

## Autonomy as an Element of Human Dignity in South African Case Law<sup>1</sup>

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### Introduction

Human dignity features prominently in various international human rights instruments.<sup>2</sup> In addition, human dignity is also a central concept in biolaw and bioethics – fields that are becoming increasingly relevant as the biological revolution dawns on mankind. But what exactly is meant by human dignity? Especially in the fields of biolaw and bioethics, human dignity has been used to support various divergent points of view. This apparent absence of a clear meaning creates questions about the usefulness of this concept, and valid fears that it can easily serve to camouflage unconvincing arguments and unarticulated biases.<sup>3</sup> John Harris provides a colorful analogy:<sup>4</sup>

Appeals to human dignity are, of course, universally attractive; they are the political equivalents of motherhood and apple pie. Like motherhood, if not apple pie, they are also comprehensively vague.

If human dignity is to play any sensible role in human rights law and ethics, there is a clear need for its authoritative interpretation. While other concepts such as freedom and equality have received much scholarly and judicial attention in the leading constitutionalist systems of the English-speaking world, particularly the United States, Canada and India, human dignity has largely been backstage. The reason is of course that human dignity is not explicitly mentioned in the human rights instruments of these jurisdictions. Although the courts in these jurisdictions have acknowledged human dignity as an implicit value in their human rights systems,<sup>5</sup> not much attention has been given to analyzing human dignity *per se*.

South Africa is in a unique position compared to the above-mentioned countries: human dignity is explicitly protected in the South African constitution and has been the subject of increased analysis by the Constitutional Court.<sup>6</sup> Since 1995, a body of human dignity case law has gradually developed in South Africa, which may offer an authoritative reference source to human rights lawyers and ethicists in other jurisdictions. This article will analyze the development of the concept 'human dignity' in case law, with specific attention to the emergence of autonomy as an element of human dignity.

## **I. The concept ‘human dignity’: a philosophical overview**

Firstly, a conceptual distinction must be made between ‘human dignity’ and ‘dignity’. As this discussion will show, various philosophical traditions give different interpretations to dignity. *Human* dignity denotes a specific species of dignity that is perceived as the objective value *inherent* to all humans. Other notable species of dignity in Western philosophy are 1) a behavioral conception of dignity, which denotes the objective value that an individual possesses based on certain behavioral qualities that are associated with dignity, such as composure, calmness, a noble manner, etc.;<sup>7</sup> 2) an aspirational conception that denotes the objective value that an individual possesses based on her accomplishments in life;<sup>8</sup> and 3) dignity as subjective self-value. In the broader societal context, these species of dignity are not necessarily mutually exclusive, but can be supplementary. One can, for instance, consistently support both the following positions: 1) X must enjoy the *same* basic rights as other members of society based on her (inherent or human) dignity; and 2) X must be accorded *higher* respect in social interactions based on her (aspirational) dignity as a world-renowned scholar. However, once the context is delineated more narrowly, such as the specific context of human rights law or biolaw, the incompatibility of the various species of dignity increases – especially between the various renderings of dignity as objective value.

Let us now consider the development of human dignity in philosophy. The interpretation of dignity as inherent value can track its origin to the ancient Stoic tradition. *Reason* is posited as a property of all humans – slave and free alike – which enables them to know the universe and improve themselves; this ability gives all humans dignity, which is equated to immeasurable value. The advent of Christianity transferred the source of humankind’s inherent worth to its belief that man was created by God in His divine image. The Renaissance once again saw the celebration of humankind’s free will and power of self-realization as the source of dignity, albeit thoroughly rooted within the Christian religious worldview. As Giovanni Pico della Mirandola energetically exclaims in his *Oration on the Dignity of Man*, which became the manifesto of the Renaissance: “Oh wondrous and unsurpassable felicity of man, to whom it is granted to have what he chooses, to be what he wills to be!” This idea was secularized in the elaborate metaphysical system that Immanuel Kant developed during the Enlightenment. This philosophical tradition continues to be massively influential in our conceptual understanding of dignity in the human rights context, namely as inherent to every human being. In contemporary human rights law, this inherent species of dignity has become commonly denoted as *human* dignity. The positioning of human dignity as a central value in any moral or legal system is therefore a moral or legal vindication of the idea that humanness *per se* is valuable. Against this philosophical background, the discussion will focus on human dignity as it has been applied in South African law.

## **II. Human dignity in the South African constitution**

In one of its first cases, the Constitutional Court already singled out human dignity as the “touchstone” of the new constitutional political order.<sup>9</sup> In all the cases that dealt with controversial and sensitive socio-political matters, such as the death penalty,<sup>10</sup> termination of pregnancy,<sup>11</sup> gay rights,<sup>12</sup> the wearing of religious symbols at public schools,<sup>13</sup> and commercial sex,<sup>14</sup> human dignity has played a vital role in the Constitutional Court’s judgments.

Human dignity has a dual function in the South African constitutional dispensation: as a foundational *value* that informs the interpretation of all other specific rights, and as a justifiable and enforceable *right*.<sup>15</sup> Human dignity as a foundational value is provided for in three places in the Bill of Rights chapter of the Constitution:<sup>16</sup> the introductory section of the Bill of Rights,<sup>17</sup> as well as the all-important limitation<sup>18</sup> and interpretation<sup>19</sup> clauses of the Bill of Rights. Human dignity as an enumerated right in the Bill of Rights is stated as follows:<sup>20</sup>

**Human dignity**

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

In its application of human dignity, the Constitutional Court has consistently emphasized the interdependency and mutually reinforcing relationship between human dignity and other enumerated rights, such as freedom,<sup>21</sup> privacy,<sup>22</sup> equality,<sup>23</sup> the right to life.<sup>24</sup> It is also important to note that human dignity is specifically only applicable to persons *in esse* and not to the unborn<sup>25</sup> (as is the case in Germany, for instance).

### **III. The meaning of human dignity**

At its broadest meaning, human dignity refers to the *intrinsic worth of all human beings*.<sup>26</sup> Beyond this frequently-used phrase, the Constitutional Court has not attempted to provide a comprehensive definition of human dignity and has in fact remarked that human dignity “is a difficult concept to capture in precise terms.”<sup>27</sup> However, certain elements of human dignity have clearly crystallized in case law. The first of these positivist elements is the universal and egalitarian character of human dignity.<sup>28</sup> The Constitutional Court has at times used the typical Dworkinian formulation of “equal concern” in the context of human dignity.<sup>29</sup> This egalitarian quality of human dignity confirms its roots in the philosophical tradition of inherent dignity, to the logical exclusion of the aspirational or behavioral tradition.<sup>30</sup>

The second positivist element of human dignity relates to the protection of personality rights, namely self-worth and reputation. At common law (which in South Africa is Roman-Dutch law), the legal concept ‘dignity’ was equated with self-esteem or self-worth,<sup>31</sup> which included privacy.<sup>32</sup> Common law dignity was differentiated from reputation, although the classic Roman law *actio iniuriarum* was common to all the personality rights.<sup>33</sup> While self-worth as the common law meaning of dignity was clearly associated with human dignity from the onset of

the constitutional dispensation,<sup>34</sup> the position with reputation was less clear. After divergent judgments by the provincial high courts on the inclusion of reputation in the ambit of the constitutional concept 'human dignity',<sup>35</sup> the Constitutional Court has in *Khumalo v Holomisa* unanimously indicated that human dignity includes all personality rights, including reputation.<sup>36</sup> It is therefore clear that *human* dignity, or dignity in the *human rights context*, includes but also transcends common law dignity.

Haysom<sup>37</sup> has proposed a third positivist element of human dignity, namely *autonomy*.<sup>38</sup> At the time, he only cited the (celebrated) concurring opinion of Ackerman J in *Ferreira v Levin* to support his analysis, in which Ackerman J only implicitly refers to autonomy.<sup>39</sup> Recent developments in South African case law have, however, clearly vindicated autonomy as an element of human dignity, and will be analyzed below. These legal developments concerning autonomy and human dignity cannot be analyzed in isolation from the developments concerning autonomy and human rights in general – the interrelation between human dignity and other human rights has already been mentioned. We will therefore track – within the South African legal system – the emergence of autonomy as an element of human dignity integrated with the emergence of autonomy in general human rights case law.

## **IV. The rise of autonomy**

### **A. Introductory remarks**

The concept 'autonomy' originates from the Greek 'auto' (self) and 'nomos' (law), meaning to be one's own law. In its simplest meaning, autonomy can therefore be understood as *self-determination*.<sup>40</sup> In the context of individual human rights, there is considerable conceptual overlap between autonomy and freedom.<sup>41</sup> Freedom includes both political freedom (the Roman *libertas*, which includes various rights concerning participation in the political process), as well as individual or personal freedom (the right to personal self-determination, that is, choosing and pursuing one's own ends in life, as exemplified in Mill's essay *On Liberty*). In its contemporary usage, autonomy generally corresponds with the latter form of freedom, but also has a broader meaning as referring to one's personal psychological *capacity* for self-determination. One can therefore remark that a child must develop autonomy (but not freedom) as a precondition to be an autonomous (or free) person. In the liberal philosophical tradition, autonomy as individual freedom is intimately associated with personal development and self-actualization, and perceived as a precondition for well-being and self-fulfillment.<sup>42</sup>

### **B. The role of autonomy**

In the first five years since the inception of the Constitutional Court (1995-1999) the term 'autonomy' was used in association with several enumerated

constitutional rights and values, including human dignity,<sup>43</sup> freedom,<sup>44</sup> privacy<sup>45</sup> and equality.<sup>46</sup> However, the *nature* of the relationship between autonomy and these rights and values was still inexact and vague at this stage. The only reference in case law during this period that sketches the nature of the relationship between human dignity and autonomy in clearer terms – namely of autonomy being an *element* of human dignity – is the implicit reference to autonomy in *Ferreira* on which Haysom based his hypothesis.<sup>47</sup>

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally.

The connection that Haysom drew between personal development and autonomy depends on and therefore implies adherence to the liberal philosophical tradition that perceives autonomy as a causally necessary condition for the achievement of the individual's own good through personal development or self-realization.<sup>48</sup> Given this philosophical foundation, Haysom's implicit reasoning is therefore a simple syllogism: 1) Personal development is an element of human dignity (as per *Ferreira*); 2) autonomy is integral to personal development; 3) therefore autonomy must also be an element of human dignity.

In the same concurring opinion of Ackermann J in *Ferreira*, autonomy is also associated with another core concept of the South African Constitution, namely the open society – the concept 'open society' is central in both the limitation and interpretation clauses of the Bill of Rights.<sup>49</sup> Again, the term 'autonomy' is not used, but instead concepts such as 'personal development' and 'own conception of the good life' that are associated with autonomy:<sup>50</sup>

An "open society" . . . is a society in which persons are free to develop their personalities and skills, to seek out their own ultimate fulfillment, to fulfill their own humanness and to question all received wisdom without limitations placed on them by the State. The "open society" suggests that individuals are free, individually and in association with others, to pursue broadly their own personal development and fulfillment and their own conception of the "good life".

In the footnote to this paragraph, Ackermann J approvingly quotes Popper from his *magnum opus* *The Open Society and its Enemies* in which Popper refers to an open society as "the society in which individuals are confronted with personal decisions" that is contrasted with the "closed society" or "the magical or tribal or collectivist society". Since the concept of an open society suggests autonomy, and the open society is a core concept in the Constitution, autonomy is established as a general constitutional value.

Although Ackermann J's concurring opinion in *Ferreira* represents an important step in the emergence of autonomy in South African human rights law in general

and as an element of human dignity in particular, the absence of the explicit use of the term 'autonomy' in these paragraphs, however, renders it tentative in nature.<sup>51</sup>

In the period 2000-2004, autonomy was placed center stage in *S v Jordan*,<sup>52</sup> a case that tested the constitutionality of the legal prohibition of commercial sex. Counsel for the applicants argued that the rights to human dignity, freedom and privacy should be clustered together under the global concept of autonomy. Underlying this argument is clearly the idea that autonomy is at the core of all three these rights. The applicants' argument was dealt with in the concurring opinion of Sachs and O'Regan JJ.<sup>53</sup> The Court did not specifically comment on the relationship between autonomy and the relevant rights, but rejected applicants' argument on the grounds that positing an independent right to autonomy would neither be "useful" for the purposes of constitutional analysis, nor would it be "appropriate" to base constitutional analysis on a right not expressly included within the Constitution. By rejecting the applicants' argument purely on these formal grounds and not addressing the underlying substantive claim that autonomy is at the core of the rights to human dignity, freedom and privacy, the judgment can be interpreted as an implicit confirmation of this substantive claim.

In 2007, this implicit confirmation was made explicit by O'Regan J in her dissenting opinion in *NM v Smith*.<sup>54</sup> This case dealt with the unauthorized publication of the identities of three HIV-positive women in the biography of a high-profile politician. The three women were successful in claiming damages for infringement on their privacy, dignity and psychological integrity. It should be noted that the dissent primarily relates to the majority's finding on the facts and not the interpretation of constitutional rights.<sup>55</sup> O'Regan J clearly posits autonomy as a constitutional value that underlies human dignity, freedom and privacy:<sup>56</sup>

Underlying all these constitutional rights [human dignity, privacy and freedom] is the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them. . . . Our Constitution seeks to assert and promote the autonomy of individuals...

Finally, a majority opinion of the Constitutional Court that explicitly confirms autonomy as a core element of human dignity was realized in *Barkhuizen v Napier*<sup>57</sup> – coincidentally delivered on the same day as the *NM* judgment. *Barkhuizen* concerns the constitutionality of a time limitation clause in a short-term insurance policy that prevents an insured claimant from instituting legal action if summons is not served on the insurance company within the time limit set out in the clause. Although it has been contended that such a clause is unconstitutional in that it violates the right to approach a court for redress, the Court upheld the principle of *pacta sunt servanda* (agreements must be honored) as an embodiment of the constitutional values of human dignity and freedom. The majority per Ngcobo J specifically deals with autonomy and states

unequivocally that autonomy “is the very essence of freedom and a vital part of dignity.”<sup>58</sup> This judgment therefore marks an important milestone in the legal development surrounding human dignity in South African law.

This position is echoed in the recent judgment of *MEC for Education: Kwazulu-Natal v Pillay*<sup>59</sup> that will now be the *locus classicus* concerning the wearing of cultural and religious symbols at public schools in South Africa. In this case the majority of the Constitutional Court per Langa CJ stated that an “entitlement to respect for the unique set of ends that the individual pursues” is a “necessary element of freedom and of dignity of any individual.”<sup>60</sup> Applying once again the classic liberal position that autonomy is a *conditio sine qua non* for the individual’s pursuit of his or her “unique set of ends”, autonomy is confirmed as a “necessary element” of human dignity.

In conclusion, we have seen how autonomy emerged: tentatively initially, then gradually drawing more attention, and in 2007 eventually culminating in the clear recognition of its status and role in South Africa’s human rights law. In particular, the *Barkhuizen* judgment finally provides clear binding authority that autonomy is an element of human dignity.

### **C. Defining autonomy**

Apart from its authoritative role in illuminating the *role* of autonomy (as an element of human dignity), the *Barkhuizen* judgment also authoritatively provides the *meaning* of autonomy: the Court defines autonomy as “the ability to regulate one’s own affairs, even to one’s own detriment.”<sup>61</sup> This definition firstly confirms that autonomy corresponds with personal self-determination or what in philosophy is generally called personal or individual freedom; and secondly, also implies – logically, and through the use of the word “ability” – the personal psychological *capacity* for self-determination. This conceptual overlap between autonomy and personal or individual freedom is confirmed by the Court’s reference to autonomy as the “very essence of freedom.”

In *NM*, O’Regan J also provides two descriptions of autonomy, each of which we will respectively consider. The first *NM* definition describes autonomy as “human beings choosing how to live their lives within the overall framework of a broader community.”<sup>62</sup> The first part of this definition (human beings choosing how to live their lives) is essentially similar to the *Barkhuizen* definition, while the second part (within the overall framework of a broader community) expands on it by explicitly imbedding autonomy in its wider social context. This socially integrated nature of autonomy has gradually been established as an important part of the Court’s conception of autonomy, which development deserves attention.

Initially some concurring opinions dating from 1995 and 1996 endeavored to separate autonomy from social interdependence in an effort to differentiate between autonomy and freedom, the latter being posited as a socially integrated enabler of autonomy.<sup>63</sup> While freedom was posited as what Berlin termed 'positive freedom' – as requiring positive state intervention – autonomy was used to denote 'negative freedom'. This atomistic rendering of autonomy had cracks of incoherence, as it admitted to the socially dependent nature of at least the *development* of autonomy.<sup>64</sup>

An important turning point came in the 1998 judgment of *National Coalition of Gay and Lesbian Equality v Minister of Justice* which released autonomy from its atomistic confines into a social context, and effectively did away with the independence-interdependence distinction between autonomy and freedom. Sachs J's concurring opinion is a clear statement of this position:<sup>65</sup>

Viewed this way autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the state... While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times.

This socially integrated conception of autonomy does not imply that autonomy can be limited by dominant social values any more than would an atomistic conception of autonomy; what differentiates a socially integrated conception from an atomistic conception is that the former realizes the necessity for positive state action to enable autonomy in its social context. Sachs J rationalizes this approach of positive state intervention in his concurring opinion in *Ferreira*:<sup>66</sup>

The reality is that meaningful personal interventions and abstinences in modern society depend not only on the state refraining from interfering with individual choice, but on the state helping to create conditions within which individuals can effectively make such choices.

In this way the state enhances autonomy and human dignity,<sup>67</sup> and therefore fulfills its duty to promote the values of the Constitution.<sup>68</sup> This is perhaps most vividly illustrated by the series of gay rights cases, in which the Constitutional Court specifically pointed out legal and social recognition of gay and lesbian people's personal relationships as vital to their human dignity. This entailed not only a negative duty on the state to refrain from interfering with personal relationships (decriminalization of sodomy),<sup>69</sup> but also a positive duty to grant the social benefits of legal recognition of personal relationships (for instance the legalizing of gay adoption and same-sex marriages).<sup>70</sup>

The first *NM* definition can therefore be welcomed as an explicit confirmation of the socially integrated nature of autonomy, which is evidently an important consideration when interpreting and applying autonomy. This socially integrated

conception of autonomy is also perfectly compatible with the *Barkhuizen* judgment, which indeed applies and protects autonomy within the highly socially interdependent context of contractual relations.

Let us now turn to the second definition expounded by O'Regan J in her dissenting opinion in *NM*. A few paragraphs after providing the first definition, she also describes autonomy by quoting a passage from Scanlon:<sup>71</sup>

As Scanlon described in his seminal essay on freedom of expression, an autonomous person –  
“. . . cannot accept without independent consideration the judgment of others as to what he should believe or what he should do. He may rely on the judgment of others, but when he does so he must be prepared to advance independent reasons for thinking their judgment likely to be correct, and to weigh the evidential value of their opinion against contrary evidence.”<sup>72</sup>  
Our Constitution seeks to assert and promote the autonomy of individuals in the sense contemplated by Scanlon.

The second *NM* definition – the Scanlon quote – is in a significant way a departure from the *Barkhuizen* definition: it idealistically insists that an autonomous individual “may rely on the judgment of others, but when he does so he *must* be prepared to advance independent reasons for thinking their judgment likely to be correct...” The reality is that most of the values that people are brought up with are seldom, if ever, the subject of rational evaluation – most people tend to accept the core values with which they are brought up and only spend mental energy on rationally evaluating certain life decisions within a largely given value-context. What is important from a liberal perspective is that an individual must have the *ability* to challenge any received wisdom and essentially make up her own mind, as expressed in the *Barkhuizen* definition as well as more elaborately in Ackermann J's reference to the open society in *Ferreira*.<sup>73</sup> The ability to regulate one's own affairs (or choose one's own life) indeed implies that one is allowed to make decisions without being (morally or legally) obliged to rationalize such decisions – it implies that one does *not* need to have any rational awareness in such regulation (or choosing). Although a statement of the ideal, the second *NM* definition per the Scanlon quote is therefore not compatible with the majority position in *Barkhuizen*.

To conclude this discussion on the meaning of autonomy, we will look at a remark that O'Regan J makes in *NM* that may point the direction for further legal analysis. She makes an important connection between autonomy and the broad meaning of human dignity as inherent worth, stating that the protection of autonomy “flows from our recognition of individual human worth.”<sup>74</sup> Though this causality is not logically apparent, it is not explained further. Similar to the earlier references in *Ferreira* to personal development, the application of classic liberal political theory is implied to complete the logic.<sup>75</sup> The causality depends on at least the following two values: 1) Recognition of every individual's inherent value means that the individual's *own good* or well-being is allocated great value; and

2) every individual's own good is *best provided* for by empowering her to take her own means of pursuing it. In the future application and conceptual refinement of autonomy in case law, it will be essential that these values that underlie autonomy and bind it to human dignity, be given due consideration by the Court.

## **Conclusion**

Since its introduction to law through the interim Bill of Rights in 1993, human dignity has been at the centre of South African constitutional analysis. Although it was clear from the onset that human dignity is a broader concept than common law dignity, the parameters of this conceptual breadth were to gradually crystallize in case law: while inherent worth and self-worth were recognized early on as elements of human dignity, binding authority for autonomy as an element of human dignity was only attained in 2007, following a steady increase in case law of analysis of autonomy as concept. This conceptual clarity marks a certain coming of age of human dignity in South African law, unlocking a wealth of philosophical works on autonomy that can be drawn on in the future application of human dignity, ranging from the classics such as Mill and Kant, to contemporary philosophers such as Feinberg and Dworkin.

## **Epilogue: Implications for biolaw and bioethics?**

On the international stage, conceptual clarity regarding human dignity can also be constructively applied – especially to biolaw and bioethics discourses. In this epilogue, I will suggest some brief thoughts on the possible implications of this conceptual clarity for biolaw and bioethics.

The most far-reaching and controversial aspect of the biological revolution is certainly the possibility of human genetic engineering. In the debate about human genetic engineering, the human dignity platform has generally been monopolized by conservatively-leaning commentators, who generally argue either for a comprehensive ban on such technology, or for only allowing such technology for therapeutic purposes. However, given the analysis of human dignity in this paper – and especially the prominent role of autonomy as an element of human dignity – the human dignity platform can offer strong arguments to the permissive side in the human genetic engineering debate. Consider for instance the following argument: Human genetic engineering will enable humankind to shape our own future on an entirely new level; we will *self-determine* the genetic characteristics of our species, instead of leaving such determination to the random forces of nature. From this perspective it can be argued that human genetic engineering radically enhances autonomy and hence human dignity.

However, the analysis of human dignity as autonomy also implies an important limitation on the use of human genetic engineering. Autonomy – the ability to regulate one’s own affairs and to choose how to live one’s life within the overall framework of a broader community – implies that one should have a *choice of a reasonable array of different life plans* available to members of one’s society. Apart from societal and other environmental factors, a person’s genetic endowment can obviously also heavily impact on the scope and content of the array of different life plans available to such person. Accordingly, human genetic engineering should not be used in such a way as to result in the reduction of this reasonable array of different life plans. Essentially, autonomy should not be used to compromise itself; prospective parents’ autonomy to use genetic engineering should be limited by the prospective child’s future capacity for autonomy.

A relevant question therefore hangs above the therapy-versus-enhancement demarcation that characterizes much of the current debate on human genetic engineering. If human dignity is accepted as the paradigm for this debate, should the demarcation of ethical and legal permissibility not rather be drawn between those uses of genetic engineering that compromise the capacity for autonomy, and those that are neutral or enhancing towards the capacity for autonomy?

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- <sup>1</sup> The author would like to acknowledge the support of the Mercator Foundation (through the Humanism in the Age of Globalization project).
  - <sup>2</sup> The Charter of the United Nations, its constitutional instrument, commits its members, in its preamble, to the “dignity and worth of the human person.” The Universal Declaration of Human Rights begins, in the preamble, with the statement that the inherent “dignity” and the “equal and inalienable rights” of all persons are the “foundation of freedom and justice and peace.” The Universal Declaration goes on to assert in s 1 that “[a]ll human beings are born free and equal in dignity and rights.” The American Convention on Human Rights states in s 11(1) that “everyone has the right to have his honor respected and his dignity recognized.” The African Charter on Human and Peoples’ Rights states in s 5 that “[e]very individual shall have the right to the respect of the dignity inherent in a human being.”
  - <sup>3</sup> Adam Schulman. Bioethics and human dignity. Staff working paper. The President’s Council on Bioethics.
  - <sup>4</sup> John Harris, Clones, Genes, and Human Rights, *in* THE GENETIC REVOLUTION AND HUMAN RIGHTS 61, 66 (Justine Burley, ed., 1999).
  - <sup>5</sup> See for instance: (*in the US*) *Furman v Georgia* 408 US 238 at 273, 92 SCt 2726 (1972); (*in Canada*) *R v Oakes* (1986) 19 CRR 308 at 334-335; (*in India*) *Francis Coralie Mullen v Administrator, Union Territory of Delhi* (1981) 1 SCC 608 at 618-619.
  - <sup>6</sup> The Constitutional Court’s website can be visited at <<http://www.constitutionalcourt.org.za>>.
  - <sup>7</sup> See Aurel Kolnai, *Dignity*, 51(197) *Philosophy* 251-271, 253 (1976).
  - <sup>8</sup> Aristotle famously said: “Dignity does not consist in possessing honors, but in deserving them.”

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- <sup>9</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 (6 June 1995) para 329.
- <sup>10</sup> *Makwanyane*.
- <sup>11</sup> *Christian Lawyers Association of South Africa & others v Minister of Health & others* 1998 (4) SA 113 (T), 1998 (11) BCLR 1434 (T).
- <sup>12</sup> Consensual sexual conduct between adults in private has been freed from criminal restriction, not only because sexual orientation is specifically listed in the Bill of Rights as a characteristic that may not be the grounds for unequal treatment, but on wider grounds of dignity and privacy (*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (1) BCLR 1517 (9 October 1998), hereafter referred to as *National Coalition I*, paras 28-32, per Ackermann J for the Court; paras 108-129, per Sachs J with whose sentiments Ackermann J associated himself – para 78). Same-sex partners have been held to be entitled to access to statutory health insurance schemes (*Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T)). The right of permanent same-sex partners to equal spousal benefits provided in legislation has been asserted (*Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC)). The protection and nurturance same-sex partners can jointly offer children in need of adoption has been put on equal footing with heterosexual couples (*Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC)). The right of a same-sex partner not giving birth to a child conceived by artificial insemination to become the legitimate parent of the child has been confirmed (*J v Director General: Department of Home Affairs* 2003 (5) SA 621 (CC)). The equal right of same-sex partners to beneficial immigrant status has been established (*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999), hereafter referred to as *National Coalition II*). The common law has been developed by extending the spouse's action for loss of support to partners in permanent same-sex life relationships (*Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA)). Finally, same-sex partners' right to conclude a marriage has been established – first by the Supreme Court of Appeal (*Fourie and Another v Minister of Home Affairs and Another* (232/2003) [2004] ZASCA 132 (30 November 2004), hereafter referred to as *Fourie* (SCA)) and subsequently by the Constitutional Court (*Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC) (1 December 2005), hereafter referred to as *Fourie* (CC)).
- <sup>13</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21 (5 October 2007).
- <sup>14</sup> *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002).
- <sup>15</sup> *Dawood* para 35.
- <sup>16</sup> Chapter 2 of the Constitution of the Republic of South Africa, Act 108 of 1996.  
<<http://www.info.gov.za/documents/constitution/index.htm>>
- <sup>17</sup> s 7 of the Constitution, which reads: “7(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”
- <sup>18</sup> s 36 of the Constitution, which reads: “36(1) 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, taking into account all relevant factors...”

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- <sup>19</sup> s 39 of the Constitution, which reads: “39(1) When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom...”
- <sup>20</sup> s 10 of the Constitution.
- <sup>21</sup> *Ferreira* para 49.
- <sup>22</sup> *National Coalition I* para 30.
- <sup>23</sup> *National Coalition I* para 30; *National Coalition II* paras 41, 54; *Fourie* (CC) paras 50, 114, 151-152.
- <sup>24</sup> *Makwanyane* para 84.
- <sup>25</sup> *Christian Lawyers Association of South Africa & others v Minister of Health & others* 1998 (4) SA 113 (T), 1998 (11) BCLR 1434 (T), in which the Transvaal Provincial Division of the High Court per McCreath J held that the Constitution does not change the common law position of the foetus as *not* being a legal persona (1443B-C, 1437C-D). The Court commented that: “One of the requirements of the protection afforded by the *nasciturus* rule is that the foetus be born alive. There is no provision in the Constitution to protect the foetus pending the fulfilment of that condition.” (1441I.)
- <sup>26</sup> *Makwanyane* para 328; *Dawood* para 35.
- <sup>27</sup> *National Coalition I* para 28.
- <sup>28</sup> *Makwanyane* para 329; *National Coalition I* para 28; *Fourie* (SCA) para 24; *National Coalition II* para 54; *Fourie* (CC) paras 50, 61; *Hoffmann* para 37.
- <sup>29</sup> *National Coalition II* para 54; *Fourie* (CC) paras 95, 112; *Walker* para 130.
- <sup>30</sup> Cf. NICK BOSTROM, DIGNITY AND ENHANCEMENT (2007).
- <sup>31</sup> *University of Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 1 SA 441 (A) is the *locus classicus* on common law dignity in South African law. Common law dignity has been defined as “that valued and serene condition in his social and individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt” (*S v Umfaan* 1908 TS 62 67); “self-respect” (*S v Holliday* 1927 CPD 395 400); “right to tranquil enjoyment” (*S v Holliday* 1927 CPD 395 401); “his proper pride in himself” (*S v Tanteli* 1975 2 SA 772 (T) 775).
- <sup>32</sup> *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996) para 68.
- <sup>33</sup> *Khumalo and others v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002) para 27.
- <sup>34</sup> *S v Williams and others* (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632 (9 June 1995) paras 47, 77; *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998) paras 113, 132; *Prince v President of the Law Society of the Cape of Good Hope* (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (25 January 2002) para 47.
- <sup>35</sup> *Mandela v Felati* (1994) 4 BCLR 1 (W); *Gardener v Whitaker* (1994) 5 BCLR 19 (E); *Potgieter v Kilian* (1995) 11 BCLR 1498 (N).
- <sup>36</sup> *Khumalo* para 27.
- <sup>37</sup> Nicholas Haysom was Chief Legal Advisor to President Nelson Mandela, and is currently Director for Political Affairs in the office of the Secretary General of the UN. Haysom’s biographical notes can be viewed at <<http://www.un.org/News/Press/docs/2007/sga1065.doc.htm>>.

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- 38 Nicholas R.L. Haysom, Dignity, in SOUTH AFRICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS 123, 131 (M.H. Cheadle, D.M. Davis, N.R.L. Haysom, eds., 2002).
- 39 Haysom's citation refers to Ackermann J's opinion at para 146, while it is apparent from the context that he intend to refer to para 46. It is assumed that the '1' was a typographic error.
- 40 Joel Feinberg, The Child's Right to an Open Future, in WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124-153, 140. (W. Aiken and H. LaFollette, eds., 1980).
- 41 Cf. ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969) 131-34; Ian Carter, Positive and Negative Liberty, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed., Winter 2007 Edition) <<http://plato.stanford.edu/archives/win2007/entries/liberty-positive-negative/>>.
- 42 See in general JOHN STUART MILL, ON LIBERTY; for a discussion in the context of the parent-child relationship, see Feinberg 143-44; for a discussion in the context of biolaw and bioethics, see Jacob Dahl Rendtorff, Basic Principles in Bioethics and Biolaw, paper delivered at the Twentieth World Congress of Philosophy, in Boston, Massachusetts, August 10-15, 1998. <<http://www.bu.edu/wcp/MainBioe.htm>>.
- 43 *Ferreira* paras 98, 107; *Bernstein* para 150; *Gauteng* footnote 18 to para 51.
- 44 *Coetzee v Government of The Republic of South Africa* (CCT19/94) [1995] ZACC 7; 1997 (4) BCLR 437; 1997 (3) SA 527 (22 September 1995) para 44; *Ferreira* para 251; *Bernstein* para 150.
- 45 *Ferreira* paras 98, 107; *National Coalition I* paras 32, 117.
- 46 *Bernstein* para 151; *National Coalition II* footnote 50 to para 41.
- 47 *Ferreira* para 46 per Ackermann J.
- 48 Haysom tellingly elaborates on autonomy by referring to self-actualization (at p131): "In this sense [of respect for autonomy], the subject's worth as a self-actualising being must be protected."
- 49 In *S v Lawrence*, at para 146, Sachs J declares in his concurring judgment: "The concept of an open society must indeed be regarded as one of the central features of the bill of rights..."
- 50 *Ferreira* para 50.
- 51 In his concurring opinion in *Ferreira* at para 251 Sachs J uses 'autonomy' explicitly as an element of freedom and personal security.
- 52 *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002).
- 53 *Jordan* para 52.
- 54 *NM and Others v Smith and Others* (CCT69/05) [2007] ZACC 6 (4 April 2007).
- 55 Para 125. In his concurring opinion, Langa CJ at para 92 is therefore able to associate himself with the analyses of constitutional rights by both Madala J for the majority and by O'Regan J: "I ... associate myself with the discussions of the rights to privacy and dignity in both Madala and O'Regan JJ's judgments..."
- 56 Paras 145-146.
- 57 *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5 (4 April 2007).
- 58 Para 57. The Court employed the term 'self-autonomy', which is an unnecessary tautology. It does not seem that the Court intended 'self-autonomy' to mean anything different from 'autonomy'.

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- <sup>59</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21 (5 October 2007).
- <sup>60</sup> Para 64 footnote omitted.
- <sup>61</sup> Para 57.
- <sup>62</sup> Para 131.
- <sup>63</sup> *Coetzee* para 44 per Sachs J (concurring); *Ferreira* paras 250-51 per Sachs J (concurring); and *Bernstein* para 150 per O'Regan (concurring).
- <sup>64</sup> See the quote from Nedelsky in the footnote to *Ferreira* para 251 per Sachs J (concurring).
- <sup>65</sup> *National Coalition I* para 117, footnote omitted. Also see *Jordan* para 82 per Sachs and O'Regan JJ (concurring) and *Volks NO v Robinson and Others* (CCT12/04) [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (21 February 2005) paras 154 and 156 per Sachs J (dissenting).
- <sup>66</sup> Para 251.
- <sup>67</sup> *Bernstein* para 150.
- <sup>68</sup> s 7(2) of the Constitution, which reads: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."
- <sup>69</sup> *National Coalition I* para 32.
- <sup>70</sup> *National Coalition II* para 54; *Du Toit, Fourie* (CC) para 50.
- <sup>71</sup> Paras 145-146.
- <sup>72</sup> Scanlon, *A Theory of Freedom of Expression*, 1 *Philosophy and Public Affairs* 204, 216 (1972).
- <sup>73</sup> See *B. The role of autonomy* above.
- <sup>74</sup> Para 131.
- <sup>75</sup> A non-liberal state may, for instance, promote (or even enforce) specific versions of the good life *because* it perceives these as protecting and advancing its citizens' inherent worth.