27.

¹⁴ 1995 (7) BCLR 861 (CC).

The Constitutional Court has also linked dignity to the entitlement to vote and public participation, finding that “the vote of each and every citizen is a badge of dignity”¹⁵ and that civic dignity is enhanced when the public participates in consultative processes.¹⁶

In *Khosa and others v Minister of Social Development and another*¹⁷ the denial of social benefits to non-citizen permanent residents was found to violate the equality clause, with the value of dignity employed to give substantive content to the equality right.¹⁸

Dignity has also played a key role in a number of unfair discrimination cases, with the elimination of unfairly discriminatory conduct being linked to the desire to establish a society in which human beings are accorded equal dignity and respect irrespective of their personal characteristics.¹⁹ In *Hoffmann*, for example, a differentiation based on HIV status was held to be unfairly discriminatory given the reinforcement of a social stigma (based on HIV-positive status) impairing the dignity of the individual concerned.²⁰

In *Dawood*, the right to dignity was found to protect the rights of persons to “enter into a marriage relationship” and closely connected to family life:²¹

“The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity.”

¹⁵ *August and another v Electoral Commission and others* 1999 (3) SA 1 (CC) par 17.

¹⁶ *Doctors for Life v Minister of Health* 2006 (6) SA 416 par 115.

¹⁷ 2004 (6) BCLR 569 (CC).

¹⁸ See *Cheadle et al* 5.3.4. The authors argue that the court ascribed the protection of a collective interest to the value of dignity, with distributive consequences for the State.

¹⁹ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par 41.

²⁰ *Hoffmann v South African Airways* 2000 (11) BCLR 1235 (CC).

²¹ *Dawood and another; Shalabi and another; Thomas and another v Minister of Home Affairs and others* 2000 (8) BCLR 83 par 37. In *Dawood*, the subject of the challenge was a statutory provision requiring foreign spouses of South African citizens to possess valid temporary residence permits before applying for an immigration permit from within South Africa. The result was that foreign spouses could not continue to live with their families while awaiting the outcome of their applications, effectively resulting in the separation of family members and violating the right to human dignity.

How dignity should be balanced with others rights, such as freedom of expression, is contested terrain. Understanding dignity to encompass reputation is important for defamation cases, and results in the need for a careful balance between two constitutional rights. In some instances, the courts have held that freedom of expression should prevail over the right to dignity, depending upon the facts of the matter, while being careful to note that freedom of speech will not always prevail over the human dignity right.²²

A recent example provides a good illustration of the way in which the dignity concept is considered to be pivotal in giving effect to the realisation of a different fundamental right, without the court necessarily relying directly on section 10 of the Constitution in coming to its conclusion. In *Equal Education and others v Minister of Basic Education and others*²³ the applicants sought an urgent order declaring various state functionaries to be acting in breach of their constitutional and statutory duty to ensure that the National School Nutrition Programme (NSNP) would provide a daily meal to all qualifying learners whether or not they were attending school, during the Covid-19 pandemic.

The High Court focused its judgment on the duties of the state in relation to provision of basic nutrition to school children (section 28 of the Constitution) and confirmed that the state remained responsible to provide families with other socio-economic rights to enable them to provide for their children.²⁴ In finding that the state had contravened its constitutional obligations, the court said the following:

“When interpreting provisions in the Bill of Rights this Court should “promote the values that underlie an open and democratic society based on human dignity, equality and freedom.” If there was not duty on the Department to provide nutrition when the parents cannot provide the children with basic nutrition, the children face starvation. A more undignified scenario than starvation of a child is unimaginable. The morality of a society is gauged by how it treats its children. Interpreting the Bill of Rights promoting human dignity, equality and freedom can never allow for the hunger of a child and a constitutional compliant interpretation is simply

²² *Mandela v Falati* 1995 (1) SA 251 (W).

²³ Case 22588 / 2020 (High Court: Gauteng Division)

²⁴ See *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) par 17.

that the Department must in a secondary role roll out the NSNP, as it has been doing.”

4 References

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