

## HUMAN RIGHTS

### PREAMBLE

#### Values contained in the Constitution

It is extremely important for you to understand that the values as enshrined in the Constitution are the highest (and therefore the most important) values in South Africa. You (all South Africans) have an active duty to live and realise the values of the Constitution. This duty is not limited to the government and legal practitioners.

#### Human dignity as core value

A value or principle like human dignity may therefore *never* be violated. This means that nobody can ever agree to have their human dignity violated. Permission in this context is a myth and it is very important for you to understand this in the context of this document. Human dignity is the core value in terms of which any and all conduct should be measured. In other words: does my conduct towards others respect their human dignity, and are all persons guided in a dignified manner to form part of the NWU as a whole?

#### Scope

Although this document has been written and compiled with student life and specifically the hierarchical relationships accompanying this in mind, its content applies to all students and employees of the NWU. After all, the provisions of the Constitution apply to all and cannot be limited to certain individuals or situations.

#### Application

It is vital that you realise that the content of this document does not apply only where you physically work with a person. All information contained in it also applies to any form of social media. You can therefore be held accountable for any comments that you post on *Facebook, Twitter, Instagram*, et cetera. Think carefully before you use these platforms to state your views or post a comment, even if you do not intend it to be taken seriously.

#### Introduction

As South Africans we all share in the Constitution of the Republic of South Africa, 1996 (Constitution), and its values. Not only do we uphold these values, but we also rely on them as they are embodied in the Constitution. This shared loyalty is the ideal starting point for such a diverse context as a university or, in terms of the relevance of this guide, as the NWU community. This guide expounds on three core constitutional rights namely: the right to human dignity, the right to freedom, and the right to equality. It makes human rights

practically executable and easier to understand. The aim of this guide is to provide you with sufficient explanations and examples to help you to understand human rights better. You and I must both be agents for change in South Africa and try to establish a human rights culture by promoting respect and informing others about human rights. This guide attempts to provide you with the necessary information to do so.

### **Where human rights come from –a brief overview**

Human rights were initially called “the rights of man”, until the middle of the 20th century, when Eleanor Roosevelt made the term “human rights” better known. Through her work at the United Nations, Roosevelt tried to convey that the term “right of man” was viewed by many as applicable only to men. That is why she started propagating the term “human rights”, because it was more gender neutral. Human rights were not intended to be exclusive to a certain class or group of people (Mabungizi, 2004). Therefore, when people talk of human rights, they should be generally understood as the rights belonging to an individual as a consequence of their being a human being and for no other reason.

Human rights are rights that each and every human being possesses, merely because they are human. This means that these rights cannot be relinquished or alienated.

### **What are human rights?**

The Constitution comprises 243 sections, and is divided into 14 chapters. The second chapter of the Constitution, the Bill of Rights, contains a list of human rights. The Bill of Rights consists of 27 sections that each describes a separate right of South African citizens. If one looks at this scope, one can see that certain rights are more relevant than others. That is why this document looks only at those rights that are relevant to the NWU community (staff, students and stakeholders).

Sections 9 to 14 guarantee the right to equality, human dignity, life, freedom and safety of the person, as well as the right to privacy. The traditional freedom rights are found in sections 15, 16, 17, 18, 21 and 22, where freedom of religion, speech, association, movement and profession are guaranteed. Section 24 gives everyone the right to an environment that is not harmful to their health. Section 25 offers every citizen the right to property. Section 30 gives every South African the right to live their culture and speak their language. However, this may not be done in a way that does not align with the Bill of Rights (Kleyn & Viljoen, 2002).

These are the human rights that are the most appropriate for the purposes of this guide. Because it may be difficult for people without a legal background to remember these rights, we have compiled a graphic representation to help you remember these rights. This representation simplifies these rights further by linking each of them to constitutional values, namely freedom, human dignity and equality, which form the basis of democracy in South Africa. It is also important to note that these are the same values as those included in the NWU’s Human Rights Policy (which binds us all), and which will be discussed under the next point.

### **How do human rights apply to you and me?**

South Africa has a regime of the supremacy of the Constitution. This means that the Constitution of the Republic of South Africa, 1996, is the highest authority in the country and the highest law that applies to you and me. Section 2 of the Constitution states that any law or action (by you or me or by any other

structure) that is not in line with the Constitution will be regarded as invalid and unconstitutional. Section 2 also states that all South Africans (again, you and I included) are guided by the Constitution and are therefore legally bound by it and obliged to subject ourselves to its provisions.

As it is the highest authority in South Africa, it is the ideal document to use if one wants to promote and protect human rights. The Bill of Rights (Chapter 2 of the Constitution), which protects all human rights, is regarded as the cornerstone of the South African democracy (Currie & De Waal, 2001). Section 8(2) furthermore makes provision for the rights in the Bill to be recognised and respected in the everyday environment – and this makes human rights directly relevant to the way in which interaction between people takes place.

Any country would think that the ideal state is the one in which a culture of human rights is in place and everybody's human rights are respected. In South Africa this is definitely the case. In section 184 (1)(a) the Constitution confirms that a culture of human rights must be established and that respect for human rights must be promoted. This is a worthy objective, and for the country to manage this, it is important for us, as part of the university community, to take ownership of this idea and to put measures in place to be able to grow and to learn about a culture of human rights.

The North-West University has already taken ownership of this idea and already has a human rights policy in place that is underwritten by staff and students. This policy stipulates that all the fundamental values and rights included in the Constitution must be upheld and respected in the university community. This policy furthermore states that these human rights should not be viewed in isolation, but should underlie all university practices and policies. For this reason as far as the Bill of Rights is concerned, the entire NWU community is also bound by the university's Human Rights Policy.

### **Human rights and initiation**

Now that human rights have been set out properly, we can look in more detail at the well-known challenge in our midst when it comes to attempts to maintain a human rights culture, namely initiation. In the case of **EB v Creecy NO (2010)** a learner was elected as vice head boy of a prominent Afrikaans-medium high school in Krugersdorp. Before their formal instatement, a so-called "team-building exercise" was held for the newly elected leaders. In fact, it was an initiation ritual. The reason that was given for this action, was that the exercise would contribute to cohesion among the learners. The judge in the case described the initiation that took place as follows (**EB v Creecy NO, 2010**):

As history has shown these kinds of orientations more often than not become a spectacle of that which would only satisfy those with a distorted sense of 'fun' and 'enjoyment' and, for that matter, 'bonding'. This initiation was no exception: it was marked by unruly and rowdy behaviour probably much to the delight and amusement of the onlookers but unfortunately so, to the dismay and humiliation of the victims.

From the description by the judge in this case it is clear that the human dignity, equality and freedom of the learners were violated by the exercise. To make it more practical: we can test each of the constitutional values involved against the given facts. These learners were humiliated, and their human dignity was therefore violated. A group of more senior learners was in control of the event and they treated the learners involved in a way that had a negative impact on their human rights (for example the right to equality). In the final

instance their right to freedom was violated, particularly the right to the freedom and safety of their person, as they were forced to participate in a humiliating activity.

### **Importance to you and me**

Very often students in a residence welcome newcomers in such a way that they are “moulded” within a certain ethos or culture. This is often done because people believe that if they suffer together, they will bond more effectively. As can be seen from the description by the judge, this is not the right way to do things, and it is in fact a violation of human rights. Further and more specific examples are given under the next point, as are – even more important – the consequences of this type of violation.

### **What is the perspective of the South African Human Rights Commission on violations through initiation practices?**

The South African Human Rights Commission (SAHRC) was established in terms of Chapter 9 of the Constitution as an institution that is mainly responsible for promoting and maintaining the constitutional democracy in South Africa. The SAHRC maintains that the circumstances surrounding each incident will determine the right that was violated (SAHRC, 2001:13). However, all initiation practices have the same effect, namely to humiliate students and to subordinate them – some physically as well as mentally (SAHRC, 2001:16). Students often have to participate in practices or events merely because they have been a tradition for a long time. The reality is that we have been living in a constitutional democracy for more than two decades, and that we should look again at practices and adjust them to the current legal situation.

This statement refers to all practices that are taken from the past and also practices that are planned for the future. It is therefore important to give examples of human rights violations within the initiation context to enable people to avoid such risks and to help to further assess actions.

### **Examples of violations of human rights**

In 2001 the SAHRC ordered an investigation into initiation practices at educational institutions on the basis of a request by the Minister of Education at the time, the late Prof Kadar Asmal. The minister made this request on the grounds of several complaints that had been received after the tragic death of a student during one of these rituals. Some of the examples of initiation were taken from the report by the SAHRC and will be used to illustrate violations of human rights (SAHRC, 2001:4-6). Other examples were taken from case law and relevant sources will also be considered. Again, this is done using the three core values of the Constitution and the violations are linked back to the relevant values. The consequences of such actions are discussed individually after the examples have been cited. Please note that this guide does not provide information on names, places et cetera, because such information is confidential. The examples are also used without bias.

#### ***Students are kept awake and forced to memorise the names of senior students***

This first example was a complaint by a first-year student who complained that she was being deprived of sleep by house committee members and senior students. Students were constantly called to “meetings” during the night and forced to learn the names of senior students and write a test on this (SAHRC, 2001:6).

According to the complaint, this behaviour prevented the first years from performing well academically. This type of tradition therefore deprives students of their freedom. Keeping a person awake violates their freedom and safety – which are guaranteed and protected by section 12 of the Constitution.

### **Importance to you and me**

Any violation of human rights can result in prosecution. Should a student be kept awake or forced to do something against their will, and should these actions amount to a violation of their human rights – as seen in this example – the state will have a case against you and you as an individual can be prosecuted in a court of law.

### ***Painting of students and dropping them off to walk back to town***

In February 2001 a second-year student died during an initiation ritual in a residence. The ritual involved all second years shaving their heads. Their entire body was then painted and they were dropped off somewhere outside the town and ordered to walk back to town. During this ritual, one student was hit by a car and died (SAHRC, 2001:6). This set of facts involves a number of violations. One can start by looking at the change in the appearance of the students. As a person you are protected by the Constitution against the violation of the safety of your person. Besides the specific rights that were violated, the entire value of freedom is at stake here. The freedom of these students was further violated by the fact that they had been transported and had had to walk back. The defence that is usually offered is the voluntary assumption of risk. This will be discussed further under the point on accountability.

### **Importance to you and me**

Any violation of human rights can be prosecuted. The student in control of activities like these can be legally prosecuted, because the actions carried out do not justify the limitation of other people's freedom. Section 36 of the Constitution looks at the possibility of limiting rights. It should be viewed as a balance between the right that can be limited and the aim or cause of the limitation of this particular right.

### ***Assault***

Many of us think that assault only manifests if one person is hit by another (physical attack). In fact, this is only a small part of the offence. You can be convicted of assault for the smallest reason in terms of the de minimis rule used in these types of cases. Violence can be applied directly or indirectly, and both forms will be discussed with reference to relevant examples (Snyman, 2006:432).

### ***Pushing and shoving of students***

If one student is pushed and shoved by another student, for example where a house committee member pushes a first year who does not carry out his instructions, it constitutes direct violence and therefore assault. In the case of Herbert (10 CTR 424) the court found the accused guilty on a charge of assault because he had slapped the complainant's cap from his head without his permission (Snyman, 2006:433).

### *Hitting fellow students with a walking stick or any other object*

Indirect application of violence occurs when one person uses an instrument to exercise power over someone else's body, for example by hitting them or throwing objects at them. Practical examples mentioned in criminal law include when one person pulls away a chair when someone else wants to sit on it, causing person number two to fall down, or spitting on someone, or emptying a glass of water or beer over him (Snyman, 2006:434). Even if these actions do not injure the complainant, the requirements for making a case of assault are present – regardless of whether the complainant has been injured or not.

#### **Importance to you and me**

If a student is pushed, shoved or hit, or an object is thrown at him, they can lay a charge of assault against the offender. This means that you as an individual can be criminally prosecuted in your personal capacity. Depending on the complaint against you, a conviction can lead to a prison sentence and/or a suspended sentence, as well as a fine. Therefore if you are convicted, you will have a criminal record for the rest of your life.

### *Intimidation of fellow students*

Section 1(1) of the Intimidation Act (72 of 1982) says that a person can be held liable on a complaint of intimidation if they act in a manner that causes another individual or a group to fear for their own safety, including the safety of property. It is therefore illegal to write on a mirror in the residence “we are after your blood”, or “tomorrow you will wish that you prayed more”. These types of actions have no other purpose than to intimidate and scare. They violate the right to freedom and create fear, because the student must cooperate as a result of intimidation and not because they choose to do so.

#### **Importance to you and me**

Intimidation is not determined by your insight into or interpretation of your own actions, nor by those of other seniors. It is determined by the consequences of your actions as perceived by the group or persons who allegedly experience the intimidation.

The consequences and procedures for a house committee member acting in an official capacity are discussed in more detail below.

#### **Examples of liability**

The reality of possible prosecution and liability for own actions is often forgotten. The following examples indicate the extent to which we as members of the NWU community can be held liable for our actions should such actions amount to a violation of rights in certain factual situations.

The first example is **S v Van der Merwe (2011)**. Students were held liable in their personal capacity for *crimen injuria* (the illegal and deliberate violation of the dignity or the privacy of another person). Students at a university who contravened the integration policy of the university exposed black staff members to various initiation rituals. These actions, accompanied by abusive name-calling, led to a complaint of *crimen*

injuria, as the students' actions had violated the dignity of the staff members. These students were consequently subjected to disciplinary action by the university, and they had to face a criminal complaint in court. The students were fined and received a suspended sentence of one year. They were also permanently banned from the university. This means that these types of actions are viewed in such a serious light that the state can take action against you, and if you are convicted, you have a criminal record for the rest of your life. This applies to all students, as you are a South African citizen and are subject to South African legislation.

If one looks at the position of a house committee member, there is another form of liability that is important. This involves someone else holding an institution liable for actions by an individual because of the presence of a type of relationship between the two parties. For example, the university can in some cases be held liable for the actions of a house committee member. The best and most appropriate example can be found in the case of **Gibbens v Williams, Muller, Wright & Mostert Ingelyf en andere (1987)**. The case involved an initiation ritual in which male first-year students were forced to dive into a mud bath. The action took place with the approval of the houseparent and under the supervision of the house committee. This initiation, ritual or tradition, as it was described in the court papers, formed part of the approved induction programme for residences. This programme was part of the formal programme to welcome and orientate first years at the university. To determine whether a damages claim could succeed, the court analysed the relationship between the university and a house committee member.

The first argument offered was one of voluntary assumption of risk. It was alleged that the students had participated in a mud-bath diving ceremony while they had known what the consequences could be, and also that it had not been compulsory to do so. However, the court maintained that:

... the circumstances that the group of first years found themselves in, where it was expected of them to play along with the whole process of initiation and to subject themselves to the authority of the senior students, it is hardly conceivable that the plaintiff could deviate from the order to go through the mud bath.

If one takes this into account, together with the democracy of South Africa that is based on human dignity, equality and freedom, it is not possible to accept that the student voluntarily accepted the risk of possibly humiliating actions. Remember: human rights cannot be relinquished, and a defence based on voluntary risk acceptance does not deprive a person of his human rights.

The court went further and established whether there could possibly be an employer/employee relationship between the university and a house committee member. The court found, with the necessary authority, that four factors are required to determine whether such a relationship does exist. All four these factors are discussed to enable us to determine whether the university can also be held liable for any actions carried out by a house committee member.

1. Contractual agreement

Certain requirements are set out in the regulations for residences that guide the election process. The regulations serve as a contract between the house committee member and the university. As these

regulations are an approved university document, house committee members must subordinate themselves to this authority on accepting the office. A contractual agreement is therefore in place.

## 2. Control

The house committee is chaired by the primaria or primarius of the residence and reports to the houseparent. The houseparent reports to the Director: Student Life, and the director to the Executive Director: Student Life. For this reason, houseparents and house committee members can be regarded as an extension of the university management. Management is allocated certain duties, and these duties are listed in the residence regulations, thus establishing the relevant or expected control.

## 3. Remuneration

Some sort of remuneration will be paid only when certain duties have been carried out. The fact that house committee members receive remuneration confirms the first and second points and reconfirms the employer/employee relationship.

## 4. Dismissal

The court found that the final requirement was that it had to be within the authority of the university to dismiss a house committee member. It is clear from the disciplinary rules that this falls within the authority of the university, and that numerous incidences of the dismissal of house committee members can be listed. The finding of the court in the relevant case was therefore that the university had to be held liable for all the damage incurred and that occurred under the supervision and as a result of the negligence of the house committee member.

### **Importance to you and me**

The lesson we can learn from this is that a house committee member can be regarded as an employee of the university. This implies that where the house committee member acts in their official capacity, the university is liable for these actions. The relevance of this for the current guide is that the lesson does not end there. We must remember that because the house committee member can be regarded as an employee of the university, the university as employer can claim damages from the employee because of the damage that resulted from negligent actions. The same applies to houseparents.

### **Conclusion**

The law is an integral part of our daily lives. As was mentioned in the introduction, not only must we abide by it, but we must also be able to rely on it. Human rights are not merely a topic or a statement that applies sometimes. These rights are practical and present in our everyday lives and it is hoped that practical examples in this guide make them even clearer. This guide also provides relevant information to help you to adjust your actions and traditions. For South Africa to become a nation within which we celebrate a culture of human rights, individuals like us should always strive to make the NWU community a micro cosmos by internalising and using guides like these.

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