SHUTTING DOWN THE DEATH FACTORY IN SOUTH AFRICA: THE NORMATIVE ROLE OF THE TWIN RIGHTS OF HUMAN DIGNITY AND LIFE

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1. INTRODUCTION

Post-democratic South Africa is a shinning example of an abolitionist state in Africa. At the apogee of the apartheid regime, however, South Africa gained the notoriety of being one of the world's leading states regarding the death penalty, with a high number of executions. A major catalyst in the paradigm shift from a retentionist to an abolitionist state was the adoption of the 1993 interim constitution[1] that came into effect in 1994. The final Constitution[2] of 1996, which is examined in this presentation follows up and indeed strengthens the human rights and democratic values of the interim constitution of 1993.

There is a powerful sense in which the South African Constitution may be described as a declaration of values. This is because the 1996 Constitution identifies and articulates basic values, objects and the spirit of the constitutional democracy established since 1994. This notion of an objective value order in the Constitution commands the general support of case law as inspired by several provisions of the Constitution.

First, the opening section of the Constitution identifies inter alia human dignity, equality and personal autonomy as values on which the sovereign democratic state of South Africa is founded. Non-racialism, non-sexism, constitutional supremacy, the rule of law, universal adult suffrage and multi-party democracy are also listed among the foundational principles of the Constitution. Second, section 7(1) proclaims that the bill of rights in chapter 2 of the Constitution 'affirms the democratic values of human dignity, equality and freedom.'

Third, the interpretation clause of the Constitution instructs all courts to promote the values of an open and democratic society based on human dignity, equality and freedom.[3] Specifically, section 39(2) enjoins courts to infuse these underlying norms into the interpretation of any statute and the bill of rights. Also, all courts must factor the animating values of the Constitution into their decisions when called upon to develop the common law or customary law.[4] Fourth, the limitation clause requires all restrictions on constitutional rights to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom in order to pass constitutional muster.[5]

In this respect, Devenish points out that several justices of the Constitutional Court in *S v Makwanyane*[6] invoked the traditional African notion of *ubuntu* as a useful source of constitutional values.[7] Mokgoro J put her finger on this African concept when she explained that *ubuntu* embraces

> the key values of group solidarity, compassion, respect, human dignity, conforming to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasizes respect for human dignity, marking a shift from confrontation to conciliation.[8]

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[1] Constitution of the Republic of South Africa, Act 200 of 1993.

[2] Constitution of the Republic of South Africa, Act 108 of 1996.

[3] s39 (1) (a).

[4] s 39(2). In this regard, see *Amod and another v Multilateral Motor Vehicle Accident Fund,* 1999 (4) SA 1319 par 30 where the Supreme Court of Appeal aptly demonstrated how a court may develop the common law in such a manner as to promote the underlying values, objects and spirit of the constitution even without a direct application of the letter of the bill of rights. See also O Mireku 'Culture and the South African Constitution: An Overview' 2000 (6) *Freiberg Working Papers* 1 at 9-10.

[5] s 36(1).

[6] 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[7] GE Devenish *A Commentary on the South African Bill of Rights* (1999) 12.

[8] *Makwanyane* (n 6) para 308.

As the *Makwanyane* decision clearly illustrates, the substantive norms of the constitutional text— such as the rights to human dignity, life, equality as well as the concept of *ubuntu*— primarily buttress and reinforce fundamental rights and freedoms enshrined in the Bill of Rights. All this makes it imperative for South African courts to take cognisance not only of the text of the Constitution by itself, but of the fact that the Constitution expresses the spirit, aspirations and values of the new constitutional democracy. Every court, according to Kommers, must 'engage in open-ended decision making while appearing to be text-bound.'[9] In effect, therefore, each foundational value plays a dual role: both as a concrete individual right and, more importantly, as an animating value that throws light on all other constitutional rights.

The purpose of this paper is to argue that the entire constitutional order is actually informed and driven by certain overarching suprapositivist norms. To this end, the paper examines the contours, role and import of human dignity and the right to life as two key constitutional values that essentially underpin and bolster the bill of rights.[10] This paper is, therefore, organized under two principal subheadings: (II) Right to Human Dignity; and (III) Right to Life.

II. HUMAN DIGNITY

According to Mahomed J, it was the redolence of the systematic assault by the apartheid state on 'the human dignity of persons'[11] that led drafters of the South African Constitution to entrench 'the notion of dignified treatment as a core value.'[12] As Davis contends, the centrality of the right to dignity is immediately underpinned and entrenched by the first founding provision of the Constitution.[13] At the outset, section 1(a) sets out human dignity as ***numero uno*** on the list of values underlying the new democratic state. In addition, the pre-eminence of dignity as the highest fundamental value is reiterated in the operational provisions of the Constitution as well. Undoubtedly, the substantive dignity clause in section 10 serves as a pivot for all the above ancillary provisions— both founding and operational— that proclaim the primacy of dignity as a constitutional norm. In fact, the framework of the Constitution clearly suggests that every other right gains perspective only if the light of dignity shines on it. As a major animating value in the entire constitutional order, section 10 formulates the substantive right to dignity by providing

> Human Dignity
> Everyone has inherent dignity and the right to have their dignity respected and protected.

Davis suggests that the qualifier 'inherent' in the dignity clause was purposefully inserted to emphasise 'the fact that a persons dignity is intrinsic to his or her existence as a human being in the same way that personality is inherent.'[14]

It is noteworthy that this formulation of an inherent right to human dignity is clearly reflected in major international documents on human rights such as the Universal Declaration of Human Rights of 1948 (Article 1), and the African Charter on Human and Peoples' Rights (Article 5). Undoubtedly, the fact that under these international instruments natural persons are the only bearers of the right to dignity further acts to buttress the view that the section 10 protection is similarly meant to be enjoyed by human beings alone.[15] By implication, any such definition of the scope of the dignity clause may necessarily exclude juristic persons from the class of rights bearers. Indeed, Leibowitz and Spitz do support this opinion by arguing

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[9] DP Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 47.

[10] It is only due to constraints of space that this paper has left out an analysis of equality as a constitutional value. Since the inegalitarian past of the South African society thrived on a systematic abuse of human dignity, the courts have employed dignity as a catalyst for redressing the impact of historical or structural inequalities. For a full discussion of equality as a norm, see O Mireku *Constitutional Review in Federalised Systems of Government* (Nomos Verlag 2000) 124-132. See also D Davis *Democracy and Deliberation*, (Juta 1999) 69-95.

[11] *Makwayane* (n 6) para 262; and also para 329 *per* O'Regan J. See further Devenish (n 7) 51; and LM du Plessis and Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (Juta Kenweg 1994) 149.

[12] ibid 150.

[13] D Davis 'Dignity' in D Davis et al *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 70 at 72.

that the provision should be confined to natural persons so as to avert 'doing violence to the language' of the dignity clause: especially, the key word 'human' in the title of section 10.[16]

With the exception of Germany, none of the federal constitutions in Canada, USA nor India makes an explicit provision for the right to dignity. For this reason, Canadian, US, and Indian courts have adopted the normative aspects of dignity to infuse the interpretation of other enumerated rights such as equality, prohibition of cruel and inhuman punishment as well as socio-economic rights. In the result, the express terms of the dignity clause in the German constitution (Basic Law of 1949) appeared to have loomed large in the eyes of South African drafters. This perhaps explains the textual similarity between the dignity clauses of the German and South African constitutions.[17] While each dignity clause seems to impose positive state obligations, everyone is equally guaranteed the respect and protection of his or her dignity, which is expressly declared inviolable or inherent.

What then is the scope of human dignity as guaranteed under section 10? In *S v Makwanyane*, the Constitutional Court explored in considerable detail the nature, meaning and relevance of *inter alia* the right to dignity. Describing the death penalty as a cruel, inhuman or degrading punishment, the court unanimously found that capital punishment violated the rights to human dignity, life and equality. In the event, the court struck down as unconstitutional, a provision in the penal code that permitted the sentence of death on conviction for murder.

It is interesting to note that almost all the judges of the *Makwanyane* court recognised the importance of dignity as an underlying value that informs the meaning of other entrenched rights. In this regard Chaskalson P made it clear that the right to dignity, together with the right to life, is the most important right and the source of all other rights.[18] Again, O'Regan J emphasised that the protection of dignity is 'the touchstone of the new political order and is fundamental to the new constitution.'[19]

Besides concurring in the joint judgment delivered by Ackermann J in *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others,*[20] Sachs J found it necessary to expatiate on the underlying value of dignity. He reiterated that dignity is 'the motif which links and unites equality, and which, indeed, runs through the protections offered by the Bill of Rights.'[21] Thus, the dignity clause is perceived as a value-laden fountain that animates and holds together all other constitutional rights.

In view of the normative nature, scope and significance of dignity, the Constitutional Court has repeatedly held that, under appropriate circumstances, other constitutional rights must be read in conjunction with the right to dignity.[22] Viewed distinctly from the more specific rights, the dignity clause seems to signify purposes and values that underlie the entire constitutional project.[23] Thus in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; and Thomas v Minister of Home Affairs* (*Dawood*),[24] the

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[14] ibid 70.

[15] ibid. Refer to s8(2). See further, *Minister of Home Affairs and others v Watchenuka and another* 2004 (2) BCLR 120 (SCA) where the Supreme Court of Appeal at para 26 alluded to the inherent dignity of all people, regardless of their nationality, as the basis of and inspiration for the recognition of the enumerated rights in our bill of rights. At para 25, Nugent JA, for the court, noted that 'Human dignity has no nationality. It is inherent in all people– citizens and non-citizens alike– simply because they are human.' See also David Leibowitz and Derek Spitz: 'Human Dignity,' in M Chaskalson et al *Constitutional Law of South Africa* (1998) § 17.2(a).

[16] ibid.

[17] See also art 8 of the Namibian constitution, which, like the German constitution, contains a parallel guarantee of an *inviolable* right to human dignity.

[18] *Makwanyane* (n 6) par 144.

[19] ibid para 329. See also para 272 per Mahomed J.

[20] 1999 (1) SA 6 (CC). Hereinafter cited simply as *Gay and Lesbian*.

[21] ibid par 120.

[22] Note for instance, ibid par 18; *Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at par 31. See also GJ Naldi *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (1995) 44.

[23] Davis (n 13).

[24] 2000 (3) SA 936 (CC); 2000 (8) BCLR (CC).

Constitutional Court had occasion to elaborate further on the dual role of human dignity. Speaking for the court, O'Regan J stressed that section 10

> makes plain that dignity is not only a *value* fundamental to our Constitution, it is a justifiable 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.[25]

Leibowitz and Spitz, therefore, argue that the entrenchment of human dignity as a founding constitutional value provides the judiciary with a tool for adopting a purposive interpretation to the content of other specific rights.[26] One may be tempted to question what indeed is required of a court that adopts a purposive or contextual construction of a constitution. By a purposive interpretation, a court first attempts to determine the purpose of each specific right and then interprets the right in order to include activity that falls within the purpose and exclude activity that does not.[27]

III. RIGHT TO LIFE

Attention may now be focused on the right to life, which is conceptually interrelated, and mutually reinforcing to the constitutional protection of human dignity. It may be pertinent to observe that all throughout the text of the Constitution, the shortest provision is section 11, which proclaims

> Life
>
> Everyone has the right to life.

Despite the simplicity of language, the broad constitutional concept of protection of life entailed in this provision implicates contentious social issues such as capital punishment, abortion and euthanasia. In respect of the strategy for banning the death penalty, South African drafters parted ways with their German counterparts. While the German and Namibian constitutions bolster the constitutional right to life with an explicit prohibition of capital punishment, the South African interim constitution was silent on this vexed question— leaving it for the Constitutional Court to resolve.

A. Death Penalty

With the uncommon assertiveness of a neophyte, the *Makwanyane* court found that at the core of the constitutional right to life is an injunction against the state not to put anyone to death. In other words, the right to life entitles every person not to be killed deliberately by the state as a punishment.[28] It is important to note that most members of the court, in dealing a fatal blow to the death sentence, relied heavily on the right to life clause. Together with the dignity clause, the right to life was interpreted to provide a prerequisite to the enjoyment of and the foundation for all other constitutional rights.[29]

Expressing himself on the scope and relationship between the 'twin rights of life and dignity,' Chaskalson P emphasised that, 'taken together,' both constitute

> the essential content of all rights under the Constitution. Take them away, and all other rights cease.[30]

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[25] ibid par 32.
[26] D Leibowitz and D Spitz in M Chaskalson et al (n 15) § 17.4(a).
[27] PW Hogg *Constitutional Law of Canada* 3rd Ed (1997) 643.
[28] *Makwayane* (n 6) par 217 per Langa J. Compare Davis 'Life' in Dennis Davis et al (n 13) 68 where the author states the opposite in an obvious misquotation of Langa J.
[29] PN Bouckaert 'Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa' (1996) 32 *Stanford Journal of International Law* 287 at 312.
[30] *Makwayane* (n 6) par 84.

Similarly, four other judges noted the underlying value of the twin rights and were at pains to factor into the ambit of these inseparable rights, the constitutional notion of *ubuntu*.[31] According to the separate albeit concurring opinions of Mokgoro and Madala JJ, the concept of *ubuntu* embodies the ideas of 'humaneness', 'personhood', morality, fairness and social justice. At various points in their judgments, the four judges shared a common view that the community need for *ubuntu* generates reciprocity between rights and duties of the individual *vis á vis* those of the society at large.[32] In this regard, Madala J further elaborated on what Langa J called '[a]n outstanding feature of *ubuntu* in a community sense'[33] by stating that *ubuntu*

> calls for a balancing of the interest[s] of society against those of the individual, for the maintenance of law and order, but not for dehumanising and degrading the individual.[34]

Thus, the communitarian value engendered by *ubuntu* was perceived by the Constitutional Court to dovetail into the broad scope of the twin rights of life and dignity in rendering the death sentence unconstitutional.

What clearly emerges from the *Makwanyane* decision is the powerful role of human dignity, the right to life, *ubuntu*, and other suprapositivist norms in making capital punishment an unconstitutional form of criminal sanction. Despite the indisputable supremacy of the Constitutional Court as the highest court in the land on all constitutional matters, there have been intermittent popular calls for the reinstatement of the death penalty especially when a heinous crime is reported in the media.

It is however my humble submission that with the abolition of the death sentence there may not be any room for turning back without breaching domestic and international law obligations of the state. At the municipal level, constitutional doctrines such as the rule of law and *Rechttsstaat*, constitutional supremacy, judicial sovereignty and the binding force of the bill of rights require the state to comply with the *Makwayane* ruling and, for that matter, all other judicial decisions. Moreover, by ratifying the International Covenant on Civil and Political Rights (CCPR) as well as the subsequent Annexure to Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty,[35] South Africa has committed itself to abolish the death penalty. With the ratification of these two international law instruments, South Africa also bound itself with the global belief that abolition contributes to the promotion of human dignity and that abolition is indeed desirable.

IV. CONCLUSIONS

In a nutshell, this discourse on the twin rights of human dignity and life has made the case that dignity and life each doubles, in effect, as a normative concept and also as a concrete human right. Three key observations come into sharp focus.

First, the normative conceptions of the twin rights of human dignity and life serve as the motif for all the rights enshrined in the Constitution. For this reason the values of human dignity and life constitute the vital cornerstone of the entire constitutional order.

Second, although the centrality of constitutional values tends to make constitutional adjudication value-laden, the Constitutional Court has clearly remained responsive to rational argument. Instead of clinging to dogmatism or what Meyerson calls the 'partisan recitations of ideology,'[36] the court readily resorts to international human rights instruments and norms so as to protect individual rights and freedoms.

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[31] The concept of *ubuntu* was part of the post-amble to the interim constitution under the caption of 'National Unity and Reconciliation.' See ibid paras 223-227 per Langa J; 237-260 per Madala J; 263-264 per Mahomed J; and 307-313 per Mokgoro J.
[32] ibid Mahomed J at para 263.
[33] ibid Langa J at para 225.
[34] ibid Madala J at para 250.
[35] On 10 March 1999, South Africa acceded to the CCPR and on 28 November 2002 it also acceded to the two Optional Protocols. Both Optional Protocols allow for the possibility of individual written complaints to the Human Rights Committee after the exhaustion of domestic remedies.
[36] D Meyerson (1997) *Rights Limited*, Juta, 176.

Finally, the human rights jurisprudence crafted thus far reveals an activist and interventionist approach by the Constitutional Court. With the seminal decision in *Makwanyane*, the court cut its teeth as an activist defender of constitutional rights not only against government authority but also even against the tide of public opinion. By declaring the death penalty unconstitutional, the court also signalled the dawn of a new constitutional order based on a justiciable bill of rights.[37] In order to play this interventionist role effectively, the court has repeatedly said that the Constitution is value-laden and therefore requires a generous and purposive interpretation. Accordingly, virtually all members of the court have, with one voice, consistently registered the centrality of constitutional values embodied in, *inter alia*, human dignity and the right to life.

[37] Heinz Klug: 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review,' (1997) 13 *SAJHR,* 185 at 195.