

The Value of Human Dignity in the Refugee Protection

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Abstract

This article seeks to illuminate the significance and importance of human dignity in the evolution of the legal protection of refugees and asylum-seekers at international, continental and national level. Human dignity – as a value and a right – plays an important role in the interpretation of the rights as outlined in the South African Bill of Rights and the various laws and policies that give effect to them. The article demonstrates how human dignity contributed (and still contributes) to the advancement of South Africa’s refugee regime, whose main objective is to ensure that refugees and asylum-seekers are afforded access to their constitutional rights. A further objective is ensuring that refugees and asylum-seekers are afforded the kind of treatment that is consistent with global and constitutional standards of dignity, which inform the ethics of refugee reception and treatment.

Keywords Refugees, asylum-seekers, human dignity, fundamental rights, interpretation, realistic, idealistic.

Introduction

In South Africa, respect for and protection of dignity is a cornerstone of the country’s Constitution. The principle of dignity is at the heart of the Bill of the Rights, which is an integral part of the Constitution, and a human rights charter that protects the civil, political and socio-economic rights of all who live in South Africa (RSA, 1996). Dignity is placed at the centre of the jurisprudence of the Bill of Rights. Its value is reflected in the prominence it enjoys at the Constitutional Court, where it is regarded as one of the most fundamental moral norms, from which all rights derive (Currie and de Waal, 2005: 272-3). It therefore functions as an interpretive tool to give meaning, substance, content and scope to those rights contained in the Bill of Rights or to those fundamental rights which are not contained in the Bill of Rights, such as refugee rights. It is further serves to provide principled guidance to resolve constitutional value conflicts (Botha, 2009: 171). In this way, the highest court

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links dignity to socio-economic rights and benefits for all purposes of protection of vulnerable and poor people, including refugees and asylum-seekers. In other words, dignity has served as a vital part of the mediation of disputes related to refugees' and asylum-seekers' eligibility for the benefits of socio-economic programmes designed to respond to the material deprivation of their essential needs. Dignity is also an integral component of the economic development of the poor and vulnerable. Emphasizing dignity, the courts have insisted that South Africa should uphold its international, constitutional and legislative obligations to treat human beings with the appropriate respect, dignity, care, and concern (Kavuro, 2018: 27-28). This article demonstrates that this position is drawn from the idealistic approach to the ethics of international migration.

Against this background, this article explores the role and value of dignity in the protection of refugees and asylum-seekers. The primary focus is on the exploration of the links between human dignity, socio-economic rights and the rights of refugees, at international, continental and national levels. The centrality of dignity in the protection of the poor, marginalised and vulnerable is illuminated with a view to shedding light on the need to offer fair, decent and favourable treatment to recognised refugees and asylum-seekers. Accordingly, the article considers the importance of dignity in guiding the interpretation of specific socio-economic rights underpinning the protection of vulnerable groups. In this context, the article discusses the impact of dignity on the evolution of international refugee protection. It argues that after the reaffirmation of human dignity as a core tenet on which the international legal order should be grounded, international refugee law was revisited and re-engineered to meet the standards of dignified protection as contemplated in the 1945 Charter of the United Nations (UN) and the 1948 Universal Declaration of Human Rights (UDHR). It further argues that gaps in international refugee law can be closed by human rights texts, adopted to give effect to those rights contained in the UDHR (1948). The article then examines the treatment of refugees in South Africa during all the political eras of this country – prior to the formation of the Union; pre-apartheid; apartheid; and post-apartheid. The article shows that there was no refugee legislation until the inception of democracy in 1994. This would afford refugees and asylum-seekers the dignity, which they were denied by previous regimes. This article takes into account the fact that this dignity – as a constitutional value – is given precedence by the Constitutional Court over the values of equality and freedom, as enshrined in the Bill of Rights. Related rights include socio-

economic rights, which are granted to refugees and asylum-seekers in terms of the Constitution (RSA, 1996) and the Refugees Act 130 of 1998 (RSA, 1998), which affords them humane and dignified treatment. The article further examines the question of favourable treatment, as enshrined in international refugee treaty, through realistic and idealistic approaches to the ethics of the treatment of non-citizens, in general and refugees, in particular. The concluding section stresses the value of human dignity and emphasises the centrality of its role in the recognition of the rights of refugees and asylum-seekers, by having rights extended to them, not only to this country's citizens.

The Impact of Dignity on International Refugee Protection

Dignified treatment under the United Nations (UN) Refugee Convention (1951)

The need for the protection of human dignity led the international community to revisit international refugee treaty, which was revised in 1951, to ensure that refugees and asylum-seekers are afforded fair, decent and favourable treatment. This radical move to create a universal standard of treatment of refugees cannot be separated from the recognition of human dignity as reaffirmed by the Charter of the UN (1945). The importance of human dignity is principally reflected in and underpins the UDHR (1948) as well as subsequent human rights treaties. These important human rights decisions, which inform the current international legal order, elevated the protection of the moral worth of human beings to the centre of the protection of humanity as a whole. This approach is anchored in the moral philosophy of Immanuel Kant, who observed that the protection of dignity of the person implies that the person should be given liberties that will allow such person to live his or her life in accordance with ends that he or she freely chose. By enjoying all liberties, an individual can be an autonomous agent with the ability to define his or her own destiny independently. To get here, an individual must enjoy all fundamental rights and freedoms, which the state must desist from threatening or violating. Any human being – citizens and non-citizens alike – should not be treated as mere objects or as means to an end. Despite the territorial boundaries or sovereignty of any nation, all individuals must be treated as ends in themselves who act for their own sake and are capable of autonomous choice (Kant, 1785: 8-31).

Universal fundamental rights and freedoms as well as fundamental refugee rights were developed with a view of furthering the Kantian philosophy. The idealistic approach to the ethics of the treatment of persons would dictate that

all people should be entitled to all universal rights, regardless of their nationality (Ugur, 2007: 7). Within this view, Jacques Maritain, one of the drafters of the UDHR, asserts that human beings are bearers of fundamental human rights and freedoms because of the very fact that they are persons and masters of themselves and of their acts. Consequently, the state cannot treat human beings merely as means to an end. A person is “an end, which must be treated as such” (Maritain and Anson, 1949: 65). What this view tells us, is that the dignity of a person cannot be respected and protected if there is no recognition of fundamental rights and freedoms that equally apply to all people, irrespective of their gender, economic status or nationality. This is the rationale behind the recognition of universal human rights and universal refugee rights. It is therefore clear why dignity, as a vital and vibrant precept, led heads of state and governments to consider the place of refugees within international legal systems with a particular focus on how the plight of refugees and asylum-seekers can humanely, favourably and effectively be protected.

It is crucial to point out that international refugee treaty was adopted in the 1920s. However, in 1951 international refugee treaty was reformed in a manner that incorporated most liberal elements in terms of civil, political, economic, social and cultural rights. As a result, the 1951 Convention Relating to the Status of Refugees (the UN Refugee Convention) was adopted and thus grounded the protection of refugees in the theories of equality in rights and dignity. In fact, the UN Refugee Convention (1951) introduced a number of strategies intended to provide for favourable standards of treatment with respect to access to socio-economic rights and benefits that were exclusively enjoyed by citizens. Prior to the adoption of the UN Refugee Convention (1951), legal obligations to respond to socio-economic needs of refugees and asylum-seekers were non-existent. Issues related to socio-economic problems were largely addressed by charity organisations or non-state agents. The grounding of international refugee protection in equality, rights and dignity has the potential of creating a positive legal obligation on the state, which requires the national government to act positively. This would subsequently create and secure humane conditions under which refugees’ essential needs will be responded to in accordance with the resources available, and through international cooperation. Securing humane conditions can be achieved through the entitlement of socio-economic rights and benefits and through being included as beneficiaries of socio-economic schemes as well as other public goods and services. Inadequate national resources do not absolve the

host state from extending social welfare to refugees. Hence, the host state may seek financial assistance from other nations on the basis of international cooperation and burden sharing. It follows that the positive legal obligations – imposed on the host state – to protect refugees and asylum-seekers' dignity and moral worth should require the establishment of social justice, which allows them to regain self-respect and self-esteem through access to socio-economic programmes and labour opportunities. Such access must be facilitated in a fair, dignified and favourable manner.

The analysis of fair and unbiased protection may not overlook the fact that political realism can provide an ethical basis for exclusion of refugees from certain entitlements. As a sovereign state, a host country is obliged to take into consideration the relevant internationally recognised standards. However, nothing stops the host country from adopting immigration or refugee measures which it morally views as not posing a threat to the ways of life of its citizens, but whose outcome may generate restrictive immigration policies. Proponents of fair and dignified treatment will, in this regard, advocate for the right to work for all refugees as such entitlement will contribute to the increase of the state's resources. The promotion of self-reliance is the threshold requirement, as entrenched in the UN Refugee Convention (1951), whose aim is to ensure the restoration of hope and dignity in the lives of people who live in exile. The restoration of the self-esteem and self-reliance of refugees and asylum-seekers is not only grounded in the accessibility of social welfare, but also in the active participation in the economy of the host country.

The 1951 revision of international refugee treaty set out certain strategies towards, if implemented, the protection of the dignity, health and well-being of refugees and asylum-seekers. Worth citing are the following strategies:

- (i) Both refugees and asylum-seekers must be recognised as human beings endowed with certain inalienable rights. By recognising the necessity to protect them as humans, a host state must observe the demands made under the Charter of the UN (1945), the UDHR (1948), the refugee convention and human rights treaties (Preamble to the UN Refugee Convention, 1951).
- (ii) All nations or states that are party to the UN Refugee Convention (1951) have to extend fundamental rights and benefits traditionally associated with citizenship, to refugees and asylum-seekers in a manner that promotes, at national level, the widest possible exercise of refugees' rights and benefits contained in the UN

Refugee Convention (Preamble to the UN Refugee Convention, 1951).

- (iii) Owing to the special vulnerabilities of refugees, their fundamental rights and freedoms (and their entitlements thereof) must be conceived and understood in social and humanitarian terms. Entitlements and accessibility of rights and benefits must be accorded to refugees and asylum-seekers on a favourable basis (Preamble to the UN Refugee Convention, 1951).
- (iv) Offering the differentiated treatment to refugees (or asylum-seekers) with respect to socio-economic rights must be prioritised. The prioritisation of access to the existing social welfare system at national level can be drawn from the mandate given to the UNHCR to promote the admission of asylum-seekers regardless of their socio-economic status (Article 8(d) of the Statute of the UNHCR (UN, 1950)).

In light of the above strategies, the protection of refugees and asylum-seekers in a humane and equitable manner is of fundamental importance. At the heart of the UN Refugee Convention lays moral and legal obligations to protect refugees and asylum-seekers from humiliation, degradation, deprivation and poverty. Within this view, a host state must, in practice, play a major role in ensuring that refugees retain feelings of self-worth and self-esteem and move toward self-reliance. At national level, it is imperative for the host state – as a sovereign nation – to adopt its own refugee regime in light of the principles of international refugee law and in light of the principles underpinning its Constitution. In situations where the national refugee regime falls short of the international refugee protection, refugees should have a legal recourse to approach the court for resolution of disputes. The court has the mandate to determine whether the state conforms to refugee norms, principles and standards and to interpret the rights of refugees in a way that promotes freedom from human suffering caused by war, political persecution or caused by other reasons such as physical deprivation or discrimination.

Although human dignity is at the centre of the protection of the plight of refugees and asylum-seekers, there is no right to human dignity expressly protected under the UN Refugee Convention (1951). Rather, the idea of protection of human dignity is implicitly reflected in the positive and negative nature of refugee rights. Whilst the negative nature of certain rights imposes a

duty on the state and others not to interfere with refugees' or asylum-seekers' rights and liberties, the positive nature of certain rights requires that refugees or asylum-seekers should live in conditions in which the basic necessities of life will be provided. In emergency situations, they must be provided with public relief and assistance. For the purpose of restoration of normalcy to their lives, they must have favourable access to public goods and services that seek to improve the quality of life of citizens. In other words, where refugees or asylum-seekers lack the material means to do so, the state must avail the resources required to enhance their ability to arrange their lives in accordance with their choices. It is evident that the underlying purpose of the provision of dignified and favourable treatment is to create spaces in which refugees can favourably enjoy access to the state's social welfare system. This would facilitate and promote the effective local integration into socio-economic development programmes.

Dignified Treatment under the African Union (AU) Refugee Convention

In 1969, the Organisation of African Unity (OAU), and currently the African Union (AU) adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa (AU Refugee Convention, 1969). The OAU committed African states and governments to the alleviation of refugees' and asylum-seekers' misery and suffering by means of offering them socio-economic opportunities to achieve a better life and future. Like the UN Refugee Convention (1951), the AU Refugee Convention (1969) does not expressly protect the right to human dignity. Unlike the UN Refugee Convention (1951), the AU Refugee Convention (1969) does not expressly guarantee socio-economic rights and benefits of refugees. Nonetheless, the convention imposes a positive obligation on African states to create and secure humane conditions under which refugees' essential socio-economic problems will be responded to on a humanitarian basis and on the basis of the spirit of African solidarity or in the African context (Articles 2(2), 2(4) and para 8 of the Preamble, AU Refugee Convention, 1969). It is within the African humanitarian context that the principle of favourable treatment should apply to refugees and asylum-seekers. It follows that the AU Refugee Convention (1969) closes gaps in the UN Refugee Convention (1951) in such a way that those rights which are not contained in the latter convention should be interpreted in terms of the furtherance of the spirit of African solidarity (Article 2(4), AU Refugee Convention, 1969). The AU Refugee Convention (1969) stresses that the admission, reception and treatment of asylum-seekers (or refugees) should be viewed as a peaceful and humanitarian act (Article 2(2), AU Refugee

Convention, 1969). Poor African countries cannot object to admitting and receiving asylum-seekers on the ground of poverty as such objection will be inconsistent with the African spirit of protecting all humanity or the notion of African compassion towards other human beings. African compassion towards the protection of all humans, is imbedded in the collective or communitarian efforts to alleviate the suffering of others. It is not morally right to sit idly and watch when another human being is suffering or in danger. One must act. This is what the spirit of African solidarity implies at individual level. At national level, the state must morally adhere to and apply those moral norms, ethics and rules established by its political community for the humane treatment of another human being. Such African approach to the treatment of human beings must, in principle, be reinforced by the principle of *non-refoulement*, which prohibits the return of refugees or asylum-seekers to a place where their lives would be exposed to danger (Article 2(3), AU Refugee Convention, 1969).

In light of these views, African countries are therefore obliged to make the best efforts to adopt their own asylum regimes that are in line with the spirit, purports and objectives of the AU Refugee Convention. Once a national asylum law has been developed and adopted, each and every African government is required to make its best efforts consistent with its own asylum law and societal norms to receive refugees and to secure their full local integration, or in terms of sharing burdens, to secure their resettlement in the third countries (Article 2(1), AU Refugee Convention, 1969). In other words, in the event that the protection of refugees becomes a burden, an African country enjoys the discretion to appeal to other African countries through the AU to take appropriate measures to lighten such burden in the spirit of African solidarity and international cooperation (Article 2, AU Refugee Convention, 1969).

The humanitarian approach, however, places an emphasis on the need to create conditions in which a better life and future can be achieved by refugees (Paragraph 1 of the Preamble, AU Refugee Convention, 1969). A better standard of life – comparable to that of citizens – cannot be achieved without access to socio-economic rights and benefits as well as other public service delivery programmes. Accessibility must be informed by African morals, norms and values that are ingrained in the most recognised African ethics of

*ubuntu*¹. The ethics of the treatment of persons is grounded in the notion of equal treatment, equality in dignity, mutual respect, mutual concern, and in the idea that a person enjoys humanity through others (Kavuro, 2015: 188-189). The African ethics should permeate and inform any measure taken for the protection of refugees. That measure should aim at the restoration of the dignity that refugees or asylum-seekers had lost, as this will rebuild their confidence, hope and vision. Hope for a better future can be restored through social and economic empowerment. The protection of human dignity is linked to access to resources, to enable refugees and asylum-seekers to pursue their happiness or dreams. This approach to the ethics of the protection of refugees defeats the argument that national resources should be reserved and preserved for the benefit of citizens only. This article demonstrates that the said approach does not sit well with the realistic approach to the ethics of the protection of non-citizens.

Dignified Treatment under Human Rights Treaties

The emphasis on the protection of humanity engenders the morality for host states to adopt refugee management measures that are not only consistent with international refugee treaties, but also consistent with human rights law. A human rights-based approach to the treatment of human beings is conceptually grounded in equality in rights and dignity. A human rights-based approach has to supplement the international refugee protection. Rights contained in the human rights texts can be invoked by refugees or asylum-seekers to claim dignified treatment in the situations where the UN Refugee Convention (1951) does not provide a favourable approach to certain rights. From a realistic view, the host state cannot fall short of some supposed moral

¹ *Ubuntu* is described by Mokgoro J in *S v Makwanyane* 1995 (3) SA 391 (CC) para 308 as follows: *Generally, ubuntu translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises a respect for human dignity, marking a shift from confrontation to conciliation. In South Africa ubuntu has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of 'humanity' and 'menswaardigheid', are also highly prized. It is values like these that [section 39(1)(a) of the South African Constitution] requires to be promoted.* They give meaning and texture to the principles of a society based on freedom and equality.

duties entrenched in international human rights. This article recognises the shortcomings of the UN Refugee Convention (1951). Firstly, it does not require a favourable approach to entitlement to rights and benefits which do not find expression in it. Secondly, it does not recognise the special vulnerabilities of refugees. Furthermore, the AU Refugee Convention (1969) is of no help with regard to the manner in which a particular right should be accorded to a particular individual. It applies an ambiguous approach when it seeks to afford all rights to refugees and asylum-seekers on the basis of an African spirit and philosophy.

Accordingly, the main concern is that both international refugee conventions do not clearly specify the treatment that could be afforded vulnerable groups of refugees, such as women, children, disabled people, elderly people or persons with serious illnesses. These lacunae in international refugee law could possibly be filled by relying on dignified standards of treatment as set forth under, for example, the UDHR, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the 1980 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1981 African Charter on Human and Peoples' Rights (ACHPR), the 1989 Convention on the Rights of the Child (CRC), the 1990 African Charter on the Rights and Welfare of the Child (ACRWC) and the 2006 Convention on the Rights of Persons with Disabilities (CRPD). The list of human rights texts is non-exhaustive, as there are a number of other human rights texts designed to protect certain specific interests of certain categories of people.

Generally, the basic human rights standards play a significant role, not only in the fight against discrimination against vulnerable groups, including refugees and asylum-seekers, but also in the struggles of the needy and vulnerable, to demand positive state measures that would allow them to live a life of dignity (VeneKlasen et al., 2004: 4). Observance and promotion of human rights norms and standards is regarded as bases of the alleviation of social vulnerabilities and other types of marginalisation. Hence, human rights principles require individuals' active participation in economic development and democratic processes. The human rights-based protection is a principled and viable tool that can be invoked by refugees and asylum-seekers to claim basic human rights and to promote active participation in human, social,

political and economic development of the host country. Integral to effective human rights protection is the understanding that poor, vulnerable, marginalised individuals' desire for the enjoyment of a sense of dignity and for the satisfaction of their basic needs would be realised only if they have access to human rights entitlements (Chapman, 2005: 4).

According to Beracochea et al. (2011: 5), the human rights-based approach provides an alternative response to challenges to receive an effective human rights protection, because:

Deep within [its] essence is the knowledge that ordinary people have the capacity to manage their own lives and society quite well using knowledge and resources that [the international community] have developed that must be shared freely.

For refugees and asylum-seekers to manage their own lives, they must be allowed to have access to those rights that the domestic distributive justice system provides. In fact, the domestic distributive justice system makes national resources to be shared freely among its own citizens. The human rights-based approach challenges this approach based on the principle of citizenship, as this approach deprives certain individuals of national protection. In refugee protection domains, a human rights-based approach can support and strengthen asylum laws in restoring a sense of normality to the lives of victims of persecutions and reviving their participation in social and economic activities. It can be invoked with respect to defining special treatment that should be accorded to certain individuals, such as women, pregnant women, young girls, infants, children (separated or unaccompanied), elderly people, disabled people and victims of rape or human trafficking. In understanding these differences in treatment, the rights of refugees must be incorporated into national laws, policies and strategies, in a manner which gives effect to special treatment accorded to different categories of refugees. This approach to the treatment of refugees should be what the favourable treatment of refugees entails or what the modern human rights protection entails. The protection of dignity varies and this is dependent on the situation of the person.

The need for human rights protection to reinforce or supplement the refugee rights protection is very important because, as Eide (1996: 25) posits, human rights law inter-relates the promotion of human rights norms and standards with the advancement of socio-economic development. Socio-economic development is seen as a vehicle to the progressive realisation of socio-

economic rights or better standards of life. The observance of human rights norms plays a crucial role in the alleviation of deprivation and poverty and is seen as a primary goal of social protection and social progress, thereby contributing to positive national economic growth (Eide, 1996: 25). Of concern is that, by its very nature, refugee rights are not viewed as tenets of socio-economic development but as tenets of the humanitarian protection in the host community. More often, refugee rights are understood in the context of humanitarian terms and not in the context of development terms. Given the fact that the refugees' situation is not a matter that is likely to be resolved in the foreseeable future, it is widely argued that refugees should therefore be integrated into the host society, including integration into economic and ultimately political participation. The inclusion of refugees in the democratic processes would allow them to voice their views on how the economy could be sustained and grown at individual, community and national levels. This article argues that refugee scholars have not given adequate attention to the issue of political participation by refugees and asylum-seekers.

The protection of human rights has not been linked to economic development until very recently. Human rights principles and economic development were, prior to 1990, viewed as separate disciplines that were aimed at increasing human freedom and individual autonomy. This article argues that not enough has been done in the analysis of the role of human rights norms in the protection of refugees, following the recent merger of these two disciplines that gave birth to the human rights-based approach. This approach is regarded as a tool that provides solutions to poverty or deprivation "through the establishment and enforcement of the rights that entitle the poor and marginalised people to a fair share of society's resources" (Chapman 2005: 16).

This suggests that refugees' socio-economic rights should be recognised in terms of their right to development and empowerment, in order to conceptualise those rights in a concrete way that responds to the position of refugees in a globalised economy. In a globalised economy, refugees and asylum-seekers should be given opportunities to restore their freedom to use their talents and skills or to develop their abilities with a view of achieving better and dignified standards of life. In this context, the idea of social empowerment and economic development should, according to Chapman (2005: 4), be understood as:

[...] Increasing people's possibility and capacity to make the most of their potential to live as full creative human beings and to come together to build caring, supporting, and accountable society [and]... responding to people's basic needs for survival and aspirations for human dignity and respect.

This denotes that the capabilities of different categories of refugees (i.e. men, women, children and people with disabilities) should be developed logically and rationally. Although there is a tendency to associate the concept of development with citizenship and analyse it in that context, human fulfilment, active participation and development should not be denied to refugees or asylum-seekers on the ground of nationality. Because socio-economic development is integral to the advancement of better standards of dignified treatment, the right to socio-economic development is an inalienable right, as explicitly stated by the 1986 Declaration on the Right to Development. The preamble of the Declaration (UN, 1986) defines the concept of development as:

[...] A comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the distribution of benefits resulting therefrom.

In this light, all humans are afforded the right to participate in, contribute to and enjoy socio-economic development, including cultural and political progress. It is within this context that refugee rights should be construed at the national level. This argument is supported by the fact that the right to human dignity would imply favourable treatment in labour, social, cultural, economic and political domains. Together with the right to life, the right to human dignity or dignified treatment is viewed as a pillar of social empowerment, social transformation and economic development. As demonstrated, dignified treatment requires the state to make social programmes available to the poor and to ensure that they enjoy unlimited access to those programmes. There is consensus among human rights scholars that a constant improvement of the well-being of individuals will not be possible in circumstances in which people are stuck in poverty, entirely deprived of basic rights or are not accorded special treatment tailored to meet their special needs (Liebenberg, 2008: 154; Pieterse, 2007: 796-822; Sen, 1999: 38; Nussbaum, 2000: 34). The same applies in situations where nothing

is done by the state to improve the conditions of the poor. Poverty or deprivation makes it harder for vulnerable people such as refugees, asylum-seekers and needy citizens to benefit from a range of rights. Access to socio-economic rights is central to the full realisation of human and refugee rights, as well as fundamental freedoms. Integral to human and societal development is the accessibility of socio-economic rights and benefits. Upholding refugee rights should involve more than the protection of physical safety. It needs to include a comprehensive process by which refugees should be integrated into the basic socio-economic strata of society and certain levels of socio-economic development.

Sen, who views rights and freedoms as development, maintains that equitable social transformation will be achieved if every human being has access to those basic rights that increase or enhance human freedom which, in turn, enables a person to achieve his or her life goals (Sen, 1999:38). In the view of Nussbaum (2000: 34), the pain, suffering, humiliation or degradation associated with social inequality or physical deprivation can be eradicated through the accessibility of socio-economic rights, which she views as a principled and nuanced mechanism to empower vulnerable, poor individuals to realise their potential.

The main question is whether socio-economic rights are refugee rights or human rights or both, prior to analysing their role in the protection of the right to the economic development of refugees. The human rights-based approach presumes that human rights are universal and inalienable. They inhere in everyone. They cannot be given by a state or taken away by it. Secondly, all human rights are indivisible. Whether of a positive or negative nature, human rights are derived from the concept of human dignity and seek to protect the intrinsic worth of the human being. Thirdly, human rights are interdependent and interrelated. The realisation of socio-economic rights presupposes the observance of core civil and political rights such as the right to equality, human dignity and freedom from arbitrary treatment. These rights are a cornerstone of social transformation and economic empowerment in South Africa, hence their foundational constitutional value. Fourthly, all individuals are equal in dignity and rights. All human beings are entitled to fundamental human rights and freedoms without discrimination of any kind. This cosmopolitan approach informs South Africa's Bill of Rights which, in turn, underpins the provisions of the Refugees Act (RSA, 1998), relating to the rights of refugees and asylum-seekers (S 27(b) of the Refugees Act). In this respect, the government of South

Africa has to adhere to the norms and standards of the treatment, as expressed in regional and international texts relating to the treatment of refugees and enshrining refugee and human rights. In sum, the connection between refugee rights and socio-economic development/empowerment is expressed in terms of the norms of equality and dignity which engender the favourable treatment of refugees at the national level through the requirement that certain human rights, norms and standards be observed when admitting and protecting refugees in the country. The following sections illustrate that the significance of human dignity has shaped South Africa's legal protection and has engendered the dignity-based jurisprudence invoked by the court to ensure the effective protection of refugees and asylum-seekers in terms of law and policy.

Development of Refugee Law in South Africa

Historical Background

The post-apartheid immigration and refugee law seeks to distance itself from the apartheid practices which denied black South Africans and their fellow black Africans dignified treatment. The current law also distances itself from the previous practices conducted prior to the installation of the apartheid government in 1948. Prior to 1900, the movement of refugees from Europe was understood as white people migrating to and settling in South Africa, whereas other races were forced to migrate as slaves or to work as cheap labourers (Lazerson, 1994: 82-99). After 1900, immigration became an issue of legal concern. There was a need to control and manage immigration on a legal basis. The first immigration law was adopted in 1913 under the Immigrants Regulations Act 22 of 1913, and was aimed at excluding Indian immigrants (Klotz, 2014: 10-11). In 1930, the immigration law was revised under the Immigration Quota Act 8 of 1930 with a view to excluding those migrants classified as 'undesirable'. Based on this exclusionary approach, more restrictive immigration measures were imposed under the Aliens Act 1 of 1937 and the Aliens Registration Act 26 of 1939, with a view of restricting "an influx of European refugees prior to World War II" (Comaroff and Comaroff, 2001: 249). Later, discriminatory immigration measures were directed at the exclusion of African black people and this approach remained operational until the 1990s (Comaroff and Comaroff, 2001). Exclusion, which gives rise to unfair discrimination, lies at the heart of denying people their respect and dignity. Unfair discrimination always sends a message to victims that they are individuals of lesser moral worth, as compared to others. For that

reason, unfair discrimination is not compatible with equality in rights and dignity.

Klotz (2014: 10) illustrates how the immigration laws and policies adopted by the apartheid regime were firmly underpinned by segregation, whereby a sharp ontological line between white and non-white was developed. The roots of the contemporary exclusionary approach and xenophobic sentiments (or violence) can be traced to the past immigration laws. For instance, between 1913 and 1986, African black people, whether refugees or not, were, in principle, not allowed to enter South Africa and could only stay in South Africa as 'illegal migrants' and, if employed, as 'illegal migrant workers' (Adepoju, 2003: 4). Consequently, refugees and asylum-seekers resided in South Africa illegally and had to do their best to support themselves (Polzer, 2008: 480; Handmaker, 2001: 92). They could not claim the dignified standards of treatment, contemplated either in the international refugee law or human rights law. The tension between this long history of an exclusionary approach and the post-apartheid commitment to the protection of dignity of every human person can still be seen in contemporary political approaches to the question of whether refugees and asylum-seekers should, on either an equal basis or a favourable basis, enjoy socio-economic protection.

The question of the favourable protection of refugees can be understood better if two approaches to the ethics of international migration are explored. These two approaches are realistic and idealistic. The morality of the realistic approach is based on the moral standards of protection offered to members of a political community (i.e. citizens) as opposed to non-members or outsiders (i.e. non-citizens), who are viewed as a threat to the political community (Ugur, 2007: 5-6). The realistic theory posits immigration as posing a threat to national interests and the ways of life of citizens and their association as well as their economic development or empowerment. Within this understanding, politicians and policymakers support and adopt socio-economic laws that confine the distribution of national resources to citizens to the exclusion of non-citizens. Put plainly, citizenship becomes the moral ground on which national resources and opportunities can primarily be distributed. In this way, immigration laws, policies and procedures are reformed with a view of decreasing the overall levels of immigration (Ugur, 2007: 5-6). New criteria for admission into the country or for accessing the labour market are introduced, including changes in refugee determination procedures. The shortcomings of the realistic approach are based on the state placing greater weight on the

protection of the interests of citizens than on the interests of outsiders seeking to join its political community. In doing so, little attention is given to meeting the moral standards of protection that take root in equality in rights and dignity, espoused under human rights law (Carens, 1996: 164). The disregard of international moral standards is ethically justified on the basis of the sovereignty of the nation and its moral primary obligation to protect its citizens. However, Carens (1996) asserts that every human being belongs to a particular political community, who enjoys the protection of the government of that community, even if he or she is in another country. The reality is that refugees are the only human beings who do not enjoy the protection of the governments of their own political communities, from which they fled.

In contrast to the realistic approach, the idealistic approach justifies the protection of all human beings (citizens and non-citizens alike) on the basis of humanity and thus applies an egalitarian principle to the protection of international migration. The egalitarian principle derives from and is constructed on the natural law theories on which the ethics of human rights standards are based. The idealistic approach assumes that human rights apply to all human beings irrespective of their nationalities. It purports that people should move freely around the globe and that people should seek asylum in another country. It advocates for a just and fair distribution of wealth among all people within given territorial boundaries. Politicians view this approach as a danger to the preservation of their state's national resources. Hence, the idealistic approach overlooks the sovereignty of the nation and its territorial power to choose who to admit into the country and to decide on the protection to be afforded to that person (Ugur, 2007: 6-7; Carens, 1996: 167). In light of the above, this article analyses the question of the protection of refugees and asylum-seekers in the post-apartheid constitutional order, in the context of the realistic and the idealistic approaches.

The primary point of departure is that the South African Constitution is informed by the natural law theories and thus guarantees certain fundamental rights in the Bill of Rights to all, without distinction of any kind. These rights include socio-economic rights, which are seen as a vehicle to the protection of the human dignity of the poor and vulnerable. The idealistic approach adopted by the Constitution makes the question of protection of the dignity of refugees and asylum-seekers very interesting. Why? Because the post-apartheid government has constitutionally committed itself to upholding the principle of equality in rights and dignity of all people living in the country. Does the idealistic approach apply to immigration law and distributive law? This

question will be responded to through the analysis of the current immigration law. In principle, the application of the idealistic approach is partially underscored in the 1997 Green Paper on International Migration. This Green Paper (RSA, 1997) pointed to the need to extend special protection to refugees and asylum-seekers in a sensible and humane manner. The shift from the discriminatory practices to the dignified protection practices resulted in the adoption of the Refugees Act, 1998. The Act firstly domesticates the UN Refugee Convention (1951) and the AU Refugee Convention (1969). Secondly, it recognises the human rights law as an interpretative tool to be employed when defining the treatment of refugees and asylum-seekers with respect to a disputed or impugned right. Thirdly, the Act gives effect to basic fundamental rights and freedoms contained in the Bill of Rights that apply to everyone. In a nutshell, the Act recognises the equal dignity and moral worth of refugees and asylum-seekers. It thus rests on a rejection of South Africa's racist history, in which black people – citizens and non-citizens alike – were subjected to humiliation and degradation.

Holistically, the Refugees Act (1998) is conceived in cosmopolitan and positive terms. It underscores the idealistic theories. The cosmopolitan terms imply that refugees and asylum-seekers are entitled to all fundamental rights and freedoms, save for those rights the Constitution ascribes to citizens. The positive terms imply that South Africa should act positively to ensure that (a) their needs are met; (b) they have adequate resources; and (c) they are afforded opportunities to advance themselves. People cannot have their dignity respected by the state if they are not afforded socio-economic rights and benefits, whose access is a key to the development of a society in which every individual can pursue his or her dream for the fulfilment of his or her potential. It is within this context that the Refugees Act (1998) is designed to alleviate the desperation and destitution suffered by refugees and asylum-seekers prior to and after arriving in South Africa through the facilitation of equal access to subsidised public service delivery. Despite these promises, the implementation of the refugee law highlights the tension between the protection of human rights and inherited inclinations to treat non-citizens, in particular African black people, as a threat to national security and economic growth (Klotz, 2014: 171).

Human Dignity as an Interpretive Tool

As a foundational value, human dignity is employed to interpret the rights contained in the Bill of Rights. Owing to the idealistic approach to the ethics of

the protection of refugees and asylum-seekers, most of the constitutional rights in the Bill of Rights accrue to refugees and asylum-seekers. Firstly, they accrue to them on account of their cosmopolitan or universal nature. Secondly, the cosmopolitan rights accrue to them by virtue of the Refugees Act (1998). These cosmopolitan rights include the socio-economic rights. The cosmopolitan nature of socio-economic rights is not of concern to this article. The article is more concerned about the fact that it has become a norm that socio-economic rights (and other rights in the Bill of Rights) must be interpreted to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It is understood that the equal respect of human dignity has the potential of promoting the individual autonomy and liberty. In this respect, the founding value of human dignity must essentially inform the interpretation of both the constitutional rights of refugees and of distributive law (i.e. socio-economic legislation) that recognises, circumscribes or limits their rights. The human dignity-based jurisprudence is given precedence in the interpretation of the rights guaranteed by the Refugees Act. The reason is that human dignity – as a value – has been used to develop socio-economic laws in a manner that gives more protection to poor and vulnerable individuals. In refugee realms, it has, so far, been relied on to extend the right to study, work and engage in economic activities to asylum-seekers.

Unlike the refugee law, distributive or socio-economic laws are framed within the realistic context. The realism about the exclusion of refugees and asylum-seekers starts with the recognition that the primary obligation of the state is to protect and advance its citizens, in particular the previously disadvantaged people. In the pursuit of an egalitarian society, the moral worth of refugees and asylum-seekers are usually recognised when the court is ceased with scrutinising a distributive law, conferring socio-economic benefits to ascertain whether such distributive law is in compliance with the constitutional aim, value and standard of dignity. In scrutinising the distributive law, certain factors are taken into consideration. Consideration is given to:

- (i) The impact of socio-economic measures on the conditions of individuals, groups or communities, when determining whether such measures facilitate, promote, and expedite the eradication of deep-seated or inherited inequality (cf. *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal 2010 2 BCLR 99 (CC) para 18*).

- (ii) The reasonableness of positive measures to protect the interests of marginalised groups effectively (cf. *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) paras 31, 36).
- (iii) The need to redress historical, structural and systemic forms of marginalisation, discrimination, indignity or humiliation experienced by millions of black people (cf. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 91).

These considerations are meant to ground the interpretation and adjudication of socio-economic rights in contextual, historical, comparative and purposive methods (de Ville, 2000: 144). As noted, the dignity-based jurisprudence has been elevated to the number one position when it comes to giving meaning, content and substance to socio-economic rights of citizens on the one hand and of refugees on the other in practical situations or in resolving constitutional disputes.

In this way, human dignity was central to the reasoning of the Supreme Court of Appeal (SCA) in *Minister of Home Affairs v Watchenuka* 2004 1 SA 21 (SCA). In this case, the Minister of Home Affairs prohibited asylum-seekers from taking up employment and from studying within the first six months. Although the state as sovereign body has the power to describe the conditions for non-citizens as it deems desirable, the SCA stated that the absolute deprivation of access to education and livelihood opportunities during the first six months violated the human dignity of asylum-seekers (para 24). Viewing work as an important component of living in dignity, the SCA explained that the freedom to engage in productive work ensured, at least, the minimum conditions for asylum-seekers' dignified life (para 27). In justifying its reasoning, the SCA went on to state that human dignity inheres in all people regardless of their nationality and that "self-esteem and a sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful" (para 27). The SCA's remarks were primarily based on the idealistic approach to the protection of the intrinsic worth of a human being. Because human dignity must be protected in every situation, the right to human dignity outweighed distributive laws which fundamentally impair the human dignity of refugees. In the context of asylum-seeking, the protection of dignity requires mechanisms that would enable asylum-seekers to survive and live a better life. Access to the labour market and education is among those mechanisms. The SCA, in *Somali Association of South Africa v Limpopo, Department of Economic Development, Environment and Tourism*, 2015 1 SA 151 (SCA), also invoked the

value of human dignity to determine the scope and ambit of the right to seek employment contained in the Refugees Act. The court noted that the right to seek employment was wide enough to include the right to self-employment guaranteed by article 18 of the UN Refugee Convention. The Supreme Court of Appeal (para 43) stated that:

[...] If, because of circumstances, a refugee or asylum-seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade.

The SCA stated that since certain constitutional rights, such as the right to freely choose a trade, occupation or profession, are reserved for citizens, it cannot be invoked by the state to condemn refugees or asylum-seekers to a life of humiliation and degradation (para 43). This illustrates that certain rights constitutionally afforded to citizens, can be extended to refugees or asylum-seekers. Proceeding from this analysis, new restrictive changes to the Refugees Act, which came into force in terms of the Refugees Amendment Act 11 of 2017 (RSA, 2017), and which were aimed at limiting asylum-seekers' right to work, fall short of the dignified standards of treatment. Under the current revised regime, asylum-seekers must be allowed to work by the Standing Committee for Refugee Affairs and on the basis of conditions determined by the Standing Committee. Accordingly, asylum-seekers are subjected to assessment to determine their abilities to sustain themselves and their dependants – with or without the assistance of family or friends. Those who are unable to sustain themselves must be assisted by humanitarian organisations or be allowed to work. This new dimension of protection of asylum-seekers is inconsistent with the judgements of the SCA handed down in the two aforementioned cases and is in conflict with obligations imposed on South Africa by international refugee law to offer them humanitarian assistance or protection.

Conclusion

The idea of human dignity has shifted from a moral value to a legal norm on which the current international legal order is based. As a legal norm, the idea has gradually shaped the international refugee protection at global, continental and national level to the extent that restores the moral worth of refugees and asylum-seekers. It challenges the realistic approach which is

grounded in essential elements of sovereignty. In the South African context, the idea has greatly contributed to a more liberal constitutional, statutory, or judicial protection of refugees and asylum-seekers. Normatively, human dignity has engendered the dignity-based jurisprudence, which is a powerful tool that is used, not only to give effect to refugees' rights, but also to extend some of the rights traditionally attached to citizenship to refugees or asylum-seekers for the protection of their welfare. It holistically connects and brings all refugee, human and constitutional rights together for all purposes of social progress. It problematises the traditional distinctions between the rights of citizens and the rights of non-citizens and between needy citizens and needy refugees.

The dignity-based jurisprudence employed by the courts is significant for the interpretation and protection of refugee rights for several reasons. Firstly, the value of dignity demands that no-one should be reduced to a mere object of state power, or be left without the resources needed to live a dignified life or be deprived of autonomous choice and abilities to meet their own ends. Secondly, dignity has no boundaries and for that reason, it cannot be confined to citizens only. Thirdly, dignity, read together with the value of *ubuntu*, requires all persons to be treated humanely and demands equal treatment consistent with and infused by values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity. Fourthly, measures based on the immigration law principle of self-sufficiency, in cases involving destitute refugees, would not be constitutionally justified in circumstances where they have the effect of degrading refugees by compelling them to resort to crime, prostitution, stealing, or begging. Fifthly, discrimination against this vulnerable group would amount to unfair discrimination if it has a stigmatising effect by sending out a message that this group of people is in some ways inferior to citizens or less worthy as human persons. The value of human dignity has played an important role in the recognition of the rights of refugees and asylum-seekers and the extension of rights to them. It is still applied to mediate a number of legal disputes, including administrative disputes or criminal matters involving refugees and asylum-seekers.

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