CHAPTER 9: THE RIGHTS TO DIGNITY AND LIFE

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1. INTRODUCTION

In *S v Makwanyane*[1], O'Regan J stated that the right to human dignity and the right to life are 'entwined'.[2] One cannot experience other rights if one does not have the right to life – thus, it is the predecessor to all other rights. However, as O'Regan J acknowledged, the right to life as enshrined in the Constitution is the right to a human life and not the right to life as 'mere organic matter'. Therefore, the right to dignity largely informs the content of the right to life. Human dignity has been referred to as the 'cornerstone'[3] of our Constitution, and it is found therein as both a right and a value. These two critical rights have given rise to many legal questions regarding capital punishment, whether the right to life includes the right to die and whether a foetus has the right to life. This chapter will elaborate further on the distinction between dignity as a right versus dignity as a value, following which it will be compared with the notion of ubuntu. Lastly, the current South African position on the aforementioned legal questions will be stated.

2. DIGNITY AS A RIGHT VERSUS DIGNITY AS A VALUE

The right to human dignity is enshrined in section 10 of the Constitution, where it is stated that, 'everyone has inherent dignity and the right to have their dignity respected and protected'. Critically, the fact that human dignity is inherent in human beings means that one does not have less dignity by virtue of one being considered an outcast in society. For example, criminals maintain their inherent dignity despite the fact that they have caused society some harm.

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[1] *S v Makwanyane and Another* 1995 (3) SA 391.

[2] Ibid at para 327.

[3] Ibid at para 330.

Human dignity as a *value* is found in section 1 of the Constitution, where it is stated:

'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms . . . '

Dignity, therefore, is one of the values that must inform our entire legal order.[4] The fact that the Constitution refers to dignity as being inherent is evidence that it is not a right granted by the state to its citizens, but rather something that attaches to a person by virtue of being human.[5] In this sense, the Constitution aligns itself firmly with international human rights discourse and demands transformation in our society from an oppressive past to a future where the inherent worth of all people is upheld and celebrated.[6]

In most constitutional jurisprudence, dignity has been deemed a value because there has been a more specific right which was directly relied on. Therefore, dignity as a value is often attached to a constitutional claim of infringement of a more direct right. For example, one could bring a claim for the breach of the right to equality (a right which has been discussed at length by the courts and for which tests have been developed to assess such an infringement),[7] and one could also bring a concurrent claim for the breach of dignity. In this case, dignity would act as a value to inform the interpretation of the right to equality. Often when competing interests are concerned, a court will be asked to honour the inherent dignity of all parties in finding a suitable solution.

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[4] Arthur Chaskalson 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *South African Journal on Human Rights* 193 at 196.

[5] Ibid.

[6] Ibid at 199.

[7] *Harksen v Lane NO and Others* 1998 (1) SA 300.

The Constitution endorses a substantive conception of equality; that is the recognition that whilst the Bill of Rights gives everyone the right to equality, South Africa's society is vastly unequal. Therefore, unequal measures which advance certain sections of society to the exclusion of others must be taken to alleviate this disparity in order to eventually achieve formal equality. Substantive equality is thus justified and informed by human dignity through the acknowledgment that in order to truly respect the dignity of those living in desperate situations as a result of our oppressive past, they need to be placed on an equal footing to everyone else in society.[8]

The Constitutional Court in National Coalition[9] endorsed the connection between dignity and equality in finding that the criminal offense of sodomy not only unfairly discriminated against gay men but also impaired their dignity, as it stigmatised them as criminals 'simply because they seek to engage in sexual conduct which is part of their experience of being human'.[10] In the landmark judgment, the court found that the criminalisation of sodomy infringed on gay men's right to equality as it unfairly discriminated against them on the listed ground of sexual orientation. However, the court stressed that the right to dignity was a 'cornerstone of our Constitution'[11] which played a role in equality analysis. The criminalisation of sodomy effectively stripped gay men of 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. Therefore, the court found the crime not only was a breach of equality but also as a breach of dignity and privacy. In his separate but concurring judgment, Sachs J poignantly describes the connection between equality and dignity:

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[8] Chaskalson op cit. note 4 at 202-204.

[9] *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 (1) SA 6

[10] Ibid at para 28.

[11] Ibid.

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 who and what they are is profoundly disrespectful of the human personality and violative of equality'.[12]

(a) Case Summary: Dawood[13] and the Reliance on Dignity as a Right

Background

This was an application to confirm an order of constitutional invalidity of section 25(9)(b) of the Aliens Control Act 96 of 1991 on the ground that it infringed the applicants' right to dignity. The Act provided that an immigration permit would only be granted to the spouse of a South African citizen who was in the country at the time only if that spouse was in possession of a valid temporary residence permit. If the spouse applying for the immigration permit did not have the required temporary residence permit, then said spouse would have to leave South Africa and apply from another country. Section 25(9) of the Aliens Control Act previously read as follows:

> (a) A regional committee may, on an application mentioned in s (1) made by an alien who has been permitted under this Act to temporarily sojourn in the Republic in terms of a permit referred to in s 26(1)(b), authorise the issue to him or her of a permit in terms of this section mutatis mutandis as if he or she were outside the Republic, and upon the issue of that permit he or she may reside permanently in the Republic.
>
> (b) Notwithstanding the provisions of para (a), a regional committee may authorise a permit in terms of this section to any person who has been permitted under s 26(1) to temporarily sojourn in the Republic, if such person

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[12] Ibid at para 129.

[13] *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 (3) SA 936 (CC).

is a person referred to in
ss 4(b) or 5.

Facts

The court heard three cases together, all of which concerned the constitutionality of section 25(9)(b) of the Act. Further, the applicants took issue with a non-refundable fee of R10 020 which had to be paid when lodging immigration applications. In each case the applicants were married − one spouse being a permanent resident of South Africa whilst the other spouse was attempting to obtain an immigration permit.

Court a quo

The High Court declared the impugned provision of the Act to be inconsistent and invalid on the ground that it infringed the right to dignity.

Applicants' argument

The applicants argued that the Act had the effect of denying spouses the right to cohabit, which in turn infringed the right to dignity. The reason that dignity as a right was relied on directly in this case was because the Constitution did not contain an express right to family life or cohabitation. It was stated that international human rights law recognises the importance of protecting the family structure and that marriage is a vitally important social institution. Furthermore, with marriage comes reciprocal duties of support that spouses owe each other, which would be near impossible to satisfy were they separated.

Discussion of the court

O'Regan J, declared that human dignity was a 'fundamental value of our Constitution'[14] and that it 'informs constitutional adjudication and interpretation at a

[14] Ibid at para 34.

range of levels'.[15] Furthermore, dignity was not only a constitutional value but is also a justiciable right as enshrined in section 10. The court recognised that in most cases there was a more specific right wherein the primary breach was found, but in this case there was no such more specific right. O'Regan stated that any legislation that impaired the ability for spouses to fulfil their matrimonial obligations to each other would be an infringement of their dignity.[16] Cohabitation was widely viewed as being essential to a marriage relationship, thus, the prohibition of cohabitation constituted an infringement of dignity.

The court went on to analyse the impugned provisions. Section 25(9) of the Act had the effect of prohibiting a person from being in South Africa at the time of their application being granted. Section 25(9)(b) made an exception for spouses, dependent children and destitute or aged family members and allowed them to remain in the country pending the outcome of the application. However, the overarching effect of the impugned provisions of the Act when read together was that a foreign spouse may stay in South Africa pending the outcome of their immigration application, provided they have a valid temporary resident permit. Immigration permits take a long time to be granted, which meant that the applicants' temporary residence permits were often expired by the time their immigration applications were processed. Furthermore, there was a broad discretion given to immigration officials to deny immigration applications, and this discretion was often abused. Given these factors, the situation often arose where the non-South African spouse would be forced to leave and the South African spouse would have to choose between following their spouse or staying in the country alone. Given the extreme levels of poverty in the country, the prior option would be impossible for many spouses, meaning that the marital duty of cohabitation was severely restricted. Therefore, the right to dignity of the spouses was infringed.

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[15] Ibid at para 35.

[16] Ibid at 37.

Limitations analysis

Having found that the impugned provisions of the Act infringed the section 10 right to dignity, the court needed to determine whether such a limitation was justified.

Scope of the limitation

The court noted public officials were given a broad discretion in allowing them to refuse to grant a temporary resident permit, as the Act did not stipulate factors that needed to be taken into account when making such a decision. Therefore, the limitation of section 10 was in terms of a law of general application but the Act itself was vague on the circumstances in which it would be constitutionally permissible to refuse to grant the permit. Furthermore, the court acknowledged that public officials did not have legal training and therefore could not be expected to exercise their discretion in a manner consistent with the Bill of Rights. The court stated that there could be many instances where spouses' rights were unjustifiably infringed given the lack of legislative clarity. Therefore, the scope of the limitation was broad.

Purpose and effect of section 25(9)(b)

The court recognised that the purpose of the Act was an important one – to control immigration into the country. Furthermore, the exception given to certain people was valid as it protected the family unit. However, the exception was wholly dependent on the extensive and unguided discretion given to busy administrative officials, which undermined the protection given by the exception. The court also found there to be no legitimate purpose for the lack of guidance given to officials. Together with the wide discretion conferred, the lack of guidance provided to decision-makers meant that the purpose of section 25(9)(b) was undermined.

Held

The failure to specify factors to be taken into consideration when granting a temporary resident permit introduced arbitrariness into the process which was inconsistent with the protection given to marriage and family. The effect of the Act resulted in an unjustifiable infringement of the right to dignity.

Important parts of the order

1. Section 25(9)(b) read with section 26(3) and (6) of the Aliens Control Act 96 of 1991 was declared to be inconsistent with the Constitution and therefore invalid;
2. The declaration of invalidity was suspended for 24 months to enable Parliament to correct the inconsistency;
3. During this time period, Home Affairs officials were directed not to refuse to extend temporary residence permits to similarly placed applicants, unless there was good cause shown.

3. THE INCREASING PREVALENCE OF UBUNTU IN LITIGATION

Ubuntu is an African moral and social conception in which communitarian values are emphasised over individual rights, but not to their exclusion. Individual rights continue to hold great importance in communities practicing ubuntu, but group solidarity is of utmost importance;[17] 'Umuntu ngumuntu ngabantu' – a human being is a human being because of other human beings.[18] This phrase roughly describes the core concept of ubuntu – that human beings are interconnected and rooted in community life.[19] The notion of ubuntu influences individuals' perception of themselves and the place that they hold in the world. Above all, ubuntu teaches values which have been said to be critical to a developing democracy such as South Africa[20] – values such as 'humaneness, personhood and morality,[21]', 'altruism, kindness, generosity, compassion, benevolence, courtesy and respect and concern

[17] Justice Yvonne Mokgoro 'Ubuntu and the Law in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 15 at 16.

[18] Moeketsi Letsekga 'In Defence of Ubuntu' (2012) 1 *Studies in Philosophy and Education* 31 at 48.

[19] Ibid.

[20] Ibid at 47.

[21] Ibid at 48.

for others,'.[22] Through these values, it is argued that ubuntu can shape South African democracy into one embodying deep respect for one's fellow citizen, thus promoting the rights culture espoused in the Constitution.[23] Letseka draws a connection between the values enshrined in the Constitution and those that are taught by ubuntu. One of the links he finds is the shared value of human dignity, and he quotes Mokgoro as saying 'life and dignity are like the two sides of the same coin. The concept of ubuntu embodies them both'.[24] Human dignity was found as both a right and a value in the Constitution and is also one of the foundational elements of ubuntu. Therefore, Letseka proposes that ubuntu has strong transformational power to help foster the united society envisaged in the Constitution.[25]

Ubuntu has increasingly made its way into jurisprudential discourse, with courts often citing it as their justification for a value judgement. The case of Port Elizabeth Municipality[26] was one such instance, involving the eviction of about 68 people from privately owned land. The court stated that in the past the solution to this problem would have been severe – the squatters would have been evicted and could have faced prosecution.[27] However, the new constitutional dispensation acknowledged that the dire issue of homelessness in our country was a remnant of the past, where non-white people were forced from their homes and thrown into poverty.[28] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) sought to respond to this history by ensuring that evictions take place in a manner that is fair and upholds the inherent dignity of all South Africans.

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[22] Ibid.

[23] Ibid.

[24] Ibid at 55.

[25] Ibid.

[26] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

[27] Ibid at para 8.

[28] Ibid at para 10.

The court was required to strike a balance between the strictly individualistic property rights of the landowner protected in section 25 of the Constitution, and the right to be treated with dignity in the eviction process as proclaimed in both the Constitution and PIE. In doing so, the court expressly mentioned ubuntu and stated that it 'suffuses the whole of the constitutional order. It combines individual rights with a communitarian philosophy.'[29] Thus the Constitutional Court relied on the communitarian values of ubuntu in recognising that sometimes individual rights must be limited for the advancement of the greater good.

Ubuntu played a decisive role in the Makwanyane judgments, which declared the death penalty unconstitutional. On multiple occasions the court made reference to the fact that the preamble to the interim Constitution expressly mentioned, 'a need for ubuntu but not for victimisation'.[30] In his separate but concurring judgment Langa J stated that ubuntu placed great respect on life and dignity – 'the life of another person is at least as valuable as one's own'.[31] Madala J spoke to the tendency in communities practising ubuntu to favour reconciliation and rehabilitation over retribution. He then questioned whether the irrevocable nature of the death penalty accorded with the values of ubuntu, and declared that it did not.[32] Makwanyane is one of the most important, if not the most important, constitutional judgments to date. The fact that such great emphasis was placed on the prescripts of ubuntu is evidence that it holds a special place in shaping South Africa's democracy and constitutional litigation.

4. THE RIGHT TO LIFE

Section 11 of the Constitution is plainly worded: 'Everyone has the right to life'. However, the content of this right was hotly contested in the context of the death

[29] Ibid at para 35.

[30] *Makwanyane* supra note 1 at para 130.

[31] Ibid at para 225.

[32] Ibid at para 260.

penalty. In the new constitutional dispensation, did capital punishment pass constitutional muster? The landmark judgment of *S v Makwanyane,* discussed above*,* answered this question in the negative. The death penalty unjustifiably limited the rights to life, dignity and the prohibition against cruel, inhuman and degrading treatment.

(a) Case Summary: Makwanyane and The Constitutionality of The Death Penalty

Facts

In the court *a quo* the two accused were convicted of murder and sentenced to death. Section 277(1)(a) of the Criminal Procedure Act 51 of 1977 empowered a court to hand down a sentence of death for the crime of murder. The issue raised was whether the death penalty was consistent with the interim Constitution.

Arguments by counsel for the accused

The arguments advanced by the accused was that the death sentence was:

1. An infringement of human dignity;
2. Inconsistent with the right to life;
3. Unable to be corrected in the event of error.

Arguments by the Attorney General for the State

1. Capital punishment was recognised in many parts of the world, including South Africa;
2. The death penalty was a deterrent to violent crime;
3. Capital punishment was in line with the country's commitment to a retributory form of justice.

Starting points

The court began by acknowledging that the Constitution established a new order which was founded on human rights.[33] The judgment of Chaskalson P relied more heavily on the then section 11(2) prohibition against 'cruel, inhuman or degrading treatment or punishment', rather than on the right to life. He acknowledged that it was up to the court to give meaning to the definition of 'cruel, inhuman and degrading', and that a purposive interpretation of the text needed to be followed when doing so. A purposive approach to interpretation is one that gives expression to the underlying values of the Constitution.[34] This is mandated by section 35(1) of the Constitution which requires a court to interpret rights in the Bill of Rights in such a way as to 'promote the values which underlie an open and democratic society based on freedom and equality'.[35] Following such an approach, it was stated that section 11(2) must be interpreted in such a way that afforded people the full extent of its protection. Other rights that formed part of the context of the section 11(2) right were the right to life, the right to dignity and the right to equality.

The court was concerned about the implications of the doctrine of the separation of powers in this case. Some argued that the court was overstepping the mark, and that this matter was for Parliament to legislate on. However, the court ultimately found that the failure to deal specifically with the issue of capital punishment in the Constitution was intentional – the executive left it to the Constitutional Court to decide on the constitutionality of the death penalty.

Discussion of section 11(2) – cruel, inhuman or degrading punishment

The court fairly easily came to the conclusion that the death penalty was cruel, inhuman and degrading, largely because of its finality and irrevocability – it not only put an end to the right to life but to all other rights, executing a person's entire

[33] Ibid at para 9.

[34] Ibid, quoted from *S v Zuma and Two Others*.

[35] Ibid at para 321.

humanity.[36] Another consideration was the widely documented mental anguish suffered by the convicts whilst they awaited death. However, the court went on to state that the question was not whether capital punishment was cruel, inhuman and degrading but whether it was cruel, inhuman and degrading within the meaning of section 11(2) – that is, whether the Constitution prohibited it.[37] It was noted that international law did not prohibit the death sentence. However, in most unsuccessful international challenges to capital punishment the particular empowering constitution either qualified the right to life (by listing the death sentence as an exception) or expressly allowed for the penalty. In the South African case, the right to life was unqualified. Therefore, whilst examining foreign law was important, the ultimate decision had to be taken within the particular South African context.

The arbitrariness argument

It was argued that section 277 was inherently arbitrary because of the amount of chance involved in the process – only a small percentage of people accused of murder were sentenced to death, and of those many escaped the death sentence on appeal or by way of pardon.[38] Evidence showed that the majority of people sentenced to death were poor and black, whereas most of the judges sentencing them were middle-to-upper class and white.[39] Furthermore, most of murder accused were represented by *pro deo* counsel who were often young and inexperienced. This created a disparity by which rich, white accused, who were able to hire an expensive legal team, were far more successful in evading the death penalty. Therefore, the argument was that the death penalty was applied arbitrarily, which was an unconscionable outcome when such fundamental rights were affected.

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[36] Ibid at para 26.

[37] Ibid.

[38] Ibid at para 48.

[39] Ibid.

The court responded by saying that a certain degree of arbitrariness was present in every case and in every court system.[40] Further, there could never be perfect equality between prosecution and defence, and that was why appeal courts were so crucial in the justice system. However, the court insisted on the need for a lower tolerance for arbitrariness when it came to matters of life and death. Generally, human error can be rectified, but error in passing the death penalty was irrevocable.

Discussion of public opinion

It was argued for the state by the Attorney General that South African opinion should be taken into account when deciding whether capital punishment was cruel, inhuman and degrading.[41] The court was prepared to accept that South African society at the time most probably did not condemn the death penalty, but stated that the only relevant consideration was whether the Constitution allowed it. Whilst public opinion was not irrelevant, it was certainly not decisive, because if it were, there would be no need for courts. The new legal order required courts to protect the rights of all and the court could not make its decision based on popular opinion.

Cruel, inhuman and degrading punishment within the context of the Constitution

Taking into account all relevant South African considerations as well as a broad discussion of foreign law, the court came to the conclusion that the death penalty was a cruel, inhuman and degrading punishment in the context of section 11(2) of the Constitution. It noted that capital punishment, 'destroys life,'[42] and 'annihilates human dignity'.[43] Furthermore, the arbitrariness found within the process was irredeemable.

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[40] Ibid at para 54.

[41] Ibid at para 87.

[42] Ibid at para 95.

[43] *Ibid.*

Limitations analysis

Once a limitation of the section 11(2) right was found, the court had to determine whether such a limitation was justified in terms of section 33 of the interim Constitution – essentially an application of the principle of proportionality. One of the arguments put forward by the Attorney General was that the death penalty acted as a deterrent against crime, and the court accepted the vital importance of that objective. However, the court ultimately concluded that there was no evidence to show that the death penalty was in fact an effective deterrent, or that it was a more effective deterrent than life imprisonment. Poignantly, the court then suggested that 'more lives may be saved through the inculcation of a rights culture, than through the execution of murderers',[44] which was evidence of the penetration of the values of ubuntu into constitutional litigation. It was also stated that the goal of retribution should not be given excessive weight, and that South African society should be one that, 'wishes to prevent crime . . . [not] to kill criminals simply to get even with them'.[45] Furthermore, whilst crime prevention was another important factor for consideration, the court found that crime could be prevented through less restrictive means – such as life imprisonment, which would ensure that the criminal could not commit crime again.

Held

'The rights to life and dignity are the most important of all human rights, and the source of all other personal rights . . . '.[46] The court held that the requirements of the limitations analysis were not met, and that section 277(1) of the Criminal Procedure Act was inconsistent with section 11(2) of the Constitution and, therefore, invalid.

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[44] Ibid at para 125.

[45] Ibid at para 131.

[46] Ibid at para 144.

Separate but concurring judgment of O'Regan J

O'Regan J agreed with Chaskalson J that the death penalty constituted a violation of section 11(2) which could not be saved by the limitations clause, but held further that the punishment also violated the rights to life and dignity.[47] O'Regan J referred to the right to life as being 'antecedent'[48] to all other rights, as without it no other rights could be exercised. She proceeded to describe her interpretation of the content of the right to life:

'It is not life as mere organic matter that the Constitution cherishes, but the right to a human life: the right to life 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 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.'[49]

The importance of dignity to our new constitutional order is again emphasised in this judgment – O'Regan J states that respect for dignity is especially important given South Africa's history of a 'denial of common humanity'.[50] She describes the nature of dignity as being inherent in all human beings, thus rejecting outright the argument that criminals relinquish their right to be treated with dignity upon committing the crime.[51]

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[47] Ibid at para 318.

[48] Ibid at para 326.

[49] Ibid.

[50] Ibid at para 329.

[51] Ibid at para 331.

O'Regan concluded that the death penalty was a breach of the rights to life and dignity. Not only did she describe the process in gruesome detail and found it to be a breach of dignity but also argued that dignity was infringed during the time spent on death row awaiting execution.[52] After undertaking the limitations analysis, O'Regan J found the death penalty to be an unjustifiable infringement of the rights contained in sections 11(2), 9 and 10.

Separate but concurring judgment of Sachs J

Whilst in agreement with the majority judgment, Sachs suggested that the starting point in this case should rather have been on the right to life, and not on the prohibition against cruel, inhuman and degrading punishment. 'This court is unlikely to get another case which is emotionally and philosophically more elusive yet textually more direct'.[53] Sachs's simple yet compelling argument was that the wording of the Constitution was clear – everyone had the right to life, meaning that capital punishment was automatically prohibited.[54] He also steadfastly held that the limitations clause did not apply to this case, because 'section 33 permitted limitation on rights, not their extinction'.[55] Therefore, there could be no justification for the breach of the right to life and the death penalty was thus unconstitutional.

[52] Ibid at para 336.

[53] Ibid at para 350.

[54] Ibid.

[55] Ibid at para 354.

5. THE RIGHT TO DIE?

One question that has deeply concerned our courts is whether the right to life includes the right to die, or rather, to choose the time of one's death in particular circumstances. There are three main cases in this regard – *S v Grotjohn*[56], *Clarke v Hurst*[57] and *Stransham-Ford*.[58]

(a) Case summary: Grotjohn 1970

Issue

Whether helping someone to commit suicide constitutes the crime of murder

Facts

- The deceased, Grotjohn's wife, was paralysed and depressed.
- They had an argument and Grotjohn assembled and loaded his gun, handed it to her and said: 'Then shoot yourself if you want because you're a burden.'
- She placed the gun between her feet and fired it, killing herself.
- The court noted that neither suicide nor attempted suicide is a crime in SA.
- It was argued on behalf of the accused that the act of the deceased was a 'voluntary and self-employed act' which broke the causal chain, enabling Grotjohn to escape liability.

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[56] *Ex Parte Die Minister van Justisie: In Re S v Grotjohn* 1970 (2) SA 355 (A).

[57] *Clarke v Hurst NO and Others* 1992 (4) SA 630 (D).

[58] *Minister of Justice and Correctional Services v Estate Late James Stransham-Ford and Others* 2015 (1) All SA 354 (SCA)

Held

- Whether the help or encouragement of another person in a suicide constitutes a crime will depend on the facts of the case;
- The mere fact that the suicide is voluntary and independent of the accused's actions does not necessarily justify an acquittal – to do this, the accused's actions would have to be entirely separate from the suicide and not the cause of the action;
- Appropriate verdicts could be murder, attempted murder or culpable homicide.

(b) Case summary: Clarke v Hurst 1992

Issue

Whether the decision by a family member to discontinue life-preserving measures of a patient in a persistent vegetative state with no hope of recovery constitutes a crime

Facts

- Clarke was in a persistent vegetative state and was kept alive via a feeding tube.
- Clarke's wife sought an order authorising her to discontinue his treatment, notwithstanding the fact that this would hasten his death.
- Clarke was a member of the SA Voluntary Euthanasia Society and had signed a document in which he asked not to be kept alive in the event of his being unable to recover from a disability.
- The court emphasised the *boni mores* of society, which would be influenced by the quality of Clarke's life.

Held

- Liability would depend on whether there was a duty not to discontinue life-sustaining procedures.
- Such a duty would not arise if the procedures had proved unsuccessful.

- The court allowed Mrs Clarke to discontinue Clarke's life-sustaining treatment, despite the fact that this would shorten his lifespan.

(c) Case summary: Stansham-Ford 2015

Issue

Whether it is permissible for patients to ask for assistance from medical practitioners to allow them to end their lives. There are two ways of doing this. The first is termed 'physician assisted suicide' (PAS) where the medical practitioner writes the patient a script for lethal drugs for the patient to take in her own time. The second is called 'voluntary euthanasia', or 'physician administered euthanasia' (PAE) which involves the medical practitioner administering lethal drugs to the patient, who is usually paralysed and cannot administer drugs to herself.

Facts

- Mr Stransham-Ford was dying of cancer and approached the court asking for an order allowing his medical practitioner to help him end his life either through PAS or PAE, with no criminal liability for the doctor.
- Stransham-Ford cited his right to dignity as the ground for which his assisted suicide should be granted. He wanted to be able to commit suicide, and die with dignity, before the cancer became too debilitating.
- The court *a quo* not only granted the order but also held that the outright prohibition of PAS and PAE was an unjustifiable limitation of the applicant's rights to human dignity and freedom to bodily and psychological integrity.
- The SCA acknowledged that neither suicide nor attempted suicide were crimes in South Africa. Nor was it a crime to refuse medical treatment that would prolong one's own life. The court also acknowledged that a doctor was lawfully allowed to stop life-sustaining treatment when a patient had no hope of recovery as a result of being in a persistent vegetative state. Lastly, the court noted that a medical practitioner did not commit a crime by prescribing palliative drugs for a

patient, despite knowing that such drugs would hasten the patient's death.

Held

- The appeal succeeded based on technical grounds:
    1. Stransham-Ford had died two hours before the court *a quo* passed judgment, meaning that there was no longer a cause of action and the court should not have made an order at all.
    2. The court a quo heard the matter on an urgent basis and, thus, made a hasty decision which did not examine all of the relevant law
    3. The court process did not comply with the Uniform Rules of Court

- This case was not a challenge to the legality of PAE in general; it was brought for the sole purpose of determining Mr Stransham-Ford's right to die. Thus, this case holds no binding precedent on the law pertaining to PAE.

Obiter comments

- As the law stands, the consent of the patient to PAE does not make the medical practitioner's conduct lawful – the doctor would still commit the crime of murder.
- Regarding the legality of PAS, the court said that this would have to be decided upon a case-by-case basis, and that the principles laid down in *Grotjohn* would have to be adapted to fit modern-day medical practice and the values enshrined in the Bill of Rights. The court said that when making such a decision, the starting point would have to be the right to life.

6. ABORTION AND THE RIGHT TO BODILY INTEGRITY

A particularly relevant debate worldwide is whether a foetus has the right to life, which would make abortion unconstitutional and illegal. In South Africa, abortion is lawful within the limits of the Choice on Termination of Pregnancy Act.[59] The 1998 case of *Christian Lawyers' Association*[60] unsuccessfully challenged the constitutionality of the Act on the ground that it violated the foetus's right to life. The counter-argument was that the prohibition of abortion violated a woman's right to bodily integrity, which included the right to make decisions concerning reproduction.[61] Ultimately, the court upheld the rights of women in striking down the constitutional challenge. Therefore, the current South African position is that the right to life does not extend to a foetus.

Abortion has been the centre of many heated discussions recently in many Republican-controlled states in America resulting in restriction of the legality of abortions within their jurisdiction. Unlike South Africa, certain federal laws in the US require a minor to obtain the consent of a parent or guardian before being allowed to undergo an abortion. Increasingly more stringent requirements on which facilities are allowed to provide abortions has meant that many abortion clinics in the US have been forced to close down.[62] This means that access to necessary healthcare has been made increasingly difficult for women living in these states as many of them have to travel long distances to receive treatment. This is expensive, requiring unpaid leave and the funding of travel expenses. In many states a woman seeking an abortion is required to attend counselling beforehand, which is intended to

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[59] 92 of 1996.

[60] *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T)

[61] S 12(2) of the Constitution of the Republic of South Africa, 1996.

[62] Guttmacher Institute 'State Facts about Abortion: Alabama' available at *https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-alabama*.

dissuade her from continuing with the procedure.[63] It is also common for doctors being required to show the woman a sonogram of the foetus and play its heartbeat.[64]

One of the most controversial decisions concerned the recently-signed Alabama Human Life Protection Act,[65] which banned abortion in its entirety, even in cases of rape or incest, unless the life of either the woman or the foetus was in grave danger.[66] The Act also exposed doctors who administer abortions and women who undergo abortions in Alabama to criminal action.[67] This law is unconstitutional under and in terms of the US Supreme Court decision of *Roe v Wade* in 1973 which legalised abortion across the country.[68] However, Alabama lawmakers are hoping that the Act will give the Supreme Court an opportunity to revisit and overturn *Roe v Wade*. Following this, many other states have passed so-called 'heartbeat bills' where abortion is illegal once the foetus has a heartbeat.[69] Foetuses can develop a heartbeat as early as six weeks into pregnancy, which is often before a woman even knows that she is pregnant.[70]

Anti-abortion laws serve to tell women that an unborn foetus with no consciousness has more rights and deserves more respect than they do. Anti-abortion laws make a woman carry the burden of an unwanted pregnancy as punishment for her supposed recklessness, without imposing much hardship on the

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[63] Ibid.

[64] Ibid.

[65] Caroline Kelly 'Alabama governor signs nation's most restrictive anti-abortion bill into law', available at *https://edition.cnn.com/2019/05/15/politics/alabama-governor-signs-bill/index.html.*

[66] Ibid.

[67] Ibid.

[68] Ibid.

[69] Ibid.

[70] Ibid.

man at all. They strip a woman of her rights to bodily integrity and human dignity, and undermine her equality in society. Furthermore, studies have shown that banning abortion does not in fact prevent abortions from happening – they are instead performed by unsafe methods, which places the woman at great risk and further infringes her dignity.

7. QUESTIONS

(a) MCQs

1. The case of Christian Lawyers Association:
   a. Successfully challenged the constitutionality of abortion on the ground that it violated a foetus's right to bodily integrity.
   b. Unsuccessfully challenged the constitutionality of abortion on the ground that it violated the foetus's right to life.
   c. Successfully challenged the constitutionality of abortion on the ground that making abortion illegal is a justifiable limitation on a woman's right to bodily integrity.
   d. Was unsuccessful in the court *a quo* but won on appeal.

2. In Grotjohn it was held that:
   a. Neither suicide nor attempted suicide is a crime in South Africa.
   b. The final act of the deceased in committing suicide interrupts the causal chain, thus allowing anyone who encouraged or helped the deceased to die to escape criminal liability for murder.
   c. Encouraging or enabling a person to commit suicide will always constitute the crime of murder.
   d. Whether encouraging or enabling a person to commit suicide amounts to the crime of murder will depend on the facts of each case.

3. Choose the INCORRECT answer. In *Stransham-Ford*:

a. The judgment of the court *a quo* was overturned on appeal to the SCA, which criticised the trial court for handing down judgment despite Mr Stansham-Ford having died, thus extinguishing the claim.
b. Physician assisted euthanasia (PAE) is illegal in South Africa and amounts to the crime of murder.
c. Mr Stansham-Ford was in a persistent vegetative state and his family wanted permission to lawfully withhold life-sustaining treatment, despite the fact that this would hasten his death
d. Whether physician assisted suicide (PAS) is unlawful will depend on the facts of each case together with an analysis of the ruling in *Grotjohn* in light of modern medical practice and constitutional values

4. Choose the INCORRECT answer. In *Port Elizabeth Municipality* the Constitutional Court:
   a. Dismissed leave to appeal to hear the case.
   b. Held that the section 25 right to property can never be limited and that all that needs to be proved for an eviction is unlawful occupation of land
   c. Spoke to the need for unlawful occupiers to be treated with dignity throughout the eviction process.
   d. Stated that in our constitutional dispensation it is sometimes appropriate for individual rights to be limited in order to protect the rights of vulnerable people.

5. In *Dawood* it was held that
   a. The right to dignity includes the right to protection of family life, and that the Aliens Control Act infringed that right by requiring spouses without a valid temporary residence permit to leave the country pending their immigration application.
   b. The exemption in the Act created for spouses, children and vulnerable family members with valid temporary residence permits was

unconstitutional because it discriminated against people who had no familial ties to a South African national.

c. The value of dignity was infringed by the Aliens Control Act, making the impugned provisions unconstitutional and invalid.
d. When litigating a constitutional issue one has to rely on the most direct right and may only rely on the right to dignity if there is no such more direct right.

(b) Short questions

1. Briefly discuss the competing rights at issue in *Christian Lawyers Association* and give the current position on abortion in South African law. **(*5 marks*)**

2. O'Regan J and Sachs J decided to place their emphasis on the right to life when declaring the death penalty unconstitutional. Given the unqualified nature of the right to life in our Constitution, do you believe that it is possible for the death penalty to be reintroduced in South Africa in a way that *justifiably* limits the right? **(*5 marks*)**

3. With reference to any case(s) of your choosing, discuss the court's interpretation of human dignity and its place in the constitutional order.

(*5 marks*)

(c) Long questions

1. In an essay, and with reference to the Constitution and relevant case law, discuss the difference between dignity as a right versus dignity as a value. Include a discussion on ubuntu and its place in dignity litigation.

(*15 marks*)

2. Dr Devon is a highly qualified anaesthetist. His mother, Mrs Devon, has been suffering from a debilitating muscular disease for the past two years. She is

still fully comprised of her mental faculties but is required to take an excessive amount of medication to cope with her condition. She often feels nauseated and fatigued after taking her medication, and still experiences pain consistently despite taking the medication. Mrs Devon has decided that she has lived for long enough with these, what she considers, inhumane conditions and she asks her son to give her a lethal overdose of morphine so that she may die peacefully. Dr Devon could not resist his mother's dying wish and complied with her request.

Subsequent to his mother's death Dr Devon has been arrested and charged with murdering his mother. Your law firm is defending Dr Devon. They ask you to prepare a memorandum on the following issue: are there any constitutional arguments that may be made arguing that the current South African criminal law as expressed in *Grotjohn* is unconstitutional? Specifically, they want to know if it may be argued that the current law on so-called 'assisted suicide' infringes the victim's right (in this case Mrs Devon's) to dignity. And if it does, whether a victim in the position of Mrs Devon should be able to consent to 'dying with dignity'? (*20 marks*)

3. Angela and Jennifer are newly married and excited about their future. Central to their plans is having children. However, from a biological perspective both cannot conceive a child together as they are women. They are not comfortable utilising a sperm donor for personal reasons. While on holiday in Taiwan during November 2019 the couple meet Tony Wu, a 15-year-old tour guide. Tony is an orphan who works at the tourist attractions during the holidays. The couple fall in love with Tony as he is a humble and incredibly intelligent child. They buy Tony a ticket to Cape Town and all return to Cape Town after the holiday during December. Tony arrives in Cape Town on a three-month holiday visa. The couple are determined to adopt Tony. They apply to the Taiwanese Embassy in Cape Town. Unfortunately, their application was unsuccessful. Furthermore, they forget to apply for a temporary residence permit for Tony after returning home. On the 1st of April

2020 an immigration officer comes to remove Tony and informs the couple that he will be extradited back to Taiwan. He also informs the couple that since Tony turned 16 on 18 February he is required to do compulsory military training in Taiwan for two years. The couple are aggrieved by this news. They have become extremely attached to Tony and treat him as their son. They are distraught that their family is being torn apart. The couple come to see you, their attorney, seeking an order that the failure of the Aliens Control Act, 1991 to provide them with a remedy to this predicament is an infringement of their dignity.

Provide the couple with a succinct memo on the prospects of their success.

(15 marks)

4. Given your thorough understanding of the right to life, do you believe that the right to life includes the right to choose your death? Make short reference to any applicable cases as well as to the purposive approach adopted by the Constitutional Court when interpreting rights in the Bill of Rights. (*20 marks*)

8. Answers

(a) MCQs

1. **b**.
2. **d**.
3. **c**.
4. **b**.
5. **a**.

(b) Short questions

1. The *Christian Lawyers Association* case was an unsuccessful challenge to the Choice on Termination of Pregnancy Act, which legalises abortion in all instances up until a certain time period in the pregnancy. The association attempted to argue that abortion is an unjustifiable limitation on the foetus's right to life, and thus the Choice on Termination of Pregnancy Act was unconstitutional. The court instead focused on the right to bodily integrity of the mother, and held that to force her to give birth to a baby violated her reproductive rights. Therefore, in South Africa, abortion is currently legal in all circumstances (in other words, it is not confined to cases of rape or incest). A mother may choose to abort her child up within a given time period without the consent of any other person, including the father.

2. The right to life is enshrined in section 11 of the Constitution and reads, 'Everyone has the right to life'. In certain other constitutions worldwide, such as the American Constitution, the right to life is qualified. This means that express provision is made for a limitation of the right to life in certain scenarios, such as the death penalty. In the South African Constitution, no such qualification exists – there is no exception within section 11 which allows for the right to be limited in particular instances. Of course, any right can be justifiably limited through the application of the section 36 limitations analysis, but the right to life nevertheless remains unqualified. This makes it much

harder for the death penalty to pass constitutional muster, as it has to pass the section 36 test. The test was applied in *Makwanyane* where the death penalty did not pass because of the arbitrariness inherent in the punishment. Furthermore, it was found that the punishment was not actually a deterrent and thus did not suit its purpose. Therefore, it is hard to conceive that the death penalty could be reintroduced, unless its arbitrariness is somehow removed, and even then it would have to be justified using the high threshold of section 36.

3. Human dignity has been termed the 'cornerstone' of South Africa's democracy and as such it underlies and infuses all other rights (*Makwanyane*). Dignity is both a right and a value in our Constitution. It is listed as a right in section 10 and a value in section 1(a). Dignity refers to the inherent worth of human beings, and it is a fairly broad concept. Because of this, there is often a more direct right on which a litigant may rely. When this happens, dignity as a value is nevertheless relevant in that it informs the interpretation of all other rights and conduct. For example, in the *National Coalition* case the primary right relied on was that of equality – it was argued that it was unfair discrimination to criminalise an act for men which would be legal if it were performed by women or by a woman and man together. However, when assessing the unfairness of the discrimination, the court went to great lengths to consider the impairment to the applicants' fundamental human dignity by the criminalisation of sodomy. In this case, therefore, human dignity was invoked as a value. There might be instances in which there is no other more direct right on which to rely, in which case a litigant could choose to rely on the right to dignity (*Dawood*). In the *Dawood* case there was no direct right to protection of family life that could be relied on, so the applicants relied on the right to dignity. Thereafter, the protection of family life was read in to the content of the right to dignity. Therefore, when assessing dignity as a whole it is unlikely that it would be relied on directly when there is a more direct and clear right. However, the court has continually used the value of human dignity to interpret all other rights in the Bill of Rights and has held it up as being of fundamental importance in our constitutional dispensation.

(c) Long questions

1. In the South African Constitution, dignity is found both as a right and as a value. As a right, it is enshrined in section 10, which says that 'everyone has inherent dignity and the right to have their dignity respected and protected'. Section 1 of the Constitution lists values upon which democratic South Africa is founded, and dignity is one of them. The question then becomes: what is the difference between the two, and what is the place of ubuntu in dignity litigation?

   The right to dignity would be relied on when any action or legislation is alleged to violate a person's inherent dignity. If an infringement of dignity is indeed found to exist, then the infringement would be tested using the section 36 limitations analysis to assess whether the infringement is justifiable or not. If the infringement cannot be found to be justifiable, the particular act or legislation will be declared unconstitutional and thus invalid.

   However, it is not often that the right to dignity is relied upon directly in constitutional litigation. This is because in most scenarios there is an applicable right which has clearer application (for example, the right to equality). This is where dignity as a value comes in. Given that dignity underlies South Africa's entire democratic order, it plays a vital role in the interpretation of other rights. In *National Coalition*, for example, even though the primary right argued was the right to equality, dignity informed the equality analysis in order explain the position of the applicants better and how their equality had been infringed. Given its high status in South Africa's constitutional dispensation, the value of dignity is most often a factor when analysing other rights.

   Ubuntu is an African philosophy and way of life which encompasses many values. Within ubuntu teaching is a strong sense of communitarianism –

that humans are all equal and all rely on each other for survival. Thus, there is a strong sense of respect for fellow human beings that runs through ubuntu philosophy. One of the key values encompassed by ubuntu is that of human dignity. As such, ubuntu is often cited in cases which involve constitutional challenges of dignity.

In *PE Municipality*, the court had to consider the competing rights within an eviction procedure. On the one hand was the individualistic right to property as enshrined in section 25, and on the other the right to dignity which is found in both the Constitution and in the PIE Act. The court struck this balance by observing the communitarian values espoused by ubuntu 'suffuses the whole of the constitutional order. It combines individual rights with a communitarian philosophy'. Therefore, in South Africa, individual rights may be limited for the benefit of the greater majority as in line with ubuntu.

Ubuntu was also discussed in the *Makwanyane* judgment. Given its communitarian nature, ubuntu emphasises reconciliation and restorative justice over retribution. The death penalty is certainly the most severe form of retribution as it is irreversible. Therefore, it was found that the death penalty was inconsistent with the values of ubuntu and thus inconsistent with the right to life and the right to dignity.

The act of Dr Devon is termed 'physician assisted suicide' (PAS) and is undertaken when a doctor provides a patient with lethal drugs to be taken when the patient desires to end her life. The issue at hand is whether PAS is illegal and, if so, if it is unconstitutional. The recent case of *Stransham-Ford* involved an application to court to allow Mr Stransham-Ford to be able to choose to die via either PAS or physician assisted euthanasia (PAE), as he was suffering from cancer. As with Mrs Devon, Mr Stransham-Ford's mental faculties were intact and, the medical practitioner fully understood the nature of what he was asking for. Stransham-Ford felt that as the cancer got worse he was losing his fundamental human dignity. Therefore, he argued that prohibiting him from being able to choose when to die would be a violation of his right to

dignity. The court *a quo* granted Stransham-Ford's application and declared that the outright criminalisation of PAE and PAS was indeed a breach of his dignity. The SCA, however, overturned that decision on technical grounds –primarily that Mr Stransham-Ford had already died by the time judgment in the court a quo was handed down, and so the claim was extinguished. Furthermore, as Mr Stransham-Ford brought the application solely to declare his own rights, and not to challenge the constitutionality of the criminalisation of PAS/PAE in general, this case held no binding precedent on PAS/PAE.

An older case, which is binding, is that of *Grotjohn*, in which the issue was whether there could be criminal liability for telling someone to commit suicide, even if the ultimate act was undertaken by the deceased independently. The court in this case held that liability would have to be assessed on a case-by-case basis, and there was no fixed answer. In *Grotjohn's* case, the fact that his wife had independently and voluntarily shot herself did not help him escape liability because he had assembled the gun for her and had told her to shoot.

Therefore, the fact that Mrs Devon took the morphine of her own accord and independently of Dr Devon would not necessarily escape him from liability. In fact, if *Grotjohn* was applied identically then Dr Devon would be guilty of murder.

PAS/PAE raises important issues with regards to the right to dignity. As has been emphasised by our courts on numerous occasions, dignity is a fundamental human right and is one of the most important rights in our constitutional dispensation. Therefore, if an incurable illness lowers one's human dignity, the argument goes that one should be able to choose to die before that dignity is infringed even more. To force someone to stay alive would be to force them to live an undignified life. Furthermore, in both *Grotjohn* and *Stransham-Ford* the court noted that neither suicide nor attempted suicide are crimes in South Africa. An able-bodied person can attempt suicide without incurring criminal liability at all. However, a sick

person might not be able to physically commit suicide, which is why medical assistance is requested. Therefore, it could be argued that there is an arbitrary distinction being created between people who can physically commit suicide by themselves and those who cannot, and who are then forced to live in indignity for the rest of their lives.

2. The issue to be decided is whether Tony's extradition is an infringement of Angela and Jennifer's right to dignity.

   In the South African Constitution there is no specific right to protection of family life. Instead, there is the right to human dignity. Dignity attaches to people at birth and is an innate quality of being human. It shows respect for the inherent worth of people and celebrates diversity. Therefore, the right to dignity is a broad right and encompasses any event in which one's fundamental dignity is infringed. As Angela and Jennifer cannot rely on a more specific right, the right to dignity would be relied on in this case. Luckily for them, the Dawood case dealt with the right to dignity in protection of family life. In Dawood, South African nationals were being forced to live apart from their immigrant spouses until the immigrant spouse obtained a residence permit to live in South Africa. The court held that this was a violation of the spouses' right to dignity, as a large part of one's dignity involves family life and keeping a family home. Due to the poverty experienced by many in South Africa, spouses were often unable to afford to both travel overseas until a residence permit was granted, so the South African spouse would be forced to remain behind. The court noted that this was an undignified choice to have to make. Therefore, the court in Dawood decided that the protection of family life was fundamental to the right to human dignity.

   Angela and Jennifer should rely on the *Dawood* case to argue that Tony's extradition would cause their family members to live apart from one another, and thus their dignity unjustifiably infringed.

A distinction between Angela and Jennifer's scenario and the situation in *Dawood* is that in *Dawood* the applicants were in fact married. In this scenario, there are no legal ties between Angela and Jennifer and Tony. However, our courts have increasingly recognised that family structures in South Africa are diverse and that families no longer take on the traditional nuclear model. The court would have to be persuaded that Angela, Jennifer and Tony are indeed a family worthy of protection. To do this, they could prove that they applied to adopt Tony (even though they were unsuccessful).

3. Refer to memo for question 2 above (long questions).