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A COMPARATIVE STUDY OF FUNDAMENTAL RIGHTS IN SOUTH AFRICA AND IRELAND WITH SPECIFIC EMPHASIS ON HUMAN DIGNITY

A thesis submitted for the Degree of Doctor in Philosophy by

ANNE HUGHES

VOLUME 1 OF 2

26th October 2011

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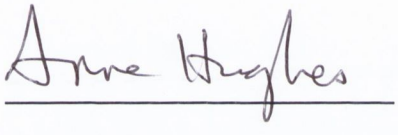

Anne Hughes

26th October 2011

SUMMARY

Since the post-apartheid constitutional era commenced almost two decades ago, there have been many progressive judicial decisions on fundamental rights in South Africa. By contrast over the same period, the longer-established Irish legal system has gone through a phase of deference to the separation of powers resulting in a more restricted interpretation of human rights. As no comprehensive analysis of the comparison between fundamental rights in South Africa and Ireland has hitherto been undertaken, this thesis aims to address that subject. The thesis involves substantial doctrinal research and a literature review focusing primarily on fundamental rights in South Africa, Ireland and internationally, but extending to other countries and regional systems. Case law and legislation are noted, and new developments tracked. The conclusions result from deductive and inductive reasoning, refined by critical evaluations.

While the Irish and South African Constitutions were introduced in different circumstances—the South African Bill of Rights being clearly of a transformative nature—there are many points in common between the two legal regimes. The constitutional value of human dignity underpins both documents. It has occupied a more prominent place in South African jurisprudence, where it is mentioned repeatedly in the text, whereas the term "dignity" appears only in the Irish Preamble. The focus in South Africa is on substantive equality. In Ireland the constitutional equality guarantee has been confined to formal equivalence, and (unlike in South Africa) socio-economic rights are not firmly entrenched.

Before embarking on a detailed review of the constitutions and jurisprudence on fundamental rights in both countries, this thesis sets the scene by describing the role of human dignity internationally. Its place in contemporary jurisprudence is examined, as is its philosophical meaning and its history, sources, roles and impact. Dignity is associated regularly with equality and other rights. It occupies a pivotal place in human rights enquiries. Since the Second World War, it has been frequently referenced in international, regional and national legal instruments.

The right to dignity—specifically granted in the South African Bill of Rights—and the idea of equal respect are studied. Attention to dignity has restricted the types of punishment that can be used as a legal sanction. It has enhanced the protection of family life, shaped the law of defamation, influenced the investigation of crimes of sexual violence, and permeated children's rights. Dignity is associated with other basic entitlements such as the rights to freedom and security, fair trial, privacy and autonomy, and freedom of expression.

There have been some contrasts, as well as similarities, between South Africa and Ireland in the development of substantive law. The principle of personal responsibility requires *mens rea* for culpability for serious crimes and has provoked controversy in relation to vicarious liability in tort. There is a long tradition of judicial support for humane detention conditions for prisoners in South Africa, whereas evidence of the Irish judiciary's commitment to this principle has been slow to emerge. Human dignity—a central component in the South African value-system—can help to deliver substantive equality and socio-economic rights. It could have a significant impact on the law of privacy and on issues arising in relation to the family, children's rights and technological developments and research.

This thesis extends to an examination of remedies and the scope of fundamental rights. As suggested in the South African jurisprudence, a more coherent values-driven structure could be created for ascertaining the appropriate level of damages for defamation and catastrophic injuries. Alternative reconciliatory remedies for defamation might also be considered. Mediation of disputes is arguably more compatible than adversarial litigation with the establishment of enduring human relationships that enhance human dignity. The horizontal application of rights and the extent of the state's positive human rights obligations are probed. There is a constitutional base for mandating the courts to enforce rights where the state is not a direct protagonist. It is argued that the limitation rules that apply to actions concerning fundamental rights should not be the same as those that govern other claims in tort. A broad interpretation, as in South Africa, can give effect to the spirit of a constitution and its underlying values. Accountability is essential in a democracy to ensure that those in positions of power exercise the authority entrusted to them in a responsible manner.

Because of the similarities in the normative constitutional framework in both countries, some useful guidelines can be extracted from the South African experience to reinvigorate Irish jurisprudence. Illustrations from various jurisdictions demonstrate that the South African approach is not idiosyncratic on account of the apartheid legacy, but is suitable for adoption in other countries. Fundamental Irish constitutional values have the capacity to produce a more rigorous prohibition on parental corporal punishment, to progress the delivery of substantive equality and the reduction of overcrowding in prisons, and to lead to recognition of the ethnic identity of Travellers. The law of torts could be refashioned, and contract law might be developed to provide further protection for consumers and others in an unequal bargaining position. The Irish judiciary could give a deeper meaning to human dignity by seeing it in a relational context, rather than adopting a restricted individualistic view of it. A mutually supportive and respectful relationship could develop between the judiciary and the executive.

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My interest in South African jurisprudence was sparked by my contacts with people from that country for several decades. I have followed the rise and the welcome fall of apartheid, and admire those who strived for and achieved a peaceful transition to freedom.

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ARGENTINA

- Corte Suprema de Justicia [CSJN] [Supreme Court of Justice], 7/7/1992 *Ekmedjian v Sofovich* Fallos (1992-315-1492) (Arg)

AUSTRALIA

- *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (High Court)
- *Leeth v Commonwealth* [1992] HCA 29, (1992) 174 CLR 455
- *New South Wales v Lepore* [2003] HCA 4, [2003] 3 LRC 726
- *Skelton v Collins* (1966) 115 CLR 94 (High Court)
- *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (High Court)

BOTSWANA

- *AG v Dow* [2001] AHRLR 99 (BwCA 1992)
- *Diau v Botswana Building Society* 2003 (2) BLR 409 (BwIC) (Industrial Court)
- *Jimson v Botswana Building Society* [2005] AHRLR 86 (BwIC 2003) (Industrial Court)
- *Kanane v S* 2003(2) BLR 64 (CA) rev'g (Crim Trial No F94/1995) (High Court) 22 March 2002
- *Makuto v S* [2000] 2 BLR 130 (CA)
- *Mosetlhanyane v AG* (BwCA 27 January 2011)
- *Noor v Botswana Co-operative Bank Ltd* 1999 (1) BLR 443 (CA)
- *S v Marapo* [2002] AHRLR 58 (BwCA 2002)
- *S v Petrus* [1985] LRC (Const) 699 (CA)
- *Sekwati v DPP* [2008] BWHC 263
- *Sesana v AG* [2006] BWHC 129, [2006] 2 BLR 633

CANADA

- *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229 (SC)
- *Bazley v Curry* [1999] 2 SCR 534 (SC)
- *Canada (AG) v Mossop* (1993) 100 DLR (4th) 658, [1993] 1 SCR 554 (SC)
- *Canadian Foundation for Children, Youth and the Law v Canada (AG)* 2004 SCC 4, [2004] 1 SCR 76 (SC)

- *Chamberlain v Surrey School District No 36* 2002 SCC 86, [2002] 4 SCR 710 (SC)
- *Egan v Canada* [1995] 2 SCR 513 (SC)
- *Fleming v Reid* (1991) 82 DLR (4th) 298 (Ont CA)
- *Gosselin v Quebec (AG)* 2002 SCC 84, [2002] 4 SCR 429 (SC)
- *Grant v Torstar Corp* 2009 SCC 61 (SC)
- *Halpern v Canada (AG)* (2003) 225 DLR (4th) 529 (Ont CA)
- *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 (SC)
- *Jacobi v Griffiths* [1999] 2 SCR 570 (SC)
- *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 (SC)
- *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SC)
- *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* 2000 SCC 69, [2000] 2 SCR 1120 (SC)
- *Miron v Trudel* [1995] 2 SCR 418 (SC)
- *Nova Scotia (AG) v Walsh* 2002 SCC 83, [2002] 4 SCR 325 (SC)
- *Nova Scotia (Workers' Compensation Board) v Martin* 2003 SCC 54, [2003] 2 SCR 504 (SC)
- *Quebec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand* [1996] 3 SCR 211 (SC)
- *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 (SC)
- *R v Hess* [1990] 2 SCR 906 (SC)
- *R v Jones* [1986] 2 SCR 284 (SC)
- *R v Kapp* 2008 SCC 41, [2008] 2 SCR 483 (SC)
- *R v Keegstra* [1990] 3 SCR 697 (SC)
- *R v Oakes* [1986] 1 SCR 103 (SC)
- *R v Sharpe* 2001 SCC 2, [2001] 1 SCR 45 (SC)
- *R v Smith* [1987] 1 SCR 1045 (SC)
- *Reference re Remuneration of Judges of the Provincial Court (PEI)* [1997] 3 SCR 3 (SC)
- *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)* [1990] 1 SCR 1123 (*Prostitution Reference*) (SC)
- *Retail, Wholesale and Department Store Union, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* 2002 SCC 8, [2002] 1 SCR 156 (SC)
- *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd* [1986] 2 SCR 573 (SC)
- *Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 v Saskatchewan* [1987] 1 SCR 460 (SC)

- *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68, [2002] 3 SCR 519 (SC)
- *Thibaudeau v Canada* [1995] 2 SCR 627 (SC)
- *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 67 DLR (4th) 161, [1990] 1 SCR 425 (SC)
- *Trociuk v British Columbia (AG)* 2003 SCC 34, [2003] 1 SCR 835 (SC)
- *US v Burns* 2001 SCC 7, [2001] 1 SCR 283 (SC)

FINLAND

- Case No S 98/225 (*Child-Care Services* case) Helsinki Court of Appeals 28 October 1999

FRANCE

- *Dalloz* 1996, 167 Cour de Cassation, 3e Civ, 6 March 1996
- *Droit social* (1996), 987 CA Riom, 29 January 1996
- *Freedom of Association* case, Decision No 71-44 (16 July 1971) (Constitutional Council)
- *Lefevre v Ville d'Amiens* Cour de Cassation, Troisième chambre civile, [Supreme Court, 3rd Civil Chamber], Arrêt No 1362, 15 December 2004

THE GAMBIA

- *Denton v Director-General, National Intelligence Agency* (2006) AHRLR 241 (GaHC 2006)

GERMANY

- *Aviation Security Act* case, 115 BVerfGE 118 (15 Feb 2006) (Federal CC)
- *Daschner* case, Regional Court (*Landgericht*) Frankfurt am Main, Decision 20 December 2004, *Neue Juristische Wochenschrift* 2005, 692
- *First Abortion* case, BVerfGE 39, 1 (1975) (Federal CC)
- *Handelsvertreter*, BVerfG 7 February 1990, BVerfGE 81, 242; [1990] JZ 691 (Federal CC)
- *Life Imprisonment* case, 45 BVerfGE 187 (1977) (Federal CC)
- *Loan guarantee*, 1 BvR 567, 1044/89, BVerfGE 89, 214 (19 October 1993) (Federal CC)
- *Lüth*, BVerfGE 7, 198 (1958) (Federal CC)
- *Numerus Clausus I* case (1972), 33 BverfGE 303 (Federal CC)
- *Peep Show*, BVerwGe 64, 274 (1981) (Federal Administrative Tribunal)
- *Treaty of Lisbon* case, BVerfG, 2 BvE 2/08, Absatz-Nr (1-421) (30 June 2009) (Federal CC)

GHANA

- *Abass v Accra Metropolitan Assembly* (Misc 1203/2002) (High Court) 24 July 2002 (*Sodom and Gomorrah* case)
- *Adjei-Ampofo (No 1) v Accra Metropolitan Assembly* [2007-2008] SCGLR 611 (SC)
- *Adjei-Ampofo (No 2) v Accra Metropolitan Assembly* [2007-2008] SCGLR 663 (SC)
- *Asare v Ga West District Assembly* (Suit No 36/2007) (High Court) 2 May 2008
- *Centre for Human Rights & Civil Liberties (CHURCIL) v AG* (Suit No J1/5/2008) (Supreme Court) 23 March 2010
- *Ghana Lotto Operators v National Lottery* [2009] 3 LRC 235 (SC)
- *New Patriotic Party v Inspector-General of Police* [2001] AHRLR 138 (GhSC 1993)

HUNGARY

- *Environmental Protection* case, Decision 28/1994, 20 May 1994 (Constitutional Court)
- *Housing* case, Decision 42/2000, 8 November 2000 (Constitutional Court)
- *Social Benefits* case, Decision 43/1995, 30 June 1995 (Constitutional Court)
- *Welfare Act* case, Decision 32/1998, 22 June 1998 (Constitutional Court)

INDIA

- *Additional District Magistrate, Jabalpur v Shukla* [1976] INSC 129, 1976 SCR 172 (*Habeas Corpus* case)
- *Air India Statutory Corp v United Labour Union* [1996] INSC 1400
- *Ashok v Union of India* [1997] INSC 491
- *Bandhua Mukti Morcha v Union of India* [1983] INSC 206, 1984 (2) SCR 67
- *Choudhry v State of Bihar* [1954] INSC 114, 1955 (1) SCR 1045
- *Common Cause v Union of India* [1993] INSC 7, 1993 (1) SCR 10
- *Common Cause v Union of India* [1996] INSC 1199
- *Consumer Education & Research Centre v Union of India* [1995] INSC 91, JT 1995 (1) 636
- *Dalmia v Justice Tendolkar* [1958] INSC 30, 1959 SCR 279
- *Gopalan v State of Madras* [1950] INSC 14, 1950 SCR 88
- *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217 (SC)
- *Jain v Union of India* [1984] INSC 115, 1984 (3) SCR 942
- *Jitendra Kumar Singh v State of Uttar Pradesh* [2010] INSC 20
- *Jolly George Verghese v Bank of Cochin* [1980] INSC 19, 1980 SCR (2) 913
- *Keshavananda Bharati v State of Kerala* AIR 1973 SC 1461

- *LIC of India v Consumer Education & Research Centre* [1995] INSC 272, 1995 SCC (5) 482
- *Maneka Gandhi v Union of India* [1978] INSC 16, 1978 SCR (2) 621
- *Minerva Mills Ltd v Union of India* [1980] INSC 141, 1981 SCR (1) 206
- *Mullin v Administrator, Union Territory of Delhi* [1981] INSC 12, 1981 SCR (2) 516
- *Nakara v Union of India* [1982] INSC 103, 1983 (2) SCR 165
- *Naz Foundation v Government of NCT of Delhi* WP (C) No 7455/2001, 160 (2009) DLT 277 (High Court of Delhi)
- *Olga Tellis v Bombay Municipal Corporation* [1985] INSC 155, 1985 SCR Supl (2) 51
- *Paschim Banga Khet Mazdoorsamity v State of West Bengal* [1996] INSC 659, 1996 (4) SCC 37
- *People's Union for Democratic Rights v Union of India* [1982] INSC 67, 1983 SCR (1) 456
- *Randhir Singh v Union of India* [1982] INSC 24, 1982 (3) SCR 298
- *Royappa v State of Tamil Nadu* [1973] INSC 214, 1974 (2) SCR 348
- *Sodan Singh v New Delhi Municipal Committee* [1989] INSC 258, 1989 (3) SCR 1038
- *State of Kerala v Thomas* [1975] INSC 224, 1976 (1) SCR 906
- *Thakur v Union of India* [2008] INSC 613
- *Unni Krishnan v State of Andhra Pradesh* [1993] INSC 60, 1993 (1) SCR 594
- *Vishaka v State of Rajasthan* [1997] INSC 665
- *Vishal Jeet v Union of India* [1990] INSC 176, 1990 (2) SCR 861
- *X v State Bank of India* (Writ Petition No 1856 of 2002) (Bombay High Court) 16 January 2004

IRELAND

- *A v Governor of Arbour Hill Prison* [2006] IEHC 169, [2006] IESC 45, [2006] 4 IR 88
- *Abbey Films Ltd v AG* [1981] IR 158 (SC)
- *AG v DMK* [2004] IEHC 609
- *AG v Paperlink Ltd* [1984] ILRM 373 (HC)
- *AG v Southern Industrial Trust Ltd* [1960] 94 ILTR 161 (HC, SC)
- *AG v X* [1992] IESC 1, [1992] 1 IR 1
- *AG (Society for the Protection of Unborn Children Ireland Ltd) v Open Door Counselling Ltd* [1988] IR 593 (SC)
- *Article 26 and Part V of the Planning and Development Bill 1999, Re* [2000] IESC 20, [2000] 2 IR 321
- *Article 26 and ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999, Re* [2000] IESC

19, [2000] 2 IR 360

- *Article 26 and the Employment Equality Bill 1996, Re* [1997] IESC 6, [1997] 2 IR 321
- *Article 26 and the Health (Amendment) (No 2) Bill 2004, Re* [2005] IESC 7, [2005] 1 IR 105
- *Article 26 and the Offences against the State (Amendment) Bill 1940, Re* [1940] IR 470 (SC)
- *Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995, Re* [1995] IESC 9, [1995] 1 IR 1
- *Aslam v Minister for Justice and Equality* [2011] IEHC 512
- *Bank of Nova Scotia v Hogan* [1996] IESC 2, [1996] 3 IR 239
- *Bates v Minister for Justice* [1998] 2 IR 81 (SC)
- *Blake v AG* [1982] IR 117 (HC, SC)
- *Blascaod Mór Teo v Commissioners of Public Works in Ireland (No 3)* [1999] IESC 4, [2000] 1 IR 6
- *Blascaod Mór Teo v Commissioners of Public Works in Ireland (No 4)* [2000] IEHC 130, [2000] 3 IR 565
- *Blehein v Minister for Health and Children* [2004] IEHC 374, [2004] 3 IR 610; [2010] IEHC 329
- *Bloomer v Incorporated Law Society of Ireland* [1995] 3 IR 14 (HC)
- *Bolger v Governor of Mountjoy Prison* [1997] IEHC 172
- *Breathnach v Ireland* [2001] IESC 59, [2001] 3 IR 230 rev'g [2000] IEHC 53, [2000] 3 IR 467
- *Brennan v AG* [1984] ILRM 355 (SC) aff'g [1983] ILRM 449 (HC)
- *Brennan v Governor of Portlaoise Prison* [1998] IEHC 140, [1999] 1 ILRM 190
- *Browne v AG* [1991] 2 IR 58 (HC)
- *Buckley (Sinn Féin) v AG* [1950] IR 67 (SC)
- *Byrne v Ireland* [1972] IR 241 (SC)
- *Carmody v Minister for Justice, Equality and Law Reform* [2009] IESC 71, [2010] 1 ILRM 157
- *Carna Foods Ltd v Eagle Star Insurance Co (Ireland) Ltd* [1995] 1 IR 526 (HC)
- *Casey v Governor of Midlands Prison* [2009] IEHC 466
- *CC v Ireland* [2005] IESC 48 & [2006] IESC 33, [2006] 4 IR 1
- *CM v TM (No 2)* [1990] 2 IR 52 (HC)
- *Conlon v Mohamed* [1989] ILRM 523 (SC)
- *Conway v Irish National Teachers Organisation* [1991] 2 IR 305 (HC, SC)
- *Cooke v Walsh* [1984] ILRM 208 (SC)
- *Corway v Independent Newspapers (Ireland) Ltd* [1996] IEHC 27, [1999] IESC 5, [1999] 4 IR 484

- *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1 (HC, SC)
- *County Meath VEC v Joyce* [1997] 3 IR 402 (HC)
- *Cox v Ireland* [1992] 2 IR 503 (SC)
- *Creighton v Ireland* [2010] IESC 50
- *Criminal Assets Bureau v PS* [2004] IEHC 351, [2009] 3 IR 9
- *Crotty v An Taoiseach* [1987] IESC 4, [1987] IR 713
- *DB v Minister for Justice* [1999] 1 IR 29 (HC)
- *de Búrca v AG* [1976] IR 38 (HC, SC)
- *Dellway Investments Ltd v National Asset Management Agency* [2011] IESC 14
- *De Rossa v Independent Newspapers plc* [1999] IESC 63, [1999] 4 IR 432
- *Devlin v Roche* [2002] IESC 34, [2002] 2 IR 360
- *Devoy v Governor of Portlaoise Prison* [2009] IEHC 288
- *DG v Eastern Health Board* [1997] IESC 7, [1997] 3 IR 511
- *Dillane v AG* [1980] ILRM 167 (SC)
- *Doherty v South Dublin County Council (No 2)* [2007] IEHC 4, [2007] 2 IR 696
- *DPP v Best* [1999] IESC 90, [2000] 2 IR 17
- *DPP v Redmond* [2006] IESC 25, [2006] 3 IR 188
- *DPP (Murphy) v PT* [1999] 3 IR 254 (HC)
- *DPP (Stratford) v O'Neill* [1998] 2 IR 383 (HC)
- *Dublin City Council v Gavin* [2008] IEHC 444; [2009] IEHC 477
- *Dullaghan v Hillen* [1957] Ir Jur Rep 10 (CC)
- *Dunne v National Maternity Hospital* [1989] IR 91 (SC)
- *Dunnes Stores Ireland Co v Ryan* [2002] IEHC 61, [2002] 2 IR 60
- *Dunphy v DPP* [2005] IESC 75, [2005] 3 IR 585
- *E v Minister for Justice Equality and Law Reform* [2012] IEHC 3
- *East Donegal Co-Operative Livestock Mart Ltd v AG* [1970] IR 317 (SC)
- *EH v Clinical Director of St Vincent's Hospital* [2009] IESC 46, [2009] 3 IR 774
- *Enright v Ireland* [2003] 2 IR 321 (HC)
- *Equality Authority v Portmarnock Golf Club* [2009] IESC 73, [2010] 1 ILRM 237 aff'g [2005] IEHC 235
- *Eviston v DPP* [2002] IESC 62, [2002] 3 IR 260
- *Finnegan v An Bord Pleanála* [1979] ILRM 134 (HC, SC)
- *Fletcher v Commissioners of Public Works* [2003] IESC 13, [2003] 1 IR 465
- *FN v Minister for Education* [1995] 1 IR 409 (HC)

- *Foy v An t-Ard Chlaraitheoir* [2002] IEHC 116; [2007] IEHC 470
- *G v An Bord Uchtála* [1980] IR 32 (HC, SC)
- *G v District Judge Murphy* [2011] IEHC 445
- *G v Minister for Justice Equality and Law Reform* [2011] IEHC 65
- *Garvey v Ireland* [1981] IR 75 (SC)
- *Gavrylyuk v Minister for Justice, Equality and Law Reform* [2008] IEHC 321
- *Glencar Explorations plc v Mayo County Council (No 2)* [2001] IESC 64, [2002] 1 IR 84
- *Glover v BLN Ltd* [1973] IR 388 (SC)
- *Grant v Roche Products (Ireland) Ltd* [2008] IESC 35, [2008] 4 IR 679
- *Grealish v Murphy* [1946] IR 35 (HC)
- *Greene v Minister for Agriculture* [1990] 2 IR 17 (HC)
- *Green Party v Radio Telefís Éireann* [2003] 1 IR 558 (HC)
- *GT v KAO (Child Abduction)* [2007] IEHC 326, [2008] 3 IR 567
- *H v A* [2010] IEHC 497
- *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd* [1988] ILRM 629 (SC)
- *Hayes v Ireland* [1987] ILRM 651 (HC)
- *Health Service Executive v X* [2011] IEHC 326
- *Heaney v Ireland* [1996] 1 IR 580 (SC) aff'g [1994] 3 IR 593 (HC)
- *Heaney v Minister for Finance* [1986] ILRM 164 (HC)
- *Hickey v Sunday Newspapers Ltd* [2010] IEHC 349
- *Hosford v John Murphy and Sons Ltd* [1988] ILRM 300 (HC)
- *Howard v Commissioners of Public Works in Ireland* [1994] 1 IR 101 (SC)
- *Hunter v Gerald Duckworth & Co Ltd* [2003] IEHC 81
- *Hyland v Minister for Social Welfare* [1989] IR 624 (HC, SC)
- *IO'T v B* [1998] 2 IR 321 (SC)
- *JD v Residential Institutions Redress Review Committee* [2009] IESC 59, [2010] 1 IR 262
- *JF v DPP* [2005] IESC 24, [2005] 2 IR 174
- *JK v VW* [1990] 2 IR 437 (SC)
- *JMcB v LE* [2010] IEHC 123, [2010] 4 IR 433
- *Kavanagh v Governor of Mountjoy Prison* [2002] IESC 13, [2002] 3 IR 97
- *Kelly v Minister for the Environment* [2002] IEHC 38, [2002] IESC 73, [2002] 4 IR 191
- *Kennedy v Ireland* [1987] IR 587 (HC)
- *Kerry Co-Operative Creameries Ltd v An Bord Bainne Co-Operative Ltd* [1990] ILRM 664 (HC)

- *King v AG* [1981] IR 233 (HC, SC)
- *King v Minister for the Environment (No 2)* [2006] IESC 61, [2007] 1 IR 296
- *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235
- *Kinsella v Kenmare Resources plc* 17 November 2010 (HC)
- *Landers v AG* [1975] 109 ILTR 1 (HC)
- *Lawlor v Minister for Agriculture* [1987] IEHC 4, [1990] 1 IR 356
- *Leech v Independent Newspapers (Ireland) Ltd* [2009] IEHC 259, [2009] 3 IR 766 (discovery); 24 June 2009 (HC) (merits)
- *Liddy v Minister for Public Enterprise* [2004] 1 ILRM 9 (HC)
- *Lindsay v Mid-Western Health Board* [1993] 2 IR 147 (HC)
- *Lockwood v Ireland* [2010] IEHC 430
- *Lovett v Gogan* [1995] 3 IR 132 (SC)
- *Lowth v Minister for Social Welfare* [1998] 4 IR 321 (HC, SC)
- *M v Commissioner of an Garda Síochána* [2011] IEHC 14
- *Macauley v Minister for Posts and Telegraphs* [1966] IR 345 (HC)
- *McCann v Judge of Monaghan District Court* [2009] IEHC 276
- *McD v L* [2009] IESC 81
- *McDonagh v Kilkenny County Council* [2007] IEHC 350
- *McDonnell v Ireland* [1998] 1 IR 134 (SC)
- *McGee v AG* [1974] IR 284 (SC)
- *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 (SC)
- *Mackie v Wilde* [1998] 2 IR 570 (HC)
- *McKinley v Minister for Defence* [1992] 2 IR 333 (SC)
- *McMahon v Leahy* [1984] IR 525 (SC)
- *MacMathúna v Ireland* [1995] 1 IR 484 (SC) aff'g [1989] IR 504 (HC)
- *McMenamin v Ireland* [1996] 3 IR 100 (HC, SC)
- *McN v Health Service Executive* [2009] IEHC 236
- *Madigan v AG* [1986] ILRM 136 (HC, SC)
- *Maria (ET) v Clinical Director of the Central Mental Hospital* [2010] IEHC 378
- *MD v Ireland* [2012] IESC 10
- *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3
- *Meskell v CIE* [1973] IR 121 (SC)
- *Molyneux v Ireland* [1997] 2 ILRM 241 (HC)
- *Moynihan v Greensmyth* [1977] IR 55 (SC)

- *Muckley v Ireland* [1985] IR 472 (HC, SC)
- *Muldoon v Ireland* [1988] ILRM 367 (HC)
- *Mulligan v Governor of Portlaoise Prison* [2010] IEHC 269
- *Murphy v AG* [1982] IR 241 (HC, SC)
- *Murphy v GM* [2001] IESC 82, [2001] 4 IR 113 aff'g [1999] IEHC 5
- *Murray v Ireland* [1991] ILRM 465 (SC) aff'g [1985] IR 532 (HC)
- *Murtagh Properties v Cleary* [1972] IR 330 (HC)
- *Norris v AG* [1984] IR 36 (SC)
- *Northampton County Council v ABF* [1982] ILRM 164 (HC)
- *North Western Health Board v HW* [2001] IESC 90, [2001] 3 IR 622
- *Nottinghamshire County Council v B* [2011] IESC 48
- *Nova Media Services Ltd v Minister for Posts and Telegraphs* [1984] ILRM 161 (HC)
- *O'Brien v Keogh* [1972] IR 144 (SC)
- *O'Brien v Manufacturing Engineering Co Ltd* [1973] IR 334 (HC, SC)
- *O'Brien v Mirror Group Newspapers Ltd* [2000] IESC 70, [2001] 1 IR 1; 23 November 2006 (HC)
- *O'Brien v Stoutt* [1984] IR 316 (HC, SC)
- *O'Brien v Wicklow Urban District Council* 10 June 1994 (HC)
- *O'Donnell (a minor) v South Dublin County Council* [2007] IEHC 204
- *O'Donoghue v Minister for Health* [1993] IEHC 2, [1996] 2 IR 20
- *O'Donovan v AG* [1961] IR 114 (HC)
- *O'Flanagan v Ray-Ger Ltd* [1983] IEHC 83
- *O'G v AG* [1985] ILRM 61 (HC)
- *O'Keeffe v Hickey* [2008] IESC 72, [2009] 2 IR 302
- *O'Reilly v Limerick Corporation* [1989] ILRM 181 (HC)
- *O'Shea v Ireland* [2006] IEHC 305, [2007] 2 IR 313
- *Parsons v Kavanagh* [1990] ILRM 560 (HC)
- *People (AG) v O'Brien* [1965] IR 142 (SC)
- *People (DPP) v Barnes* [2006] IECCA 165, [2007] 3 IR 130
- *People (DPP) v Davis* [2001] 1 IR 146 (CCA)
- *People (DPP) v Egan* [2010] IECCA 28
- *People (DPP) v Murray* [2012] IECCA 60
- *People (DPP) v MS* [2003] IESC 24, [2003] 1 IR 606.
- *People (DPP) v O'Shea* [1982] IR 384 (SC)

- *People (DPP) v Quilligan (No 2)* [1989] IR 46 (SC)
- *People (DPP) v Quilligan (No 3)* [1993] 2 IR 305 (SC)
- *People (DPP) v Tiernan* [1988] IR 250 (SC)
- *People (DPP) v Z* [1994] 2 IR 476 (HC, SC)
- *Philip Clarke, Re* [1950] IR 235 (SC)
- *Pine Valley Developments Ltd v Minister for the Environment* [1987] IR 23 (SC)
- *PO'C v DPP* [2000] 3 IR 87 (SC)
- *Prendergast v Higher Education Authority* [2008] IEHC 257, [2009] 1 ILRM 47
- *Quinn's Supermarket v AG* [1972] IR 1 (SC)
- *Redmond v Minister for the Environment* [2001] IEHC 128, [2001] 4 IR 61
- *Reilly v Devereux* [2009] IESC 22, [2009] 3 IR 660
- *Ring v AG* [2004] IEHC 14, [2004] 1 IR 185
- *Riordan v An Taoiseach* [2000] 4 IR 537 (HC, SC)
- *Roche v Roche* [2006] IEHC 359, [2009] IESC 82, [2010] 2 IR 321
- *Rodgers v ITGWU* [1978] ILRM 51 (HC)
- *Ryan v AG* [1965] IR 294 (HC, SC)
- *Sage v Minister for Justice* [2011] IEHC 84
- *Shortt v Commissioner of An Garda Síochána* [2007] IESC 9, [2007] 4 IR 587
- *Siney v Dublin Corporation* [1980] IR 400 (SC)
- *Sinnott v Minister for Education* [2001] 2 IR 545 (HC, SC)
- *Sinnott v Quinnsworth Ltd* [1984] ILRM 523 (SC)
- *SM v Ireland (No 2)* [2007] IEHC 280, [2007] 4 IR 369
- *SM v Mental Health Commission* [2008] IEHC 441, [2009] 3 IR 188
- *Smelter Corporation of Ireland Ltd v O'Driscoll* [1977] IESC 1, [1977] IR 305
- *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan* [1989] IR 753 (SC)
- *Somjee v Minister for Justice* [1981] ILRM 324 (HC)
- *State (Burke) v Lennon* [1940] IR 136 (HC, SC)
- *State (C) v Frawley* [1976] IR 365 (HC)
- *State (DPP) v Walsh* [1981] IR 412 (SC)
- *State (Healy) v Donoghue* [1976] IR 325 (HC, SC)
- *State (Keegan) v Stardust Victims' Compensation Tribunal* [1986] IR 642 (SC)
- *State (M) v Minister for Foreign Affairs* [1979] IR 73 (HC)
- *State (Nicolaou) v An Bord Uchtála* [1966] IR 567 (SC)
- *State (Richardson) v Governor of Mountjoy Prison* [1980] ILRM 82 (HC)

- *TD v Minister for Education* [2001] IESC 101, [2001] 4 IR 259 rev'g [2000] 3 IR 62 (HC)
- *Tilson, Re* [1951] IR 1 (HC)
- *Tormey v Ireland* [1985] IR 289 (SC)
- *Tuohy v Courtney* [1994] 3 IR 1 (SC)
- *Ulster Bank Ireland Ltd v Fitzgerald* [2001] IEHC 159
- *University of Limerick v Ryan* 21 February 1991 (HC)
- *VTS v Health Service Executive* [2009] IEHC 106
- *W v Ireland (No 2)* [1997] IEHC 212, [1997] 2 IR 141
- *W v W* [1993] 2 IR 476 (SC)
- *Ward v McMaster* [1988] IR 337 (SC)
- *Ward of Court (withholding medical treatment) (No 2), Re a* [1996] 2 IR 79 (HC, SC)
- *WO'R v EH (Guardianship)* [1996] 2 IR 248 (SC)
- *Yun v Motor Insurers Bureau of Ireland* [2009] IEHC 318, [2009] 7 JIC 1701
- *Zappone v Revenue Commissioners* [2006] IEHC 404, [2008] 2 IR 417

ITALY

- *Corporal punishment*, Cambria, Cass, sez VI, 18 Marzo 1996 [Supreme Court of Cassation, 6th Penal Section, 18 March 1996], Foro It II 1996, 407 (Italy)

KENYA

- *Godfrey Ngotho Mutiso v Republic* [2010] eKLR (CA)
- *Kanyua v AG* [2010] eKLR (Interim Independent Constitutional Dispute Resolution Court of Kenya, 23 June 2010)
- *Kariuki v Town Clerk, Nairobi City Council* [2011] eKLR (High Court, 4 March 2011)
- *Kimani v AG* [2010] eKLR (High Court, 12 March 2010)
- *Mbiyu v Commissioner of Police* [2011] eKLR (High Court, 5 January 2011)
- *Nabori v AG* [2007] eKLR (High Court, 11 December 2007)
- *RM v AG* [2006] AHRLR 256 (KeHC 2006)
- *Rono v Rono* [2005] AHRLR 107 (KeCA 2005)
- *Waweru v Republic* [2006] eKLR (High Court, 2 March 2006)

LATVIA

- *Social security*, Case No 2000-08-0109, 13 March 2001 (Constitutional Court)

LESOTHO

- *Baitsokoli v Maseru City Council* [2005] LSCA 13 (CA)
- *Mothobi v Director of Prisons* [1996] LSCA 92 (CA)
- *R v Tsehlana* Rev Case 157/77 (HC)
- *Ts'epe v Independent Electoral Commission* [2005] AHRLR 136 (LeCA 2005) (CA)

MALAWI

- *Jacob v Republic* (MSCA Crim App No 16/2006) 19 July 2007 (Sup Ct App)
- *Jumbe v AG* [2005] MWHC 15
- *Kafantayeni v AG* [2007] MWHC 1, [2007] 5 LRC 353
- *Masangano v AG* [2009] MWHC 31
- *Munthali v AG* [2002] AHRLR 102 (MwHC 1993)
- *R v Soko* [2010] MWHC 2 (Blantyre Chief Resident Magistrate's Court)

MALAYSIA

- *Kanawagi A/l Seperumaniam v Dato' Abdul Hamid Bin Mohamad* [2004] 5 MLJ 495 (Kuala Lumpur High Court)

NAMIBIA

- *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia* [2009] NASC 17
- *AG, Ex p, Re Corporal Punishment by Organs of State* [1991] NASC 2; 1991 (3) SA 76 (NmS)
- *Alexander v Minister of Justice* [2010] NASC 2
- *Chairperson of the Immigration Selection Board v Frank* [2001] NASC 1
- *Engelbrecht v Minister of Prisons and Correctional Services* 2000 NR 230 (High Court)
- *Government of the Republic of Namibia v Mwilima* [2002] NASC 8
- *Julius v Commanding Officer, Windhoek Prison* 1996 NR 390 (High Court)
- *Kauesa v Minister of Home Affairs* [1995] NASC 3; 1995 (11) BCLR 1540 (NmS)
- *McNab v Minister of Home Affairs* [2007] NAHC 50
- *Müller v President of the Republic of Namibia* [1999] NASC 2; 200 (6) BCLR 655 (NmS)
- *Namunjepo v Commanding Officer, Windhoek Prison* [1999] NASC 3; 2000 (6) BCLR 671 (NmS)
- *Nanditume v Minister of Defence* [2002] AHRLR 119 (NaLC 2000) (Labour Court of Namibia)
- *S v Tcoeib* [1996] NASC 1; 1996 (1) SACR 390 (NmS)
- *Trustco Group International Ltd v Shikongo* [2010] NASC 6

NEW ZEALAND

- *Czech Roma*, Refugee Appeal No 71193/98 (Sept 9, 1999) (NZ Refugee Status App Auth)
- *Hosking v Runting* [2004] NZCA 34, [2005] 1 NZLR 1
- *Lange v Atkinson* [1998] 3 NZLR 424 (CA); [2000] NZCA 95
- *Quilter v AG* [1998] 1 NZLR 523 (CA)

NIGERIA

- *Fawehinmi v Abacha* (1998) 1 HRLRA 543 (CA)
- *Gbemre v Shell Petroleum Development Co Nigeria Ltd* [2005] AHRLR 151 (NgHC 2005)
- *Ifeanyi Anyanor v Commissioner of Police, Delta State* (2007) CHR 185 (High Court of Delta State)
- *Inspector-General of Police v All Nigeria Peoples Party* [2007] AHRLR 179 (NgCA 2007)
- *Kalu v S* (1998) 3 NWLR (Pt 509) 531 (SC)
- *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* [2002] AHRLR 159 (NgSC 2001)
- *Odafe v AG* [2004] AHRLR 205 (NgHC 2004)
- *Okoro v S* (1998) 2 SCNJ 84 (SC)
- *Peter Nemi v AG Lagos State* (1996) 6 NWLR 587

PORTUGAL

- *Abolition guaranteed minimum income*, Ruling Nº 509/02, 19 December 2002 (Constitutional Court)
- *National Health Service*, Decision (*Acórdão*) N° 39/84, 11 April 1984 (Constitutional Tribunal—*Tribunal Constitucional*)

SEYCHELLES

- *Boulle v Government of Seychelles* [2011] SCCC 5 (Constitutional Court)

SOUTH AFRICA

- *Abahlali baseMjondolo Movement SA v Premier of the Province of Kwazulu-Natal* [2009] ZACC 31 (CC)
- *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC)
- *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)

- *August v Electoral Commission* 1999 (3) SA 1 (CC)
- *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (B)
- *Bannatyne v Bannatyne* [2002] ZACC 31, 2003 (2) SA 363 (CC)
- *Barkhuizen v Napier* 2007 (5) SA 323 (CC)
- *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC)
- *Beja v Premier of the Western Cape* [2011] ZAWCHC 97 (Western Cape High Court, Cape Town)
- *Bel Porto School Governing Body v Premier of the Western Cape Province* [2002] ZACC 2, 2002 (3) SA 265 (CC)
- *Bernstein v Bester* 1996 (2) SA 751 (CC)
- *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC)
- *Booysen v Minister of Home Affairs* 2001 (4) SA 485 (CC)
- *Bothma v Els* [2009] ZACC 27, 2010 (2) SA 622 (CC)
- *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs* [2004] ZAGPHC 18 (High Court, Witwatersrand Local Division)
- *Brink v Kitshoff* 1996 (4) SA 197 (CC)
- *Brooks v Minister of Safety and Security* [2008] ZASCA 141, 2009 (2) SA 94
- *C v Department of Health and Social Development, Gauteng* [2012] ZACC 1 (CC)
- *C v Minister of Correctional Services* 1996 (4) SA 292 (T) (High Court)
- *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)
- *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC)
- *Cassiem v Commanding Officer, Victor Verster Prison* 1982 (2) SA 547 (C) (SC Cape Provincial Division)
- *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC)
- *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC)
- *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC)
- *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC)
- *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33 (CC) aff'g [2011] ZASCA 47
- *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC)
- *Collins v Minister of the Interior* 1957 (1) SA 552 (AD SC)
- *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530

- *Daniels v Campbell* 2004 (5) SA 331 (CC)
- *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC)
- *De Lange v Smuts* 1998 (3) SA 785 (CC)
- *De Reuck v DPP (Witwatersrand Local Division)* 2004 (1) SA 406 (CC)
- *Dikoko v Mokhatla* 2006 (6) SA 235 (CC)
- *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* [1999] ZASCA 9, [1999] 2 All SA 381 (A)
- *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC)
- *DPP Kwazulu-Natal v P* [2006] 1 All SA 446 (SCA)
- *DPP, Transvaal v Minister for Justice and Constitutional Development* [2009] ZACC 8, 2009 (4) SA 222 (CC)
- *Dube, Re* 1979 (3) SALR 820 (N)
- *Du Plessis v De Klerk* 1996 (3) SA 850 (CC)
- *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC)
- *EN v Government of RSA* [2006] AHRLR 326 (SAHC 2006); 28 August 2006 (High Court, Durban and Coast Local Division)
- *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30, 2012 (1) SA 256 (CC)
- *F v Minister of Safety and Security* [2011] ZACC 37 (CC)
- *Ferreira v Levin* 1996 (1) SA 984 (CC)
- *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (AD)
- *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)
- *Fraser v Children's Court Pretoria North* [1997] ZACC 1, 1997 (2) SA 218 (CC)
- *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* [2007] ZACC 13, 2007 (6) SA 4 (CC)
- *Gauteng Provincial Legislature: Re Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) (*Gauteng School Bill* case)
- *Glenister v President of the Republic of South Africa* [2011] ZACC 6, 2011 (3) SA 347 (CC)
- *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A) (SC)
- *Gory v Kolver* 2007 (4) SA 97 (CC)
- *Gosschalk v Rossouw* 1966 (2) SA 476 (C)
- *Governing Body of the Juma Musjid Primary School v Essay NO* [2011] ZACC 13, 2011 (8) BCLR 761 (CC)

- *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)
- *Gumede (born Shange) v President of the Republic of South Africa* [2008] ZACC 23, 2009 (3) SA 152 (CC)
- *Harksen v Lane* 1998 (1) SA 300 (CC)
- *Harris v Minister of the Interior* (the *Vote* case) 1952 (2) SA 428 (AD SC)
- *Hassam v Jacobs* [2009] ZACC 19, 2009 (5) SA 572 (CC)
- *Hassim v Officer Commanding, Prison Command, Robben Island* 1973 (3) SA 462 (C) (SC Cape Provincial Division)
- *Hoffmann v South African Airways* 2001 (1) SA 1 (CC)
- *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W)
- *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* [2008] ZACC 6, 2008 (5) SA 31 (CC)
- *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC)
- *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC)
- *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC)
- *Jaftha v Schoeman* 2005 (2) SA 140 (CC)
- *Johncom Media Investments Ltd v M* [2009] ZACC 5, 2009 (4) SA 7 (CC)
- *Joseph v City of Johannesburg* [2009] ZACC 30, 2010 (4) SA 55 (CC)
- *K v Minister of Safety and Security* 2005 (6) SA 419 (CC)
- *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC)
- *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC)
- *Khumalo v Holomisa* 2002 (5) SA 401 (CC)
- *Kruger v Minister of Correctional Services* [2005] ZAGPHC 24 (High Court, Transvaal Division)
- *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC)
- *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC)
- *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12, 2004 (4) SA 125 (CC)
- *Lee v Minister of Correctional Services* [2011] ZAWCHC 13 (Western Cape High Court, Cape Town)
- *Le Roux v Dey* [2011] ZACC 4, 2011 (3) SA 274 (CC)
- *Lesapo v North West Agricultural Bank* [1999] ZACC 16, 2000 (1) SA 409 (CC)
- *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8, 2005 (2) SA 117 (CC)

- *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC)
- *Malachi v Cape Dance Academy International (Pty) Ltd* [2010] ZACC 13, 2010 (6) SA 1 (CC)
- *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) (SC)
- *Marechane, Re* [1882] 1 SAR 27
- *Masetlha v President of the Republic of South Africa* [2007] ZACC 20, 2008 (1) SA 566 (CC)
- *Mashavha v President of the Republic of South Africa* [2004] ZACC 6, 2005 (2) SA 476 (CC)
- *Masiya v DPP (Pretoria)* [2007] ZACC 9, 2007 (5) SA 30 (CC)
- *Mazibuko v City of Johannesburg* [2009] ZACC 28 (CC)
- *MEC: Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* [2007] ZACC 25, 2008 (2) SA 319 (CC)
- *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC)
- *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC)
- *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC)
- *Minister of Correctional Services v Kwakwa* [2002] ZASCA 17, [2002] 3 All SA 242 (A)
- *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC)
- *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC)
- *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (*TAC* case)
- *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC)
- *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC)
- *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) (SC)
- *Minister of Posts and Telegraphs v Rasool* 1934 AD 167 (SC)
- *Minister of Public Works v Kyalami Ridge Environmental Association* [2001] ZACC 19, 2001 (3) SA 1151 (CC)
- *Minister of Safety and Security v Hamilton* [2003] 4 All SA 117 (SCA)
- *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA)
- *Minister of Safety and Security, Ex p: Re S v Walters* 2002 (4) SA 613 (CC)
- *Minister of the Interior v Harris* (the *High Court of Parliament* case) 1952 (4) SA 769 (AD SC)
- *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* [2006] ZAGPHC 47 (High Court, Witwatersrand Local Division)
- *Mnguni v Minister of Correctional Services* [2005] ZACC 13, 2005 (12) BCLR 1187 (CC)
- *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC)
- *Mohunram v National DPP* 2007 (4) SA 222 (CC) (SA)

- *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C)
- *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC)
- *Mpanza v Minister of Native Affairs* 1946 WLD 225
- *Mthembi-Mahanyele v Mail & Guardian Ltd* [2004] 3 All SA 511 (SCA)
- *Mvumvu v Minister of Transport* [2011] ZACC 1, 2011 (2) SA 473 (CC)
- *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)
- *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) (*Sodomy* case)
- *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA)
- *Ndlwana v Hofmeyr NO* 1937 AC 229 (SC)
- *Niemand v S* [2001] ZACC 11, 2002 (1) SA 21 (CC)
- *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC)
- *NM v Smith* 2007 (5) SA 250 (CC)
- *Nokotyana v Ekurhuleni Metropolitan Municipality* [2009] ZACC 33, 2010 (4) BCLR 312 (CC)
- *Nxasana v Minister of Justice* 1976 (3) SA 745 (DCLD)
- *Nyathi v MEC for the Department of Health, Gauteng* 2008 (5) SA 94 (CC)
- *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC)
- *Pharmaceutical Manufacturers Association of South Africa, ex p President of the Republic of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC)
- *Pheko v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34 (CC)
- *Phillips v DPP (Witwatersrand Local Division)* 2003 (3) SA 345 (CC)
- *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26, 2003 (2) SA 34 (CC)
- *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)
- *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)
- *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC)
- *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) (*Prince II*)
- *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC)
- *R v Abdurahman* 1950 (3) SA 136 (AD)
- *R v Bunting* 1916 TPD 578
- *R v Carelse* 1943 CPD 242
- *R v Detody* 1926 AD 198

- *R v Kahn* 1955 (3) SA 177 (AD)
- *R v Lusu* 1953 (2) SA 484 (AD)
- *R v Ngwevela* 1954 (1) SA 123 (AD SC)
- *R v Padsha* 1923 AD 281
- *R v Plaatjies* 1910 EDL 63
- *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC)
- *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC)
- *Road Accident Fund v Mdeyide* [2010] ZACC 18, 2011 (2) SA 26 (CC)
- *Ross v South Peninsula Municipality* [2000] 4 All SA 85 (C) (Western Cape High Court)
- *Rossouw v Sachs* 1964 (2) SA 551 (AD)
- *S v Baloyi* 2000 (2) SA 425 (CC)
- *S v Basson* 2005 (1) SA 171 (CC)
- *S v Chapman* 1997 (3) SA 341 (SCA)
- *S v Coetzee* 1997 (3) SA 527 (CC)
- *S v Dodo* 2001 (3) SA 382 (CC)
- *S v Dzukuda* 2000 (4) SA 1078 (CC)
- *S v ffrench-Beytagh* 1972 (3) SA 430 (AD)
- *S v Jordan* 2002 (6) SA 642 (CC)
- *S v Kumalo* 1965(4) SA 565 (N)
- *S v Lawrence* 1997 (4) SA 1176 (CC)
- *S v M* 2008 (3) SA 232 (CC)
- *S v Makwanyane* 1995 (6) BCLR 665 (CC)
- *S v Mamabolo* 2001 (3) SA 409 (CC)
- *S v Manamela* 2000 (3) SA 1 (CC)
- *S v Mhlungu* [1995] ZACC 4, 1995 (3) SA 867 (CC)
- *S v Myute* 1985(2) SA 61 (Ck)
- *S v November en 'n Ander* 1988 (1) SA 661 (O)
- *S v Thebus* 2003 (6) SA 505 (CC)
- *S v Turrell* 1973 (1) SA 248 (C)
- *S v V en 'n Ander* 1989 (1) SA 532 (A)
- *S v Williams* 1995 (3) SA 632 (CC)
- *S v Zuma* 1995 (2) SA 642 (CC)
- *Sachs v Minister of Justice* 1934 AD 11
- *Saliwa v Minister of Native Affairs* 1956 (2) SA 310 (AD)

- *Satchwell v President of Republic of South Africa* 2002 (6) SA 1 (CC)
- *Schermbrucker v Klindt NO* 1965 (4) SA 606 (AD)
- *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22, 2008 (2) SA 24 (CC)
- *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC)
- *South African Broadcasting Corporation v National DPP* 2007 (1) SA 523 (CC)
- *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) (*SANDU*)
- *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C) (High Court, Cape of Good Hope Division)
- *Stanton v Minister of Justice* 1960 (3) SA 354 (T)
- *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC)
- *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W) (High Court, Witwatersrand Local Division)
- *Tayob v Ermelo Local Road Transportation Board* 1951 (4) AD 440 (SC)
- *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11, 2011 (4) SA 191 (CC)
- *Thint Holdings (Southern Africa) (Pty) Ltd v National DPP* [2008] ZACC 14, 2009 (1) SA 141 (CC)
- *Thint (Pty) Ltd v National DPP* [2008] ZACC 13, 2009 (1) SA 1 (CC)
- *Treatment Action Campaign v Minister of Correctional Services* [2009] ZAGPHC 10 (High Court, Transvaal Division)
- *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC)
- *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C), sub nom *B v Minister of Correctional Services* 1997 (6) BCLR 789 (High Court, Cape of Good Hope Division)
- *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC)
- *Van Eeden v Minister of Safety and Security* [2002] 4 All SA 346 (SCA)
- *Van Vuren v Minister of Correctional Services* [2010] ZACC 17, 2010 (12) BCLR 1233 (CC)
- *Van Wyk v Minister of Correctional Services* [2011] ZAGPPHC 125 (North Gauteng High Court, Pretoria)
- *Volks v Robinson* 2005 (5) BCLR 446 (CC)
- *Wagener v Pharmacare Ltd* [2003] ZASCA 30, [2003] 2 All SA 167 (SCA)
- *Waring & Gillow Ltd v Sherborne* 1904 TS 340
- *Weare v Ndebele* [2008] ZACC 20, 2009 (1) SA 600 (CC)
- *Whittaker v Roos* 1912 AD 92 (SC)
- *Williams v Johannesburg Municipality* 1915 TPD 106

- *Wolpe v Officer Commanding SA Police, Johannesburg* 1955 (2) SA 87 (W)
- *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (AD)

SPAIN

- *Health information*, Decision 29 May 2003 (SC)
- *Retrogressive measures*, Decision 81/1982 (Constitutional Court)

SWAZILAND

- *Kunene v R* CRI Case No 112/78 (HC)
- *R v Nkambule* CRI Case No 21/81 (HC)
- *R v Zwane* CRI Case No 8/73 (HC)
- *Swaziland National Ex-Mine Workers Association v Minister of Education* [2010] SZSC 35

SWITZERLAND

- *V v Einwohrnergemeine X und Regierunsgrat des Kantons Bern* BGE/ATF 121 I 367 (Federal Court) 27 October 1995

TANZANIA

- *Ephrahim v Pastory* [1990] LRC (Const) 757 (High Court)
- *Mbushuu v R* [1995] 1 LRC 216 (CA)

UGANDA

- *Abuki v AG* [1997] UGCC 5 (Constitutional Court)
- *AG v Kigula* (No 3/2006) (Supreme Court) 21 January 2009 aff'g [2005] UGCC 8 (Constitutional Court)
- *Kyamanywa v Uganda* (No 10/2000) (Constitutional Court) 14 December 2001
- *Mao v AG of Uganda* [2003] UGCC 3 (Constitutional Court)
- *Mukasa v AG* [2008] AHRLR 248 (UgHC 2008)
- *Oryem v Uganda* [2003] UGSC 30

UNITED KINGDOM

- *Airedale NHS Trust v Bland* [1993] AC 789 (HL)
- *Bowman v Secular Society* [1917] AC 406 (HL)
- *Desmond v Chief Constable of Nottinghamshire Police* [2011] EWCA Civ 3, [2011] All ER (D)

- *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557
- *Herring v Boyle* (1834) 1 Cr M & R 377, 149 ER 1126
- *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL)
- *Horkulak v Cantor Fitzgerald International* [2003] EWHC 1918 (QB), [2004] ICR 697
- *Horwood v Millar's Timber and Trading Co Ltd* [1917] 1 KB 305 (CA)
- *H West & Son Ltd v Shephard* [1964] AC 326 (HL)
- *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 (HL)
- *Isabel, Countess of Rutland's Case* (1606) 6 Co Rep 52 b, 77 ER 332 (Star Chamber)
- *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359
- *Lange v Atkinson* [1999] UKPC 46, [2000] 1 NZLR 257
- *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215
- *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224
- *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT (CA)
- *Minister of Home Affairs v Fisher* [1980] AC 319 (PC)
- *Murray v Ministry of Defence* [1988] 2 All ER 521 (HL)
- *Nachimson v Nachimson* [1930] P 217 (CA)
- *Napier v Scottish Ministers* 2005 SC 229 (Court of Session Outer House, Scotland)
- *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1
- *Provincial Motor Cab Co v Dunning* [1909] 2 KB 599 (DC)
- *R v Bournewood Community and Mental Health NHS Trust, Ex p L* [1998] UKHL 24, [1999] 1 AC 458
- *R v East Sussex County Council, ex p Tandy* [1998] AC 714 (HL)
- *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 (CA)
- *R v Stephens* (1866) LR 1 QB 702 (QB)
- *R v Woodrow* (1846) 15 M & W 404, 153 ER 907
- *Reyes v R (Belize)* [2002] UKPC 11, [2002] 2 AC 235
- *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL)
- *R (Limbuela) v Secretary of State for the Home Dept* [2005] UKHL 66, [2006] 1 AC 396
- *Sherras v De Rutzen* [1895] 1 QB 918 (DC)
- *South Bucks District Council v Porter* [2003] UKHL 26, [2003] 2 AC 558
- *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464 (CA)
- *Swinney v Chief Constable of Northumbria Police (No 2)* 25 May 1999 Times Law Reports (QB)

- *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225

UNITED STATES OF AMERICA

- *Abrams v US* 250 US 616 (1919)
- *Armstrong v State* 1999 MT 261, 296 Mont 361, 989 P2d 364 (SC of Montana)
- *Atkins v Virginia* 536 US 304 (2002)
- *AZ v BZ* 431 Mass 150 (2000) (SC of Massachusetts)
- *Barker v Washburn* 1911, 200 NY 280, 93 NE 958
- *Bigelow v Virginia* 421 US 809 (1975)
- *Bowers v Hardwick* 478 US 186 (1986)
- *Brinegar v US* 338 US 160 (1949)
- *Brown v Board of Education* 347 US 483 (1954)
- *Brown v Plata* 131 S Ct 1910 (2011)
- *Bush v Gore* 531 US 98 (2000)
- *Campbell v Wood* 18 F.3d 662 (1994) (US Court of Appeals 9th Circuit)
- *City of Richmond v JA Croson Co* 488 US 469 (1989)
- *Commonwealth v Nickerson* 1861, 87 Mass (5 Allen) 518
- *Cruzan v Director, Missouri Department of Health* 497 US 261 (1990)
- *Dandridge v Williams* 397 US 471 (1970)
- *Davis v Davis* 842 SW 2d 588 (1992) (SC of Tennesse)
- *DeShaney v Winnebago County Department of Social Services* 489 US 189 (1989)
- *Downing v Municipal Court* 88 Cal App.2d 345 (1948) (Court of Appeals of California)
- *Estelle v Williams* 425 US 501 (1976)
- *Figueroa Ferrer v Commonwealth* 107 PR Dec (1978) (SC of Puerto Rico)
- *Fullilove v Klutznick* 448 US 448 (1980)
- *Furman v Georgia* 408 US 238 (1972)
- *Gertz v Robert Welch, Inc* 418 US 323 (1974)
- *Goldberg v Kelly* 397 US 254 (1970)
- *Goodridge v Massachusetts (Department of Public Health)* 440 Mass 309, 798 NE.2d 941 (2003) (SC of Massachusetts)
- *Greenberg v Miami Children's Hospital Research Institute, Inc* 264 F.Supp 2d 1064 (2003) (US District Court, Southern District Florida)
- *Gregg v Georgia* 428 US 153 (1976)
- *Griswold v Connecticut* 381 US 479 (1965)

- *GS Rasmussen & Associates, Inc v Kalitta Flying Services, Inc* 958 F.2d 896 (1992) (US Court of Appeals 9th Circuit)
- *Hamdi v Rumsfeld* 542 US 507 (2004)
- *Heart of Atlanta Motel, Inc v US* 379 US 241 (1964)
- *Hicks v Feiock* 485 US 624 (1988)
- *Ingraham v Wright* 430 US 651 (1977)
- *International News Service v Associated Press* 248 US 215 (1918)
- *JB v MB* 783 A.2d 707 (2001) (SC of New Jersey)
- *Kass v Kass* 91 NY 2d 554 (1998) (Court of Appeals of New York)
- *Kerrigan v Commissioner of Public Health* 957 A.2d 407 (2008) (SC of Connecticut)
- *King v Smith* 392 US 309 (1968)
- *Korematsu v US* 323 US 214 (1944)
- *Kremen v Cohen* 337 F.3d 1024 (2003) (US Court of Appeals 9th Circuit)
- *Lawrence v Texas* 539 US 558 (2003)
- *Levy v Louisiana* 391 US 68 (1968)
- *Marriage Cases, Re* 43 Cal.4th 757 (2008) (SC of California)
- *Miller v Albright* 523 US 420 (1998)
- *Moore v Regents of University of California* 51 Cal.3d 120 (1990) (SC of California)
- *Morissette v US* 342 US 246 (1952)
- *New Jersey v TLO* 469 US 325 (1985)
- *New York Times v Sullivan* 376 US 254 (1964)
- *Olmstead v LC* 527 US 581 (1999)
- *Paris Adult Theatre I v Slaton* 413 US 49 (1973)
- *Penfield Co v SEC* 330 US 585 (1947)
- *People v Anderson* 493 P2d 880 (Cal 1972) (SC of California)
- *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992)
- *Quinlan, Re* 355 A.2d 647 (1976) (SC of New Jersey)
- *Rice v Cayetano* 528 US 495 (2000)
- *Robalina v Armstrong* NY 1852, 15 Barb 247
- *Roberts v US Jaycees* 468 US 609 (1984)
- *Roe v Wade* 410 US 113 (1973)
- *Rosenblatt v Baer* 383 US 75 (1966)
- *Shelley v Kraemer* 334 US 1 (1948)
- *Trop v Dulles* 356 US 86 (1958)

- *Valentine v Chrestensen* 316 US 52 (1942)
- *Virginia v Black* 538 US 343 (2003)
- *Willis v State* 888 NE.2d 177 (Ind 2008) (SC of Indiana)
- *York v Jones* 717 F.Supp 421 (1989) (US District Court, Eastern District Virginia)

ZAMBIA

- *Banda v The People* [2002] AHRLR 260 (ZaHC 1999)
- *Mukunto v AG* [1988] ZMSC 22, (1988 - 1989) ZR 31 (SC)

ZIMBABWE

- *Banana v S* [2000] 4 LRC 621 (SC)
- *Blanchard v Minister of Justice, Legal and Parliamentary Affairs* [2000] 1 LRC 671 (SC)
- *Catholic Commission for Justice and Peace in Zimbabwe v AG* [1993] 2 LRC 279 (SC)
- *Chinamora v Angwa Furnishers (Private) Ltd* [1997] 1 LRC 149 (SC)
- *Chituku v Minister of Home Affairs* [2004] ZWHHC 6
- *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs* [1991] 1 ZLR 105 (S) (SC)
- *Dzvova v Minister of Education Sports and Culture* [2007] ZWSC 26
- *Juvenile v S* [1989] LRC (Const) 774 (SC)
- *Kachingwe v Minister of Home Affairs* [2005] ZWSC 134
- *Ncube v S* [1988] LRC (Const) 442 (SC)
- *Woods v Commissioner of Prisons* [2003] ZWSC 74
- *Woods v Minister of Justice, Legal and Parliamentary Affairs* [1994] 1 LRC 359 (SC)

DECISIONS AND COMMUNICATIONS OF INTERNATIONAL BODIES

AFRICAN COMMISSION

- *Achuthan (Banda) v Malawi* [2000] AHRLR 144 (ACHPR 1995)
- *African Institute for Human Rights and Development (Sierra Leonean refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004)
- *Aminu v Nigeria* [2000] AHRLR 258 (ACHPR 2000)
- *Amnesty International v Sudan* [2000] AHRLR 297 (ACHPR 1999)
- *Amnesty International v Zambia* [2000] AHRLR 325 (ACHPR 1999)
- *Article 19 v Eritrea* [2007] AHRLR 73 (ACHPR 2007)
- *Civil Liberties Organisation v Nigeria* (2000) AHRLR 243 (ACHPR 1999)
- *Constitutional Rights Project v Nigeria* [2000] AHRLR 227 (ACHPR 1999)

- *Doebbler v Sudan* [2003] AHRLR 153 (ACHPR 2003)
- *Huri-Laws v Nigeria* [2000] AHRLR 273 (ACHPR 2000)
- *Institute for Human Rights and Development in Africa v Angola* [2008] AHRLR 43 (ACHPR 2008)
- *Interights (Bosch) v Botswana* [2003] AHRLR 55 (ACHPR 2003)
- *International Pen (Saro-Wiwa) v Nigeria* [2000] AHRLR 212 (ACHPR 1998)
- *Jawara v The Gambia* [2000] AHRLR 107 (ACHPR 2000)
- *Malawi African Association v Mauritania* [2000] AHRLR 149 (ACHPR 2000)
- *Media Rights Agenda v Nigeria* [2000] AHRLR 262 (ACHPR 2000)
- *Modise v Botswana* [2000] AHRLR 30 (ACHPR 2000)
- *Organisation Mondiale Contre la Torture v Rwanda* [2000] AHRLR 282 (ACHPR 1996)
- *Ouko v Kenya* [2000] AHRLR 135 (ACHPR 2000)
- *Purohit v The Gambia* [2003] AHRLR 96 (ACHPR 2003)
- *Social and Economic Rights Action Centre (SERAC) v Nigeria* [2001] AHRLR 60 (ACHPR 2001)

COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES

- *Koraou v Niger* [2008] AHRLR 182 (ECOWAS 2008)

COURT OF JUSTICE OF THE EUROPEAN UNION

- Case C-34/10 *Brüstle v Greenpeace eV* (ECJ, 18 October 2011; ECJ, Opinion Adv G Bot, 10 March 2011)

EUROPEAN COURT OF HUMAN RIGHTS

- *A v Ireland* (App no 25579/05) (2011) 53 EHRR 13
- *A v UK* (App no 25599/94) (1999) 27 EHRR 611
- *Airey v Ireland* (App no 6289/73) (1979-80) 2 EHRR 305
- *Bakhmutskiy v Russia* (App no 36932/02) ECHR 25 June 2009
- *Chapman v UK* (App no 27238/95) (2001) 33 EHRR 18
- *Connors v UK* (App no 66746/01) (2005) 40 EHRR 9
- *Cossey v UK* (App no 10843/84) (1991) 13 EHRR 622
- *Costello-Roberts v UK* (App no 13134/87) (1995) 19 EHRR 112
- *Dudgeon v UK* (App no 7525/76) (1982) 4 EHRR 149
- *Gäfgen v Germany* (App no 22978/05) (2011) 52 EHRR 1
- *Goodwin v UK* (App no 28957/95) (2002) 35 EHRR 18

- *Gündüz v Turkey* (App no 35071/97) (2005) 41 EHRR 5
- *Halford v UK* (App no 20605/92) (1997) 24 EHRR 523
- *Handyside v UK* (App no 5493/72) (1979-80) 1 EHRR 737
- *Heaney v Ireland* (App no 34720/97) (2001) 33 EHRR 12
- *Hirst v UK (No 2)* (App no 74025/01) (2006) 42 EHRR 41
- *HL v UK* (App no 45508/99) (2005) 40 EHRR 32
- *ĬA v Turkey* (App no 42571/98) (2007) 45 EHRR 30
- *Independent News and Media plc v Ireland* (App no 55120/00) (2006) 42 EHRR 46
- *Kalashnikov v Russia* (App no 47095/99) (2003) 36 EHRR 34
- *Klein v Slovakia* (App no 72208/01) (2010) 50 EHRR 15
- *Lingens v Austria* (App no 9815/82) (1986) 8 EHRR 407
- *MC v Bulgaria* (App No 39272/98) (2005) 40 EHRR 20
- *Open Door Counselling v Ireland* (App no 14234/88) (1993) 15 EHRR 244
- *Orchowski v Poland* (App No 17885/04) ECHR 22 October 2009
- *Osman v UK* (App no 23452/94) (2000) 29 EHRR 245
- *Otto-Preminger Institute v Austria* (App no 13470/87) (1995) 19 EHRR 34
- *Pretty v UK* (App no 2346/02) (2002) 35 EHRR 1
- *Schalk v Austria* (App no 30141/04) (2011) 53 EHRR 20
- *SH v Austria* (App no 57813/00) ECHR 3 November 2011
- *Soering v UK* (App no 14038/88) (1989) 11 EHRR 439
- *Tyrer v UK* (App no 5856/72) (1979-80) 2 EHRR 1
- *Vo v France* (App no 53924/00) (2005) 40 EHRR 12
- *Wingrove v UK* (App no 17419/90) (1997) 24 EHRR 1
- *X v Netherlands* (App no 8978/80) (1986) 8 EHRR 235
- *Z v UK* (App no 29392/95) (2002) 34 EHRR 3

INTER-AMERICAN COURT OF HUMAN RIGHTS

- *Children's Rehabilitation v Paraguay* Series C 112 [2004] IACHR 8
- *Indigenous Community of Yakye Axa v Paraguay* Series C 125 [2005] IACHR 6
- *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* Advisory Opinion OC-4/84, Inter-American Court of Human Rts Series A No 4 (19 January 1984)
- *Villagrán Morales* case (the "*Street Children*" case) Series C 63 [1999] IACHR 17

INTERNATIONAL COURT OF JUSTICE

- *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Merits) [2002] ICJ Rep 3

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Prosecutor v Akayesu (Judgment) ICTR-96-4-T, T Ch I (2 September 1998)

UNITED NATIONS HUMAN RIGHTS COMMITTEE

- *Aumeeruddy-Cziffra v Mauritius* UN Human Rights Committee (9 April 1981) 12th Session UN Doc CCPR/C/12/D/35/1978
- *Bousroual (Saker) v Algeria* UN Human Rights Committee (24 April 2006) 86th Session UN Doc CCPR/C/86/992/2001
- *Chisanga v Zambia* UN Human Rights Committee (18 November 2005) 85th Session UN Doc CCPR/C/85/D/1132/2002
- *M'Boissona (Bozize) v Central African Republic* UN Human Rights Committee (26 April 1994) 50th Session UN Doc CCPR/C/50/D/428/1990
- *Mulezi v Democratic Republic of the Congo* UN Human Rights Committee (23 July 2004) 81st Session UN Doc CCPR/C/81/D/962/2001
- *Müller v Namibia* UN Human Rights Committee (28 June 2002) 74th Session UN Doc CCPR/C/74/D/919/2000
- *Njaru v Cameroon* UN Human Rights Committee (14 May 2007) 89th Session UN Doc CCPR/C/89/D/1353/2005
- *Prince v South Africa* UN Human Rights Committee (14 November 2007) 91st Session UN Doc CCPR/C/91/D/1474/2006
- *Sankara v Burkina Faso* UN Human Rights Committee (11 April 2006) 86th Session UN Doc CCPR/C/86/D/1159/2003
- *Titiahonjo v Cameroon* UN Human Rights Committee (13 November 2007) 91st Session UN Doc CCPR/C/91/D/1186/2003
- *Wackenheim v France* UN Human Rights Committee (26 July 2002) 75th Session UN Doc CCPR/C/75/D/854/1999

LEGISLATION

INDIA

- Bonded Labour System (Abolition) Act 1976 (Act 19 of 1976)
- Central Educational Institutions (Reservation in Admission) Act 2006 (Act 5 of 2007)

IRELAND

- Criminal Justice (Public Order) Act 1994
- Criminal Law (Amendment) Act 1935
- Criminal Law (Defence and the Dwelling) Act 2011
- Criminal Law (Sexual Offences) Act 2006
- Defamation Act 2009
- Electoral (Amendment) Act 2006
- Equal Status Act 2000
- European Convention on Human Rights Act 2003
- Gaming and Lotteries Act 1956
- Housing Act 1988
- Housing (Miscellaneous Provisions) Act 2002
- Intoxicating Liquor Act 1962
- Intoxicating Liquor Act 1988
- Intoxicating Liquor Act 2000
- Married Women's Status Act 1957
- Mental Health Act 2001
- Non-Fatal Offences against the Person Act 1997
- Offences against the State Act 1939
- Prohibition of Incitement to Hatred Act 1989
- Registration of Clubs Acts 1904-2004
- Registration of Clubs (Ireland) Act 1904
- Statute of Limitations 1957
- Statute of Limitations (Amendment) Act 1991
- Taxes Consolidation Act 1997

SOUTH AFRICA

- Abolition of Corporal Punishment Act 1997
- Aliens Control Act 1991

- Appellate Division Quorum Act 1955
- Apprenticeship Act 1922
- Asiatic Land Tenure and Indian Representation Act 1946
- Bantu (Abolition of Passes and Coordination of Documents) Act 1952
- Bantu Education Act 1953
- Bantu Homelands Constitution Act 1971
- Bantu Land Act 1913
- Black Administration Act 1927
- Civil Union Act 2006
- Consumer Protection Act 2008
- Criminal Law Amendment Act 1997
- Criminal Procedure Act 1977
- Group Areas Act 1950
- Group Areas Act 1957
- Group Areas Act 1966
- High Court of Parliament Act 1952
- National Health Act 2003
- Immorality Act 1927
- Immorality Act 1957
- Insolvency Act 1936
- Intestate Succession Act 1987
- KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 2007
- Magistrates' Courts Act 1944
- Marriage Act 1961
- Matrimonial Property Act 1984
- Natal Franchise Act 1896
- Natives Land Act 1913
- Native Trust and Land Act 1936
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998
- Prevention of Illegal Squatting Act 1951
- Prohibition of Mixed Marriages Act 1949
- Promotion of Equality and Prevention of Unfair Discrimination Act 2000
- Representation of Natives Act 1936
- Republic of South Africa Constitution Act 1961

- Reservation of Separate Amenities Act 1953
- Senate Act 1955
- Separate Representation of Voters Act 1951
- Sexual Offences Act 1957
- South Africa Act Amendment Act 1956
- South African Police Service Act 1995
- State-Aided Institutions Act 1957
- State Liability Act 1957
- Suppression of Communism Act 1950

UNITED KINGDOM

- Administration of Justice Act 1970
- Commonwealth of Australia Constitution Act 1900
- Constitution Act 1867
- Human Rights Act 1998
- Rent Act 1977
- Statute of Westminster 1931

UNITED STATES OF AMERICA

- Civil Rights Act 1964

ZIMBABWE

- Constitution of Zimbabwe Amendment (No 13) Act 1993

CONSTITUTIONS

- Constitution of Belgium 1970
- Constitution of Belize 1981
- Constitution of Bermuda 1968
- Constitution of the Republic of Botswana 1966
- Canadian Charter of Rights and Freedoms 1982
- Political Constitution of the Republic of Costa Rica 1949
- Constitution of the Republic of Cuba 1940
- Constitution of Finland 1919
- Constitution of Finland 1999

- Constitution of the French Republic 1946
- Constitution of the German Reich 1919
- Basic Law for the Federal Republic of Germany 1949
- Constitution of the Republic of Ghana 1992
- Hong Kong Bill of Rights Ordinance 1991
- Constitution of the Republic of Hungary 1949
- Constitution of India 1950
- Constitution of Ireland 1937
- Israel - Basic Law: Human Dignity and Liberty 1992 (amended 1994)
- Israel - Basic Law: Government 2001
- Constitution of Japan 1946
- Constitution of the Republic of Kenya 1963
- Constitution of the Republic of Kenya 2010
- Constitution of the Republic of Latvia 1922
- Constitution of Lithuania 1992
- Constitution of the Republic of Macedonia 1991
- Constitution of the Republic of Malawi 1994
- Political Constitution of the United Mexican States 1917 (amended 1946)
- Constitution of Montana 1972
- Constitution of the Republic of Namibia 1990
- Constitution of the Federal Republic of Nigeria 1999
- Constitution of Peru 1993
- Constitution of the Republic of Poland 1997
- Political Constitution of the Portuguese Republic 1933
- Constitution of the Portuguese Republic 1976
- Constitution of Portugal 2005
- Constitution of the Union of South Africa 1909
- Constitution of the Republic of South Africa 1983
- Interim Constitution of the Republic of South Africa 1993
- Constitution of the Republic of South Africa 1996
- Charter of the Spanish People 1945
- Constitution of Spain 1978
- Constitution of the Kingdom of Swaziland 2005
- Constitution of the United Republic of Tanzania 1977

- Constitution of the Republic of Uganda 1995
- Constitution of the Republic of Zimbabwe 1979

INTERNATIONAL INSTRUMENTS AND RESOLUTIONS

- African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 13 September 2000, entered into force 25 November 2005) CAB/LEG/66.6; reprinted in 1 *Afr Hum Rts LJ* 40
- Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (signed 16 January 2002, entered into force 12 April 2002) 2178 UNTS 138
- Agreement Establishing the International Fund for Agricultural Development (adopted 13 June 1976, entered into force 30 November 1977) 1059 UNTS 191
- American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123
- American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992)
- Charter of Fundamental Rights of the European Union (2000/C 364/01) [2000] OJ C364/1
- Charter of the Organisation of African Unity (adopted at Addis Ababa 25 May 1963)
- Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 59 Stat 1031, UNTS 993, 3 Bevans 1153
- Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997) ETS No 164
- Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings (1998) ETS No 168
- Additional Protocol to the Convention on Human Rights and Biomedicine, on Transplantation of Organs and Tissues of Human Origin (2002) ETS No 186
- Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research (2005) CETS No 195

- Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (European Convention on Human Rights)
- First Protocol to the European Convention on Human Rights
- Fourth Protocol to the European Convention on Human Rights
- Convention on the Civil Aspects of International Child Abduction (adopted 25 October 1980, entered into force 1 December 1983) 19 ILM 1501 (1980) (Hague Convention on Child Abduction)
- Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (adopted 29 May 1993, entered into force 1 May 1995) 32 ILM 1139 (1993) (Hague Convention on Intercountry Adoption)
- Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13
- Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3
- European Social Charter (revised) ETS No 163
- Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995) (1994) 33 ILM 1534
- International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, opened for signature 6 February 2007) UNGA Res 61/177, UN Doc A/RES/61/177
- International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195
- International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) (2007) 46 ILM 443
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 93
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
- International Covenant on Economic, Social and Cultural Rights (adopted 16 December

1966, entered into force 3 January 1976) 993 UNTS 3

- International Labour Organisation (ILO) Indigenous and Tribal Populations Convention C107 (adopted 26 June 1957, entered into force 2 June 1959) (40th Session) (Geneva)
- ILO Discrimination (Employment and Occupation) Convention C111 (adopted 25 June 1958, entered into force 15 June 1960) (42nd Session) (Geneva)
- ILO Employment Policy Convention C122 (adopted 9 July 1964, entered into force 15 July 1966) (48th Session) (Geneva)
- ILO Workers with Family Responsibilities Convention C156 (adopted 23 June 1981, entered into force 11 August 1983) (67th Session) (Geneva)
- League of Arab States, Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) reprinted in (2005) 12 IHRR 893
- Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90
- Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (8 November 1994) UN Doc S/RES/955
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 226 UNTS 3
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1
- UN Commission on Human Rights, 43rd Session "The Limburg Principles on the Implementation of the ICESCR" (8 January 1987) UN Doc E/CN.4/1987/17
- UN Commission on Human Rights, 57th Session "Report on the workshop on the justiciability of economic, social and cultural rights, with particular reference to the draft optional protocol to the ICESCR" (22 March 2001) UN Doc E/CN.4/2001/62/Add.2 (UN Justiciability Report)
- UN Commission on Human Rights (Sub-Commission), "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (13 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (UN draft Norms)
- UN Commission on Human Rights "Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises" (22 February 2006) UN Doc E/CN.4/2006/97
- UN Committee on Economic, Social and Cultural Rights, "General Comment No 3" 5th Session (1990) in "Compilation of General Comments and General Recommendations

adopted by Human Rights Treaty Bodies" (29 July 1994) UN Doc HRI/GEN/1/Rev.1, 48

- UN Committee on Economic, Social and Cultural Rights, "General Comment No 4" 6th Session (1991) in "Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies" (29 July 1994) UN Doc HRI/GEN/1/Rev.1, 53
- UN Committee on Economic, Social and Cultural Rights, "General Comment No 9" 19th Session (3 December 1998) UN Doc E/C.12/1998/24
- UN Committee on the Rights of the Child, "Consideration of Reports Submitted by States Parties under Article 44 of the Convention on the Rights of the Child. Concluding Observations: Ireland" (29 September 2006) UN Doc CRC/C/IRL/CO/2
- UN Committee on the Rights of the Child, "General Comment No 8" (2 March 2007) UN Doc CRC/C/GC/8
- UN Conference on the Human Environment "Stockholm Declaration" (16 June 1972) UN Doc A/Conf.48/14/Rev 1(1973)
- UN Declaration on the Elimination of All Forms of Racial Discrimination, UNGA Res 1904 (XVIII) (20 November 1963) UN Doc A/RES/1904 (XVIII)
- UNESCO "Universal Declaration on the Human Genome and Human Rights" (11 November 1997) Gen Conf 29 C/Res 16
- UNESCO "International Declaration on Human Genetic Data" (16 October 2003) Gen Conf 32 C/Res 22
- UNESCO "Universal Declaration on Bioethics and Human Rights" (19 October 2005) Gen Conf 33 C/Res 36
- UN General Assembly (UNGA) 3rd Session Third Committee 95th Meeting (6 October 1948) UN Doc A/C.3/SR.95
- UNGA 3rd Session Third Committee 96th Meeting (7 October 1948) UN Doc A/C.3/SR.96.
- UNGA 3rd Session Third Committee 98th Meeting (9 October 1948) UN Doc A/C.3/SR.98.
- UNGA "Draft Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles for the Implementation of the UN 'Protect, Respect and Remedy' Framework" http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf (visited 3 March 2011)
- UNGA Res 44(I) (8 December 1946) UN Doc A/RES/44(I)
- UNGA Res 3151 (XXVIII) (14 December 1973) UN Doc A/RES/3151(XXVIII)
- UNGA Res 41/120 (4 December 1986) UN Doc A/Res/41/120
- UN "Global Compact" http://www.unglobalcompact.org/AboutTheGC/TheTen

Principles/index.html (visited 2 March 2011)

- UN Human Rights Committee, *Chitat Ng v Canada* "Communication No 469 of 1991" (7 January 1994)
- UN Human Rights Council "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts" (19 February 2007) UN Doc A/HRC/4/35
- UNHRC "Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises" (7 April 2008) UN Doc A/HRC/8/5
- UNHRC "Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises" (22 April 2009) UN Doc A/HRC/11/13
- UNHRC "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Further Steps toward the Operationalization of the 'Protect, Respect and Remedy' Framework" (9 April 2010) UN Doc A/HRC/14/27
- UNHRC "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises—Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy' Framework" (21 March 2011) UN Doc A/HRC/17/31
- Universal Declaration of Human Responsibilities (adopted 1 September 1997) Inter-Action Council
- Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)
- UN Security Council (UNSC) Res 182 (4 December 1963) UN Doc S/Res/182(1963)
- UNSC Res 311 (4 February 1972) UN Doc S/Res/311(1972)
- UNSC Res 392 (19 June 1976) UN Doc S/Res/392(1976)
- UNSC Res 473 (13 June 1980) UN Doc S/Res/473(1980)
- World Conference on Human Rights "Vienna Declaration and Programme of Action" (25 June 1993) UN Doc A/CONF.157/23

1 CHAPTER I - INTRODUCTION

1.1 Introduction

Human dignity is the core philosophical notion that has inspired international human rights for over half a century and has driven constitutional analysis in the areas of social justice[1] and respect for human personality and freedom.[2] It features in the text of many contemporary constitutions and has been found to exist as an unexpressed value in others.[3] Yet its effects on constitutional analysis have not been constant. The same, or similar, language in particular constitutional texts has yielded widely differing outcomes.[4]

This thesis seeks to examine the constitutional jurisprudence on dignity in South Africa and Ireland. It analyses the rich case law of the Constitutional Court in South Africa, contrasting it to the slender pickings among the judgments of the Irish courts.[5] It attempts to explain why such a profound difference in outcome has occurred and it proposes a way forward for the Irish courts, consistent with Irish constitutional norms, in the light of the lessons that may be learnt from South Africa.

Why should there be such a profound difference in the jurisprudence of the two countries? The thesis points out the following answers. The South African Constitution[6] is manifestly transformative in character, replacing the harsh positivism and lack of respect for the equal and inherent worth of the person which characterised the apartheid regime.[7] This Constitution, in embracing the values of equal respect and inherent dignity, has transformed the judicial resolution, not merely of issues relating to race and ethnicity, but of matters completely removed from that context. The new constitutional understanding of the

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[1] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Institute of Public Administration, Dublin 2002), at 46.

[2] William Binchy, "Dignity as a Constitutional Concept" in Oran Doyle and Eoin Carolan eds, *The Irish Constitution: Governance and Values* (Thompson Round Hall, Dublin 2008), at 307.

[3] *Ibid*.

[4] *Ibid*, at 308; William Binchy, "The Role of Comparative and Public International Law in Domestic Legal Systems" (2010) 23(3) *Advocate (South Africa)* 58, at 61.

[5] Binchy (n2), at 318-319; Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (4th edn Tottel Publishing, Dublin 2004), at [2.1.32]-[2.1.34], [7.3.222]-[7.3.223].

[6] Constitution of the Republic of South Africa 1996.

[7] Arthur Chaskalson, "Human Dignity as a Constitutional Value" in David Kretzmer and Eckart Klein eds, *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, The Hague 2002), at 133, 138.

individual and society, and so the place of dignity in the constitutional order, has resulted in the refashioning of the law in areas of social justice, such as housing, health provision and education, but also in relation to personal conduct and personal relationships. It is, in retrospect, no surprise that a dignity-based new constitutional order should have led the courts to the conclusion that same-sex marriage is a constitutional necessity.

The experience in Ireland has been quite different. The Constitution of 1937 can be regarded in some respects as a cuckoo in a common law nest, imported from outside to a radically hostile culture of legal practice and judicial analysis.[8] It contains a reasonably clearly identifiable philosophy and value system—largely that of Thomism,[9] tempered by Enlightenment-inspired civil liberties.[10] This philosophy was no doubt consistent with the broad attitudes of Irish society in 1937 but not at all easy to harmonise with a system based on common law, case-by-case determinations, eschewing grand theory, where rights were not stated but emerged inferentially from the absence of legal constraints.[11]

Moreover, the strong tradition of deference to parliamentary sovereignty[12] was slow to fade. It is true that for a period of a couple of decades, from the mid-1960s to the mid-1980s, the Irish constitutional jurisprudence on fundamental rights developed exponentially, under the inspiration of Ó Dálaigh CJ and more particularly Walsh J.[13] These two judges can now be seen as faithful exponents of the philosophy of the Constitution, who grasped its radically transformative effects on the traditional common law model, based on deference to parliamentary sovereignty, and the strongly positivist philosophy which had been in the ascendancy. Walsh and Ó Dálaigh opened up the possibility of a judicial understanding of constitutional rights as being based on a human rights philosophy.[14] The implications for the doctrine of the separation of powers were equally radical. Yet, other judges, while acquiescing

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[8] Ronan Keane, "Judges as Lawmakers: The Irish Experience" (2004) 4(2) *JSIJ* 1, at 9.

[9] GF Whyte, "Natural Law and the Constitution" (1996) 14 *ILT* 8, at 8-9; Gerard F Whyte, "Some Reflections on the Role of Religion in the Constitutional Order" in Tim Murphy and Patrick Twomey eds, *Ireland's Evolving Constitution, 1937-1997: Collected Essays* (Hart, Oxford 1998), at 60.

[10] William Binchy, "The Supreme Court of Ireland" in Brice Dickson ed, *Judicial Activism in Common Law Supreme Courts* (OUP, Oxford 2007), at 171; Hogan and Whyte (n5), at [1.1.55], [7.1.08]-[7.1.18], [7.1.22] fn42; Keane (n8), at 10, 13-14, fn17; Whyte (n1), at 46-51.

[11] The common law's theory of personal liberty was based on the principle that no legal sanction could be imposed for what was not expressly forbidden by law: Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn Macmillan, London 1915), at xxxvii, 203-204.

[12] See *ibid*, at xviii-xix, 37-38; Brian Walsh, "The Constitution and Constitutional Rights" in Frank Litton ed, *The Constitution of Ireland 1937-1987* (Institute of Public Administration, Dublin 1988), at 91.

[13] Binchy (n10), at 169, 171-172; Keane (n8), at 9-10; JM Kelly, *A Short History of Western Legal Theory* (Clarendon Press, Oxford 1992), at 425.

[14] Brian Walsh, "Constitutional Adjudication" (1995-1996) 17 *Hold LR* 153, at 159.

in the Walsh/Ó Dálaigh approach, had no great enthusiasm for it. Their training and background generally gave them no particular expertise in philosophical reflection. With the departure of Ó Dálaigh CJ and, later, Walsh J, and perhaps more importantly, with changes in Irish society in which the standing of the Catholic Church and, consequently, respect for its social philosophy, has weakened greatly, the present disposition of Irish judges to uphold and develop a natural law understanding of human dignity has become almost imperceptible.[15]

The thesis argues that, consistent with the notion that there is a discernible philosophy and value-system within the Constitution, including respect for human dignity, the Constitution permits—indeed requires—courts to develop a rich jurisprudence which, while not necessarily going as far as judges in South Africa have done, nevertheless involves a far greater judicial commitment to giving substance to these values.

1.2 Communitarian understanding of dignity

With human dignity as their constant lodestar, the South African courts play their constitutionally-mandated part in the national mission to transform relationships in society by moving them from their morally indefensible apartheid roots of inequality, humiliation and enforced vulnerability on the particularly odious ground of race to a foundation of reciprocity in a humane community exhibiting respect for the inherent dignity, equality and freedom of each of its members. The person is positioned in society, where human rights—linked with correlative duties—are harmonised to the greatest extent possible. This well-developed communitarian understanding of dignity supported by constitutional norms clearly reasoned and articulated by the judiciary contrasts with the Irish courts' sporadic acknowledgement of the dignity of the atomised individual without taking into account the emphasis in the Constitution on social justice which also requires human dignity to be located in a group setting. Because of the dramatic switch from the exclusivity embedded in the previous regime to a polity committed to embracing all citizens, it is not surprising that the transformative process was based on the value of human dignity, which recognises the inherent worth of each person. What is startling is that the Irish judges (unlike their South African counterparts) have shown great reluctance to examine the foundational norms and value systems of the Constitution. Their failure, combined with an unnecessarily stringent application of the separation of powers, has inhibited the development of a jurisprudence laying strong

[15] Binchy (n10), at 214-215.

emphasis on human dignity.

As South Africa has shown, a communitarian application of human dignity can be the foundation of a humanist philosophy that promotes equality in many spheres and combats discrimination on the grounds of, *inter alia*, race, gender, civil status and cultural background, as well as extending the ambit of the right to life from mere survival to the leading of a dignified healthy meaningful life with sufficient nourishment and shelter to enable the development of fulfilling relationships and participation in society with the enjoyment of civil and political rights. Its ethos requires that prisoners, children, nomadic people, the disabled and other marginalised or vulnerable groups be treated with equal respect. It protects against degradation and humiliation in the punishment meted out for crimes and in the sanctions for civil law breaches. The all-pervasive influence of human dignity is evident in these examples of the diverse areas where it has been successfully invoked: bodily and mental integrity, fair procedures in the justice system, freedom to express oneself and to form publically-recognised relationships, upholding of reputation, and preservation of a private sphere with the autonomy to take an informed decision on how best to lead one's life and to decide on what private information to reveal. Its reciprocal nature is evident in its curtailment of self-degradation and its limiting effect on the exercise of rights to accommodate the rights of others or the common good.

Why has a comparison between the Irish and South African case law revealed such a marked divergence between the reliance on and understanding of human dignity in each jurisdiction? One explanation is that the South African Constitution has unequivocally espoused human dignity as a foundational value and contains multiple textual references to it. Its Bill of Rights also includes a non-derogable individual right to respect for human dignity. When interpreting or developing the law, the courts are explicitly directed to promote the Bill of Rights' underlying values, spirit, purport and objects. Contrast the Irish Constitution, containing just one reference to dignity—and that is not embodied in it, but in the Preamble. At first glance on a literal reading of the Constitution, it might be thought that the Preamble is superfluous to its interpretation. But a deeper study reveals that the Irish Constitution is also values-based and I propose that, in the absence of an interpretation clause, reliance should be placed on the reference to dignity in the Preamble as a factor when interpreting the document. The Preamble refers to the common good and social order, which is evidence of a

communitarian understanding of dignity with its emphasis on mutual interdependence.[16] The values of human dignity and social inclusion could mandate judicial enforcement of socio-economic rights.[17]

A purposive approach is an appropriate method of interpretation in certain circumstances—particularly when concepts such as equality, personal rights and values are deliberately left vague to enable them to be applied in changing circumstances. So in the quest for the meaning of the Constitution, a purposive interpretation reflecting its values is apt. As an objection might be made to the relevance of human dignity and a study of the South African Constitution to the Irish situation, before embarking on the comparative review this introductory chapter will examine interpretative methods more closely and establish the veracity of the method proposed in this thesis.

1.3 Framework of study and relevance to proposition

The purpose of this chapter is to outline the proposition, sketch the main lessons which the Irish courts may learn from South Africa, defend the interpretative method proposed for the Irish Constitution and describe the research methodology. Chapter II examines the role of dignity in contemporary jurisprudence, its meaning in philosophy, and its history, sources, roles and impact. Rationales from the human being's nature, spirituality, reasoning capacity and status in the community have amalgamated to provide a coherent perception of human dignity, which merits mutual love in relationships and a common commitment to respect for each other in order to experience the full breadth of humanity in social solidarity—a modern appreciation of human dignity that supports a communitarian understanding of the concept in law. Noted in the jurisprudence are dignity's association with other rights, its close relationship with equality, its relevance to groups, its pivotal place in human rights and its implications for democracy.

Chapter III describes the historical background to the South African Constitution and reviews its provisions on fundamental rights. Its values are shaped by the traditional concept of *ubuntu*, which promotes harmonious communal living while recognising each participant's right to respect.

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[16] Aisling O'Sullivan and Phil CW Chan, "Judicial Review in Ireland and the Relationship between the Irish Constitution and Natural Law" (2006) 15(2) *Nott LJ* 18, at 21. See also Claire McHugh, "Socio-Economic Rights in Ireland: Lessons to be Learned from South Africa and India" (2003) 4 *Hibernian LJ* 109, at 113.
[17] McHugh (n16), at 118, 126, 128.

In Chapters IV to VI the case law in South Africa on dignity is evaluated. Chapter IV focuses on the *right* to dignity and the idea of equal respect, which underpinned the case law condemning discrimination on the grounds of sexual orientation. This right has had a significant impact on the types of punishment that are available as a legal sanction, protection of family life, defamation laws, the handling of crimes of sexual violence and children's rights. These diverse areas where the right to dignity has had an effect show that, in the hands of judges committed to the constitutional transformative ideal, it has a far-reaching potential to improve society for the benefit of the community as a whole and for individuals in it.

Chapter V shows the association of the *value* of dignity with other rights, in particular freedom and security, fair trial, privacy and autonomy, freedom of expression and equality. Again, it is evident that a judiciary willing to engage the constitutional value of dignity to interpret the purpose of the provisions in the Constitution will find that this yields a better insight into all fundamental rights whose true nature will consequently be more readily understood by the public—an added bonus on top of the recognition in law of the position of the individuals concerned.

Chapter VI deals with economic and social rights. Although certain socio-economic rights are set out in the Bill of Rights, the courts read the Constitution as a whole and utilise an objective notion of human dignity to discern the scope of these rights. In the reconciliation of scarce resources with protection of human dignity, collective rights have ensured judicial scrutiny of government programmes to meet urgent social needs. While the executive is held accountable, the courts have adopted a collaborative approach insisting on consultation between the parties and engagement to seek a reasonable solution. The judiciary has not usurped the policy roles of the other arms of state and has given the government and legislature an opportunity to rectify deficiencies that have come to light, but the courts have not hesitated to intervene when they have detected *mala fides* or prevarication in delivering results. A review of the justiciability and judicial enforcement of socio-economic rights in a number of countries reveals that even where there is no explicit recognition in a constitution of these rights, there is a solid foundation on which they can be claimed and adjudicated. Respect for the human dignity of all members of society has ensured at least the minimum protection for the vulnerable. Therefore, even though the Irish Constitution does not contain as many specific socio-economic rights as its South African counterpart, the judicial approach to them in South Africa can be adapted for Ireland.

Chapter VII examines the Irish case law and compares it with the South African jurisprudence. The historical development of dignity is traced and its philosophy sought in Irish decisions. Some startling comparisons (and a few stark contrasts) emerge between South Africa and Ireland in substantive law. Although dignity can best be understood as an aspect of the natural law philosophy on which the Irish Constitution is largely, though not exclusively based, there has been little judicial effort to substantiate a natural law understanding of dignity in key areas of equality and personal rights. The chapter reviews relevant case law thematically. What emerges is a jurisprudence in stark contrast to that of South Africa, with an impoverished judicial understanding of the implications of dignity for developing, if not transforming, key areas of the law.

Remedies and the scope of fundamental rights are covered in Chapter VIII. The horizontal application in Ireland of constitutional rights might be considered to have resulted in a reshaping of the common law corpus of remedies in the light of constitutional values. Yet little has emerged. Some traces may be found in the area of defamation, for example,[18] but Irish courts have achieved less than their South African counterparts, who have worked with the conceptually weaker constitutional model of indirect horizontally.[19]

Finally, the conclusions from this comparative review are stated in Chapter IX. There are similarities in the normative framework of the Constitutions of both countries, and some useful guidelines can be extracted to reinvigorate Irish jurisprudence. There are significant lessons to be learnt which will be summarised briefly in the next section.

1.4 Summary of major lessons

The main messages are in the areas of equality, socio-economic rights, the legal status of unmarried fathers, punishment of children, prison conditions, the extent of state responsibility to protect human rights, and civil liability for failures of the police and state-endorsed agents. There are helpful pointers relating to publication of private information, the parameters of

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[18] *Hunter v Gerald Duckworth & Co Ltd* [2003] IEHC 81 (see n223 in Ch VIII).

[19] The Bill of Rights has direct horizontal application, but the Constitutional Court has preferred to have recourse to indirect horizontality, which is also facilitated by the Constitution: Dikgang Moseneke, "Transformative Constitutionalism: Its Implications for the Law of Contract" (2009) 20 *Stellenbosch L Rev* 3, at 8. See Ch III, 3.2.3.2; George Devenish, *A Commentary on the South African Bill of Rights* (Butterworths, Durban 1999), at 19-20, 24-25, 31-32.

informed consent, regulation of research and aids to human reproduction, prohibition of hate speech, development of the laws of defamation and contract, quantum of damages and effective remedies.[20]

Examined against a standard of accountability, Irish law could follow on the lines of South African jurisprudence a remoulding of tort law in the light of constitutional values. Since some constitutional rights do not depend on the state for their existence, they are enforceable against all those with whom the individual has relationships to the extent that they are capable of being applied. The Irish courts' incoherent explanations and haphazard approach to the enforcement of rights in private law could be put on a structured basis by applying the constitutional norms of human dignity and the common good to discern the nature and extent of each right. Adoption of the indirect horizontal effect doctrine as in South Africa would be beneficial.

1.5 Purposive interpretation

Courts have adopted two opposing interpretative approaches in relation to constitutions, namely the literal and the purposive. Each one has its rightful place provided it is applied in the context to which it is suited. Gerard Hogan and Gerry Whyte pointed out that the literal approach focusing on the language in the text is most appropriate in relation to technical provisions.[21] But its shortcomings are evident when there is an apparent conflict within the document.[22] The broad purposeful method is a better tool to discover the meaning of fundamental rights and public policy, because it discerns the people's intentions as embodied in the Constitution and identifies the purpose and objective in protecting human rights while using the textual language as a guide.[23] The literal theory is a product of parliamentary supremacy and, as George Devenish put it, is associated in South Africa with "primitive legal positivism of the by-gone era, of imperialism, colonialism and white minority rule".[24] He

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[20] The damage to a defamed person's dignity and standing in the community could be repaired by a public apology, a judicial finding of defamation and a modest sum in compensation. Similarly where a severely impaired person is unaware of the impact of the injuries received, their human dignity could be reconciled with society's values by a smaller award than that merited by a fully-conscious plaintiff.

[21] Hogan and Whyte (n5), at [1.1.03].

[22] Raymond Byrne and J Paul McCutcheon, *The Irish Legal System* (5th edn Bloomsbury Professional, Haywards Heath, West Sussex 2009), at [15.130].

[23] Hogan and Whyte (n5), at [1.1.05].

[24] George Devenish, "The Evolution and Development of a Value-Based and Teleological Interpretation of Statute and Common Law in South Africa as a Result of the 1996 Constitution" in Emmanuel Quansah and William Binchy eds, *The Judicial Protection of Human Rights in Botswana* (Clarus Press, Dublin

rejects a mere technical exercise in constitutional interpretation and notes that a purposive approach involving values is required.[25] Constitutions are now regarded as *sui generis* and require a generous purposive construction, so the ordinary rules of statutory construction are not applied rigidly.[26] Etienne Mureinik argues for an interpretation where text, purpose and values are weighed to produce a value-coherent interpretation by which "the judge is charged with the duty of finding the construction most consonant with the morality that affords the best explanation of the legal system."[27]

A canon of interpretation first expressed in Ireland in 1980 was that of harmonious interpretation, which regards the Constitution as having a single scale of values that should be read without internal discord.[28] It may require a literal interpretation to yield to a purposive one.[29] Similarities can be seen in the South African jurisprudence where the harmonious reading of the Constitution as a whole is favoured, as exemplified by Sachs J in *Prince II*,[30] *Van Heerden*[31] and *NM v Smith*.[32] Harmony is useful when it results in the constitutional purposes

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2009), at 116.

[25] *Ibid*, at 117. On values-based interpretation, see Devenish (n19), at 606-608.

[26] Charles Manga Fombad, "The Constitutional Protection against Discrimination in Botswana" (2004) 53 *ICLQ* 139, at 145.

[27] Etienne Mureinik, "Administrative Law in South Africa" (1986) 103 *SALJ* 615, at 623.

[28] Hogan and Whyte (n5), at [1.1.12]-[1.1.13], citing *Dillane v AG* [1980] ILRM 167 (SC).

[29] *Ibid*, at [1.1.16]. This did not happen in *People (DPP) v O'Shea*, where the majority diverged from Henchy J's vision of the Constitution as "an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation": [1982] IR 384 (SC), at 426. Henchy J noted that in a constitution "the letter killeth, but the spirit giveth life": *ibid*. In 1985 a differently composed Supreme Court effectively repudiated the majority reasoning in *O'Shea*, and adopted Henchy J's harmonious approach in which the scheme of the entire constitution is regarded to prevent a literal construction defeating the Constitution's fundamental purpose, thus resolving conflicts between two provisions: *Tormey v Ireland* [1985] IR 289. Henchy J rejected a hierarchy of rights, *ibid*, at 295-296:

> The rule of literal interpretation, which is generally applied in the absence of ambiguity or absurdity in the text, must here give way to the more fundamental rule of constitutional interpretation that the Constitution must be read as a whole and that its several provisions must not be looked at in isolation, but be treated as interlocking parts of the general constitutional scheme. This means that where two constructions of a provision are open in the light of the Constitution as a whole, despite the apparent unambiguity of the provision itself, the court should adopt the construction which will achieve the smooth and harmonious operation of the Constitution. A judicial attitude of strict construction should be avoided when it would allow the imperfection or inadequacy of the words used to defeat or pervert any of the fundamental purposes of the Constitution.

Henchy J's dissenting views in *O'Shea* were cited frequently in later cases and were approved by Keane CJ in *People (DPP) v MS*: [2003] IESC 24, [2003] 1 IR 606, at 619.

See Byrne and McCutcheon (n22), at [15.144]-[15.147]; Hogan and Whyte (n5), at [1.1.03], [1.1.15]-[1.1.16], [1.1.19]-[1.1.20], [1.1.50], [7.1.49]; Gerard Hogan, "Constitutional Interpretation" in Litton (n12), at 184; John Kelly, "The Constitution: Law and Manifesto" in *ibid*, at 214-215.

[30] *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), at [155].

[31] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), at [136].

being achieved. As Rory O'Connell stated, "courts must not simply harmonise those provisions, they must aim to realise their purpose, and more particularly the central purposes of the Constitution."[33]

When values are being considered, the question arises as to whether they are to be ascertained by gauging what they meant in 1937 when the people adopted the Constitution or whether they have a current meaning.[34] Although the historical approach sometimes has a role to play, John Kelly thought it was not the correct viewpoint here and proposed that the "present-tense" approach was appropriate for standards and values, such as "personal rights", "common good", "social justice", "equality" and—in the context of private property guarantees—for concepts like "injustice".[35] This accords with Walsh J's dictum in *McGee* that as "the prevailing ideas" of the virtues in the Preamble "may be conditioned by the passage of time", the Constitution is interpreted "in the light of prevailing ideas and concepts."[36]

It has to be recognised that applying a purposive interpretation to a constitutional text whose values are capable of assuming a different content or scope over a period of time can present formidable intellectual challenges.[37] A purposive interpretation based on an originalist perspective is a far simpler endeavour. Here the task is to identify the original purpose of those who created the Constitution and construe the language of the text accordingly. But if key concepts can change their meaning over time in the light of "prevailing ideas", then the historical purpose loses its centrality and the courts must construct an artificial purpose based on the changed corpus and shape of the new values. In describing this as an artificial purpose, the intent is not to stigmatise the process as involving falsity or disingenuousness, but rather to identify the fact that the courts are no longer engaging exclusively in a process of historical detection of actual purpose—instead they are involved in a more complex process of seeking to draw from an indentified cluster of values (including newly developed or reshaped values) a coherent normative philosophy. Undoubtedly there is purpose in the interpretative process, but it relates more to the purpose of achieving philosophical coherence rather than to identifying the purpose of those who created the Constitution.

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[32] 2007 (5) SA 250 (CC), at [204].
[33] Rory O'Connell, "Guardians of the Constitution: Unconstitutional Constitutional Norms" (1999) 4 *J Civ Lib* 48, at 51 (footnote omitted).
[34] Whyte (n1), at 24, 27.
[35] Kelly (n29), at 215.
[36] *McGee v AG* [1974] IR 284 (SC), at 319. On *McGee*, see Francis X Beytagh, Jr, "Privacy in Perspective: The Experience under Foreign Constitutions" (1984) 15 *U Tol L Rev* 449, at 493-504.
[37] See Binchy (n2), at 312-313.

So far as the reference to dignity contained in the Preamble is concerned, it seems entirely reasonable to apply an originalist interpretation to it (in the first place at least) in order to appreciate its significance as part of the philosophical system embraced by the Constitution in 1937. It may be appropriate for the court thereafter to examine whether dignity has acquired a different meaning in the light of "prevailing ideas". One must concede such a theoretical possibility of change, but, so far as dignity is concerned, it may be argued that the philosophical understanding of the concept, rooted in the inherent equal value of every human being, integrated in social relationships whose purpose should be to enhance human flourishing, has not been replaced by a Lockean concept of dignity, which is contingent on personal circumstances and facts external to each human being.[38] The "prevailing ideas" would reasonably include those reflected in all the great international human rights instruments, beginning with the Universal Declaration of Human Rights (UDHR) of 1948,[39] which includes references to dignity that clearly envisage that it is shared, equally and inherently, by everyone.

It must be acknowledged that two decisions of the Supreme Court—*Re a Ward of Court (withholding medical treatment) (No 2)*[40] and *Roche v Roche*[41]—are difficult to reconcile with a natural law understanding of dignity; yet neither decision sought to invoke changing "prevailing ideas" on dignity as a reason for adopting a different interpretation of the concept and both professed broad loyalty to the interlinked constitutional understanding of human rights.

Frank Michelman's suggestion for interpretation captures the multi-faceted holistic nature of the task which must give effect to the underlying values:

> On the constitutional level, legal interpretation succeeds by construing legal words, intentions, and purposes, yes, but by construing them decidedly in

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[38] John Locke's understanding of dignity was that its actualisation is vulnerable, dependent on wilful actions of society and is to be safeguarded by political and social institutions grounded on a social contract: Dietrich Ritschl, "Can Ethical Maxims be Derived from Theological Concepts of Human Dignity?" in Kretzmer and Klein (n7), at 96.

[39] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

[40] [1996] 2 IR 79. See GF Whyte, "The Right to Die and the Irish Constitution" (1997) 3 *EPL* 235.

[41] [2009] IESC 82, [2010] 2 IR 321. Murray CJ expressly linked the moral status of embryos with human dignity, but he declined "to pronounce on the truth of when human life begins" on the grounds that when a broad consensus did not exist on such a complex multi-faceted issue, it was a policy choice to be exercised by the legislature: *ibid*, at [44]-[45], [49]-[50]. See Raymond Byrne and William Binchy, *Annual Review of Irish Law 2009* (Round Hall/Thomson Reuters, Dublin 2010), at 246-251, 469-480.

> the light of consequences, and by appraising consequences decidedly in the light of an emergent national sense of justice to which the interpretations are themselves, recursively, contributing.[42]

1.5.1 Review of interpretative methods in the case law

A review of the Irish case law shows judicial support for the purposive values-focused interpretation. In *AG v Paperlink* in 1983 Costello J noted that the Constitution was "a political instrument as well as a legal document" and that a purposive, rather than a strictly literal, approach to its interpretation was appropriate.[43] He expanded on this view in *Murray v Ireland*:

> [W]hilst not ignoring the express text of the Constitution, a purposive approach to interpretation which would look at the whole text of the Constitution and identify its purpose and objectives in protecting human rights, is frequently a desirable one.[44]

Hardiman J in *Sinnott v Minister for Education* viewed the terms "historical", "harmonious" and "purposive" as disparate aspects of interpretation which form part of every constitutional construction.[45] The established interpretative approach of the Supreme Court was described by Murray CJ in *A v Governor of Arbour Hill Prison* as "the teleological approach—a universally recognised method of interpreting constitutional and other legal norms", which meant that (even though the Constitution did not expressly say so) the ambit and effect of a particular constitutional provision fell to be considered "within the rubric and scheme of the Constitution as a whole" and involved taking into account the Constitution's "objectives, principles and provisions" as a whole.[46]

As MacMenamin J indicated in *Health Service Executive v X*, it is beyond doubt that statutes for the protection of vulnerable people are to be construed in a broad purposive manner reflecting constitutional values and compatible with the Constitution itself.[47]

The purposive approach infused with constitutional values can be seen in operation in South

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[42] Frank I Michelman, "A Constitutional Conversation with Professor Frank Michelman" (1995) 11 *SAJHR* 477, at 485.
[43] [1984] ILRM 373 (HC), at 385.
[44] [1985] IR 532 (HC), at 539.
[45] [2001] 2 IR 545 (SC), at 688. In *Sinnott*, he used the purposive approach as outlined by Costello J in *AG v Paperlink*: *ibid*.
[46] [2006] IESC 45, [2006] 4 IR 88, at [71]-[72].
[47] [2011] IEHC 326, at [63]-[64], [67].

Africa. All the judges in *S v Mhlungu* agreed that a purposive interpretation was appropriate,[48] but there was a difference of opinion between them on how it applied to the particular provisions under scrutiny. Devenish described the majority judgment of Mahomed J as "[t]he high water mark of a values-based interpretation".[49] Kriegler J, dissenting in *Du Plessis v De Klerk* because he would have applied the interim Constitution[50] horizontally, stated, "[i]t is ... trite that the Constitution is to be interpreted purposively and as a whole, bearing in mind its manifest objectives."[51]

Chaskalson P in *Makwanyane* approved of the purposive interpretation of fundamental rights taking into account the context, including the history and background to the adoption of the Constitution, aimed at securing for "individuals the full measure" of its protection.[52] O'Regan J agreed that the courts' responsibility was to develop fully constitutional rights and in that quest to seek the purpose for which a right was included in the Constitution.[53] She clarified that the purposive or teleological approach did not invariably result in a generous meaning—at times it required a narrower or specific definition.[54] In delving for the purpose, the common South African values could form a basis on which to develop a South African human rights jurisprudence and Mokgoro J, relying on the reference to it in the epilogue to the Constitution[55] and "the underlying idea and its accompanying values ... expressed in the preamble", identified the value of *ubuntu* (humaneness) as the unifying thread.[56] She equated its spirit with the internationally recognised human dignity from which human rights derive.[57]

Guided by "the broad and ample style" of the chapter in the Constitution of Bermuda providing for the protection of fundamental rights and freedoms[58] as well as by the influence on the drafters of the European Convention on Human Rights[59] and the UDHR, Lord Wilberforce in *Minister of Home Affairs v Fisher* backed a "generous interpretation avoiding

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[48] [1995] ZACC 4, 1995 (3) SA 867 (CC), at [8] (Mahomed J), [63] (Kentridge AJ dissenting), [97] (Kriegler J), [129] (Sachs J).
[49] Devenish (n24), at 97.
[50] Interim Constitution of the Republic of South Africa 1993.
[51] 1996 (3) SA 850 (CC), at [123].
[52] *S v Makwanyane* 1995 (6) BCLR 665 (CC), at [9]-[10], citing *Minister of Home Affairs v Fisher* [1980] AC 319 (PC), at 328.
[53] 1995 (6) BCLR 665 (CC), at [325].
[54] *Ibid*.
[55] Interim Constitution of the Republic of South Africa 1993, Epilogue, third para.
[56] 1995 (6) BCLR 665 (CC), at [307]-[308].
[57] *Ibid*, at [309].
[58] Constitution of Bermuda 1968, Chapter I.
[59] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (ECHR).

what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."[60] The Privy Council rejected simply interpreting the Constitution "with less rigidity, and greater generosity, than other Acts" and chose a broader perspective where it was treated as a *sui generis* instrument with its own principles of interpretation that recognised its character and origin.[61]

The Supreme Court of Canada has endorsed the purposive approach to definition of the fundamental rights and freedoms in the Canadian Charter. In *R v Big M Drug Mart Ltd* Dickson J considered the values underlying Canadian "political and philosophic traditions" when he interpreted the purpose of freedom of conscience and religion[62] and concluded that the Charter gave equal protection to manifestation of religious non-belief and refusal to participate in religious practice as it did to the expression and practice of religion.[63]

1.5.2 A preamble as an indicator of values

In jurisdictions where the constitution has a normative thrust it has been accepted widely that it is legitimate to look to its preamble to discern the underlying values to be applied to interpretation of the substantive provisions. A preamble usually sets out *basic values* supported by the community and spells out common *aspirations* and *goals* for the future.[64] Although generally the preamble to a constitution does not contain directly enforceable rules of law, it can play a substantial role in interpreting and applying the constitution.[65] It does not have the limited importance traditionally attached to the preambles of statutes, as it contains considerably more information on the history of the constitution and the purposes for enacting it.[66] IM Rautenbach and EFJ Malherbe describe its significance:

> A constitutional preamble is therefore an important source whenever a provision of the constitution is interpreted by applying the principles that

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[60] [1980] AC 319 (PC), at 328.

[61] *Ibid*, at 329. Lord Wilberforce explained, *ibid*:

> Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

[62] Canadian Charter of Rights and Freedoms 1982, Section 2(a).

[63] [1985] 1 SCR 295, at [123].

[64] IM Rautenbach and EFJ Malherbe, *Constitutional Law* (4th edn LexisNexis Butterworths, Durban, 2004), at 97.

[65] *Ibid*, at 98.

[66] *Ibid*, at 98-99.

> the history and origin of the provision, the constitution as a whole, and the purpose of the provision must be taken into account.[67]

The South African Constitution differs from the Irish one in that specific values on which the democratic State is founded are listed in Section 1. Human dignity,[68] equality, human rights and freedom are mentioned first[69]—these values are repeated in other provisions of the Constitution.[70] Constitutional supremacy is also a founding value[71] and, as recited in the Preamble, the Constitution was adopted by the people as the supreme law. A perusal of the preambular text shows that the first goal is to establish a society with democratic values and social justice.[72] Another aim is an improved quality of life and personal freedom to achieve one's full potential. All the values are designed to ensure human dignity and freedom in an accountable, responsive and open political system.[73] The Preamble indicates that the Constitution gives a central place to the dignity of the individual and also endeavours to restore the collective dignity of the state and of the people.[74] These universal values are expressed in *ubuntu*.[75]

The values in the Preamble to the Irish Constitution are prudence, justice and charity. The aims relevant to human rights are to assure the dignity and freedom of the members of an orderly society while promoting the common good. The Constitution was adopted by the people, who are sovereign and the source of all State powers.[76] It is remarkable that, despite the different circumstances and eras in which they were adopted, there are such striking similarities between the values and aspirations in the South African and Irish documents—the South African Constitution echoes the common commitment to a just society where human dignity and individual liberty are respected. Furthermore, both documents with supremacy in law were adopted by the people.

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[67] *Ibid*, at 99.

[68] On human dignity as a value, see Stuart Woolman, "Dignity" in Stuart Woolman, Theunis Roux and Michael Bishop eds, *Constitutional Law of South Africa* (2nd edn Juta, Cape Town 2006), at [36-22]—[36-25].

[69] Constitution of the Republic of South Africa 1996, Section 1(a).

[70] *Ibid* Sections 7(1) (rights), 36(1) (limitation of rights), 39(1)(a) (interpretation of Bill of Rights).

[71] *Ibid* Section 1(c).

[72] Christopher Roederer, "Founding Provisions" in Woolman, Roux and Bishop (n68), at [13-4]. See also Heinz Klug, *The Constitution of South Africa: A Contextual Analysis* (Hart, Oxford 2010), at 110.

[73] Devenish (n19), at 11-12.

[74] Lourens M du Plessis, "The Evolution of Constitutionalism and the Emergence of a Constitutional Jurisprudence in South Africa: An Evaluation of the South African Constitutional Court's Approach to Constitutional Interpretation" (1999) 62 *Sask L Rev* 299, at 315.

[75] Devenish (n19), at 12.

[76] Constitution of Ireland 1937, Article 6.1.

The next subsection will examine the role of the preamble in divining the meaning of the constitution in South Africa, Ireland and other jurisdictions.

1.5.3 The preamble in the courts

The South African courts have invoked the Preamble to the Constitution to discern its goals and to amplify its values.[77] Some examples will illustrate this point. We have already seen that Mokgoro J referred to the values in the Preamble in *Makwanyane*.[78] Her colleagues in that case did likewise. Chaskalson P,[79] Ackermann[80] and Mahomed[81] JJ mentioned the new order envisaged by the Preamble where all would enjoy fundamental rights and freedoms in a constitutional state. Sachs J deduced from, *inter alia*, the Preamble the requirement for "an amplitude of vision" where the Constitution speaks for all of society and not just one section of it (as previously).[82] In *Ferreira v Levin* he read the Constitution as a whole (including the Preamble) as establishing a setting allowing for a more expansive role for the word "freedom" than a narrow reading of the text in isolation would admit.[83] That the Preamble is a marker for constitutional values and cannot be ignored when interpreting the Constitution is evident from his following remarks in *Mhlungu*:

> The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.[84]

The provisions in the Constitution are meant to give effect to the values and goals encompassed in the Preamble, so the literal meaning is circumscribed.[85] Rautenbach and Malherbe confidently assert the principle:

> [P]rovisions of the Constitution *must* therefore *always* be interpreted and applied within the context of the preamble and not only in the case of vague and ambiguous concepts. In a particular case, this could mean that

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[77] Sanford Levinson, "Do Constitutions Have a Point? Reflections on 'Parchment Barriers' and Preambles" in Ellen Frankel Paul, Fred D Miller, Jr, and Jeffrey Paul eds, *What Should Constitutions Do?* (CUP, Cambridge 2011), at 162-164. See also Theunis Roux, "Democracy" in Woolman, Roux and Bishop (n68), at [10-22].
[78] Text to n56.
[79] 1995 (6) BCLR 665 (CC), at [130] fn159.
[80] *Ibid*, at [155]-[156].
[81] *Ibid*, at [262].
[82] *Ibid*, at [362]-[363].
[83] 1996 (1) SA 984 (CC), at [255].
[84] [1995] ZACC 4, 1995 (3) SA 867 (CC), at [112] (footnote omitted).
[85] Rautenbach and Malherbe (n64), at 99.

> the literal, clear meaning of a constitutional provision will not be followed, because it must be interpreted and applied *as qualified by the values and goals set out in the preamble and in other provisions of the Constitution*.[86]

Liav Orgad has categorised the Preambles to the Irish and South African Constitutions as "interpretive", the role of interpretive preambles being rooted in the common law tradition as an aid to the construction of statutes.[87] He observed invocations of the Preamble to interpret the Constitution and as a tool to guide in understanding its spirit in both jurisdictions.[88] It is true that the Irish Preamble has been used by the judiciary on occasion as an interpretative aid.[89] Although not asserted as confidently as Sachs J did in *Mhlungu*, the Supreme Court affirmed in *Buckley (Sinn Féin) v AG* that the Constitution should be construed to give effect to the objectives of promoting the common good to assure the individual's dignity and freedom as set out in the Preamble.[90] Within two years of adoption of the Constitution ("with its most impressive Preamble ... the Charter of the Irish People"), Gavan Duffy J in *State (Burke) v Lennon*, being determined not to "whittle it away", had viewed the dignity and freedom of the individual as one of the "cardinal principles" proclaimed in the Preamble.[91] Disallowing an appeal from Gavan Duffy J's decision, Geoghegan J considered it possible that the implication of a limitation of the personal right of freedom was negatived more strongly by this "solemn reference" in the Preamble.[92]

Since the people's purpose in adopting the Constitution could be discerned from it, thereby helping to determine "the meaning of and the effect to be given to particular provisions", the Supreme Court endorsed the use of the Preamble as an interpretative aid in *AG v Southern Industrial Trust Ltd*.[93] In *McGee* Walsh J adopted the same stance as O'Byrne J in *Buckley* and placed the onus on the judiciary to apply the values in the Preamble to interpret the Constitution.[94] Budd J followed suit.[95] Citing Walsh J's dictum, O'Higgins CJ in *State (Healy) v*

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[86] *Ibid* (footnote omitted).
[87] Liav Orgad, "The Preamble in Constitutional Interpretation" (2010) 8 *ICON* 714, at 723-724.
[88] *Ibid*, at 724.
[89] See Hogan and Whyte (n5), at [2.1.07]-[2.1.18]; text to n33-n40 in Ch VII.
[90] [1950] IR 67, at 80-81 (O'Byrne J):

> In the enacting portion of the Constitution, contained in the Preamble, the people of Ireland, seeking, amongst other things, "to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured ... adopt, enact and give" to themselves the Constitution. These most laudable objects seem to us to inform the various Articles of the Constitution, and we are of opinion that, so far as possible, the Constitution should be so construed as to give to them life and reality.

[91] [1940] IR 136 (HC), at 143, 155.
[92] [1940] IR 136 (SC), at 178.
[93] [1960] 94 ILTR 161 (SC), at 175 (Lavery J).
[94] [1974] IR 284 (SC), at 319:

Donoghue found that justice in the courts must import regard to the individual's dignity (not only fairness and fair procedures).[96] He agreed with the judge at first instance (Gannon J) that fair procedures apply in criminal trials; however, in serious cases justice also required the provision of legal assistance and means-related aid.[97] Gannon J had highlighted the judiciary's primary role in protection from injustice, its part in furthering the constitutional aims articulated in the Preamble being equal to that of the other arms of state:

> The promotion of the common good so that the dignity and freedom of the individual may be assured, being the objective stated in the preamble to the Constitution, is as much a function and responsibility of the judicial organ of the State as of the legislature or the executive.[98]

The "broad motivating and purposive considerations" in the Preamble set the scene for Henchy J in *Garvey v Ireland*, where he underlined the importance of a livelihood and an honourable retirement to a person's dignity and freedom.[99] By the late 1980s the courts had adopted a purposive interpretation relying on the goals and values in the Preamble, as Murphy J recognised in an *obiter dictum* in *Lawlor v Minister for Agriculture*.[100]

Following Henchy J's view in *O'Shea*,[101] O'Flaherty J in *AG v X* agreed that the Constitution

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> According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity.

[95] *Ibid*, at 322:

> When the preamble to the Constitution speaks of seeking to promote the common good by the observance of prudence, justice and charity so that the dignity and freedom of the individual may be assured, it must surely inform those charged with its construction as to the mode of application of its Articles.

Henchy J referred to the Preamble in a rhetorical, but forceful, way: Hogan and Whyte (n5), at [2.1.17]; see text to n430 in Ch VII.

[96] [1976] IR 325 (SC), at 347-348.

[97] *Ibid*, at 348-350.

[98] [1976] IR 325 (HC), at 335.

[99] [1981] IR 75 (SC), at 99. The Supreme Court held that the guarantee of fair procedures in Article 40.3 of the Constitution applied to the Government's exercise of its power of removal from office of the Garda Commissioner.

[100] [1987] IEHC 4, [1990] 1 IR 356, at 375-376:

> [I]t does seem to me that the teleological and schematic approach has for many years been adopted in this country—though not necessarily under that description—in the interpretation of the Constitution. The innumerable occasions in which the preamble to the Constitution has been invoked and in particular the desire therein expressed "to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored and concord established with other nations" in seeking to "fill the gaps" in the Constitution is itself an obvious example of the teleological approach.

[101] See n29.

should be read harmoniously—the spirit could prevail over the letter.[102] He held that an injunction restraining a woman from travelling abroad to have an abortion would interfere to an unwarranted degree with her freedom of movement, the authority of the family and the aspiration in the Preamble to assure the dignity and freedom of the individual.[103] Finlay CJ also adopted a harmonious values-based interpretation of the right to life in accordance with the concepts of prudence, justice and charity in the Preamble, as explained by Walsh J in *McGee*.[104]

In 2011 Hogan J in *Aslam v Minister for Justice and Equality* granted a pregnant asylum seeker an injunction restraining her transfer out of the country by air or sea, because the State had constitutional obligations to protect her and her unborn child's life and health.[105] Guided by the Preamble, he was required to interpret these obligations in a fashion that assured her dignity.[106] When considering an asylum seeker's application for judicial review of a decision denying her claim in *E v Minister for Justice Equality and Law Reform*, he continued the same theme and, echoing Henchy J's comments in *Garvey*, he pointed out that the obligation to respect fair procedures assured the dignity of the individual as set out in the Preamble—it was not "an exercise in pure formalism, but ... rather an opportunity to enable the person affected to fairly put his or her case."[107]

Denham CJ in *MD v Ireland* associated the equal treatment of all human persons with "the principles of freedom, justice and human dignity, which, *inter alia*, the preamble of the Constitution aims to safeguard."[108] Finnegan J recognised human dignity as a key constitutional objective protected by the Preamble in *People (DPP) v Murray*.[109]

Murphy J (partially dissenting) in *DPP v Best* construed the right and duty of parents to educate their children in Articles 42 teleologically in the light of the purpose for adopting the Constitution as explained in the Preamble:

> Article 42.1 and 42.2 recognise that it is for parents to educate their children. This provision is not based on any proprietary right of the parents

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[102] [1992] IESC 1, [1992] 1 IR 1, at 87.
[103] *Ibid*, at 88.
[104] *Ibid*, at 52-53, citing [1974] IR 284 (SC), at 318-319.
[105] [2011] IEHC 512, at [33], [36].
[106] *Ibid*, at [34].
[107] [2012] IEHC 3, at [13].
[108] [2012] IESC 10, at [38].
[109] [2012] IECCA 60.

> or functional analysis of the educational process. It is grounded on the acceptance of the belief that it is the moral right and duty of parents to educate children and that by exercising that and the other fundamental rights referred to in the Constitution the goals identified in the Preamble may be achieved.[110]

This review of Irish case law from the earliest days of the Constitution up to 2012 has shown that the courts have consistently returned to the Preamble as an indicator of constitutional values to be used to discern the people's purpose in enacting the Constitution and the meaning of specific provisions. The Preamble with its reference to human dignity has been invoked in diverse areas such as fair criminal trial, punishment for crime, equality, privacy, autonomy, expression, education, admission of refugees and freedom of movement. It can be a guide to the unenumerated rights springing from specific provisions in the Constitution to cope with changing circumstances.[111]

There are other examples of national courts enlightening the meaning of their constitutions by reference to the preamble. When it considered a challenge to the procedure for ratification of the Lisbon Treaty,[112] the German Federal Constitutional Court relied, *inter alia*, on the resolution contained in the Preamble to the Basic Law[113] to serve world peace as an equal partner in a united Europe in order to show that the principle of openness towards European law applied.[114] Hence, there was a constitutional mandate to realise a united Europe.[115] The French Constitutional Council gave binding legal force to the Preamble to the 1946 Constitution[116] as an independent source of human rights in 1971, when it struck down a law for breaching freedom of association.[117] The Preamble has also supported socio-economic rights in France.[118]

The Indian Supreme Court decisions are littered with references to the constitutional preamble and its association with human dignity.[119] The Preamble and human dignity have underpinned

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[110] [1999] IESC 90, [2000] 2 IR 17, at 65-66.

[111] Ruth Cannon, "Matters of Irish Constitutional Debate: Originalism, Democracy and Natural Law" (1995) 5 *Irish Student L Rev* 22, at 32.

[112] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

[113] Basic Law for the Federal Republic of Germany 1949.

[114] *Treaty of Lisbon* case, BVerfG, 2 BvE 2/08, Absatz-Nr (1-421) (30 June 2009), at 222, 225. See Orgad (n87), at 725.

[115] BVerfG, 2 BvE 2/08, Absatz-Nr (1-421) (30 June 2009) (Federal CC of Germany), at 225.

[116] Constitution of the French Republic 1946.

[117] Decision No 71-44 (16 July 1971). See Orgad (n87), at 726-727.

[118] See text to n59-n62 in Ch VI.

[119] See text to n211-n215 and n233-n249 in Ch III; Orgad (n87), at 727-728.

rights in various spheres including the right to travel as part of personal liberty;[120] health and safety at work imposing obligations on the employer and on the state to protect current and retired employees;[121] and equality, where social justice is aimed at achieving substantial social, economic and political equality,[122] and the reservation of government jobs for the historically deprived has been upheld.[123] Construing fundamental rights in the light of the Preamble, the Court in *Randhir Singh* deduced that the principle of "equal pay for equal work" could be applied to employees receiving different scales of pay based on no classification or irrational classification for identical work under the same employer.[124] Referring to the Preamble as an aid to interpretation in *Minerva Mills*, Chandrachud CJ captured the far-reaching nature of democracy embodied in the Constitution as securing the dignity of the individual in the community:

> Democracy is not an empty dream. It is a meaningful concept whose essential attributes are recited in the preamble itself: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship, and Equality of status and opportunity. Its aim, again as set out in the preamble, is to promote among the people an abiding sense of "Fraternity assuring the dignity of the individual and the unity of the Nation".[125]

This has remarkable resonances of the Irish constitutional vision of the person placed in society.

Judges in Australia and Canada have occasionally resorted to the Preamble. Three of the High Court judges in *Leeth* referred to it—Brennan J considered that the constitutional unity of the Australian people "in one indissoluble Federal Commonwealth" recited in the Preamble to the Commonwealth of Australia Constitution Act 1900 meant that offenders against the same law could not be exposed to different maximum penalties depending on the locality of the sentencing court.[126] Taking an even stronger line, Deane and Toohey JJ used the Preamble to help ascertain the "conceptual basis" of the Constitution from which emanated an implied

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[120] *Maneka Gandhi v Union of India* [1978] INSC 16, 1978 SCR (2) 621.

[121] *Consumer Education & Research Centre v Union of India* [1995] INSC 91, JT 1995 (1) 636. See text to n436 in Ch V.

[122] *Air India Statutory Corp v United Labour Union* [1996] INSC 1400.

[123] *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217.

[124] *Randhir Singh v Union of India* [1982] INSC 24, 1982 (3) SCR 298. See text to n433-n434 in Ch V.

[125] *Minerva Mills Ltd v Union of India* [1980] INSC 141, 1981 SCR (1) 206, at 240.

[126] *Leeth v Commonwealth* [1992] HCA 29, (1992) 174 CLR 455, at [7]. See Mark McKenna, Amelia Simpson and George Williams, "First Words: The Preamble to the *Australian Constitution*" (2001) 24 *UNSWLJ* 382, at 391-392; Anne Winckel, "A 21st Century Constitutional Preamble—An Opportunity for Unity Rather than Partisan Politics" (2001) 24 *UNSWLJ* 636, at 645-646.

guarantee of legal equality.[127]

The majority in the Canadian Supreme Court decision on the *Provincial Judges' Salaries* case adjudged that although the Preamble to the Canadian Constitution Act[128] was not a source of positive law, it had important legal effects—it recognised and affirmed judicial independence as an unwritten norm.[129] It went further than ordinary statutory preambles, which could identify the purpose of a statute and aid in the construction of ambiguous statutory language, as the Preamble to the Act embodying the Constitution articulated political theory by recognising and affirming the basic principles at the source of its substantive provisions.[130] The Court saw that the Preamble was more than the key to construing express provisions of the Act, but also invited the use of those principles to fill out gaps in the constitutional scheme.[131] Lamer CJ, delivering the majority judgment, eloquently portrayed the Preamble as "the grand entrance hall to the castle of the Constitution".[132]

The United States Supreme Court has used the Preamble as a tool of constitutional interpretation.[133] Justice Brennan in *Goldberg v Kelly* observed that the purpose of public assistance was to promote welfare and liberty—aims listed in the Preamble.[134] Although the issue of whether and in what manner it should be used has been debated,[135] the judicial references to it still provide the Preamble with some constitutional weight.[136]

In many jurisdictions (including, as illustrated, South Africa and Ireland) the judiciary resorts to

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[127] [1992] HCA 29, (1992) 174 CLR 455, at [9].

[128] Constitution Act 1867.

[129] *Reference re Remuneration of Judges of the Provincial Court (PEI)* [1997] 3 SCR 3, at [94]-[95], [109]. See McKenna, Simpson and Williams (n126), at 397; Jonathon W Penney and Robert J Danay, "The Embarrassing Preamble? Understanding the 'Supremacy of God' and the *Charter*" (2006) 39 *UBC Law Rev* 287, at 297. For a critical review of this case, see Jeffrey Goldsworthy, "The Preamble, Judicial Independence and Judicial Integrity" (2000) 11 *Constit Forum* 60.

[130] [1997] 3 SCR 3, at [95].

[131] *Ibid*.

[132] *Ibid*, at [109].

[133] Dan Himmelfarb, "The Preamble in Constitutional Interpretation" (1991) 2 *Seton Hall Const LJ* 127, at 145. On the use of the Preamble in the courts, see Milton Handler, Brian Leiter and Carole E Handler, "A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation" (1990) 12 *Cardozo L Rev* 117, at 119-123. On the Preamble to the Constitution of the United States generally, see James M Beck, "The Preamble of the Constitution" (1926) 14 *Geo LJ* 217. For a comparison between the Preambles to the Irish and the US Constitutions, see Brian Walsh, "200 Years of American Constitutionalism—A Foreign Perspective" (1987) 48 *Ohio St LJ* 757, at 760.

[134] 397 US 254 (1970), at 265. See text to n405-n406 in Ch V.

[135] For arguments in favour of the Preamble having a role in discerning the values supporting unenumerated rights, see Gilbert Paul Carrasco and Peter W Rodino, Jr, "'Unalienable Rights,' the Preamble, and the Ninth Amendment: The Spirit of the Constitution" (1990) 20 *Seton Hall L Rev* 498.

[136] Orgad (n87), at 720.

a constitution's preamble to identity the values shared by the community and the common objectives. The courts then use those identified values to interpret and apply the provisions in the constitution. The preamble can reinforce deep norms embodied in a constitution. It should be read by the judges, not in isolation, but as one key to the philosophy endorsed, which, in turn, will elucidate the purpose of rights, their meaning and the most appropriate harmonious interpretation to give effect to constitutional values in a modern changing society.

1.5.4 Philosophies supporting a values-based interpretation

A values-based interpretation requires articulation of a cogent moral foundation for decisions in compliance with the constitutional role assigned to the judges.[137] Invoked should be those shared principles explicitly or implicitly encompassed within the constitution and applied as mandated by the constitution interpreted in a purposive manner.

Fortunately since World War II there are many international and regional human rights instruments expressing universally agreed norms across diverse cultures available to support the judiciary in divining the meaning of values in national constitutions. In modern multi-cultural societies there is no need to resort to personal or widely-held (but not universally-shared) moral, religious or political convictions—nor, indeed, could this potentially-partisan view be justified.[138] The task is to adhere to the common values enshrined in the constitution and to apply those principles in cases arising for adjudication.

A review of the South African case law shows that overall the judges have adhered to the universal constitutional values without imposing their own personal morality or the morality of any section of society in the adjudication process. They have not avoided grappling with difficult moral issues as can be seen in the litigation concerning sexual orientation[139] and religious freedom.[140] Despite their usual objectivity, on occasion the influence of their

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[137] Devenish (n19), at 608.

[138] Although there is a view that the idea of human rights is ineliminably religious, this does not deny that those who are not religious can take human rights seriously: Michael J Perry, "Is the Idea of Human Rights Ineliminably Religious?" in Austin Sarat and Thomas R Kearns eds, *Legal Rights: Historical and Philosophical Perspectives* (University of Michigan Press, Ann Arbor, Mich 1997), at 252. See text to n30-n33 in Ch II.

[139] See Ch V, 5.5.3.

[140] *Eg*, *S v Lawrence* 1997 (4) SA 1176 (CC), *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) (*Prince II*), *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC).

personal moral and religious beliefs has become apparent.[141]

The South African Preamble refers to God[142] and the Irish Preamble has an even more conspicuous religious ethos resonant of its time.[143] The jurisprudence of Roman-Dutch law was natural law,[144] but the judiciary has not relied on it to interpret the Constitution—there have been occasional references to *ubuntu*. The judgments reflect constitutional values from a secular universally accepted perspective.[145] This is as it should be, since the Constitution recognises the right to freedom of conscience and religion.[146]

In addition to guaranteeing similar freedoms,[147] the Irish Constitution guarantees not to endow any religion.[148] Therefore, as in South Africa, a secular approach to interpreting the Constitution and the common values it encompasses is appropriate.[149] However, this does not mean that natural law[150] cannot be an *aid* to interpretation. "Natural law" has been equated with the neutral term "justice".[151] Walsh J made the connection in *McGee*:

> Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection.[152]

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[141] *Eg*, *Le Roux v Dey* where Mogoeng J did not agree with his nine colleagues that the choice to lead a heterosexual lifestyle, and to be known as heterosexual, should not be protected by legal action: [2011] ZACC 4, 2011 (3) SA 274 (CC), at [9].

[142] "May God protect our people." See Levinson (n77), at 168.

[143] "In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the People of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial... ." See Levinson (n77), at 170, 171; Michael J Perry, "What Do the Free Exercise and Nonestablishment Norms Forbid? Reflections on the Constitutional Law of Religious Freedom" (2003) 1 *U St Thomas LJ* 549, at fn66; Michael J Perry, "A Right to Religious Freedom? The Universality of Human Rights, The Relativity of Culture" (2005) 10 *Roger Williams UL Rev* 385, at fn36.

[144] Devenish (n19), at 630.

[145] See *ibid*, at 639.

[146] Constitution of the Republic of South Africa 1996, Section 15(1).

[147] Constitution of Ireland 1937, Article 44.2.1°.

[148] *Ibid* Article 44.2.2°.

[149] On secular and religious approaches to constitutional interpretation, see Whyte, "Some Reflections on the Role of Religion in the Constitutional Order" (n9), at 54-59.

[150] On natural law, see n191 and text thereto in Ch VIII. See also Hogan and Whyte (n5), at [7.1.08]-[7.1.20], [7.8.14]; Morton J Horwitz, "Natural Law and Natural Rights" in Sarat and Kearns (n138), at 39-51; Gerard Whyte, "Religion and the Irish Constitution" (1997) 30 *J Marshall L Rev* 725, at 739-744; Whyte (n1), at 27 fn76.

[151] O'Connell (n33), at 54, 60, 61.

[152] [1974] IR 284 (SC), at 310. See also *ibid*, at 317-318.

Explicit reliance on natural law has waned in recent decades—Murphy J's acknowledgement of the influence of Thomist natural law in *DPP v Best*[153] is an exception.[154]

In *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995*, the Supreme Court held that the Constitution was the fundamental supreme law of the State representing the will of the people—hence, it ruled out natural law as being superior to specific provisions in the Constitution and it could not be called on to invalidate an amendment passed by the people in a referendum.[155] When Hamilton CJ, who delivered the judgment, went on to consider the right to life of the unborn he made a sweeping statement that the Court had already rejected the argument "that the natural law was superior to the Constitution and that no provision of the Constitution or of any Act enacted by the Oireachtas or any judicial interpretation thereof can be contrary to natural law".[156] Although a plausible reasoned defence might be made of his conclusion insofar as it concerns the *Constitution*, his immunisation of *statutes* and *judicial decisions* was undoubtedly too broad—he went further than was necessary to decide the issues in the case and ignored the wording of the Constitution itself, which refers to "inalienable" rights and rights "antecedent to positive law".[157] The Supreme Court's reasoning has been described as "somewhat simplistic and lacking in sophistication"[158] and "instructively deficient".[159] No attempt was made to resolve the conflict between two provisions in the Constitution—both of which were the result of amendments to the Constitution. Indeed, the conflict was not even acknowledged. Neither was the issue of natural law addressed thoroughly.

That Hamilton CJ himself did not intend to wipe out natural law entirely from constitutional jurisprudence is evident in his judgment in the *Ward of Court* case less than three months

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[153] [1999] IESC 90, [2000] 2 IR 17, at 65.

[154] Hogan and Whyte (n5), at [1.1.55].

[155] [1995] IESC 9, [1995] 1 IR 1, at 43. See Byrne and McCutcheon (n22), at [15.183]-[15.186]; Hogan and Whyte (n5), at [7.1.23]-[7.1.29]; Gary Jeffrey Jacobsohn, "An Unconstitutional Constitution? A Comparative Perspective" (2006) 4 *ICON* 460, at 467-470; O'Connell (n33), at 64-66; O'Sullivan and Chan (n16), at 30-32, 35-36; Adrian F Twomey, "The Death of the Natural Law?" (1995) 13 *ILT* 270.

[156] [1995] IESC 9, [1995] 1 IR 1, at 50.

[157] See text to n192-n194 in Ch VIII.

[158] Whyte, "Natural Law and the Constitution" (n9), at 11. See also, *ibid* (footnote omitted):

> Essential premises are not properly established; judicial precedents and constitutional provisions which appear to endorse natural law theory are not properly engaged (and, indeed, in the case of Mr Justice Walsh's remarks, are perversely cited in support of a positivist understanding of the Constitution which he would never endorse); and there is a failure to address obvious questions raised by the judgment, such as whether there is any residual role for natural law theory under the Constitution and, if so, for which variants of that theory.

[159] Jacobsohn (n155), at 469.

later, where he referred to unenumerated natural rights ancillary to the right to life.[160] Indeed, when he was a High Court judge in *Northampton County Council v ABF* he had enthusiastically accepted the legal legitimacy of natural law and stated, "[t]he natural law is of universal application and applies to all human persons".[161] He asserted that natural law rights were "recognised by Bunreacht na hÉireann and the courts created under it as antecedent and superior to all positive law".[162]

Since it is of universal application, it can be deduced that natural law is not confined to the religious tradition—as Roderick O'Hanlon said, it is "in essence immutable" and "is not contingent on contemporary *mores* or any particular culture, because it resides in the innermost common denominator of all humankind through all generations, that is, human reason."[163] The origins of natural law can be traced back to the pre-Christian days of Aristotle, whose philosophical ideas influenced the adoption of the doctrine by scholars of various religions centuries later.[164] It formed a strong vein in the jurisprudence of the courts of the United States of America.[165] The dignity of man recognised in natural law was the unifying theme behind adoption of the UDHR—it was universally acceptable to all cultures and to those of all religions and of none.[166] Its appeal is secular (as well as undoubtedly religious). A non-sectarian view of human dignity was taken by Henchy J in *McGee*[167] and *Norris*,[168] where his application of respect for dignity would require the State to preserve as great a range of authentic moral choice based on the personal make-up of the individual as is consistent with the common good[169]—it did not mean that the law could impose a particular institutional religious view on the conscientious individual.

The common good (a prime constitutional aim), like human dignity, is rooted in natural law philosophy.[170] As William Binchy said, "it envisages a social scaffolding capable of supporting

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[160] *Re a Ward of Court (withholding medical treatment) (No 2)* [1996] 2 IR 79 (SC), at 123-124. See Byrne and McCutcheon (n22), at [15.187]-[15.194].
[161] [1982] ILRM 164 (HC), at 166.
[162] *Ibid*.
[163] Roderick J O'Hanlon, "Natural Rights and the Irish Constitution" (1993) 11 *ILT* 8, at 8.
[164] See Kelly (n13), at 57-58; Tim Murphy, "The Cat amongst the Pigeons: Garrett Barden and Irish Natural Law Jurisprudence" in Doyle and Carolan (n2), at 128, 133-134.
[165] Devenish (n19), at 630.
[166] See 2.2.1.1 in Ch II.
[167] [1974] IR 284 (SC).
[168] *Norris v AG* [1984] IR 36 (SC).
[169] Binchy (n2), at 315; Seamus Henchy, "Precedent in the Irish Supreme Court" (1962) 25 *MLR* 544, at 550.
[170] Binchy (n2), at 315-316; Kelly (n13), at 423-424.

the individual fulfilment of human potential."[171]

1.5.5 Judicial practice

Unlike the South African judiciary, Irish judges in recent decades have avoided engagement with the philosophical and moral dimensions to contentious disputes.[172] They have not leveraged the strong value system in the Constitution. The result has been a failure to vindicate personal rights, to assure the human dignity of the individual in the community and to promote the constitutional aim of social justice. Reliance on the other arms of government to comply with the State's constitutional duties has been misplaced. The power structure in Ireland has continued with very little challenge. By failing to intervene to redress social exclusion in the socio-economic sphere, the judges are not fulfilling their constitutional duty to uphold the Constitution, and are not defending and vindicating personal rights.[173] Accordingly, Irish democracy is falling short of realising the constitutional value of a just social order, in which the freedom and dignity of the individual is assured.[174]

The trend in recent years to revert to the positivist view of the Constitution is regrettable, as it runs contrary to its spirit and purpose garnered from a reading of the document as a whole—the Preamble in addition to the fundamental rights and other substantive provisions contained within it. It runs contrary to Seamus Henchy's conviction that the Constitution broke "with the positivist character of the common law", a conclusion which he attributed to the fact that the Preamble "makes clear that the Constitution and the laws which owe their force to the Constitution derive, under God, from the people and are directed to the promotion of the common good."[175]

The Irish Preamble approved by the people in 1937 was prophetic in anticipating the UDHR with its emphasis on human dignity by more than a decade.[176] It was the first national constitution to specifically refer to dignity in the sense of being inherent in all people.

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[171] Binchy (n2), at 316.

[172] *Eg*, *Roche v Roche* [2006] IEHC 359, [2009] IESC 82, [2010] 2 IR 321 (see text to n387-n389 in Ch VII). See 7.2 in Ch VII. The European Court of Human Rights allows the states a margin of appreciation when there is not a European consensus on the moral issue arising and when the appropriate legal protection has not been resolved in the majority of states: *Vo v France* (App no 53924/00) (2005) 40 EHRR 12, at [82]. However, a dissenting view was that there could be no margin of appreciation in application of an absolute right: *ibid*, at [O-III8] (Ress J).

[173] McHugh (n16), at 126, 129.

[174] *Ibid*, at 129.

[175] Henchy (n169), at 550.

[176] Walsh (n12), at 92.

Although Christopher McCrudden has named four countries (Mexico, Germany, Finland and Portugal) as incorporating the concept of dignity in their constitutions before Ireland in 1937,[177] a closer examination of those constitutions shows that this is not correct—the references to dignity were either to dignity as status,[178] adopted by subsequent amendment[179] or implied by the use of an analogous term.[180]

The Supreme Court's virtual closing off of identifying more unenumerated rights (in the socio-economic area at least)[181] has inhibited the courts from keeping pace with the legal problems presented by the changes in modern life and advancing technology.[182] The judges need to overcome their reluctance to grasp the philosophies underlying the Constitution. Instead they could expose its values, interpret its provisions in accordance with those values and apply them to cases coming before them for adjudication. Novel legal issues arising in the increasing complexity of modern life where people are more mobile than in the past and there is much diversity in Irish society will ensure a continuing demand for the judiciary to take this step. As Brian Walsh expressed it, the Constitution has given the judiciary a position of special responsibility as "the ultimate interpreters of the law and of the Constitution itself", and this requires that the fundamental human rights of minorities be guaranteed so that they can "permanently withstand the assaults tolerated or even initiated by occasional despotic majorities."[183]

One area where the values will have an impact is in enforcement of the Hague Convention on

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[177] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *EJIL* 655, at 664. See text to n104-n108 in Ch II.

[178] The original constitution adopted by Finland in 1919 mentioned "hereditary dignity".

[179] The original constitutions adopted by Mexico in 1917 and by Portugal in 1933 contained no reference to dignity.

[180] The German Reich Constitution of 1919 stated that the principles of justice were aimed at the attainment of "humane conditions of existence" for all.

[181] Gerry Whyte, "Rights and Judicial Activism" in Bryan Fanning and others eds, *Theorising Irish Social Policy* (University College Dublin Press, Dublin 2004), at 172-174.

[182] *TD v Minister for Education* [2001] IESC 101, [2001] 4 IR 259. Keane CJ pointed out that the Supreme Court had not specifically endorsed the view that unenumerated rights flowed from the Christian and democratic nature of the State and neither had it decided whether the declaration of unenumerated rights should be the courts' function rather than that of the Oireachtas: *ibid*, at 281. He had first expressed these doubts three years earlier: *IO'T v B* [1998] 2 IR 321 (SC), at 369-370. See Byrne and McCutcheon (n22), at [15.60]. In *IO'T v B* Keane J relied (wrongly in my view) on remarks of Walsh J in *McGee* and on the judgment in *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* to deduce that "no identifiable and superior *corpus* of law" existed to which judges might have recourse: [1998] 2 IR 321 (SC), at 372.

[183] Brian Walsh, "The Judicial Power, Justice and the Constitution of Ireland" in Deirdre Curtin and David O'Keeffe eds, *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T.F. O'Higgins* (Butterworth, Dublin 1992), at 157.

Child Abduction, which allows a state to refuse to return a child to the requesting jurisdiction if it would not be permitted by the "fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[184] The correct application of this provision requires clarity on the content and boundaries of the fundamental human rights principles in the Irish Constitution. So far there has been a dearth of considered judicial analysis of these principles—the courts have preferred to take the easier option of deciding the cases before them on narrow points of law or fact.[185]

If a conflict emerged between rights under European law and the fundamental rights protected by the Irish Constitution, a thorough analysis of the values enshrined in the Constitution would strengthen the judicial evaluation.[186]

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[184] Convention on the Civil Aspects of International Child Abduction (adopted 25 October 1980, entered into force 1 December 1983) 19 ILM 1501 (1980) (Hague Convention on Child Abduction), Art 20.

[185] *Eg, Nottinghamshire County Council v B* where the parents of two children challenged an application by the English local authority to have them returned to England: [2011] IESC 48. The parents claimed that they and their children constituted a family under Articles 41 and 42 of the Constitution and that return of the children would be in breach of those rights because the law of the United Kingdom permitted adoption of the children of married couples in circumstances where it would not be permitted in Ireland: *ibid*, at [4]. The Supreme Court upheld the decision of Finlay Geoghegan J to return the children because their adoption was no more than a "possibility"; furthermore, O'Donnell J, who delivered the Court's judgment, considered that the UK adoption regime was "not so fundamentally at odds" with the forms of adoption permitted under the Irish Constitution: *ibid*, at [67], [89]. He did not explore the human rights norms underlying the Irish Constitution, but concentrated more on the value of international co-operation: *ibid*, at [60], [64]-[65], citing Constitution of Ireland 1937, Article 29. His terminology dismissed resistance to international co-operation on human rights grounds as "isolationism" and "fundamentalist": *ibid*, at [45], [63]. He raised (but did not decide) the question of the level of constitutional protection afforded to non-citizens travelling to Ireland and suggested that Article 40.1 of the Constitution (the equality provision) could be relevant: *ibid*, at [84]. By focusing on the Irish court's order of *return* of the children rather than on what might happen to them (*eg*, adoption) if they were *returned* to England, O'Donnell J narrowed the level of protection under the Convention: *ibid*, at [54], [61]. The test he applied was not whether there was a constitutional difference between the two regimes, but whether what was proposed or contemplated in the requesting state departed "so markedly from the essential scheme and order envisaged by the Constitution" and was such a direct consequence of the court's order that return was not permitted by the Constitution: *ibid*, at [54]. A difference in the law relating to the care of children between the jurisdictions (even if the foreign law would be unconstitutional if enacted in Ireland) was not the issue—that difference could be ignored if the laws in both jurisdictions were "recognisably part of the same spectrum" of views; to justify a refusal to return it was necessary to show that the manner in which the children would be dealt with by the courts on their return "must necessarily offend against the provisions of the Irish Constitution if administered in an Irish court": *ibid*, at [52]. O'Donnell J focused on the compatibility of the legal *systems* rather than compliance of the requesting jurisdiction with the *constitutional standards* of the requested state: *ibid*, at [45], [63]-[64], [66]. Although he referred to case law concerning natural law, he did not deliberate on this aspect: *ibid*, at [30], citing *Northampton County Council v ABF* (Hamilton J, relying on Walsh J in *McGee*).

[186] See Maria Cahill, "Constitutional Exclusion Clauses, Article 29.4.6° and the Constitutional Reception of European Law" (2011) 34 *DULJ* 74, at 96.

1.5.6 Synopsis

This examination of constitutional interpretation has substantiated the proposition that the Irish courts should adopt a purposive values-based approach taking the reference to human dignity in the Preamble as a serious factor. Apart from reliance on the Preamble, human dignity is germane to the debate on human rights because of its universal acceptance in international instruments.[187] The UDHR, with its several references to human dignity regarded as inherent, has grown in importance since it was first signed and is now widely considered to be part of customary international law.[188]

Another reason for taking human dignity seriously is because it is intrinsically linked with specific fundamental rights in the Constitution as supported by the text and case law. The Irish courts have found that there is an unenumerated right to dignity.[189] In the equality context Article 40.1 was defined as referring to our dignity as human beings.[190] The values of privacy and dignity have been associated with a prisoner's personal rights under Art 40.3.1.[191] Justice in the courts implies regard for the dignity of the individual as well as fairness and fair procedures.[192] Hardiman J noted that the dignity of the individual requires fair procedures in public administration.[193] The higher level of constitutional protection afforded to a person's dwellinghouse under Article 40.5 is because secure occupation of it is necessary for human dignity.[194]

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[187] Costello P referred to the concepts in the Preamble and in Article 40.1 (the common good, dignity, freedom and equality) as being recognised in the UDHR: *Molyneux v Ireland* [1997] 2 ILRM 241 (HC), at 243. Murray J mentioned the recognition in the UDHR "of the inherent dignity and of the equal and inalienable rights of all members of the human family": *North Western Health Board v HW* [2001] IESC 90, [2001] 3 IR 622, at 736. In the same case, Hardiman J stated, "[a]mple scope must be given to the fundamental values of human dignity": *ibid*, at 747.

[188] Johannes van Aggelen, "The Preamble of the United Nations Declaration of Human Rights" (2000) 28 *Denv J Int'l L & Pol'y* 129, at 131.

[189] See text to n45-n49 in Ch VII.

[190] See text to n14 in Ch VII.

[191] See text to n230-n239 in Ch VII. Hardiman J identified values based on respect for human rights and dignity as underlying the necessity to treat prisoners properly: see text to n54 in Ch VII.

[192] *State (Healy) v Donoghue* [1976] IR 325 (SC), at 348. McGuinness J relied on the same principles to constrain the DPP from reversing a decision not to prosecute after that decision had been communicated to a suspect without any caveat: *Eviston v DPP* [2002] IESC 62, [2002] 3 IR 260, at 318-319. The entitlement of unconvicted prisoners not to be made to stand trial in prison garb (based on the presumption of innocence) is in order to avoid stigmatisation and to maintain the dignity of the individual: *People (DPP) v Davis* [2001] 1 IR 146 (CCA), at 152, citing *Estelle v Williams* 425 US 501 (1976), at 518 (Justice Brennan dissenting).

[193] *Dellway Investments Ltd v National Asset Management Agency* [2011] IESC 14, citing David Gwynn Morgan and Gerard Hogan, *Administrative Law in Ireland* (4th edn Round Hall/Thomson Reuters, Dublin 2010).

[194] See text to n23 in Ch VII. There is statutory immunity from criminal and civil liability for injury or damage caused by the use of reasonable force in defending one's dwelling: Criminal Law (Defence and

The part played by human dignity in the Preamble as a fundamental constitutional value, its role as the basis of international human rights instruments, the fact that it has been recognised as an unenumerated right, and the connections between dignity and constitutional rights merit the Irish judges giving it greater prominence in their decisions. There is no convincing argument in favour of ignoring or overlooking it. On the contrary, if it were analysed in depth and applied by the judiciary, it could lead to a coherent articulation of the impact of the Constitution on individuals in a shared society in the context of their everyday lives. People would then have a clearer picture of the implications for them of the Constitution in practice and would have confidence that they could rely on the judiciary to uphold constitutional values and rights.

1.6 Research methodology

As this is a comparative study, I engaged in substantial doctrinal research. My literature review started with fundamental rights concentrating on the South African and Irish Constitutions and international human rights. It broadened out to other African and European countries (particularly Germany), and to Canada, India, Israel, the US, Australia, and New Zealand. The regional systems in Europe, Africa and America had interesting comparisons. Relevant case law and legislation were noted. Tracking of new developments was necessary. The content and impact of various human rights instruments and systems were taken into account. I attended appropriate conferences and lectures, and tested my theories by lecturing and making presentations in legal and interdisciplinary environments.

The conclusions were drawn from engaging in deductive and inductive reasoning. The application of sub-conscious reasoning to the doctrine elicited preliminary findings, which were refined by critical evaluations. The study culminated in the writing of a report that combined an understanding of the relevant theory and its practical application with the results of comparative research.

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the Dwelling) Act 2011 sections 2, 5.

2 CHAPTER II – THE ROLE OF DIGNITY IN CONTEMPORARY JURISPRUDENCE

2.1 The philosophical dimension

The dignity of the person refers to the special status given to all individuals by virtue of being human.[1] The first occurrence of the "dignity of man" was a philosophical expression invented by a Greek aristocrat, Panaetius of Rhodes, and translated into Latin by a Roman nobleman.[2] It was eventually connected with Stoic theology.[3] As it could be understood as pure ethics, it could be combined with Judaeo-Christian beliefs.[4]

Yair Lorberbaum remarked that the concept of human dignity and the sanctity of human life are historically bound up (at least in Jewish tradition and to a great extent in early Christianity, which draws from it) with the biblical notion of humankind created in the divine image.[5] The

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[1] The term "dignity" in literature or conversation has different meanings depending on the context. Its many definitions include "the state of being worthy of honour or respect", "a high or honourable rank or position" and "high regard or estimation": *The Concise Oxford Dictionary of Current English* (8th edn OUP, Oxford 1991), at 326. When applied to states, royalty or diplomats, it can be associated with status and signify that an entity, office or person is deserving of exceptional honour. A dignitary is "a person holding high rank or office" and is superior to others in certain respects: *ibid.* The adjective "dignified" indicates that a person or event conducts themselves in a respectful way. One definition is "noble or stately in appearance or manner": *ibid.* A dignified person is someone with self-esteem, who is conscious of their own worth without being boastful or over-endowed with pride.

[2] Hubert Cancik, "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero, *De Officiis* I, 105-107" in David Kretzmer and Eckart Klein eds, *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, The Hague 2002), at 27.

[3] In the philosophy of the Stoics and in Roman humanism, there was a *collective* notion of *dignitas humana* that did not have the modern egalitarian meaning: Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights" (2010) 41 *Metaphilosophy* 464, at 473. Humans were of superior rank to "lower" forms of life because of faculties such as reason and reflection: *ibid.*

[4] Cancik (n2), at 27. Cf Lorne Sossin, "The 'Supremacy of God', Human Dignity and the Charter of Rights and Freedoms" (2003) 52 *U New Brunswick LJ* 227, at 229-230.

[5] Yair Lorberbaum, "Blood and the Image of God: On the Sanctity of Life in Biblical and Early Rabbinic Law, Myth, and Ritual" in Kretzmer and Klein (n2), at 55. Cf Y Michael Barilan, "From *Imago Dei* in the Jewish-Christian Traditions to Human Dignity in Contemporary Jewish Law" (2009) 19 *Kennedy Institute Ethics J* 231; John J Coughlin, "Pope John Paul II and the Dignity of the Human Being" (2003) 27 *Harv JL & Pub Pol'y* 65, at 71-73, 79; Izhak Englard, "Human Dignity: From Antiquity to Modern Israel's Constitutional Framework" (2000) 21 *Cardozo L Rev* 1903, at 1904, 1906-1917; George P Fletcher, "In God's Image: The Religious Imperative of Equality under Law" (1999) 99 *Colum L Rev* 1608, at 1615-1618, 1620; Michael Freeman, "The Problem of Secularism in Human Rights Theory" (2004) 26 *Hum Rts Q* 375, at 387-389; Kevin J Hasson, "Religious Liberty and Human Dignity: A Tale of Two Declarations" (2003) 27 *Harv JL & Pub Pol'y* 81, at 85-88; Egle Venckiene, "The Importance of Historical Discourse for the Legal Protection of Human Dignity at Present" (2010) 119 *Jurisprudence* 147, at 152-154, 157; William Joseph Wagner, "Universal Human Rights, the United Nations, and the *Telos* of Human Dignity" (2005) 3 *Ave Maria L Rev* 197, at 221-222, 225. On *Imago Dei* and human rights, see Gordon Butler, "The Essence of Human Rights: A Religious Critique" (2009) 43 *U Rich L Rev* 1255, at 1263, 1272; Jean

idea of *Imago Dei* is to be found in Mesopotamia and perhaps in ancient Egypt as well.[6] Lorberbaum acknowledges it is arguable that the modern content of human dignity has nothing in common with these ancient thought structures, but has its origins in modern anthropology, metaphysics and the ethics of Immanuel Kant and other Enlightenment thinkers.[7] He has recourse to Paul Ricoeur's view that "the symbol gives rise to thought" as a counter-argument.[8] In ancient times, dignity was more often a symbol of social status and therefore of superiority rather than of equality. But Cicero and some other classical Roman writers also used the concept of *dignitas hominis* to refer to the dignity of human beings as such without being dependent on any additional status.[9]

In philosophical terms, "human dignity" has been recognised since ancient times. It and the term "human being" are synonymous. Each person is unique. Humanity has always been regarded as superior to animals and other species. Cicero contrasted man with animals.[10] Philosophers saw that the capacity for rational thought and free will distinguished human beings.[11] According to Christian Starck, classical and Christian concepts of human dignity and freedom recognised an important social aspect, where human beings were interdependent, as evidenced by the enshrinement of fraternity and solidarity in the early political structures.[12] In sub-Saharan Africa, the mutually supportive relationship between human dignity and equality has spawned the social concept of *ubuntu.*[13] Langa CJ of South Africa, having translated it from Zulu as "a person is a person through another person", said it described the essence of humanity and what it means to be a human being.[14]

Bethke Elshtain, "The Dignity of the Human Person and *The Idea of Human Rights: Four Inquiries*" (1999) 14 *JL & Relig* 53, at 63-64; Ethna Regan, *Theology and the Boundary Discourse of Human Rights* (Georgetown University Press, Washington, DC 2010), at 70, 85.

[6] Lorberbaum (n5), at 55.

[7] *Ibid*, at 84.

[8] *Ibid* citing Paul Ricoeur, *Symbolism of Evil*, trans from the French by E Buchanan (Boston 1967), at 348.

[9] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *EJIL* 655, at 657.

[10] He focused on the difference in mental capacities, as in this extract, "[i]t is vitally necessary for us to remember always how vastly superior is man's nature to that of cattle and other animals; their only thought is for bodily satisfactions... . Man's mind, on the contrary, is developed by study and reflection": *ibid*, citing Cicero, *De Officiis, I*, at 30. On Cicero's idea of human dignity, see Kari Saastamoinen, "Pufendorf on Natural Equality, Human Dignity, and Self-Esteem" (2010) 71 *J History of Ideas* 39, at 49-51.

[11] Christian Starck, "The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions" in Kretzmer and Klein (n2), at 180.

[12] *Ibid*.

[13] On *ubuntu*, see Thaddeus Metz, "Human Dignity, Capital Punishment, and an African Moral Theory: Toward a New Philosophy of Human Rights" (2010) 9 *J Human Rights* 81, at 82-85.

[14] Langa CJ, "A Reply to Professor William Binchy on 'Constitutionality, the Rule of Law and Socio-Economic Development'" (Lecture at Southern African Chief Justices Forum in Botswana 2009), at 7

The equality of all human beings was a conclusion of the Christian view that all are equally the image of God. Thus, human beings have a metaphysical anchor as the basis for their freedom, equality and fraternity.[15] Human dignity does not signify simply autonomy. Starck describes it as "self-determination which is exercised on the basis that everyone—not simply the person claiming the right to self-determination—is of value in his or her own right."[16] Equal consideration is to be given to the other.

The inherent dignity of the individual demands respect from others on a reciprocal basis. The rationale for designating the human person as special has metamorphosed or extended over the centuries. The enigmatic question is—what is the meaning of life and what is our purpose in it?

An individual's inner worth is at the core of their being. Their personality is unique to them and they are entitled to forge their own identity. Identity and personality are deeply significant for each individual in the passage through life.[17] The assurance of the scope to all people in society to achieve their full potential to lead meaningful lives in accordance with their unique identity and to express their own personality requires respect for each other from all members of society.

Dignity is the opposite of shame.[18] It is equated with honour, particularly with the aim of redressing a humiliating assault on dignity, and is the entitlement of all human beings

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http://www.venice.coe.int//SACJF/2009_08_BTW_Kasane/default.htm (visited 10 November 2009).

[15] Starck (n11), at 181.

[16] *Ibid*.

[17] Cardinal Manning viewed dignity as the achievement of the individual's potential in life. Each life has value in its own right irrespective of comparisons with others. In 1874 Cardinal Manning described the dignity in physical labour aimed at helping others as well as oneself, Henry Edward Manning, *The Dignity and Rights of Labour, and Other Writings on Social Questions* (Burns, Oates & Washbourne, London 1934), at 6:

> [I]n the mere labour of the body there is a true dignity. The man who puts forth the powers of the body, and that honestly, for his own good and the good of his neighbour, is living a high and worthy life, and that because it is his state in the world. It is the lot in which we are placed, and any man who fulfils the lot of his existence is in a state of dignity.

Humility, being the absence of jealousy and envy, is a feature of dignity. Cardinal Manning expressed it as follows, "I know nothing that is more undignified than for a man to think there is nobody of higher stature, morally or intellectually, than himself. The smallest man on earth is the man who thinks there is nobody greater than himself.": *ibid*, at 15. He considered that the four cardinal virtues of prudence (guiding the intellect), justice (guiding the will), temperance (governing the passions) and fortitude (sustaining the whole person) "underlie all the dignity of man, and they justify all his rights": *ibid*, at 33-34.

[18] Chana Safrai, "Human Dignity in a Rabbinical Perspective" in Kretzmer and Klein (n2), at 105.

irrespective of status.[19]

Because of our mutual dependence in society, dignity invokes duties and responsibilities towards others as well as respect for oneself and others. There is a common interest in protecting or enhancing the dignity of all members of society provided that all reciprocate.

Mette Lebech profers four distinct rationales that have developed and amalgamated to provide a more coherent understanding of human dignity.[20] The first rationale to gain credence was in the time of Cicero and antiquity when the physical superiority of humans gave them the right to dominion over animals and other creatures. The second rationale emerged in the Middle Ages when Thomas Aquinas identified the discerning feature of humans as being their likeness to God. Each individual was deserving of respect because of their spirituality. In modern times after the Reformation, the spiritual dimension was thought wanting and Kant developed a third rationale which imputed superiority to human beings by virtue of their reasoning capacity and free will. Mary Wollstonecraft saw that politics significantly affected the lives of people in society and the fourth rationale attributed to her was based on the status of each individual in the community.

These four rationales combine to explain why human beings have human dignity. A further step is necessary in order to experience what it really means to be human. Relationships between individuals open up the various aspects of humanity. The relationships in question can be based on love, family ties or friendship.[21] They can be between spouses or life partners, within families and extend to neighbours, the local community, wider society, the state and internationally. Love of all other individuals as well as love of oneself gives the full experience of humanity. It reveals the essential attributes of what it means to be human and the depth of the individual's identity beneath one's nature, spirituality, reason and social integration.[22] Lebech deduces that it is only in love that we adequately identify the other. We have to rely on love in practice to give content to the idea of human dignity.[23]

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[19] On the generalisation of the concept of dignity, see Habermas (n3), at 472-475. See also Meir Dan-Cohen, "A Concept of Dignity" (2009) Working Paper http://ssrn.com/abstract=1468031 (visited 2 June 2011).

[20] Mette Lebech, "What is Human Dignity?" (2004) 2 *Maynooth Philosophical Papers* 59, at 60.

[21] *Ibid*, at 67.

[22] *Ibid*, at 68.

[23] Lebech concludes, "we learn to respond out of our own depth to the equally fundamental value of the other. Hence, as an expression, 'human dignity', refers beyond criteria to the fundamental value of the existence of individual human beings.": *ibid.*

Richard Stith endorsed the preference expressed by John Finnis for respecting human beings rather than simply valuing them.[24] But Stith considers that love for one another based on God's love for us might be a better foundation for relationships than respect. Being made in the image of God, we, in turn, should love each other because of God's love for us and our likeness to God. A loving person cares for the individual because of his or her unique existence and not because of their achievements.[25] Love responds and gives the other freedom. It does not seek to control the other. The sanctity of each individual requires reverential treatment.

As the ideal religious base of love does not have universal appeal, Stith settles for the secularly-acceptable respect for others as a more widely embraced starting point. He sees human beings as beginnings, not ends.[26] They should be given the opportunity to develop their personality in order to achieve their full potential. Respond to others, but be prepared to release them rather than holding them.[27] Eschew control.[28] Acknowledge their wishes and defer to them. A retreat, not a charge, is often required.

The common commitment to respect for each other is a source of solidarity and the foundation of society. There is mutual interest in respecting each other, so that all can develop and grow. The quest in life is to find and be true to one's identity. Respect for the identity and inviolability of each person is a better foundation for society than a value judgement of the individual.[29]

Michael J Perry is an adherent of the "love" doctrine.[30] God loves us; therefore, we must all love each other. In the absence of love, Perry paints the gloomy spectre of Nietzsche's nihilism.[31] He is convinced that morality founded on the claim that every human being has

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[24] Stith quoted Finnis, "[h]uman beings are not just 'values' ... rather, they are persons each incommunicably, non-fungibly individual in [a] peculiar, deep way, and so entitled, one by one, to be respected.": Richard Stith, "The Priority of Respect: How Our Common Humanity Can Ground Our Individual Dignity" (2004) 44 *Intl Philosophical Q* 165, at 169, citing John Finnis, "Public Reason, Abortion and Cloning" (1998) 32 *Val UL Rev* 361, at 377.

[25] *Ibid*, at 174.

[26] *Ibid*, at 166.

[27] *Ibid*, at 178.

[28] *Ibid*, at 180.

[29] Stith sums up, "[w]e can find solidarity more safely in a common respect than in a common goal.": *ibid*, at 184.

[30] Michael J Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (CUP, Cambridge 2007).

[31] *Ibid*, at 29.

inherent dignity and is therefore inviolable has solely a religious basis. This is the cornerstone of human rights.[32] Having analysed the works of various philosophers (including Ronald Dworkin, Martha Nussbaum, Richard Rorty, Leo Tolstoy, Richard Posner, Raimond Gaita and Finnis), he discounts a non-religious footing for the morality of human rights.[33]

Dworkin perceives that human beings can be sacred or inviolable from a secular perspective as well as from a religious point of view.[34] The secular proponent sees each individual as "a creative masterpiece" attributable to a combination of natural and human intervention.[35] Sacredness or inviolability arises through history or association.[36] A person is the highest product of natural creation and of deliberative human creative force.[37] Because of the intrinsic importance of these two elements, no-one should violate anyone else and everyone commands respect and protection from everyone else.[38] Human life can have instrumental and subjective value as well as intrinsic value.[39]

Autonomy is necessary in order to develop one's personality. Adults have the right to make decisions defining their own lives. Dworkin explains the importance of respect for autonomy thus:

> Recognizing an individual right of autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent—but, in any case, distinctive—personality. It allows us to lead our own lives rather than be led along them, so that each of us can be, to the extent a scheme of rights can make this possible, what we have made of ourselves.[40]

Democracy provides an environment where people have the freedom to make rational choices for themselves. Dworkin links dignity to freedom,[41] and makes a further link from dignity

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[32] On Perry and the religious basis for human rights, see Butler (n5), at 1263-1267.

[33] Michael J Perry, "The Morality of Human Rights: A Nonreligious Ground?" (2005) 54 *Emory LJ* 97, at 150.

[34] Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (Harper Collins, London 1993), at 25, 82. See Steven C Rockefeller, "Comment" in Charles Taylor and others, *Multiculturalism: Examining the Politics of Recognition* (Amy Gutmann ed, Princeton University Press, Princeton 1994), at 95.

[35] Dworkin (n34), at 82-83.

[36] *Ibid*, at 74.

[37] *Ibid*, at 82.

[38] *Ibid*, at 84.

[39] *Ibid*, at 72. On dignity as intrinsic human worth, see Neomi Rao, "Three Concepts of Dignity in Constitutional Law" (2011) 86 *Notre Dame L Rev* 183, at 196-202.

[40] Dworkin (n34), at 224.

[41] The connection is evident in the following passage, *ibid*, at 239:

> ... a true appreciation of dignity argues ... for individual freedom, not coercion, for a régime of

through freedom to democracy:

> Because we cherish dignity, we insist on freedom, and we place the right of conscience at its center... Because we honor dignity, we demand democracy.[42]

Each individual has experiential and critical interests in life.[43] It is essential for individuals and for their integrity that their lives as a whole make sense and that they have lived a good life according to their own convictions. Integrity is closely connected to dignity and is important in people having the freedom to live their lives in a responsible fashion as they see fit.[44] Self-respect is a necessary ingredient in acting with integrity and in nurturing one's own dignity. Dworkin alludes to our antipathy towards the attempted waiver of dignity when he highlights the lack of self-respect in a person acting without integrity.[45] As bad, or even worse, are those who do not recognise that they have compromised their own dignity.[46]

Dworkin defines a person's right to be treated with dignity as "the right that others acknowledge his genuine critical interests: that they acknowledge that he is the kind of creature, and has the moral standing, such that it is intrinsically, objectively important how his life goes."[47] Human dignity is based on the intrinsic value of life, which merits the regard in which one is held by oneself and by others.

Irrespective of their conduct, everyone should be treated with respect, or at least, should not be treated with disrespect or suffer indignity. The community disapproves of those who do not have self-esteem and do not appreciate their own dignity. However, there is not necessarily a duty on others to advance an individual's critical interests. Rather, the obligation

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> law and attitude that encourages each of us to make mortal decisions for himself. Freedom is the cardinal, absolute requirement of self-respect: no one treats his life as having any intrinsic, objective importance unless he insists on leading that life himself, not being ushered along it by others, no matter how much he loves or respects or fears them.

Law regards self-application as important and looks wherever possible to voluntary compliance: Jeremy Waldron, "Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley" (2009) NYU School of Law Public Law Research Paper No 09-50 http://ssrn.com/abstract=1461220 (visited 1 June 2010), at 41, 60. It only resorts to coercion as a last resort and—when coercion is necessary—dignity is respected in the manner of enforcement: *ibid*, at 60-61 (footnotes omitted).

[42] Dworkin (n34), at 239.

[43] *Ibid*, at 201.

[44] *Ibid*, at 205.

[45] "[W]e think that someone who acts out of character, for gain or to avoid trouble, has insufficient respect for himself.": *ibid.* The right to be treated as a person cannot be waived: Herbert Morris, *On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology* (University of California Press, Berkeley 1976), at 53.

[46] Dworkin (n34), at 235.

[47] *Ibid*, at 236.

is to recognise and respect those interests no matter what the circumstances. Dworkin endorses Kant's principle that people should be treated as ends, not means.[48] Only the individuals themselves are entitled to define what is important to them in the passage through life.

Another secular supporter is Nussbaum, who considers that the good of other human beings is worth pursuing in its own right.[49] She attributes this caring characteristic to the basic social emotion of compassion.[50] One feels disturbed when bad things happen to others. Pity or compassion arises because of the seriousness of the disturbing situation, which is not attributable to any fault on the sufferer's part, and an empathy with the other's dilemma because it could happen to oneself.[51] Compassion can co-exist with human dignity.[52]

Denise Réaume identifies dignity as the good in virtue of which we are owed respect, which she considers a more basic concept than Peter Birks' notion of equal respect, although implicit in his account.[53] It has a dual operation, the corollary of respect from others being self-esteem.[54] Dignity is violated by *treating* a person with dishonour or worthless as a moral personality (irrespective of whether they *feel* demeaned or worthless).[55] A social aspect arises because of our common association as members of the human race.[56] Dignity is not just autonomy.[57] Our commonality demands that we respect each other simply for being

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[48] Dworkin explains that principle as not requiring "that people never be put at a disadvantage for the advantage of others, but rather that people never be treated in a way that denies the distinct importance of their own lives": *ibid.*

[49] Martha C Nussbaum, "Skepticism about Practical Reason in Literature and the Law" (1994) 107 *Harv L Rev* 714, at 718.

[50] *Ibid*, at 719.

[51] Martha C Nussbaum, "Compassion: The Basic Social Emotion" (1996) 13 *Soc Phil & Pol'y* 27, at 31.

[52] *Ibid*, at 45.

[53] Denise G Réaume, "Indignities: Making a Place for Dignity in Modern Legal Thought" (2002) 28 *Queen's LJ* 61, at 64, citing Peter Birks, "Harassment and Hubris: The Right to an Equality of Respect" (1997) 32 *IJNS* 1.

[54] *Ibid*, at 85.

[55] *Ibid*, at 91.

[56] *Ibid*, at 87.

[57] According to L'Heureux-Dubé J in the Supreme Court of Canada, while some mentally ill patients may have "a low level of awareness of their environment because of their mental condition", which may influence their own conception of dignity, "an objective appreciation of dignity" prevailed and there could be "interference with the safeguard of their dignity" despite the fact that the patients might have "no sense of modesty": *Quebec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand* [1996] 3 SCR 211, at [108]. In another Canadian case, Robins JA highlighted the equal dignity of the mentally ill and the importance of their autonomy: *Fleming v Reid* (1991) 82 DLR (4th) 298 (Ont CA), at 311.

Jeremy Waldron suggests that the issue of how human dignity applies to infants and to the profoundly disabled can be addressed by applying the rank of equality to all humans by virtue of their unrealised

human.[58]

Kant's philosophy of life is premised on the absolute inner worth of the individual, which gives rise not only to duties to others but also to a "necessary duty to oneself".[59] Inner worth is different from moral worth. Thomas E Hill, Jr, explains:

> Kant ascribes to human personality a worth which is not diminished or increased by what a person does. It depends not on his actions but upon his capacities. This is a man's "inner worth" as a person, based on the fact that he is a moral agent rather than upon his moral achievements.[60]

The duty of each person to oneself and towards other human beings flows from the dignity of the person. Dignity is above value and is irreplaceable. An individual is entitled to respect from all other rational beings. Humanity's uniqueness is derived from the distinguishing feature of being able to reason and exercise free will. Autonomy is the ground of dignity and, is "a property of the will of every rational being, namely, the property of legislating to oneself universal (moral) laws without the sensuous motives of fear, hope for reward, and the like."[61]

According to Hill, Kant saw that the capacity to be rational and self-governing set us apart from the lower animals and gave us dignity. Moral conduct is the practical exercise of this "noble capacity".[62] Because all individuals have the ability to rationalise, all are equal and should be treated as equals. People are ends in themselves and must not be used solely as a means to an end. They are not to be regarded as objects. Each human being has inherent dignity and an unparalleled personality. Kant's practical imperative in simplistic terms was: act so that you treat humanity (whether yourself or another) always as an end (not as a means).[63] Hill points

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potential rationality (albeit that the subject's rationality is evolving or may even be impossible to achieve by virtue of his or her condition): Waldron (n41), at 20.

[58] Réaume puts it thus, "[a]s human beings we are called upon to treat others 'as fellow members of a common association,' to be honoured not particularly for our accomplishments but simply because of our membership in the human race.": Réaume (n53), at 85, citing Thomas E Hill, Jr, "Social Snobbery and Human Dignity" in *Autonomy and Self-Respect* (CUP, New York 1991), at 170.

[59] Immanuel Kant, *The Moral Law: Groundwork of the Metaphysic of Morals* (Herbert James Paton tr, Routledge, London 2005), at 107. On Kant's theory of inherent dignity, see Shiv RS Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (Studies in International Law, Hart, Oxford 2007), at 52-54; Donna Hicks, *Dignity: The Essential Role It Plays in Resolving Conflict* (Yale University Press, New Haven 2011), at 4-5; Michael Rosen, *Dignity: Its History and Meaning* (Harvard UP, Cambridge, Mass 2012), at 10, 19-31, 55, 80, 143, 153-154; Saastamoinen (n10), at 48-49; Dietmar von der Pfordten, "On the Dignity of Man in Kant" (2009) 84 *Philosophy* 371.

[60] Thomas E Hill, Jr, *Dignity and Practical Reason in Kant's Moral Theory* (Cornell University Press, Ithaca 1992), at 166-167.

[61] *Ibid*, at 47, citing Kant (n59), at 115, 120.

[62] *Ibid*, at 36-37.

[63] The precise version is: "Act in such a way that you always treat humanity, whether in your own person

out the distinction between "humanity in a person" and the entire person, leading to the deduction that Kant recognised that human beings have characteristics, such as animal instincts and talents, apart from their humanity.[64] The dignity of humanity arises from man's rational nature, which should direct his will.[65] The element of duty is apparent here. While Kant conceded that people are imperfect and do not always act rationally or fulfil their duties to themselves or to others, he steadfastly adhered to the precept that even the most heinous individual should not be abused.[66] Irrespective of his situation, he retains the capacity to act rationally, although he may not be disposed to do so. Kant had faith in humanity and the inextinguishable spark of goodness in each of us because of our capacity to rationalise.[67]

There is a dual aspect to Kant's imperative. The negative aspect inhibits treating another solely as a means. The positive angle enjoins us to treat humanity as an end.[68] One conclusion to be drawn from this is that there is not an outright embargo on treating people as means, provided they are also treated as ends. Kant urged us not to value a person's individuality, but his humanity, which he holds in common with others.[69]

Dignity is an "incalculable" value.[70] Kant characterised it as "an unconditional and incomparable worth".[71] Unconditional worth means that a perfectly rational person would value dignity.[72] To understand its incomparable worth, it is necessary to distinguish between price and value. Dignity has value and worth, but is priceless. There can be no trade off between dignity and something with mere price.[73]

Our relationships with others should be moulded to accord with the requirements of dignity. Clearly we have a primary duty not to destroy the other person or ourselves by degradation or

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or in the person of any other, never simply as a means but always at the same time as an end": Kant (n59), at 106-107.

[64] Hill (n60), at 39. Kant considered that the basis of human worth commands respect; Waldron pointed out that this is not exactly respect for persons—what commands respect is the capacity for morality; this involves respecting something within a person, not a person him- or herself: Waldron (n41), at 14-15.

[65] Hill (n60), at 39-40.

[66] *Ibid*, at 41.

[67] *Ibid*.

[68] *Ibid*. See also Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart, Oxford 2009), at 108.

[69] Hill (n60), at 43 fn 2.

[70] *Ibid*, at 10.

[71] *Ibid*, at 47, citing Kant (n59), at 115.

[72] *Ibid*, at 48.

[73] *Ibid*.

suicide; this duty arises, not because a person is irreplaceable, but because it degrades humanity.[74] Each one has a duty to develop his rational capacities and to strive to exercise reason in moral contexts.[75] Try to reason with others, not to manipulate them, and do not treat anyone as worthless.[76] Allow individuals the freedom to form and pursue their own life plans, subject to the constraint that others be allowed a similar freedom.[77] Individual liberty is limited by a concern for the liberty and rational development of all.[78] Help others to set their own ends and to pursue them rationally.[79] Honour human rationality in ourselves and in others in our words, symbols and deeds.[80]

The concept of dignity has a long tradition in non-Western societies. However, there the emphasis is on duties owed to others. The focus is frequently on the community rather than on the individual.

Human dignity is the foundation of society and civilisation in Islam and originated in the creation of man, when, according to the Koran, God "bestowed dignity on the progeny of Adam" by breathing His Own Spirit into him.[81] Stressing our interdependence, Abdullah al-Ahsan has defined human dignity as "the recognition and respect of human need, desire and expectation one individual by another".[82] Since all human beings are descended from Adam and his spouse, every person possesses dignity.[83] It is not earned by meritorious conduct and is the right of everyone regardless of colour, race and religion.[84] There is a prohibition on violating the personal dignity of all, whether a Muslim or non-Muslim, pious or of ill-repute,

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[74] *Ibid*, at 51.
[75] *Ibid*, at 52-53.
[76] *Ibid*, at 53.
[77] *Ibid*, at 54. Dignity can be used negatively as a constraint on infringement of another's rights or it can have a positive slant in support of the assertion of rights. "Human dignity as empowerment" can be distinguished from "human dignity as constraint": Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP, Oxford 2001), at 11. The judiciary is more inclined to use it as a constraint when the legislature has democratically considered the various rights involved and has made a choice as to which route to adopt: Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP, Oxford 2006), at 558. Human dignity is a basis for extending existing human rights to new situations or for devising new rights.
[78] Hill (n60), at 56.
[79] *Ibid*, at 54.
[80] *Ibid*, at 55.
[81] Abdullah al-Ahsan, "Law, Religion and Human Dignity in the Muslim World Today: An Examination of OIC's Cairo Declaration of Human Rights" 24 (2008-2009) *JL & Relig* 569, at 569, citing Koran 17:70, 15:29, 32:9, 38:72.
[82] *Ibid*.
[83] *Ibid*, citing Koran 4:1.
[84] Mohammad Hashim Kamali, *The Dignity of Man: An Islamic Perspective* (Islamic Texts Society, Cambridge 2002), at 1.

law-abiding or a criminal.[85] Human dignity in Islamic texts is affirmed in a variety of contexts, including the unity and equality of mankind.[86] According to Linda Hogan and John D'Arcy May, dignity is an absolute value in Islam (an Abrahamic faith based on the doctrine of creation), but it is in danger of being eclipsed by the overwhelming presence of the utterly transcendent God.[87] The primary responsibility of the Muslim is submission to God and the practice of religious duties rather than insisting on one's entitlements because of one's dignity as a human being, which in any case is a gift from God.[88]

In traditional societies, the tendency is to base human relations on the exchange of gifts instead of expressions of respect and gratitude.[89] The correlative to recompense for good is retribution for evil.[90] The ancestral and natural spirits are an integral part of the community and what it means to be human.[91] For the indigenous people in the Pacific Islands, the primary source of human dignity is a relationship to land through participation in the kinship group.[92] The social aspect of this human relationship may provide a nexus with other societies' understanding of dignity.[93]

Hindu society is founded on the ideas of duty (*dharma*) and deeds (*kharma*), which determine our existence and rebirths.[94] The *Bhagavadgîta* (the Hindu equivalent of the New Testament) regards caste duty and disinterested action as the highest moral ideal.[95] This socially structured inequality is compounded by gender inequality.[96] Hierarchy is the natural norm in India.[97] The traditional caste system is a blatant denial of human dignity.[98] But, within the boundaries of each caste, there is egalitarianism.[99] Gandhi believed that the caste method could remain as a means of ordering society, if it rid itself of the pattern of defining lower

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[85] *Ibid*, at 2.
[86] *Ibid*, at 3.
[87] Linda Hogan and John D'Arcy May, "Constructing the Human: Dignity in Interreligious Dialogue" in Regina Ammicht-Quinn, Maureen Junker-Kenny and Elsa Tamez eds, *The Discourse of Human Dignity* (Concilium, SCM Press, London 2003), at 79.
[88] *Ibid*.
[89] *Ibid*, at 80.
[90] *Ibid*.
[91] *Ibid*.
[92] *Ibid*, at 81, citing JD May, "Human Rights as Land Rights in the Pacific" (1993) 6 *Pacifica*, at 61-80.
[93] *Ibid*, at 82.
[94] *Ibid*, at 84.
[95] *Ibid*.
[96] *Ibid*, at 83.
[97] *Ibid*.
[98] *Ibid*, at 82.
[99] *Ibid*, at 84.

castes as morally and spiritually inferior.[100]

The absence of self is the foundation of Buddhism.[101] Liberation is achieved through wisdom and compassion.[102] Morality is based on duties and priority is given to the communal.[103] While compassion is compatible with dignity, the lack of emphasis on the human personality removes a rationale for dignity in religions originating in the West and in the Enlightenment philosophy.

2.2 Law

2.2.1 History

Dignity is not endowed by states or by the international order. It is innate in each human being. The role of dignity in law developed during the course of the 20th century.[104] It began appearing as a concept in constitutions in the first half of the century, including those adopted in Mexico,[105] Weimar Germany,[106] Finland,[107] Portugal,[108] Ireland,[109] Cuba,[110] Spain[111] and Costa Rica.[112] This can be attributed to a variety of influences such as the emphasis on dignity in the Catholic religion,[113] the Enlightenment[114] and socialism.[115]

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[100] *Ibid*.
[101] *Ibid*, at 85.
[102] *Ibid*, at 86.
[103] *Ibid*.
[104] McCrudden (n9), at 664.
[105] Political Constitution of the United Mexican States 1917 (amended 1946), Art 3(II)(c).
[106] Constitution of the German Reich 1919, Art 151. See Habermas (n3), at 468.
[107] The initial reference was to "hereditary dignity": Constitution of Finland 1919, Art 15. It was amended in 1995 to guarantee the "inviolability of human dignity" (Section 1) and to refer to "the security required for a dignified life" (Section 15a).
[108] Political Constitution of the Portuguese Republic 1933, Art 45.
[109] Constitution of Ireland 1937, Preamble, fifth paragraph:

> And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations.

[110] Constitution of the Republic of Cuba 1940, Art 20.
[111] Charter of the Spanish People 1945, Arts 1, 25.
[112] Political Constitution of the Republic of Costa Rica 1949, Art 56.
[113] Catholic Church, *Catechism of the Catholic Church* (Rev edn Geoffrey Chapman, London 1999), at [27], [225], [306], [308], [356]-[357], [364], [369], [872], [1004], [1468], [1487], [1645], [1691]-[1692], [1698], [1700]-[1876], [1934]-[1935], [1938], [1956], [2203], [2261], [2275], [2284]-[2301], [2324], [2334]-[2335], [2418], [2424], [2436], [2524]. See McCrudden (n9), at 658.
The Catholic religion imbued a sense of responsibility for one's decisions by asserting that man had to take some action to secure forgiveness for sins rather than adopting the fatalistic doctrine of predestination: Butler (n5), at 1307.
[114] On the Enlightenment and human rights, see *ibid*, at 1262, 1267, 1269, 1305.
[115] McCrudden (n9), at 664. The Catholic influence was evident in Portugal, Ireland and Spain, the

2.2.1.1 UN Charter and UDHR

After the atrocities and wholesale assault on dignity during the Second World War, dignity was incorporated in international agreements attempting to prevent a recurrence of such appalling treatment of human beings. It was mentioned in the United Nations Charter[116] and in the Universal Declaration of Human Rights (UDHR).[117] One of the main aims of the UN Charter as set out in its preamble was "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[118] The reference to dignity was inserted at the suggestion of Field Marshal Jan Smuts from South Africa at the San Francisco conference where the UN Charter was adopted in 1945.[119] The preamble to the UDHR placed the recognition of the fundamental dignity and equal and inalienable rights[120] of people as "the foundation of freedom, justice and peace in the world".[121] There is a second reference to dignity in the preamble when it refers back to dignity, equality and social progress mentioned in the UN Charter:

> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.[122]

Article 1 UDHR declares:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Here the Kantian influence is evident. It embraces the individual and community aspects, as well as engaging the intellect and moral conscience of the person. In the course of the drafting of the UDHR, the South African representative CT Te Water objected to the inclusion

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socialist in Finland, and both Catholic and social democratic/socialist in Central and South American countries: *ibid*.

[116] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 59 Stat 1031, UNTS 993, 3 Bevans 1153 (UN Charter) preamble.

[117] Universal Declaration of Human Rights (adopted 10 December 1948) UN General Assembly (UNGA) Res 217 A(III) preamble, arts 1, 22 and 23.

[118] UN Charter (n116) preamble, first para, second point.

[119] John P Humphrey, *Human Rights and the United Nations: A Great Adventure* (Bowker, Epping 1984), at 67.

[120] The foundation of the concept of inalienable rights that pertain to the individual had crystallised by the end of the 17th century: Gareth Peirce, *Dispatches from the Dark Side: On Torture and the Death of Justice* (Verso, London 2010), at vii.

[121] UDHR (n117) preamble, first para.

[122] *Ibid* fifth para.

of the words "dignity and rights".[123] His initial objection was because he did not agree to the extension of equality to all rights, personal, social, economic and political, irrespective of whether or not they were fundamental.[124] He also insisted there was no universal standard of dignity.[125] He backtracked subsequently and supported a Guatemalan proposal to move draft article 1 to the preamble on the basis that it was a statement of fact, not a right.[126] In the South African delegation's view, the dignity of the individual was a broader and deeper concept than a right.[127] If fundamental human rights were respected, the dignity of the individual person would be automatically recognised.[128] Eleanor Roosevelt (chairperson of the Human Rights Commission and of the Drafting Committee established by it) said that the word "dignity" had been considered at great length and the Human Rights Commission had decided to include it to emphasise the inherent dignity of all mankind.[129]

Economic and social rights were incorporated in the UDHR at Articles 22 to 27 at the insistence of Latin American and Communist countries, who battled with the North Atlantic countries and their allies over the emphasis to be accorded to them as compared with the hitherto more important civil and political rights.[130] Eleanor Roosevelt was committed to Franklin D Roosevelt's "four freedoms", which included freedom from want and this, according to Mary Ann Glendon, ensured that they "would be a constant touchstone for all members of the Commission."[131] Article 22, introducing this set of rights, refers to dignity and development of the personality.[132] The right to work in Article 23 also mentions dignity.[133]

These international texts were concluded after much deliberation and with a lot of effort to

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[123] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, New York 2001), at 144.
[124] UNGA 3rd Session Third Committee 95th Meeting (6 October 1948) UN Doc A/C.3/SR.95, at 91-92.
[125] *Ibid*, at 92.
[126] UNGA 3rd Session Third Committee 96th Meeting (7 October 1948) UN Doc A/C.3/SR.96, at 96.
[127] *Ibid*.
[128] *Ibid*.
[129] UNGA 3rd Session Third Committee 98th Meeting (9 October 1948) UN Doc A/C.3/SR.98, at 110. See Jenna Reinbold, "Political Myth and the Sacred Center of Human Rights: The Universal Declaration and the Narrative of 'Inherent Human Dignity'" (2011) 12 *Hum Rights Rev* 147, at 161.
[130] Johannes Morsink, "The Philosophy of the Universal Declaration" (1984) 6 *Hum Rts Q* 309, at 334.
[131] Glendon (n123), at 42.
[132] It reads:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

[133] Art 23(3): "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection."

obtain a common platform between various nations with widely different cultures and backgrounds. The agreed basis for human rights in the UDHR is secular humanist.[134] Reference to a divine origin or a basis in nature was avoided. Jacques Maritain has noted that in the course of negotiations on the text of the UDHR there was a divergence of views between those who accepted and those who rejected natural law as the cornerstone of human rights.[135] The drafters adopted a practical approach and contented themselves with a statement and enumeration of human rights without any reference to their foundation.[136]

Rights are subject to limitation. Maritain differentiated between the possession and the exercise of rights and said that, even in the case of inalienable rights, their exercise can be modified and limited in the interests of justice.[137] Economic, social and cultural rights cannot be implemented without some restrictions on the freedom and rights of the individual.[138] There are conflicting views on the values determining the application of rights. Human dignity means different things to different groups. According to Maritain, for some "the mark of human dignity lies firstly and chiefly in the power to appropriate individually the gifts of nature so that each may be in a position to do freely what pleases him"; some see dignity "in the power to place those gifts under the collective control of the social body"; and others see dignity "in the power of bringing the gifts of nature into service for the joint attainment of an immaterial good and of the free self-determination of the person".[139] Because of diverse deeply held values, these issues could not be resolved in the UDHR.

Glendon rightly said that the UDHR "heralded a new moment in the history of human rights."[140] It emphasised dignity and insisted on the link between freedom and solidarity.[141] Her overview neatly captures the interdependence between the individual and society, and the intermingling of rights:

> When read as it was meant to be, namely as a whole, it is an integrated document that rests on a concept of the dignity of the human person within the human family. In substance, as well as in form, it is a declaration of

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[134] Morsink, (n130), at 334.
[135] Jacques Maritain, "Introduction" in UNESCO ed, *Human Rights: Comments and Interpretations: A Symposium* (Allan Wingate, London 1949), at 13.
[136] *Ibid*, at 14.
[137] *Ibid*, at 15.
[138] *Ibid*.
[139] *Ibid*, at 16.
[140] Glendon (n123), at 173.
[141] *Ibid*.

interdependence—interdependence of people, nations, and rights.[142]

UNESCO's 1947 enquiry into the theoretical basis of human rights concluded that human dignity underlies the philosophy of freedom and democracy in human rights.[143] It emphasised the necessity of continually fostering dignity.[144] Mahatma Gandhi in a letter to UNESCO in 1947 pointed out that all rights "came from duty well done."[145] Even the right to live "accrues to us only when we do the duty of citizenship of the world."[146] He advocated correlating "every right to some corresponding duty to be first performed."[147]

Susan Waltz's research into the drafting of the UDHR shows that the small states played a significant part in the procedure. She concludes that without their presence and active participation, the UDHR might have been shorter and more inspirational (as the United States wanted).[148] It probably would not have included "socioeconomic rights or consistent condemnation of discrimination. The rights of women might also have been downplayed."[149] Quite often the proponents of human rights were small states (particularly those in Latin America) and non-governmental organisations. In contrast, the United Kingdom and France were somewhat opposed to the UDHR.[150] The US was an enthusiastic advocate for human rights during World War II when it was seeking the support of other states for the war effort. After the end of the conflict, it lost interest, but was forced by the smaller states to fulfil its commitment to human rights.[151] It is incorrect to think that the views of the US dominated the content of the UDHR. Waltz highlights the subsequent effect of the Cold War, which politicised human rights.[152]

In order to prevent the resurgence of totalitarianism, which was interpreted as a reaction to extreme individualism, there is an emphasis in the UDHR on the community rather than solely

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[142] *Ibid*, at 174.
[143] "The Grounds of an International Declaration of Human Rights" in UNESCO (n135) Appendix II, at 259.
[144] "The United Nations cannot succeed in the great purposes to which it is committed unless it so acts that this dignity is given increasing recognition, and unless steps are taken to create the conditions under which this dignity may be achieved more fully and at constantly higher levels.": *ibid*.
[145] In UNESCO (n135), at 18.
[146] *Ibid*.
[147] *Ibid*.
[148] Susan Waltz, "Universalising Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights" (2001) 23 *Hum Rts Q* 44, at 70.
[149] *Ibid*, at 71.
[150] *Ibid*, at 70.
[151] *Ibid*, at 69-70.
[152] *Ibid*, at 69.

on the individual.[153] This can be seen from the insertion of the word "alone" in Article 29(1), which locates people necessarily in the community for development of their full potential.[154]

The value of dignity had universal appeal, but for a variety of reasons.[155] It was not simply a Western ideal, but was attractive to South American, Latin American, African and Eastern countries. The basis of the appeal was not solely Christianity, but those with the Kantian view and followers of Eastern philosophy were equally sympathetic to the concept.

In a look back more than 50 years after adoption of the UDHR, William Joseph Wagner indicated that interest groups and states have used human rights for their own political purposes.[156] As a result, some are sceptical of Western human rights.[157] However, Wagner considers that human rights can be moulded by adding social content and that the UDHR was a worthwhile endeavour, as it tried to replace force with human dignity.[158]

2.2.1.2 ECHR and EU Charter

The term dignity is not used explicitly in the European Convention on Human Rights (ECHR).[159] As it is expressly based on the UDHR, it is implicitly based on the latter's assertion of human dignity.[160] In any event, the European Court of Human Rights has made it clear in its jurisprudence that dignity is a foundation value of democracy.[161]

The European Union Charter of Fundamental Rights signed in Nice in 2000 placed the individual at the heart of the Union's activities and declared human dignity, freedom, equality

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[153] Morsink (n130), at 329.

[154] *Ibid*, at 334. Art 29(1) reads: "Everyone has duties to the community in which alone the free and full development of his personality is possible."

[155] The Kenyan High Court explained that the universality of the UDHR was based on "a common heritage of humankind which is the oneness of the human family and the essential dignity of the individual": *RM v AG* [2006] AHRLR 256 (KeHC 2006), at [69].
For legal reasons in support of the claim that human dignity is the moral source from which all of the basic rights derive their meaning, see Habermas (n3), at 466-470.

[156] Wagner (n5), at 214, 216-217.

[157] *Ibid*, at 199. See Wiktor Osiatynski, "On the Universality of the Universal Declaration of Human Rights" in András Sajó ed, *Human Rights with Modesty: The Problem of Universalism* (Martinus Nijhoff Publishers, Leiden 2004), at 33-50.

[158] Wagner (n5), at 223, 225.

[159] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (ECHR).

[160] Gay Moon and Robin Allen, "Dignity Discourse in Discrimination Law: A Better Route to Equality?" [2006] *EHRLR* 610, at 621.

[161] *Ibid*. See *Gündüz v Turkey* (App no 35071/97) (2005) 41 EHRR 5, at [40]: "the Court would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society."

and solidarity its foundational values.[162] The entire of Chapter I is devoted to dignity rights directed towards the physical and mental aspects of personal security.[163] There is an unequivocal demand that dignity be protected in Article 1, which reads: "Human dignity is inviolable. It must be respected and protected." Unsurprisingly, the right to life is proclaimed[164] and torture, inhuman or degrading treatment or punishment,[165] slavery[166] and forced labour[167] are proscribed. Article 2 (dealing with the right to life) contains an explicit prohibition on the death penalty.[168] The right to integrity is set out in Article 3. Modern scientific developments have necessitated the inclusion of a ban on eugenics, the sale of body parts and cloning, and informed consent is required for participation in scientific experiments and medical treatment.[169] In another sign of the times and increased mobility, human trafficking is forbidden.[170]

Individual dignity is central to workers' rights. Under the umbrella of solidarity, Article 31 of the EU Charter acclaims workers' rights to conditions respecting their dignity along with their health and safety.[171] Article 25 asserts the rights of the elderly in the context of equality: "The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life."

2.2.1.3 Popularity of Dignity

In the second half of the 20th century, the concept of dignity gained widespread acceptance. It is routinely mentioned in international treaties. Some European Directives have focused on it and a growing number of nations have included it in their constitutions. The reference to dignity in the UDHR has frequently been the impetus for incorporation of dignity in national constitutions.

2.2.1.4 International Humanitarian Texts

The initial stimulus for the inclusion of dignity in humanitarian texts was war. In 1863 the US

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[162] Charter of Fundamental Rights of the European Union (2000/C 364/01) [2000] OJ C364/1 (EU Charter) Preamble.
[163] *Ibid* Arts 1-5.
[164] *Ibid* Art 2.1.
[165] *Ibid* Art 4.
[166] *Ibid* Art 5.1.
[167] *Ibid* Art 5.2.
[168] *Ibid* Art 2.2.
[169] *Ibid* Art 3.2.
[170] *Ibid* Art 5.3.
[171] *Ibid* Art 31.1.

required that prisoners be treated with dignity.[172] After the Second World War the International Committee of the Red Cross proposed that the Geneva Conventions protecting prisoners of war should include preambles incorporating: "[r]espect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking."[173] The Conventions, as adopted, included Common Article 3 prohibiting, *inter alia*, "outrages upon personal dignity, in particular humiliating and degrading treatment."[174] The statutes of international criminal tribunals and the Rome Statute establishing the International Criminal Court have referred to "outrages upon personal dignity".[175]

Dignity played a role in abolitionist policies, so it is not surprising that the Slavery Convention 1956 echoes back to the UN Charter in affirming "faith in the dignity and worth of the human person".[176] Likewise, given the prominence of the principle of the "dignity of labour" in the growth of the trade union movement, there is an emphasis on dignity in International Labour Organisation Conventions.[177]

2.2.1.5 UN Human Rights Instruments Since the 1960s

Following up on the aspirations in the UDHR, in 1966 the International Covenants on Civil and

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[172] McCrudden (n9), at 667, fn 82, citing "Instructions for the Government of Armies of the United States in the Field" (Lieber Code), 24 Apr 1863, Art 75.

[173] *Ibid*, at 667, fn 84, citing "Remarks and Proposals submitted by the International Committee of the Red Cross", Document for the consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference of Geneva (21 Apr 1949) (Feb 1949), at 8.

[174] *Ibid*, at 668, fn 85, citing Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Art 3.

[175] Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Art 4(e); Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (signed 16 January 2002, entered into force 12 April 2002) 2178 UNTS 138, Art 3(e); Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Art 8.2(b)(xxi). See McCrudden (n9), at 668. On genocide, see Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, Oxford 1989), at 11-12, 110-111; Andrew Vincent, *The Politics of Human Rights* (OUP, Oxford 2010), at 106-118.

[176] McCrudden (n9), at 668; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 226 UNTS 3, preamble.

[177] McCrudden (n9), at 669. See International Labour Organisation (ILO) Indigenous and Tribal Populations Convention C107 (adopted 26 June 1957, entered into force 2 June 1959) (40th Session) (Geneva) Preamble, Art 2.3; ILO Discrimination (Employment and Occupation) Convention C111 (adopted 25 June 1958, entered into force 15 June 1960) (42nd Session) (Geneva) Preamble; ILO Employment Policy Convention C122 (adopted 9 July 1964, entered into force 15 July 1966) (48th Session) (Geneva) Preamble; ILO Workers with Family Responsibilities Convention C156 (adopted 23 June 1981, entered into force 11 August 1983) (67th Session) (Geneva) Preamble.

Political Rights (ICCPR)[178] and on Economic, Social and Cultural Rights (ICESCR),[179] which comprise the International Bill of Rights, fleshed out states' obligations. They highlight the importance of dignity and acknowledge it as the foundational value.[180] The preambles to the ICCPR and the ICESCR set the scene in identical terms:

> Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Recognizing that these rights derive from the inherent dignity of the human person ...

Dignity is mentioned in Article 10 of the ICCPR: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[181]

Article 13 of the ICESCR, having recognised the right of everyone to education, continues:

> [The State Parties] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.[182]

Conventions banning discrimination on the grounds of race and gender are among the many that have referred to dignity. The Convention on the Elimination of Racial Discrimination refers three times to dignity in its preamble.[183] It takes into consideration that the UN Charter "is based on the principles of the dignity and equality inherent in all human beings", that the UDHR "proclaims that all human beings are born free and equal in dignity and rights" and that

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[178] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[179] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[180] John McGinnis has criticised international human rights treaties and customary law as inadequate protectors of human dignity: John O McGinnis, "The Limits of International Law in Protecting Dignity" (2003) 27 *Harv JL & Pub Pol'y* 137, at 137. He considers that the dignity of the poor would be better served by focusing on the tangible benefits and increased standards of living and education obtained by World Trade Agreements: *ibid*, at 138. Vested interests stand to gain by implementation of rights.

[181] ICCPR (n178) art 10.1. This right is violated by the enforced disappearance of people (*ie,* their arrest, detention or abduction with the authorisation, support or acquiescence of a state or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on their fate or whereabouts, with the intention of removing them from the protection of the law for a prolonged period of time): *Bousroual (Saker) v Algeria* UN Human Rights Committee (24 April 2006) 86th Session UN Doc CCPR/C/86/992/2001, at [9.2]. See also *Mulezi v Democratic Republic of the Congo* UN Human Rights Committee (23 July 2004) 81st Session UN Doc CCPR/C/81/D/962/2001, at [5.3].

[182] ICESCR (n179) art 13.1.

[183] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195.

the 1963 UN Declaration on the Elimination of All Forms of Racial Discrimination:[184]

> ... solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person.

The preamble to the Convention on Discrimination against Women in 1979 also mentions dignity three times.[185] Having noted the focus on dignity in the UN Charter and in the UDHR, it goes on:

> Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.

In 1986 the UN gave formal recognition to the central importance of dignity in standards it adopted for new human rights instruments which should be "of fundamental character and derive from the inherent dignity and worth of the human person".[186] International instruments since then have referred to dignity in mainstream human rights areas and also in topics not traditional human rights territory. In the mainstream category are conventions on the Rights of Children in 1989,[187] Migrant Workers in 1990[188] and the Disabled in 2007.[189] An example in the non-traditional class is an agreement on funding for agricultural development adopted at a conference in Rome in 1976, in which the first paragraph of the preamble recognised that a continuing world food problem was afflicting many people in the developing countries and was jeopardising "the most fundamental principles and values associated with the right to life and human dignity".[190]

Dignity was the central organising principle of the Vienna World Conference on Human Rights

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[184] UNGA Res 1904 (XVIII) (20 November 1963) UN Doc A/RES/1904 (XVIII).

[185] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

[186] UNGA Res 41/120 (4 December 1986) UN Doc A/Res/41/120, para 4(b).

[187] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, preamble, arts 23, 28, 37, 39, 40.

[188] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 93, arts 17, 70.

[189] International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) (2007) 46 ILM 443, preamble, arts 1, 3, 8, 16, 24, 25.

[190] Agreement Establishing the International Fund for Agricultural Development (adopted 13 June 1976, entered into force 30 November 1977) 1059 UNTS 191.

in 1993.[191] The Declaration and Programme of Action adopted dignity as foundational to human rights generally[192] and in particular areas like the prohibition of gender-based violence and harassment,[193] the abolition of extreme poverty[194] and biomedical ethics.[195] Conventions since then have contained specific provisions protecting dignity in relation to diverse matters such as the criminal justice process in relation to children,[196] minimum welfare of migrant workers and their families,[197] health of the disabled[198] and their treatment as autonomous individuals,[199] reintegration of abused children and disabled people,[200] reputation,[201] and control of personal data.[202] UNESCO gave a central role to dignity in the Universal Declaration on the Human Genome and Human Rights in 1997.[203]

2.2.1.6 Regional Treaties

Apart from UN instruments, regional treaties have embodied references to dignity illustrating the widespread acceptance of dignity as a fundamental value. There are examples in Inter-American, African and Arab texts, as well as those in Europe. The Preamble to the American Declaration of the Rights of Man of 1948 agreed in the same era as the UDHR refers twice to dignity and connects duties with the dignity of liberty.[204] The right to property in the

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[191] McCrudden (n9), at 670. This Second World Conference on Human Rights was attended by over 170 governments.

[192] World Conference on Human Rights "Vienna Declaration and Programme of Action" (25 June 1993) UN Doc A/CONF.157/23, preamble.

[193] *Ibid* pt I, art 18.

[194] *Ibid* pt I, art 25.

[195] *Ibid* pt I, art 11.

[196] Convention on the Rights of the Child (n187) arts 37, 40. These provisions were reference points for the Supreme Court of Appeal when it upheld an appeal against the leniency of a sentence on a girl for the murder of her grandmother and theft, as the trial judge failed to give sufficient weight to the gravity of the offence and the interests of society: *DPP Kwazulu-Natal v P* [2006] 1 All SA 446 (SCA), at [15], [22], [26].

[197] Convention on the Rights of Migrant Workers (n188) art 70.

[198] Convention on the Rights of Persons with Disabilities (n189) art 25.

[199] *Ibid* art 3.

[200] Convention on the Rights of the Child (n187) art 39; Convention on the Rights of Persons with Disabilities (n189) art 16.

[201] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, opened for signature 6 February 2007) UNGA Res 61/177, UN Doc A/RES/61/177, art 24.

[202] *Ibid* art 19.

[203] McCrudden (n9), at 671 fn 120; UNESCO "Universal Declaration on the Human Genome and Human Rights" (11 November 1997) Gen Conf 29 C/Res 16, preamble, arts 1, 2, 6, 10-12, 15, 21, 24.

[204] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) Preamble, first and second paras:

> All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another.

Declaration acknowledges the importance to a person's dignity of basic needs such as a home.[205] The American Convention on Human Rights mentions dignity in relation to humane treatment[206] and the prohibition on forced labour.[207] It provides a privacy right to have one's honour respected and dignity recognised.[208] The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women refers to dignity several times.[209]

Having referenced dignity twice in its Preamble, Article 5 of the African Charter on Human and Peoples' Rights commences with the right of every individual "to the respect of the dignity inherent in a human being and to the recognition of his legal status" and continues to ban all "forms of exploitation and degradation of man" including slavery, torture,[210] and inhuman or degrading treatment.[211] Article 3 of the Protocol to the African Charter on Women's Rights

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> The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.

See Viviana Bohórquez Monsalve and Javier Aguirre Román, "Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law" (2009) 11 *SUR - Intl J Human Rights* 39, at 44-45.

[205] American Declaration of the Rights and Duties of Man (n204) Art XXIII: "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."

[206] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Art 5. On dignity in the American Convention on Human Rights, see Monsalve and Román (n204), at 46-47.

[207] American Convention on Human Rights (n206) Art 6.2.

[208] *Ibid* Art 11.1.

[209] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995) (1994) 33 ILM 1534, Preamble, Arts 4, 8. See Monsalve and Román (n204), at 47-48.

[210] The African Commission found that the government of Sudan was responsible for torture, because—even though it had punished some torturers—it had not taken preventive measures such as halting of incommunicado detention, effective remedies, and ongoing investigations into allegations: *Amnesty International v Sudan* [2000] AHRLR 297 (ACHPR 1999), at [56]-[57]. It also stated that holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family if and where the individual was being held, was inhuman treatment of both the detainee and the family concerned: *ibid*, at [54].

The security forces in Cameroon tortured a journalist/human rights activist physically and mentally in violation of the ICCPR: *Njaru v Cameroon* UN Human Rights Committee (14 May 2007) 89th Session UN Doc CCPR/C/89/D/1353/2005, at [6.1].

[211] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

The government of Nigeria was found to have violated this provision by sending armed gangs to attack human rights activists and to destroy their homes: *Constitutional Rights Project v Nigeria* [2000] AHRLR 227 (ACHPR 1999), at [45], [48]. Rapes and physical searches of refugees by Guinean soldiers after a speech by the President incited them to act against the refugees constituted inhuman treatment: *African Institute for Human Rights and Development (Sierra Leonean refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004), at [57], [62], [72].

asserts a woman's right to dignity and development of her personality.[212] The Protocol upholds the right of elderly,[213] disabled[214] and imprisoned pregnant or nursing women[215] to be treated with dignity.

Dignity in the Arab Charter on Human Rights of 2004 has a religious basis.[216] Article 3 affirms the equality of men and women within a religious framework.[217] In Article 17 there is protection for the dignity of children embroiled in the criminal legal process. States are obliged to take "measures to guarantee the protection, survival, development and well-being of the child in an atmosphere of freedom and dignity."[218] People deprived of their liberty should "be treated with humanity and with respect for the inherent dignity of the human person."[219] States are tasked with safeguarding the dignity, self-reliance and social participation of the disabled.[220]

2.2.1.7 National Constitutions

It is interesting to note that countries where there has been wholesale abuse of people have protected human dignity in post-atrocity laws.[221] These include Germany and South Africa. Germany's Basic Law adopted in 1949 gave dignity the most predominant place.[222] Article 1 is

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[212] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 13 September 2000, entered into force 25 November 2005) CAB/LEG/66.6; reprinted in 1 *Afr Hum Rts LJ* 40:

> 1. Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights;
> 2. Every woman shall have the right to respect as a person and to the free development of her personality.

[213] *Ibid* Art 22(b).

[214] *Ibid* Art 23(b).

[215] *Ibid* Art 24(b).

[216] League of Arab States, Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) reprinted in (2005) 12 IHRR 893, Preamble, first para:

> Based on the faith of the Arab nation in the dignity of the human person whom God has exalted ever since the beginning of creation and in the fact that the Arab homeland is the cradle of religions and civilizations whose lofty human values affirm the human right to a decent life based on freedom, justice and equality.

[217] *Ibid* Art 3.3: "Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments."
See Javaid Rehman, *International Human Rights Law* (2nd edn Longman, Harlow 2010), at 380.

[218] Arab Charter on Human Rights (n216) Art 33.3.

[219] *Ibid* Art 20.1.

[220] *Ibid* Art 40.1. Unjustified segregation of the mentally retarded is discrimination: *Olmstead v LC* 527 US 581 (1999). On *Olmstead*, see Sylvia B Caley and Steven D Caley, "The *Olmstead* Decision: The Road to Dignity and Freedom" (2010) 26 *Ga St UL Rev* 651, at 654-662.

[221] See Henk Botha, "Human Dignity in Comparative Perspective" (2009) 20 *Stellenbosch L Rev* 171, at 175-177.

[222] McCrudden (n9), at 665; Basic Law for the Federal Republic of Germany 1949. On dignity in German

devoted to the protection of human dignity, which is the foundation for directly enforceable human rights.[223] The foundational values in the South African Constitution are dignity, equality and freedom;[224] it also recognises dignity as a self-standing right.[225] Israel is another country that has highlighted human dignity in its basic laws.[226]

Christopher McCrudden points out that the incorporation of dignity into national constitutions in Europe was popular in the 1970s following the collapse of dictatorships in Greece, Spain and Portugal, and in the 1990s after the fall of the Berlin Wall, which signalled the turn to democracy in Central and Eastern Europe.[227] The German Constitution and its interpretation by the German Constitutional Court was influential, not just in Europe, but also in South Africa and Israel.[228]

There are significant differences in the use of dignity in the various texts reflecting cultural relativism and pluralism.[229] According to McCrudden, some countries, particularly those with Catholic or Islamic outlooks, "use dignity as the basis for (or another way of expressing) a comprehensive moral viewpoint, 'a whole moral world view', which seems distinctly different from region to region."[230] He instances Ireland's 1937 Constitution and Arab human rights texts as examples of this trend.

2.2.2 Sources

Dignity was a right of personality and status in legal systems based on Roman law.[231] Many European jurisdictions have had a long-standing right to personality, which has a community

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constitutional law, see Botha (n221), at 178-196.

[223] It reads:

> (1) The dignity of man inviolable. To respect and protect it is the duty of all state authority.
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
> (3) The following basic rights bind the legislature, the executive and the judiciary as directly enforceable law.

[224] Constitution of the Republic of South Africa 1996, Section 1(a).

[225] *Ibid* Section 10.

[226] Israel - Basic Law: Human Dignity and Liberty 1992 (amended 1994), Sections 1a, 2 and 4; Basic Law: Government 2001, Section 39(d).

[227] McCrudden (n9), at 673.

[228] *Ibid*.

[229] *Ibid*.

[230] *Ibid*, at 675. Dignity does not provide an agreed content to human rights. McCrudden considers that it has a more limited institutional benefit in "providing a language in which judges can appear to justify how they deal with issues such as the weight of rights, the domestication and contextualization of rights, and the generation of new or more extensive rights": *ibid*, at 724.

[231] *Ibid*, at 657.

aspect and is not solely concerned with autonomy and the right to self-determination. It acknowledges the person as a social being, who communicates and interacts with other members of society. The moral integrity of the individual is recognised, as is the need of security for each person's own ethical standards. The dignity of everyone in the community is protected. The aim is harmony between society and the individual's expression of his or her unique personality in accordance with their own priorities without the imposition of uniform standards in deeply personal issues.

In Germany and France, rights of personality are protected. James Whitman has tracked their origin in Germany to the Roman law concept of insult, which in ancient Rome protected certain damage to possessions, and evolved to protect against public insult.[232] It was based on honour and matured to safeguard non-economic interests and various kinds of disrespect.[233] Whitman points out that the dignity of the "*ancien régime*" was not *human* dignity, but was "intended to guarantee that high-status persons would be treated better than low-status persons".[234] In 20th century Continental Europe, "human dignity" in a reaction against the *status quo* was extended by a pattern of levelling up to all sectors of the population.[235] South Africa, with a Roman-Dutch basis for its law, recognised a tort of injury to dignity. Infringement of a person's *dignitas* constituted a delict and compensation could be claimed with the *actio iniuriarum*, which applied between private individuals and did not lie against the state.[236] Mokgoro J explained it in *Dikoko v Mokhatla*:

> The law of defamation is based on the *actio injuriarum*, a flexible Roman law remedy which afforded the right to claim damages to a person whose personality rights had been impaired by another. The action is designed to afford personal satisfaction for an impairment of a personality right and became a general remedy for any vexatious violation of a person's right to his dignity and reputation.[237]

The South African constitutional concept of dignity is much broader than the pre-existing personality right. Nelson Mandela in his speech in Trafalgar Square in 2005 viewed

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[232] James Q Whitman, "The Two Western Cultures of Privacy: Dignity versus Liberty" (2004) 113 *Yale LJ* 1151, at 1183.
[233] *Ibid*, at 1184.
[234] James Q Whitman, "Human Dignity in Europe and the United States: The Social Foundations" (2004) 25 *HRLJ* 17, at 17.
[235] *Ibid*, at 18.
[236] Irma J Kroeze, "Human Dignity in Constitutional Law in South Africa" in European Commission for Democracy Through Law, *The Principle of Respect for Human Dignity* (Proceedings of the UniDem Seminar, Montpellier, 2 – 6 July 1998) http://www.venice.coe.int/docs/1998/CDL-STD(1998)026-e.asp (visited 23 November 2009).
[237] 2006 (6) SA 235 (CC), at [62].

overcoming poverty as an act of justice rather than charity; it protected fundamental human rights, the right to dignity and a decent life.[238]

Many states worldwide with different value systems, cultures and legal backgrounds have given prominence to dignity in their constitutions or case law. Its ambit stretches across continents to countries such as India,[239] where dignity is mentioned in the Preamble to its Constitution (similar to Ireland), Japan,[240] Hong Kong[241] and Malaysia[242] in Asia, to Peru[243] and Argentina[244] in South America, to Poland,[245] Macedonia[246] and Hungary[247] in Eastern Europe, and to Belgium[248] and Portugal[249] in Western Europe.

2.2.3 Roles and impact

Dignity is not merely an ethical cornerstone of the international legal order, but its use in multiple international instruments has led to it becoming a substantive guarantee in its own right to-day assuring respect for each individual and giving protection against humiliating and degrading treatment.[250]

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[238] McCrudden (n9), at 663.
[239] Constitution of India 1950.
[240] Constitution of Japan 1946.
[241] Hong Kong Bill of Rights Ordinance 1991.
[242] The High Court of Malaysia has held "it is the fundamental right of every person within the shores of Malaysia to live with common human dignity": Erin Daly, "Constitutional Dignity: Lessons from Home and Abroad" Widener Law School Legal Studies Research Paper Series no 08-07 http://ssrn.com/abstract=991608 (visited 16 January 2009), citing *Kanawagi A/l Seperumaniam v Dato' Abdul Hamid Bin Mohamad* [2004] 5 MLJ 495, 506 (High Court Malaysia - Kuala Lumpur) (Fiaza Tamby Chik J).
[243] Constitution of Peru 1993.
[244] The Argentine Supreme Court has held that "the right of reply is a natural fundamental right that is essential to the legitimate defense of one's dignity, honor and privacy": Daly (n242), citing Corte Suprema de Justicia [CSJN] [Supreme Court of Justice], 7/7/1992 *Ekmedjian v Sofovich* Fallos (1992-315-1492) (Arg), *reprinted in* Angel R Oquendo, *Latin American Law* (Foundation Press, New York 2006) at 245.
[245] Constitution of the Republic of Poland 1997.
[246] Constitution of the Republic of Macedonia 1991.
[247] Constitution of the Republic of Hungary 1949, as amended.
[248] Constitution of Belgium 1970, as amended.
[249] Constitution of the Portuguese Republic 1976.
[250] Niels Petersen, "Human Dignity, International Protection" in Rüdiger Wolfrum ed, *The Max Planck Encyclopedia of Public International Law* (online edn OUP 2008), at 10. http://www.mpepil.com (visited 10 October 2008). The Ugandan High Court held the state vicariously liable and made an award of damages against it for the humiliating and degrading actions of the police in sexually harassing a woman, contrary to the constitutional provision requiring respect for human dignity and protection from inhuman treatment: *Mukasa v AG* [2008] AHRLR 248 (UgHC 2008), at [41], [43], citing Constitution of the Republic of Uganda 1995, Article 24.

Human dignity has a variety of roles in law. It can be a value, a principle or a right. Gay Moon and Robin Allen explain:

> The appeal to respect for human dignity can be made to assert a value that ought to be shared by all; to invoke a principle to stand alongside other fundamental principles (including in particular the principle of equal treatment) to help determine how that other principle should be applied; and to claim a remedy for the violation of a self-standing right.[251]

Sometimes it can be a fundamental value, being the bedrock of a constitution. Dignity has featured in jurisprudence in its various guises and has been interpreted by the courts in different ways. Frequently this has caused confusion, as the judges have not made clear the context in which it is being used and how the concept works.[252]

Some commentators have been enthusiastic supporters of the use of dignity in law, while others have been less enamoured with it or have criticised it as a vague concept which has detracted from other legal principles or values.[253] It has played a growingly significant role in Canadian jurisprudence, particularly in the area of equality law; however, it has drawn adverse reaction from some quarters.[254]

There is no reference to dignity in the US Constitution, but it has related concepts including a ban on cruel and unusual punishment and a due process clause.[255] The US Supreme Court has invoked the concept of dignity sporadically. Vicki Jackson sees scope for its development:

> Although some members of the U.S. Supreme Court in the postwar period have embraced dignity as a motivating principle for the U.S. Bill of Rights, the role of the concept of "human dignity" in the Court's jurisprudence is

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[251] Moon and Allen (n160), at 615.

[252] *Ibid*; Rory O'Connell, "The Role of Dignity in Equality Law: Lessons from Canada and South Africa" (2008) 6 *ICON* 267, at 284.

[253] Supporters include Evadné Grant, "Dignity and Equality" (2007) 7 *HRL Rev* 299; Maxine D Goodman, "Human Dignity in Supreme Court Constitutional Jurisprudence" (2006) 84 *Neb L Rev* 740. For criticisms, see Andrew Foster, "The Role of Dignity in Canadian and South African Gender Equality Jurisprudence" (2008) 17 *Dalhousie J Legal Stud* 73; R James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007) 70 *Sask L Rev* 1. The strengths and weaknesses of using dignity are pointed out by David Feldman, "Human Dignity as a Legal Value" Part 1 *PL* [1999] 682, Part 2 *PL* [2000] 61; Tarunabh Khaitan, "Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea" (2012) 32 *OJLS* 1.

[254] Moon and Allen said that some Canadian jurists regard the dignity discourse as unhelpful, and, even detrimental, in the development of human rights (in Canada principally concerned with equality rights): Moon and Allen, (n160), at 617.

[255] Vicki C Jackson, "Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse" (2004) 65 *Mont L Rev* 15, at 16.

episodic and underdeveloped.[256]

She explains that the difference between the European notion of human dignity and that prevailing in much of the US is due partly to "the interactions among newer and older legal ideas and the varying capacities of existing legal systems to assimilate newer legal norms to existing traditions."[257]

The concept of dignity played an important role in the US Supreme Court decision in *Lawrence v Texas* holding that the state ban on sodomy violated the Due Process clause.[258] Delivering the Opinion of the Court, Justice Kennedy considered that the State should not interfere in private relationships and that adults' liberty to choose did not detract from their dignity.[259] He referred back to the Court's decision in *Planned Parenthood of Southeastern Pa v Casey* to explain the respect the Constitution demands for liberty in making personal choices.[260]

US jurisprudence has primarily emphasised the importance of privacy. This is compatible with the ethos in a nation where the liberty of the individual is supreme and there is abhorrence of government interference. Individual states have references to dignity in their constitutions. Montana is unique among the states in the US in having an explicit and wide guarantee of individual dignity in its 1972 Constitution.[261] Section 4 in its Declaration of Rights is devoted to

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[256] *Ibid*, at 17 (footnotes omitted).

[257] *Ibid*, at 20.

[258] 539 US 558 (2003); Jackson (n255), at fn 9.

[259] 539 US 558 (2003), at 567:

> The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
>
> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

[260] 539 US 558 (2003), at 574, citing *Planned Parenthood of Southeastern Pa v Casey* 505 US 833 (1992), at 851:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

[261] Jackson (n255), at 21.

individual dignity.[262] Montana was inspired to focus on dignity in its Constitution by the Puerto Rican Constitution adopted in 1951 and which, in turn, had been influenced by the UDHR.[263] The Constitutions of Illinois and Louisiana, adopted in 1970 and 1974 respectively, refer to dignity, but not as comprehensively as that of Montana.[264]

The dignity clause may have played a role in the occasional assertions by the Montana Supreme Court that the state constitution provides different more expansive rights than in the federal Constitution.[265] In *Armstrong v State* the court held that a legislative ban on certified physician assistants from performing abortions violated the right to privacy and invoked the dignity clause to support its conclusions.[266] As Jackson says, the court appeared to attribute both some independent value to the "dignity" clause and a coherent connectedness between the right to dignity and other rights.[267]

The dignity clause in the Puerto Rican Constitution has been significant in the case law of its Supreme Court, which has asserted that the inviolability of human dignity is the foundational concept at the base of the Commonwealth's commitments to democracy and human rights.[268] In contrast to other states where the legislature led the way in introducing no-fault divorce,

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[262] Constitution of Montana 1972, Art II Section 4:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

[263] Jackson (n255), at 22-25.

[264] *Ibid*, at fn 21. On dignity in the Constitution of Illinois, see Elmer Gertz, "Hortatory Language in the Preamble and Bill of Rights of the 1970 Constitution" (1973) 6 *John Marshall J Prac & Proc* 217, at 227-231, 234.

[265] Jackson (n255), at 29.

[266] 1999 MT 261, 296 Mont 361, 989 P2d 364; Jackson (n255), at 30. The European Court of Human Rights found that Ireland had a positive obligation to secure to a pregnant woman whose life was at risk effective respect for her private life by legislation or the provision of a regulatory regime giving an accessible and effective procedure by which she could establish whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3° of the Constitution: *A v Ireland* (App no 25579/05) (2011) 53 EHRR 13, at [267]. For reviews of the *A* case, see Sanjivi Krishnan, "What's the Consensus? The Grand Chamber's Decision on Abortion in *A, B and C v Ireland*" [2011] *EHRLR* 200; Joyce Mortimer, "Failing to Legislate for Lawful Abortion—The Impact of *C*" (2011) 105(2) *GLSI* 16; Elizabeth Wicks, "*A, B, C v Ireland*: Abortion Law under the European Convention on Human Rights" (2011) 11 *HRL Rev* 556.

[267] Jackson (n255), at 30, citing *Armstrong*, at [72]:

> Respect for the dignity of each individual—a fundamental right, protected by Article II Section 4 of the Montana Constitution—demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic value of life in general, answering to their own consciences and convictions. Equal protection ... requires that people have an equal right to form and to follow their own values in profoundly spiritual matters. ... Finally the right of individual privacy ... requires the government to leave us alone in all these most personal and private matters.

[268] *Ibid*, at 33.

the abandonment of the fault system came through the Supreme Court in Puerto Rico in *Figueroa Ferrer v Commonwealth* where it held that the requirement for fault to obtain a divorce violated Puerto Rico's constitution; the court criticised the fault regime in divorce for requiring married couples either to mislead the court or to surrender aspects of their private lives to public scrutiny.[269] The constitutional principles of dignity and privacy "are based on principles which aspire to universality," and "protect ... dignity and private life in divorce proceedings through the expression of the mutual decision to obtain a divorce."[270]

In the US, priority is given to individual rights in contrast to the socialist outlook in the continental European tradition, where dignity is central to the common good as well as being an attribute of the individual. Glendon has called for a return to the founding values of the US with more emphasis on responsibility and sociality.[271] She criticised the legal fraternity's emphasis on achieving individual civil rights and the heavy stress in American legal education on the distinction between law and morality.[272] The rights culture had jettisoned the values of dignity and freedom and embraced instead the fulfilment of "insistent unending desires".[273] The balance should be redressed by focusing on duties and the individual's responsibility towards the community.

Neomi Rao supports the precedence given in the US to the enforcement of individual rights over community interests.[274] She is a critic of the European use of dignity to promote socialist ideologies at the expense of the freedom of the individual.[275] Rao accepts that she is out of touch with the times in not endorsing human dignity as a constitutional value.[276] For her, dignity is a noble-sounding abstraction, which some see as providing "an irreducible minimum of recognition for all individuals."[277] She denounces the proportionality review in modern constitutionalism as diluting rights and trading them off against other political and social needs.[278] While the US Supreme Court balances rights, it does so infrequently, and gives more

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[269] 107 PR Dec (1978); Jackson (n255), at 34, fn 71. Most couples obtained divorce by mutual consent, but through a judicial charade: *ibid*, at 34.
[270] Jackson (n255), at 34, citing *Figueroa Ferrer* 107 PR Dec (1978), at 301.
[271] Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, New York 1991), at 143.
[272] *Ibid*, at 85.
[273] *Ibid*, at 171.
[274] Neomi Rao, "On the Use and Abuse of Dignity in Constitutional Law" (2008) 14 *Colum J Eur L* 201, at 256.
[275] *Ibid*, at 221-222, 255.
[276] *Ibid*, at 255.
[277] *Ibid*.
[278] *Ibid*, at 256.

scope for argument about individual rights.[279] She advocates a new take on dignity based on the American Constitution and legal traditions, which would emphasise individual liberty and self-determination rather than the newer communitarian view found elsewhere.[280]

Mahatma Gandhi, who comported himself in a highly dignified manner, articulated a non-Western philosophy and promoted the community aspect of living rather than individual rights.[281] He advocated *dharma*, which is based on duty arising out of communal responsibility.[282]

The Universal Declaration of Human Responsibilities adopted by the InterAction Council of former world leaders in 1997 affirmed human dignity and equality as the basis of freedom, justice and peace in the world.[283] This assertion implies obligations. All people have the responsibility to strive for the human dignity and self-esteem of others.[284]

African culture is less individualistic and the common good has been emphasised more. The African concept of *ubuntu* marries the individual and the community. It binds the interests of the individual with those of the society within which the individual lives. While the dignity of the individual is recognised, the common good is the primary target. It may be that this was essential in order to ensure survival in a difficult natural environment and in an even more challenging social and political arena when the European settlers arrived. Social solidarity has been the principal aim of traditional communities. *Ubuntu* recognises the dignity of the individual in the context of the common good. The idea is that it is in the interests of each individual to look after their neighbours and to work for the welfare of other members of the community. A giver can turn into a beneficiary if circumstances change. It has resonances of the Christian ethos of doing unto others as you would want done unto you.

Dignity played a primary role in the South African case *Makwanyane* where the death penalty

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[279] *Ibid*.
[280] *Ibid*.
[281] Nazeem MI Goolam, "Human Dignity - Our Supreme Constitutional Value" (2001) 4 *Potchefstroom Elec LJ* 1, at 5 http://www.heinonline.org.elib.tcd.ie/HOL/Page?handle=hein.journals/per2001&div=4&collection=journals&set_as_cursor=0&men_tab=srchresults (visited 12 November 2009).
[282] *Ibid*.
[283] Universal Declaration of Human Responsibilities (adopted 1 September 1997) Inter-Action Council, preamble.
[284] *Ibid* art 2.

was held to be unconstitutional.[285] Langa J considered that *ubuntu* was relevant and brought out its community aspect with mutual duties in addition to respect for the individual's dignity.[286] The element of reciprocal love in *ubuntu* was significant for Mahomed J.[287] Mokgoro J linked dignity with *ubuntu* while highlighting group co-existence in harmony.[288]

Other African countries also place a value in their constitutions and jurisprudence on the dignity of the individual. Zimbabwe invoked the concept of dignity when it too declared the death penalty unconstitutional.[289] In *Jumbe v AG* the High Court of Malawi struck down legislation reversing the onus of proof in corruption charges, as it breached the constitutional right to a fair trial, which included the presumption of innocence and the right to silence, and was not justified under the limitation clause in the Constitution; Katsala J invoked democratic

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[285] *S v Makwanyane* 1995 (6) BCLR 665 (CC); McCrudden (n9), at 688.

[286] 1995 (6) BCLR 665 (CC), at [224]:

> The concept [*ubuntu*] is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

For a critique of the explanations the Constitutional Court gave for thinking that an *ubuntu* ethic entailed that the death penalty was an unconstitutional violation of human dignity, see Metz (n13), at 85-91.

[287] 1995 (6) BCLR 665 (CC), at [263]:

> "The need for *ubuntu*" [in the postamble to the Constitution] expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.

[288] *Ibid*, at [308]:

> 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 respect for human dignity, marking a shift from confrontation to conciliation.

[289] *Catholic Commission for Justice and Peace in Zimbabwe v AG* [1993] 2 LRC 279 (SC of Zimbabwe), at [23], [37], [49], [87], [122]. The prolonged delays in executing the death penalty and the harsh incarceration conditions were held to be serious enough to amount to inhuman treatment contrary to Section 15(1) of the Constitution of the Republic of Zimbabwe 1979: *ibid*, at [120]. The legislature responded by amending the Constitution to provide that delay in executing the death sentence would not contravene that subsection: Constitution of Zimbabwe Amendment (No 13) Act 1993, section 2. See Anthony R Gubbay, "The Protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience" (1997) 19 *Hum Rts Q* 227, at 232, 240-242; Joan Small and Evadné Grant, "Dignity, Discrimination, and Context: New Directions in South African and Canadian Human Rights Law" (2005) 6(2) *Human Rights Rev* 25, at fn 70.

principles when he stressed that the accused should be treated with dignity as fellow human beings, notwithstanding the odious and contemptible nature of corruption.[290]

While accepting that there are different philosophies of life and various cultures throughout the world, it is worthwhile striving to find common ground for co-existence, where the interests of the community, states and international world order will be protected while respecting the dignity of the individual. Chandra Muzaffar asks that our rights and responsibilities be guided by universal moral and spiritual values.[291] He sees human dignity as the common starting point.[292]

Jack Donnelly pointed out the historical difference between the Western alliance of human dignity and human rights, on the one hand, and the traditional place of human dignity in non-Western societies, on the other.[293] Islamic, African, Chinese and Indian societies have valued dignity, but have not historically embraced universal human rights. Instead these societies have given precedence to the common good. He considers that in an era when there is a focus on the individual, universal human rights are appropriate for all societies. Independent evidence for this trend can be gauged from the fact that international gatherings have endorsed human rights and, indeed, have selected human dignity as a, if not the, foundational

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[290] [2005] MWHC 15, at 47:

> Admittedly corruption is bad. It is evil and it has to be rooted out of our society. It is counter productive and it seriously retards development. Those that engage in corruption in a way violate the citizens' right to development as enshrined in section 30 of the Constitution. They, among other things, divert for their own use public resources thereby depriving the general public the benefit from such resources. Such people are selfish and greedy at the expense of everyone else. Surely, if caught, they must be dealt with firmly.
>
> However, inasmuch as we may harbour hatred for such people, we can only show and prove to the whole world and indeed to ourselves that we are an open and democratic society and that we cherish and promote the values that underlie such a society if we treat those we suspect of committing heinous crimes with dignity as fellow human beings and afford them all the protection that accused persons enjoy under the Constitution. I do not see any justification for limiting their right to be presumed innocent bearing in mind that they are mere suspects and have not been convicted of the alleged crimes.

[291] Chandra Muzaffar, "From Human Rights to Human Dignity" (1995) 29(4) *Bulletin of Concerned Asian Scholars* 6, at 8.

[292] *Ibid*: "The great challenge before us is to develop this vision of human dignity culled from our religious and spiritual philosophies into a comprehensive charter of values and principles, responsibilities and rights, and roles and relationships acceptable to human beings everywhere." See also Chandra Muzaffar, *Rights, Religion and Reform: Enhancing Human Dignity through Spiritual and Moral Transformation* (RoutledgeCurzon, London 2002), at 34-35.

[293] Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" (1982) 76 *APSR* 303, at 303. See also William Binchy, "The Role of Comparative and Public International Law in Domestic Legal Systems" (2010) 23(3) *Advocate (South Africa)* 58, at 61.

value grounding human rights.[294]

In contrast to Donnelly's focus on individual rights at the expense of social justice, Guy Haarscher looks at the relationships between each individual and society.[295] The dignity of each member should be considered and the norm should be respect for the other.[296]

In the final debate in the UN General Assembly on the UDHR in 1949, the Indian delegate's view was that the basis of rights is neither the state nor the individual human being, but the human person participating in social life and working towards national and international cooperation.[297] The emphasis is on the individual in society rather than on the individual *per se* or the state.

Dignity as a value can be an excellent interpretative guide to constitutions. In some, it is the primary value overtly expressed or the judiciary has identified it as such. In other states, it is one of the basic values and takes its place on an equal footing with values such as freedom and equality.

2.2.4 Association with other rights

2.2.4.1 Equality

The dignity of the individual is inextricably linked with equality. Because each person has inherent worth, all are regarded as equal. Therefore it is not a surprise to find that dignity and equality are closely associated. According to Jo Pasqualucci, the Inter-American Court of Human Rights relies on natural law to hold that equality arises directly from the unity of the human family and is inextricably linked to the dignity of the individual.[298] The Court explained that the principle of non-discrimination

> cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally

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[294] Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn Cornell University Press, Ithaca 2003), at 41.

[295] Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (CUP, Cambridge 2006), at 236.

[296] *Ibid.*

[297] UN Secretariat, *Our Rights as Human Beings: A Discussion Guide on the Universal Declaration of Human Rights* (UN, New York 1949), at 24.

[298] Jo M Pasqualucci, "The Evolution of International Indigenous Rights in the Inter-American Human Rights System" (2006) 6 *HRL Rev* 281, at 286, citing OC-4/1984, *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica* IACtHR Series A 4 (1984) at [55].

> irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.[299]

In South Africa dignity is the springboard for substantive equality. Sachs J explained the effect of a dignity analysis in *National Coalition for Gay and Lesbian Equality v Minister of Justice* (*Sodomy* case):

> The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality.[300]

The treatment of some groups in society as inferior to others is prohibited as being contrary to the equality of all human beings. In the *Sodomy* case, where legislation criminalising sexual intimacy between gay men was found unconstitutional, Sachs J condemned as inequality the criminalisation of people because of their humanity.[301] The South African judiciary does not have unfettered discretion to find a lack of equality based on the judges' own views, but has a structured method for assessing the merits and legal import of each situation.

Moon and Allen promote dignity as an element that can help achieve substantive equality.[302] They consider that the Aristotelian concept of equality is insufficient to address historical disadvantage.[303] Dignity attacks discrimination based on class or social status.[304] The use of

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[299] *Ibid*.

[300] 1998 (12) BCLR 1517 (CC), at [126].

[301] *Ibid*, at [129]:

> At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. The indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream; they may also be derived from the location of difference as a problematic form of deviance in the disadvantaged group itself, as happens in the case of the disabled. In the case of gays it comes from compulsion to deny a closely held personal characteristic. To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality.

[302] Moon and Allen (n160), at 645:

> [R]espect for human dignity operates in a number of important ways in giving greater meaning to the desire to secure equality. As a cornerstone of human rights, it requires that individuals be respected for their innate humanity, and that they should not be used as objects, as means to an end, but as ends in themselves. This imperative has very important consequences for enriching the equality discourse. In particular it counters stigma, stereotyping, prejudice and the exclusion from benefits or opportunities which are some of the minimum conditions for a life with dignity.

[303] *Ibid*, at 643.

[304] *Ibid*.

dignity by the judiciary as an aid to achieve equality can entrench social solidarity.[305]

Dignity requires that people be treated well, whereas equality simply puts all in the same (not necessarily good) position. In this context dignity is a contested concept. For some, as in South Africa, it is a powerful basis for substantive equality. But for others, as for a coterie in Canada, it can limit the range of anti-discrimination laws.[306]

2.2.4.2 Freedom and security

In legal terms dignity has been important frequently in trying to ensure that no-one suffers indignity at the hand of the state. It protects personal safety and demands humane treatment. Hence there is a clear ban on torture and on cruel treatment even of those who have violated others. Accused people and convicted prisoners are entitled to be treated with dignity. In South Africa prisoners established the right to vote while incarcerated in *August v Electoral Commission*, where Sachs J described the vote as "a badge of dignity and of personhood", signifying "everybody counts".[307]

The imprisonment of judgment debtors in South Africa without a criminal trial was found to be an infringement of their constitutional rights to freedom and security.[308] The court invoked the constitutional right to dignity as an interpretative aid. While the goal of the legislation to provide a mechanism for the enforcement of judgment debts was a legitimate and reasonable government objective, the means were not justified since it resulted in the unjustifiable imprisonment of those who were impecunious and could not pay, as well as those who had sufficient resources but refused to discharge their legal obligations.

Those involved in armed conflict have the right not to be tortured and must be dealt with in a decent fashion.

2.2.4.3 Fair trial

The right to a fair trial is based on the dignity of the person. The elements of rationality and free will in dignity have led to a ban on serious criminal responsibility without *mens rea*. It

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[305] *Ibid*, at 649.

[306] Andrew Foster analysed the focus on dignity to define equality in Canada and South Africa and concluded, "the use of dignity as a normative standard for determining violations of equality has itself reinforced the formalism it was intended to overcome": Foster (n253), at 74.

[307] 1999 (3) SA 1 (CC), at [17].

[308] *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631.

offends the inner worth of the individual to impose guilt in the absence of intention to commit a crime or knowledge of the transgression. Hardiman J quoted from Canadian jurisprudence in *CC v Ireland*, when the Supreme Court found unconstitutional legislation criminalising sexual relations with a girl under 15 years because it exposed a person without mental guilt to a maximum sentence of life imprisonment and failed to respect the accused's liberty and dignity.[309]

Respect for dignity, in particular the freedom and security of the person, has resulted in an amelioration of harsh or precipitative civil procedures for collection of debts. The defaulting debtor is entitled to a fair hearing with advance notice of the possibility of punitive measures being imposed.[310] As support for her decision to this effect in *McCann v Judge of Monaghan District Court*, Laffoy J referred to *Coetzee* as finding:

> ... the sanction of imprisonment is ostensibly aimed at the debtor who will not pay, but it also strikes at those who cannot pay and simply fail to prove this at the hearing due to negative circumstances created by the provisions themselves.[311]

The dignity of those accused of war crimes must be respected, as Sachs J made clear in *S v Basson*.[312]

2.2.4.4 Privacy and autonomy

Dignity has been inextricably linked with the rights to privacy and autonomy. The Victorian Law Reform Commission in Australia's research into workplace privacy revealed a social aspect

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[309] [2006] IESC 33, [2006] 4 IR 1, at [21]:

> Wilson J [in *R v Hess; R v Nguyen* [1990] 2 SCR 906] went on to review the academic authorities. She concluded:-
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> > "Our commitment to the principle that those who did not intend to commit harm and who took all reasonable precautions to ensure that they did not commit an offence should not be imprisoned stems from an acute awareness that to imprison a mentally innocent person is to inflict a grave injury on that person's dignity and sense of worth. Where that person's beliefs and his actions leading up to the commission of the prohibited act are treated as completely irrelevant in the face of the state's pronouncement that he must automatically be incarcerated for having done the prohibited act, that person is treated as little more than a means to an end."

[310] *McCann v Judge of Monaghan District Court* [2009] IEHC 276.

[311] *Ibid*, citing *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), at [13].

[312] 2005 (1) SA 171 (CC), at [126]:

> The effective prosecution of war crimes and the rights of the accused to a fair trial are not antagonistic concepts. On the contrary, both stem from the same constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom.

to the intermingling of these three elements.[313] Privacy can have connotations of territory, confidentiality or the freedom to make intimate personal decisions. The inherent worth of the individual demands that each person be allowed to exercise free will responsibly; every individual must be given the space to choose the course of action which makes life meaningful for him or her. This may not coincide with what the majority considers correct behaviour. Respect for dignity usually requires that society support them in their decision. Tolerance is not enough, but a more active level of endorsement is required.

The right to self-determination is limited by the bounds of dignity. A person is not permitted to violate their own dignity. In France a man of low stature claimed that he wished to earn a livelihood by taking part in dwarf-throwing competitions, which were banned. His challenge to this law failed. The UN Human Rights Committee accepted the State's argument that dwarf-throwing was an affront to dignity, which threatened public order; France had authority to ban dwarf-throwing to prevent public disorder. The claimant's right to self-determination did not prevail.[314]

In common law systems privacy first became established as a central legal value in the US and had its origins in 1880 when Thomas Cooley argued that there was a "right to be let alone".[315] The earliest manifestation of dignity in the autonomy context was in allowing the fulfilment of decisions about procreation and in allowing access to contraceptives. A constitutional right to privacy was established by the US Supreme Court in *Griswold v Connecticut* when it struck down a state statute which made it an offence for married couples to use contraceptives.[316] Famously, in *Roe v Wade* the right to privacy protected women's autonomy in respect of their

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[313] Victorian Law Reform Commission, "Workplace Privacy: Issues Paper" (2002), at [2.38]:

> Privacy always includes and refers to autonomy and dignity. This means that the protection of privacy will always encompass the following rights:
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> - not to be turned into an object or thing, that is, not to be treated as anything other than an autonomous human being; and
> - not to be deprived of the capacity to form and develop relationships.
>
> This right of privacy is aimed not just at the protection of the individual's privacy, but at protecting privacy as a social value.

On privacy as a social value, see Hilary Delany, Eoin Carolan and Cliodhna Murphy, *The Right to Privacy: A Doctrinal and Comparative Analysis* (Thomson Round Hall, Dublin 2008), at 18-20.

[314] *Wackenheim v France* UN Human Rights Committee (26 July 2002) 75th Session UN Doc CCPR/C/75/D/854/1999. See Rao (n39), at 226-227. France, South Africa and Germany are inclined to separate dignity from autonomy to give the legal conception of dignity an expanded more positive, community-based meaning: *ibid*, at 220.

[315] Thomas McIntyre Cooley, *A Treatise on the Law of Torts* (Callaghan and Co, Chicago 1880), at 29. See David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn OUP, Oxford 2002), at 516.

[316] 381 US 479 (1965).

bodies.[317] The majority of the Supreme Court held that the right was not absolute, so the grounds on which the state was entitled to prevent abortions were restricted.[318]

The dignity of the person has been intertwined with the autonomy of adults in obtaining legal recognition for the right of homosexuals to have sexual relations in private without fear of prosecution and is prominent in their quest to obtain the right to marry same-sex partners. The US Supreme Court resiled from its earlier enthusiasm to protect privacy in *Bowers v Hardwick* when a narrow majority refused to uphold the right of adult homosexuals to engage in consensual sexual relationships.[319] This contrasts with the European Court of Human Rights' decision in *Dudgeon v UK*, where the states were found to have a restricted margin of appreciation in view of the degree of personal intimacy.[320]

The limits to the bounds of privacy when one enters into relationships were explained by Ackermann J in *Bernstein v Bester*:

> A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.[321]

O'Regan J amplified this conception of privacy in referring to our interdependence in society and the supportive role to be played by each other and by the state.[322]

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[317] 410 US 113 (1973).

[318] Feldman (n315), at 519.

[319] 478 US 186 (1986).

[320] (App no 7525/76) (1982) 4 EHRR 149, at [52]:

> [N]ot only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8 (2).

[321] 1996 (2) SA 751 (CC), at [77].

[322] *Ibid*, at [150]:

> In my view, the democratic society contemplated by the Constitution is not one in which freedom would be interpreted as licence, in the sense that any invasion of the capacity of an individual to act is necessarily and inevitably a breach of that person's constitutionally entrenched freedom. Such a conception of freedom fails to recognise that human beings live within a society and are dependent upon one another. The conception of freedom underlying the Constitution must embrace that interdependence without denying the value of individual

Transsexuals also base their claims to legal recognition on privacy and autonomy. In *Goodwin v UK* the European Court of Human Rights found that the UK breached the right to private life by refusing to record Ms Goodwin's altered gender and considered that the margin of appreciation diminished as social attitudes changed over time.[323] Society must be tolerant of different identities.[324]

Dignity is central in decisions on medical treatment and its continuation or withdrawal.[325] The controversial areas of abortion and the right to die raise issues of dignity, privacy and autonomy. *Re Quinlan* in the US established the right to refuse medical treatment.[326] The common law right to informed consent and constitutional privacy right are relevant. *Cruzan v Director, Missouri Department of Health* upheld the state's right to insist on clear evidence of the person's wishes before agreeing to the withdrawal of medical treatment.[327] Justice Brennan, dissenting, prioritised dignity in death.[328]

Jeremy Miller, having reviewed US case law, considered that dignity should replace privacy as the prime constitutional value.[329] The liberty to determine one's path without intrusion by the

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autonomy. It must recognise the important role that the state, and others, will play in seeking to enhance individual autonomy and dignity and the enjoyment of rights and freedoms.

[323] (App no 28957/95) (2002) 35 EHRR 18, at [90]:

> [T]he very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings. In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.

[324] *Ibid*, at [91]:

> No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.

[325] On dignity in the area of bioethics, see Rao (n39), at 232-234.

[326] 355 A.2d 647 (1976) (SC of New Jersey).

[327] 497 US 261 (1990).

[328] "Dying is personal. And it is profound. For many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence.": *ibid*, at II A.

[329] Jeremy M Miller, "Dignity as a New Framework, Replacing the Right to Privacy" (2007) 30 *T Jefferson L Rev* 1, at 50:

> Courts must recognize that privacy is a mere shell of dignity that will continue to be cracked

state creates individuality and promotes dignity in the form of self-respect, self-worth and value.[330] According to Miller, "[p]rivacy can promote crime, but dignity promotes only goodness."[331]

2.2.4.5 Freedom of expression

Communication is an aspect of dignity. Because of this, freedom of expression is an important right. Dickson CJ of the Canadian Supreme Court in *R v Keegstra*, a prosecution for hate speech, considered that freedom of expression was essential in a participative democratic society based on dignity and equality.[332] It often comes into conflict with other values. In *Keegstra* Dickson CJ found that the dignity of the targets of the speech took precedence over free speech.[333]

Guy Carmi has pointed out the difference between the values underlying free speech in the US and other Western democracies. In the US the guiding value is liberty, whereas in Germany and many other Western democracies the value of human dignity is supreme.[334] The characteristics of dignity "include a communitarian approach to human rights, the promotion of positive rights, paternalism, and the protection of audience rights."[335] The use of the proportionality analysis by European courts is another distinguishing feature leading "to speech restrictive results when free speech is balanced with other rights—predominantly human dignity."[336]

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and chipped until it disappears. Dignity, in contrast, will survive because it is intrinsic and fundamental to human beings, the minimization of which is much more suspect than making public one's secret behavior.

[330] *Ibid.*

[331] *Ibid*, at 51.

[332] [1990] 3 SCR 697, at 70:

> Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

[333] *Ibid*, at 72:

> [G]iven the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal ...

[334] Guy E Carmi, "Dignity Versus Liberty: The Two Western Cultures of Free Speech" (2008) 26 *BU Int'l LJ* 277, at 323.

[335] *Ibid*, at 371.

[336] *Ibid*, at 374.

Notwithstanding the emphasis on freedom of expression in the US, even there hate speech has been curtailed.[337] Alexander Tsesis has called for extension of the protection against hate speech to prohibit speech that is not intimidating but which incites an audience to commit discrimination at work or in public places.[338] Tsesis sums up the benefits of this step, "[s]uch an extension of current American jurisprudence would indicate a greater respect for human dignity than for degrading expression."[339] He instances France as a country which has banned hate speech while holding freedom of expression in high regard. There the emphasis is on the promotion of democracy rather than on "the naive libertarian belief" common in the US that "truth will emerge even when inflammatory statements are made about vulnerable groups."[340] Another example is Sweden where the free expression of ideas is regarded as central to a democracy, but the Swedish Supreme Court has restricted free speech on occasion including incitement to hatred against a protected group.[341]

Dignity can be used by both sides in a dispute to promote their own viewpoint.[342] In these types of conflict, the best approach is not to look at a hierarchy of rights to establish precedence, but to have regard to the context in which the conflict arises and to see where the best interests of dignity lie. It is not always a matter of trading one person's dignity off against another's or against the common good. The integrity of the individual has to be made central and respect shown for the core identity of the human personality.

2.2.4.6 Social, economic and cultural rights

Individuals cannot realise their full potential, if they do not have the basic resources to enable them to achieve it and to respect their dignity. Dignity could be the foundation for requiring states to provide social, economic and cultural support to individuals and groups. In an appeal for global assistance to relieve poverty in Africa and the enforcement of socio-economic rights, Nsongurua Udombana described the effect of poverty, "[e]xtreme or abject poverty—the 'poverty that kills'—violates the sacred right to life, and the supreme value of human

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[337] In *Virginia v Black* the Supreme Court held that a state may ban cross burning carried out with the intent to intimidate: 538 US 343 (2003).

[338] Alexander Tsesis, "Dignity and Speech: The Regulation of Hate Speech in a Democracy" (2009) 44 *Wake Forest L Rev* 497, at 532.

[339] *Ibid*.

[340] *Ibid*, at 525.

[341] *Ibid*, at 531. According to Tsesis, "[t]he Court thereby acknowledged that hate speech stifles victims from participating in democracy while it increases bigoted individuals' right to self-determination.": *ibid*.

[342] *Eg*, *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* [2008] ZACC 6, 2008 (5) SA 31 (CC).

dignity."[343]

There is a minimum core of subsistence needed for the realisation of human dignity. There has been criticism from some quarters of this proposition for not going beyond the minimum necessary for survival. McCrudden sees three elements in the minimum core of human dignity: first, the ontological aspect focused inward on the individual; second, the relational perspective looking outwards towards society; and third, the limited-state claim, which is the principle that the state exists for the individual and not *vice versa.*[344] His analysis has not detected any norm in law requiring the provision of more than the minimum needed to preserve dignity.

Oscar Schachter as far back as 1983 evoked Kant in finding that the dignity of the person required at least the recognition of a minimal concept of distributive justice to satisfy the essential needs of everyone.[345] A person cannot foster dignity if in abject poverty. Schachter concedes that the minimum may not be enough.[346]

The right to life has been interpreted as meaning more than simply existence.[347] The Indian Supreme Court has held that the constitutional right to life and personal liberty includes

> the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.[348]

Living clearly extends beyond survival to basic needs and freedom to interact with others.

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[343] Nsongurua J Udombana, "Life, Dignity, and the Pursuit of Happiness: Human Rights and Living Standards in Africa" (2008) 27 *U Tas LR* 47, at 81.

[344] McCrudden (n9), at 679.

[345] Oscar Schachter, "Human Dignity as a Normative Concept" (1983) 77 *AJIL* 848, at 851. As the idea of a just society is connected with the promise of emancipation and human dignity, the norm underlying distributive justice is autonomy: Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, Studies in Contemporary German Social Thought, MIT Press, Cambridge, Mass 1998), at 418.

[346] "Some would probably go beyond this and contend that substantial equality is a necessary condition of respect for the intrinsic worth of the human person. 'Each person is as good as every other' may be inferred as a plausible maxim.": Schachter (n345), at 851.

[347] The African Commission stated that the inviolability of human beings and respect for the life and dignity of the person give a broad interpretation of the right to life, which was not protected by living in a state of constant fear and/or threats: *Aminu v Nigeria* [2000] AHRLR 258 (ACHPR 2000), at [18].

[348] McCrudden (n9), at 693, citing *Mullin v Administrator, Union Territory of Delhi,* AIR 1981 SCR (2) 516, at 518.

The Inter-American Court of Human Rights has stated that the fundamental right to life is broader than freedom from the arbitrary deprivation of life.[349] It includes the right to live a "*vida digna*" or a dignified existence.[350] The Inter-American Court held that the state, pursuant to its duty to guarantee life, has the obligation to generate living conditions that are at least "minimally compatible with the dignity of the human person".[351] The state "has the duty to adopt positive concrete measures oriented to satisfy the right to a '*vida digna*,' especially when dealing with persons in a situation of vulnerability and risk", including indigenous communities.[352]

The issue of housing for destitute people was addressed by the South African Constitutional Court in *Government of the Republic of South Africa v Grootboom* when it found that the State was obliged to devise and implement a programme to progressively realise the right of access to adequate housing and that it must provide for relief to those living in crisis situations.[353] In 1990 the UN Committee on Economic, Social and Cultural Rights monitoring implementation of the ICESCR had found that socio-economic rights contain a minimum core.[354] The Court declined to use this as a yardstick because it did not have enough information to assess what would be the appropriate level in the conditions pertaining in South Africa.[355] It found that the obligation on the State was to have a reasonable programme reasonably implemented and kept under continuous review.[356] The State could not ignore a significant segment of society.[357] Yacoob J adverted to the importance of assessing the situation in the light of the fundamental value of dignity.[358]

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[349] *Indigenous Community of Yakye Axa v Paraguay* Series C 125 [2005] IACHR 6, at [161]. See Pasqualucci (n298), at 310.

[350] Series C 125 [2005] IACHR 6, at [161]-[162], citing *Children's Rehabilitation v Paraguay* Series C 112 [2004] IACHR 8, at [156].

[351] Series C 125 [2005] IACHR 6, at [162]. See Pasqualucci (n298), at 310.

[352] Series C 125 [2005] IACHR 6, at [162]. See Pasqualucci (n298), at 310.

[353] 2001 (1) SA 46.

[354] *Ibid*, at [29].

[355] *Ibid*, at [33].

[356] *Ibid*, at [42]-[43].

[357] *Ibid*, at [43].

[358] *Ibid*, at [83]:

> The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity.

The interaction of constitutional rights and foundational values such as dignity can form the basis of socio-economic and cultural rights. The tension between the judiciary and the other arms of government in an effort to preserve the separation of powers is evident worldwide.[359] Yacoob J in *Grootboom* said the question of how to enforce socio-economic rights was "a very difficult issue which must be carefully explored on a case-by-case basis."[360] Bearing this in mind, Chaskalson CJ (now retired) described the challenge:

> A balance must be struck between the role of the court as interpreter and upholder of the Constitution, and the role of government in a democratic society as policymaker and lawmaker. That is not easily done. Inevitably, claims for the enforcement of socio-economic rights are hard cases. They are hard, not only because they draw courts into policy matters, including possibly the budget itself, but because of the abject living conditions of many people in our country and their legitimate demands that this be addressed now that apartheid is over.[361]

2.2.5 Groups

Dignity applies in relationships and in the wider community. The dignity of groups is protected. It has a collective aspect and seeps into the national psyche and into the international realm.

David Feldman identified three levels on which human dignity operates: "the dignity attaching to the whole human species; the dignity of groups within the human species; and the dignity of individuals."[362] He commented that the second level

> ... excludes discrimination between groups on irrelevant grounds, and allows them to assert rights to exist and to continue their traditions. Rules against genocide, apartheid, and incitement to racial hatred fall in this category, as do arrangements for giving remedies for group libels. Treating a person with respect for their dignity is incompatible with discrimination on grounds which are morally irrelevant, providing a link between the values of dignity and equality.[363]

There are subjective and objective aspects to human dignity. Feldman explains how those who lack individual capacity, such as young children or patients in a persistent vegetative state, can have intrinsic human dignity in an objective sense:

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[359] On the legitimacy of court adjudication, see Habermas (n345), at 279.
[360] 2001 (1) SA 46, at [20].
[361] Arthur Chaskalson, "Dignity and Justice for All" (2009) 24 *Maryland J Intl L* 24, at 32.
[362] Feldman (n315), at 125.
[363] *Ibid*, at 126.

> The subjective aspect is concerned with one's sense of self-worth, which is usually associated with forms of behaviour which communicate that sense to others. The objective aspect is concerned with the state's and other people's attitudes to the individual or group, usually in the light of social norms or expectations. It is in this sense that people who lack the capacity to cultivate the subjective aspect of dignity can nevertheless be said to have a type of dignity which demands respect.[364]

Iacobucci J of the Canadian Supreme Court in *Law v Canada* described human dignity of individuals and groups and how it is harmed by marginalisation.[365]

South Africa goes beyond the mere prohibition of discrimination against members of disadvantaged groups to a more positive recognition of the value of all in society, as expressed by Goldstone J in *President of the Republic of South Africa v Hugo*:

> [T]he purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.[366]

German constitutional law firmly places the individual in the community. Grant's study led to her to the following conclusion:

> The invocation of human dignity thus requires arguments about freedom and autonomy to be considered within the context of the needs of the community as a whole, rather than being concerned with the individual in isolation.[367]

The Federal Constitutional Court envisaged the individual encircled by the community in the *Life Imprisonment* case.[368]

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[364] *Ibid*, at 127.

[365] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, at [53]:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

[366] 1997 (4) SA 1 (CC), at [41].

[367] Grant (n253), at 309.

[368] *Ibid*, citing 45 BVerfGE 187 (1977) (Fed CC of Germany) translated in Kommers, *The Constitutional Jurisprudence of the Federal Republic of* Germany (2nd edn Duke University Press, London 1997), at 307-308:

> The free human person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself.

2.3 Horizontal application

There is much academic debate over whether human rights can be enforced horizontally between private parties or whether the onus is solely on the state to respect and protect human rights. Andrew Clapham considers that it is not possible to confine protection to the public sphere.[369] An individual's dignity should not be violated from any source, whether public or private. Clapham concludes:

> This examination of contemporary applications of the values of dignity and democracy points to their evolving nature and new considerations which demand that human beings can enjoy dignity and democracy even where the threats to these values come from non-state actors.[370]

Prudent judicial intervention is necessary when those in power baulk at protecting dignity because of self-interest or a fear of antagonising a section of the electorate. The judiciary is entrusted with upholding dignity, while not usurping the legislature's role entirely. Clapham has faith in the capacity of the judiciary to do this even when the violator of dignity is from the private sphere.[371] He instances Ireland[372] and South Africa[373] as countries that have applied human rights obligations in the private sector.

Murray Hunt found Kriegler J's approach persuasive in his dissenting judgment in *Du Plessis v De Klerk*,[374] as he focused on fundamental rights as "all pervasive and superior legal norms".[375] Hunt interprets Kriegler J's views as meaning:

> This freedom within the meaning of the Basic Law is not that of an isolated and selfregarding individual, but rather [that] of a person relating to and bound by the community. In the light of this community-boundedness it cannot "in principle be unlimited". The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community's social life; yet the autonomy of the individual has to be protected. This means that [the state] must regard every individual within society with equal worth.

[369] Clapham (n77), at 553.

[370] *Ibid*.

[371] *Ibid*, at 558:

> [W]e have to trust the judges to juggle commitments to dignity and democracy in the context of individual complaints. Where the legislature has failed to address the best way to properly protect either dignity or democracy from assaults by private actors, human rights law may demand judicial intervention. Judges will usually be careful not to cause a constitutional crisis by usurping the legislature. Judges can ... usually find interpretative devices to ensure that the enjoyment of human rights is protected from the actions of non-state actors.

[372] *Ibid*, at 554, fn 74, citing *Rodgers v ITGWU* [1978] ILRM 51, which held that a trade union cannot deny a right to disassociate and must comply with fair procedures.

[373] *Ibid*, at 555-558, citing *Christian Education South Africa v Minister for Education* 2000 (10) BCLR 1051 (CC), where the issue was essentially the human rights of children versus the human rights of parents.

[374] 1996 (3) SA 850 (CC), at [135].

[375] Murray Hunt, "The 'Horizontal Effect' of the Human Rights Act" [1998] *PL* 423, at 434.

> [P]rivate relationships are left undisturbed insofar as they are not regulated by law, but once law becomes involved in regulating those relationships, they have lost their truly private nature and the State, as the maker, the administrator, the interpreter and the applier of the law which governs those relationships, is bound to act in all those roles in a way which upholds and protects the rights made fundamental by the Constitution.[376]

Kriegler J explained graphically the impact of the fundamental rights in Chapter 3 of the interim Constitution[377] on private relationships and on the State.[378]

Hunt favours the Irish *sui generis* constitutional tort over the restrictive American approach:

> In marked contrast to the American requirement of "state action", the Irish constitutional jurisprudence allows individuals to sue other private parties by directly invoking their constitutional rights as the source of their claim.[379]

William Wade also supports the Irish approach:

> Since human rights are general principles of justice, of the kind enshrined and entrenched in written constitutions, they have a universal and fundamental character which ought, one might think, to be operative *erga omnes*.[380]

Thus, the obligation to respect dignity has an effect on relationships between individuals in certain circumstance.

As society evolves, so does the ambit of human dignity. The accepted wisdom changes in each generation. There are mind-boggling scientific developments that require ethical and legal standards to be applied to ensure they continue for the benefit of society as a whole while

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[376] *Ibid*, at 434-435 (footnote omitted).

[377] Interim Constitution of the Republic of South Africa 1993.

[378] 1996 (3) SA 850 (CC), at [135]:

> Unless and until there is a resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms are concerned. As far as the Chapter is concerned a landlord is free to refuse to let a flat to someone because of race, gender or whatever; a white bigot may refuse to sell property to a person of colour; a social club may black-ball Jews, Catholics or Afrikaners if it so wishes. An employer is at liberty to discriminate on racial grounds in the engagement of staff; a hotelier may refuse to let a room to a homosexual; a church may close its doors to mourners of a particular colour or class. But none of them can invoke the law to enforce or protect their bigotry. One cannot claim rescission of a contract or specific performance thereof if such claim, albeit well-founded at common law, infringes a Chapter 3 right. One cannot raise a defence to a claim in law if such defence is in conflict with a protected right or freedom. The whole gamut of private relationships is left undisturbed. But the state, as the maker of the laws, the administrator of laws and the interpreter and applier of the law, is bound to stay within the four corners of Chapter 3.

[379] Hunt (n375), at 429.

[380] William Wade, "Horizons of Horizontality" (2000) 116 *LQR* 217, at 224.

respecting the individual's integrity, equality and autonomy. Human dignity is an excellent yardstick for assessing what is acceptable to the individual and what is best for the community at large.

More often than not, there is a mélange of values, principles and rights involved in assessing human rights. Frequently equality, dignity, freedom, privacy and the common good are issues in contention. It is usually not possible to isolate one value on which to base a decision. A multi-faceted approach is required. It can be a balancing exercise by the legislature and, in default, by the judiciary, to decide what the right answer is at the present time. The principle of proportionality has assumed importance in recent decades in adjudication of personal rights.

2.4 Democracy

Respect for dignity is not enough. Democracy requires active protection, and even promotion, of dignity. Participation by individuals in the democratic process enhances the dignity of all in society. It also is an overt manifestation of the equality of all individuals. In *Doctors for Life International v Speaker of the National Assembly* Sachs J highlighted the benefit of participation in democracy for marginalised groups.[381] He returned to the theme of the importance of being heard for dignity and self-respect, when he dissented in *Merafong Demarcation Forum v President of the Republic of South Africa*:

> [I]t is important to remember that the value of participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect.[382]

Susan Marks considers that democracy invokes social and economic rights in addition to the commonly accepted civil and political rights.[383] She sees risks to democracy by ignoring some

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[381] 2006 (12) BCLR 1399 (CC), at [234]:

> Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy. Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to.

[382] 2008 (5) SA 171 (CC), at 298.

[383] Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of*

categories of human rights and points out the

> tension between the proclaimed indivisibility of civil, political, economic, social, and cultural rights and the priority accorded to some of those rights. This affects the prospects for deepening democracy within nation-states, for, if equality is to be secured in the opportunities for political participation, all categories of human rights need protection.[384]

Humane governance, as defined by Richard Falk is "the effective realization of human rights, including economic and social rights, and the extension of participatory mechanisms and accountability procedures".[385]

Political marginalisation reinforces subordinate socio-economic status. Clapham points out that the protection of dignity can have an impact on other values such as freedom.[386] The equality necessary to protect an individual's dignity may curtail another's freedom. Participation in democracy by acceptance of the democratic will[387] in the common interest might dilute an individual's autonomy. He advocates resolving conflicts, not by establishing a hierarchy of rights, but by examining the context in each case.

2.5 Assessment

Feldman warned against relying on dignity as a right or value because it was "culturally dependent and eminently malleable".[388] Using dignity as a yardstick could give rise to complications on account of the lack of clarity on its central core because of disagreement on what makes life good for individuals and societies.[389] The various ways in which dignity operates can give rise to confusion. He also feared that the indeterminate nature of dignity gives too much scope to the judiciary and could weaken the legislature in a democracy.[390] Protection of dignity can be paternalistic and undermine respect for autonomy.[391] This could arise when the individual does not recognise their own dignity and is prohibited from

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Ideology (OUP, Oxford 2000), at 107.

[384] *Ibid.*

[385] Richard A Falk, *On Humane Governance: Toward a New Global Politics* (Polity, Cambridge 1995), at 125.

[386] Clapham (n77), at 533.

[387] The source of the legitimacy of democratic will-formation includes, on the one hand, the communicative presuppositions that allow the better arguments to come into play in various forms of deliberation and, on the other, procedures that secure fair bargaining conditions: Habermas (n345), at 278-279.

[388] Feldman, "Human Dignity as a Legal Value" Part I (n253), at 698.

[389] Feldman, "Human Dignity as a Legal Value" Part II (n253), at 75.

[390] *Ibid*, at 76.

[391] *Ibid.*

exercising their free will to attempt to destroy it. The autonomy of another member of society might also be inhibited in the interests of protecting an individual's dignity. Feldman noted that dignity has been used in some jurisdictions to advance social rights.[392] Because of the importance of dignity in the case law of the European Court of Human Rights, he considered that the value was likely to become increasingly significant in the UK with the enforcement of the Human Rights Act 1998.[393] Feldman's prediction proved correct. According to Moon and Allen the dignity discourse has pervaded equality jurisprudence in the UK and has also been included in legislation.[394]

Susie Cowen acknowledges the multi-factorial nature of the dignity concept.[395] However, she considers it useful because of its concern with the collective as well as the individual: "It makes little sense to speak of the worth of human beings in isolation. Human beings are social creatures. This idea is found in the concept *ubuntu*."[396] The value of equality is insufficient on its own to give meaning to the equality right, but supported by dignity it can deliver substantive equality and can serve transformative and distributive justice roles.[397]

Social and economic rights may be pursued by relying on the dignity of the person. While the primary instigator is the legislature, the judiciary needs to step in when the legislator has failed to protect dignity. In some societies, those in power can become the new elite to the exclusion of the poor and uneducated. In a democracy, the best solution is a dialogue between the judiciary and the legislature. This preserves the separation of powers doctrine, while ensuring that the constitution is a living instrument of practical benefit to individuals.

Joan Small and Evadné Grant support the use of dignity by the South African and Canadian courts to further substantive equality.[398] In South Africa, the courts define dignity by looking at the individual in association with group membership.[399] The contextual enquiry in Canada and South Africa leads to flexible jurisprudence adapted to each case, but backed by a structure and not reliant on the judiciary's own unilateral opinion.[400]

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[392] *Ibid*, at 61.
[393] *Ibid*, at 75.
[394] Moon and Allen (n160), at 625-626.
[395] Susie Cowen, "Can 'Dignity' Guide South Africa's Equality Jurisprudence?" (2001) 17 *SAJHR* 34, at 58.
[396] *Ibid*, at 50.
[397] *Ibid*, at 55.
[398] Small and Grant (n289), at 54.
[399] *Ibid*, at 42.
[400] *Ibid*, at 51.

Dignity is drawn on by judges in a wide range of jurisdictions from dissenting or concurring opinions in the International Court of Justice, to the European Court of Human Rights and in domestic courts, including the French *Conseil Constitutionnel* and Canadian, German, South African and Irish courts.[401]

[401] McCrudden (n9), at 682-685.

3 CHAPTER III - DIGNITY IN THE SOUTH AFRICAN CONSTITUTION

3.1 Historical background

3.1.1 Politics

Following the abolition of apartheid[1] and the formation of a democratic government,[2] a new constitution was adopted in South Africa in 1996.[3] The drafting process absorbed much time,[4] lots of effort and the talents of a multitude of legal intellectuals.[5] Emerging from a

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[1] The apartheid era had commenced in 1948 when the National Party formed the first government consisting of Afrikaners only: TRH Davenport and Christopher Saunders, *South Africa: A Modern History* (5th edn Macmillan, Basingstoke 2000), at 377. The concept originated in the mid-1930s, among Afrikaner intellectuals, who wanted some "vertical" separation of the races: *ibid*, at 373. The government applied apartheid in a plethora of laws and executive actions with four ideas at heart of the system; first, the population comprised four racial groups—white, coloured, Indian and African—each with its own inherent culture; second, whites, as the civilised race, were entitled to have absolute control over the state; third, white interests should prevail over black interests and the state was not obliged to provide equal facilities for the subordinate races; fourth, the white racial group formed a single nation, with Afrikaans- and English-speaking components, while Africans belonged to several (eventually 10) distinct nations or potential nations—a formula that made the white nation the largest in the country: Leonard Thompson, *A History of South Africa* (3rd edn Yale University Press, New Haven 2001), at 190.
Apartheid is an Afrikaans term meaning "apartness" or "segregation": Lee W Potts, "Law as a Tool of Social Engineering: The Case of the Republic of South Africa" (1982) 5 *BC Int'l & Comp L Rev* 1, at fn 2. Racial segregation and white domination of South African social, political and economic life were firmly established prior to 1948: *ibid*, at 1-2. Longstanding official governmental policy had been to confine Africans to special locations in the urban areas: *ibid*, at 24. One of the first projects undertaken at the Cape settlement of 1652 was to plant a hedge of bitter almonds to separate the Dutch garrison from the coloured population: *ibid*. In the Orange Free State, whites excluded Asians from residence and real property ownership: *ibid*, at 24-25. Using the Natives Land Act 1913 and the Native Trust and Land Act 1936, the Union Parliament set aside 14% of the land in South Africa for exclusive ownership by Africans: *ibid*, at 25.
Preceded by the prohibition of sexual intercourse between white women and African men, the Immorality Act 1927 made it illegal between unmarried Europeans and Africans: *ibid*, at 34.
Almost without interruption from 1809, South African law required African males to have passes from their home jurisdictions while in white areas: *ibid*, at 37.

[2] Following the first non-racial election held in April 1994, Nelson Mandela was elected president and formed the Government of National Unity consisting of the African National Congress (ANC), the National Party and the Inkatha Freedom Party: Thompson (n1), at 263-264; Davenport and Saunders (n1), at 568-569.

[3] Constitution of the Republic of South Africa 1996.

[4] The process was initiated at the Convention for a Democratic South Africa (CODESA) held on 20 and 21 December 1991, where one of the working groups established was tasked with drafting a constitution for a democratic non-racial South Africa; CODESA was opened by Chief Justice Corbett and presided over by Judges Mahomed and Schabort; CODESA subsequently broke down; following violence, the government and the ANC signed a Record of Understanding on 26 September 1992; negotiations resumed and the negotiators agreed a draft interim constitution in November 1993 providing for the new parliament to act as a constitutional assembly to draw up the first fully democratic constitution: Davenport and Saunders (n1), at 560, 563-566, 571. See also Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (5th edn Juta, Cape Town 2005), at 4-6; Thompson (n1), at 252-258.

[5] Cyril Ramaphosa (ANC) chaired the Constitutional Assembly and the Constitutional Committee, which was the main negotiating and co-ordinating structure reporting directly to the Constitutional Assembly;

background of a racially divided[6] unequal society based on an inhumane[7] premise of white supremacy entrenched in a plethora of complicated petty laws,[8] the framers of the Constitution aimed to build a legal model for an inclusive democratic nation. The new regime recognised that to achieve meaningful change it was not enough simply to give all citizens the franchise,[9] but it was necessary to remove the inequities that had characterised South African

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Kader Asmal was a member of the Constitutional Committee: Hassen Ebrahim, *The Soul of a Nation: Constitution-Making in South Africa* (OUP, Cape Town 1998), at 180, 198, 334 fn 17. The Theme Committee dealing with fundamental rights (of which Asmal was also a member) was supported by a Technical Committee of specialists and experts, namely, Prof H Cheadle, Prof J Dugard, Ms S Liebenberg, and Prof I Rautenbach: *ibid*, at 182-183, 184, 339 fn 29. A workshop on human rights and international law was held in April 1995, organised jointly by the Constitutional Assembly, Parliament, and the Raoul Wallenberg Institute from Sweden: *ibid*, at 184-185.

[6] The population in 1996 was almost 44 million comprising 77% Africans, 12% whites, 8.5% coloureds and 2.5% Asians: Davenport and Saunders (n1), at 428.

[7] The United Nations General Assembly (UNGA) declared that the practice of apartheid constituted "a crime against humanity": UNGA Res 3151 (XXVIII) (14 December 1973) UN Doc A/RES/3151(XXVIII) G, preamble.

[8] Legislation covered a broad sweep of segregationist policies to keep state control on a racist basis over people covering (with examples in brackets) where they lived (Bantu Land Act 1913, Asiatic Land Tenure and Indian Representation Act 1946, Group Areas Acts 1950, 1957 and 1966), their education (Bantu Education Act 1953), work (Apprenticeship Act 1922 making skilled trades more accessible to white youths), marriage and sexual relations (Prohibition of Mixed Marriages Act 1949, Immorality Act 1957), facilities (Reservation of Separate Amenities Act 1953), movement (Bantu (Abolition of Passes and Coordination of Documents) Act 1952—a misleading title, as this legislation coordinated the pass laws rather than repealing them), and culture (State-Aided Institutions Act 1957 enforcing segregation in public libraries and places of entertainment): John Dugard, *Human Rights and the South African Legal Order* (Princeton University Press, Princeton 1978), at 65, 68-70, 75, 78-82; Davenport and Saunders (n1), at 271, 389, 390-391, 397. See also Potts (n1), at 20-41.

The Group Areas Act was the core of apartheid, having as its aim the segregation of the different races into their own groupings and limitation of their land rights in South Africa to the bare minimum; DP Malan, the Prime Minister when it was first introduced, described the Bill as "the essence of the apartheid policy": Fatima Meer, *The Ghetto People: A Study of the Effects of Uprooting the Indian People of South Africa* (Studies in the Mass Removal of Population in South Africa No 6, Africa Publications Trust, London 1975), at 4.

HF Verwoerd replaced the static term of apartheid with separate development in government parlance; he saw the total separation of white and black as the ideal aim; he viewed apartheid as more than territorial separation of the races; it comprised religion and the political, social, economic and every other sphere of life; maintenance of the colour bar was the most important issue: Davenport and Saunders (n1), at 391-392.

[9] Although whites, coloureds and Indians had voting rights to elect representatives to three uniracial chambers based on separate ethnic rolls under the Tricameral Constitution (Constitution of the Republic of South Africa 1983), African leaders had rejected a proposal for a Council for Blacks: Davenport and Saunders (n1), at 502; Thompson (n1), at 225-226. The government had transformed the administration of Africans by abolishing the Natives Representative Council in 1951 and grouping the reserves into territories destined to become homelands administered under white tutelage by a set of Bantu authorities, consisting mainly of hereditary chiefs; in 1971 the Bantu Homelands Constitution Act empowered the government to grant the homelands independence and the Transkei became the first to become independent in South Africa's terms in 1976, having been made self-governing in 1963: *ibid*, at 191. Verwoerd's government commencing in 1959 had given the first firm commitment to some kind of independence for the African areas: Davenport and Saunders (n1), at 407. See *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8, 2005 (2) SA 117 (CC), at [38]; *Mashavha v President of the Republic of South Africa* [2004] ZACC 6, 2005 (2) SA 476 (CC), at [51].

Historically, there were divergent franchise policies with the vote being enjoyed by all races in the Cape

society and to improve the living conditions of the majority who had struggled in poverty for generations. Another crucial factor was the polarised and diverse backgrounds of people in South Africa. They ranged from the various indigenous tribes with the oldest heritage in the country,[10] through the Indians whose ancestors were brought to South Africa as slave-like[11] indentured labourers[12] or came as traders[13] starting in the 19th century, to the descendents of

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from 1853, but denied to Africans and Indians in Natal from 1865 and 1896 respectively: Davenport and Saunders (n1), at 123. As had happened in the Transvaal in 1885, the Franchise Act 1896 in Natal meant effective disenfranchisement of Indians without the appearance of discrimination on racial grounds; the vote was denied to those whose countries of origin did not have representative institutions founded on the Parliamentary franchise: *ibid*, at 121. Jan Smuts' token enfranchisement of Indians in 1946—rejected as inadequate by the Indians themselves—was reversed by the new government in 1948: *ibid*, at 379. Hertzog's legislation in 1936 giving Africans three white representatives in the Assembly was opposed by a small number of white parliamentarians with conflicting liberal and segregationist attitudes: *ibid*, at 328-329. After a skirmish between the courts and the other two branches of government, legislation was eventually passed in dubious circumstances in 1956 removing coloured voters from the common electoral roll: Thompson (n1), at 190-191.

[10] The Africans were descendants of the San hunter-gatherers, the Khoikhoi pastoralists and the Bantu-speaking mixed farmers, who formed various tribal chiefdoms such as the Zulu and Xhosa: Thompson (n1), at 10, 16. On the Khoisan peoples and the emergence of Bantu-speaking chiefdoms, see Davenport and Saunders (n1), at 6-13.

[11] Other forms of servitude could resemble slavery in substance, although different in legal form; the House of Commons in Britain recognised this in 1828 when it passed a unanimous resolution securing to all natives of South Africa the same freedom as enjoyed by other free people there; this arose following denunciation by missionaries of the holding by the Afrikaners of their Cape Coloured servants in a semi-service status under a system akin to indenture recognised by Roman-Dutch law: Hugh Tinker, *A New System of Slavery: The Export of Indian Labour Overseas 1830-1920* (2nd edn Hansib, London 1993), at 15. The British government banned the slave trade throughout the Empire in 1807; the British parliament emancipated slaves in the Empire to take effect after a four-year apprenticeship in 1838: Davenport and Saunders (n1), at 47. Fatima Meer deduced that the indentured workers' "state of unfreedom was little different from that of the slaves"; they were on the lowest rung of the hierarchy: Meer (n8), at 2.

[12] The first batch of 340 indentured Indian labourers arrived in Durban aboard the *Truro* ship on 16 November 1860: JB Brain, *Christian Indians in Natal 1860-1911: An Historical and Statistical Study* (Human Sciences Research Council Publication Series, OUP, Cape Town 1983), at 246; Tinker (n11), at 97. The indentured labourer system was introduced to South Africa to meet the demand of white settlers for workers in the sugar and cotton industries, as the required interests and skills were not present in traditional African society; laws were passed by the Natal Legislative Council in 1859 and by the Indian Government in 1860 extending to Natal the existing system for emigration of Indian workers to tropical and subtropical British and French colonies; colonists who wanted to employ indentured Indians applied to the Natal Government, which would arrange and pay for the recruitment, transport and assignment of the Indians, the employers being liable to repay these costs in instalments: Leonard Thompson, "Co-operation and Conflict: The Zulu Kingdom and Natal" in Monica Wilson and Leonard Thompson eds, *The Oxford History of South Africa* (Clarendon Press, Oxford 1969), at 387-388. The indentured labour system in South Africa came to an end when India banned emigration to South Africa from 1 July 1911: Tinker (n11), at 313. For further information on Indian indentured labourers in South Africa, see *ibid*, at 96-97, 272-273, 283-285, 287-291, 293-306, 312-314; Robert A Huttenback, *Gandhi in South Africa: British Imperialism and the Indian Question, 1860-1914* (Cornell University Press, Ithaca 1971), at 2-26. There were also indentured Chinese labourers in South Africa; they were introduced from 1904 to meet a labour shortage in the gold mines: Davenport and Saunders (n1), at 237.

[13] From the late 1870s, Gujerati traders (commonly Muslims) came to South Africa under their own initiative and set up shops in competition with whites in Natal, the Transvaal and the Orange Free State: Davenport and Saunders (n1), at 121.

the settlers of European origin[14] and the "coloureds", being the mixed race mainly the progeny of whites and other races.[15] Within these groupings there was also divisiveness with a history of tensions among the native tribes[16] and a well-publicised antipathy between the Europeans of English and Dutch origin against the backdrop of the Boer War almost 100 years earlier.[17] Deaths and detentions during the apartheid era left their scars. Many in the previously privileged class resented the change.[18] Reconciliation between the various strata in society and redress of the injustices suffered were primary aims in the new South Africa.

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[14] Two English captains annexed the Cape without authority on behalf of King James I in 1620: Davenport and Saunders (n1), at 8. The Dutch East India Company established a base in Table Bay in 1652 and subsequently brought in European settlers, including Huguenot refugees fleeing from France in 1689 and many German-speakers during the 18th century: *ibid*, at 21-22. Having seized the Cape in 1806, Britain legally acquired it under a treaty with the Netherlands in 1815: *ibid*, at 42-43. British emigrants settled in the new district of Albany in the eastern Cape in 1820: *ibid*, at 44. A small settlement of British traders and hunters established itself at Port Natal in 1824: *ibid*, at 113. The Voortrekkers migrated from the Cape in the Great Trek in the 1830s and formed the Republic of Natalia (the first Boer state) in 1839: *ibid*, at 80. It was short-lived, as it submitted to British control in 1842: *ibid*, at 113. A new Voortrekker republic was established north of the Vaal in 1844: *ibid*, at 81. The Orange Free State Republic of 1854 adopted a constitution based on Cape Dutch and Voortrekker experience and also on American and European precedents: *ibid*, at 84.

[15] The coloureds were concentrated mainly in the western part of South Africa, particularly in the Cape; their ancestors included indigenous Khoisan people and slaves from Indonesia, Madagascar and tropical Africa: Thompson (n1), at 113. See also Davenport and Saunders (n1), at 33; Alex Hepple, *South Africa: A Political and Economic History* (Pall Mall Press, London 1966), at 11-12.

[16] Tribal conflict was particularly marked during the Mfecane wars from about 1817 until the murder of the Zulu chief, Shaka, in 1828: Thompson (n1), at 113; Davenport and Saunders (n1), at 17-18. Violence among black South Africans was prevalent from the mid-1980s, particularly between Inkatha gangs and Zulu-supporters of the United Democratic Front in what is now KwaZulu-Natal: Thompson (n1), at 229-230; Davenport and Saunders (n1), at 486-487.

[17] The South African War (the Boer War to the British, the Second War of Freedom to Afrikaners) was from 1899 to 1902: Thompson (n1), at 141-143. Against a background of the discovery of gold and a perceived threat of Africans uniting to throw off white rule, the British had annexed the Transvaal in 1877: Hepple (n15), at 85. The First Boer War (called the First Freedom War by the Boers) started when the Transvaal Boers rose up against the British in December 1880 and ended a few months later with the Transvaal regaining its independence; there was an agreement on self-government, subject to British suzerainty: *ibid*, at 86. The realisation that the gold mines were extensive attracted many foreigners (mainly British) to Johannesburg: *ibid*, at 89. They campaigned unsuccessfully for full citizenship rights and ultimately petitioned the British government for protection: *ibid*, at 89, 91. Following unproductive negotiations between the British and President Kruger of the Transvaal, the (Second) Boer War broke out between Britain and the Transvaal in October 1899: *ibid*, at 91. Because of its defensive alliance with the Transvaal, the Orange Free State was also at war with Britain: *ibid*. At the end of the war during which many were interned and died in concentration camps established by the British, the Boers surrendered, and the Transvaal and the Orange Free State became British colonies: *ibid*, at 91-92.

On the Boer War 1899-1902, see also Davenport and Saunders (n1), at 223-232.

[18] The resentment manifested itself in drastic action resulting in death and destruction on some occasions. On 10 April 1993, Chris Hani (a communist and previously the leader of MK, the militant ANC wing *Umkhonto we Sizwe*) was murdered allegedly with the encouragement of white political leaders: Davenport and Saunders (n1), at 565. On 25 June 1993 the Afrikaner Weerstands Beweging (AWB), led by Eugene Terre'blanche, drove an armoured vehicle through the doors of the World Trade Centre near Johannesburg and trashed the chamber where the negotiations on the draft constitution were taking place: *ibid*, at 566.

The first step was to draft an interim Constitution, which was adopted in 1993 and came into effect on 27 April 1994.[19] It was the result of protracted negotiations between the representatives of the apartheid state and its opponents.[20] While not procedurally a revolt because it was adopted by a statute of the old constitutional order, Laurie Ackermann has categorised the change as "a substantive constitutional revolution" which "imploded the apartheid constitution and structures".[21] The interim Constitution established a formula for drafting another constitutional document and for its adoption by the Constitutional Assembly in a democratic fashion to ensure public ownership and acceptance.[22] Following an initial rejection of some provisions,[23] the new Constitution was approved by the Constitutional Court on 4 December 1996[24] and took effect on 4 February 1997.[25]

3.1.2 Legal system

The local legal backdrop was Roman-Dutch law.[26] It became the common law as a result of Dutch and British colonisation from 1652 to the end of the 19th century.[27] Indigenous African law was applied in certain circumstances.[28] Pius Langa has described indigenous systems of law and custom as having been "tolerated to the extent that their principles were not repugnant to the dominant system of law."[29] English law had considerable influence,

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[19] Interim Constitution of the Republic of South Africa 1993. It was a liberal democratic constitution, including ideas borrowed from western Europe and the US, modified by South African experience; it contained an elaborate Bill of Rights with economic rights as well as the classic civil and political rights; several sections (including those dealing with human rights) were ambiguous and would need to be fleshed out by political action or resolved by the Constitutional Court: Thompson (n1), at 257-258.

[20] Currie and de Waal (n4), at 4.

[21] Laurie WH Ackermann, "Equality and the South African Constitution: The Role of Dignity" (2000) 60 *Heidelberg J Intl L* 537, at 538. Currie and de Waal (n4), at 2, have also described it as "a constitutional revolution".

[22] The National Assembly doubled as a Constitutional Assembly, which set up its own structures; submissions from the public were encouraged and all meetings of the Constitutional Assembly and its committees were open to the public: Davenport and Saunders (n1), at 571-572.

[23] *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

[24] *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97.

[25] President Mandela signed the definitive text at Sharpeville on 10 December 1996: Davenport and Saunders (n1), at 572.

[26] See Chris Nwachukwu Okeke, "African Law in Comparative Law: Does Comparativism Have Worth?" (2011) 16 *Roger Williams UL Rev* 1, at 34-35.

[27] Wouter de Vos, "Roman-Dutch Law in South Africa at the End of the Century—and Thereafter" in Antony Anghie and Garry Sturgess eds, *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer Law, The Hague 1998), at 73. On the development of South African common law, see François du Bois, "The Past and Present of South African Law" (2004) 32 *Intl J Legal Information* 217, at 221-227.

[28] De Vos (n27), at 74.

[29] Pius Langa, "Legal Visions—South Africa in the 21st Century" in Anghie and Sturgess (n27), at 102.

particularly on procedure, and reached its high point at the creation of the Union of South Africa in 1910.[30] This can be attributed partly to the fact that English was the official language of the courts for a substantial period.[31] The right of appeal to the Privy Council was abolished in 1950.[32] South Africa left the Commonwealth in 1961,[33] the year in which it became a republic,[34] and did not rejoin it until 1 June 1994 after the abolition of apartheid. From the 1960s the South African courts tended to apply pure Roman-Dutch law.[35] Despite the infiltration of English law, Roman-Dutch law was the substantive private common law.[36]

3.1.3 International isolation

On the international front South Africa had isolated itself from the human rights treaties originating from the United Nations and had not participated in the formation of the African Charter in 1981.[37] Its representatives had taken an active part in the drafting of the United Nations Charter[38] and the Universal Declaration of Human Rights (UDHR).[39] However, South

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[30] *Ibid*, at 83.
[31] *Ibid*, at 81.
[32] *Ibid*, at 78.
[33] The government had intended to follow the precedent whereby India remained a member of the British Commonwealth when it became a republic; however, at a conference of Commonwealth countries, the African members, supported by Canada and India, sharply criticised apartheid, and South Africa then withdrew from that loose association: Thompson (n1), at 188.
[34] Prime Minister Smuts' efforts to douse the republican propaganda of the opposition during the election campaign in 1948 had failed: Davenport and Saunders (n1), at 370. The National Party had earnestly wanted a republic since forming a government after that election; there was an initial disagreement between Malan and JG Strijdom's wing of the National Party which advocated separatist republicanism until they were persuaded in 1951 that the issues of republican status and Commonwealth membership were separable: *ibid*, at 378. With Verwoerd's succession as Prime Minister in 1958, the government made a major change in the political orientation of South Africa by deciding to go for a republic: *ibid*, at 407. The National Party achieved a major Afrikaner ethnic objective in 1961 when, after obtaining a narrow majority in a referendum of the white electorate, the government transformed South Africa into a republic: Thompson (n1), at 188. The government had excluded all non-whites from any share in the making of the Republic: Davenport and Saunders (n1), at 418. The inauguration of the Republic in May 1961 was marked by a general strike called by the newly-established National Action Council led by Mandela: *ibid*, at 420. Indian South Africans were recognised as citizens of the Republic for the first time in 1963: *ibid*, at 418.
[35] Langa (n29), at 85.
[36] *Ibid*, at 91.
[37] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).
[38] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 59 Stat 1031, UNTS 993, 3 Bevans 1153 (UN Charter). Christof H Heyns and Frans Viljoen, "Country Study—South Africa" in Christof H Heyns and Frans Viljoen eds, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Kluwer Law International, The Hague 2002), at 539. Field Marshal Jan Smuts submitted a draft Preamble, a shortened slightly modified version of which was accepted at the San Francisco Conference: Wilhelm G Grewe and Daniel-Erasmus Khan, "Drafting History" in Bruno Simma ed, *The Charter of the United Nations: A Commentary Vol 1* (2nd edn OUP, Oxford 2002), at 11. See also Davenport and Saunders (n1), at 516.
[39] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III). South Africa

Africa fell foul of the UN in 1946 when the General Assembly criticised the treatment of people of Indian origin and passed a resolution saying that Indians in South Africa should be treated in conformity with agreements between the two countries and the UN Charter.[40] As a result of the elections by whites in 1948 the National Party came to power and set about institutionalising apartheid, which was based on the false assumption that blacks were an inferior race.[41] It passed a plethora of statutes and regulations based on racial discrimination, which favoured the already powerful and dominant whites at the expense of the black majority.[42] Ackermann described it thus:

> The state did its best to deny to blacks that which is definitional to being human, namely the ability to understand or at least define oneself through one's own powers and to act freely as a moral agent pursuant to such understanding or self-definition. Blacks were treated as means to an end and hardly ever as an end in themselves; an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.[43]

Mainly at the instigation of Asian and African states, the question of apartheid was raised in the General Assembly in 1952 and on many occasions before the General Assembly and the Security Council in subsequent years.[44] A group of experts appointed by the Secretary-General

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abstained from voting on the UDHR ostensibly because it went far beyond the rights and freedoms contemplated in the Charter; it objected to the inclusion of social, cultural and economic rights, freedom of movement and universal participation in government; its delegate observed that there was no universality in the concept of equality nor any universal standard in the different concepts of dignity; South Africa's position lacked integrity and was erected not because of its philosophical merits, but for the protection of the system of apartheid: Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Pennsylvania Studies in Human Rights, University of Pennsylvania Press, Philadelphia 1999), at 26-28, fn 52. See also Tore Lindholm, "Article 1: A New Beginning" in Asbjørn Eide and others eds, *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press, Oslo 1992), at 39, 43, 49; Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, New York 2001), at 144, 146.

[40] John P Humphrey, *Human Rights and the United Nations: A Great Adventure* (Bowker, Epping 1984), at 15; UNGA Res 44(I) (8 December 1946) UN Doc A/RES/44(I). In December 1946, Mrs Pandit of India made a scorching attack on South Africa's Indian policy at the second session of the GA, while Dr AB Xuma (ANC) lobbied Assembly delegates in New York: Davenport and Saunders (n1), at 517. The Indian government's support for South African Indians in the international arena goes back to 1917 when it first gave a clear warning that it intended to press for fair treatment for Indians in Commonwealth countries: *ibid*, at 279. When Malan introduced legislation in 1925 to make repatriation of Indians easier to effect, the South African government agreed to receive a fact-finding commission from India; a round-table conference eventually took place between the South African and Indian governments over four weeks from 17 December 1926: *ibid*, at 306-307.

[41] Arthur Chaskalson, "Dignity and Justice for All" (2009) 24 *Maryland J Intl L* 24, at 26.

[42] Arthur Chaskalson, "Human Dignity as a Constitutional Value" in David Kretzmer and Eckart Klein eds, *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, The Hague 2002), at 138.

[43] Ackermann (n21), at 540 (footnote omitted).

[44] Sydney D Bailey, "The Security Council" in Philip Alston ed, *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press, Oxford 1992), at 312-313. The League of Nations had never subjected South Africa to the intensity of moral pressure which bore down it at the UN, apparently

of the UN recommended in 1964 that South Africa should incorporate into its constitution a bill of rights based on the UDHR.[45] The Security Council had described apartheid as incompatible with the UDHR in 1963,[46] and went on in 1976 to reaffirm it as "a crime against the conscience and dignity of mankind".[47] In 1972 it endorsed the struggle of the oppressed people in South Africa as being in compliance with the UDHR.[48] It reaffirmed in a resolution in 1980 that apartheid was a severe violation of dignity, "... the policy of apartheid is a crime against the conscience and dignity of mankind and is incompatible with the rights and dignity of man..."[49]

In 1955 the ANC adopted the Freedom Charter.[50] Many of its principles were incorporated in the South African Constitution when it was drafted by the ANC-led government 40 years later.[51]

3.1.4 Apartheid jurisprudence

The judiciary faced a dilemma during the apartheid era. Parliament was supreme[52] and

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because the political values of the League were intrinsically European and harboured colonialist assumptions: Davenport and Saunders (n1), at 341. See also Thompson (n1), at 214.

[45] Bailey (n44), at 312.

[46] UN Security Council (UNSC) Res 182 (4 December 1963) UN Doc S/Res/182(1963) para 2.

[47] UNSC Res 392 (19 June 1976) UN Doc S/Res/392(1976) para 3. See Bailey (n44), at 312.

[48] UNSC Res 311 (4 February 1972) UN Doc S/Res/311(1972) para 3.

[49] UNSC Res 473 (13 June 1980) UN Doc S/Res/473(1980) para 3. For a comparison between the meaning of dignity in human rights theory and the way dignity was discussed in anti-apartheid literature, see Eleni Coundouriotis, "The Dignity of the 'Unfittest': Victims' Stories in South Africa" (2006) 28 *Hum Rts Q* 842.

[50] The Freedom Charter was an expression of collective human dignity in its promise and claim for the recognition of specific human rights in a future South Africa: Heinz Klug, "The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?" (2003) 64 *Mont L Rev* 133, at 144. At a Congress of the People attended by 3,000 people of all races at Kliptown, south of Johannesburg, on 26 and 27 June 1955, sections of the Charter were voted on by show of hands; it demanded a non-racial, democratic system of government, and equal protection for all before the law; it urged nationalisation of the banks, mines and heavy industry, as well as land redistribution; it sought equal work and educational opportunities, and the removal of restrictions on family life: Davenport and Saunders (n1), at 404. See also Thompson (n1), at 208-209.
The ANC had earlier Bills of Rights; one in 1923 asked for equal rights for all civilised men; another dating from 1943—couched in the moderate language of western liberal thinking—demanded the "freedom of the African people from all discriminatory laws whatsoever": Davenport and Saunders (n1), at 362.

[51] Ryan F Haigh, "South Africa's Criminalization of 'Hurtful' Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression" (2006) 5 *Wash U Global Stud L Rev* 187, at 193.

[52] Following the Statute of Westminster 1931, the supremacy of Parliament was confirmed by the Appellate Division of the South African Supreme Court in 1937 when in *Ndlwana v Hofmeyr NO* 1937 AC 229 it dismissed a challenge by a disenfranchised African to the Representation of Natives Act 1936 on the grounds that the wrong procedure had been used to enact it. The Court ruled that the Union Parliament, being fully sovereign, could adopt any legislative procedure it thought fit: Davenport and

judicial review of the validity of legislation was prohibited.[53] There was a conflict between the positive law and moral right. Apartheid was a denial of common humanity.[54] The

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Saunders (n1), at 331; Dugard (n8), at 29.

The supremacy issue caused a constitutional crisis in the 1950s stemming from the government's attempt to remove the coloured voters from the common electoral rolls, which was an entrenched provision in the Constitution adopted on formation of the Union in 1910 (Constitution of the Union of South Africa 1909) and was only amendable by special procedure. The Separate Representation of Voters Act 1951 purported to place coloured voters on a separate roll with power to elect four members to the Assembly, one to the Senate and two to the Cape Provincial Council (whites only to the Assembly and Senate, but not explicitly so to the Council). It was passed by ordinary legislation and not by the special procedure for entrenched provisions. In *Harris v Minister of the Interior* (the *Vote* case) 1952 (2) SA 428 (AD), the Appellate Division declared the Act invalid because the special procedure had not been used. Parliament then passed the High Court of Parliament Act 1952 purporting to transform Parliament into a High Court with power to review all cases in which the Appellate Division declared legislation invalid. The Appellate Division ruled in *Minister of the Interior v Harris* (the *High Court of Parliament* case) 1952 (4) SA 769 (AD) that this legislation was also invalid on the ground that the "High Court of Parliament" was Parliament under another name: Davenport and Saunders (n1), at 379-380; Dugard (n8), at 30-31; Thompson (n1), at 190-191.

In 1955 two acts were passed by ordinary procedure—the Senate Act 1955 enlarging the Senate and altering the method of election of senators to give the government the majority required under the entrenched clause amendment procedure, and the Appellate Division Quorum Act 1955 increasing the number of appellate judges to 11. The South Africa Act Amendment Act 1956 (revalidating the Separate Representation of Voters Act 1951 and removing the coloured voters from the common electoral rolls) received the required majority under the entrenched clause amendment procedure (thanks to a packed Senate): Thompson (n1), at 191, Dugard (n8), at 31. The enlarged Appellate Division in *Collins v Minister of the Interior* 1957 (1) SA 552 (AD) agreed by a majority of 10 to one that the South Africa Act Amendment Act was valid; Schreiner J (the sole dissentient) considered it was not correct to view the two statutes separately and that the new Senate, created for purpose of circumventing the entrenched clauses, was not the type of Senate contemplated by the South Africa Act in the entrenched provisions: Dugard (n8), at 32. Schreiner J was the senior judge of appeal, but—contrary to tradition—was overlooked for the role of Chief Justice in 1957; the government was unable to forgive his persistent opposition to their legislative scheme to remove coloured voters from the common role and his steadfast dedication to the notion of equality before the law: *ibid*, at 286.

For a full review of the judgments in the four cases mentioned, see Ian Loveland, *By Due Process of Law? Racial Discrimination and the Right to Vote in South Africa, 1855-1960* (Hart, Oxford 1999), at 205-208, 285-290, 309-313, 366-371; Joshua Davidson, "The History of Judicial Oversight of Legislative and Executive Action in South Africa" (1985) 8 *Harv JL & Pub Pol'y* 687, at 710-720.

Although the British notion of parliamentary sovereignty was originally designed and actually served to protect the basic freedoms of the citizenry against abridgement by the executive, the South African adaptation of the concept differed in that the restraints on the British parliament (representative government and faithful adherence to the historical objectives of equal protection of citizens' rights) were absent: JD van der Vyver, "Depriving Westminster of its Moral Constraints: A Survey of Constitutional Development in South Africa" (1985) 20 *Harv CR-CL Law Rev* 291, at 291-292, 306-307. On the development of parliamentary supremacy in South Africa prior to the Union, see Dugard (n8), at 16-24.

[53] Arthur Chaskalson, "From Wickedness to Equality: The Moral Transformation of South African Law" (2003) 1 *ICON* 590, at 592, citing Republic of South Africa Constitution Act 1961, section 59.

Judicial review was not unknown in the Dutch colonies of South Africa; the Orange Free State Constitution of 1854 enshrined it: Davidson (n52), at 688. But judges used it sparingly and often met with opposition when they did: *ibid*. On judicial review in the Orange Free State and Transvaal colonies, see *ibid*, at 691-697.

[54] Tholakele Hope Madala, "The Principle of Respect for Human Dignity" in European Commission for Democracy Through Law, *The Principle of Respect for Human Dignity* (Proceedings of the UniDem Seminar, Montpellier, 2 – 6 July 1998) http://www.venice. coe.int/docs/1998/CDL-STD(1998)026-e.asp

establishment's view was that it was the judges' role to enforce apartheid laws based on an immoral system.[55] But, as John Dugard pointed out, the Roman-Dutch legal heritage[56] embodied principles advancing equality[57] and liberty,[58] which judges could choose in resolving

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(visited 30 March 2010).

[55] The judiciary itself showed deference to the legislature and the executive as far back as 1934 when it accepted that if the Minister had an unfettered discretion by statute, it was not the court's function "to curtail its scope in the least degree"; it adopted the principle that Parliament "may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway" and it was "the function of courts of law to enforce its will": Dugard (n8), at 327, citing *Sachs v Minister of Justice* 1934 AD 11, at 36-37. The same attitude was apparent in 1960 when a court held that the condition for the exercise of emergency powers of arrest and detention was not the factual state of danger to public order or safety, but the *opinion* of the Minister, magistrate or commissioned officer; it stated, "[t]he Court cannot substitute its own opinion": *ibid*, at 111, citing *Stanton v Minister of Justice* 1960 (3) SA 354 (T).

[56] Sir James Rose Innes (Chief Justice 1914-1927) was a notable defender of individual rights and expressed critical views of the other branches of government when he found himself opposed to legislation: Dugard (n8), at 287, 385. His philosophy of strict construction of statutes denying equality of treatment prevailed in *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 (upholding acquisition of land by Asians through a company) and in *R v Detody* 1926 AD 198 (preventing the pass laws from being extended to African women): *ibid*, at 310-311. He and Kotzé JA dissented in *R v Padsha* 1923 AD 281 where the majority upheld the validity of regulations prohibiting non-white Asian immigrants, but the dissentients refused to accept the popular meaning of "Asiatic" in South Africa and insisted that if the regulations were valid they must extend to all Asians, whether white or coloured in appearance: *ibid*, at 308-310.

Although English common law and the Roman-Dutch law provided the procedural and substantive bases for the South African legal system, the spirit of these laws had not penetrated deeply enough into basic values of the South African society to prevent the establishment of the apartheid legal system: Potts (n1), at 11-12. The South African common law strives, in accordance with Roman-Dutch principles, to maintain a stable equilibrium between all rights of legal subjects: Van der Vyver (n52), at 325.

[57] South African common law is colour-blind: Dugard (n8), at 71. In 1882 Kotzé CJ declared that the court was bound to do equal justice to every individual without regard to colour or degree except where the law expressly provided to the contrary: *ibid*, at 72 fn 97, citing *Re Marechane* [1882] 1 SAR 27, at 31. In *R v Plaatjies* 1910 EDL 63 it was held that a municipality might not set aside a separate part of a stream for exclusive white swimming even though it provided for a separate (and apparently equal) part for black swimming, and in *Williams v Johannesburg Municipality* 1915 TPD 106 the decision was that a municipality authorised to work trams for public use might not set aside certain trams for the use of coloured persons: *ibid*, at 312. Although some lower court decisions had inclined to the view that separate facilities for different racial groups could never be reasonable, in 1934 the Appellate Division of the Supreme Court in a majority decision upheld the validity of regulations establishing separate post office counters for white and black on the ground that discrimination coupled with equality was not unreasonable: *ibid*, at 64, citing *Minister of Posts and Telegraphs v Rasool* 1934 AD 167. Gardiner AJA (in dissent), invoking the "fundamental principle that in the eyes of the law all men are equal", viewed the relegation of Indians to a non-European counter as humiliating treatment impairing the *dignitas* of the person affected: *ibid*, at 315-316, citing *Rasool*, at 185, 187, 190-191. After *Rasool* the courts struck down discriminatory subordinate legislation where there were unequal facilities, but refused to regard "mere technical inequality of treatment" as sufficient to set aside subordinate legislation and insisted on substantial inequality: *ibid*, at 64, citing *R v Carelse* 1943 CPD 242, at 253; *R v Abdurahman* 1950 (3) SA 136 (AD), at 145.

Lee Potts pointed out that the South African version of European law rejected the concept of equity and significantly limited the concept of equality before the law by confining it to white South Africans only: Potts (n1), at 17. In addition to the courts not sitting as courts of equity, other principles of the South African legal culture that facilitated the implementation of apartheid were, first, the courts would not interfere in discriminatory practices sanctioned by Parliament; second, the courts would decide *ultra vires* questions on the side of the executive; third, white popular opinion on race questions would

conflicts in laws affecting race[59] and security.[60] The judiciary had scope to make moral decisions in some circumstances.[61] According to Arthur Chaskalson, the common law requirement to interpret statutes in accordance with the principles of liberty and equality gave

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inform judicial interpretations of ambiguous race legislation: *ibid*, at 49.

[58] In 1912 the Appellate Division ordered the government to pay damages to strikers for their illegal treatment as awaiting trial prisoners and castigated the authorities for their conduct: Dugard (n8), at 326, citing *Whittaker v Roos* 1912 AD 92. In 1916 when the Transvaal Provincial Division overturned the conviction of a socialist politician under wartime legislation for "exciting public feeling" in what was—as recounted by John Dugard—"a vicious attack on the war effort", Wessels J warned that if liberty were to be suppressed, it was to be suppressed by the legislature and not by the court: *ibid*, at 326-327, citing *R v Bunting* 1916 TPD 578, at 583-584. 30 years later Price J pronounced that the right to personal liberty was "always guarded by courts of law as one of the most cherished possessions of our society": *ibid*, at 108, citing *Mpanza v Minister of Native Affairs* 1946 WLD 225, at 229.

[59] The Appellate Division of the Supreme Court overruled the decision of a transportation board withholding a taxi-cab licence from an Asian on the grounds of his race: Dugard (n8), at 318, citing *Tayob v Ermelo Local Road Transportation Board* 1951 (4) AD 440. It also promoted equality and liberty in *R v Lusu* 1953 (2) SA 484 (AD), when it set aside a conviction imposed on a black man during the defiance campaign of the early 1950s for entering a "European waiting room" in a railway station on the ground that the administration had failed to provide substantially equal facilities for blacks: *ibid*, at 318; however, the government retorted by enacting the Reservation of Separate Amenities Act 1953, which invalidated this construction: *ibid*, at 65; Davenport and Saunders (n1), at 387. On the interpretation of race legislation, see Davidson (n52), at 728-734.

[60] John Dugard, "Should Judges Resign—A Reply to Professor Wacks" (1984) 101 *SALJ* 286, at 286. This article was in response to Raymond Wacks, "Judges and Injustice" (1984) 101 *SALJ* 266. See also Raymond Wacks, "Judging Judges: A Brief Rejoinder to Professor Dugard" (1984) 101 *SALJ* 295.

In 1954 the Appellate Division interpreted a provision allowing banning orders restricting freedoms of movement and expression in the Suppression of Communism Act 1950 as obliging the Minister to comply with the *audi alteram partem* rule, but the Act was amended after the adverse court decision: Dugard (n8), at 138-139, citing *R v Ngwevela* 1954 (1) SA 123 (AD). A similar decision in 1956 relating to the banishment provision of the Black Administration Act 1927 upheld the right of a banished person to be heard in his defence *before* the issue of a banishment order; it received like treatment, as amending legislation was introduced to exclude its operation: *ibid*, at 331, citing *Saliwa v Minister of Native Affairs* 1956 (2) SA 310 (AD). The Appellate Division widened the scope of the writ of *habeas corpus* in 1975 when it held that individuals concerned about corporal punishment being inflicted on suspected members of political organisations in South West Africa had *locus standi* to institute proceedings on their behalf; Rumpff CJ considered that there should be a wide construction because illegal deprivation of liberty was "a threat to the very foundation of a society based on law & order": *ibid*, at 351-352, citing *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (AD), at 310-311.

On the interpretation of security legislation, see Davidson (n52), at 734-741.

[61] Chaskalson (n53), at 594. There were some notable decisions upholding freedom of association, but frequently the legislature amended the law in their aftermath to support the oppressive regime. For instance, following a decision restraining the police from attending a political meeting on private premises, the Criminal Procedure Act was amended to permit *any* policeman to enter *any* premises at *any* time without a warrant where he suspected on reasonable grounds that *any* crime had been or was likely to be committed or that preparations for the commission of *any* offence were likely to be made on the premises: Dugard (n8), at 144-145, citing *Wolpe v Officer Commanding SA Police, Johannesburg* 1955 (2) SA 87 (W). Another example was the amendment of the Suppression of Communism Act in 1962 after the Appellate Division had ruled that a ministerial prohibition under the Act on any gathering of any number of persons having a common lawful or unlawful purpose could not apply to social gatherings: *ibid*, at 162-163, citing *R v Kahn* 1955 (3) SA 177 (AD).

Van Zijl J of the Cape Provincial Division in a case arising out of a student protest emphasised the important role of public protest in a democracy and stated that freedom of speech and freedom of assembly were "part of the democratic right of every citizen": *ibid*, at 186, citing *S v Turrell* 1973 (1) SA 248 (C), at 256.

> ... room for moral decisions in the development and application of the common law, in the interpretation and application of statutes not directly affected by apartheid, and even, though to a limited extent, in the interpretation and application of apartheid laws.[62]

Didcott J described a chasm between laws as passed by parliament and justice:

> Parliament has the powers to pass the statutes it likes and there is nothing the Courts can do about that. The result is law. But it is not always the same as justice.[63]

Faced with a plethora of racially discriminatory laws, although some members of the judiciary did not show independence of spirit in politically-charged conflicts,[64] Dugard's view is that in this they behaved no differently from judges in the United States and Britain in times of crisis.[65] The best traditions of South African law compared favourably with those of Anglo-American and Western European legal systems and those traditions were upheld on a daily basis by South African judges in less divisive cases.[66]

While recognising that there were some exceptions, the Truth and Reconciliation

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[62] Chaskalson (n53), at 594.

[63] *Ibid*, at 593, citing *Re Dube* 1979 (3) SALR 820 (N), at 821. In 1976 Didcott J (then of the Natal court) departed from restrictive decisions in *Rossouw v Sachs* 1964 (2) SA 551 (AD) and *Schermbrucker v Klindt NO* 1965 (4) SA 606 (AD) when he approved an interpretation of the Terrorism Act which provided some minimal relief and comfort to the family of a detainee: Dugard (n8), at 359, citing *Nxasana v Minister of Justice* 1976 (3) SA 745 (DCLD).

[64] The assessment of Rodney Davenport and Christopher Saunders is that the Supreme Court had not generally disgraced itself except, frequently, in political cases. They cite high profile cases in defence of the courts: a very sharp interdict on the use of third-degree methods by the security police against a political detainee in *Gosschalk v Rossouw* (March 1966); a ten-year prison sentence imposed on a security policeman for carelessly shooting and killing a detainee, whom he was merely attempting to intimidate, in *S v Van As* (1984); the setting aside of a conviction by the Supreme Court of Bophuthatswana under the South African Terrorism Act by the Appeal Court, because the Act, though it extended to the Territory, was repugnant to Bophuthatswana's Declaration of Fundamental Rights, which placed the onus of proof on the State (May 1982); the finding by the Cape Supreme Court that it was unreasonable to expect ordinary readers of books to be aware in every case of whether a book was on the banned list (1981); and the judgment of the Supreme Court of South West Africa laying down that South West African People's Organisation (SWAPO) infiltrators captured while bearing arms were entitled to be tried as prisoners of war (1983): Davenport and Saunders (n1), at 582. Dugard has a less benign view of *Gosschalk v Rossouw* 1966 (2) SA 476 (C): Dugard (n8), at 132, 135.
An exceptional political case was where the Appellate Division rejected an allegation that the Dean of Johannesburg had committed an offence under the Terrorism Act, *inter alia*, by paying money to dependants of political prisoners; Ogilvie Thompson CJ interpreted the Act with strict regard to the context to which it related, namely, participation in terrorist activities: *ibid*, at 348-349, citing *S v ffrench-Beytagh* 1972 (3) SA 430 (AD), at 457.

[65] Dugard (n8), at 387.

[66] *Ibid*. The Innes tradition of critical judicial comment was followed by South African judges in respect of legislation which judges considered politically colourless: *ibid*, at 385. Some of these acts of judicial censure resulted in benevolent reforms by the legislature, including the abolition of compulsory whipping for certain offences and modification of mandatory minimum sentences for recidivists: *ibid*.

Commission[67] condemned the judiciary in general for its willingness to uphold unjust laws without comment and for readily accepting police evidence over that of the accused.[68] Leaders of the judiciary had made a written submission to the Truth and Reconciliation Commission acknowledging the failure of the judiciary as an institution to protect basic rights during the apartheid era.[69]

In South African law there has been a long-standing remedy for violation of dignity and reputation under the umbrella of protection of a personality right.[70] Mokgoro J described it in

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[67] The Truth and Reconciliation Commission (TRC) was an attempt to make South Africans come to terms with their past by addressing the crimes of apartheid. It had power to grant amnesties to individuals, on condition that they revealed the truth and could prove their actions were politically motivated. After looking at precedents in eastern European and Latin American states that had recently rejected authoritarian regimes, parliament created the TRC with a mandate to deal with gross human rights violations since 1 March 1960. It was comprised of 17 commissioners of balanced gender and diverse racial backgrounds, and was chaired by Archbishop Desmond Tutu. The TRC was divided into three committees dealing with gross human rights violations, amnesty, and reparations for victim. It had a large budget, much of it from foreign donors, and set up an elaborate organisation with regional offices and a large number of employees who took more than 20,000 statements from victims of political violence. Starting in December 1995, it worked for more than two years and held over 50 public hearings around the country. More than 7,000 individuals applied for amnesty. The TRC was criticised by both sides of the divide, and its report was the subject of court challenges by former President FW de Klerk and the ANC. It revealed information about the heinous behaviour of agents of the apartheid regime and showed that some ANC operatives had committed serious crimes. Leonard Thompson regards the TRC as neither advancing the cause of racial reconciliation nor of bringing justice to the victims of political violence: Thompson (n1), at 274-278.
Tutu and Judges Goldstone and Sachs argued that the truth was a necessary part of the healing process: Davenport and Saunders (n1), at 701. Strengthened by the testimony of victims and the often corroborative evidence of amnesty applicants, some people felt that justice should be allowed to run its full course: *ibid*, at 702. For a detailed review and assessment of the TRC, see *ibid*, at 690-703.

[68] Chaskalson (n53), at 597.

[69] Albie Sachs, *The Strange Alchemy of Life and Law* (OUP, Oxford 2009), at 76. The submission was made in October 1997 by the five senior judges who presided over the courts after 1994 (Chief Justices Corbett and Mohamed, Deputy Chief Justice van Heerden, and Constitutional Court President Chaskalson and Deputy President Langa); they acknowledged the role of the courts in upholding apartheid, and the effect of apartheid in causing poverty and suffering on a massive scale, and dragging down the morale of law-enforcement agencies; they recognised the prevalence of torture and the cruelty of detention without trial; they criticised the overwhelming whiteness of judicial appointees, and the positivist attitudes of some judges who accepted that a law properly enacted was by definition just, regardless of its content; on the favourable side, they attached importance to the rearguard action of some judges in standing up for the rule of law: Davenport and Saunders (n1), at 582-583.

[70] Steven Heyman segregated personality rights in the US into three categories (with the corresponding wrongs in brackets): first, the right to personality, which is subdivided into the substantive right to mental and emotional well-being (intentional infliction of emotional distress) and the formal right to "an inviolate personality" comprising privacy (unreasonable intrusion or exposure) and personal dignity (insulting words); second, the right to self-expression through speech and conduct (improper regulation); and third, the right to image or reputation (defamation and related torts): Steven J Heyman, *Free Speech and Human Dignity* (Yale University Press, New Haven 2008), at 55. On the development of the tort of intentional infliction of emotional distress, see Dennis P Duffy, "Intentional Infliction of Emotional Distress and Employment at Will: The Case against Tortification of Labor and Employment Law" (1994) 74 *BUL Rev* 387, at 392-395; Daniel Givelber, "The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct"

Dikoko v Mokhatla:

> The law of defamation is based on the *actio injuriarum*, a flexible Roman law remedy which afforded the right to claim damages to a person whose personality rights had been impaired by another. The action is designed to afford personal satisfaction for an impairment of a personality right and became a general remedy for any vexatious violation of a person's right to his dignity and reputation.[71]

Jonathan Burchell distinguished between the historical divisions of impairments of reputation, dignity and person in the *actio iniurarum*.[72] The Roman-Dutch legal tradition in South Africa prevailed over the English stream of law to give a higher protection to reputation.[73] Impairments of dignity included invasions of privacy, unlawful arrest and malicious prosecution.[74] The significance of the remedy for infringement of dignity is evident from Burchell's assessment:

> The protection of human dignity under the *actio iniuriarum* is undoubtedly one of the most impressive and enduring legacies of Roman law, and a feature which places the South African law of delict in the forefront of the protection of what is arguably the most fundamental of all human rights.[75]

As well as the more usual usages to defend privacy and to prevent unwarranted arrest and prosecution, the remedy came to be used to safeguard an individual from insulting words or conduct, interference with parental authority, breach of promise to marry, and adultery.[76] The *actio iniurarum* is not confined to insult, even though insulting behaviour and the expression of arrogance played a formative function in the development of the idea of *animus iniuriandi*.[77] The case law up to the middle of the 20th century did not give any substance to

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(1982) 82 *Colum L Rev* 42, at 43-45; Hub Harrington, "Alabama Supreme Court Recognizes Intentional Infliction of Severe Emotional Distress as an Independent Cause of Action: *American Road Service Co v Inmon*, 394 So. 2d 361 (Ala. 1980)" (1982) 12 *Cumb L Rev* 525. For a definition of the tort and its interpretation in practice, see Givelber *supra*, at 45-75.

[71] 2006 (6) SA 235 (CC), at [62] (footnotes omitted).

[72] Jonathan M Burchell, "The Protection of Personality Rights" in Reinhard Zimmermann and Daniel Visser eds, *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press, Oxford 1996), at 640.

[73] Truth *per se* is not a defence to a defamation action—it is only a defence when publication of the truth is for the public benefit: *ibid*, at 644.

[74] *Ibid*, at 640.

[75] *Ibid*, at 650. On the influence of apartheid on private law, see Christopher Roederer, "The Transformation of South African Private Law after Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy" (2006) 37 *Colum Hum Rights L Rev* 447, at 453-468.

[76] Burchell (n72), at 650. See John Campbell, "Litigating Human Dignity: The Roman-Dutch Common Law" [2011] *EHRLR* 375.

[77] Burchell (n72), at 651-652. Burchell interpreted the Supreme Court's decision in 1993 extending a remedy for invasion of privacy to an artificial or juristic person—which obviously cannot experience insult in the strict sense—as a rejection of a limiting requirement of insult: *ibid*, at 652, citing Corbett CJ

the concept of privacy, but from the 1950s a right to be free from encroachments into one's private realm began to develop in South Africa and gave protection against unreasonable intrusions into the private sphere, public disclosure of private facts, appropriation of name or likeness, and portrayal in a false light.[78]

3.2 Fundamental rights in the South African Constitution

3.2.1 Transitional phase

The interim Constitution marked the boundary between the old regime based on discrimination with a privileged white minority and the new democracy where all are equal and the human dignity of each individual is respected.[79] It took two years to negotiate its terms between a myriad of different political groups with diverse interests. New structures to support democracy included the Constitutional Court[80] and the Human Rights Commission.[81] An elected Constitutional Assembly, modelled on the Indian experience,[82] comprising the National Assembly and the Senate was established to draft a new Constitution based on 34 Constitutional Principles.[83] The agreed draft was to be proofed by the Constitutional Court and certified by it as complying with the Principles before becoming operative.[84]

The Preamble set the scene for a complete break with the old order by signalling the need to create a state where there would be "equality between men and women of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".[85] The Principles crystallised that theme by stating clearly that the new democratic government's aim was to achieve a society where there was gender and racial equality.[86] This was an acknowledgement that the starting point was inequality in a society deliberately divided along

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in *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (AD), at 460-3, esp 462A-E.

[78] *Ibid*.

[79] Respect for dignity is an affirmation of fundamental human equality; by resisting the temptation to humiliate the white minority, Mandela and the other black African leaders gave all groups the chance to escape the cycle of revenge: Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (Jonathan Cape, London 1999), at 150.
Langa described the fact that agreement was reached at all on an interim Constitution as "a remarkable feat" and "one of the miracles of the century": Langa (n29), at 109.

[80] Interim Constitution of the Republic of South Africa 1993, Section 98.

[81] *Ibid* Section 115. The ICESCR plays a significant role in the Commission's special mandate to monitor socio-economic rights: Christof H Heyns and Frans Viljoen, "Overview of study results" in Heyns and Viljoen (n38), at 19.

[82] Sachs (n69), at 69.

[83] Interim Constitution of the Republic of South Africa 1993, Sections 68, 71(1), Sch 4.

[84] *Ibid* Section 71(2).

[85] *Ibid* Preamble, first para.

[86] *Ibid* Sch 4, Principles I, III, V.

racial lines and therefore there were many inequities to be gradually removed. Not only was past discrimination to be eliminated, but there was an edict to take positive steps to promote equality and national unity.[87] The new document should provide for entrenched justiciable "universal fundamental rights, freedoms and civil liberties" drafted after considering, *inter alia*, the fundamental rights listed in Chapter 3 of the interim Constitution.[88] The justiciability of rights broke with the past supremacy of positive law and parliament's complete autonomy to enact binding laws supporting an immoral apartheid system. The recognition that equality could not be achieved without the improvement of living conditions and the existence of socio-economic rights was evident from the edict in Principle V that the legal system should ensure an equitable legal process and equality before the law to include programmes to relieve the plight of the disadvantaged—particularly those disadvantaged on the grounds of race, colour or gender. While the separation of powers was expressed in Principle VI, the judiciary was specifically singled out as the organ of state with power "to safeguard and enforce the Constitution and all fundamental rights."[89]

The interim Constitution was not merely a transitional measure, but was supreme,[90] binding and justiciable.[91] Section 7(4) provided for the courts to adjudicate on alleged breaches of the fundamental rights in Chapter 3 and for relief to be sought in a representative capacity.[92]

The first enumerated fundamental right was equality in Section 8. It gave protection against direct and indirect[93] unfair discrimination in general and particularly singled out discrimination on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation,[94] age, disability, religion, conscience, belief, culture or language.[95] Measures to redress past discrimination,[96] whether against individuals or groups,[97] were allowed.[98] Restoration of land

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[87] *Ibid* Principle III.
[88] *Ibid* Principle II.
[89] *Ibid* Principle VII.
[90] *Pharmaceutical Manufacturers Association of South Africa, ex p President of the Republic of South Africa* [2000] ZACC 1, 2000 (2) SA 674, at [19]-[20], [44]-[45], [49].
[91] Currie and de Waal (n4), at 5; interim Constitution of the Republic of South Africa 1993, Section 4.
[92] Class actions and public interest litigation were allowed: Interim Constitution of the Republic of South Africa 1993, Section 7(4)(b)(iv) and 7(4)(b)(v) respectively.
[93] The explicit prohibition on indirect discrimination was inserted because the South Africans wanted to avoid the American interpretation of the Fourteenth Amendment only to forbid intentional discrimination: Adrien Katherine Wing, "The South African Constitution as a Role Model for the United States" (2008) 24 *Harv Blackletter LJ* 73, at 76.
[94] The South African Constitution was the first one to include sexual orientation in its protections: Wing (n93), at 75.
[95] Interim Constitution of the Republic of South Africa 1993, Section 8(2).
[96] Aware of the American debate on reverse discrimination and wanting to avoid a rash of reverse

rights where people had been dispossessed on a discriminatory basis during the apartheid regime was an entitlement.[99] *Prima facie* evidence of unfair discrimination was sufficient, subject to rebuttal by the defence.[100]

The right to life was set out in Section 9. There was a specific right to dignity in Section 10, "[e]very person shall have the right to respect for and protection of his or her dignity." Broadly accepted civil and political rights were incorporated based on physical security, justice and democratic norms.[101] Interestingly, there was a specific right to privacy concentrating on the physical aspect, possessions and communications.[102]

Freedom of religion, belief and opinion in Section 14 extended beyond established religions to conscience.[103] Freedom of expression, association and peaceful assembly[104] were guaranteed.[105] Personal property rights were subject to expropriation for public purposes on payment of compensation.[106] There was a right to basic education and equal access to educational institutions.[107] Again, taking account of pluralism, the right to be educated in the language of one's choice within reason was granted,[108] private segregated schools could be

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discrimination cases, the drafters made it clear that affirmative action is part of the notion of equality, rather than an exception to it: Wing (n93), at 76.

[97] In embracing group-based remedies, even though they may disadvantage individuals from a privileged group, the South Africans go beyond the individualistic approach of US jurisprudence: Wing (n93), at 76. It is naïve to think that prejudices can be combated without an insistent affirmative emphasis on the equal worth and dignity of groups; if a dignitary slur on an individual is based wholly or partly on contempt for the group to which that individual belongs as a collective entity, then assertion of the equal dignity of the group as an entity may be necessary to rebut prejudice: Jeremy Waldron, "The Dignity of Groups" (2008) NYU School of Law Public Law Research Paper No 08-53 http://ssrn.com/abstract= 1287174 (visited 8 June 2010), at 19.

[98] Interim Constitution of the Republic of South Africa 1993, Section 8(3)(a).

[99] *Ibid* Section 8(3)(b).

[100] *Ibid* Section 8(4).

[101] *Ibid* Sections 11, 12, 18-22, 24, 25.

[102] "Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications": *ibid* Section 13.

[103] State-endowed religious observances were allowed provided they were equitable, free and voluntary: *ibid* Section 14(2). Taking cognisance of the multi-cultural nature of South African society, personal, family and marriage laws could be tailored to different religions: *ibid* Section 14(3).

[104] The Supreme Court of Ghana found that the prohibition on holding a public rally without a police permit constituted a serious abridgment of responsible human and civil rights inherent in a democracy and intended to secure the freedom and dignity of man: *New Patriotic Party v Inspector-General of Police* [2001] AHRLR 138 (GhSC 1993), at [53], [55]. See also *Inspector-General of Police v All Nigeria Peoples Party* [2007] AHRLR 179 (NgCA 2007).

[105] Interim Constitution of the Republic of South Africa 1993, Sections 15, 17, 16 respectively.

[106] *Ibid* Section 28(3).

[107] *Ibid* Section 32(a).

[108] *Ibid* Section 32(b).

established on cultural, language or religious grounds provided there was no racial discrimination,[109] and there was a general right to choose one's language and culture.[110]

Free enterprise was the basis of the economy, but intervention was allowed to protect workers, foster human development and to improve the quality of life and working conditions, provided the measures were compatible with a democracy based on equality and freedom.[111] Workers' rights were given constitutional status.[112]

Unusually in comparison with traditional constitutions and with a nod to posterity from solidarity rights, which had the potential to endow societal benefits in the future as well as in the present, protection extended beyond the purely personal to the environment.[113] Another modern feature was Section 30 relating to children's rights, which was an acceptance of the temporal changes in people's enjoyment of rights. The justiciability of socio-economic rights was recognition of the need to make human rights a reality for people deprived by state action of physical and monetary benefits. Certain standards of living were necessary to enjoy fully civil and political rights.

None of the fundamental rights was absolute. The entrenched rights in Chapter 3 were subject to limitation by law to the extent that it was reasonable and compatible with a free and equal democracy.[114] The essential content of the right could not be negated and the limit on certain entrenched rights (including the right to human dignity) must also have been necessary.[115] Fundamental rights were all-pervasive. Courts were obliged to have regard to them, their spirit and aims when interpreting laws, and in applying and developing the common and customary law.[116]

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[109] *Ibid* Section 32(c).
[110] *Ibid* Section 31. On the development and meaning of the right to culture, see Jewel Amoah and Tom Bennett, "The Freedoms of Religion and Culture under the South African Constitution: Do Traditional African Religions Enjoy Equal Treatment?" (2008) 8 *AHRLJ* 357, at 367-368, 371-372.
[111] Interim Constitution of the Republic of South Africa 1993, Section 26.
[112] *Ibid* Section 27.
[113] "Every person shall have the right to an environment which is not detrimental to his or her health or well-being": *ibid* Section 29.
[114] *Ibid* Section 33(1)(a).
[115] *Ibid* Section 33(1)(b). Its role in the limitation of rights is the key, in practice, to the idea of human dignity serving as a foundational principle: Klug (n50), at 148.
[116] *Ibid* Section 35(3).

3.2.2 Constitution of 1996

3.2.2.1 Drafting and adoption

The new Constitution drafted by the Constitutional Assembly did not differ markedly from the interim document.[117] Most judicial decisions under the interim Constitution remain authoritative.[118] The Constitutional Assembly adopted a constitutional text on 8 May 1996.[119] The Constitutional Court approved many of its provisions, but rejected, *inter alia*, the failure to entrench the right of individual employers to bargain collectively.[120] Judicial scrutiny of a constitution before becoming effective was unique. Iain Currie and Johan de Waal describe it as "an unprecedented and extraordinary exercise of judicial review."[121] Despite the fact that the Constitutional Assembly was the pinnacle of the country's democratic institutions, the certification process empowered an unelected Constitutional Court to pronounce on its efforts with reference to a set of principles formulated by unelected negotiators.[122]

There was an objection to the inclusion of socio-economic rights on the basis that they were not universal, and should not be justiciable because of the separation of powers and budgetary implications arising from their enforcement.[123] The Court overruled the first objection, since the Constitutional Assembly was not confined to including only universal rights, but was entitled to add additional rights. The second objection was dismissed, as it considered that these rights are justiciable at least to some extent; the Court pointed out that upholding civil and political rights also has budgetary implications at times.

Objection was taken to the omission of family rights and the right to marry.[124] The Court found that the values of dignity, equality and freedom as well as the right to dignity in Section 10 would protect the right to marry and freedom of choice in relation to one's spouse.[125] They also provide negative protection for family life. The drafters of the Constitution steered a middle course in relation to the family in order to cater for a multi-cultural society with varying

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[117] It received 86% support—well in excess of the two-thirds majority required: Currie and de Waal (n4), at 6, fn 21; interim Constitution of the Republic of South Africa 1993, Section 73(2).
[118] Currie and de Waal (n4), at 6.
[119] The draft text was adopted with only two negative votes and a small number of abstentions: Davenport and Saunders (n1), at 572.
[120] *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), at [69].
[121] Currie and de Waal (n4), at 6.
[122] *Ibid*.
[123] *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744, at [76]-[78].
[124] *Ibid*, at [96].
[125] *Ibid*, at [100].

views on these issues and also to take account of different individual lifestyle choices.[126] Many of the constitutional provisions provided direct and indirect support for marriage and the family. The Court did not enter into the abortion debate raised in the context of the rights to bodily integrity.[127]

The phrase "fundamental rights, freedoms and civil liberties" in Constitutional Principle II of the interim Constitution should not be broken down into separate words and examined in isolation.[128] The Court said that as a whole it conveyed a composite idea firmly established in human rights jurisprudence. These rights vary from country to country.

With regard to the limitation of rights, the new text omitted the reference to the limitation being "necessary" and required it only to be reasonable and justifiable. The Court said that the qualification "necessary" was not universally accepted in national constitutions as the norm for limiting rights.[129] Section 36 of the new Constitution dealing with the limitation of rights embodied the requirement of proportionality and was in conformity with the interpretation given to that term in *Makwanyane*, where the death sentence was held to be unconstitutional.[130] Chaskalson P alluded to the different roles of the organs of state and the

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[126] *Ibid*, at [103].
[127] *Ibid*, at [59]-[60].
[128] *Ibid*, at [50].
[129] *Ibid*, at [90].
[130] *S v Makwanyane* 1995 (6) BCLR 665 (CC). There Chaskalson P had found that the task of adjudicating on the validity of limitations on rights involved weighing up competing values and an assessment based on proportionality, and continued, *ibid*, at [104]:

> The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

Writing extrajudicially, Albie Sachs described *Makwanyane* as having treated proportionality as "the vertebral support of the whole legal analysis": Sachs (n69), at 206. On the proportionality analysis in South Africa, see Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Colum J Transnat'l L* 72, at 124-131.
Jeremy Waldron considers it more compatible with dignity to have standards such as "reasonable care" in order to facilitate thoughtfulness about situations than to lay down a rule; this permits ordinary people to recognise a norm, apply it to their conduct, make a determination and act on it: Jeremy Waldron, "Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley" (2009) NYU School of Law Public Law Research Paper No 09-50 http://ssrn.com/abstract=1461220 (visited 1 June 2010), at 43-

delicate balance to be struck by the judiciary in respecting the separation of powers.[131] The South African courts have unequivocally adopted proportionality as a central principle. Among other objections dismissed in the *First Certification* case were to provisions relating to horizontality of rights,[132] and access to information.[133]

The Indian freedom struggle and the processes used to accommodate diversity in a democratic national framework influenced Nelson Mandela's generation and are reflected in the Constitution, which owes much to the spirit of Gandhi with his focus on compassion and self-denial[134] as well as to the institutionalisation of democracy in the philosophy of Nehru.[135] Other influences come from the rest of Africa, Europe, North and South America.[136] Albie Sachs has observed that the notion of universal human rights permits their adoption to many cultural contexts and does not equate to the globalised imposition of one set of values on all humanity.[137]

3.2.2.2 Supremacy and values

The Preamble leaves no doubt that the Constitution is supreme and transformative.[138] The purposes in adopting it as "the supreme law of the Republic" recognise that socio-economic benefits are necessary to achieve social justice and for full personal development.[139] The

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[131] He quoted Lamer J of the Supreme Court of Canada who had said in the *Prostitution Reference*, "the role of the Court is not to second-guess the wisdom of policy choices made by legislators.": *S v Makwanyane* 1995 (6) BCLR 665, at [104], citing *Reference re ss 193 and 195(1)(c) of the Criminal Code of Manitoba* (1990) 48 CRR 1, at 62.

[132] *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744, at [53]-[56], [200]-[202].

[133] *Ibid*, at [82]-[87].

[134] Gandhi (like Martin Luther King) exemplified the virtue of dignity by claiming his rights publically, forcefully and without exaggerating or underestimating how his rights should be seen by others: Michael J Meyer, "Dignity as a (Modern) Virtue" in Kretzmer and Klein (n42), at 198, 205-207. For an account of Gandhi in South Africa, see Bipan Chandra, *India's Struggle for Independence 1857-1947* (Penguin Books, New Delhi 1989), at 170-176; Davenport and Saunders (n1), at 121-122, 244-245, 276-278; Huttenback (n12), at 46-331; Shweta Mehra, *Human Rights: A Gandhian Perspective* (Sarup & Sons, New Delhi 2006), at 14, 21-25; Tinker (n11), at 283-284, 288-289, 300, 314.

[135] Sachs (n69), at 91-92. India's nationalist leaders (including Nehru and Gandhi) viewed human rights as indivisible and interconnected; they were imbued with socialist philosophy: Vijayashri Sripati, "Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective" (2007) 16 *Tul J Int'l & Comp L* 49, at 66.

[136] Sachs (n69), at 92.

[137] *Ibid*.

[138] For a definition of transformative constitutionalism, see Karl E Klare, "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146, at 150. On the Constitutional Court's procedural authority and interpretative mandate as a transformative court, see Eric C Christiansen, "Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice" (2010) 13 *J Gender Race & Justice* 575, at 578-594.

[139] Constitution of the Republic of South Africa 1996, Preamble, fifth para, points 1-3: The Constitution

Constitution aims to change the unjust ethos of the past to a society where all are cherished equally.

The founding values in Section 1 include human dignity and the achievement of equality irrespective of race or sex.[140] It is more difficult to amend Section 1 than other parts of the Constitution.[141] Chapter 2 contains a Bill of Rights.[142] Dignity has been given a more prominent and recognised place than in the interim Constitution. As well as including it in the founding values, the definition of the right to dignity in Section 10 has been extended to read, "[e]veryone has inherent dignity and the right to have their dignity respected and protected."[143] Chaskalson described the affirmation of human dignity as one of the founding values of the Constitution as significant,[144] because although human dignity was immanent in the values and rights of democracy, freedom and equality emphasised in the interim Constitution, it was not recognised as a foundational value.[145] The right to dignity in Section 10 is stronger, as it refers to "the 'inherent dignity' of all people, thus asserting that respect for human dignity, and all that flows from it, is an attribute of life itself, and not a privilege

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was adopted, *inter alia*, to

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> Improve the quality of life of all citizens and free the potential of each person.

[140] *Ibid* Section 1(a), (b).

[141] A Bill amending it has to receive the support of three-quarters of the National Assembly instead of the two-thirds majority required to change other provisions (except for the amending provision itself, which is subject to the higher threshold): *ibid* Section 74(1). The entrenchment of founding values seems partly attributable to the influence of the German Basic Law: Ackermann (n21), at 543.
On amendments made, see Hugh Corder, "The Republic of South Africa" in Dawn Oliver and Carlo Fusaro eds, *How Constitutions Change: A Comparative Study* (Hart, Oxford 2011), at 274-276.

[142] Constitution of the Republic of South Africa 1996, Sections 7-39.

[143] The additional text underscores the recognition that human dignity is not merely a protected and entrenched right, but that the concept of human dignity is definitional to what it means to be a human—that all humans have inherent dignity as an attribute independent of and antecedent to any constitutional protection thereof; Ackermann argues that human dignity has been accepted as a categorical constitutional imperative: Lourens WH Ackermann, "The Legal Nature of the South African Constitutional Revolution" [2004] *NZL Rev* 633, at 647.
An understanding of what it means to be human involves a belief that human beings are self-aware in ways that add dimensions to matters such as experiencing abuse or facing death; our understandings of human capacity and human desire are relevant: Peggy Cooper Davis, "Responsive Constitutionalism and the Idea of Dignity" (2009) 11 *U Pa J Const L* 1373, at 1374.

[144] Kriegler J also stated, "the right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution": *Ex p Minister of Safety and Security: Re S v Walters* 2002 (4) SA 613 (CC), at [28].

[145] Arthur Chaskalson, "Human Dignity as a Foundational Value of Our Constitutional Order" (2000) 16 *SAJHR* 193, at 196.

granted by the state".[146]

In *Hyundai* Langa DP pointed out the focus on the dignity of all in the new transformative Constitution.[147] Ngcobo J in *Daniels* also pinpointed dignity as the focal point.[148]

The central position given to dignity as a value brought the South African legal order in line with post-World War II constitutionalism and closer in language to the Charter of the Organisation of African Unity[149] and the African Charter,[150] both of which record "the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples".[151] It is in accord with the foundational role attributed to dignity in the UN Charter and human rights instruments.

The Constitution marks a radical shift to democracy and is not just a tweaking of the old

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[146] *Ibid* (footnote omitted).

[147] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC), at [21]:

> The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

Writing extrajudicially, Langa suggested that the Epilogue to the interim Constitution, which identified the need to change by healing the wounds caused by the divisions of the past and embracing a future founded on "human rights, democracy and peaceful co-existence and development opportunities for all", provided a basis for understanding transformative constitutionalism: Pius Langa, "Transformative Constitutionalism" (2006) 17 *Stellenbosch L Rev* 351, at 352. Peggy Cooper Davis considers that the South African Constitutional Court's decisions concerning issues such as the death penalty, procedural due process, consensual sodomy and gay marriage show that responsive constitutionalism can yield a respect for human dignity that commits one to much more than saying "never again" to apartheid: Davis (n143), at 1375.

Dikgang Moseneke (also writing extrajudicially) indicated that in order to achieve substantive equality (the primary purpose of the Constitution), transformative adjudication must aim for social redistributive justice by looking at violations of human rights in the context of the socio-economic conditions of groups and by having regard to the historical context: Dikgang Moseneke, "Transformative Adjudication" (2002) 18 *SAJHR* 309, at 318-319. He pointed out that as the Constitution's transformative mission is altruistic rather than individualistic, the change being sought was not only freedom, but also the achievement of equal worth and social justice, which was allied, *inter alia*, to substantive equality: Dikgang Moseneke, "Transformative Constitutionalism: Its Implications for the Law of Contract" (2009) 20 *Stellenbosch L Rev* 3, at 12.

[148] "The new constitutional order ... affirms the equal worth and equality of all South Africans. The recognition and protection of human dignity is the touchstone of this new constitutional order.": *Daniels v Campbell* 2004 (5) SA 331 (CC), at [54].

[149] Charter of the Organisation of African Unity (adopted at Addis Ababa 25 May 1963) (OAU Charter) Preamble.

[150] African Charter (n37) Preamble.

[151] Chaskalson (n145), at 196.

constitutional order.[152] The South African Constitution (like the German one) embodies a normative value system.[153] Similar to the European Convention on Human Rights (ECHR),[154] positive obligations are imposed by the South African Constitution.[155] As Chaskalson said, "[t]he Constitution demands a moral reading of its provisions".[156] The common law must be developed to conform with the Constitution's value system.

3.2.3 The Bill of Rights

3.2.3.1 Scope

The Bill of Rights is the cornerstone of democracy in South Africa.[157] Section 7 reaffirms "the democratic values of human dignity, equality and freedom."[158] Rights are not absolute, but can be limited as in Section 36 or elsewhere in the Bill.[159] Section 36 denotes carefully the boundaries of the limitation by reference to the underlying values.[160] Balancing of individual

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[152] The Constitution has a transformative role "from a grossly unequal society" to one based on equality between all: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC), at [74] (Ngcobo J). Ngcobo J differentiated it from other constitutions where it is assumed that all are equal, and mentioned the US as an example where the equal protection clause in its Constitution has limited application to the government's programme to remedy race discrimination: *ibid*, at [74], fn 10, citing *Fullilove v Klutznick* 448 US 448 (1980), *City of Richmond v JA Croson Co* 488 US 469 (1989).

[153] The Constitutional Court drew an analogy between the South African and the German Constitutions, and cited the German Federal Constitutional Court as saying, *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), at [54], and *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), at [94], citing *First Abortion* case, BVerfGE 39, 1 (1975), at [41]:

> The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.

The Court in *Carmichele* contrasted the South African Constitution with the US Constitution, which distinguishes between government action and inaction resulting in the state not being liable for not preventing harm: 2001 (4) SA 938 (CC), at [45], citing *DeShaney v Winnebago County Department of Social Services* 489 US 189 (1989).

See Henk Botha, "Human Dignity in Comparative Perspective" (2009) 20 *Stellenbosch L Rev* 171, at 200; Roederer (n75), at 497-499; Christopher J Roederer, "Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa's Bill of Rights" (2009) 26 *Ariz J Intl & Comp L* 427, at 484-501.

[154] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (ECHR).

[155] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), at [45]. Pierre de Vos observed that the obligation on the state in Section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights entailed a combination of negative and positive duties, and applied to all rights whether classified as civil and political or social and economic: Pierre de Vos, "Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution" (1997) 13 *SAJHR* 67, at 78-79.

[156] Chaskalson (n53), at 608 (footnote omitted).

[157] Constitution of the Republic of South Africa 1996, Section 7(1).

[158] *Ibid*.

[159] *Ibid* Section 7(3).

[160] *Ibid* Section 36(1):

> The rights in the Bill of Rights may be limited only in terms of law of general application to the

rights against community interests is necessary at times, but Chaskalson pointed out that rights can be interpreted in ways that avoid conflict.[161]

There is a broad approach to *locus standi* in constitutional issues in contrast with the restrictive common law requirements.[162] In addition to those directly affected, access to the court is granted to their representatives when they are unable to act themselves.[163] Class actions,[164] public interest litigation[165] and proceedings by associations[166] are permitted. Section 39 of the Constitution obliges the courts to "promote the spirit, purport and objects of the Bill of Rights"[167] and makes it clear that other common or customary law or statutory rights only exist to the extent that they are consistent with the Bill.[168] When interpreting the Bill, a court, tribunal or forum must "promote the values that underlie an open and democratic society based on human dignity, equality and freedom".[169] The spirit of the foundational values is to be observed.

The supremacy of the Bill of Rights is evident. But it is not simply a domestic measure. There is a clear instruction to courts to consider international law when interpreting the Bill of Rights.[170] They may also consider foreign law.[171]

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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, including

a) the nature of the right;
b) the importance of the purpose of the limitation;
c) the nature and extent of the limitation;
d) the relation between the limitation and its purpose; and
e) less restrictive means to achieve the purpose.

[161] Chaskalson (n145), at 201.
[162] Currie and de Waal (n4), at 80.
[163] Constitution of the Republic of South Africa 1996, Section 38(b).
[164] *Ibid* Section 38(c).
[165] *Ibid* Section 38(d).
[166] *Ibid* Section 38(e).
[167] *Ibid* Section 39(2).
[168] *Ibid* Section 39(3).
[169] *Ibid* Section 39(1)(a).
[170] *Ibid* Section 39(1)(b). South Africa has the first Constitution setting out an explicit mandate for the courts to use comparative and international law in their human rights reasoning: Esin Örücü, "Comparative Law in Practice: The Courts and the Legislator" in Esin Örücü and David Nelken eds, *Comparative Law: A Handbook* (Hart, Oxford 2007), at 427. Having reviewed cases from many jurisdictions, Paolo Carozza concluded that the centre of gravity of the global jurisprudence he observed regarding the death penalty was in the affirmation of the dignity of the human person and the principle that human rights law exists to protect that dignity; some weight was also given to foreign sources by the transnational character of the dialogue: Paolo G Carozza, "My Friend Is a Stranger: The Death Penalty and the Global *Ius Commune* of Human Rights" (2003) 81 *Tex L Rev* 1031, at 1079. He discerned an emerging global *ius commune* of human rights in which the concept of human dignity, with its universal appeal, served as a common currency of transnational judicial dialogue and borrowing in matters of human rights: Paolo G Carozza, "Human Dignity and Judicial Interpretation of Human Rights:

Most of the rights are conferred on persons as such, but citizens' and political rights can be invoked by citizens, and children's rights are granted to minors.[172] Workers and employers have rights,[173] and juristic persons may have rights in certain circumstances.[174]

3.2.3.2 Horizontal application

The fundamental rights in the interim Constitution were held in *Du Plessis v De Klerk*[175] not to bind individuals directly so as to have horizontal application in disputes between private individuals.[176] This was principally on account of the omission of the judiciary from Section 7(1), which read, "[t]his Chapter shall bind all legislative and executive organs of state at all levels of government." The Constitutional Assembly was concerned not to tolerate private violations of rights and created a different application scheme in the 1996 Constitution.[177] It included the judiciary in the application provision in Section 8(1), "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." It also

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A Reply" (2008) 19 *EJIL* 931, at 932. The new *ius commune* embodied the value of subsidiarity, with its attendant pluralism, rather than uniformity: *ibid*, at 934.
On the courts' use of international law, see Dikgang Moseneke, "The Role of Comparative and Public International Law in Domestic Legal Systems: A South African Perspective" (2010) 23(3) *Advocate (South Africa)* 63, at 65-66; Okeke (n26), at 36-37.

[171] Constitution of the Republic of South Africa 1996, Section 39(1)(c). South African courts have used foreign decisions in order to fill a vacuum left by the temporary absence of indigenous jurisprudence. When the national jurisprudence is sufficiently plentiful and sophisticated, the use of foreign law could be expected to decline significantly. Where there is a transformative constitution, it is more likely that foreign experience will be drawn on to exemplify how transformation is possible on particular issues: Christopher McCrudden, "Human Rights and Judicial Use of Comparative Law" in Esin Örücü ed, *Judicial Comparativism in Human Rights Cases* (UK National Committee of Comparative Law, London 2003), at 14-15. The Constitutional Court's use of foreign law shifted from embracing it initially for guidance, then to regarding it with circumspection, and most recently to dialogue by taking account of foreign jurisprudence without apology: Langa CJ, "A Reply to Professor William Binchy on 'Constitutionality, the Rule of Law and Socio-Economic Development'" (Lecture at Southern African Chief Justices Forum in Botswana 2009), at 3-5 http://www.venice.coe.int//SACJF/2009_08_BTW_Kasane/ default.htm (visited 10 November 2009).

[172] George Devenish, *A Commentary on the South African Bill of Rights* (Butterworths, Durban 1999), at 20.

[173] Constitution of the Republic of South Africa 1996, Section 23.

[174] Devenish (n172), at 20, 22-24.

[175] 1996 (3) SA 850 (CC). For analysis and criticism of *Du Plessis*, see Jörg Fedtke, "From Indirect to Direct Effect in South Africa: A System in Transition" in Dawn Oliver and Jörg Fedtke eds, *Human Rights and the Private Sphere: A Comparative Study* (University of Texas at Austin Studies in Foreign and Transnational Law, Routledge-Cavendish, Abingdon 2007), at 364-371; Klare (n138), at 179-187; Moseneke, "Transformative Constitutionalism: Its Implications for the Law of Contract" (n147), at 6-7.

[176] Currie and de Waal (n4), at 33.

[177] *Ibid*, at 34. Sections 8 and 9(4) of the 1996 South African Constitution have effectively reversed the holdings in *Du Plessis v De Klerk* that the interim Constitution did not apply directly in relations between private persons, nor did it directly apply to private common-law litigation: Andrew S Butler, "Private Litigation and Constitutional Rights under Sections 8 and 9 of the 1996 Constitution—Assistance from Ireland" (1999) 116 *SALJ* 77, at 77. Very few countries have similar constitutional provisions; those that do include Brazil, Malawi, Namibia and Zambia: *ibid*, at 78, fn 8.

imposed an obligation on individuals to uphold the rights of other individuals in certain circumstances.[178]

According to Currie and de Waal, questions concerning the horizontal application of the Bill of Rights cannot be determined in the abstract, but require a contextual enquiry—provided that the circumstances of a particular case should not be used to frustrate the clear intention of the drafters to extend the direct operation of the provisions of the Bill of Rights to private conduct.[179] The purpose of a provision and the nature of the duty imposed by the right are important considerations.[180] The same duties may not be imposed on an individual as on the state where financial outlay is required. Currie and de Waal give an example of a privately-funded hospital, which would not be subject to the same obligations under the Bill of Rights as a public hospital.

3.2.3.3 Socio-economic rights

In contrast with earlier constitutions which tentatively recognised socio-economic rights[181] or contained a single, all-encompassing guarantee,[182] the South African Constitution includes specific guarantees relating to housing,[183] healthcare,[184] welfare,[185] and other socio-economic rights recognised as separate justiciable rights.[186] Although from a different background, after the fall of the Berlin Wall in 1989 countries of central and eastern Europe also favoured this

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[178] "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.": Constitution of the Republic of South Africa 1996, Section 8(2).

[179] Currie and de Waal (n4), at 53. More often than not, the Constitutional Court has avoided the direct application of a provision in the Bill of Rights to a common law rule, but has resorted to indirect horizontality facilitated by Section 39(2) of the Constitution, which obliges courts to promote the spirit, purport and objects of the Bill of Rights when developing the common law: Moseneke, "Transformative Constitutionalism: Its Implications for the Law of Contract" (n147), at 8. Although legal academics have criticised or praised this method of adjudication, a third group has argued that indirect horizontality is better suited to produce an incremental and cohesive body of constitutionalised common law: *ibid*.

[180] Currie and de Waal (n4), at 54.

[181] David M Beatty, *The Ultimate Rule of Law* (OUP, Oxford 2004), at 119-120, fn 3, citing Constitution of India, Part IV, and Constitution of Ireland, Art 45.

[182] *Ibid*, at 120, citing Constitution of Japan, Art 25.

[183] Constitution of the Republic of South Africa 1996, Section 26.

[184] *Ibid*, Section 27.

[185] *Ibid*.

[186] On the different generations of rights and the options concerning socio-economic rights considered when the Bill of Rights was being drafted see Sachs (n69), at 166-168. Human dignity is foundational to all types of rights, drawing them together and acting as a reminder of their principled indivisibility: Catherine Dupré, "Unlocking Human Dignity: Towards a Theory for the 21st Century" [2009] *EHRLR* 190, at 202. Dupré explains that human dignity's historical focus on autonomy makes it the queen of civil and political rights; its fundamental material and humane dimension also makes it the queen of economic and social rights; it may be the archetype of the third generation solidarity rights (the right to peace or to a healthy environment): *ibid*, at 199, 202.

approach.[187] In Hungary the Constitutional Court has drawn on dignity in its decisions on socio-economic rights.[188] The Basic Law in Israel has been interpreted as generating a right to the minimal material conditions necessary to exist.[189] Other examples of constitutions with justiciable socio-economic rights are those of Lithuania,[190] Finland,[191] and Portugal.[192]

While socio-economic rights are not explicitly recognised in the United Kingdom, they have been implicated through the right not to be subjected to inhuman or degrading treatment. The House of Lords in *Limbuela* held that there had been a breach of Article 3 ECHR[193] when asylum seekers denied support were faced with starvation and homelessness.[194] Baroness Hale stated that Article 3, along with the right to life, was the most important of the ECHR rights and reflected "the fundamental values of a decent society, which respects the dignity of each individual human being, no matter how unpopular or unworthy she may be."[195]

The right to respect for private and family life, and for a person's home in Article 8 ECHR also has socio-economic implications. In *Connors v UK*, where Article 8 was the basis for the right not to be evicted summarily, the European Court of Human Rights recognised that it imposed a positive obligation on states to facilitate the lifestyle of vulnerable minorities—in this case, the nomadic traditions of gypsies.[196]

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[187] Beatty (n181), at 120, citing Constitution of Hungary.

[188] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *EJIL* 655, at 693. Combined with the right to life, the framework of social institutions supporting the right to social security has been interpreted as requiring the minimum necessary to guarantee the right to human dignity, thus imposing an obligation on the state to provide shelter for the homeless in dire circumstances: *ibid*, at 693, fns 271-273, citing Decision 42/2000 (XI 8) AB, Constitutional Court file number: 5/G/1998, published in the Official Gazette (Magyar Közlöny) MK 2000/109.

[189] *Ibid*, at 701.

[190] Constitution of Lithuania 1992.

[191] Constitution of Finland 1999.

[192] Constitution of Portugal 2005.

[193] "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[194] *R (Limbuela) v Secretary of State for the Home Dept* [2005] UKHL 66, [2006] 1 AC 396. The state was culpable for inaction in the face of unacceptable conditions, which the claimants alleged required "a person to sleep rough, thus exposing him to risks to health and safety and depriving him of dignity": *ibid*, at 400. The fact that the primary intention was not to degrade or humiliate was not an exculpatory factor.

Limbuela was significant, first, for finding that "inhuman and degrading" covered denial of the most basic needs to a seriously detrimental extent and, second, for recognising that the state was responsible for the destitution because the legal structure rendered the individuals destitute by prohibiting them from obtaining paid work while simultaneously withdrawing social support: Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, Oxford 2008), at 236-237.

[195] [2005] UKHL 66, [2006] 1 AC 396, at [76].

[196] (App no 66746/01) (2005) 40 EHRR 9, at [84].

The Inter-American Court of Human Rights has adopted a broad approach to the right to life and considers its exercise as essential for the exercise of all other human rights.[197] In the *Street Children* case against Guatemala it held that a person's right to life[198] included "the right that he will not be prevented from having access to the conditions that guarantee a dignified existence".[199] The Court upheld the complaints against the state, which had violated the children's rights by breaching the negative obligation not to deprive them of their lives arbitrarily and also the positive obligation to protect street children by investigating, prosecuting and punishing crimes against them.[200] In its examination of the rights of the child to protection by society and the state,[201] it reiterated its view of the dual nature of the state's default. It criticised the violation of the children's physical, mental and moral integrity and their lives, and also the failure to prevent at-risk children from

> living in misery, thus depriving them of the minimum conditions for a dignified life and preventing them from the "full and harmonious development of their personality", even though every child has the right to harbor a project of life that should be tended and encouraged by the public authorities so that it may develop this project for its personal benefit and that of the society to which it belongs.[202]

The protection afforded to prisoners has evolved from the prohibition of intentional torture and physical maltreatment through its extension to precluding impairment of their mental and intellectual well-being to a requirement to provide reasonable living conditions for them.[203] The intermingling of civil and political rights with socio-economic rights is consonant with the ethos of the Vienna Declaration, which placed them on the same platform and demanded that they be promoted equally.[204]

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[197] *Villagrán Morales* case (the *"Street Children"* case) Series C 63 [1999] IACHR 17, at [144].

[198] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Art 4.

[199] Series C 63 [1999] IACHR 17, at [144]. The case concerned the torture and murder of street children by the police, who were attempting to deal with juvenile delinquency and vagrancy. The state's lax attitude meant that the crimes against street children continued in the knowledge that the authorities at the very least condoned the extreme actions of the security forces.
On the *Street Children* case, see Viviana Bohórquez Monsalve and Javier Aguirre Román, "Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law" (2009) 11 *SUR - Intl J Human Rights* 39, at 52-53.

[200] The Court expanded the conception of the right to life to meet basic needs: McCrudden (n188), at 693.

[201] American Convention on Human Rights (n198) Art 19.

[202] Series C 63 [1999] IACHR 17, at [191].

[203] In Canada and the US two distinct bases—residual liberty and intolerable conditions—have justified intervention when an otherwise proper detention has been rendered unlawful because the custodial conditions are excessive or interfere with the fundamental rights of prisoners: Adrian Hoel, "What rights do you take to prison? *Habeas corpus* and prison conditions" (2009) 83 *ALJ* 395, at 397.

[204] World Conference on Human Rights "Vienna Declaration and Programme of Action" (25 June 1993)

It is noteworthy that the Vienna Declaration pre-dated agreement on the interim Constitution in South Africa. The international human rights model was one of the influences on the drafters.[205] Although they sought precedent constitutions mentioning socio-economic rights, the only ones the drafters could find incorporated them merely as non-justiciable directives of state policy.[206] They adverted to the Irish and the Indian[207] Constitutions, both of which were in this category.[208]

In view of the crucial influence of Indian constitutional jurisprudence on the formation and development of the Bill of Rights in South Africa, it is worth examining some central aspects of that jurisprudence. Unlike its Irish counterpart, the Indian Supreme Court[209] construed the

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UN Doc A/CONF.157/23, pt I, art 5:

> All human rights are universal, indivisible and interdependent and interrelated. ... While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

[205] Sripati (n135), at 108.

[206] Sachs (n69), at 168.

[207] Constitution of India 1950.

[208] Sachs (n69), at 168.

[209] For over a quarter of a century after gaining independence in 1947, the Indian judiciary had a somewhat fraught relationship with the other two branches of government. Initially there were skirmishes over the power of the government to amend the Constitution to pare back property rights in order to achieve social justice and a more equal society. Sripati described the battle between the Parliament and the Court during the first two decades as being over land reform, compensation for expropriation of private property and the abolition of the privy purses (compensation payable to former princes); her view was that the Court aligned itself with the propertied classes and repeatedly blocked Parliament's attempts to water down the right to property through constitutional amendments to implement the directive principles: Sripati (n135), at fn 298. Venkat Iyer has a different perspective and regards the Court's actions up to 1973 as constitution-reinforcing entirely consistent with the role of the courts in a liberal democracy; the Court saw the naked power of an encroaching state as the biggest threat to freedom and the rule of law: Venkat Iyer, "The Supreme Court of India" in Brice Dickson ed, *Judicial Activism in Common Law Supreme Courts* (OUP, Oxford 2007), at 131.
The integrity of the judiciary was tested—and some would say, found wanting—by the declaration of an emergency in 1971 and the abrogation of safeguards on detention with the suspension of *habeas corpus* applications to enforce fundamental rights to equality, life and liberty in 1975. Indira Gandhi, as Prime Minister after the 1971 elections, enacted a series of constitutional amendments that made any law implementing any or all of the directive principles immune from judicial review; Sripati described as "historic" the constitutional bench's judgment conceding that although Parliament had unlimited powers to amend any part of the Constitution (including the right to property), such sweeping away of judicial review was destructive to the "basic features" or "basic structure" of the Constitution and therefore unconstitutional: Sripati (n135), at fn 298, citing *Keshavananda Bharati v State of Kerala* AIR 1973 SC 1461. Sripati was critical of the Supreme Court's deference to the government during the emergency: *ibid*, at 97, fn 300. *Keshavananda* is seen as the high-water mark of judicial activism in the entire history of independent India; the Supreme Court did not list the elements of the "basic structure" of the Constitution, leaving them to be decided on a case-by-case basis: Iyer *supra*, at 130. For analyses of *Keshavananda*, see Burt Neuborne, "The Supreme Court of India" (2003) 1 *ICON* 476, at 491-492; Gary Jeffrey Jacobsohn, "An Unconstitutional Constitution? A Comparative Perspective" (2006) 4 *ICON*

fundamental rights combined with the directives to give practical effect to social and economic rights. Sachs described the Indian Court's interpretation as "creative", by using the directives "to give texture and substance to fundamental civil and political rights that were directly enforceable in the courts."[210] A more detailed look at the Indian case law at this juncture will be instructive.

Having survived onslaughts as an institution (albeit with a rather tarnished reputation as a defender of fundamental rights), the Supreme Court redeemed itself in 1978 in *Maneka Gandhi* and held that the Constitution should be read as an integrated document encompassing due process.[211] The Court gave an integrated reading to the rights to personal

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460, at 471, 472, 473-475, 479, 480-481, 483, 486; Milan Dalal, "India's New Constitutionalism: Two Cases That Have Reshaped Indian Law" (2008) 31 *BC Int'l & Comp L Rev* 257, at 262-263.
Tensions between the judiciary and the government boiled over because of *Keshavananda*; within a day of the judgment, the government announced it was passing over three senior judges, who were in the majority in that case, for the office of Chief Justice and appointed Ray J, who had supported the government's position; the three judges and the incumbent Chief Justice, who had only one day left in office, tendered their resignation amidst strong protests from the public, media and legal community over their treatment: Iyer *supra*, at 133. Iyer described the period 1973-1977 as "easily the least glorious in the annals of the Supreme Court", when it became highly politicised and significantly marginalised: *ibid*, at 137-138.
The "basic structure" doctrine was imported to India from the West and reinterpreted there: Andreas Buss, "Dual Legal Systems and the Basic Structure Doctrine of Constitutions: The Case of India" (2004) 19(2) *Can JL & Soc* 23, at 23.
In the *Habeas Corpus* case the Supreme Court in a majority decision upheld the government's actions: *Additional District Magistrate, Jabalpur v Shukla* [1976] INSC 129, 1976 SCR 172. Iyer labelled the majority judgments "remarkable" for their summary rejection of arguments based on natural law and on the importance of judicial scrutiny of executive action where basic freedoms were involved, and for the enthusiasm with which the judges endorsed the positions advocated by the emergency regime; remarks by Beg J and Ray CJ were seen by many as insulting to detainees; in view of credible reports about widespread abuse and torture of detainees, this raised serious questions about the objectivity and impartiality of the Court; Ray CJ even questioned the patriotism of the detainees' counsel by suggesting they had wilfully and grossly exaggerated the emergency regime's actions: Iyer *supra*, at 135. The judges' observations and the Court's visible determination to shut out any possibility of judicial review for human rights infringements represented an unmistakable capitulation by the Court in the face of executive pressure: *ibid*, at 136. Khanna J dissenting (finding that the rule of law did not permit the revocation of fundamental rights) based his decision on natural law pre-dating the Constitution and was adamant that procedural and substantive safeguards could not be extinguished. Prime Minister Indira Gandhi passed over Khanna J for the position of Chief Justice in 1977 in favour of Beg J (one of the majority judges in the *Habeas Corpus* case); Iyer described her move as "a further display of contempt for judicial independence": *ibid*, at 137.

[210] Sachs (n69), at 168.

[211] *Maneka Gandhi v Union of India* [1978] INSC 16, 1978 SCR (2) 621. It overruled its earlier decision in *Gopalan v State of Madras* [1950] INSC 14, 1950 SCR 88. The government had impounded Maneka Gandhi's passport ostensibly in the public interest without prior notice. As she had not been given the opportunity to contest its cancellation or to put forward her reasons for going abroad for consideration, she had been denied a fair hearing and the government's arbitrary action infringed her right to equality before the law. Bhagwati J categorised equality as "a dynamic concept with many aspects and dimensions" and it could not "be imprisoned within traditional and doctrinaire limits.": [1978] INSC 16, 1978 SCR (2) 621, at 674.

liberty and life in Article 21, the various freedoms in Article 19 (including freedom of expression and of movement) and equality in Article 14.[212] The goal of fundamental rights, as identified by Beg CJ, was to secure political and social justice in a free and equal society thereby assuring the dignity of the individual.[213] The right to personal liberty included the unenumerated right to travel as a method of self-expression and freedom as a moral agent, which Bhagwati J based in human dignity.[214] A restrictive constitutional interpretation was eschewed by Krishna Iyer J, who recognised the dynamic nature of a state's fundamental law:

> [T]o look at the little letters of the text of Part III *de hors* the Discovery of India and the Destiny of Bharat or the divinity of the soul and the dignity of the person highlighted in the Preamble unduly obsessed with individual aberrations of yesteryears or vague hunches leading to current fears, is a parsimonious exercise in constitutional perception.[215]

An expansive interpretation has continued to be the hallmark of Indian jurisprudence. It can be seen in *Mullin*, where Bhagwati J was influenced by the "luminous guideline" of the US Supreme Court to follow a wide liberal approach flexible enough to deal with changes in society and various circumstances.[216] Applying this method, the right to life was not confined to "mere animal existence" and meant "something much more than just physical survival".[217]

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[212] The Supreme Court reads these three Articles as the "golden triangle" forming the touchstone of the essential features of Part III of the Constitution: Susanne Baer, "Dignity, liberty, equality: A fundamental rights triangle of constitutionalism" (2009) 59 *UTLJ* 417, at fn 10.

[213] [1978] INSC 16, 1978 SCR (2) 621, at 648:

> Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. ... Their waters must mix to constitute that grand flow of unimpeded and impartial Justice (social, economic and political), Freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vacation or occupation as well as of acquisition and possession of reasonable property), of Equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of Fraternity (assuring dignity of the individual and the unity of the nation), which our Constitution visualises.

[214] "It cannot be disputed that there must exist a basically free sphere for man, resulting from the nature and dignity of the human being as the bearer of the highest spiritual and moral values.": *ibid*, at 695. Freedom of movement does not exist in all circumstances, but depends on the context. Bhagwati J outlined the test to be applied based on the nature and depth of integration of the claimed right with an enumerated right (*ibid*, at 697):

> What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right.

[215] *Ibid*, at 718.

[216] *Mullin v Administrator, Union Territory of Delhi* [1981] INSC 12, 1981 SCR (2) 516, at 527. In *Mullin* the Court upheld the right of a detainee to receive family visits and to consult with her lawyer.

[217] *Ibid*, at 528.

It should be dignity-supporting.[218] Remarks by Bhagwati J on the extent of the right to life[219] combined with other fundamental rights, including equality, opened the door to the practical enforcement of socio-economic rights in future cases.[220]

In *Bandhua Mukti Morcha* Bhagwati J declared that the right to live with human dignity enshrined in Article 21 of the Constitution derived its "life breath" from the directive principles.[221] In this case brought on behalf of bonded labourers[222] working in stone quarries, the state was required to invest "their right to live with basic human dignity, with concrete reality and content" by ensuring observance of social welfare and labour laws enacted to protect workers.[223] Bhagwati J stated that "inaction" on the part of the state in securing implementation of the legislation would amount to "denial of the right to live with human dignity".[224]

The right to live with human dignity was a central theme in the Supreme Court's judgment in 1982 in *People's Union for Democratic Rights*, where it held that the state had a constitutional obligation to enforce the rights of workers, who were weak and had been treated unequally, against private entities.[225] The Court transformed the policy directive to secure equal pay for

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[218] *Ibid*:

> The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

[219] The Indian Supreme Court's interpretation of the right to life is at the forefront of an approach which infuses the values of positive freedom, solidarity, and equality into fundamental rights, thereby opening up the possibility of recognising positive duties even in relation to civil and political rights; the positive duties flow directly from the Court's affirmation of the central values for which the right to life stands; Sandra Fredman mentions in particular the value of positive freedom: Fredman (n194), at 206.

[220] [1981] INSC 12, 1981 SCR (2) 516, at 529:

> [T]he magnitude and content of the components of this right [to live with human dignity] would depend upon the extent of the economic development of the country, but it must ... include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self.

[221] *Bandhua Mukti Morcha v Union of India* [1983] INSC 206, 1984 (2) SCR 67, at 103. He acknowledged that the terms of the Constitution meant that the directive principles were not enforceable in court, but where legislation already existed the state could be obliged by the courts to enforce it: *ibid*.

[222] The bonded labour system had been abolished by the Bonded Labour System (Abolition) Act 1976.

[223] [1983] INSC 206, 1984 (2) SCR 67, at 103-104.

[224] *Ibid*, at 103. The state's duty extended to rehabilitation of the released individuals with support to avoid them living a free life in penury. As Bhagwati J discerned, "[t]he bonded labourer who is released would prefer slavery to hunger, a world of 'bondage and (illusory) security' as against a world of freedom and starvation.": *ibid*, at 133.

[225] *People's Union for Democratic Rights v Union of India* [1982] INSC 67, 1983 SCR (1) 456. The Court also promoted the right to equality of the vulnerable and historically disadvantaged in a hierarchical society. Equal bargaining power is often absent in relationships between powerful employers and workers keen for a job at any price: see *ibid*, at 490 (Bhagwati J). The prohibition of discrimination

equal work in Article 39(d) of the Constitution into a fundamental right by using this directive principle to enhance the rights to equality before the law in Article 14 and to equality of opportunity in public employment in Article 16 in *Randhir Singh*.[226] Reddy J interpreted equality rights as directed to all in society, including the majority who were workers, and he pointed out that the "equality clauses of the Constitution must mean some thing to everyone."[227]

The right to life includes the right to a livelihood in the sense of a means of living, but does not entail a right to carry on a trade or business of one's choice.[228] The livelihood right was established in *Olga Tellis* through the medium of the right to life.[229] There was a negative obligation on the state not to deprive people of their livelihood without giving them the opportunity to be heard in a fair, just and reasonable procedure.[230] Chandrachud CJ drew on the US experience of due process to prevent arbitrary action by the public authorities.[231] He

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against specified historically disadvantaged groups in Article 15 of the Constitution could be another basis for a substantive equality doctrine: Catharine A MacKinnon, "Sex equality under the Constitution of India: Problems, prospects, and 'personal laws'" (2006) 4 *ICON* 181, at 190. Equality should be understood as non-subordination instead of uniformity: *ibid*, at 200.

This was a significant decision and, according to JN Pandey, "heralded a new legal revolution"; his assessment is that it "clothed millions of workers in factories, fields, mines and projects sites with human dignity" giving them rights to wages, sustenance, shelter, medical aid and safety: JN Pandey, *The Constitutional Law of India* (45th edn Central Law Agency, Allahabad 2008), at 231.

[226] *Randhir Singh v Union of India* [1982] INSC 24, 1982 (3) SCR 298 (SC). The Court held that the same pay scales should apply to drivers in the police force as to drivers of heavy vehicles in other departments.

[227] *Ibid*, at 305.

[228] *Sodan Singh v New Delhi Municipal Committee* [1989] INSC 258, 1989 (3) SCR 1038 (SC).

[229] *Olga Tellis v Bombay Municipal Corporation* [1985] INSC 155, 1985 SCR Supl (2) 51. Fredman pointed out that the Court, although using the vocabulary of a right to livelihood, only imposed a duty to consult those facing eviction and did not insist that alternative pitches with proper infrastructure be provided as a condition precedent to removals: Fredman (n194), at 143. For a succinct view of *Olga Tellis*, see CB Raju, *Social Justice and the Constitution of India: With Reference to SC's/ST's* (Serials Publications, New Delhi 2007), at 72.

In contrast, Gauntlett JA held that the right to life in the Constitution of Lesotho did not encompass a right to a livelihood, as the Constitution imposed limitations on the right to life: *Baitsokoli v Maseru City Council* [2005] LSCA 13 (CA of Lesotho), at [17], [28]. Furthermore, Lesotho dealt with socio-economic rights (including the opportunity to secure a livelihood) as principles of state policy and not as fundamental rights: *ibid*, at [18]-[19].

[230] The Court did not impose an affirmative duty on the state to provide work, so the pavement dwellers could be evicted in the public interest, provided that they had been allowed a fair hearing. It acknowledged that to evict them from their homes on the pavement was equivalent to depriving them of their right to work, since they were unable to survive in their rural villages and needed to live near their workplaces in the cities where work was available.

Cf *Asare v Ga West District Assembly* (Suit No 36/2007) (Ghana High Court) 2 May 2008, when Ofari Atta J held that the right to life of those who had built houses in a flood plain could be justifiably interfered with by being evicted in the public interest to allow the construction of drains to prevent flooding in future, thus protecting the right to life of others.

[231] The outcome appeared puzzling to some commentators in view of the ringing rhetoric in earlier

found that there were two purposes to the right to be heard: first, an instrumental one to try to change the outcome and, second, an intrinsic value consisting of

> the opportunity which it gives to individuals or groups, against whom decisions taken by public authorities operate, to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons.[232]

Participation was evidenced by dialogue comprising the giving and receiving of explanations, articulating and listening to reasons for and against the measure, thereby expressing and respecting dignity as persons irrespective of the outcome.

In *Consumer Education and Research Centre*, the Supreme Court found that the right to live with dignity imposed obligations on the employer and on the state to safeguard the health of workers during work and in retirement.[233] The Court integrated the right to life in Article 21 of the Constitution[234] with the Preamble and directive principles,[235] which amplify that right.[236] The ethos of social justice was imbued in the Preamble and in the directive principles.[237] The

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passages of the judgment and critics suggested that the Court failed to invalidate the enabling legislation because it did not have the courage to take such a politically risky step; Pierre de Vos has countered critics with his explanation that the Court insisted that the pavement dwellers could only be removed on certain stringent conditions: de Vos (n155), at 82.

[232] [1985] INSC 155, 1985 SCR Supl (2) 51, at 91.

[233] *Consumer Education & Research Centre v Union of India* [1995] INSC 91, JT 1995 (1) 636. This case concerned those employed in the asbestos industry. See Raju (n229), at 74-75.

[234] The Constitution of India in not merely a legal document, but also a social document providing for a social contract, whose goals are achieved through the fundamental rights and directive principles; the essence of the social contract, as a political theory (in its most common form as proposed by Jean-Jacques Rousseau) is that in order to live in society, human beings agree to an implicit social contract, which gives them certain rights in return for giving up certain freedoms they would have in a state of nature: Parul Sharma, *Welfare State, Right to Life and Capital Punishment in India* (Sampark, Calcutta 2005), at 84. On Rousseau's concept of law, see Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart, Oxford 2009), at 182-183.

[235] The novel feature of including directive principles in the Constitution was borrowed from the Irish Constitution: Pandey (n225), at 385; Jacobsohn (n209), at 471.

[236] The Supreme Court was consistent in its approach in a case concerning the right to life insurance on reasonable conditions, when it reiterated that the Preamble, the fundamental rights and the directive principles combined to give a right to livelihood as a meaningful life, which required the provision of social security and benefits on equal terms: *LIC of India v Consumer Education & Research Centre* [1995] INSC 272, 1995 SCC (5) 482. With resonances of previous *dicta* concerning employers and employees In *People's Union for Democratic Rights v Union of India* [1982] INSC 67, 1983 SCR (1) 456, Ramaswamy J in *LIC of India* was prepared to dismantle unequal negotiation terms.

The right to life in a welfare state obliged the state and doctors employed in state hospitals to provide timely medical assistance in the case of emergencies and, in default, the Supreme Court held that the injured person was entitled to compensation: *Paschim Banga Khet Mazdoorsamity v State of West Bengal* [1996] INSC 659, 1996 (4) SCC 37.

[237] Particularly those in Article 38, which enjoins the state to strive to secure a social order to promote the welfare of the people, and in Article 39(e) requiring state policy to prevent abuse of the health of workers.

Constitution envisioned social justice as "its arch to ensure life to be meaningful and liveable with human dignity."[238] Ramaswamy J gave a comprehensive exposé of social justice in *Air India* describing it as "a dynamic device to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person."[239]

The range of fundamental rights has been expanded in many areas by an interpretation taking a broad inclusive view of the Constitution and invoking the Preamble and directive principles to enrich the interpretation of equality and the right to life.[240] The affirmative action provisions in the Constitution have been given an expansive interpretation by the Supreme Court.[241] In *Sawhney*,[242] the Court upheld reservation by the government of jobs in the public sector[243] for the dalits (formerly called the "untouchables" and formally referred to as the "Scheduled Castes"),[244] Scheduled Tribes[245] and other socially and educationally backward

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[238] [1995] INSC 91, JT 1995 (1) 636, at 657 [20]. The manifestation of the goal of social justice was the opportunity for self-expression and enjoyment of life supported by a basic level of health care and income in a communal setting. See *ibid*:

> Social security, just and humane conditions of work and leisure to workman are part of his meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity, the State should provide facilities and opportunities to them to reach at least minimum standard of health, economic security and civilised living while sharing according to the capacity, social and cultural heritage.

Social justice uses the rule of law to achieve equality in results: *ibid*, at 658 [21].

[239] *Air India Statutory Corp v United Labour Union* [1996] INSC 1400 (SC). He positioned the rule of law as "a potent instrument of social justice to bring about equality in results.": *ibid*.

[240] By interpreting the right to life in Article 21 of the Constitution in the light of the directive principles, the majority of the Supreme Court held that every child has a right to free education up to the age of 14 years: *Unni Krishnan v State of Andhra Pradesh* [1993] INSC 60, 1993 (1) SCR 594. Reddy J for the majority was clear that the Constitution was an integrated document, the fundamental rights in Part III being fleshed out by the directive principles in Part IV: *ibid*, at 649.

The Constitution was amended in 2002 to add a new fundamental right in Article 21A requiring the state to provide free compulsory education to children from six to 14 years old. The fact that as a result of *Unni Krishnan* a child denied education could approach the courts for an order compelling the government to provide facilities was used as a strategic tool by activists seeking improvements in primary education: Vijayashri Sripati and Arun K Thiruvengadam, "India: Constitutional amendment making the right to education a Fundamental Right" (2004) 2 *ICON* 148, at 153. The Supreme Court played a crucial role in bringing education to the forefront of the national agenda: *ibid*, at 157.

[241] The affirmative action provisions have been enhanced by constitutional amendments to equip them to address social and economic deprivation—particularly in the areas of education and public employment.

[242] *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217. On the judgment and the background to it, see Karthik Nagarajan, "Compensatory Discrimination in India Sixty Years after Independence: A Vehicle of Progress or a Tool of Partisan Politics" (2009) 15 *Wash & Lee J Civil Rights & Social Justice* 483, at 499-505.

[243] The reservation was made in accordance with the provision in the Constitution allowing affirmative action in favour of backward classes inadequately represented in employment in the public sector: Constitution of India 1950, Article 16(4).

[244] Nagarajan (n242), at 485. On the socio-economic condition of dalits, see Adrienne Anderson, "On

classes.[246] However, in relation to the other backward classes, it ordered the government to exclude the creamy layer.[247] Sawant J emphasised the importance of socio-economic benefits to enable an individual to be fulfilled as a person, to participate in society and to enjoy civil and political rights to the full.[248] Reddy J (delivering a separate judgment in *Sawhney*) pointed out

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Dignity and Whether the Universal Declaration of Human Rights Remains a Place of Refuge after 60 Years" (2009) 25 *Am U Int'l L Rev* 115, at 139.

[245] Scheduled Tribes are tribal communities who live in isolated pockets of India: Nagarajan (n242), at 487. They are specified by the President and may be altered by Parliament: Constitution of India 1950, Article 342.

[246] The identification of those communities that constitute the socially and educationally backward classes, and the extension of quotas to them, has caused much controversy and violence in India—unlike the reservation system for dalits and Scheduled Tribes, which has aroused less controversy: Nagarajan (n242), at 487.

The Supreme Court confirmed the *ratio decidendi* in *Sawhney* when it upheld legislation reserving educational places in public institutions for members of castes, tribes and other backward classes: *Thakur v Union of India* [2008] INSC 613. The legislation had been enacted to progress the directive principle in Article 46 of the Constitution promoting the educational and economic interests of the weaker sections of society: [2008] INSC 613, at [22], citing the Statement of Objects and Reasons for Central Educational Institutions (Reservation in Admission) Act 2006 (Act 5 of 2007). Balakrishnan CJ regarded the directive principles and the fundamental rights as equally important and significant, since the rationale for categorising directive principles as non-justiciable was simply a desire not to make an infant state accountable immediately for not fulfilling the obligations arising under them: [2008] INSC 613, at [173]. He found that the application of the creamy layer principle to identification of the socially and educationally backward class was necessary, because one of the main criteria for determining that class was poverty: [2008] INSC 613, at [150].

The Constitution permits special provision to be made for admission of members of castes, tribes and other backward classes to educational institutions: Constitution of India 1950, Article 15(5).

On *Thakur* and its background, see Nagarajan (n242), at 505-507; MP Singh, "*Ashoka Thakur v Union of India*: A Divided Verdict on an Undivided Social Justice Measure" (2008) 1 *NUJS L Rev* 193, at 193-197.

In implementing the reservation policy, the state has to strike a balance between the competing claims of the individual under Article 16(1) guaranteeing equality of opportunity in relation to employment and the reserved categories falling within Article 16(4): *Jitendra Kumar Singh v State of Uttar Pradesh* [2010] INSC 20, at [33].

[247] 1992 Supp (3) SCC 217, at [810], [882]. The "creamy layer" is the term applied to the privileged section of the other backward classes: Nagarajan (n242), at 504. The Supreme Court's determination of "Scheduled Caste" status recognises that membership of a dalit caste *per se* subjects individuals to a particularly egregious form of discrimination ("untouchability") regardless of socio-economic status, and merits positive action: Smita Narula, "Equal by Law, Unequal by Caste: The 'Untouchable' Condition in Critical Race Perspective" (2008) 26 *Wisconsin Intl LJ* 255, at 325. In contrast, the determination of "other backward classes" takes into account the socio-economic gains achieved by many members of backward castes in India—who are not subject to untouchability practices—and confines constitutional protections more strictly to those in greatest need by using empirical evidence of economic status: *ibid*. The definition of the creamy layer to be excluded should not necessarily be determined solely on income or economic grounds, but social capacity (which could include educational achievements) was relevant also: 1992 Supp (3) SCC 217, at [809].

[248] 1992 Supp (3) SCC 217, at [414]:

> [T]he social and political justice pledged by the Preamble of the Constitution to be secured to all citizens, will remain a myth unless first economic justice is guaranteed to all. The liberty of thought and expression also will remain on paper in the face of economic deprivations. A remunerative occupation is a means not only of economic upliftment but also of instilling in the individual self-assurance, self-esteem and self-worthiness. It also accords him a status and a dignity as an independent and useful member of the society. It enables him to participate in the affairs of the society without dependence on, or domination by, others, and on an equal plane

the modern addition of social justice in the economic and political spheres to the original revolutionary demands of liberty, equality and fraternity, and, as he stated, "[f]raternity assuring the dignity of the individual has a special relevance in the Indian context."[249]

The Supreme Court of India's broadening of the *locus standi* rules and other innovations to facilitate public interest litigation[250] have enhanced greatly the practical implementation of socio-economic rights.[251] It started in the late 1970s when the Court relaxed the formalism of traditional litigation to allow disadvantaged groups increased access to justice.[252] As a result, the Supreme Court has obtained a highly controversial transformative role in the protection and promotion of the actual enjoyment of human rights.[253] Public interest litigation has

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> ... The employment under the State, by itself, may, many times help achieve the triple goal of social, economic and political justice.

Equality required that affirmative action be confined to those who were actually socially and economically backward, as its object was "not to uplift a few individuals and families in the backward classes but to ensure the advancement of the backward classes as a whole.": *ibid*, at [521]. The aim was to develop the social capacities of individuals until they were able to compete with others on equal terms: *ibid*.

[249] *Ibid*, at [637].

[250] Bhagwati and Sen JJ both pointed out that adversary litigation differs from public interest litigation and exhorted the state to embrace it instead of resisting petitions brought on behalf of the poor and vulnerable: *Bandhua Mukti Morcha v Union of India* [1983] INSC 206, 1984 (2) SCR 67 (SC), at 102, 174. Bhagwati J stated that public interest litigation was rather "a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice": *ibid*, at 102.

[251] Iyer (n209), at 143. The initial impetus was to deal with grievances by prisoners and gross human rights abuses. Iyer considers that public interest litigation has not always succeeded in making distributive justice a reality for the weak and oppressed because of the inability of the courts to enforce its orders on the massive scale required and lack of resources and/or will on the part of the politicians and bureaucrats to carry out the necessary reforms: *ibid*, at 150-151. He also criticised public interest litigation, first, for allowing scope for "judge-shopping" particularly in the early years by having an unstructured manner of dealing with individual petitions to named judges; second, by creating a two-tier system discriminating against ordinary litigants; third, for being misused by those with private axes to grind or opportunistic publicity-seekers; fourth, for needlessly delaying developmental projects: *ibid*, at 151-152. Pathak J redressed abuses of public interest litigation by requiring in future verification of the allegations in a petition save in exceptional circumstances such as *habeas corpus* applications; he also stipulated that petitions should be addressed to the entire Court and not to a particular judge: *Bandhua Mukti Morcha* [1983] INSC 206, 1984 (2) SCR 67 (SC), at 158.

[252] Iyer (n209), at 141. There were hints that the Supreme Court was on the verge of a new era in 1976: Neuborne (n209), at fn 111. Iyer has outlined the procedural and substantive innovations comprised in the process as including: first, widening of the rules of *locus standi* to permit someone else to approach the court on behalf of a victim too poor or otherwise unable to do so personally; second, a greater investigative role for the court with the court perhaps appointing commissioners or committees to gather facts and materials; third, closer collaboration between the parties and the judges—and occasionally even third parties; fourth, creative moulding of reliefs; and, fifth, post-litigation monitoring by the court of its orders: Iyer (n209), at 141-142. See also Fredman (n194), at 124; Neuborne (n209) at 502-503.

[253] Fredman (n194), at 124. This raises questions about the proper function of the courts in a democracy, but Fredman considers that courts can act as a catalyst for democratic pressures which ultimately make recalcitrant or incompetent governments act: *ibid*, at 125. According to her, the ideal

covered a wide range of issues such as vulnerable children, environmental protection, public health, consumer protection, maintenance of state-run hospitals, distribution of government largesse, investigation of corruption by state agencies, maintenance of standards in public education, and affirmative action in favour of backward classes.[254] By a combination of finding unenumerated constitutional rights from an expansive reading of the fundamental rights (particularly the rights to life, equality and the various freedoms) invigorated by the directive principles[255] and the use of public interest litigation to allow friends of the vulnerable access to

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behind public interest litigation is to construct the court as a vehicle for social conversation between co-equal citizens; instead of interest-bargaining, where success depends on economic or political power, judicial process requires decision-making based on a dynamic interplay between the different perspectives brought together in the social conversation; the courts can enhance accountability, facilitate deliberative democracy, and promote equality: *ibid*.

[254] Iyer (n209), at 143. In a case dealing with child prostitution, the Court correctly categorised prostitution as not only a social ill but also a socio-economic problem and, therefore, considered that preventive rather than punitive measures should be taken to combat it: *Vishal Jeet v Union of India* [1990] INSC 176, 1990 (2) SCR 861. A public health issue was taken up as public interest litigation after receipt by the Chief Justice of a letter indicating that insecticides, colour additives and food additives banned as carcinogenic elsewhere were in widespread use in India: *Ashok v Union of India* [1997] INSC 491.

Common Cause (a registered society dedicated to public causes) has been successful in promoting practical solutions and holding people accountable by resorting to the courts. In one case initiated by it, the Supreme Court issued detailed directions with time lines requiring the authorities to put properly structured arrangements in place for hearing consumer complaints in lieu of the ad hoc solutions devised by the courts: *Common Cause v Union of India* [1993] INSC 7, 1993 (1) SCR 10. In its challenge to a government minister, who had been biased in the allotment of petrol pumps and retail dealerships and had favoured relations of staff, government colleagues and business contacts, the Court took a decisive stance and as well as ordering the quashing of ministerial orders, cancellation of allotments, and the sale by public auction of petrol pumps re-possessed by the authorities, it gave the minister two weeks to show to the Court why he should not be prosecuted and pay damages: *Common Cause v Union of India* [1996] INSC 1199.

[255] India is not alone in using directive principles to bring about socio-economic improvements. The Supreme Court of Ghana, using the modern interpretative approach of treating a constitution as a living organism rather than adhering to the original intent, held that there was a rebuttable presumption that all constitutional provisions (including the directive principles) were justiciable and that any ambiguity concerning the legal enforceability of the directive principles should be decided in favour of fundamental rights: *Ghana Lotto Operators v National Lottery* [2009] 3 LRC 235. The Court found that it had jurisdiction to strike down legislation incompatible with a sound healthy economy, whose underlying objectives—as set out in the directive principles—included affording ample opportunity for individual initiative and creativity, and fostering an enabling environment for a pronounced role for the private sector: Constitution of the Republic of Ghana 1992, Article 36(2)(b). The economic objectives in the directive principles were legally binding and not simply a matter of conscience for government.

In an action brought in 2008 by a lawyer, respect for dignity was the foundation for gaining acceptance for improvement in living and working conditions. There was a successful outcome to the litigation after the Supreme Court found that he had *locus standi*: *Adjei-Ampofo (No 1) v Accra Metropolitan Assembly* [2007-2008] SCGLR 611. Prior to taking proceedings, he had sought on numerous occasions to have the government change the practice of employing workers to carry human faeces in pans on their heads from residences in Accra: *ibid*, at 612. He claimed it was an affront to their dignity and to the dignity of Ghanaians as a whole contrary to Article 15(1) of the Constitution, which provides that the dignity of all shall be inviolable. He also maintained it contravened Article 15(2)(a) as it was cruel, inhuman and degrading, and Article 15(2)(b) because it detracted from their dignity and worth as human beings. An amicable settlement was reached and it was agreed that the practice would be

the courts, the Indian Supreme Court has given concrete recognition to socio-economic rights with practical benefits for the marginalised.[256]

From the comparative analysis I have undertaken, it is clear that there has been a shift in favour of the justiciability of socio-economic rights. The rift between civil and political rights and socio-economic rights has been sealed internationally and domestically in many countries either by specific constitutional recognition or by a dynamic judicial interpretation of stated fundamental rights—sometimes enlivened by directive principles—to develop unenumerated rights. There has also been a change in outlook in academic circles.[257]

The rigid political and economic rule bordering on dictatorship during the apartheid era did not regard all people as human beings and rode roughshod over their dignity, not just by deprivation of the majority of civil and political rights to vote, freedom of movement and free speech, but also by favouring economically the minority—but politically dominant—whites at the expense of the black population regarded as servile, cheap labour and dispensable. This led to an enormous gulf between the two sectors, with most blacks being left with inferior education and housing. Sachs perceived that there was a link amounting to interdependence between the absence of civil and political rights and the lack of socio-economic benefits, so that restoration of dignity in South Africa necessitated both "the development of increased respect for the personality rights and freedom" of every individual and "the creation of

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phased out: *Adjei-Ampofo (No 2) v Accra Metropolitan Assembly* [2007-2008] SCGLR 663, at 663. Under the terms of settlement Accra Metropolitan Assembly committed itself to construct public toilet facilities, to ensure that planning and development permits were only granted for plans that made adequate provision for proper facilities and to prosecute those who failed to comply with the ban on pan latrines: *ibid*, at 663-664.

[256] India understands that there is no contradiction between economic and social rights and political and civil rights, knowing that economic and social rights make access to rights of citizenship meaningful; it realises that equality and freedom are not opposed but work together: MacKinnon (n225), at 202.

[257] Two legal scholars mentioned by David Beatty as having moved from a position of favouring the omission of socio-economic rights from constitutions to embracing the idea wholeheartedly were Cass Sunstein, one of America's most prolific scholars, and Dennis Davis, "a legal giant in South Africa", who became a judge: Beatty (n181), at 126-127. They were both inspired by the South African Constitutional Court's decision in *Grootboom* ruling that national, provincial and municipal governments had a collective responsibility to develop programmes that would provide emergency shelter and relief for squatters living in "crisis conditions": *ibid*, at 127, citing *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46. Sunstein was impressed by the decision's carving out a middle ground between making social and economic rights fully enforceable individual entitlements and denying them any recognition in law: *ibid*, at 128. Davis was the judge in the court at first instance to whom Irene Grootboom and her co-squatters prayed for relief; he saw things in a new light when confronted with the squalor and deprivation of those before his court: *ibid*. While the Court recognised that foundational values of human dignity, freedom and equality are denied those without food, clothes or shelter, it was sensitive to the fact that government could respond in many ways that would meet the requirements of the Constitution: *ibid*, at 128-129.

material conditions for a dignified life for all."[258] Without education, the poor were ill-equipped to demand political rights. Without the vote, they lacked the democratic clout to canvass for improved social conditions. The interrelatedness of civil and political rights and socio-economic rights helps resolve the tensions that inevitably arise in the enforcement of the latter because of lack of adequate resources to completely satisfy the needs of all. There can be reconciliation between the libertarian whose emphasis is on the individual, autonomy and choice, and the communitarian, who sees our social setting as dictating choices.[259] Sachs labels the reconciliation of the liberty and community views in the South African Constitution the "dignitarian" approach, which "united the right to be autonomous with the need to recognise that we all live in communities."[260] He summarised this development, "[i]t was the fundamental right of all human beings to have their basic human dignity respected, that linked the right to freedom with the right to bread."[261] It was not only the poor whose dignity was undermined by apartheid, but the dignity of the privileged whites and of society in general was assailed by the intentional institutionalised non-recognition of the humanity of all, irrespective of race or colour.[262]

The ANC's constitutional guidelines published in 1988 mentioned socio-economic rights.[263] In

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[258] Sachs (n69), at 172. Venitia Govender asserted that economic, social and cultural rights are more than mere policy goals, and are entitlements and guarantees without which the realisation of civil and political rights would be superficial and severely constrained: Venitia Govender, "Economic, Social and Cultural Rights in South Africa: Entitlements, Not Mere Policy Options" in Berma Klein Goldewijk, Adalid Contreras Baspineiro and Paulo César Carbonari eds, *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (Intersentia, Antwerp 2002), at 75. See also Jeremy Sarkin, "The Role of National Human Rights Institutions in Post-apartheid South Africa" in Jeremy Sarkin and William Binchy eds, *Human Rights, the Citizen and the State: South African and Irish Approaches* (Round Hall Sweet & Maxwell, Dublin 2001), at 48.

[259] For an assessment of the link between the foundational values and material circumstances in South African jurisprudence and in human rights literature, see Susie Cowen, "Can 'Dignity' Guide South Africa's Equality Jurisprudence?" (2001) 17 *SAJHR* 34, at 52-54.

[260] Sachs (n69), at 173. See Stéphanie Hennette-Vauchez, "A Human *Dignitas*? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence" (2011) 9 *ICON* 32.

[261] Sachs (n69), at 173.

[262] Ackermann (n21), at 540. Gandhi realised that the supposed benefactors in a traditional hierarchy are themselves humiliated by the belittling of fellow human beings: Meyer (n134), at 199-200.

[263] Hugh Corder and Dennis Davis, "The Constitutional Guidelines of the African National Congress: A Preliminary Assessment" (1989) 106 *SALJ* 633, at 633, 641. Starting with the Freedom Charter in 1955, the ANC had inextricably linked social welfare with post-apartheid liberation: Eric C Christiansen, "Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lesson from South Africa" (2008) 13 *UCLA J Intl L & Foreign Aff* 369, at 378.

The first significant comprehensive contribution dealing with the broader considerations of constitutional rights was authored by Sachs who, during the second half of the 1980s, published a number of papers arguing for redistribution of wealth through a transformative constitution: Dennis M Davis "Socioeconomic rights: Do they deliver the goods?" (2008) 6 *ICON* 687, at 687-688. Sachs proposed that an orderly and fair redistribution of wealth be achieved by establishing a minimum floor of rights to a series of carefully defined social and economic goods: *ibid*, at 688. In keeping with the

1992 the ANC produced a draft Bill of Rights that encompassed rights for workers and in the social, welfare, health and educational areas.[264] There was political opposition from the apartheid government represented by the National Party, which viewed the social welfare rights as a threat to the system of white and Afrikaner privilege that existed under apartheid.[265] The strength of the ruling party's position prior to elections in 1994 explains why the interim Constitution contained fewer socio-economic rights than the final Constitution negotiated after the ANC had received overwhelming electoral support.[266]

The range of protection that the Constitution affords to basic needs is wide. The housing and health care, food, water and social security rights in Sections 26[267] and 27[268] of the 1996 Constitution were completely new with no parallel rights in the interim Constitution.[269] Starting from the negative obligation perspective, first, there is at the very least a prohibition on the State and others from preventing or interfering with the individual's right of access to housing.[270] Second, there is a positive obligation on the State to provide housing on a

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universal principle of the interrelatedness of all human rights, Moseneke has also supported the substantive fulfilment of socio-economic rights through transformative adjudication: Moseneke, "Transformative Adjudication" (n147), at 318.

[264] Davis (n263), at 688. Ideologically opposed to this proposal were first, neoliberals, who regarded the market as the effective agent for the distribution of social capital; they were wary of increasing the state's power of interference in the private sphere, thereby minimising individual liberty and hindering the operation of the market: *ibid*, at 688-689. Second, social democrats opposed it as a threat to democracy by giving the unelected judiciary broad capacity for judicial review and scope for interfering with legislation passed by a democratically elected parliament and with implementation of the executive's policies; they also feared the creation of a new judicial elite: *ibid*, at 689.

[265] Christiansen (n263), at 379.

[266] *Ibid*, at 379-380. In the Constitutional Assembly debates ANC negotiator Asmal stressed the need for material benefits and security in order to be liberated: Christiansen (n263), at 378, fn 66, citing Rep of South Africa, Debates of the Constitutional Assembly 24 Jan to 20 Feb 1995, at 122-23 (1994-96) and 3 Debates of the Constitutional Assembly, 122-23 (1996).

[267] It reads:

1) Everyone has the right to have access to adequate housing.
2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

[268] The text is:

1) Everyone has the right to have access to
   a) health care services, including reproductive health care;
   b) sufficient food and water; and
   c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3) No one may be refused emergency medical treatment.

[269] Devenish (n172), at 357.

[270] Lilian Chenwi, "Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to

progressive basis. The extent of the State's duties differs according to the economic resources available to different sectors of the population.[271] Some may be able to rent or buy their own accommodation. The State's resources can be concentrated on those without means or access.[272] Third, framed in negative terms, arbitrary evictions are banned, and there is the protection of court scrutiny before eviction from a home or before a home is demolished.[273]

Mirroring the nature of the rights relating to housing,[274] the right to health care, nutrition and welfare[275] may not be directly infringed by retrogressive provisions, while reasonable legislative and implementation measures to achieve progressive realisation of the right are required.[276] The right to emergency medical treatment is a negative one not to be arbitrarily excluded from that which already exists, in that no-one requiring medical assistance urgently can be turned away from a hospital which is able and available to provide the service.[277] It does not extend to routine medical treatment and is not necessarily free.[278] Under Section 35(2)(e) detained people have an unqualified right to adequate medical treatment, as well as to adequate accommodation, nutrition and reading material.[279]

Children have an unconstrained right in Section 28(1)(c) to "basic nutrition, shelter, basic health care services and social services". Basic education is the right of children and adults.[280] The State's obligation in relation to further education is to make it progressively available and accessible through reasonable measures.[281]

As we have already seen, when the Constitution was being drafted, there was considerable

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Adequate Housing of Those Subject to Evictions" (2008) 8 *HRL Rev* 105, at 116, citing *Grootboom* 2001 (1) SA 46 (CC), at [34].

[271] Currie and de Waal (n4), at 586.

[272] *Ibid*, at 587.

[273] Chenwi (n270), at 116.

[274] Currie and de Waal (n4), at 591.

[275] The difference between the welfare provisions is that social security refers to insurance schemes to which workers and employers contribute for the purposes of financial old-age pensions, medical and unemployment insurance, whereas social assistance financed from public funds is based on need, entitlement to it and the extent of that entitlement being assessed on a case-by-case basis: *ibid*, at 591-592. The availability of social security and social assistance depends on schemes having been established by the State or privately based on legislation requiring their establishment: *ibid*, at 592.

[276] *Ibid*, at 591.

[277] *Ibid*, at 592.

[278] *Ibid*, at 593.

[279] *Ibid*.

[280] Constitution of the Republic of South Africa 1996, Section 29(1)(a).

[281] *Ibid* Section 29(1)(b).

debate over whether socio-economic rights should be justiciable.[282] Sachs, who was involved in drafting the Constitution, thought that the equal protection clause and affirmative action, although they would have helped the black middle classes, were not enough to lift the standards of living of the desperately poor.[283] The problem was not just to prevent continuing or new discrimination, but to ensure that everyone was entitled to at least the minimum decencies of life.[284] Davis described the Constitution that emerged as representing an alternative vision to the neoliberal framework with its focus on globalisation.[285] It moved beyond the conception of rights as a shield against a sovereign espoused by Hobbes to rights involving significant claims on state and community resources.[286]

3.2.3.4 Environmental rights

The environmental rights were strengthened in the 1996 Constitution in Section 24.[287] The word "harmful" replaced "detrimental" in the interim Constitution, which was a considerable improvement in the standard of protection. However, it is still enshrined in negative terms and is not a positive right to a healthy environment.[288] Protection was improved by extending the duty (albeit a negative one) from the State to the private sector; this is done by reading Section 24(a) in conjunction with Section 8 allowing for direct horizontal application of the 1996 Constitution against privately-owned enterprises, which often cause massive environment degradation.[289]

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[282] Sachs (n69), at 167. See also Sandra Liebenberg, "South Africa: Adjudicating Social Rights Under a Transformative Constitution" in Malcolm Langford ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP, Cambridge 2008), at 75-77.

[283] Sachs (n69), at 169.

[284] *Ibid*.

[285] Davis (n263), at 690. A transformative constitution (as in South Africa) can protect and promote social citizenship by offsetting some of the corrosive effects of neoliberalism: Dennis M Davis, Patrick Macklem and Guy Mundlak, "Social Rights, Social Citizenship, and Transformative Constitutionalism: A Comparative Assessment" in Joanne Conaghan, Richard Michael Fischl and Karl Klare eds, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (OUP, Oxford 2002), at 511, 534.

[286] Davis (n263), at 690-691. It is of the social democratic genre: *ibid*, at 690.

[287] It provides:

> Everyone has the right
>
> a) to an environment that is not harmful to their health or well-being; and
> b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
>
> i. prevent pollution and ecological degradation;
> ii. promote conservation; and
> iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

See Louis J Kotzé, "A Critical Survey of Domestic Constitutional Provisions relating to Environmental Protection in South Africa" (2008) 14 *Tilburg L Rev* 298, at 303-309.

[288] Currie and de Waal (n4), at 525.

[289] *Ibid*, at 524.

Protection of the environment for posterity in Section 24(b) is a positive obligation on the State to take the initiative to achieve this by reasonable legislative and other measures.[290] It is unlikely to have direct horizontal application.[291]

3.2.4 Dignity

Dignity and equality are inextricably linked in the Constitution. They are the foundational values mentioned in Section 1[292] and, together with freedom, are the basic democratic values which restrict the limitation of rights[293] and govern the interpretation of the Bill of Rights.[294] In times of emergency, the rights to equality and dignity are non-derogable—equality to the extent that unfair discrimination is based solely on the grounds of race, colour, ethnic or social origin, sex, religion or language, and dignity in its entirety.[295] Equality rights are set out in some detail in Section 9.[296] In contrast, the right to dignity is succinct.[297]

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[290] *Ibid*, at 527. See *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs* [2004] ZAGPHC 18 (High Court, Witwatersrand Local Division). The elevation of environmental rights to a fundamental justiciable human right sets the goal of attaining a protected environment "by an integrated approach, which takes into consideration *inter alia* socio-economic concerns and principles": *ibid*, at 25 (Claassen J). The Constitution "envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development": *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* [2007] ZACC 13, 2007 (6) SA 4 (CC), at [45]. See also *MEC: Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* [2007] ZACC 25, 2008 (2) SA 319 (CC), at [60]-[61]. Environmental considerations have to be accorded appropriate recognition and respect in administrative processes: *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* [1999] ZASCA 9, [1999] 2 All SA 381 (A), at [20]. The courts must ensure that adequate and effective mechanisms are provided to the State for the proper enforcement of environmental obligations: *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* [2006] ZAGPHC 47 (High Court, Witwatersrand Local Division), at [17.3].
On *BP Southern Africa*, see Willemien Du Plessis and Lizette Britz, "The Filling Station Saga: Environmental or Economic Concerns?" [2007] *J South African L* 263, at 265, 271; Jan Glazewski and Emma Witbooi, "Environmental Law" [2004] *Annual Survey of SA Law* 397, at 404-408. On *Fuel Retailers*, see Tumai Murombo, "From Crude Environmentalism to Sustainable Development: *Fuel Retailers*" (2008) 125 *SALJ* 488. Cf *Minister of Public Works v Kyalami Ridge Environmental Association* [2001] ZACC 19, 2001 (3) SA 1151 (CC), criticised in M Kidd, "Greening the Judiciary" (2006) 9 *Potchefstroom Elec LJ* 1, at 2-3.

[291] Currie and de Waal (n4), at 524-525.

[292] Constitution of the Republic of South Africa 1996, Section 1(a).

[293] *Ibid* Section 36(1).

[294] *Ibid* Section 39(1)(a).

[295] *Ibid* Section 37(5)(c).

[296] It reads:

1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

3.2.4.1 The values dimension in South African jurisprudence

The case law from South Africa exudes a values perspective. Recognising that dignity is the inviolable central essential gravity at the soul and heart of each individual,[298] Sachs J articulated an inviolable core beyond the realm of the state:

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4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 9(1) embodies two concepts: first, the right to equality before the law, which is inherent in the rule of law, and, second, equal protection and benefit of the law: Devenish (n172), at 40, fn 40. "Equal protection" comes from the American idea of constitutional equality and "equal benefit", taken from the Canadian Charter of Rights, broadens the equality guarantee from procedure to the substance of the law: *ibid*, citing Cheadle and Davis, "Equality" in Davis, Cheadle and Haysom eds, *Fundamental Rights in the Constitution* (1997), at 61. The commitment to substantive equality is endorsed again in Section 9(2) by the reference to "full and equal enjoyment of all rights and freedoms": *ibid*, at 41; *Sodomy* case 1998 (12) BCLR 1517 (CC), at [62].

Legislative and other measures may safeguard or assist previously disadvantaged individuals or groups in the interests of achieving substantive equality. Affirmative action was explicitly allowed to avoid disputes as in the US and to avoid merely formal equality: Chaskalson (n41), at 36.

In Lesotho there was an unsuccessful challenge by a man who was unable to stand as a local government election candidate in his home electoral division because that division had been reserved for women: *Ts'epe v Independent Electoral Commission* [2005] AHRLR 136 (LeCA 2005). The Court of Appeal rejected his argument that the court *a quo* had been unduly deferential to the legislature and found that the measures (designed to achieve important objectives) were not arbitrary, unfair or irrational; they impaired rights as little as possible; and there was a proportionality between the effects of the measures and the objective: *ibid*, at [38]-[40].

Unfair discrimination, whether direct or indirect, by the State is prohibited by Section 9(3). Grounds additional to those particularised in the interim Constitution are pregnancy, marital status and birth. Protection from discrimination on the grounds of birth promotes personal dignity (a key aspect of which is individual autonomy) by ensuring that each person can create her own identity, free from the constraints of ascriptive status, and is treated on the basis of individual merit: Steve D Shadowen, "Personal Dignity, Equal Opportunity, and the Elimination of Legacy Preferences" (2010) 21 *Geo Mason U Civ Rts LJ* 31, at 40, 81. A corollary of autonomy-linked personal dignity is that an individual achieves and fulfils this dignity through her own capabilities and conduct: *ibid*, at 44. This is an illustration of the transition from status-based dignity to conduct-based dignity: *ibid*.

Section 9(4) was another innovation, which gave the anti-discrimination provision horizontal effect backed by legislation to be introduced within three years: Constitution of the Republic of South Africa 1996, Sch 6, Section 23(1). Subsections 9(2)-(4) make it clear that discriminatory or disparate impact as well as intent is actionable under the Constitution: Wing (n93), at 76. It can be deduced from other parts of Constitution that the right in Section 9(4) is not dependent on legislation: Devenish (n172), at 41.

Section 9(5) carries forward a presumption that discrimination on one of the listed grounds is unfair unless it is proven to be fair.

[297] Constitution of the Republic of South Africa 1996, Section 10.

[298] On the universality and individuality of human dignity, see Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights" (2010) 41 *Metaphilosophy* 464, at 473-475. On the philosophical foundations of human dignity in South African constitutional law, see Botha (n153), at 207-209.

> ... there is a core to the individual conscience so intrinsic to the dignity of the human personality that it is difficult to imagine any factors whatsoever that could justify its being penetrated by the state.[299]

The inviolability of the private sphere from unreasonable searches and seizures was mentioned by van der Westhuizen J, quoting Jackson J (dissenting) in a US case:

> [O]ne need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.[300]

In *Mohamed* the Court—casting doubt on whether a suspected criminal could validly consent to his removal to the US to face a criminal charge involving the death penalty thereby endangering his life—noted the statement in the German *Peep Show* decision that "[h]uman dignity is an objective, indisposable value, the respect of which the individual cannot waive

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[299] *S v Lawrence* 1997 (4) SA 1176 (CC), at [168].

[300] *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC), at [64], citing *Brinegar v US* 338 US 160 (1949), at 180-81. While these remarks are valid insofar as they protect the privacy of the person's physical presence and tangible environment, they do not give any recognition to the inviolable nature of dignity, which cannot "disappear" or be lost or waived by its holder. Richard Stith has said, "[w]e cannot forfeit or waive our humanity nor change its status as a principle" nor can we "legally consent to be enslaved (to be reduced from person to property) nor to be killed": Richard Stith, "The Priority of Respect: How Our Common Humanity Can Ground Our Individual Dignity" (2004) 44 *Intl Philosophical Q* 165, at 182. In German law, a waiver of dignity is not acceptable; it has absolute effect and cannot be balanced against other legal interests: Eckart Klein, "Human Dignity in German Law" in Kretzmer and Klein (n42), at 148-149, 157-159. The *Daschner* case held that because of the absolute ban on torture, which infringes dignity, the pleas of self-defence (of oneself or of another) or necessity were unreasonable and did not apply: Florian Jessberger, "Bad Torture--Good Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany" (2005) 3 *JICJ* 1059, at 1065, 1073; see also A Cassese tr, "Respect for Human Dignity in Today's Germany: Regional Court (*Landgericht*) of Frankfurt am Main, Decision of 20 December 2004, *Daschner Wolfgang and E.* Case" (2006) 4 *JICJ* 862; *Gäfgen v Germany* (App no 22978/05) (2011) 52 EHRR 1.

The German Constitutional Court held that a statute passed in the wake of the 9/11 terrorist attacks, permitting the *Luftwaffe* to shoot down aircraft that had been taken over by terrorists was not compatible with the protection of dignity in Article 1 of the Basic Law; the Court stated it was "absolutely inconceivable" to intentionally kill the crew and the passengers of a hijacked plane, even when they were "doomed anyway"; human dignity enjoys "the same constitutional protection regardless of the duration of the physical existence of the individual human being": Waldron (n130), at 18, citing 115 BVerfGE 118 (15 Feb 2006) (Federal Constitutional Court of Germany). See also Botha (n153), at 195.

Naming dignity as an absolute value may have a useful symbolic effect in a society such as Germany with its traumatic history of human rights violations, but David Weisstub suggests that proportionality may be more appropriate for balancing collective and individual interests in liberal democratic societies without such a history: David N Weisstub, "Honor, Dignity, and the Framing of Multiculturalist Values" in Kretzmer and Klein (n42), at 276-277. There is a distinction between autonomy, which can be waived, and dignity, which is inviolable; therefore consent may not be a defence to criminal physical harm: Vera Bergelson, "Autonomy, Dignity, and Consent to Harm" (2008) 60 *Rutgers L Rev* 723, at 729-730.

validly."[301]

Ackermann J linked dignity and freedom with respect for the individual's unique humanity:

> 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. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible.[302]

These views on the freedom to develop one's unique potential are correct, but Ackermann J erred in saying that self-awareness is necessary for human dignity.[303] Sachs J in the *Sodomy*

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[301] *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC), at [62], fn 55, citing German Federal Administrative Tribunal's *Peep Show* decision BVerwGe 64, 274 (1981) [English translation by Michalowski and Woods, *German Constitutional Law – The Protection of Civil Liberties* (Ashgate/Dartmouth, Aldershot, 1999) at 105]. On the *Peep Show* case, see Botha (n153), at 182, 185.

[302] *Ferreira v Levin* 1996 (1) SA 984 (CC), at [49].

[303] The concept of dignity does not reflect the subjective state of mind of the perpetrator or the victim, but instead has an "objective," normative meaning; Vera Bergelson gave as an example voluntary cannibalism which *by its very terms* denies people equal moral worth and, thus, assaults the victim's dignity—even that of a willing participant; she described what was at stake as people's moral dignity, or dignity of personhood, as opposed to social dignity, or dignity of rank: Bergelson (n300), at 730-731.

In a different context, Denise Réaume has proposed replacing the tort of intentional infliction of nervous shock with a dignity-based tort of intentional outrage to dignity, which would substitute the legally protected interest of dignity for the weak concept of emotional tranquillity as a foundation for expansion of tort law; her rationale is that it is the desire to inflict distress or humiliation that constitutes the assault on dignity rather than the causing of that precise effect; to *treat* a person as worthless as a moral personality offends dignity irrespective of whether one succeeds in making that person *feel* worthless: Denise G Réaume, "Indignities: Making a Place for Dignity in Modern Legal Thought" (2002) 28 *Queen's LJ* 61, at 86, 90-91.

There are various views on whether awareness on the part of the victim is a necessary element in the tort of false imprisonment. Fawsitt J of the Irish Circuit Court considered it was not and stated, "[t]he fact that a person is not actually aware that he is being imprisoned does not amount to evidence that he is not imprisoned, it being possible for a person to be imprisoned in law, without his being conscious of the fact and appreciating the position in which he is placed": *Dullaghan v Hillen* [1957] Ir Jur Rep 10 (CC), at 15. In the UK, the House of Lords ruled in *Murray v Ministry of Defence* [1988] 2 All ER 521 that false imprisonment was actionable without proof of special damage, and it was not necessary for a person unlawfully detained to prove knowledge of the detention or harm. Because the law attached "supreme importance to the liberty of the individual", Lord Griffiths refused to follow the US route, which required that the person confined be conscious of the confinement or be harmed by it: *ibid*, at 529, citing Restatement of the Law, Second, Torts 2d (1965) § 35, p 52. He doubted *Herring v Boyle* (1834) 1 Cr M & R 377, 149 ER 1126, and approved instead the dictum in *Meering v Grahame-White Aviation Co Ltd* of Atkin LJ, who thought "a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic" or while unknowingly being confined in a locked room, or while being restrained (without being locked in) within defined bounds, although damages would be affected by whether the imprisoned person was conscious of it or not: *ibid*, at 528-529, citing (1919) 122 LT (CA), at 53–54. In the US, since the interest protected is regarded as a mental one, resembling apprehension of contact in the assault cases, the Restatement of Torts has taken the position that there can be no imprisonment unless the plaintiff is aware of it at the time—the mere

case pinpointed dignity as the underlying value in the Bill of Rights and related it to self-worth and equality:

> It will be noted that the motif which links and unites equality and privacy, and which, indeed, runs right through the protections offered by the Bill of Rights, is dignity. This Court has on a number of occasions emphasised the centrality of the concept of dignity and self-worth to the idea of equality.[304]

In *Soobramoney v Minister of Health (Kwazulu-Natal)* the same judge endorsed Ronald Dworkin's view of the composition of the sanctity of life and stressed the importance of the law in supporting the freedom of society to make choices.[305] Sachs J explained the religious-based philosophy of life in *Minister of Home Affairs v Fourie*:

> For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For

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dignitary interest in freedom from unconscious confinement is not worthy of redress; this position is opposed by three American decisions in cases of children and an incompetent: W Page Keeton (ed) and William Lloyd Prosser, *Prosser and Keeton on the Law of Torts* (5th edn Hornbook Series, West Pub Co, St Paul, Minn 1984), at 47-48, citing *Robalina v Armstrong* NY 1852, 15 Barb 247; *Commonwealth v Nickerson* 1861, 87 Mass (5 Allen) 518; *Barker v Washburn* 1911, 200 NY 280, 93 NE 958. For criticism of the requirement of consciousness of confinement, see Scott Reed, "Is Knowledge of the Fact of Imprisonment by the Plaintiff a Necessary Element in False Imprisonment?" (1944) 32 *Ky LJ* 212; William L Prosser, "False Imprisonment: Consciousness of Confinement" (1955) 55 *Colum L Rev* 847; Donald S Cohen, "False Imprisonment: A Reexamination of the Necessity for Awareness of Confinement" (1975) 43 *Tenn L Rev* 109; Sheldon H Nahmod, "Awareness of Confinement for False Imprisonment: A Brief Critical Comment" (1976) 15 *Duq L Rev* 31. See also Lawrence Vold, "The Legal Allocation of Risk in Assault, Battery, and Imprisonment—The *Prima Facie* Case" (1938) 17 *NBLB* 149, at 193.
In an action for battery, it is not essential that the plaintiff should be conscious of the contact at the time it occurs; interest in personal integrity still is entitled to protection, although the plaintiff is asleep or under an anaesthetic or otherwise unaware of what is going on; a technical infringement attracts nominal damages; more serious events can confer an entitlement to compensation for the resulting mental disturbance, *eg*, fright, revulsion or humiliation: Keeton and Prosser *supra*, at 40.
Assault is essentially a mental rather than a physical invasion; since the interest involved is the mental one of apprehension of contact, the plaintiff must be aware of the threat of contact: *ibid*, at 43-44. See also Vold *supra*, at 177-178.

[304] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC), at [120] (footnotes omitted).

[305] 1998 (1) SA 765 (CC), at [55], citing Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (Harper Collins, London 1993), at 240, 241:

> [The present case] does point to the need to establish what Dworkin has in his book *Life's Dominion*, called the "relative importance of the natural and human contributions to the sanctity of life". He concludes his study with the eloquent reminder that if people are to
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> > "retain the self consciousness and self respect that is the greatest achievement of our species, they will let neither science nor nature simply take its course, but will struggle to express, in the laws they make as citizens and the choices they make as people, the best understanding they can reach of why human life is sacred, and of the proper place of freedom in its dominion."

Whatever the moral and ethical arguments, the courts are clear that the principle of sanctity of life in the medical context is not absolute: David McQuoid-Mason, "Pacemakers and 'Living Wills': Does Turning Down a Pacemaker to Allow Death with Dignity Constitute Murder?" (2005) 18 *SACJ* 24, at 26.

> millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. Such belief affects the believer's view of society and founds a distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries. For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation.[306]

When describing the death penalty in *Makwanyane*, Chaskalson P used Kantian terminology:

> [Death] is ... an inhuman punishment for it "...involves, by its very nature, a denial of the executed person's humanity", and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.[307]

Although they came to opposite conclusions in a dispute over the validity of a limitation clause in an insurance contract, two judges in *Barkhuizen v Napier* connected freedom and autonomy with dignity.[308] Undoubtedly, the freedom of the competent to regulate their affairs unhindered is critical. However, the converse is not true, as even the incompetent retain their objective dignity, which is deserving of respect.[309] Sachs J (dissenting) in *Barkhuizen v Napier* saw strict contract rules as impeding free will.[310] He cited Davis J, who raised the issue of

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[306] 2006 (1) SA 524 (CC), at [89] (footnote omitted).

[307] *S v Makwanyane* 1995 (6) BCLR 665 (CC), at [26], citing *Furman v Georgia* 408 US 238 (1972), at 290 (Brennan J, concurring).

[308] 2007 (5) SA 323 (CC). For Ngcobo J in the majority, "[s]elf-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.": *ibid*, at [57]. Jonathan Lewis criticised the Constitutional Court in this case for not awarding costs against the losing party because an important constitutional issue was in dispute; the state was not involved, as it concerned a contractual dispute between two private parties: Jonathan Lewis, "The Constitutional Court of South Africa" (2009) 125 *LQR* 440, at 446-447.

[309] The concept of dignity can be developed to require respect for all sentient beings with the capacity to flourish; the theory recognises the variable nature of the good for diverse beings, requiring that their fundamental interests be protected through fundamental rights: David Bilchitz, "Moving beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals" (2009) 25 *SAJHR* 38, at 40. David Bilchitz expanded a theory of value known as the capabilities approach expounded by Amartya Sen and Martha Nussbaum; value in an individual life is to be understood in terms of functionings and capabilities: *ibid*, at 62. It requires respect for those without full autonomy, such as children, the senile and the mentally incompetent, the value of particular functionings and capabilities being determined according to what enables each individual to flourish as the kind of being that it is: *ibid*, at 63. Bilchitz examines and dismisses as inadequate theories based on personhood, or on human dignity viewed from the perspective of category or the capacity for rational thought and autonomy promoted by Kant: *ibid*, at 41-43, 52-56. He rejects rationales from marginal cases such as general capacity, partial autonomy, or social obligation: *ibid*, at 58-60.

[310] "Freedom of contract has been said to lie at the heart of constitutionally prized values of dignity and autonomy. Yet the evolution of contract law suggests that the notion of sanctity of contract has been used to undermine rather than reinforce true volition.": 2007 (5) SA 323 (CC), at [150] (footnote

reciprocal respect for each other:

> "... Parties to a contract must adhere to a minimum threshold of mutual respect in which the 'unreasonable and one-sided promotion of one's own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts'."[311]

As Sachs J expounded in *Harksen v Lane*, even in marriage each partner preserves their own identity and personal dignity.[312] O'Regan J advocated harmonious interaction between the individual and society in *Bernstein v Bester*.[313] General assumptions about people's roles in society deny the individual's identity. Kriegler J (dissenting) warned about assuming that women are closer than men to their children.[314]

Langa J in *Makwanyane* saw the dual constituents of rights and duties arising out of living in a community:

> [*Ubuntu*] is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the

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omitted).

Lewis criticised Sachs J for encroaching on the separation of powers by, in effect, drafting legislation without sufficient evidence on which to assess the facts and develop the law: Lewis (n308), at 451, 458.

[311] 2007 (5) SA 323 (CC), at [140], citing *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C), at 474J-475F (references omitted).

[312] 1998 (1) SA 300 (CC), at [124]:

> Being trapped in a stereotyped and outdated view of marriage inhibits the capacity for self-realisation of the spouses, affects the quality of their relationship with each other as free and equal persons within the union, and encourages society to look at them not as "a couple" made up of two persons with independent personalities and shared lives, but as "a couple" in which each loses his or her individual existence. If this is not a direct invasion of fundamental dignity it is clearly of comparable impact and seriousness.

Dignity can be opened up inwards (relating to the inner mental and emotional world of the person) and outwards (relating to the person's social and relational identity and being): Dupré (n186), at 194.

[313] 1996 (2) SA 751 (CC), at [150]:

> [H]uman beings live within a society and are dependent upon one another. The conception of freedom underlying the Constitution must embrace that interdependence without denying the value of individual autonomy. It must recognise the important role that the state, and others, will play in seeking to enhance individual autonomy and dignity and the enjoyment of rights and freedoms.

[314] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), at [80] (footnote omitted):

> One of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choices they make about their own identities. Reliance on the generalisation that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely.

> exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.[315]

Ackermann J quoted from Kant to illustrate the primacy accorded to freedom, but even Kant accepted that it is limited by the freedom of others.[316] As Mahomed J expressed eloquently in *Makwanyane*, reciprocal love for each other enriches not just the lover and the beloved, but wider society as well:

> "The need for *ubuntu*" [in the postamble to the interim Constitution] expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.[317]

Mokgoro J encapsulated the multi-factorial nature of communication and its importance for dignity:

> ... freedom of speech is a *sine qua non* for every person's right to realise her or his full potential as a human being, free of the imposition of heteronomous power. Viewed in that light, the right to receive others' expressions has more than merely instrumental utility, as a predicate for the addressee's meaningful exercise of her or his own rights of free expression. It is also foundational to each individual's empowerment to autonomous self-development.[318]

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[315] *S v Makwanyane* 1995 (6) BCLR 665, at [224]. The Confucian conception of "human dignity" centres on individual consciousness and respect for every person; with its egalitarian content and recognition of common humanity, it—like *ubuntu*—also gives rise to a corresponding duty to show respect for others: Man Yee Karen Lee, "Universal Human Dignity: Some Reflections in the Asian Context" (2008) 3(1) *Asian J Comparative L* http://www.bepress.com/asjcl/vol3/iss1/art10/ (visited 13 April 2010), at 19.
Non-Western philosophies—African, Asian and indigenous traditions—lay great emphasis on the obligations/responsibilities of an individual as compared with his/her rights: Nazeem MI Goolam, "Human Dignity—Our Supreme Constitutional Value" (2001) 4 *Potchefstroom Elec LJ* 1, at 5. Nazeem Goolam considers that since every human being has a responsibility to treat every other human being in a dignified and humane manner, human dignity is a universal human duty: *ibid*, at 4.

[316] *Ferreira v Levin* 1996 (1) SA 984 (CC), at [52], citing Kant, *The Metaphysical Elements of Justice* (tr John Ladd) Macmillan (1985) at 43:

> Kant luminously conceptualises freedom as the "only one innate right" in the following terms:
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> > "Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity."

[317] *S v Makwanyane* 1995 (6) BCLR 665, at [263]. Tabaro J of the Ugandan Constitutional Court stated that *ubuntu* is a concept embraced by all the communities of Uganda; he agreed with Madala J's view of it in *Makwanyane* as being associated with humaneness, social justice and fairness, and permeating fundamental human rights; he also referred with approval to Langa J's conclusion in *Makwanyane* that the concept carries with it the idea of human dignity and true humanity: *Abuki v AG* [1997] UGCC 5, at 9.

[318] *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), at [26] (footnote omitted).

O'Regan J illustrated a broad embrace of cultural diversity:

> With human dignity as the lodestar, it becomes clear that treating people as worthy of equal respect in relation to their cultural practices requires more than mere tolerance of sincerely held beliefs with regard to cultural practices.[319]

She understood that "an approach to cultural rights in our Constitution must be based on the value of human dignity which means that we value cultural practices because they afford individuals the possibility and choice to live a meaningful life."[320] One's religion is a central aspect of dignity, according to Ngcobo J in dissent in *Prince II*,[321] so respect for the beliefs of

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[319] *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC), at [156].

[320] *Ibid*, at [157]. Steven Rockefeller advocated expanding the politics and ethics of equal dignity so that respect for the individual was understood to involve not only respect for the universal human potential in every person, but also respect for the intrinsic value of the different cultural forms in and through which individuals actualise their humanity and express their unique personalities: Steven C Rockefeller, "Comment" in Charles Taylor and others, *Multiculturalism: Examining the Politics of Recognition* (Amy Gutmann ed, Princeton University Press, Princeton 1994), at 87.

[321] *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), at [51] (footnote omitted):

> There can be no doubt that the existence of the law which effectively punishes the practice of the Rastafari religion degrades and devalues the followers of the Rastafari religion in our society. It is a palpable invasion of their dignity. It strikes at the very core of their human dignity. It says that their religion is not worthy of protection. The impact of the limitation is profound indeed.

The majority in *Prince II* approved of Sachs J's contextual approach in *Christian Education* instead of the use of different levels of scrutiny: 2002 (2) SA 794 (CC), at [128], citing *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), at [30]. All the judges in *Prince II* applied the balancing test, but ended up giving different weights to the relevant factors: Sachs (n69), at 209. They all accepted that freedom of religion was infringed, but there was disagreement over whether a workable exception could be framed and policed.

Sachs J (dissenting) expanded on the meaning of a contextual balancing exercise and focused on the effect on people, 2002 (2) SA 794 (CC), at [151]:

> The balancing has always to be done in the context of a lived and experienced historical, sociological and imaginative reality. Even if for purposes of making its judgment the Court is obliged to classify issues in conceptual terms and abstract itself from such reality, it functions with materials drawn from that reality and has to take account of the impact of its judgments on persons living within that reality. Moreover, the Court itself is part of that reality and must engage in a complex process of simultaneously detaching itself from and engaging with it. I believe that in the present matter, history, imagination and mind-set play a particularly significant role, especially with regard to the weight to be given to the various factors in the scales.

The balancing of freedom of religion against the public interest in curbing drug use was a particularly difficult task in *Prince II*, where the majority held that the banning of cannabis was justified even though Rastafarians wished to use it for religious purposes. The dilemma for society where religion collides with other community goals is evident in another passage from Sachs J's minority judgment in which he strived to show how reconciliation between apparently conflicting interests could satisfy religious beliefs while benefiting all living in a receptive tolerant community, *ibid*, at [170]:

> [N]o amount of formal constitutional analysis can in itself resolve the problem of balancing matters of faith against matters of public interest. Yet faith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a constitutional principle. Religious tolerance is accordingly not only

others and facilitation of the practice of their beliefs is necessary.[322]

Understanding that dignity can be infringed by dehumanising behaviour, treating people as objects or instruments, stigmatising them and stereotyping individuals, Chaskalson P invoked US case law on the dehumanising effect of capital punishment:

> It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process.[323]

Excessive punishment as a deterrent offends dignity, according to Sachs J in *Mohunram v National DPP*.[324] Kentridge AJ, quoting Dickson CJC, upheld the presumption of innocence as essential to dignity in order to avoid the stigma of being prematurely branded a criminal.[325]

> important to those individuals who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.

There can also be a dilemma for the judiciary to ensure respect for the separation of powers while upholding constitutional values, as mentioned by Sachs J after he distinguished the South African accommodation of minority religions from the position in the US, *ibid*, at [155]:

> [L]imitations analysis under section 36 is antithetical to extreme positions which end up setting the irresistible force of democracy and general law enforcement, against the immovable object of constitutionalism and protection of fundamental rights. What it requires is the maximum harmonisation of all the competing considerations, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet guided by international experience, articulated with appropriate candour and accomplished without losing sight of the ultimate values highlighted by our Constitution. In achieving this balance, this Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the legislature and the executive, and what falls squarely to be determined by the judiciary.

The Court used less restrictive means arguments in its reasoning: Eva Brems, "Human Rights: Minimum and Maximum Perspectives" (2009) 9 *HRL Rev* 349, at 361. On the *Prince* litigation, see Lourens du Plessis, "Affirmation and Celebration of the 'Religious Other' in South Africa's Constitutional Jurisprudence on Religious and Related Rights: Memorial Constitutionalism in Action?" (2008) 8 *AHRLJ* 376, at 388-390. The UN Human Rights Committee found that there was no breach of the ICCPR: *Prince v South Africa* UN Human Rights Committee (14 November 2007) 91st Session UN Doc CCPR/C/91/D/1474/2006.

[322] On dignity and freedom-of-religion litigation, see Christopher McCrudden, "Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The *JFS* Case Considered" (2011) 9 *ICON* 200, at 221-226.

[323] *S v Makwanyane* 1995 (6) BCLR 665 (CC), at [91], citing *People v Anderson*, 493 P2d 880 (Cal 1972), at 899.

[324] 2007 (4) SA 222 (CC), at [146]:

> Deterrence as a law enforcement objective is constrained by the principle that individuals may not be used in an instrumental manner as examples to others if the deterrence is set at levels beyond what is fair and just to those individuals. To do otherwise would be to breach the constitutional principle of dignity.

[325] *S v Zuma* 1995 (2) SA 642 (CC), at [22], citing *R v Oakes* (1986) 26 DLR (4th) 200, at 212-213 (Supreme Court of Canada):

> "The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal

The traditional South African concept of *ubuntu* promotes the goal of harmonious communal living, while at the same time recognising each participant's right to respect.[326] We find here the notion and expression of interdependence with benefits accruing to the individual from the community spirit.[327] The intrinsic worth of an individual, and the freedom to develop and maintain an identity, lead to a person having an interest in their reputation in the community.[328] O'Regan J captured the dual interest in reputation:

> The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.[329]

According to Sachs J, the apartheid system itself clearly debased the oppressed, but it also

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> offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. ..."

[326] *Ubuntu* has resonances of Confucianism, where harmony involves physical and psychological balance, and also a balanced, mutual connectedness among all things in the cosmos; harmony is not uniformity, but means recognising an organic interconnectedness based in our complementary differences rather than seeing all as equivalent in value: Stephen C Angle, "Human Rights and Harmony" (2008) 30 *Hum Rts Q* 76, at 79. On the concept of *ubuntu*, see John D Bessler, "In the Spirit of *Ubuntu*: Enforcing the Rights of Orphans and Vulnerable Children Affected by HIV/AIDS in South Africa" (2008) 31 *Hastings Int'l & Comp L Rev* 33, at 41-46; Botha (n153), at 204-205.

[327] As Langa CJ amplified in *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC), at [53] (footnotes omitted):

> The notion that "we are not islands unto ourselves" is central to the understanding of the individual in African thought. It is often expressed in the phrase *umuntu ngumuntu ngabantu* which emphasises "communality and the inter-dependence of the members of a community" and that every individual is an extension of others. According to Gyekye, "an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons". This thinking emphasises the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity. Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement.

A similar situation exists in Germany where the individual is not seen as a lone rights-bearer, but is a free person in a social federal state in which people are interdependent without encroaching on each other's intrinsic value: Luis Aníbal Avilés Pagán, "Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico" (1998) 67 *Rev Jur UPR* 343, at 348.

[328] See *Masetlha v President of the Republic of South Africa* [2007] ZACC 20, 2008 (1) SA 566 (CC), at [98].

[329] *Khumalo v Holomisa* 2002 (5) SA 401 (CC), at [27].

infringed the dignity of the oppressors.[330] O'Regan J pointed out that tolerance is inexorably associated with free speech,[331] thus allowing room for dissenters as society develops an associative culture.

These examples from South African jurisprudence illustrate the abundance of philosophical analysis underpinning decisions. The judges consistently display an acute awareness of the constitutional values that have a transformative aim rooted in an abhorrence of the previous inhumane apartheid system. They know it is their duty to analyse and translate the Constitution into legally enforceable concepts, and base their judgments on normatively sound rationalised principles.

3.2.4.2 Human dignity and substantive rights

As well as being a unique right in Section 10, dignity has a pre-eminent place in the Bill of Rights, as one of the three democratic values affirmed by the Bill, the other two being equality and freedom.[332] These same values govern the limitation of rights[333] and must be promoted in the interpretation of the Bill.[334] By Section 35(2)(e) every detained person has the right to conditions compatible with dignity while in custody.

The right of everyone to have their inherent dignity respected and protected in Section 10 is broadly framed and, as Devenish says, covers a wide range of circumstances which could constitute a violation of dignity involving not just the liberal democratic rights, but conceivably "freedom from poverty and disease and a clean and healthy environment in which life is

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[330] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), at [145]:

> [T]he system of state-sponsored racial domination not only imposed injustice and indignity on those oppressed by it, it tainted the whole of society and dishonoured those who benefited from it. Correcting the resultant injustices, though potentially disconcerting for those who might be dislodged from the established expectations and relative comfort of built-in advantage, is integral to restoring dignity to our country as a whole.

[331] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) (*SANDU*), at [8]:

> [Freedom of expression] is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views.

[332] Constitution of the Republic of South Africa 1996, Section 7(1).

[333] *Ibid* Section 36(1).

[334] *Ibid* Section 39(1).

tolerable."[335] Accordingly it has a significant socio-economic aspect.[336] It may be limited, although in a circuitous fashion—in common with all other rights—the extent of the limitation is itself restricted by the foundational values including human dignity.[337] The rights to dignity and to life[338] are the only rights that are completely immune from derogation in times of emergency.[339] Chaskalson P described their pre-eminent position in *Makwanyane*:

> The rights to life and dignity are the most important of all human rights, and the source of all other personal rights.... By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.[340]

The reference to "inherent dignity" in Section 10 acknowledges that it is an innate quality in everyone not dependent on being endowed by the state. The content of human dignity is not set out in the Constitution. Its essence is wider than the more technical meaning in Roman-Dutch law, where it was equated with the conceptually limited term of "self-esteem" and its infraction invariably involved insult.[341] In any event the tort action for breach of *dignitas* was recognised only in the private law sphere and did not affect the state.[342]

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[335] Devenish (n172), at 83. According to the Kenyan High Court, which interpreted the right to life as including the activity of living in some environment, "[t]he right to a clean environment is primary to all creatures including man, it is inherent from the act of creation": *Waweru v Republic* [2006] eKLR (High Court of Kenya, 2 March 2006), at 7. The Court referred to the link in the UN Stockholm Declaration between freedom, equality, and a life of dignity and well-being: *ibid*, at 11, citing UN Conference on the Human Environment "Stockholm Declaration" (16 June 1972) UN Doc A/Conf.48/14/Rev 1(1973), Principle 1. It took into account the rights of all in society to a clean environment, thus evoking the issue of enviromental justice, and, even though the state authorities had failed to provide safe sewerage treatment works, the Court emphasised the continuous need for traders to accept responsibility and not to commit environmental crimes, which ought to be severely punished: *Waweru v Republic* [2006] eKLR (High Court of Kenya, 2 March 2006), at 7, 11-12, 14. Sustainable development had a cost element to be met by the developers: *ibid*, at 6.
In a later majority judgment, the Court confirmed the derivation from the right to life of "a right to a clean and healthy environment free from pollution of any kind that is detrimental to human health, wealth and/or socio-economic well being and ultimately the human life": *Nabori v AG* [2007] eKLR (High Court of Kenya, 11 December 2007), at 126. Having stated that the right to life included the right to live with human dignity, Rawal J continued, "[t]aking any lesser interpretation will be an affront to the dignity of human life and any hindrance or limitation to enjoy the right to live would be derogation of the most fundamental right of any human being": *ibid*, at 114.

[336] Devenish (n172), at 83. The Nigerian High Court held that gas flaring in the course of oil extraction was a gross violation of the fundamental right to life (including healthy environment) and dignity, and that legislation allowing it was unconstitutional: *Gbemre v Shell Petroleum Development Co Nigeria Ltd* [2005] AHRLR 151 (NgHC 2005), at [5], citing Constitution of the Federal Republic of Nigeria 1999, Sections 33(1) and 34(1).

[337] Constitution of the Republic of South Africa 1996, Section 36(1).

[338] *Ibid* Section 11.

[339] *Ibid* Section 37(5)(c).

[340] 1995 (6) BCLR 665 (CC), at [144].

[341] Devenish (n172), at 84.

[342] Irma J Kroeze, "Human Dignity in Constitutional Law in South Africa" in European Commission for Democracy Through Law, *The Principle of Respect for Human Dignity* (Proceedings of the UniDem

Ackermann J set out the minimum import of dignity in the *Sodomy* case:

> Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.[343]

Currie and de Waal describe it as "the source of a person's innate rights to freedom and to physical integrity, from which a number of other rights flow."[344] As a value, it "provides the basis for the right to equality—inasmuch as every person possesses human dignity in equal measure everyone must be treated as equally worthy of respect."[345] Currie and de Waal explain its place as a right thus:

> As a fundamental right, it has a residual function. It applies where many of the more specific rights that give effect to the value of human dignity, do not. In addition, since the rights in the Bill of Rights stem from dignity and are more detailed elaborations of aspects of the concept, the core right to dignity has decisive application only relatively infrequently.[346]

Dignity is referred to in the Constitution in other contexts apart from as an underlying value and in connection with substantive rights.[347]

Seminar, Montpellier, 2 – 6 July 1998) http://www.venice.coe.int/docs/1998/CDL-STD(1998)026-e.asp (visited 23 November 2009).

[343] 1998 (12) BCLR 1517 (CC), at [28] (footnote omitted).

[344] Currie and de Waal (n4), at 273 (footnote omitted).

[345] *Ibid*.

[346] *Ibid*, at 275 (footnotes omitted).

[347] Organs of state are obliged to assist and protect the dignity, first, of the courts: Constitution of the Republic of South Africa 1996, Section 165(4); second, of the institutions of Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, the Electoral Commission: *ibid* Section 181(3); and, third, the Public Service Commission: *ibid* Section 196(3).
Ministers, Deputy Ministers, Premiers, Acting Premiers and members of provincial Executive Councils swear or affirm to uphold their office with honour and dignity: *ibid* Sch 2, Sections 3, 5.

4 CHAPTER IV - THE RIGHT TO DIGNITY

As the value of human dignity supports many constitutional rights,[1] the Constitutional Court frequently bases its decisions on a right other than that to dignity in Section 10. In those circumstances, there is no need to consider the right to dignity as the *ratio decidendi*. O'Regan J in *Dawood* revealed the multiple significant roles of dignity resulting in the right to dignity itself often playing a secondary part.[2]

Even though constitutional rights overlap to a great extent, each right is considered individually. In a minority judgment in *S v Jordan*, Sachs and O'Regan JJ refused to recognise a right to autonomy not specifically mentioned in the Constitution, remarked that it was not useful to amalgamate rights to create a new right and went on to consider in turn each right allegedly breached.[3] The right to dignity has a pre-eminent place on a par with the right to life. O'Regan J in *Makwanyane* noted their interlinked nature.[4] She founded the right to

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[1] See *Alexander v Minister of Justice* [2010] NASC 2 (SC of Namibia), at [99]-[101].

[2] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), at [35] (footnotes omitted):

> The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.

[3] 2002 (6) SA 642, at [53]:

> While we accept that there is manifest overlap between the rights to dignity, freedom and privacy, and each reinforces the other, we do not believe that it is useful for the purposes of constitutional analysis to posit an independent right to autonomy. There can be no doubt that the ambit of each of the protected rights is to be determined in part by the underlying purport and values of the Bill of Rights as a whole and that the rights intersect and overlap one another. It does not follow from this however that it is appropriate to base our constitutional analysis on a right not expressly included within the Constitution.

[4] 1995 (6) BCLR 665 (CC), at [326]-[327]:

> [T]he right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.

dignity and to be treated with respect on the intrinsic worth of the individual.[5]

The Constitutional Court made it clear in *Mohamed v President of the Republic of South Africa* that the right to dignity is one of three rights not subject to being curtailed even when there are weighty countervailing demands.[6] While the Court did not decide on the issue, it raised the notion of non-waiver of the right to dignity.[7]

4.1 Equal respect

The idea of equal respect was the basis of the decision in the *Sodomy* case, where the Constitutional Court found that the criminalisation of sodomy violated the right to dignity.[8] Having identified the offence as punishment of a form of sexual conduct associated with homosexuals, Ackermann J focused on the law's degradation and devaluation of gay men.[9]

> The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.

Likewise the Inter-American Court has interpreted the right to life as including the right to live a dignified existence: *Indigenous Community of Yakye Axa v Paraguay* Series C 125 [2005] IACHR 6, at [161], citing *Children's Rehabilitation v Paraguay* Series C 112 [2004] IACHR 8, at [156]. See Jo M Pasqualucci, "The Evolution of International Indigenous Rights in the Inter-American Human Rights System" (2006) 6 HRL *Rev* 281, at 310.

[5] "Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.": 1995 (6) BCLR 665 (CC), at [328] (footnote omitted).

[6] "[O]ur Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice.": 2001 (3) SA 893 (CC), at [53].

[7] *Ibid*, at fn 55. Erasmus J in the Western Cape High Court, Cape Town, found that a collective agreement cannot amount to a waiver of individual fundamental rights to dignity and privacy: *Beja v Premier of the Western Cape* [2011] ZAWCHC 97 at [101]. He held that the City of Cape Town in providing unenclosed toilets violated Sections 10 (human dignity), 12 (bodily and psychological integrity), 14 (privacy), 24 (environment), 26 (housing) and 27 (health care) of the Constitution: *ibid*, at [150]. He ordered that the toilets be enclosed: *ibid*, at [192].

[8] Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (5th edn Juta, Cape Town 2005), at 274. The idea of equal respect could be said to have originated with Rousseau, who deemed it indispensible for freedom; he considered that the balanced reciprocity that underpins equality is the ideal in a republic; thus the age of dignity was born: Charles Taylor, "The Politics of Recognition" in Charles Taylor and others, *Multiculturalism: Examining the Politics of Recognition* (Amy Gutmann ed, Princeton University Press, Princeton 1994), at 45-49. On human dignity and equal respect, see Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights" (2010) 41 *Metaphilosophy* 464, at 469-470, 472.

[9] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (*Sodomy* case), at [28]:

> Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as

Sachs J distinguished breach of the right to dignity from violation of dignity and self-worth under the equality provisions.[10] The right to dignity has a broader brush than equality and protects individuals in circumstances where they are not respected.[11]

Equal respect was also lacking in *Nyathi* and led to a finding of infringement of the equality and dignity guarantees.[12] Mr Nyathi had been awarded compensation against the State for medical negligence, but the State failed to pay the amount due. He was precluded by statute from enforcing the debt against the State and, unfortunately, he died before his challenge to the constitutionality of the legislation could be heard. In a majority decision, the Constitutional Court held that his rights to equal protection of the law in Section 9(1) of the Constitution, to protection of dignity under Section 10, and to access to courts in Section 34 had been breached. Madala J considered that his worth as a person had not been recognised.[13] The State had a particular duty to respect people and there was added insult because of its involvement.[14]

> apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity... .

[10] *Ibid*, at [124]:

> The violation of dignity under section 10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It also could be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.

[11] Disadvantage is relevant to the equality enquiry because of its connection with dignity—not for its own sake: Evadné Grant, "Dignity and Equality" (2007) 7 *HRL Rev* 299, at 321.

[12] *Nyathi v MEC for the Department of Health, Gauteng* 2008 (5) SA 94 (CC).

[13] *Ibid*, at [45] (footnote omitted):

> The right to dignity entails the right to have one's dignity respected and protected. The circumstances of this case show the potential that section 3 [State Liability Act 1957] has for the limitation of the right to dignity. The applicant was made to wait for an extremely long time for money required to pay for his treatment. Without the rehabilitative treatment, he stood a very slim chance of survival. The state was made fully aware of this very desperate situation but provided no relief. He was then unable to attach state assets due to the operation of section 3. It certainly cannot be said, in these circumstances, that the applicant was treated in a manner that showed recognition for his worth and importance as a human being.

[14] *Ibid*, at [89]:

> In a state that has pledged itself to redeem the dignity of its citizens, it should not be the state itself that tramples on the rights of its citizens. On the contrary, everyone should be working tirelessly to protect and promote that dignity, it being accepted that we are dealing with a majority of previously disadvantaged persons.

4.2 Punishment

In *S v Williams* juvenile whipping[15] was held to be a contravention of the right to dignity in Section 10 and of the prohibition on cruel, inhuman or degrading treatment or punishment in Section 11(2) of the interim Constitution.[16] Apart from the physical aspect, the treatment of an individual—no matter how despicable—as an object violated dignity.[17] Langa J invoked foreign case law[18] to this effect:

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[15] The Supreme Court of Zimbabwe held that a sentence of corporal punishment on a juvenile was an inhuman and degrading punishment contrary to Section 15(1) of the Constitution of the Republic of Zimbabwe 1979: *Juvenile v S* [1989] LRC (Const) 774. The judges disagreed on the constitutional issue and had various views on whether juvenile corporal punishment was equivalent to adult whipping, whether corporal punishment was inherently degrading, and whether corporal punishment in schools or by parents was degrading. Dumbutshena CJ held that the same considerations should apply to physical chastisement of children by schoolteachers and that even a parent's common law right to spank a child was limited; he cited South African cases where judges showed their abhorence towards judicial corporal punishment—in *S v V en 'n Ander* 1989 (1) SA 532 (A) the Appellate Division had highlighted the increasingly popular view "that it was undesirable and even ill-advised to couple corporal punishment to a long term of imprisonment because it served no acceptable end" and in *S v November en 'n Ander* 1988 (1) SA 661 (O), at 664 C-D, Terbutt J had described corporal punishment as "a drastic punishment", which was also "humiliating and demoralising": [1989] LRC (Const) 774, at 784. Gubbay JA disagreed with Fitzmaurice J's dissenting view in *Tyrer v UK* (App no 5856/72) (1979-80) 2 EHRR 1 that there was no difference between "the caning of errant schoolboys and a judicial caning" and considered instead that the concern was "not with the gradation of the number of cuts", but "with the essential nature of the punishment itself": [1989] LRC (Const) 774, at 794-795. He went further than the European Court of Human Rights and held that "judicial whipping, no matter the nature of the instrument used and the manner of execution," was "inherently brutal and cruel"; furthermore, it was subject to abuse by those administering it and was "antiquated" and "counter-productive": *ibid*, at 796. McNally JA (dissenting on the constitutional issue) thought there was "a very clear distinction between the corporal punishment of adults and the corporal punishment of juveniles" and associated himself with the minority judgment of Fitzmaurice J in *Tyrer*, being of the view that all punishment, including imprisonment, involves an element of degradation: [1989] LRC (Const) 774, at 798, 800.

[16] 1995 (3) SA 632 (CC). Over the previous 30 years at least, South African jurisprudence had experienced a growing unanimity in judicial condemnation of corporal punishment for adults, with consistent and emphatic criticism of the practice, it being characterised as "punishment of a particularly severe kind ... brutal in its nature ... a severe assault upon not only the person of the recipient but upon his dignity as a human being": *ibid*, at [11], citing Fannin J in *S v Kumalo* 1965(4) SA 565 (N) at 574F. It was also called "a very severe and humiliating form of punishment": 1995 (3) SA 632 (CC), at [11], citing De Wet CJ in *S v Myute* 1985(2) SA 61 (Ck) at 62H.

[17] As Richard Stith said, "[w]e do not entirely lose our active potential for virtue even by habituation to vice": Stith, "The Priority of Respect: How Our Common Humanity Can Ground Our Individual Dignity" (2004) 44 *Intl Philosophical Q* 165, at 182.

[18] Langa J mentioned a case from Lesotho, where the court imposed restrictions on the whipping of people aged over 30 years: 1995 (3) SA 632 (CC), at [40], citing *R v Tsehlana* Rev Case 157/77 (HC), cited in Stephen C Neff, "Human Rights in Africa: Thoughts on the African Charter on Human and Peoples' Rights in the Light of Case Law from Botswana, Lesotho and Swaziland" (1984) 33 *ICLQ* 331, at 339. Aguda JA in *S v Petrus* in Botswana had recognised that certain types of punishment or treatment were "by their very nature cruel, inhuman or degrading" and also that a punishment not inherently inhuman or degrading might become so "by the very nature or mode of execution" notwithstanding the fact that popular demand might favour it: *S v Williams* 1995 (3) SA 632 (CC), at [40], citing [1985] LRC (Const) 699, at 725G-726A. See William Binchy, "Dignity as a Core Constitutional Concept" in Emmanuel Quansah and William Binchy eds, *The Judicial Protection of Human Rights in Botswana* (Clarus Press, Dublin 2009), at 181-183. On *Petrus*, see: Hon Justice Key Dingake, "Expanding the Frontiers of Fundamental Human Rights: Judicial Protection of Human Rights in Botswana" in Emmanuel Quansah and William

> In *Furman v Georgia,* Brennan J postulated criteria in the assessment of what amounts to cruel and unusual punishment. He pointed out that punishment does not become "cruel and unusual" merely because of the pain inflicted. The true significance lay in the fact that members of the human race are treated:
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> > "... as nonhumans, as objects to be toyed with and discarded ... [and that this is] ... thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity."[19]

"The dignity of man" is the basic concept underlying the prohibition in the United States on cruel and unusual punishment.[20] In *Trop v Dulles* Chief Justice Warren pointed out that the policy underlying the prohibition was firmly based in the Anglo-American tradition as far back as the Magna Carta and the phraseology was taken from the English Declaration of Rights 1688.[21] The purpose of the prohibition was to ensure that the State exercised its power to punish within the limits of civilised standards.[22] As identified by Justice Brennan in *Furman v Georgia*, the four fundamental principles to be applied cumulatively to assess whether a sanction is precluded as uncivilised and inhuman, are primarily that the punishment is severe enough to be degrading to dignity, and that it is arbitrary, unacceptable to contemporary society and excessive.[23] When referring to the struggle in the US to balance the desire for retribution[24] against the belief in the equal value of individuals, Justice Brennan described "the

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Binchy eds, *The Judicial Protection of Human Rights in Botswana* (Clarus Press, Dublin 2009), at 47-50; Hon Justice Onkemetse Tshosa, "Judicial Protection of Human Rights in Botswana and the Role of International Human Rights Law" in *ibid*, at 84-85.

Stephen Neff's research showed that the Swaziland courts had been particularly active in imposing restrictions on the use of corporal punishment; in 1978 the High Court there had noted the prevailing opinion among criminologists around the world that the punishment of whipping very rarely, if ever, had any beneficial result and that consequently it should be used only in very exceptional circumstances: Neff *supra*, at 339, citing *Kunene v R* CRI Case No 112/78 (HC). In another case it was held that the number of strokes given for an offence should not ordinarily exceed six: Neff *supra*, at 339, citing *R v Zwane* CRI Case No 8/73 (HC). A third case held that strokes are never an appropriate punishment for a minor traffic offence: Neff *supra*, at 339, citing *R v Nkambule* CRI Case No 21/81 (HC).

[19] 1995 (3) SA 632 (CC), at [28], citing 408 US 238 (1972), at 273. The latter case held that capital punishment in Georgia was unconstitutional.

[20] *Trop v Dulles* 356 US 86 (1958), at 100; *Gregg v Georgia* 428 US 153 (1976), at 173. Although law punishes, we deploy modes of punishment that do not destroy the dignity of those on whom it is being administered; respect for the individual's dignity requires that any punishment inflicted should be bearable: Jeremy Waldron, "Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley" (2009) NYU School of Law Public Law Research Paper No 09-50 http://ssrn.com/abstract=1461220 (visited 1 June 2010), at 61. Jeremy Waldron pointed out that punishment should be "something that a person can endure, without abandoning his or her elementary human functioning" and as he said, "[o]ne ought to be able to do one's time, take one's licks, while remaining upright and self-possessed.": *ibid*.

[21] 356 US 86 (1958), at 100.

[22] *Ibid*.

[23] 408 US 238 (1972), at 281.

[24] Tabaro J of the Ugandan Constitutional Court considered retribution "base and sordid" and "only a euphemism for a primitive instinct in men to revenge whenever wronged", while revenge even in the

dignity of the individual" as society's "supreme value".[25]

The disagreement in US society over whether retribution is an acceptable objective in imposing punishment was reflected by the judges in *Gregg v Georgia*,[26] where the Supreme Court in a majority decision upheld the constitutionality of death penalty legislation introduced in Georgia containing safeguards on the lines outlined in *Furman v Georgia*.[27] Justice Stewart accepted that retribution was no longer the dominant objective in punishment, but neither was it forbidden nor inconsistent with dignity.[28] His endorsement of retention of the death penalty brought into the equation the dignity of the victim and society's interest in deterrence, which could prevail in extenuating circumstances over the dignity of the offender.[29] Justice Brennan in dissent adhered to his stance against the death penalty *per se* and emphasised that foremost among the "moral concepts" recognised in the US was "the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings—a punishment must not be so severe as to be degrading to human dignity."[30]

Retribution as a punitive objective was held by the majority of the US Supreme Court to be inappropriate for the mentally retarded in *Atkins v Virginia* and it held that executions of mentally retarded criminals was a cruel and unusual punishment.[31] Its focus was on the

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form of the cruellest of punishments had no demonstrable deterrent effect: *Abuki v AG* [1997] UGCC 5, at 9.

[25] *Furman v Georgia* 408 US 238 (1972), at 296.

[26] 428 US 153 (1976).

[27] While in the US the death penalty is under dispute but is not considered *per se* to be an offence against human dignity, in Germany the Basic Law abolished it in the light of the Nazi experience; Ernst Benda noted that historical developments, cultural diversity and a society's principal values help to define the content and borderlines of human dignity; this applies even to societies which share a common cultural and religious heritage, as in the US and Germany: Ernst Benda, "The Protection of Human Dignity (Article 1 of the Basic Law)" (2000) 53 *SMU L Rev* 443, at 448-449.

[28] *Gregg v Georgia* 428 US 153 (1976), at 183. Helen Knowles identified three main categories of dignity in US Supreme Court death penalty opinions, *viz*, human dignity requiring abolition of the death penalty (dignity without death), human dignity coexisting with a heavily regulated death penalty (dignified coexistence), and state dignity emphasising respect for the dignity of the institutional apparatuses of the state that employs the death penalty (institutionalised dignity): Helen J Knowles, "A Dialogue on Death Penalty Dignity" (2011) 11 *Criminology & Crim Justice* 115, at 116-117.

[29] "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.": 428 US 153 (1976), at 184.

[30] *Ibid*, at 229. See Justice Brennan's extrajudicial comments on the death penalty: William J Brennan, Jr, "The Constitution of the United States: Contemporary Ratification" (1986) 27 *S Tex L Rev* 433, at 443-444. For an assessment of Justice Brennan's stance on the death penalty, see: Stephen J Wermiel, "Law and Human Dignity: The Judicial Soul of Justice Brennan" (1998) 7 *Wm & Mary Bill Rts J* 223, at 233-234.

[31] 536 US 304 (2002). Justice Stevens cited Chief Justice Warren's explanation in *Trop v Dulles* of the

excessiveness of the punishment which should be graduated and proportionate to the offence judged by the prevailing standards of decency informed by objective factors as far as possible.[32]

Similar to South Africa, the prohibition in the European Convention on Human Rights (ECHR)[33] on degrading punishment is designed to protect dignity and physical and psychological integrity, as enunciated in *Tyrer v UK*, where the European Court of Human Rights condemned judicially-authorised birching of a minor.[34] The majority considered that the absence of publicity was not the central issue, as the victim could be "humiliated in his own eyes, even if not in the eyes of others".[35] Fitzmaurice J (dissenting on the main issue) distinguished punishment of a juvenile from that of an adult.[36]

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basic concept underlying the Eighth Amendment's ban on cruel and unusual punishments as being "nothing less than the dignity of man": *ibid*, at 311, citing 356 US 86 (1958), at 100. Steven Heyman pointed out that notwithstanding the contrast between the crucial importance accorded to the value of dignity in international human rights law and the tendency to conceive of rights in terms of liberty in American law, dignity is an important theme in US Supreme Court jurisprudence: Steven J Heyman, *Free Speech and Human Dignity* (Yale University Press, New Haven 2008), at 40.

[32] Lori Church has criticised the decision on the grounds that the Court "disregarded precedent, dramatically lowered the bar in determining what constitutes a national consensus, misapplied the objective standards used to determine a national consensus, and caused further non-uniformity in an already complex area of the law": Lori M Church, "Mandating Dignity: The United States Supreme Court's Extreme Departure from Precedent Regarding the Eighth Amendment and the Death Penalty [*Atkins v. Virginia*, 122 S. Court. 2242 (2002)]" (2003) 42 *Washburn LJ* 305, at 306.

[33] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (ECHR).

[34] (App no 5856/72) (1979-80) 2 EHRR 1, at 11 [33]:

> [A]lthough the applicant did not suffer any severe or long-lasting physical effects, his punishment—whereby he was treated as an object in the power of the authorities—constituted an assault on precisely that which is the main purpose of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.
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> The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.

For reviews of *Tyrer*, see Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (CUP, Cambridge 2006), at 170-176; Jochen Abr Frowein, "Human Dignity in International Law" in David Kretzmer and Eckart Klein eds, *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, The Hague 2002), at 124.

The African Commission described the application of physical violence for offences as "tantamount to sanctioning state sponsored torture" when it held that the penalty of lashes breached the African Charter: *Doebbler v Sudan* [2003] AHRLR 153 (ACHPR 2003), at [42], citing African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) Art 5.

[35] (App no 5856/72) (1979-80) 2 EHRR 1, at 10 [32].

[36] *Ibid*, at 16 [2]. He thought that most punishment involves a loss of dignity, so an effect on dignity was not coterminous with a finding of degrading punishment: *ibid*, at 19 [8]. He disagreed with the majority's reasoning in many respects, including the distinction between institutionalised violence and non-institutionalised violence, the differentiation between being beaten by a stranger and by a person known to the offender, and the attribution of a possible psychological consequence to degrading

Corporal punishment infringes the dignity of the perpetrator as well as that of the offender.[37] State-sanctioned degrading punishment is particularly odious and is likely to lead to a general disregard for dignity.[38]

4.2.1 Corporal punishment of children

Corporal punishment in schools is a contentious issue with different attitudes being taken to it in—and frequently within—various countries. In adjudicating on it, judges have given varying weight to dignity, some regarding it as an absolute value and others being prepared to balance it against other interests.

In Namibia the Supreme Court in *Ex p AG, Re Corporal Punishment by Organs of State*[39] unanimously held that the infliction of corporal punishment in government schools pursuant to a ministerial code or state direction infringed the prohibition on inhuman or degrading treatment or punishment in Article 8(2)(b) of the Namibian Constitution, which falls under the umbrella of respect for human dignity.[40] Mahomed AJA in his lead judgment gave pre-eminence to dignity, which he stated was inherent in juveniles as well as in adults.[41]

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punishment: *ibid*, at 20-21 [9]. In his view, a distasteful, undesirable, or morally wrong practice did not necessarily amount to a breach of the prohibition on degrading punishment: *ibid*, at 24 [14].

[37] "There is no dignity in the act itself; the recipient might struggle against himself to maintain a semblance of dignified suffering or even unconcern; there is no dignity even in the person delivering the punishment. It is a practice which debases everyone involved in it.": *S v Williams* 1995 (3) SA 632 (CC), at [89].

[38] *Ibid*, at [47]:

> If the State, as role model *par excellence,* treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished.

[39] [1991] NASC 2; 1991 (3) SA 76 (NmS). The Court in the same case also struck down a sentence of corporal punishment by any judicial or quasi-judicial authority.

Mahomed AJA assessed whether a punishment was inhuman or degrading by looking at domestic and international values. He explained that in exercising an objective value judgment, regard should be had "to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution and ... to the emerging consensus of values in the civilised international community": [1991] NASC 2; 1991 (3) SA 76 (NmS), at 20. His use of national institutions as sources of identification of norms and values added another dimension to judicial interpretation: Sam K Amoo, "The Constitutional Jurisprudential Development in Namibia since 1985" in Nico Horn and Anton Bösl eds, *Human Rights and the Rule of Law in Namibia* (Macmillan Namibia, Windhoek 2008), at 50.

This ruling established the liberal credentials of the Namibian Supreme Court and its adherence to international human rights norms: Gino J Naldi, *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (Juta, Kenwyn 1995), at 50.

[40] Constitution of the Republic of Namibia 1990, Article 8.

[41] "Juveniles also have an inherent dignity by virtue of their status as human beings and that dignity is

Therefore the physical pain or the speedy recovery from the punishment was not determinative.[42]

Sachs J referred to this Namibian case in his judgment for a unanimous Constitutional Court in the challenge by Christian Education of South Africa (representing independent Christian schools) to the prohibition by the South African Schools Act of 1996 of corporal punishment in schools.[43] It was alleged that the prohibition interfered with the right of the parents of the pupils to religious freedom, as they had consented to corporal punishment in school since it was part of their religious convictions. The Minister for Education in defence relied, *inter alia*, on the children's constitutional rights to equality,[44] dignity,[45] personal freedom and security,[46] and to be protected from maltreatment, neglect, abuse or degradation.[47] The Constitutional Court dismissed the appeal against the finding of the High Court that the ban on corporal punishment in schools did not interfere unduly with the parents' right to religious freedom. The High Court judge had concluded that the legislative prohibition did not constitute a substantial burden on religious freedom and that corporal punishment in schools infringed the children's right to dignity and security of the person. Sachs J did not rule on the constitutionality of parental correction by physical punishment, but assumed that the

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also violated by corporal punishment inflicted in consequence of judicial or quasi-judical authority.": [1991] NASC 2; 1991 (3) SA 76 (NmS), at 29.

[42] The very fact of state-sanctioned punishment was inherently demeaning, *ibid*, at 34:

> A deliberate and systematic assault with a cane on the buttocks of an individual inflicted by a stranger as a form of punishment authorised by a judicial or quasi-judicial tribunal, is inherently a demeaning invasion on the dignity of the person punished. It must, in these circumstances be degrading or inhuman. It does not become less so because a juvenile might conceivably recover from such a basic infliction on his dignity sooner than an adult might in comparable circumstances.

Berker CJ (concurring) took the same view and could be taken as favouring the condemnation of all corporal punishment from whatever source no matter how moderate or controlled, *ibid*, at 4:

> It seems to me that once one has arrived at the conclusion that corporal punishment *per se* is impairing the dignity of the recipient or subjects him to degrading treatment or even to, cruel or inhuman treatment or punishment, it does not on principle matter to what extent such corporal punishment is made subject to restrictions and limiting parameters, even of a substantial kind—even if very moderately applied and subject to very strict controls, the fact remains that *any* type of corporal punishment results in some impairment of dignity and degrading treatment.

Mahomed AJA left open whether punishment inflicted by a teacher pursuant to a parent's actual delegation of the powers of chastisement would be a violation: *ibid*, at 38.

[43] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757, at [46]. On *Christian Education*, see Lourens du Plessis, "Affirmation and Celebration of the 'Religious Other' in South Africa's Constitutional Jurisprudence on Religious and Related Rights: Memorial Constitutionalism in Action?" (2008) 8 *AHRLJ* 376, at 387-388.

[44] Constitution of the Republic of South Africa 1996, Section 9(1).

[45] *Ibid*, Section 10.

[46] *Ibid*, Section 12(1)(c), (d), (e).

[47] *Ibid*, Section 28(1)(d).

legislation infringed the parents' rights.[48] The approach in the Constitutional Court was not to portray the problem as the right to bodily integrity versus the right to freedom of conscience, but, as Sachs J described it, to deliver a judgment giving "a carefully thought-through balancing of the way these two rights inter-connected in the concrete circumstances of the case."[49] The ruling was that, subject to common law principles governing reasonable chastisement, the Christian Education community could maintain the integrity of their faith at home but not impose corporal correction in the more public environ of the schools.[50] Religious belief is one of the key ingredients in a person's dignity.[51] But it is not the only aspect of dignity that was relevant, as the trend in southern Africa had been strongly in favour of regarding corporal punishment in schools as in itself violatory of the dignity of the child.[52]

The South African Constitutional Court has hesitated to condemn corporal punishment unambiguously and has clearly not found that it violates children's rights in all circumstances, leaving scope for tipping the balance in favour of the parents' rights to exert control by physical means. Langa J in *S v Williams*, which did not deal with corporal punishment in schools, mentioned that it was a controversial topic.[53]

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[48] 2000 (4) SA 757, at [27].

[49] Albie Sachs, *The Strange Alchemy of Life and Law* (OUP, Oxford 2009), at 272. As Sachs J stated in *Christian Education*, "[o]ur Bill of Rights, through its limitations clause, expressly contemplates the use of a nuanced and context-sensitive form of balancing: 2000 (4) SA 757, at [30].

[50] Sachs, *The Strange Alchemy of Life and Law* (n49), at 272.

[51] *Christian Education South Africa* 2000 (4) SA 757, at [36].

[52] *Ibid*, at [47]. See Grant (n11), at 313-314. Cf *Canadian Foundation for Children, Youth and the Law v Canada (AG)* 2004 SCC 4, [2004] 1 SCR 76, where the Supreme Court of Canada in a majority decision upheld the constitutionality of the use of reasonable corrective force by parents and teachers. Binnie J (dissenting in part in *Canadian Foundation*) found a violation of the equality provision, but it could be justified in relation to parents. He criticised the Chief Justice for concluding that children's equality rights were not infringed because their dignity was not offended by depriving them of the protection of their physical integrity against the use of unlawful force: 2004 SCC 4, [2004] 1 SCR 76, at [72]. He agreed with the conclusion in a report that the child's dignity was breached by the humiliation of corporal punishment, but mainly by the inherent lack of respect: *ibid*, at [107], citing Claire Bernard, "Corporal Punishment as a Means of Correcting Children" Quebec Commission des droits de la personne et des droits de la jeunesse (November 1998), at 8. Deschamps J (dissenting) considered that the equality breach was not justified, as the legislation did not meet the proportionality test. Arbour J (also dissenting) thought the legislation infringed the child's security interest, and the deprivation was not in accordance with the fundamental principle of justice, since its wording was vague. For reviews of *Canadian Foundation*, see: Geoffrey Shannon, *Child Law* (2nd edn Round Hall/Thomson Reuters, Dublin 2010), at [2-31], [11-191]; Benjamin Shmueli, "Corporal Punishment in the Educational System versus Corporal Punishment by Parents: A Comparative View" (2010) 73(2) *LCP* 281, at 285-286, 314-315.

[53] 1995 (3) SA 632, at [48]. Langa J stated. "[i]t is not necessary to comment on the suggestion that judicial corporal punishment is in reality no worse than cuts imposed at school": *ibid*, at [49]. He referred to the requirement of the European Court of Human Rights that for punishment to be degrading, it had to reach a minimum level of severity, attaching importance to "the difference between strokes inflicted by a policeman as a result of a court order" and "corporal punishment administered by a headmaster in terms of disciplinary rules" in a boarding school: *ibid*, at [48], citing *Costello-Roberts v*

In *Christian Education*, Sachs J avoided ruling on the extent of children's rights by dealing with the issue of punishment in schools by a proportionality analysis under the limitations clause.[54] He concluded that the legislation prohibiting corporal punishment in all schools—private as well as public—was reasonable and was justified in restricting the parents' rights to religious freedom on the assumption that this freedom included a right to chastise their children.[55] He made a clear distinction between the school and the home, when he stated, "corporal punishment administered by a teacher in the institutional environment of a school is quite different from corporal punishment in the home environment."[56]

The Namibian Supreme Court's decision on corporal punishment is wider in scope than that of the South African Constitutional Court, the Namibian Court finding that state-sanctioned corporal punishment in schools infringed children's inherent dignity. Unlike the South African Constitutional Court, it was less open to arguments attempting to justify corporal punishment of young people in a learning environment. In contrast to the Namibian and South African courts, the European Court of Human Rights in a narrow majority of five votes to four found in *Costello-Roberts v UK* that the use of reasonable corporal punishment in schools did not breach the prohibition on inhuman or degrading treatment or punishment in Article 3 ECHR.[57] By requiring a minimum level of severity, the Court accepted that human dignity is not absolute.[58] The US Supreme Court held by a narrow majority in *Ingraham v Wright* that the

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UK (App no 13134/87) (1995) 19 EHRR 112) and *Tyrer v UK* (App no 5856/72) (1979-80) 2 EHRR 1.
The attitudes to the significance of punishment in the school environment differed—the European Court of Human Rights "seemed to attach some importance to the difference between strokes inflicted by a policeman as a result of a court order ... and corporal punishment administered by a headmaster in terms of disciplinary rules in force within the school in which the youth was a boarder", whereas Justice White in a dissenting opinion in the US Supreme Court considered that when corporal punishment became so severe as to be unacceptable in a civilised society the fact that it was inflicted in public schools did not make it any more acceptable: 1995 (3) SA 632, at [49], citing *Costello-Roberts v UK* (App no 13134/87) (1995) 19 EHRR 112) and *Ingraham v Wright* 430 US 651 (1977), at 692.
On *Costello-Roberts* and *Tyrer*, see Nicole O'Neal, "Corporal Punishment in Public Schools: A Call for Legal Reform" (2008) 8 *AHRLJ* 60, at 74-75.

[54] 2000 (4) SA 757, at [32].

[55] *Ibid*, at [50]-[52].

[56] *Ibid*, at [49]. He distinguished conduct in "the intimate and spontaneous atmosphere of the home" from "the detached and institutional environment of the school": *ibid*.

[57] (App no 13134/87) (1995) 19 EHRR 112. The Court took into account the context in which the punishment was imposed and its nature, duration, and physical and mental effects on the pupil, whose age, sex and state of health were relevant in certain circumstances: *ibid*, at [30]. The approach of the European Court of Human Rights was quite different from that of the Supreme Court of Namibia which emphasised the *inherently* demeaning character of such punishment rather than its relative nature: Naldi (n39), at 51.

[58] The seven-year old boy in a private school had shown no evidence of "any severe or long-lasting effects as a result of the treatment complained of", but even if such effects were not shown, the Court

prohibition against cruel and unusual punishment in the Eighth Amendment was designed to protect those convicted of crime and did not apply to disciplinary corporal punishment in public schools.[59]

At the international level, the United Nations has progressively narrowed any scope for corporal punishment of children by the state, in school and at home. The Convention on the Rights of the Child (CRC) adopted in 1989 has a strong emphasis on the equal dignity of all—children as well as adults.[60] It contains several provisions impacting on corporal punishment of children. There is an obligation on states to legislate and educate to defend children from violence or ill-treatment in article 19(1),[61] which embraces control over all those in charge of children, whether at home, in school or elsewhere. Article 37(a) contains a general ban on torture or other cruel, inhuman or degrading treatment or punishment of children, but there is no explicit prohibition of corporal punishment. Included in the educational provisions is a

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indicated that there could be particular circumstances where it could be said that the punishment reached the minimum threshold of severity required: (App no 13134/87) (1995) 19 EHRR 112, at [32]. The Court made it clear that it was not endorsing corporal punishment and it had "certain misgivings about the automatic nature of the punishment and the three-day wait before its imposition": *ibid*.
The four judges dissenting on the Art 3 issue were struck by "the ritualised character of the corporal punishment" and also mentioned the three-day gap before the headmaster of the school "'whacked'" a lonely and insecure seven-year-old boy": *ibid*, at 137. They considered that a spanking on the spur of the moment might have been permissible, but viewed as degrading "the official and formalised nature of the punishment meted out, without adequate consent of the mother": *ibid*, at 137-138. They adverted to the trend in Europe (and in the UK since the corporal punishment the subject of the complaint) to render unlawful corporal punishment in state and certain independent schools, and felt that the discrepancy caused by the progressive outlawing elsewhere must have added to the degradation of the remaining pupils in independent schools whose disciplinary regimes persisted in corporal punishment: *ibid*, at 138.

[59] 430 US 651 (1977). This finding has given the states wide latitude regarding the treatment of the parental privilege to use physical force to discipline children: Kyli L Willis, "*Willis v State*: Condoning Child Abuse as Discipline" (2010) 14 *UC Davis J Juv L & Pol'y* 59, at 73. In 2008 the Indiana Supreme Court overturned the conviction of a single mother for battery of her son, as parents had a fundamental liberty interest to direct the upbringing of children, which included using "reasonable or moderate physical force" to control behaviour: *ibid*, at 89, citing *Willis v State* 888 NE.2d 177 (Ind 2008), at 180. Indiana's interest in protecting the welfare of children lost out in the balance against the mother's liberty, and her plea of the parental privilege defence succeeded: Willis *supra*, at 89-90.

[60] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. Although the US and Somalia are the only countries which have not ratified the CRC, the US courts have already begun using it as persuasive authority under the doctrine of "customary international law": Jason M Fuller, "The Science and Statistics behind Spanking Suggest that Laws Allowing Corporal Punishment are in the Best Interests of the Child" (2009) 42 *Akron L Rev* 243, at 256, 258-259. On CRC, see Susanna Coetzee, "Discipline in Nigerian Schools within a Human Rights Framework" (2010) 10 *AHRLJ* 478, at 484-487.

[61] It reads:

> State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

duty on states to take measures to ensure that school discipline is administered in a manner "consistent with the child's human dignity" and in conformity with the CRC.[62]

Recognising the development of norms in society across the globe over time, the UN Committee on the Rights of the Child through its general comments has essentially outlawed all corporal punishment of children in all environments.[63] Its General Comment No 8 dealing with corporal punishment contains reminders of the significance of the dignity of children[64] as a precursor to an adamant statement that the CRC bans all corporal punishment with a consequent obligation on states to enforce the ban.[65] In 1996 Italy's highest Court, the Supreme Court of Cassation, invoking the CRC, effectively prohibited all parental use of corporal punishment, basing its decision, first, on the dignity of the individual—meaning that children were not the objects of their parents—and, second, on the fostering of the child's personality.[66]

The General Comment requires that states take action against corporal punishment even in the traditional sanctity of the home.[67] Freedom of religion is not accepted as a rationale for

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[62] CRC (n60) art 28(2).

[63] There is disagreement among scholars on whether the CRC bans the use of light, educational corporal punishment: Shmueli (n52), at 306-307. Benjamin Shmueli proposes a reading of the CRC which would interpret it as not barring educational corporal punishment but only violence committed for extraneous purposes: *ibid*, at 312-313.

[64] UN Committee on the Rights of the Child, "General Comment No 8" (2 March 2007) UN Doc CRC/C/GC/8, at [2], [5], [7], [16], [17].

[65] *Ibid*, at [18]:

> There is no ambiguity: "all forms of physical or mental violence" does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them.

Courts in many countries have issued decisions, usually quoting the CRC, "condemning corporal punishment of children in some or all settings": *ibid*, at [25].

[66] *Ibid*, at fn 15, citing Cambria, Cass, sez VI, 18 Marzo 1996 [Supreme Court of Cassation, 6th Penal Section, 18 March 1996], Foro It II 1996, 407 (Italy). The Italian Court's own description as cited was:

> The use of violence for educational purposes can no longer be considered lawful. There are two reasons for this: the first is the overriding importance which the [Italian] legal system attributes to protecting the dignity of the individual. This includes "minors" who now hold rights and are no longer simply objects to be protected by their parents or, worse still, objects at the disposal of their parents. The second reason is that, as an educational aim, the harmonious development of a child's personality, which ensures that he/she embraces the values of peace, tolerance and co-existence, cannot be achieved by using violent means which contradict these goals.

[67] Other UN bodies have also recommended "prohibition and other measures against corporal punishment in schools, penal systems and, in some cases, the family": UN Committee on the Rights of the Child, "General Comment No 8" (n64), at [22]. The CRC, like all human rights instruments, is "a living instrument, whose interpretation develops over time"; since the CRC was adopted, the prevalence of corporal punishment of children in their homes, schools and other institutions has become more

corporal punishment.[68] The state has a multiple role in upholding children's rights to be free from corporal punishment. In addition to the requirement to make it "explicitly clear that the criminal law provisions on assault also cover all corporal punishment, including in the family", it may be possible to have civil and family law measures "prohibiting the use of all forms of violence, including all corporal punishment."[69]

4.2.2 Punishment of adults

African countries have varied in their attitude to corporal punishment of adults and in the rate of progress in banning it. In 1987 the Supreme Court of Zimbabwe had held unanimously in *Ncube v S* that adult whipping was unconstitutional, being inhuman or degrading punishments contrary to Section 15(1) of the Constitution.[70] The Ugandan Supreme Court considered corporal punishment in *Oryem v Uganda* and confirmed the Constitutional Court's finding in *Kyamanywa* that corporal punishment—in that case six strokes of the cane—contravened the prohibition in Article 24 of the Constitution on torture, cruel, inhuman or degrading treatment or punishment.[71] In *A v UK*, where the European Court of Human Rights held that the state

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visible: *ibid*, at [20].

[68] "Some raise faith-based justifications for corporal punishment, suggesting that certain interpretations of religious texts not only justify its use, but provide a duty to use it. ...but practice of a religion or belief must be consistent with respect for others' human dignity and physical integrity.": *ibid*, at [29].

[69] *Ibid*, at [39]. Awareness-raising, public education and the state's monitoring of the progress being made are part of the process of eliminating corporal punishment: *ibid*, at [45], [46], [51]. States are expected to insert in their periodic reports under the CRC information on "the measures taken to prohibit and prevent all corporal punishment and other cruel or degrading forms of punishment in the family and all other settings, including on ... progress towards achieving full respect for children's rights to protection from all forms of violence": *ibid*, at [53].

[70] [1988] LRC (Const) 442. Gubbay JA delivering the Court's judgment invoked US jurisprudence to describe how he perceived the basic concept against which the protection from inhuman or degrading punishment should be construed, and made a clear link between unacceptable punishment and violation of human dignity: *ibid*, at 460:

> The *raison d'être* underlying section 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity and decency... . It guarantees that the power of the State to punish is exercised within the limits of civilised standards. Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve unnecessary and wanton infliction of pain are repugnant.

He was of the opinion that whipping in its very nature was "both inhuman and degrading" and relied on four adverse features inherent in the infliction of whipping, namely, first, the manner in which it was administered, which rendered it "not only inherently brutal and cruel, ... but which stripped the recipient of all dignity and self-respect"; second, by its very nature, it treated "members of the human race as non-humans"; third, it was easily subject to abuse; and fourth, it was degrading to both the punished and the punisher, it caused the executioner and society to stoop to the level of the criminal, and it was likely to generate hatred against the prison regime and the system of justice: *ibid*, at 466. See Javaid Rehman, *International Human Rights Law* (2nd edn Longman, Harlow 2010), at 316-317.

[71] *Oryem v Uganda* [2003] UGSC 30, at 10-12 confirming *Kyamanywa v Uganda* (No 10/2000) (Uganda Constitutional Court) 14 December 2001. In Zambia, Chulu J had held in the High Court in 1999 that corporal punishment was "inhuman, degrading and barbaric" and breached the absolute prohibition on

had a duty to protect individuals against injury from private parties, the stepfather of a child had beaten him severely with a garden cane on more than one occasion, but a jury acquitted him of assault occasioning actual bodily harm and accepted his defence of "reasonable chastisement".[72]

The rights to dignity, life and not to be subject to cruel, inhuman or degrading punishment were all breached when South African immigration officers handed over to the FBI a Tanzanian national suspected of having been involved in the bombing of the US embassy in Dar es Salaam.[73] He was put on trial for conspiracy in New York. The Constitutional Court held that the South Africans should have obtained a prior undertaking from the US that the death penalty would not be executed if he were found guilty. In *Soering v UK* the European Court of Human Rights had taken a similar view when a West German national alleged that the decision by the United Kingdom Secretary of State for the Home Department to extradite him to the US to face trial in Virginia on a charge of capital murder would, if implemented, breach Article 3 ECHR.[74] Changing views on capital punishment were central to the Canadian decision in *US v Burns*,[75] where extradition to the US without assurances concerning the death penalty or life imprisonment without parole was held to violate the right not to be deprived of life, liberty or security other than in accordance with the principles of fundamental justice in Section 7 of the

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torture, inhuman and degrading punishment in the Constitution: *Banda v The People* [2002] AHRLR 260 (ZaHC 1999), at [12], [22].

[72] (App no 25599/94) (1999) 27 EHRR 611. The Court approved of the approach in *Costello-Roberts* requiring ill-treatment to attain a minimum level of severity if it is to fall within the scope of Art 3 and confirmed that the assessment of this minimum was relative: *ibid*, at [20]. The obligation on states under Art 1 ECHR to secure to everyone within their jurisdiction the rights and freedoms defined in the ECHR, taken together with Art 3, required states to take measures designed to ensure that individuals were not subjected to ill-treatment by private individuals: *ibid*, at [22]. There was a particular obligation to provide effective deterrence to protect children and other vulnerable individuals against serious breaches of personal integrity: *ibid*.

In *Z v UK* the European Court of Human Rights found that the local authority had failed to take adequate measures to protect children known to be suffering abuse and neglect at the hands of their parents: (App no 29392/95) (2002) 34 EHRR 3.

See Laura Hoyano and Caroline Keenan, *Child Abuse: Law and Policy Across Boundaries* (OUP, Oxford 2010), at 185-186; Shannon (n52), at [2-30], [11-191], [14-05].

[73] *Mohamed* 2001 (3) SA 893 (CC).

[74] (App no 14038/88) (1989) 11 EHRR 439. Although the death sentence *per se* was not contrary to the ECHR, the Court held that extradition to the US with the risk of a death sentence being imposed and exposure to "death row phenomenon" would violate the prohibition on inhuman or degrading treatment or punishment in Art 3. The Court considered that the manner of imposition and execution of the sentence, the offender's personal circumstances, the proportionality of the sentence to the crime and the conditions of detention could amount to unacceptable punishment: *ibid*, at [104]. Society's changing views were a factor for the Court, which stated, "Present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.": *ibid*.

See Rhona KM Smith, *Textbook on International Human Rights* (4th edn OUP, Oxford 2010), at 234.

[75] 2001 SCC 7, [2001] 1 SCR 283 (SC of Canada).

Canadian Charter[76] and was not justified under the limitations clause.[77]

While all eleven judges in *Makwanyane* agreed that the death penalty was unconstitutional, they based their decisions on varying provisions in the interim Constitution including the right to dignity.[78] Mahomed J referred to the effect of the death penalty on the dignity of society as a whole.[79] Ackermann J considered that the individual's right not be put to death gave rise to a corresponding state obligation to defend society from dangerous criminals.[80] He referred to German case law upholding the constitutionality of life imprisonment provided it gave some hope to the offender, whose right to dignity was not abrogated while in prison.[81]

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[76] Canadian Charter of Rights and Freedoms 1982.

[77] *Ibid*, Section 1. This was contrary to the majority view in *Kindler* 10 years earlier: *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 (SC of Canada). But Cory J in dissent then had categorised capital punishment as "the annihilation of the very essence of human dignity" and explained, "[t]he death penalty not only deprives the prisoner of all vestiges of human dignity, it is the ultimate desecration of the individual as a human being.": *ibid*, at 53.

[78] *S v Makwanyane* 1995 (6) BCLR 665 (CC). See analyses by Karl E Klare, "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146, at 172-175; Heinz Klug, "The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?" (2003) 64 *Mont L Rev* 133, at 150. *Makwanyane* is an example of how a constitutional court in a new democracy may be able to ignore public opinion as a limit on principle: Theunis Roux, "Principle and pragmatism on the Constitutional Court of South Africa" (2009) 7 *ICON* 106, at 118-120.
On international and comparative sources referenced in *Makwanyane* and the way they were linked to the local context, see Paolo G Carozza, "My Friend Is a Stranger: The Death Penalty and the Global *Ius Commune* of Human Rights" (2003) 81 *Tex L Rev* 1031, at 1056-1061.

[79] 1995 (6) BCLR 665 (CC), at [272]:

> It is not necessarily only the dignity of the person to be executed which is invaded. Very arguably the dignity of all of us, in a caring civilization, must be compromised, by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the conduct of the offender in the first place (see *Furman v Georgia* 408 US 238 at 273 (1972) (Brennan J, concurring).

[80] "[T]here is a correlative obligation on the state, through the criminal justice system, to protect society from once again being harmed by the unreformed recidivist killer or rapist.": *ibid*, at [171].

[81] *Ibid*, at [172], citing 45 BVerfGE 187 (1977), at 242:

> The [German Federal Constitutional] Court upheld the law on the basis that it was not shown that the serving of a sentence of life imprisonment leads to irreparable physical or psychological damage to the prisoner's health. The Court did however find that the right to human dignity demands a humane execution of the sentence. This meant that the existing law, which made provision for executive pardon, had to be replaced by a law laying down objective criteria for the release of prisoners serving life sentences. In the course of its judgment, the Court made clear that there is nothing constitutionally objectionable to executing a life sentence in full in cases where the prisoner does not meet the criteria. ...[T]he Court said: ...
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> > "Human dignity is not infringed when the execution of the sentence remains necessary due to the continuing danger posed by the prisoner and clemency is for this reason precluded. The state is not prevented from protecting the community from dangerous criminals by keeping them incarcerated".

The German *Life Imprisonment* case was also cited by Mahomed CJ in the Namibian Supreme Court when it held that life imprisonment was not unconstitutional, regard being had to the fact that the relevant legislation permitted release on parole in appropriate circumstances: *S v Tcoeib* [1996] NASC 1; 1996 (1) SACR 390 (NmS). The German Federal Constitutional Court in the *Life Imprisonment* case would not countenance crime deterrence as the sole objective of the criminal justice system, so in

In *S v Dodo* the Constitutional Court dealt with the constitutionality of the Criminal Law Amendment Act 1997 imposing a mandatory life sentence and was satisfied that the statutory provisions were neither disproportionate nor did they interfere unduly with the court's role in sentencing.[82] The court retained the capacity to consider the circumstances and to decline to impose a life sentence should there be substantial and compelling reasons to impose a more lenient punishment. The Constitutional Court reviewed the impact of dignity in its many guises in the South African Constitution.[83] It noted its place as a foundational value as well as a distinct right and that dignity underpins the Bill of Rights. Dignity's association with freedom was significant. Ackermann J invoked the Kantian principle of individuals being deserving of respect because of their inherent worth which required that their dignity be not attacked by treating them as objects on account of the imposition of a disproportionate punishment, whether that be merely disproportionate or disproportionate with a deterrent or reformative purpose.[84]

Kantian style it required the state to retain respect for the inmate's dignity and to uphold social justice by not turning the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect: Luis Aníbal Avilés Pagán, "Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico" (1998) 67 *Rev Jur UPR* 343, at 353.

[82] 2001 (3) SA 382 (CC). Cf *Niemand v S* [2001] ZACC 11, 2002 (1) SA 21 (CC), where legislation imposing an indeterminate sentence on a habitual criminal was found unconstitutional.

[83] 2001 (3) SA 382 (CC), at [35].

[84] *Ibid*, at [38], citing *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), at [31].

> To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ... the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.

See Rory O'Connell, "The Role of Dignity in Equality Law: Lessons from Canada and South Africa" (2008) 6 *ICON* 267, at 273, fn 50.

As is evident from the following passage from his judgment in *Dodo* (2001 (3) SA 382 (CC), at [37]), Ackermann J placed proportionality at the centre of the investigation into whether life imprisonment was constitutional:

> The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. ... In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence.

Comparable sentiments and rationales can be seen in *Tcoeib* when the Namibian Supreme Court dealt with a similar challenge.[85] There was a divergence of views among the judges of the Canadian Supreme Court in *R v Smith* when a majority found that legislation imposing a minimum sentence for importing narcotics breached the ban on cruel and unusual punishment in Section 12 of the Canadian Charter.[86] The Privy Council in *Reyes v R* was not convinced that the possibility of a pardon was sufficient to save the mandatory death penalty in Belize.[87] Notwithstanding the fact that the right to life was not absolute[88] since the Belize Constitution

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The sentences imposed for criminal offences must be proportionate to the crime and show respect for the dignity of the offender, irrespective of the public interest in curbing crime by making an example of the individual as a deterrent to others.

[85] *S v Tcoeib* [1996] NASC 1; 1996 (1) SACR 390 (NmS). Mahomed CJ was mindful of the possibility that, even if the sentence of life imprisonment was not *per se* unconstitutional, its imposition in a particular case might be unconstitutional "if the circumstances of that case justify the conclusion that it is so grossly disproportionate to the severity of the crime committed that it constitutes cruel, inhuman or degrading punishment in the circumstances or impermissibly invades the dignity of the accused": *ibid*, at 19. He found resonances of this approach in US jurisprudence where grossly excessive sentences had been held to be contrary to the prohibition on cruel and unusual punishment in the Eighth Amendment: *ibid*. He distinguished between unacceptable infringements of dignity and the unavoidable effect on the individual of guilt and sentence, *ibid*, at 20:

> The obligation to undergo imprisonment would undoubtedly have some impact on the appellant's dignity but some impact on the dignity of a prisoner is inherent in all imprisonment. What the Constitution seeks to protect are impermissible invasions of dignity not inherent in the very fact of imprisonment or indeed in the conviction of a person *per se*.

Mahomed CJ used Kantian language to describe the requirement to treat everyone (even convicted criminals) decently, *ibid*, at 13:

> It seems to me that the sentence of life imprisonment in Namibia can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he was a "thing" instead of a person without any continuing duty to respect his dignity (which would include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances).

Rehabilitation with the aim of restoring a sense of humanity in those incarcerated was worthy of support, as constitutional values mandated society "continuously and consistently to care for the condition of its prisoners, to seek to manifest concern for, to reform and rehabilitate those prisoners during incarceration and concomitantly to induce in them a consciousness of their dignity, a belief in their worthiness and hope in their future": *ibid*, at 12.

[86] [1987] 1 SCR 1045. McIntyre J (dissenting) set out three characteristics of punishment—any one of which would suffice to render the punishment cruel and unusual—first, its character or duration might outrage the public conscience or be degrading to human dignity; second, it could go beyond what was necessary to achieve a valid social aim, bearing in mind the legitimate purposes of punishment and adequate alternatives; third, it might be arbitrarily imposed by not being applied rationally in accordance with ascertained or ascertainable standards: *ibid*, at [94]. As there was a possibility of parole in this case, he adjudged the minimum sentence for importing narcotics not to be outrageous or degrading to dignity: *ibid*, at [96].

[87] *Reyes v R (Belize)* [2002] UKPC 11, [2002] 2 AC 235. Lord Bingham pointed out that mercy came too late in the process after the judicial decision and was distinct from justice: *ibid*, at [44]. International bodies interpreting human rights instruments had generally accepted the need for "proportionality and individualised sentencing": *ibid*, at [40]. Lord Bingham effectively framed the issue in transnational terms and relied on much foreign jurisprudence: Carozza (n78), at 1075-1077.

[88] International instruments (like many national legal systems) do not accord any formal primacy to the right to life itself, as they contain qualifications rendering it less than absolute: Paul Sieghart, *The*

allowed capital punishment,[89] Lord Bingham found that the mandatory nature of the death penalty infringed the prohibition on inhuman and degrading punishment and treatment.[90]

By a narrow majority in *Kigula v AG* the Ugandan Constitutional Court in 2005 also found that mandatory capital punishment was unconstitutional, as was an inordinate delay in executing the death penalty.[91] Like in Belize, the right to life is not absolute in Uganda,[92] so the Court upheld the death penalty *per se*.[93] Death by hanging passed constitutional muster. Twinomujuni JA stated that one of the general principles of constitutional construction is that fundamental rights and freedoms are to be interpreted having general regard to evolving standards of human dignity.[94] He referred to the minority decision in the US case of *Campbell v Wood*, which concluded:

International Law of Human Rights (OUP, Oxford 1983), at 130. In contrast, other rights such as freedom from torture and other ill-treatment, and freedom from slavery and servitude are absolute, and subject to no exceptions of any kind: *ibid*. Therefore international human rights law assigns a higher value to the quality of living as a process, than to the existence of life as a state: *ibid*. From the viewpoint of the person concerned, the law tends to regard acute or prolonged suffering (at all events where it is inflicted by others, and so potentially avoidable) as a greater evil than death (ultimately unavoidable for everyone): *ibid*.

The prohibition on torture, and inhuman or degrading treatment and punishment in Art 3 ECHR is absolute: *Gäfgen v Germany* (App no 22978/05) (2011) 52 EHRR 1, at [87], [107], [120], [176].

[89] Constitution of Belize 1981, Section 4(1).

[90] *Ibid*, Section 7.

[91] [2005] UGCC 8. Okello JA associated the rights to a fair hearing and to equality before the law in his condemnation of the obligatory death penalty, *ibid*, at 28. He found that the intrusion on the judicial discretion to determine an appropriate sanction violated the separation of powers, as the legislature had prescribed "the *only* sentence which the court must impose on conviction": *ibid*.

For a review of this Constitutional Court decision, see Andrew Novak, "The Decline of the Mandatory Death Penalty in Common Law Africa: Constitutional Challenges and Comparative Jurisprudence in Malawi and Uganda" (2009) 11 *Loyola J Public Interest L* 19, at 70-74.

[92] Constitution of the Republic of Uganda 1995, Article 22(1).

[93] In Tanzania the Court of Appeal found that capital punishment was an inherently cruel, inhuman and degrading punishment and infringed the right to dignity, but that the death penalty was saved under the limitations clause: *Mbushuu v R* [1995] 1 LRC 216. It disagreed with the High Court's view that the legislation imposing the death penalty for murder failed the limitations test as it was arbitrary and disproportionate; on the question of whether the death penalty was reasonably necessary to protect the right to life, Ramadhani JA (delivering the Court of Appeal's judgment) considered this was for society to decide and the trial judge had acknowledged that society at that time had so deemed it: *ibid*, at 232. The Constitution contains a prohibition on inhuman or degrading punishment or treatment: Constitution of the United Republic of Tanzania 1977, Article 13(6)(e). It also protects human dignity in the criminal process and in the execution of a sentence: *ibid* Article 13(6)(d). Basic rights may be limited in the public interest: *ibid* Article 30(2).

On the death penalty debate in Tanzania, see Aniceth Gaitan and Bernhard Kuschnik, "Tanzania's Death Penalty Debate: An Epilogue on *Republic v Mbushuu*" (2009) 9 *AHRLJ* 459.

The Nigerian Supreme Court held that the death penalty is not inconsistent with the constitutional guarantee of the right to life: *Kalu v S* (1998) 3 NWLR (Pt 509) 531, *Okoro v S* (1998) 2 SCNJ 84, both cited in Nigerian Bar Association, *Training Manual on African Regional Mechanisms for the Promotion and Enforcement of Human Rights: A Toolkit for Lawyers* (Lagos 2010), at 20-21.

[94] [2005] UGCC 8, at 55.

> Even aside from the risks of decapitation and lingering painful death, hanging is simply inconsistent with "the dignity of man" ... Hanging is without the slightest doubt, "cruel and unusual"—in layman's terms and in the constitutional sense.[95]

However, he distinguished the situation in Uganda from this and other international comparisons because of the terms of its Constitution, which expressly authorised the death penalty "clearly in the knowledge that it would be carried out by hanging", as the practice of hanging criminals in serious crimes had been in vogue for almost 60 years prior to adoption of the Constitution and the people's opinion that it was a suitable method of carrying out the death sentence was a relevant consideration.[96] On appeal in 2009, the Supreme Court unanimously upheld the findings that the mandatory death penalty and a delay of more than three years in carrying it out were unconstitutional.[97]

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[95] *Ibid*, at 84-85, citing *Campbell v Wood* 18 F.3d 662 (1994) (US Court of Appeals 9th Circuit).

[96] [2005] UGCC 8, at 86-87. Another issue on which Twinomujini JA expressed a view was the fettering of judicial discretion by legislation decreeing that life imprisonment meant a maximum of 20 years, which he interpreted as prohibiting a sentence longer than that period: *ibid*, at 105. He considered that the judiciary should be able to tailor the sanction to the circumstances of each case, that the entire sentence should be served (subject to remission for good behaviour or other just cause), and that when a "life imprisonment" sentence is pronounced, the convict should serve imprisonment for life: *ibid*. He described the legislation as "another attempt by the legislature to pre-determined sentences without hearing the parties in order to determine an appropriate sentence": *ibid*.

Jamil Mujuzi criticised the wish for life imprisonment to mean the whole of a person's life, which—as observed by courts in South Africa and Namibia—would be an infringement of the right to human dignity at the time of sentencing, since it deprived the prisoner of any real hope of release from prison: Jamil Ddamulira Mujuzi, "Why the Supreme Court of Uganda should reject the Constitutional Court's understanding of imprisonment for life" (2008) 8 *AHRLJ* 163, at 177.

[97] *AG v Kigula* (No 3/2006) (Uganda Supreme Court) 21 January 2009. As Okello JA had done in the court below, the Supreme Court highlighted the inequality in the legislation refusing a person convicted of a serious crime an opportunity to plead in mitigation and to have the judge assess their character: *ibid*, at 43:

> [A] person accused of stealing a chicken may not only be heard in mitigation, but may actually request the court to inquire into his character and antecedents for purposes of assessing appropriate sentence for him, while on the other hand, a person accused of murder and whose very life is at stake, may not do likewise. We think this is inconsistent with the principle of equality before and under the law.

The Court reiterated that the separation of powers had to be respected and unhindered by removal of its discretion in sentencing: "The Court has power to confirm both conviction and sentence. This implies a power NOT to confirm, implying that court has been given discretion in the matter. Any law that fetters that discretion is inconsistent with this clear provision of the Constitution.": *ibid*, at 45.

On the issue of delay, it evoked the inherent dignity of all when it described the legal status of a convict, "[a] condemned person does not lose all his other rights as a human being" and continued, "[h]e is still entitled to his dignity within the confines of the law until his sentence is carried out": *ibid*, at 47.

Hanging was confirmed as constitutional by the majority, the sole dissentient being Egonda-Ntende Ag JSC, who considered hanging as a method of execution as carried out in Uganda to be "a process that is cruel, inhuman and degrading treatment and punishment", which failed to meet the test of "the least possible physical and mental suffering" set by the Human Rights Committee under the International Covenant on Civil and Political Rights: *ibid*, at 78-80, 90, 96-97, citing UN Human Rights Committee, *Chitat Ng v Canada* "Communication No 469 of 1991" (7 January 1994), at [16.2], [16.4], and International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23

The High Court in Malawi had a wider range of support for its decision than the Ugandan courts when it unanimously struck down the mandatory death penalty for murder in *Kafantayeni* in 2007.[98] The Court held that the mandatory death sentence infringed the prohibition on inhuman or degrading treatment or punishment and the right to dignity in Section 19 of the Constitution.[99] By the time the Kenyan Court of Appeal considered the constitutionality of the mandatory death penalty for murder in *Mutiso* in 2010, the opposition

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March 1976) 999 UNTS 171 (ICCPR). Unlike the majority, he read all the provisions of the Constitution together "to provide a harmonious interpretation that does not do violence to the meaning of any one provision": (No 3/2006) (Uganda Supreme Court) 21 January 2009, at 85. He found that hanging as practised in Uganda was "definitely beyond the pain, suffering or humiliation that should be associated with the death penalty" and that unnecessary continual reminders by a prison warder in the three days beforehand of the impending violent death must cause "the same amount of mental suffering as that experienced under the death row phenomenon": *ibid*, at 96-97.

The psychological impact of contradictory notifications about the outcome of an appeal leading to a belief that the death sentence had been commuted, when it was not, and of inexplicably being returned to death row after two years in a different section breached the prohibition on cruel and inhuman treatment in the ICCPR: *Chisanga v Zambia* UN Human Rights Committee (18 November 2005) 85th Session UN Doc CCPR/C/85/D/1132/2002, at [7.3].

On condemned persons retaining the right to be treated with dignity, see also *Peter Nemi v AG Lagos State* (1996) 6 NWLR 587, cited in Nigerian Bar Association (n93), at 23. On *Ng v Canada*, see Smith (n74), at 234-235. For a review of the Supreme Court judgment, see Jamil Ddamulira Mujuzi, "International Human Rights Law and Foreign Case Law in Interpreting Constitutional Rights: The Supreme Court of Uganda and the Death Penalty Question" (2009) 9 *AHRLJ* 576, at 577-578, 581-588; Novak (n91), at 74-78.

[98] *Kafantayeni v AG* [2007] MWHC 1, [2007] 5 LRC 353. It was a more focused attack, as the death penalty *per se*, hanging or delay in execution were not raised in the challenge.

This case was not appealed to the Supreme Court of Appeal, but it affirmed the High Court's decision several months later in *Jacob*: Novak (n91), at 62, citing *Jacob v Republic* (MSCA Crim App No 16/2006) 19 July 2007 (Malawi Sup Ct App). For reviews of *Kafantayeni* and *Jacob*, see Novak (n91), at 63-70.

[99] Constitution of the Republic of Malawi 1994. The Court linked the protection against inhuman or degrading treatment in Section 19(3) of the Constitution with the guarantee of respect for human dignity in judicial proceedings contained in Section 19(2), and commented that the latter was "often overlooked even in the case authorities that we have examined from comparable jurisdictions": [2007] 5 LRC 353, at 358. The death penalty itself, expressly preserved by Section 16 of the Constitution, remained available as the maximum punishment for murder.

The Court did not deal with the allegations of arbitrary deprivation of the right to life or of breach of the separation of powers, which had been relied on by the accused. It invoked foreign precedents to support its decision, including *Makwanyane* and *Reyes*. Because the mandatory death penalty required a sentence of death to be passed without any opportunity for the defendant to show factors in mitigation, sentencing was not individualised and a sentence could be disproportionate to the defendant's criminal culpability. The Court also found that the mandatory death penalty breached the right to a fair trial, which required fairness of the trial at all stages including sentencing. Although it was not relied on by the accused, the Court of its own motion raised the right of access to justice, and held that it too had been breached, as sentencing was a legal issue for judicial determination within the purview of Section 41(2) of the Constitution effectively granting the right of appeal.

The African Commission accepted that the right to respect for dignity required that the death sentence should not be a disproportionate penalty and explained that it should only be imposed after consideration of whether there were any extenuating circumstances (facts bearing on the commission of the crime, which reduce the accused's moral blameworthiness taking into account the state of mind of the offender at the time of the commission of the offence): *Interights (Bosch) v Botswana* [2003] AHRLR 55 (ACHPR 2003), at [31]-[33].

to it had dissipated and the State—obviously recognising the growing trend in Africa[100] and the Commonwealth to strike it down—conceded that it was unconstitutional and that the trial judge should retain a discretion not to impose the death sentence.[101] The law should evolve in tandem with a civilised society.[102]

This review of challenges to the death penalty in various jurisdictions shows that its complete abolition was easier to achieve in South Africa because of its comprehensive constitutional ban on cruel, inhuman and degrading punishment, the unrestricted articulation of the right to life, the specific right to dignity and the foundational value of human dignity. Unsurprisingly the challenge in countries where the death penalty was specifically permitted by the terms of the constitution failed. However, even there the mandatory death penalty did not withstand scrutiny, as it failed to allow an assessment of individual culpability and responsibility for one's actions.

The conditions of detention by placing a prisoner in leg-irons or chains were found to be

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[100] See Japhet Biegon and Magnus Killander, "Human Rights Developments in the African Union during 2009" (2010) 10 *AHRLJ* 212, at 222-223.

[101] *Godfrey Ngotho Mutiso v Republic* [2010] eKLR, at [10], [31]. The Court was critical of the State for not taking action earlier to abolish the mandatory death penalty—particularly as only a handful of the those condemned to death in Kenya had been executed leaving the prisons inundated with a huge number of death row inmates: *ibid*, at [13]-[14]. Notwithstanding the State's concession, the Court considered the case on its merits: *ibid*, at [12]. It took cognisance of the array of offenders with a wide range of culpability that could be found guilty of murder, and the fact that the mandatory death penalty had been declared to constitute inhuman treatment or punishment in other countries in violation of constitutional provisions similar to those in Kenya: *ibid*, at [32]-[34]. The judge should consider any mitigating factors relating to the offence and the offender before imposing the death sentence: *ibid*, at [34]. The Court in *Mutiso* referred to many Commonwealth decisions with approval including *Reyes* and cited extensively from *Kigula* in Uganda, where the death row syndrome was highlighted because of the long delay in carrying out the sentence: *ibid*, at [23], [29], [32]-[34] (*Reyes*) and [17]-[18], [24]-[25], [35] (*Kigula*).

[102] "A law that is caught up in a time warp would soon find itself irrelevant and would be swept into the dustbins of history.": *ibid*, at [14]. The individual must have a chance to mitigate—otherwise the dignity of humanity would be ignored: *ibid*, at [34]. Similar to the challenge in Malawi, *Mutiso* was confined to the narrow issue of the mandatory death penalty and raised neither the constitutionality of the death penalty *per se* (specifically permitted by Constitution of the Republic of Kenya 1963, Section 71(1)) nor the prescription by law of the death penalty for murder, both of which were within the realm of parliament or the people in a referendum: *Godfrey Ngotho Mutiso v Republic* [2010] eKLR, at [22]. The Court found that the mandatory death sentence for murder contained in the Penal Code (section 204) violated the constitutional protection against inhuman or degrading punishment or treatment (Section 74(1)) and also breached the right to a fair trial (Section 77): *ibid*, at [36].
A new Constitution approved in Kenya in 2010 recognises everyone's inherent dignity and "the right to have that dignity respected and protected": Constitution of the Republic of Kenya 2010, Article 28. The Bill of Rights contained in it at Chapter Four has been described by Ouko J as "arguably the most progressive and probably the most liberal in the region and perhaps beyond": *Mbiyu v Commissioner of Police* [2011] eKLR (High Court of Kenya, 5 January 2011).
On the "civilised standards" rationale, see William Binchy, "The Role of Comparative and Public International Law in Domestic Legal Systems" (2010) 23(3) *Advocate (South Africa)* 58, at 61.

degrading treatment in Namibia in *Namunjepo*.[103] Strydom CJ regarded the degrading treatment as disrespecting dignity.[104]

4.3 Family

Unlike many other constitutions and international human rights instruments, there is no specific provision in the South African Constitution protecting family life.[105] Its absence was challenged unsuccessfully in the *First Certification* case, where the Court held that the foundational values and the right to dignity safeguarded the right to marry the person of one's choice, to bring up a family and to live together.[106]

When the non-South African spouses of South African citizens complained that their family life could be disrupted because they had no guarantee that they would be allowed to stay in South Africa while their application for immigration was being processed, the right to dignity was key.[107] The Constitutional Court in *Dawood* held that the legislation was invalid because it

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[103] *Namunjepo v Commanding Officer, Windhoek Prison* [1999] NASC 3; 2000 (6) BCLR 671 (NmS) (SC of Namibia). It was "a humiliating experience which reduces the person placed in irons to the level of a hobbled animal whose mobility is limited so that it cannot stray": *ibid*, at 23.
Respect for dignity and the prohibition on cruel, inhuman or degrading treatment in the African Charter precludes not only actions which cause serious physical or psychological suffering, but also those which humiliate the individual or force him or her to act against his will or conscience: *International Pen (Saro-Wiwa) v Nigeria* [2000] AHRLR 212 (ACHPR 1998), at [79]. The deplorable conditions in which women, children and aged detainees were held in Rwanda violated their physical and psychological integrity: *Organisation Mondiale Contre la Torture v Rwanda* [2000] AHRLR 282 (ACHPR 1996), at [26]. The African Commission held that the denial to detainees of medical attention under health-threatening conditions and access to the outside world does not respect their dignity: *Huri-Laws v Nigeria* [2000] AHRLR 273 (ACHPR 2000), at [41]. It noted that the term "cruel, inhuman or degrading treatment or punishment" is to be interpreted so as to extend to "the widest possible protection against abuses, whether physical or mental": *Media Rights Agenda v Nigeria* [2000] AHRLR 262 (ACHPR 2000), at [71]. See also *M'Boissona (Bozize) v Central African Republic* UN Human Rights Committee (26 April 1994) 50th Session UN Doc CCPR/C/50/D/428/1990, at [5.2]; *Civil Liberties Organisation v Nigeria* (2000) AHRLR 243 (ACHPR 1999), at [26]-[27]; *Article 19 v Eritrea* [2007] AHRLR 73 (ACHPR 2007), at [102]; *Titiahonjo v Cameroon* UN Human Rights Committee (13 November 2007) 91st Session UN Doc CCPR/C/91/D/1186/2003), at [6.3]-[6.4].

[104] "To be continuously in chains or leg-irons and not to be able to properly clean oneself and the clothes one is wearing sets one apart from other fellow beings and is in itself a humiliating and undignified experience.": [1999] NASC 3; 2000 (6) BCLR 671 (NmS) (SC of Namibia), at 23.
Cf *Engelbrecht v Minister of Prisons and Correctional Services* 2000 NR 230 (High Court of Namibia).

[105] *Dawood* 2000 (3) SA 936 (CC), at [36].

[106] *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), at [100]:

> [T]he provisions of the NT [new constitutional text] would clearly prohibit any arbitrary State interference with the right to marry or to establish and raise a family. NT 7(1) enshrines the values of human dignity, equality and freedom, while NT 10 states that everyone has the right to have their dignity respected and protected. However these words may come to be interpreted in future, it is evident that laws or executive action resulting in enforced marriages, or oppressive prohibitions on marriage or the choice of spouses, would not survive constitutional challenge.

[107] *Dawood* 2000 (3) SA 936 (CC). The Aliens Control Act 1991 required applicants for immigration

breached their right to family life, which covered the right to marry and to sustain a married relationship by living together.[108] Other provisions in the Aliens Control Act governing the issue of work permits to foreign spouses of South African citizens or permanent residents were declared unconstitutional in *Booysen*.[109] Sachs J in the Constitutional Court agreed with the High Court judge's finding that the restrictions could infringe the right to dignity of the South African spouse as well as the foreign one, as alleged by the applicants.[110]

O'Regan J in *Dawood* saw marriage as the pinnacle of carving one's identify and self-fulfilment essential to dignity for a lot of people.[111] She highlighted the social importance of marriage with its associative, community and public elements in addition to the individual and relationship aspects.[112] Family life is not confined to the traditionally recognised unit and

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permits to be outside South Africa when their permits were granted but exempted spouses and children, who could remain in the country pending the outcome of their applications provided they had valid temporary residence permits: *ibid*, at [2]-[3].

[108] The UN Human Rights Committee found that legislation under which foreign husbands of Mauritian women lost their residence status constituted discrimination on the grounds of sex under the ICCPR: *Aumeeruddy-Cziffra v Mauritius* UN Human Rights Committee (9 April 1981) 12th Session UN Doc CCPR/C/12/D/35/1978. In Botswana legislation denying citizenship to children with a Botswanan mother and a foreign father (but not where the father was a citizen of Botswana and the mother was not) was unconstitutional because it breached the Botswanan mother's freedom of movement and constituted sex-discrimination: *AG v Dow* [2001] AHRLR 99 (BwCA 1992), at 663 (Amissah JP), 678 (Aguda JA), 683 (Bizos JA).

[109] *Booysen v Minister of Home Affairs* 2001 (4) SA 485 (CC). The legislation required the foreign spouse to make the application for a work permit from outside the country and not to enter South Africa until the permit had been issued. Furthermore work permits would only be issued to foreign spouses if there were not enough people of their occupation in South Africa.

[110] "In many cases the foreign spouse was the sole or main provider for the family and this highly restrictive provision prevented them from fulfilling their duty to support, thereby violating the right to human dignity of both spouses.": *ibid*, at [7].

[111] 2000 (3) SA 936 (CC)), at [37] (footnotes omitted):

> The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity.

Cf comments by the Court of Appeal for Ontario on marriage in *Halpern v Canada (AG)* (2003) 225 DLR (4th) 529, at [5], [107].

[112] 2000 (3) SA 936 (CC), at [30] (footnotes omitted):

> Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in

other arrangements also deserve respect.[113] Marriage encompasses duties and responsibilities as well as rights, as illustrated in various marriage regimes.[114] The idea that dignity is sustained by fulfilling the duties that arise from the commitment to an intimate relationship with another entered into autonomously as a core expression of one's autonomy brings a moral dimension to the exercise of choice.[115] O'Regan J viewed marriage with its public and private nature as connoting rights and obligations in inter-personal relationships. Her views in *Dawood* were cited by all judges with varying interpretations of the scope of the maintenance rights of a surviving spouse in *Volks v Robinson*, where a woman in a permanent life partnership claimed an entitlement from the estate of her deceased partner on the same basis

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part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.

[113] "[F]amilies come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.": *ibid*, at [31] (footnote omitted).

[114] *Ibid*, at [33] (footnotes omitted):

> In terms of common law, marriage creates a physical, moral and spiritual community of life. This community of life includes reciprocal obligations of cohabitation, fidelity and sexual intercourse, though these obligations are for the most part not enforceable between the spouses. Importantly, the community of life establishes a reciprocal and enforceable duty of financial support between the spouses and a joint responsibility for the guardianship and custody of children born of the marriage. An obligation of support flows from marriage under African customary law as well. In terms of Muslim personal law, the husband bears an enforceable duty of support of the wife during the subsistence of the marriage.

[115] The question of whether a person should be entitled to resile from a commitment because of a subsequent change of mind is a further moral dimension with legal implications for consideration. Is one obliged to accept the consequences of choices made? It has resonances of the idea that punishment is required because of respect for the dignity of the offender. This was relied on unsuccessfully in the challenge to the ban on corporal punishment in schools, when those seeking freedom to punish pleaded that for believers, including the children involved, "the indignity and degradation lay not in the punishment, but in the defiance of the scriptures represented by leaving the misdeeds unpunished" and that subjectively, for those who shared that religious outlook, no indignity was involved in the punishment: *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), at [43].

The retributive justice view of punishment is that respect for the humanity of offenders demands that they accept the consequences of their actions in choosing to break the law: Patrick J Smith, "A Method for the Madness: Restorative Justice as a Valid Mode of Punishment and an Advancement of Catholic Social Thought" (2005) 44 *J Catholic Legal Studies* 433, at 444. Patrick Smith presses for restorative justice, which regards the offender as an essential part of the repairing process for the victim and at the same time aids the offender in his own healing, thus recognising the dignity of both parties: *ibid*, at 453-454.

Stephen Garvey has argued for a secular penance in the interests of the offender as part of the process of atonement after a finding and acceptance of guilt: Stephen P Garvey, "Restorative Justice, Punishment, and Atonement" [2003] *Utah L Rev* 303, at 313-314.

William Binchy argued for the option to marry without the choice of divorce in order to recognise in law people's mutual lifelong commitments if they so choose as an aspect of their human dignity and in the autonomous exercise of their free will: William Binchy, "Autonomy, commitment and marriage" in Oran Doyle and William Binchy eds, *Committed Relationships and the Law* (Four Courts Press, Dublin 2007), at 174.

as a wife.[116]

Sachs J's dissenting judgment in *Volks* has extensive philosophical analysis of the nature of marriage, which is deserving of societal support in law based on respect for autonomy and the common good. This does not mean that the law should disregard the choice made—voluntarily or because of circumstances—by lifetime partners not to marry.[117] The substantive relationship between the parties was the central issue, showing "the serious content of the mutual commitment" and not "the particular form" in which it was expressed.[118] He resisted viewing the issue "exclusively as one of the sanctity of marriage, or simply of the important social purpose that marriage serves," but saw it in terms of "the integrity of the family relationship."[119] Sachs J recognised the societal importance of marriage, describing also its benefits of self-esteem, equality and freedom for members of the family.[120] But also to be borne in mind were the rights of life partners without the benefit of having formalised their relationship and perhaps with a more enduring quality than a formal, but empty, marriage.[121] There was disagreement between Skweyiya J (for the majority) and Sachs J on the nature of marriage. He criticised Sachs J for having over-simplified the matter by saying that the only

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[116] 2005 (5) BCLR 446 (CC), at [52], [81], [93], [106], [206], [210]. See Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions* (CUP, Cambridge 2007), at 165-166, 207.

[117] 2005 (5) BCLR 446 (CC), at [156] (Sachs J):

> Respecting autonomy means giving legal credence not only to a decision to marry but to choices that people make about alternative lifestyles. Such choices may be freely undertaken, either expressly or tacitly. Alternatively, they might be imposed by the unwillingness of one of the parties to marry the other. Yet if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not be astute to penalise or ignore them because they are unconventional.

[118] *Ibid*, at [215].

[119] *Ibid*, at [217].

[120] *Ibid*, at [223]:

> There is a great social need to promote marriage as an institution which provides stability, security and predictability for intimate family relations. By so doing our society stresses the importance of people taking responsibility for their lives, and showing respect for the fact that they are members of a law-governed and interdependent community. It encourages self-reliance and self-empowerment; helps people escape from a world made up of victimisers and victims into one consisting of free and equal people; and induces the previously disadvantaged and subordinated to advance in life by calling on their inner strengths rather than allowing themselves to fall into dependence on external support.

[121] *Ibid*, at [230]:

> It needs to be remembered, however, that the claim for maintenance stems from the social regard to be given to commitment, intimacy, interdependency and stability in the family. In the case of a married survivor these will be presumed to have existed as a matter of law. However brief, unstable and non-intimate the marriage might have been, the certificate alone would suffice to grant a claim. In the case of the unmarried survivor, on the other hand, the partnership relationship would have to be proved as a matter of fact.

difference between the surviving life partner and a spouse was a marriage certificate.[122] Ngcobo J (concurring with the majority) regarded the formal aspect and choice of marriage as decisive.[123] Mokgoro and O'Regan JJ in a joint dissenting judgment saw that commitment to a relationship was not the preserve of married couples.[124]

In *Daniels* the Constitutional Court held that "spouse" for the purpose of intestacy included those married according to the Muslim rites, who, as Moseneke J stated, had been denied recognition in the past because of prejudice (including judicial bigotry) based on a one-sided view of people judged worthy of respect.[125]

The need for change in the definition of the family in accordance with societal advances is clear.

4.4 Defamation

The right to a good name and reputation form part of the right to human dignity.[126] Hefer JA's view in the Supreme Court of Appeal in *National Media Ltd v Bogoshi* was that the recognition of the right to respect for and protection of dignity in Section 10 of the Constitution "must

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[122] *Ibid*, at [58], [220].

[123] *Ibid*, at [92]:

> The law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify their acceptance of those consequences by entering into a marriage relationship. Those who do not wish such consequences to flow from their relationship remain free to enter into some other form of relationship and decide what consequences should flow from their relationships.

[124] *Ibid*, at [106]:

> The celebration of a marriage thus confers extensive legal duties and rights upon the parties to the marriage as a matter of law. As a matter of social relations, it often results in the founding of a family which provides essential human companionship, mutual support and security to the members of that family. However, not every family is founded on a marriage recognised as such in law. Yet members of such families often play the same roles as in families which are founded on marriage and provide companionship, support and security to one another.

[125] 2004 (5) SA 331 (CC), at [74]-[75]:

> [The] "persisting invalidity of Muslim marriages" is, of course, a constitutional anachronism. It belongs to our dim past. It originates from deep-rooted prejudice on matters of race, religion and culture. True to their worldview, Judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different. They exalted their own and demeaned and excluded everything else. Inherent in this disposition, says Mahomed CJ, is "inequality, arbitrariness, intolerance and inequity".
>
> These stereotypical and stunted notions of marriage and family must now succumb to the newfound and restored values of our society, its institutions and diverse people. They must yield to societal and constitutional recognition of expanding frontiers of family life and intimate relationships. Our Constitution guarantees not only dignity and equality, but also freedom of religion and belief.

[126] Currie and de Waal (n8), at 392.

encompass ... the right to a good name and reputation."[127] In balancing the right to protect one's reputation against the freedom of the press, he re-interpreted the common law by holding that strict liability of the media was incompatible with the benefit of public debate.[128] The reasonable publication defence in *Bogoshi* was approved by the Constitutional Court in *Khumalo v Holomisa*, where O'Regan J balanced the dignity in reputation against freedom of expression, which are frequently in conflict in defamation actions.[129]

The test for defamation of politicians varies depending on whether the contentious comments relate to their political activities or to their private lives. They are given equal protection in non-political activities, but frank critiques can be lawful in the public arena. Free speech is vital to democracy, so that people are informed, open to debate and can be motivated to participate in society's governing structures. In *Mthembi-Mahanyele* the Supreme Court of Appeal accepted that in some circumstances defamatory political information could be justified under the reasonable publication defence.[130] Lewis JA indicated that there were boundaries:

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[127] 1998 (4) SA 1196 (SCA), at 41, citing *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W), at 607E-G.

[128] *Ibid*, at 25:

> If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended... Much has been written about the "chilling" effect of defamation actions, but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error.

The decision was correct, but the SCA had been criticised, *inter alia*, for not acknowledging that its development of the common law principles of defamation was required by the new constitutional values or provisions. Instead, it attributed it to the ordinary dynamic development of the common law: Currie and de Waal (n8), at 388 (footnote omitted). See also Hector L MacQueen, "Delict, Contract, and the Bill of Rights: A Perspective from the United Kingdom" (2004) 121 *SALJ* 359, at 373-374.

[129] 2002 (5) SA 401 (CC), at [43]:

> Were the Supreme Court of Appeal not to have developed the defence of reasonable publication in *Bogoshi*'s case, a proper application of constitutional principle would have indeed required the development of our common law to avoid this result. ... In determining whether publication was reasonable, a court will have regard to the individual's interest in protecting his or her reputation in the context of the constitutional commitment to human dignity. It will also have regard to the individual's interest in privacy. In that regard, there can be no doubt that persons in public office have a diminished right to privacy, though of course their right to dignity persists.

See analyses by Klug (n78), at 153-154; Christopher Roederer, "The Transformation of South African Private Law after Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy" (2006) 37 *Colum Hum Rights L Rev* 447, at 502-504, 512-513. Cf *Grant v Torstar Corp* 2009 SCC 61 (SC of Canada), which modified the Canadian law of defamation by recognising a defence of responsible communication on matters of public interest; this would require the media to act proportionately and reasonably when deciding whether or not to publish.

[130] *Mthembi-Mahanyele v Mail & Guardian Ltd* [2004] 3 All SA 511 (SCA), at [64].

> That does not mean that there should be a licence to publish untrue statements about politicians. They too have the right to protect their dignity and their reputations. As Burchell puts it:
>
> > "There are limits to freedom of political comment, especially in regard to aspects of the private lives of politicians that do not impinge on political competence. Politicians or public figures do not simply have to endure every infringement of their personality rights as a price for entering the political or public arena, although they do have to be more resilient to slings and arrows than non-political, private mortals."[131]

She indicated that the circumstances to be considered in assessing whether a publication about politicians is justifiable included:

> ...the interest of the public in being informed; the manner of publication; the tone of the material published; the extent of public concern in the information; the reliability of the source; the steps taken to verify the truth of the information...; and whether the person defamed has been given the opportunity to comment on the statement before publication.[132]

In her view, in the case of urgent information crucial to the public, the absence of the opportunity to comment might not be decisive.[133] Mthiyane JA (dissenting) did not agree that there should be a separate or nuanced reasonable publication defence in relation to politicians.[134] He would prefer harmonisation of the right to freedom of expression with the right to dignity, giving both equal protection, and therefore took the view that barring cabinet ministers from suing "would undermine the protection of an individual's right to dignity, which includes reputation, and elevate the right to freedom of expression above the right to reputation."[135]

According to George Devenish, "[t]he operation of the law of defamation has a wider ambit than the mere protection of dignity" as evidenced by the fact that juristic persons can sue for defamation to vindicate their reputations, but the courts have not determined that corporations are the recipients of dignity.[136]

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[131] *Ibid*, at [67] citing Jonathan Burchell, *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998), at 229. Jonathan Burchell also said ([2004] 3 All SA 511 (SCA), at fn61, citing Burchell *supra*, at 229): "It has for many years been accepted that greater latitude must be given to freedom of expression on political matters. However, although politicians may, in one sense, be fair game for criticism, it is not completely open season in the political veld."

[132] [2004] 3 All SA 511 (SCA), at [68].

[133] *Ibid*.

[134] *Ibid*, at [117].

[135] *Ibid*, at [98].

[136] George Devenish, *A Commentary on the South African Bill of Rights* (Butterworths, Durban 1999), at

Mayor Dikoko defamed Thupi Mokhatla (the Chief Executive Officer of a municipal authority) when he blamed Mokhatla for deliberately giving his political opponents a basis for an attack on his integrity by changing accounting procedures thereby causing him to run up a debt to the Council for his mobile phone. Dikoko appealed to the Constitutional Court against the successful High Court defamation action brought by Mokhatla.[137] His appeal failed and the Constitutional Court did not interfere with the quantum. A minority would have reduced the quantum including Mokgoro J who felt that the Court should have ordered an apology, as restoration of the plaintiff's dignity would benefit both parties.[138]

Sachs J favoured reparatory remedies and considered it undesirable to have high awards in defamation cases because the main outcome that should be sought was an apology to restore dignity and worth in society.[139] A reparatory remedy is more compatible with the public interest than a high award, as it fosters accountability and debate. The defamation in *Dikoko v Mokhatla* had occurred in the course of the mayor being called to account by a governmental committee. In those circumstances, it is important that fear of a high award would not stifle comment, since the chilling effect would be felt by those motivated to speak out in the public interest as well as by those defending their own actions. The remedy advocated by the minority would strike a reasonable balance by encouraging freedom of expression, while ensuring that the dignity of the offended be respected should the boundaries of defamation be crossed. Sachs J captured the adverse effect of high awards well:

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[137] *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

[138] *Ibid*, at [69]:

> The focus on monetary compensation diverts attention from two considerations that should be basic to defamation law. The first is that the reparation sought is essentially for injury to one's honour, dignity and reputation, and not to one's pocket. The second is that courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognize the human dignity of the plaintiff, thus acknowledging, in the true sense of *ubuntu*, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant.

The interest served in many defamation cases in the US embodies a spiritual quality rather than an interest in property or reputation: Roberta Rosenthal Kwall, "A Perspective on Human Dignity, the First Amendment, and the Right of Publicity" (2009) 50 *BCL Rev* 1345, at 1353.

[139] 2006 (6) SA 235 (CC), at [109]:

> There is a ... problem with damages awards in defamation cases. They measure something so intrinsic to human dignity as a person's reputation and honour as if these were market-place commodities. Unlike businesses, honour is not quoted on the Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur.

> Witnesses before such investigative committees should feel free to speak their mind. As a matter of general principle they should not be made to fear heavy damages suits if they either overstep the mark in the telling, or do not have iron-clad proof to substantiate their testimony. The chilling effect of punitive awards would not only be felt by officials caught with their metaphorical pants down, but by honest whistleblowers and by newspapers simply carrying testimonial exposures.[140]

The constitutional value of *ubuntu-botho* with its solidarity element was "highly consonant with rapidly evolving international notions of restorative justice."[141]

The question must be asked whether, and if so to what extent, the constitutional value of dignity is driving the analysis and development of defamation law in South Africa. The trend in common law and civil law jurisdictions had been to promote the free dissemination of information in the public interest by abolishing strict liability for publishing false statements. These judgments were not necessarily rooted in protection of dignity, but may have had a different rationale. Indeed, *Bogoshi* itself had developed the common law without overtly relying on the constitutional value of dignity. In his judgment in the Supreme Court of Appeal, Hefer JA referred to the reasonable publication defence enunciated with various local variations in the US, Germany, the European Court of Human Rights, the Netherlands, England, Australia and New Zealand.[142] In balancing the right to freedom of expression with the individual's interest in reputation, the social utility of strict liability in prohibiting the dissemination of false information of no benefit to the public was not as worthy as the good effects in society of encouraging the free flow of useful information.[143] He acknowledged that the Constitution "rated personal dignity much higher than before", but he did not need to resort to the Constitution to impose the reasonableness requirement.[144]

The constitutional value of human dignity extends beyond the common law notion of self-worth to incorporate the individual's value in the eyes of others, as O'Regan J stated in the Constitutional Court in *Khumalo v Holomisa*:

> *Dignitas* concerns the individual's own sense of self worth, but included in the concept are a variety of personal rights including, for example, privacy. In

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[140] *Ibid*, at [108].
[141] *Ibid*, at [114]. It recognises that to rehabilitate a sentenced offender is "to recognise the inherent human dignity of the individual offender": *Van Vuren v Minister of Correctional Services* [2010] ZACC 17, 2010 (12) BCLR 1233 (CC), at [51].
[142] *National Media Ltd v Bogoshi* 1998 (4) SA 1196, at 26.
[143] *Ibid*, at 22.
[144] *Ibid*, at 43.

> our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.[145]

It must be remembered that freedom of expression itself also invokes dignity and autonomy.

I now propose to undertake a comparative review of the rationale underlying the protection of reputation and the solutions adopted for infringements in other jurisdictions in order to assist in ascertaining whether respect for dignity is widespread as a guide in defamation actions and whether it is in fact the basis of South African jurisprudence in this area.

In the US, freedom of speech and liberty are prime constitutional values, and there is much tolerance and encouragement of debate and expression of views—particularly of politically-motivated speech.[146] But even there, in the bastion of free speech, Justice Stewart in *Rosenblatt v Baer*—emphasising society's interest in protecting and providing redress for attacks on reputation—based it on human dignity, which he placed at the foundation of a free civilisation.[147]

When Justice Powell in *Gertz* restricted the *New York Times*[148] standard of knowledge or reckless falsity to criticism of public figures in the public or general interest, he reiterated Justice Stewart's focus on the dignity of the individual.[149] The Supreme Court in its majority decision in *Gertz* based its additional protection for private individuals on the fact that, as they had less opportunity for rebuttal, they were more vulnerable and therefore were entitled to recover damages more readily—they had not voluntarily exposed themselves to increased risk of injury from defamatory falsehoods.[150] The Court allowed the states scope for defining for

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[145] 2002 (5) SA 401, at [27].

[146] In recent years, many nations have expanded the protection afforded to defamatory speech on public matters, but few go so far as the US: Heyman (n31), at 245 fn 24. See Neomi Rao, "Three Concepts of Dignity in Constitutional Law" (2011) 86 *Notre Dame L Rev* 183, at 212-214.

[147] "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.": 383 US 75 (1966), at 92.

[148] *New York Times v Sullivan* 376 US 254 (1964).

[149] *Gertz v Robert Welch, Inc* 418 US 323 (1974), at 341.

[150] *Ibid*, at 344-345.

themselves the appropriate standard for defamation of private individuals who were in substantial danger of damage to reputation by the substance of the publication of broadcast, subject only to not imposing liability without fault.[151] Damages were restricted to compensation for actual injury when liability was imposed under a less demanding standard than the *New York Times* test.[152]

Even though reputation is more highly valued on this side of the Atlantic, the European Court of Human Rights allowed more leeway in the expression of opinions on political matters. In *Lingens v Austria* it understood the charged atmosphere that can prevail in the aftermath of elections, when articles were written using the expressions "basest opportunism", "immoral" and "undignified" about the Austrian Chancellor.[153] The magazine publisher, who had been found guilty of criminal libel for accusing the Austrian Chancellor of protecting former Nazis for political reasons and of facilitating their participation in politics, succeeded in his action for violation of his freedom of expression. The Court accepted that the words used appeared likely to harm the politician's reputation, but it had regard to the political background against which the offensive articles had been written and held unanimously that the interference with the freedom of expression in Article 10 ECHR was not necessary in a democratic society and was disproportionate to the legitimate aim pursued.[154]

In Canada considerably more analysis was done of the nature of reputation in *Hill*—an action brought by the Crown attorney—where the Supreme Court found that the common law struck an appropriate balance between the twin values of reputation and freedom of expression.[155]

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[151] *Ibid*, at 347. Steven Heyman agrees with the analysis in *Gertz*, since reputation, being the social aspect of personality, is central to individual dignity and self-realisation: Heyman (n31), at 75. Because free speech confers no general right to violate private reputation, and as these rights are of the same order and value, Heyman concludes that it was appropriate for the Court in *Gertz* to impose liability for injury to reputation based on fault—failure to use reasonable care to determine whether the defamatory statements were actually true: *ibid*, at 77.

[152] 418 US 323 (1974), at 348-349.

[153] (App no 9815/82) (1986) 8 EHRR 407, at 419 [43].

[154] There was disagreement among the judges on whether the right to respect for private life in Art 8 ECHR was engaged, the majority finding that it was not since the comments were made in the context of a public debate in the political arena: *ibid*, at 417 [38]. Thór Vilhjálmsson J disagreed, as the comments were made about the Chancellor both as a political leader and as a private individual; therefore he was of opinion that the right to respect for private life in Art 8 was one of the factors relevant to the question whether or not in this case the freedom of expression was subjected to restrictions and penalties that were necessary in a democratic society for the protection of the reputation of others: *ibid*, at 423. However, he concluded that this right had in fact been taken into account by the majority when weighing the relevant considerations: *ibid*, at 423-424.

[155] *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130. See Adrienne Stone and George Williams, "Freedom of Speech and Defamation: Developments in the Common Law World" (2000) 26 *Mon LR* 362,

Although not specifically mentioned in the Canadian Charter, Cory J stated that a good reputation was closely related to "the innate worthiness and dignity of the individual."[156] The concept of "[t]he innate dignity of the individual" underlay all the Charter rights.[157] Furthermore, reputation was intimately related to the constitutionally protected right to privacy.[158] Cory J extolled the benefits to individuals of their reputation in society and regarded its protection as mutually beneficial to all in a democracy.[159] He declined to adopt the *New York Times* standard and was satisfied that the defences of fair comment and qualified privilege were sufficient protection for freedom of expression, saying, "[s]urely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish" and continuing, "[t]hose who publish statements should assume a reasonable level of responsibility."[160]

Strict liability of the media in England was removed in *Reynolds*, when the English courts broadened the classical test of the duty to impart information the public has an interest in receiving to require a contemporaneous close look at the context and circumstances of publication with a list of factors to be taken into consideration as guidelines in order to establish the reasonableness of the publication.[161] Lord Nicholls gave precedence to reputation founded on the individual's dignity, the preservation of which had societal benefits

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at 369-371.

[156] [1995] 2 SCR 1130, at [107].

[157] *Ibid*, at [120].

[158] *Ibid*, at [121].

[159] *Ibid*, at [108]:

> Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

[160] *Ibid*, at [137].

[161] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL). See William Binchy, "Some Unanswered Questions in Irish Defamation Law" in Jeremy Sarkin and William Binchy eds, *Human Rights, the Citizen and the State: South African and Irish Approaches* (Round Hall Sweet & Maxwell, Dublin 2001), at 246-250; Stone and Williams (n155), at 371-374.

In Ireland in the absence of legislative reform, Ó Caoimh J endorsed the flexible approach in *Reynolds* as the best way of protecting constitutional rights when reputation and freedom of expression collide, and favoured expansion of the law on qualified privilege to something close to a public interest defence: *Hunter v Gerald Duckworth & Co Ltd* [2003] IEHC 81. Subsequently legislation provided for a defence of fair and reasonable publication on a matter of public interest: Defamation Act 2009 section 26.

There was a reformulation of *Reynolds* in *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359 with clarity emerging that the *Reynolds* defence did not rely on the traditional duty/interest privilege, but was a new public interest defence: Kate Beattie, "New life for the *Reynolds* 'public interest defence'? *Jameel v Wall Street Journal Europe*" [2007] *EHRLR* 81, at 83-84. The practical message for journalists from *Jameel* was the importance of editorial judgment and contextual accuracy rather than the meaning of words in isolation: *ibid*, at 86.

as well as being of importance to the individual.[162] He was keen to conform with international human rights norms to arrive at the right balance between freedom of expression and reputation.[163] This was a theme that Lord Steyn also adopted when he referred to the European Court of Human Rights for guidance in drawing the line between permissible and impermissible political speech.[164]

In Australia the High Court held in a majority decision in *Theophanous* that there was implied in the Constitution a freedom to publish material discussing government and political matters, or concerning the performance and suitability for office of politicians.[165] However, the defence of qualified privilege applied if the defendant was unaware of the falsity of the material, which was not published recklessly, and the publication was reasonable in the circumstances. More heed was paid to the politician's reputation than in *New York Times*. In a joint judgment, Mason CJ, Toohey and Gaudron JJ weighed up the advantages of the *New York Times* test, which substantially eliminated the "chilling effect" of a threatened action for defamation, against the principal criticism that it set "too little store by the reputation of the person defamed."[166] They opted to give higher protection to reputation than to freedom of political speech. Restrictions were justified to enable people to live with dignity in society.[167]

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[162] [2001] 2 AC 127 (HL), at 201:

> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed, choice, the electorate needs to be able to identify the good as well as the bad.

[163] *Ibid.*

[164] *Ibid*, at 215.

[165] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104. In fashioning a new constitutional defence to override the common law of defamation, the Court owed "a clear intellectual debt" to *New York Times*: Stone and Williams (n155), at 365.

[166] (1994) 182 CLR 104, at 134.

[167] *Ibid*, at 178-179 (footnotes omitted) (Deane J, concurring):

> [C]urtailment of the freedom of political communication and discussion is consistent with the [Constitution's] implication [of freedom of political communication and discussion] only to the extent to which it can, according to the standards of our society, be justified in the public interest either for the reason that it is conducive to the overall availability of the effective means of political communication and discussion in a democratic society or it does not go beyond what is necessary either for the preservation of an ordered society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society.

The High Court was not satisfied with the *Theophanous* finding that there was a constitutional defence to defamation based on freedom of expression, so it reformulated it in *Lange v Australian Broadcasting Corporation*.[168] In this libel action brought by the former Prime Minister of New Zealand, the Court developed the common law defence and held that a publisher relying on qualified privilege for a communication made to the public on a government or political matter must establish that its conduct in making the publication was reasonable in all the circumstances.[169] The Court placed a high value on the implied constitutional principle of freedom of communication concerning political or government matters.[170] It examined the common law right to reputation and stated that the protection of the reputations of those who take part in public life was conducive to the public good.[171] There was no reference to human dignity.

Mr Lange features again in litigation in his own country over articles critical of his performance as Prime Minister.[172] Following a complicated series of appeals, the New Zealand Court of Appeal in *Lange v Atkinson* in 2000 took cultural differences into account and was more inclined to trust the media than in other common law jurisdictions.[173] The outcome was that it protected false statements on political matters, provided the publishers were properly motivated and not seeking unfair advantage.[174] Reasonable care was not a necessary criterion.[175] It adopted an extended form of qualified privilege that was context-dependent, retaining the duty/interest test.[176]

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[168] (1997) 189 CLR 520. See John G Fleming, *The Law of Torts* (9th edn LBC Information Services, Sydney 1998), at 630-631, 642-643; Stone and Williams (n155), at 366-367.

[169] As a general rule a defendant's conduct would not be reasonable unless the defendant had reasonable grounds for believing the defamatory imputation was true, took proper steps so far as they were reasonably open to verify the accuracy of the material, and did not believe the imputation to be untrue: (1997) 189 CLR 520, at 574. The privilege would be defeated if the plaintiff proved that the publication was actuated by ill will or other improper motive: *ibid*.
The *Lange* privilege is narrower than the relatively broad defence that applies in England, where it is not limited to institutional conceptions of politics; the Australian cases have not provided a public interest defence and the privilege there rarely encompasses speech about commercial issues: Andrew T Kenyon, "*Lange* and *Reynolds* Qualified Privilege: Australian and English Defamation Law and Practice" (2004) 28 *MULR* 406, at 419.

[170] (1997) 189 CLR 520, at 560.

[171] *Ibid*, at 568.

[172] Stone and Williams (n155), at fn 71.

[173] [2000] NZCA 95. It had considered the matter previously in 1998: *Lange v Atkinson* [1998] 3 NZLR 424. The Privy Council then decided in 1999 that the New Zealand court was not bound to apply *Reynolds* nor, indeed, to adopt the Australian solution: *Lange v Atkinson* [1999] UKPC 46, [2000] 1 NZLR 257, at [25]. Hence in 2000 it re-visited its 1998 judgment. See Stone and Williams (n155), at 377.

[174] Binchy (n161), at 246.

[175] *Ibid*.

[176] Stone and Williams (n155), at 376. Adrienne Stone and George Williams have concluded that the Court of Appeal seemed to be open to the prospect that competing interests should prevail over

In *Trustco Group International Ltd v Shikongo* in 2010,[177] the Supreme Court of Namibia in an appeal from the High Court—which had found *Bogoshi* persuasive[178]—upheld development of the common law to provide a reasonable publication defence to give effect to the constitutional provisions on freedom of expression[179] and the inviolability of dignity.[180] The issues on appeal went to the merits[181] and quantum—the award in the High Court was thought to be the highest ever in Namibia for defamation.[182] O'Regan AJA, delivering the judgment on behalf of a unanimous Supreme Court, placed the onus of proof of responsible journalism and the importance of publication on the publisher.[183] As many other jurisdictions had done, she rejected the balance adopted in the US in *New York Times v Sullivan*, which gave much leeway to the press by finding that actual malice by a publisher was required before liability for defamation of a public official would be imposed.[184] The development of a reasonable publication defence would "provide greater protection to the right of freedom of speech and the media protected in section 21 without placing the constitutional precept of human dignity at risk."[185]

On quantum, the primary question was whether the award of damages was grossly disproportionate to the injury suffered.[186] O'Regan AJA reviewed awards in other cases[187] and referred to Sachs J's views in *Dikoko* on the incongruity of trying to establish a proportionate

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freedom of speech, and that, like other courts, it was especially concerned with the competing interest of reputation which it regarded as related to human dignity and privacy: *ibid*, at 375.

[177] [2010] NASC 6. The action was brought by the Mayor of Windhoek against a newspaper that published an article accusing him of being involved in an irregular deal relating to the sale of city land: *ibid*, at [5]-[6]. He maintained that the allegations were wrong and that the article defamed him by portraying him as dishonest, abusive of his mayoral position and neglectful of his duties to the public: *ibid*, at [6].

[178] *Ibid*, at [20].

[179] Constitution of the Republic of Namibia 1990, Section 21(1)(a). It is subject to reasonable restriction: *ibid* Section 21(2).

[180] *Ibid* Section 8.

[181] Neither party defended strict liability as being a reasonable restriction on freedom of expression in a democratic society: [2010] NASC 6, at [48]. The newspaper proposed that the common law be developed by putting the onus on the plaintiff to prove the falsity of the defamatory statement, whereas the respondent considered that the defence of reasonable publication as set out in *Bogoshi* was appropriate: *ibid*, at [35], [48].

[182] *Ibid*, at [21].

[183] "The effect of the defence is to require publishers of statements to be able to establish not that a particular fact is true, but that it is important and in the public interest that it be published, and that in all the circumstances it was reasonable and responsible to publish it.": *ibid*, at [53].

[184] *Ibid*, at [36]-[37].

[185] *Ibid*, at [53]. She did not decide the issue of whether the defence of reasonable publication was confined to media defendants: *ibid*, at [56].

[186] *Ibid*, at [90].

[187] *Ibid*, at [92]-[94].

relationship between vindication of reputation and determining the amount of compensation, since reputation was restored—not by money—but by a judicial finding in favour of the integrity of the individual.[188] But she also referred to Sachs J's opinion that damages were still important in a world that remained so money-oriented.[189] While taking account of the aggravating circumstances of the publication, she reduced the quantum of damages by more than 40%.[190]

To summarise my findings in the comparative analysis I have just undertaken of defamation actions involving the media and public figures, there are some trends evident in the philosophical bases for protection of freedom of speech and reputation. The individual's reputation is universally regarded as deserving of respect, albeit not specifically recognised as a separate right in many jurisdictions. Society has an interest in protecting the reputations of individuals, so it is not solely the concern of the isolated person. It matters to individuals how society views them, as well as how they regard their own dignity and self-worth. Freedom of expression—particularly in the political context in a participative democracy—is an important value to society and its members.[191] Therefore, there is some tolerance of publication errors being made in haste. The proportionality analysis is central to deciding the balance between the competing rights and the answers to the queries raised varies in different jurisdictions according to their cultural values.

Reverting to South Africa, it is quite possible that the common law would have been developed to provide a reasonable care defence in defamation in any event on the basis of the Roman-law *dignitas* concept even without the elevation of human dignity in the Constitution. This happened in other common law countries where *dignitas* was unknown and dignity was not a constitutional right or expressed value.

4.5 Sexual violence

The right to dignity is clearly breached by sexual violence. The Supreme Court of Appeal mentioned its humiliating and degrading effect in *S v Chapman*.[192] Notwithstanding the vile

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[188] *Ibid*, at [90], citing *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), at [110].

[189] [2010] NASC 6, at [91], citing *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), at [120].

[190] [2010] NASC 6, at [95]-[96].

[191] See *Thint Holdings (Southern Africa) (Pty) Ltd v National DPP* [2008] ZACC 14, 2009 (1) SA 141 (CC), at [52].

[192] 1997 (3) SA 341 (SCA), at 3:

> Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

nature of sexual violence and society's laudable desire to deter sexual crimes, the alleged perpetrator's dignity also has to be respected in the criminal process.[193] Imprisonment without culpability or in the absence of the exercise of free will to make a rational choice is contrary to constitutional values. The legislature has some scope to balance the dignity interests of the offender and the victim, but there is a limit.[194] O'Regan J described the boundaries to the imposition of strict liability in *S v Coetzee*.[195]

In Ireland strict liability is also regarded with suspicion by the courts where imprisonment is a sanction. The Supreme Court in *CC v Ireland* asserted that imprisonment without proof of *mens rea* for a serious crime would be incompatible with liberty and dignity and therefore it found unconstitutional legislation imposing strict liability for unlawful carnal knowledge of a minor.[196] Hardiman J expressed the Court's belief that *mens rea* was necessary because "to criminalise in a serious way a person who is mentally innocent is indeed 'to inflict a grave injury on that person's dignity and sense of worth' and to treat him as 'little more than a

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> The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.
>
> Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.

Cf *People (DPP) v Tiernan* [1988] IR 250 (SC), at 253. Violence against women is a manifestation of the exercise of male power over them: *Masiya v DPP (Pretoria)* [2007] ZACC 9, 2007 (5) SA 30, at [28], [77]-[78]. The global institution of male dominance remains despite having been exposed, analysed and organised against for decades: Catharine A MacKinnon, "Gender—The Future" (2010) 17 *Constellations* 504, at 504.

[193] See *Bothma v Els* [2009] ZACC 27, 2010 (2) SA 622 (CC), at [33]. The Court of Appeal in Botswana held that a law that mandatorily denied bail to anyone accused of rape was not in the public interest and breached the constitutional right to personal liberty: *S v Marapo* [2002] AHRLR 58 (BwCA 2002), at [25], citing Constitution of the Republic of Botswana 1966, Section 5(3)(b).

[194] The restriction on the right and the means used must be proportionate to the public interest to be served: Sachs, *The Strange Alchemy of Life and Law* (n49), at 206.

[195] 1997 (3) SA 527 (CC), at [177]:

> [S]ignificant leeway ought to be afforded to the legislature to determine the appropriate level of culpability that should attach to any particular unlawful conduct to render it criminal. It is only when the legislature has clearly abandoned any requirement of culpability, or when it has established a level of culpability manifestly inappropriate to the unlawful conduct or potential sentence in question, that a provision may be subject to successful constitutional challenge.

The public interest was on both sides of the equation in *S v Coetzee*, where the issue was whether the reverse onus in two provisions of the Criminal Procedure Act 1977 breached the presumption of innocence and, if so, whether they were justifiable limitations. Madala J posed the dilemma, "[i]n any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing law breakers to book, and, on the other hand, the equally great public interest of ensuring that justice is manifestly done to all": *ibid*, at [126].

[196] [2006] IESC 33, [2006] 4 IR 1.

means to an end'".[197]

The link between inequality and lack of respect for dignity was noted by the Constitutional Court in *Carmichele*, when it endorsed the importance to one's dignity of freedom from the threat of sexual violence.[198] Because of the entrenchment of the rights to life, dignity and freedom and security of the person in the Constitution and because the Bill of Rights bound all state authorities, the Court not only indicated that there was a negative duty on the state not to infringe those rights, but found that that in some circumstances there would also be a positive duty on the state "to provide appropriate protection to everyone through laws and structures designed to afford such protection."[199] The Court then went on to set in motion what has turned out to be what Iain Currie and Johan de Waal described as "considerable development of the law of delict" under the common law in the light of the Constitution.[200] It has led to the state's vicarious liability for failure to prevent injury. The Constitutional Court in *Carmichele* contrasted the system in the US—differentiating between action and inaction in holding the state not liable for not preventing harm—with the positive obligations imposed by the South African Constitution and the ECHR.[201] It pointed out that the South African Constitution, like the German Constitution, embodies "an objective, normative value system."[202] The Constitutional Court did not develop the common law itself, but referred the case back to the lower court for reconsideration. Currie and de Waal explained that on reappraisal, the law of delict was developed

> to encompass state liability in circumstances where state authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life or physical security of an identified individual or individuals from the criminal acts of a third party and ... they failed to take measures within the scope of their powers, which, judged reasonably, might have been expected to avoid that risk.[203]

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[197] *Ibid*, at [44], citing Wilson J in *R v Hess* [1990] 2 SCR 906 (SC of Canada).

[198] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), at [62] (footnote omitted):

> In addressing these obligations [of the police force] in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence. As it was put by counsel on behalf of the *amicus curiae*:
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> > "Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women."

[199] *Ibid*, at [44].

[200] Currie and de Waal (n8), at 304.

[201] *Carmichele* 2001 (4) SA 938 (CC), at [45].

[202] *Ibid*, at [54]. See Christopher J Roederer, "Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa's Bill of Rights" (2009) 26 *Ariz J Intl & Comp L* 427, at 495-498.

[203] Currie and de Waal (n8), at 305.

In *Carmichele*[204] the Constitutional Court adopted the approach of the European Court of Human Rights in *Osman v UK* where it had been found that the right to life in Article 2 ECHR obliged the state in some circumstances to take pre-emptive action to prevent harm.[205]

In *Van Eeden* the Supreme Court of Appeal considered the obligations of the police to a woman who was sexually assaulted, raped and robbed by a serial rapist who had escaped from police custody.[206] It held that the police owed the public a legal duty to act positively to prevent the escape from custody of a known dangerous criminal likely to commit further sexual offences where measures to prevent his escape could reasonably and practically have been taken by the police. The state was vicariously liable for the actions of the police and she was entitled to damages. The existence of the duty of the police in these circumstances accorded with the legal convictions of the community and there were no considerations of public policy militating against its imposition.[207] The finding was based on the state's constitutional imperatives to protect human dignity, equality and freedom and security of the person.[208] Vivier ADP judged the state's liability by the yardstick of reasonableness taking into account policy and the community's legal convictions.[209] There are no pre-defined limits to the state's liability, but, as stated by Vivier ADP, each case is individually assessed using the

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[204] 2001 (4) SA 938 (CC), at [45]. See George Devenish, "The Evolution and Development of a Value-Based and Teleological Interpretation of Statute and Common Law in South Africa as a Result of the 1996 Constitution" in Quansah and Binchy (n18), at 113-114; François du Bois, "State Liability in South Africa: A Constitutional Remix" (2010) 25 *Tulane Eur & Civil L Forum* 139, at 142-143, 145-146, 166, 171; MacQueen (n128), at 368-369, 386.

[205] (App no 23452/94) (2000) 29 EHRR 245. The European Court sketched the parameters of the positive obligation under the ECHR, *ibid*, at 305 [115]:

> It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

It recognised the "difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources" and held that the duty on the state "must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities": *ibid*, at 305 [116].

[206] *Van Eeden v Minister of Safety and Security* [2002] 4 All SA 346 (SCA).

[207] *Ibid*, at [24].

[208] *Ibid*, at [13], [24].

[209] *Ibid*, at [9]:

> A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment, based *inter alia* upon its perception of the legal convictions of the community and on considerations of policy.

criteria for negligence.[210]

Ms K, who had had an argument with a boyfriend with whom she had been out for the evening, was looking for a telephone to call home when she met three police officers. They offered her a lift home which she accepted. However, they took her to a deserted place, raped and abandoned her. The Court in *K v Minister of Safety and Security* unanimously held that the Minister was vicariously liable.[211] Although the policemen's conduct was a clear deviation from their duty, there existed a sufficiently close relationship between their employment and the wrongful conduct. O'Regan J unsurprisingly held that the police officers had breached K's rights to dignity and security of the person in Sections 10 and 12 of the Constitution, and went on to explain why the state as employer should be liable in tort for their actions:

> In committing the crime, the policemen not only did not protect the applicant, they infringed her rights to dignity and security of the person. In so doing, their employer's obligation (and theirs) to prevent crime was not met. There is an intimate connection between the delict committed by the policemen and the purposes of their employer. This close connection renders the respondent liable vicariously to the applicant for the wrongful conduct of the policemen.[212]

The finding of vicarious liability was possible because the state and the police had constitutional obligations to prevent crime in general under Section 205(3) of the Constitution.[213] The policemen also had a statutory obligation as part of their work to ensure the safety and security of all South Africans and to prevent crime.[214] Their duty extended to protect the public from crime within the police force as well as from the more usual source in the wider community. The existing common law had a test for establishing vicarious liability similar to that in other jurisdictions focusing both on "the subjective state of mind of the employees" and the objective question, whether the deviant conduct was "nevertheless

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[210] *Ibid*, at [22]:

> [O]ur courts do not confine liability for an omission to certain stereotypes but adopt an open-ended and flexible approach to the question whether a particular omission to act should be held unlawful or not. In deciding that question the requirements for establishing negligence and causation provide sufficient practical scope for limiting liability.

[211] 2005 (6) SA 419 (CC).

[212] *Ibid*, at [57].

[213] It reads: "The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

[214] 2005 (6) SA 419 (CC), at [18], citing Preamble to the South African Police Service Act 1995.

sufficiently connected to the employer's enterprise".[215]

The Court developed the common law on vicarious liability, as O'Regan J considered that the objective element of the test relating to "the connection between the deviant conduct and the employment" was sufficiently flexible to incorporate constitutional and other norms.[216] When a court utilised the test, there was a requirement "to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not."[217] In applying the test to the facts in K's situation, O'Regan J held that the objective test had been satisfied as, first, the policemen and their employer all bore a statutory and constitutional duty to prevent crime and protect the members of the public.[218] Second, in addition to the general duty to protect the public, the uniformed policemen had offered to assist K and she had accepted their offer.[219] Third, the conduct of the policemen constituted the commission of the rape and the simultaneous omission of failing while on duty to protect her from harm.[220] These three inter-related factors make it plain that viewed against the background of K's constitutional rights and the constitutional obligations of the policemen and the state, the connection between the conduct of the policemen and their employment was sufficiently close to render the state vicariously liable.[221]

This decision was a fair development of the common law. There was a sufficient nexus between the wrong perpetrated and the employment responsibilities of the police officers to justify a finding of vicarious liability.[222] It has implications for the accountability of the state where employees commit wrongs while deviating from the normal performance of their duties. It also could have application in jurisdictions outside South Africa, as O'Regan J cited foreign jurisprudence to support her reasoning.[223] So it could involve the state in making reparation for abuse by employees with a duty to protect the public, such as those working in institutions caring for children or others in state care, members of the fire brigade, hospital staff or air traffic controllers involved in transgressions.

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[215] *Ibid*, at [44].
[216] *Ibid*.
[217] *Ibid*.
[218] *Ibid*, at [51].
[219] *Ibid*.
[220] *Ibid*, at [53].
[221] *Ibid*.
[222] Contrast *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26, 2003 (2) SA 34 (CC).
[223] She cited case law from England, Canada and the US: 2005 (6) SA 419 (CC), at [36]-[37], [38]-[40], [41]-[42].

4.6 Children

A child has a right to dignity of its own. Sachs J described the independent personality of the child in *S v M*.[224] The implications of independence for children are personal and associative.[225] The dignity rights of children range across a broad spectrum and engage freedom to express themselves, communicate, and to know and form their own identities. To enable them to make lifestyle and moral choices when they grow up, education in the broad sense is indispensable. They are entitled to experience and enjoy their childhood in secure surroundings.

Specific children's rights are contained in Section 28 of the Constitution. There is constitutional recognition that, in all matters concerning them, children's "best interests are of paramount importance".[226] This rule has some practical difficulties in application, the most serious of which is the absence of guidelines to ascertain its scope.[227] The express recognition of children's rights in the Constitution has had an effect beyond the provision's immediate reach and has given an impetus to children's access to equality and other constitutional rights, as Langa DCJ stated in *Bhe*:

> Section 28 of the Constitution provides specific protection for the rights of children. Our constitutional obligations in relation to children are particularly important for we vest in our children our hopes for a better life for all. The inclusion of this provision in the Constitution marks the constitutional importance of protecting the rights of children, not only those rights expressly conferred by section 28 but also all the other rights in the Constitution which, appropriately construed, are also conferred upon children. Children, therefore, may not be subjected to unfair discrimination in breach of section 9(3) just as adults may not be.[228]

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[224] 2008 (3) SA 232 (CC), at [18]:

> Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.

[225] *Ibid*, at [19] (Sachs J):

> Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.

[226] Constitution of the Republic of South Africa 1996, Section 28(2).

[227] Barry Bekink and Danie Brand, "Constitutional Protection of Children" in CJ Davel ed, *Introduction to Child Law in South Africa* (Juta Law, Lansdowne 2000), at 194-195. There are varying views on whether it is defective because it is broad and vague, or whether its flexibility is beneficial: *ibid*, at 194.

[228] *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC), at [52] (footnotes omitted).

In that case the Court found that the African customary law rule of male primogeniture, in the form that it had come to be applied in relation to the inheritance of property, discriminated unfairly against women and extra-marital children, who still suffered from "social stigma and impairment of dignity".[229] Ngcobo J partially dissented and considered that the principle of primogeniture did not unfairly discriminate on the basis of age and birth against younger children in the family, as the limitation on their rights imposed by entrusting the responsibilities of a deceased family head to the eldest child was reasonable and justifiable, bearing in mind that the African culture cherished respect for elders, who were required to mentor the young.[230] Statutory provisions governing succession and intestacy also breached the constitutional rights to equality in Section 9(3) and to dignity in Section 10.

The best interests of the child have been given some judicial consideration. In *Fitzpatrick* where legislation prohibiting intercountry adoption was held to be contrary to the rights of the child in Section 28 to the extent that it absolutely proscribed adoption of a South African born child by non-South Africans, Goldstone J did not impose a rigid meaning on the child's best interests.[231] One of the objects of the Hague Convention is to establish safeguards to ensure that adoptions take place in the best interests of the child.[232] Goldstone J pointed out the need for flexibility to ensure the child's welfare.[233]

The Court found in *Du Toit* that the statutory exclusion of an otherwise suitable lesbian couple from adopting a child infringed not only the rights of the proposed adoptive parents, but also breached the principle that the child's best interests were paramount and infringed the child's

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[229] *Ibid*, at [59]. In Tanzania the prohibition on the sale of inherited clan land by females (but not by males) was held to constitute discrimination on the grounds of sex: *Ephrahim v Pastory* [1990] LRC (Const) 757 (High Court of Tanzania). In adjudicating on a dispute over the distribution of the estate of an intestate polygamous man, the Court of Appeal in Kenya found that it would be unfair discrimination on the grounds of sex to allocate daughters minimal shares on the basis that they would marry: *Rono v Rono* [2005] AHRLR 107 (KeCA 2005).

[230] 2005 (1) SA 580 (CC), at [181], [183].

[231] *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC). See Shannon (n52), at [1-66].

[232] Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (adopted 29 May 1993, entered into force 1 May 1995) 32 ILM 1139 (1993) (Hague Convention on Intercountry Adoption), Art 1(a). The state had cited the Hague Convention to highlight the international concern given to child trafficking: 2000 (3) SA 422 (CC), at [25]. South Africa had not signed or ratified the Convention: *ibid*, at [26].

[233] *Ibid*, at [18] (footnotes omitted):

> [T]he "best interests" standard appropriately has never been given exhaustive content in either South African law or in comparative international or foreign law. It is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child.

right to care in Section 28(1)(b) of the Constitution.[234] Skweyiya AJ criticised the Child Care Act for thus depriving children "of the possibility of a loving and stable family life", which was "a matter of particular concern given the social reality of the vast number of parentless children" in South Africa.[235]

[234] *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC).
[235] *Ibid*, at [22].

5 CHAPTER V – ASSOCIATION OF DIGNITY WITH OTHER RIGHTS

The value of dignity is frequently used as an aid to interpret other rights and to give them substance. Human dignity's foundational status[1] has meant that it serves as a background principle in the interpretation and development of other rights.[2] Heinz Klug pointed out the similarity between South African and German jurisprudence in this respect—both regard human dignity as a foundational value and both have specific rights to dignity.[3] Reva Siegel has discerned at least three distinct usages of dignity in the substantive due process and equal protection cases in the United States: dignity as life, dignity as liberty, and dignity as equality.[4] Dignity as "liberty" can be seen when dignity resembles Kantian autonomy, described by Siegel as "the right of individuals to be self-governing and self-defining, and their commensurate right not to be treated as mere objects or instruments of another's will."[5] When dignity "is concerned with respect, honor, and social standing, and concerns the right of persons to be respected as an equal member of the polity rather than denigrated, subordinated, or excluded", it is dignity as "equality".[6]

5.1 Freedom and security

Specific safeguards for the freedom and security of the person are contained in Section 12 of

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[1] Human rights emerged because of human dignity serving as "a conceptual hinge" to connect the internalised rationally justified morality anchored in the individual conscience with coercive positive enacted law: Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights" (2010) 41 *Metaphilosophy* 464, at 470.

[2] Heinz Klug, "The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?" (2003) 64 *Mont L Rev* 133, at 149.

[3] *Ibid*.

[4] Reva B Siegel, "Dignity and the Politics of Protection: Abortion Restrictions under *Casey/Carhart*" (2008) 117 *Yale LJ* 1694, at 1737.

[5] *Ibid*, at 1738 (footnotes omitted). Justice Brennan called the American Constitution "a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law": William J Brennan, Jr, "The Constitution of the United States: Contemporary Ratification" (1986) 27 *S Tex L Rev* 433, at 438.

David Bilchitz has criticised the Kantian view on dignity, describing it as "perhaps one of the least justifiable elements of his moral system": David Bilchitz, "Moving beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals" (2009) 25 *SAJHR* 38, at 54. He questions Kant's view that worth or dignity lies in rational agency alone and that rational nature is the only thing that exists as an end in itself: *ibid*. Even if it is accepted that rational agency is of value, the concept seems to embrace a wide range of mental phenomena not within the capacity of all human beings, *eg*, young children, the senile and persons with mental incapacities: *ibid*, at 55-56.

Jürgen Habermas finds fault with Kant's view of human rights, which obtain their moral content from a universal individual conception of human dignity, because he assimilates human dignity to intelligible freedom thereby losing the connotations of self-respect and social recognition deriving from the status of democratic citizenship: Habermas (n1), at 475.

[6] Siegel (n4), at 1739 (footnote omitted).

the Constitution. Section 12(1) is devoted to personal freedom,[7] while Section 12(2) relates to bodily and psychological integrity.[8]

5.1.1 Personal freedom

Freedom and security of the person at substantive and procedural levels are in issue when the liberty of the individual is at stake.[9] They can arise in civil matters as well as in relation to crime. Legitimate deprivation of liberty normally follows a fair trial and conviction. The length of detention must be reasonable, equally applied to all in similar circumstances and give an incentive to improve by a promise of early release for good behaviour.[10] A fair trial respects the dignity of the accused, of the justice system and of society as a whole. The democratic principle of equality demands that all be treated fairly. Section 12(1) of the Constitution contains detailed provisions protecting the individual's freedom and security, while the right to a fair trial is in Section 35(3). There is a case-by-case analysis of whether there has been an infringement of the constitutional right to personal freedom. Dignity and equality as foundational values are relevant in the assessment of the factual situation.

The judges in the Constitutional Court in *Ferreira v Levin* held conflicting views as to the breadth of freedom protected by Section 11 of the interim Constitution.[11] Ackermann J felt that a broad interpretation of freedom was warranted, as in its absence dignity had no practical meaning since people would be unable to achieve self-fulfilment and realise the full extent of their dignity.[12] Chaskalson P considered that dignity was not dependent on that

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[7] Constitution of the Republic of South Africa 1996, Section 12(1):
Everyone has the right to freedom and security of the person, which includes the right
a) not to be deprived of freedom arbitrarily or without just cause;
b) not to be detained without trial;
c) to be free from all forms of violence from either public or private sources;
d) not to be tortured in any way; and
e) not to be treated or punished in a cruel, inhuman or degrading way.

[8] *Ibid* Section 12(2):
Everyone has the right to bodily and psychological integrity, which includes the right
a) to make decisions concerning reproduction;
b) to security in and control over their body; and
c) not to be subjected to medical or scientific experiments without their informed consent.

[9] See *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12, 2004 (4) SA 125 (CC).

[10] Parole has a restorative justice aim: *Van Vuren v Minister of Correctional Services* [2010] ZACC 17, 2010 (12) BCLR 1233 (CC), at [51]. Retrospective deprivation of credits to advance the date of consideration for parole deprived an offender of liberty and did not conform with the rule of law: *Van Wyk v Minister of Correctional Services* [2011] ZAGPPHC 125 (North Gauteng High Court, Pretoria), at [22].

[11] 1996 (1) SA 984 (CC). See Klug (n2), at 152.

[12] "Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.": *ibid*, at [49].

wide a reading of freedom.[13] Sachs J also disagreed with Ackermann J's rendition of Section 11, but thought that the overall constitutional setting, the foundational values and the rights to dignity and privacy would give more substance to freedom.[14] Modern society requires state intervention and the inevitable curtailment of individual liberty to some extent in order to provide an environment conducive to the enjoyment of freedom by all. Sachs J rightly said it was unrealistic nowadays to "equate freedom simply with autonomy or the right to be left alone".[15] The effective exercise of individual choice depends not just on the state refraining from interference, but taking positive interventionist steps to ensure that people can choose. Mutual compatibility in society is necessary for realisation of freedom, as Sachs J explained:

> Freedom and personal security are thus achieved both by protecting human autonomy on the one hand, and by acknowledging human interdependence on the other. The interdependence is not a limitation on freedom, but an element of it.[16]

The right to freedom in Section 11 of the interim Constitution arose also in *Bernstein v Bester* where O'Regan J considered that the foundational value of dignity would aid interpretation of freedom, security and other rights.[17] In *S v Thebus* the doctrine of common purpose was held

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[13] *Ibid*, at [173]:

> [N]or do I consider it necessary, as Ackermann J has suggested that it may be, to adopt such a construction in order to give substance to the right to human dignity. In the context of the multiplicity of rights with which it is associated in Chapter 3, human dignity can and will flourish without such an extensive interpretation being given to section 11(1).

In the *Prostitution Reference* in Canada Lamer J cautioned against defining liberty or security of the person in the Canadian Charter in terms of attributes such as dignity, self-worth and emotional well-being, as liberty would then be all inclusive and would give rise to questions about the independent existence in the Charter of other rights and freedoms such as freedom of religion and conscience or freedom of expression: *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)* [1990] 1 SCR 1123 (SC of Canada), at 52.

[14] 1996 (1) SA 984 (CC), at [255]:

> The text of section 11, which includes a prohibition against detention without trial, as well as the exclusion of torture and other forms of physical and emotional ill-treatment, indicates a narrow concern with the theme of bodily restraint or abuse, rather than a sweeping repudiation of any impediment whatsoever to the orderly pursuit of happiness. On the other hand, the express acknowledgement of the rights to dignity and privacy in sections 10 and 13 respectively, read together with the preamble and the afterword, establish a setting which allows for a more expansive role for the word freedom.

[15] *Ibid*, at [250] (footnote omitted).

[16] *Ibid*, at [251] (footnote omitted).

[17] 1996 (2) SA 751 (CC), at [148]:

> [S]ection 11(1) needs to be understood in the context of the fundamental commitment to dignity expressed in our Constitution in section 10. Our Constitution represents an emphatic rejection of a past in which human dignity was denied repeatedly by an authoritarian and racist government. ... The recognition of the value of human beings is a cardinal principle of the Constitution and one which will inform the interpretation of many of the specific rights in the Constitution.

Ackermann J in *De Lange v Smuts* (a challenge to committal to prison for failure to produce documents

to be constitutional and did not violate the rights to dignity or to freedom.[18] Moseneke J did not accept the defence argument that the legal rule dehumanised the perpetrators, because they had chosen voluntarily to participate in the criminal escapade.[19] Deprivation of liberty in South Africa must be in accordance with the basic tenets of the legal system.[20]

The legislation allowing for imprisonment of judgment debtors[21] was found to be a violation of Section 11(1) of the interim Constitution in *Coetzee v Government of the Republic of South Africa*, when Sachs J treated the right to dignity as "intertwined with" the freedom and security rights, and an aid to interpreting them.[22] The Constitutional Court held in *Malachi v Cape Dance Academy International (Pty) Ltd* that the arrest and detention of an alleged debtor intending to flee the country breached the right to freedom and security in Section 12 of the Constitution and was not a justifiable limitation.[23]

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and to provide information in insolvency proceedings), considered it significant that the use of committal to prison as a means to enforce the disclosure of information in insolvency proceedings was not constitutionally or otherwise objectionable in other open and democratic societies based on dignity, equality and freedom: 1998 (3) SA 785 (CC), at [39].

[18] 2003 (6) SA 505 (CC).

[19] "[A] person who knowingly, and bearing the requisite intention, participates in the achievement of a criminal outcome cannot, upon conviction in a fair trial, validly claim that his or her rights to dignity and freedom have been invaded.": *ibid*, at [41].

[20] This approach corresponds loosely with that of the Canadian courts in dealing with the standard of "fundamental justice" in Section 7 of the Canadian Charter of Rights and Freedoms: Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (5th edn Juta, Cape Town 2005), at 296.

[21] This procedural device came to the Cape through Roman-Dutch law and was retained with some modification after the English administration replaced the Dutch authority in the Cape in the early 18th century: W le R de Vos, "Civil Imprisonment: The Impact of the New Constitution" (1994) 5 *Stellenbosch L Rev* 133, at 135. Later, other territories in South Africa legislated for civil imprisonment based on the Cape model: *ibid*. After the establishment of the Union of South Africa in 1910 it was consolidated and modified by successive legislation, which ultimately abolished civil imprisonment as such, but effectively neutralised the abolition by retaining imprisonment of a judgment debtor who had failed to satisfy a judgment debt for contempt of court: *ibid*. In 1986 the South African Law Commission recommended abolition of this procedure: *ibid*, at 136. At the request of the Minister of Justice, a further investigation was launched by the Commission and it recommended provisionally that the mechanism of civil imprisonment be retained with modifications: *ibid*.

[22] 1995 (4) SA 631 (CC), at [43]. In assessing whether the limitation of rights was reasonable and necessary, Sachs J did not establish "an impossibly high threshold" which would rule out "genuine weighing by Parliament of reasonable alternatives within the broad bracket of what would not be unduly oppressive" and indicated that what mattered in "finding 'the least onerous solution'" was that "the means adopted by Parliament fell within the category of options which were clearly not unduly burdensome, overbroad or excessive, considering all the reasonable alternatives": *ibid*, at [60]. Eva Brems commented that although the maximisation criterion was being applied in principle here, it was interpreted in a way that significantly lowered the standard; instead of looking for the least onerous solution, the Court looked for a not unduly onerous solution: Eva Brems, "Human Rights: Minimum and Maximum Perspectives" (2009) 9 *HRL Rev* 349, at 364-365.
Cf *Julius v Commanding Officer, Windhoek Prison* 1996 NR 390 (High Court of Namibia).

[23] [2010] ZACC 13, 2010 (6) SA 1 (CC), at [34], [41]. Legislation permitting lenders to seize and sell the property of defaulting debtors breached the right of access to court in Section 34 of the Constitution and was not a permitted limitation: *Lesapo v North West Agricultural Bank* [1999] ZACC 16, 2000 (1) SA

From a comparative law perspective, there is no universal approach to imprisonment for civil debt. Some countries have prohibited it entirely;[24] others have forbidden imprisonment for non-payment of a contractual obligation, but have allowed imprisonment for civil contempt of court of a recalcitrant debtor with ability to pay. The remedy of imprisonment for the failure to pay a judgment debt can be traced to ancient legal systems such as the Mosaic legislation and the Twelve Tables of early Roman law.[25] The origins of the ban on civil imprisonment date back to 1606 in English law, when nobles were not liable to be arrested for debt because—as explained by the Star Chamber—of their dignity and the presumption of sufficient wealth that could be seized.[26] Eventually in 1970 the ban on imprisonment for debt in England was extended to all.[27] Several international and regional human right instruments adopted since the Second World War prohibit imprisonment for failure to comply with an order for payment of a contractual debt.[28] They include the International Covenant on Civil and Political Rights (ICCPR), article 11 of which reads: "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation."[29] There is a very similar provision in the Fourth Protocol to the European Convention on Human Rights (ECHR).[30] The American Declaration of the Rights and Duties of Man does not confine the prevention of imprisonment to debt, but covers other civil obligations with the following wording: "No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character."[31]

In *Chinamora v Angwa Furnishers (Private) Ltd* the Supreme Court of Zimbabwe found that there were sufficient legal safeguards to prevent the jailing of an impecunious debtor.[32] The Constitution of Zimbabwe contains a specific recognition that a person can be deprived of

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409 (CC). Contrast *Road Accident Fund v Mdeyide* [2010] ZACC 18, 2011 (2) SA 26 (CC).

[24] For example, France and the Netherlands: de Vos (n21), at 139.

[25] De Vos (n21), at 134-135.

[26] Jeremy Waldron, "Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley" (2009) NYU School of Law Public Law Research Paper No 09-50 http://ssrn.com/abstract=1461220 (visited 1 June 2010), at 48-49, citing *Isabel, Countess of Rutland's Case* (1606) 6 Co Rep 52 b, 77 ER 332, at 333.

[27] De Vos (n21), at 138-139, citing Administration of Justice Act 1970.

[28] *Ibid*, at 141.

[29] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Art 11 is excluded from the provisions in the ICCPR which may be derogated from in times of public emergency: *ibid*, art 4(2).

[30] "No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation": ECHR Protocol No 4 securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Art 1.

[31] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992), Art XXV, 2nd para.

[32] [1997] 1 LRC 149. Cf *Noor v Botswana Co-operative Bank Ltd* 1999 (1) BLR 443 (CA) (Botswana).

personal liberty as authorised by law "in execution of the order of a court made in order to secure the fulfilment of an obligation imposed on him by law".[33] The Court held that the legislative provisions and the court rules did not violate the inhibition on deprivation of personal liberty in Section 13(1) of the Constitution.[34] Gubbay CJ distinguished *Coetzee*, as in Zimbabwe there was adequate protection for the debtor since the law differentiated between debtors who could not pay and those who refused to pay.[35] The reformative and autonomous elements necessary to render constitutional imprisonment for non-payment of civil debt are evident in Gubbay CJ's judgment, as he considered it essential that the debtor should have the choice to avoid prison by having access to funds to pay the amount due.[36] He recognised that imprisonment of an impecunious debtor was contrary to international human rights instruments, which were not concerned with the debtor who had the means to pay but obdurately declined to do so.[37] They were aimed at protection of the individual from imprisonment where there was a genuine inability to pay.[38] The international code was not breached in Zimbabwe, which also only targeted those who refused to pay.

In a somewhat analogous situation in *Hicks v Feiock* concerning the burden of proof in punishment for contempt of court of a father for failure to make child support payments, the

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[33] Constitution of the Republic of Zimbabwe 1979, Section 13(2)(c).

[34] Neither was the constitutional protection of the law for every person in Section 18(1) violated, since it was specifically subject to other constitutional provisions, including Section 13(2)(c) allowing deprivation of liberty to ensure fulfilment of a legal obligation: [1997] 1 LRC 149, at 169-170. Because of the avoidable nature of punishment in imprisonment for civil debt, the Court also held that it did not amount to degrading treatment under Section 15(1) of the Constitution: *ibid*, at 169. The Court pointed out that a sentence of imprisonment could not be adjudged unconstitutional unless it was blatantly disproportionate to the quality of the offence—the humiliation and degradation felt by a person sentenced to a term of imprisonment did not of itself constitute degrading treatment: *ibid*, at 168.

[35] [1997] 1 LRC 149, at 167. The onus was on the creditor to establish the debtor's ability to pay: *ibid*, at 166. The procedure required the debtor to produce evidence of his financial position, warned him of the possibility of imprisonment and, by enjoining the court to conduct a meticulous inquiry into his ability to pay, ensured that that issue was properly addressed and examined: *ibid*, at 166-167. Where the debtor did not attend the hearing, the court would not order imprisonment unless satisfied that there had been personal service of the summons, and, in practice, the court only entertained an application for imprisonment when other enforcement methods had been considered or tried and were inappropriate or unsuccessful: *ibid*, at 167.

When the Irish High Court found that the legislation permitting imprisonment for debt was unconstitutional on the grounds that it breached the guarantee of fair procedure and that it was a disproportionate interference with the debtor's right to liberty, Laffoy J referred to the Supreme Court of Zimbabwe's distinction of *Coetzee*: *McCann v Judge of Monaghan District Court* [2009] IEHC 276.

[36] [1997] 1 LRC 149, at 163:

> Thus the only real effect of imprisonment of an impoverished debtor is that of punishment. It is a punishment that can be avoided by a debtor who is able but unwilling to pay; for satisfaction of the judgment remains within his power. But it becomes mandatory against one without the means to pay. It discriminates between one and the other.

[37] *Ibid*, at 162.

[38] *Ibid*, at 162-163.

US Supreme Court focused on the difference between criminal contempt and civil contempt, due process being required only for the former.[39] Justice White pointed out the choice to avoid the conditional penalty available in civil contempt, where it was specifically designed to compel the doing of some act, in contrast to an unconditional penalty which was criminal in nature because it was "solely and exclusively punitive in character."[40] The theme of free choice has resonances in Gubbay CJ's judgment in *Chinamora*.

The Supreme Court of India in *Jolly George Verghese v Bank of Cochin* invoked the value of dignity when it held that a simple default to discharge a judgment debt did not merit imprisonment, as enjoined by article 11 of the ICCPR.[41] The Court construed the constitutional rights to equality before the law and equal protection of the laws,[42] to freedom[43] and to fair procedure before deprivation of liberty[44] in the light of the value of dignity. Krishna Iyer J affirmed that the "high value of human dignity and the worth of the human person"[45] obligated the state not to incarcerate except under law which was "fair, just and reasonable in its procedural essence."[46] The legislation was unconstitutional because it implied that a sanction could be imposed if a debtor had the ability to pay at any time since the judgment, even though he later became penniless.[47] The Court required that there be a comprehensive view of the person's situation. Imprisonment of a person to recover a debt required "proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of

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[39] 485 US 624 (1988). The case was referred back to the state court for further consideration, as the majority considered it was unclear whether civil or criminal contempt was involved. Justice O'Connor for the dissentients in *Hicks v Feiock* looked at the beneficiary of the proceedings to assist in ascertaining the nature of the punishment, as she stated, "[t]he most important indication is whether the judgment inures to the benefit of another party to the proceeding.": *ibid*, at 646. Having considered the objective features of the proceeding and the sanction in order to infer whether it was criminal or civil, the minority concluded it was civil contempt, since the penalty was intended to enforce maintenance payments and not simply to punish for non-compliance with a court order: *ibid*, at 646, 650-651.
Sachs J in *Coetzee* referring to the imprisonment of a judgment debtor and the different objectives of a criminal trial, cited *Hicks v Feiock* as re-affirming "the distinction between imprisonment for a fixed period as a punishment for doing something forbidden, and imprisonment as a flexible remedial instrument for failure to fulfil an obligation": 1995 (4) SA 631 (CC), at [43], fn 34.

[40] 485 US 624 (1988), at 633, citing *Penfield Co v SEC* 330 US 585 (1947), at 593.

[41] [1980] INSC 19, 1980 SCR (2) 913.

[42] Constitution of India 1950, Article 14.

[43] *Ibid*, Article 19.

[44] *Ibid*, Article 21.

[45] [1980] INSC 19, 1980 SCR (2) 913, at 921.

[46] *Ibid*, at 922. Krishna Iyer J adverted to the change in the legal approach over time, as he stated, "[a] modern Shylock is shacked by law's humane hand-cuffs.": *ibid*, at 916. He expanded on the equal worth of the poor, "[i]t is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of daridra Narayana, is no crime...": *ibid*, at 922.

[47] *Ibid*.

more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness."[48] An element of dishonesty could also justify imprisonment, as Krishna Iyer J indicated when he set out the parameters:

> The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. ... [C]onsiderations of the debtor's other pressing needs and straitened circumstances will play prominently.[49]

Imprisonment for crimes of strict liability infringes the right to freedom because the will to commit a crime is absent. South African criminal law, founded on liberal philosophy, as Shannon Hoctor wrote, holds humans morally autonomous and assumes the individual can distinguish right from wrong, has the competency to decide how to act and the capability to realise that decision.[50] Because of human dignity and autonomy, the individual must not be treated as an object or instrument.[51] These moral principles find expression in the necessity for there to be *mens rea* before deprivation of liberty for a crime.[52] O'Regan J in *S v Coetzee* said it had been acknowledged by the courts "on countless occasions" that "the state's right to punish criminal conduct rests on the notion that culpable criminal conduct is blameworthy and merits punishment."[53] Strict liability uses the offender as an instrument of deterrence and can only be allowed for regulatory or minor infringements of the law with correspondingly limited sanctions. Similar principles were applied in Irish law in *CC v Ireland*, where the Supreme Court held that a provision which criminalised and exposed a person without mental guilt to a maximum sentence of life imprisonment failed to respect the liberty or dignity of the individual.[54]

As criminal liability without fault is not consonant with basic tenets of the legal system, Iain Currie and Johan de Waal have deduced that its constitutionality in South Africa depends on it

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[48] *Ibid.*
[49] *Ibid.*
[50] Shannon Hoctor, "Dignity, Criminal Law, and the Bill of Rights" (2004) 121 *SALJ* 304, at 306.
[51] *Ibid.*
[52] *Ibid*, at 309. Markus Dubber urges that levels of *mens rea* (*eg*, purpose, knowledge, recklessness, and negligence) should represent degrees to which the offender's act can be conceptualised, first, as a manifestation of her capacity for autonomy and, second, as a manifestation of her view of the victim as a non-person, *ie*, as lacking the capacity for autonomy: Markus D Dubber, "Dignity in Penal Law and Penal Police" (2009) Working Paper http://ssrn.com/abstract=1530545 (visited 1 July 2010), at 5.
[53] 1997 (3) SA 527 (CC), at [162].
[54] [2006] IESC 33, [2006] 4 IR 1. Subsequently the Criminal Law (Sexual Offences) Act 2006 criminalised defilement of a child, but provided for a defence of "honest belief" that the child was over age in section 2(3) and section 3(5). The question of the burden of proof of "honest belief" was considered in *People (DPP) v Egan* [2010] IECCA 28.

being justified under the general limitation clause.[55]

The criminal law also incorporates the communitarian aspect *ubuntu*, which is closely aligned to dignity.[56] Langa J described the link between dignity and *ubuntu*, and the mutuality of respect in society in *Makwanyane*:

> [*Ubuntu*] recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.[57]

The interrelationship in communities and the equality in dignity between individuals curtail the freedom to act without regard for the other.

Section 12(1)(c) of the Constitution providing for the right to be free from public or private violence,[58] together with the rights to life and human dignity, impose a positive duty on the state to protect individuals in some circumstances.[59] Because of the constitutional imperative to protect dignity and personal freedom and security, the Court held in *Baloyi* that the state is obliged to deal with domestic violence.[60] Sachs J referred to the positive and negative aspects to the right not to be physically abused.[61]

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[55] Currie and de Waal (n20), at 297.

[56] Hoctor (n50), at 315.

[57] 1995 (6) BCLR 665 (CC), at [224]. Habermas emphasised the need to anchor human dignity in equal social status as members of an organised community, where citizens derive their self-respect from the fact that they are recognised by all other citizens as subjects of equal actionable rights: Habermas (n1), at 472.

[58] The formulation of the right to freedom from public and private violence as an aspect of the right to freedom and security justifies state intervention in domestic violence; the fact that the right to freedom from violence is a discrete right dispels any argument that the right to freedom and security only provides a guarantee against arbitrary arrest and detention: Heléne Combrinck, "The Right to Freedom from Violence and the Reform of Sexual Assault Law in South Africa" in Jeremy Sarkin and William Binchy eds, *Human Rights, the Citizen and the State: South African and Irish Approaches* (Round Hall Sweet & Maxwell, Dublin 2001), at 185.

[59] *Carmichele* 2001 (4) SA 938 (CC), at [44]. The South African Constitution, like the ECHR, by on occasion requiring operational intervention by the state to prevent harm, points in the opposite direction to the absence of positive rights in the US Constitution: *ibid*, at [45].

[60] *S v Baloyi* 2000 (2) SA 425 (CC). This was significant, as there had been a perception that domestic violence was solely a private dispute: Waheeda Amien, "Recent Developments in the Area of Women's Rights in South Africa: Focusing on Domestic Violence and Femicide" in Sarkin and Binchy (n58), at 171-172.

[61] 2000 (2) SA 425 (CC), at [11] (footnotes omitted):

> Read with section 7(2), section 12(1) has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence. Indeed, the state is

The courts have developed the common law incrementally in accordance with constitutional principles to impose vicarious liability in delict on the state, where negligent omissions by the police allowed members of the public to be killed or injured. The Supreme Court of Appeal in *Minister of Safety and Security v Van Duivenboden* held that the negligent conduct of police officers in possession of information reflecting on the fitness of a person to possess firearms gave rise to a duty to take reasonable steps to act on that information in order to avoid harm occurring, such that individuals injured as a result were entitled to compensation from the state.[62] Nugent JA for the majority based his assessment of the circumstances when it should be unlawful to culpably cause loss on the prevailing norms in South Africa.[63] He approached this task in a structured manner and ruled out intuition as a guide.[64] He considered that the norm of accountability had an important role in determining whether a legal duty ought to be recognised.[65] Where accountability could be secured without delictual liability through the political process or by another judicial remedy,[66] compensation would not necessarily be payable by the state.[67] In the absence of an alternative method of accountability, an action would lie provided there were no countervailing policy issues.[68] The state had a constitutional duty to protect an individual's constitutional rights to human dignity, life and security of the person, and, as there was no offsetting public interest, liability attached to the state.[69] The

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under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the defensive rights of everyone not to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman or degrading way.

[62] [2002] 3 All SA 741 (SCA). On the limits of state liability, see *Brooks v Minister of Safety and Security* [2008] ZASCA 141, 2009 (2) SA 94 (SCA); François du Bois, "State Liability in South Africa: A Constitutional Remix" (2010) 25 *Tulane Eur & Civil L Forum* 139, at 168-169.

[63] [2002] 3 All SA 741 (SCA), at [16].

[64] "When determining whether the law should recognize the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.": *ibid*, at [21].

[65] *Ibid*.

[66] The African Commission requires that a remedy be available, effective and sufficient: *Jawara v The Gambia* [2000] AHRLR 107 (ACHPR 2000), at [31]. A remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint: *ibid*, at [32].

[67] [2002] 3 All SA 741 (SCA), at [21]. Cf *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC).

[68] "[W]here the state's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm.": [2002] 3 All SA 741 (SCA), at [21].

[69] *Ibid*, at [22]. Marais J concurred in the outcome, but for different reasons. He did not base his decision on constitutional grounds.

issue was not the general duty of the police to investigate crime.[70]

The Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* approved of taking into consideration accountability, as well as other constitutional norms such as "the principle of effectiveness and the need to be responsive to people's needs", in a contextual enquiry to determine whether a legal duty exists.[71]

In *Minister of Safety and Security v Hamilton* the Supreme Court of Appeal held that the police had a legal duty to exercise reasonable care in considering, investigating, recommending and granting an application for a firearm licence and that the state was liable in damages to a person injured by the licence holder.[72] The police were obliged to take reasonable steps to investigate whether the applicant was competent and fit to possess a firearm. The identifiable norms that Van Heerden AJA balanced were the individual's right to life, bodily integrity and security of the person against "policy considerations such as the efficient functioning of the police, the availability of resources and the undoubted public importance of the effective control of firearms."[73] He based his decision, not directly on the Constitution, but on the common law and statutory provisions.[74] However, he was satisfied that the existence of the legal duty on the police in the circumstances was consistent with society's norms and values as reflected in the Constitution.[75]

5.1.2 Damages for breach of fundamental rights

The question of whether damages over and above those under the normal delictual headings should be awarded for breach of fundamental rights was raised in *Fose*.[76] Fose claimed damages from the State for a series of assaults by members of the police force. In addition to common law damages for pain and suffering, insult, shock, past and future medical expenses and loss of enjoyment of the amenities of life, he claimed "constitutional damages" including

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[70] *Ibid*.
[71] 2005 (2) SA 359 (CC), at [78]. See Dennis M Davis "Socioeconomic rights: Do they deliver the goods?" (2008) 6 *ICON* 687, at 704-705, 707, 708.
[72] [2003] 4 All SA 117 (SCA).
[73] *Ibid*, at [35].
[74] *Ibid*, at [36].
[75] *Ibid*.
[76] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC). See Christopher Roederer, "The Transformation of South African Private Law after Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy" (2006) 37 *Colum Hum Rights L Rev* 447, at 491-493. Cf *Chituku v Minister of Home Affairs* [2004] ZWHHC 6 (Harare High Court).

an element of punitive damages[77] for the infringement of his constitutional rights mainly not to be tortured nor subjected to cruel, inhuman or degrading treatment.[78] He also relied on violation of his rights to dignity[79] and privacy.[80] The legal issue that came before the Constitutional Court was whether constitutional damages could and ought to be awarded as appropriate relief under Section 7(4)(a) of the interim Constitution for breach of constitutional rights.[81]

According to Ackermann J, the fact that litigation was a costly venture in a country with many poor people made it even more imperative to secure an effective remedy in the event of a claim being successful.[82] He accepted that it might be necessary for the courts "to 'forge new tools' and shape innovative remedies" in order to do so.[83] In the case at hand involving claims for assault, however, the Constitutional Court found that an award of constitutional damages against the state on top of damages at common law would not be appropriate.[84] Ackermann J considered that the civil and criminal laws should be kept separate and that penalties should only be imposed following a criminal prosecution with the attendant procedural safeguards.[85] From his wide-ranging comparative review of damages in foreign jurisdictions and under the ECHR,[86] he ascertained that in some countries (including Ireland) constitutional damages are awarded.[87] He was averse to requiring the state to pay excessive damages for the wrongdoing

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[77] 1997 (3) SA 786 (CC), at [12].
[78] Interim Constitution of the Republic of South Africa 1993, Section 11(2).
[79] *Ibid*, Section 10.
[80] *Ibid*, Section 13.
[81] 1997 (3) SA 786 (CC), at [1].
[82] *Ibid*, at [69]:

> [A]n appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.

[83] *Ibid*.
[84] *Ibid*, at [73], [75], [88], [104], [106].
[85] *Ibid*, at [70].
[86] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (ECHR).
[87] 1997 (3) SA 786 (CC), at [25]-[57]. He distinguished the foreign jurisprudence, as differences in law and procedure existed between the jurisdictions reviewed and South Africa: *ibid*, at [58]. The statutory relief and the award of constitutional damages based directly on the Constitution in the US were legislative and judicial responses to the perceived inadequacy of the common law tort remedies: *ibid*, at [55]. The recognition of constitutional torts in the US established the right of citizens to hold government accountable for individual harms, which departs from the more traditional democratic approach of holding the government accountable collectively by exercising the will of the majority in elections: Stephen J Wermiel, "Law and Human Dignity: The Judicial Soul of Justice Brennan" (1998) 7 *Wm & Mary Bill Rts J* 223, at 235.

of the police, as the deterrent effect on individual police officers was doubtful[88] and public monies could be put to better use to prevent assaults by the police in future.[89]

The same attitude is apparent in Didcott J's judgment where he elaborated on the downside of punitive damages against the state.[90] Unlike Ackermann J, he was completely opposed to the introduction by the judiciary of punitive or exemplary damages against the state in any circumstances and was unambiguously of the view that it was a matter for the legislature to decide after investigation by the Law Reform Commission, consultation with experts in the area and perhaps even a judicial enquiry.[91] He was open to the possibility of punitive or exemplary damages against non-state parties because the funds would not come from the public coffers and would be a deterrent, but even if that were thought appropriate it should be the product of legislative action and not of judicial innovation.[92] Kriegler J also viewed an award of punitive damages against the state for assault as futile, but he did not rule out punitive damages in all circumstances.[93]

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[88] The Irish Supreme Court has held that in an appropriate case exemplary or punitive damages for breach of constitutional rights might be awarded as an effective deterrent: *Conway v Irish National Teachers Organisation* [1991] 2 IR 305 (HC, SC). After this case it was clear that punitive damages might be awarded for breach of a constitutional right in Ireland, but it was less easy to identify the criteria for granting them: William Binchy, "Constitutional Remedies and the Law of Torts" in James O'Reilly ed, *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Round Hall Press, Dublin 1992), at 217. The circumstances in which exemplary damages would be awarded was clarified subsequently: *Shortt v Commissioner of An Garda Síochána* [2007] IESC 9, [2007] 4 IR 587. The Supreme Court indicated that exemplary damages served several potential purposes including to mark the court's disapproval of a defendant's outrageous conduct: *ibid*, at [108], [253]. They were also punitive and they might financially punish a defendant as a deterrent to that defendant as well as a deterrent generally to the arrogant use or abuse of power: *ibid*, at [109], [253]. Although in the form of a financial penalty, an award of exemplary damages was also "a moral sanction, a mirror to 'the proper indignation of the public'": *ibid*, at [110] (Murray CJ).

[89] 1997 (3) SA 786 (CC), at [72] (footnote omitted):

> In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are "multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform", it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement.

[90] *Ibid*, at [84]:

> [P]ayment [of punitive or exemplary damages] would come from the public purse and go to the plaintiff alone. Few potential torturers would be scared greatly by such a sequel, one not affecting their own pockets. Nor could it strengthen the cause of vindication for an individual claimant, or even a series of them, to be enriched at the expense of the taxpayer.

[91] *Ibid*, at [85]-[86].

[92] *Ibid*, at [87]. Contrast *Shortt v Commissioner of An Garda Síochána* [2007] IESC 9, [2007] 4 IR 587, at [229] (Hardiman J).

[93] 1997 (3) SA 786 (CC), at [103]:

It is clear that none of the judges favoured punitive damages against the state in assault cases.[94] The taxpayer would end up paying for excessive enrichment of the person assaulted, who took the initiative to sue. The evidence in *Fose* seemed to indicate that assaults and torture by police officers were widespread.[95] The remedy should not be to make excessive awards of damages against the state. To stamp out corruption in the police force would require a practical solution such as better training, supervision and disciplining of the police.

The decision in *Fose* is a narrow one and it did not decide whether punitive damages for breach of constitutional rights generally would be appropriate. Currie and de Waal's assessment is that *Fose* established two general principles—first, where the violation of constitutional rights entails the commission of a delict, an award of damages *in addition* to those available under the common law will seldom be available and, second, even where delictual damages are not available, constitutional damages will not necessarily be awarded for a violation of human rights.[96]

5.1.3 Bodily and psychological integrity

Any doubts that might have existed over whether and to what extent personal freedom allowed control over one's body, mind and thoughts, were removed by Section 12(2) of the Constitution. Abortion is permitted by the right to make decisions concerning reproduction, so this controversial issue does not get as much public debate in South Africa as elsewhere.[97] In acknowledgement of medical and scientific developments, experiments cannot be carried out without informed consent.[98] Currie and de Waal have formulated the following universal question concerning dignity and freedom to find out if the experiments proposed are justified,

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> The relief in this case would come from the public coffers and be directed towards the appellant. The policemen implicated in the appellant's claim could not possibly be deterred by a payment of damages bearing no relation to their own finances. Nor do we vindicate the Constitution by enriching a particular claimant at the cost of the taxpayer—particularly when the problem is far larger than the claimant concerned. In other words, we do not adequately defend the Constitution by merely granting punitive damages in this case, or even in several cases. ... I should stress that punitive damages is not "appropriate relief" on these facts because it is inefficacious for dealing with the kind of problem that the appellant posits.

[94] Contrast the decision of Mwaungulu J in the High Court of Malawi when his award of damages for false imprisonment for 19 years compensated the plaintiff and punished the state for the way it treated him: *Munthali v AG* [2002] AHRLR 102 (MwHC 1993), at [27]. His award took into account the injury to feelings (indignity, mental suffering, distress and humiliation): *ibid*, at [22].

[95] 1997 (3) SA 786 (CC), at [22], [81], [89].

[96] Currie and de Waal (n20), at 221.

[97] Constitution of the Republic of South Africa 1996, Section 12(2)(a).

[98] *Ibid* Section 12(2)(c).

"[w]hen and to what extent can the benefits which accrue to society for medical and scientific experimentation outweigh considerations of individual dignity and autonomy?"[99]

The essence of the right to freedom and security of the person is a right to be left alone, which creates a sphere of individual bodily inviolability.[100] Section 12(2)(b) distinguishes between "security in" one's body, which protects bodily integrity against intrusions by the state or others, and "control over" the body, which is the protection of bodily autonomy or self-determination against interference. Currie and de Waal have described them as different components of the right to be left alone – the former in the sense of "being left unmolested by others" and the latter in the sense of "being allowed to live the life one chooses."[101]

5.2 Fair trial and imprisonment

Detailed rights for those arrested, detained and accused are set out in Section 35 of the Constitution.[102] Detainees and sentenced prisoners have the right to "conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment".[103] Fair trial rights are enumerated at length—15 specific rights being listed in Section 35(3) and providing for matters such as a public trial,[104] the presumption of innocence and not to be compelled to speak or to testify[105] or to give self-incriminating evidence.[106]

5.2.1 Criminal trials

Unlike the apartheid-era rigid system of law enforcement in accordance with the dictates of Parliament, the new South African constitutional legal system was a complete turnaround. It created an upheaval in the assessment of substantive and procedural issues arising in criminal

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[99] Currie and de Waal (n20), at 311.
[100] *Ibid*, at 308.
[101] *Ibid*, at 309.
[102] The arrested person has the right to remain silent, to be informed of that fact, not to be compelled to make a confession, to be brought to court within 48 hours and then either charged, released or informed of the reason for continuing the detention, and to be released on reasonable conditions should the interests of justice so permit: Constitution of the Republic of South Africa 1996, Section 35(1)(a)-(f).
[103] *Ibid* Section 35(2)(e). They also have rights to be informed of the reason for detention, to consult a lawyer, (at state expense, if substantial injustice would otherwise result), to bring a *habeas corpus* application, and to communicate with and be visited by close family and religious and medical advisers: *ibid* Section 35(2)(a)-(d), (f). Dingake J in Botswana High Court held that criminal proceedings were unconstitutional when an accused had been detained without trial for over 16 months and was only informed of the charge just before the start of the trial: *Sekwati v DPP* [2008] BWHC 263.
[104] Constitution of the Republic of South Africa 1996, Section 35(3)(c).
[105] *Ibid* Section 35(3)(h).
[106] *Ibid* Section 35(3)(j).

trials. The contrast was apparent to Kentridge AJ in *S v Zuma* when he pointed out that henceforth criminal trials were required to be conducted in accordance with "notions of basic fairness and justice" and that the right to a fair trial embraced "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force."[107] Moseneke J adverted to the comprehensive nature of the constitutional guarantees in criminal trials in *S v Thebus*, "the Bill of Rights authorises and anticipates prosecution, conviction and punishment of individuals provided it occurs within the context of a procedurally and substantively fair trial and a permissible level of criminal culpability."[108]

The right to a fair trial and the presumption of innocence are key elements in safeguarding the liberty and dignity of the accused.[109] Avoiding a wrongful conviction is not the only reason for the constitutional provisions to ensure a fair trial, but they are also necessary to uphold dignity and equality, as Ackermann J discerned in *S v Dzukuda*, having pointed out that dignity, equality and freedom lie "at the heart of a fair trial in the field of criminal justice".[110]

The consequences of a conviction have severe social implications and cause the community to shun the offender. The rationale behind a fair trial takes into account the associative aspects of the individual and not simply the isolated subjective effects of incarceration on the

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[107] 1995 (2) SA 642 (CC), at [16].

[108] 2003 (6) SA 505 (CC), at [36] (footnote omitted).

[109] *S v Zuma* 1995 (2) SA 642 (CC), at [22]; *S v Manamela* 2000 (3) SA 1 (CC), at [40]. Cf *R v Oakes* [1986] 1 SCR 103, where the Supreme Court of Canada stated that the presumption of innocence protects liberty and dignity; it held that a reverse onus on an accused to disprove on the balance of probabilities that drugs in his possession were for the purpose of trafficking violated the presumption of innocence and was not a justifiable limitation; there was no rational connection with the objective.

[110] 2000 (4) SA 1078 (CC), at [11] (footnote omitted):

> There are ... elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality.

On the right of an indigent accused to legal aid to ensure a fair trial, see *Government of the Republic of Namibia v Mwilima* [2002] NASC 8 (SC of Namibia).

Jeremy Waldron described the right to a hearing, where both sides can probe and respond to evidence before a tribunal, which listens to them and gives the response to their arguments in the reasons for its decision, as embodying a crucial dignitarian idea—respecting the dignity of people as *beings capable of explaining themselves*: Waldron (n26), at 44-45. By allowing arguments to be put forward to explain how their position fits into a coherent conception of the law, law conceives of people as bearers of reason and intelligence—also a tribute to human dignity: *ibid*, at 46. The right to legal representation follows from people's right to a hearing to express their own view, as they may be unable to do so perhaps because they are poor public speakers or ignorant of the law: David Luban, "Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)" [2005] *U Ill L Rev* 815, at 819. David Luban reasons that our own subjectivity lies at the very core of our concern for human dignity: *ibid*, at 821.

convicted person. A guilty verdict is the official imprimatur on publicly blaming a person for breaching standards set by society and, as Otto Lagodny said, "is meant to stigmatize and dishonour the violator", thus encroaching on the offender's human dignity.[111] The justification for the guilty verdict is the offender's misuse of responsibility, which Lagodny has portrayed as "one of the core aspects of human personality".[112] In *S v Manamela* in a joint judgment dissenting on the application of the limitation clause to the presumption of innocence on the facts, but concurring with the majority that the legislation relating to receiving stolen goods infringed both the constitutional right to silence and the presumption of innocence, O'Regan J and Cameron AJ highlighted the benefits for society and the individual of holding people responsible for their actions.[113]

In order to avoid an unwarranted violation of dignity, which society can only tolerate in regulatory or minor offences with insignificant consequences, the necessity for constitutional safeguards grows with the seriousness of the offence and the public interest in securing a conviction, which Sachs J in *S v Coetzee* labelled the "paradox at the heart of all criminal procedure."[114]

An agent of the apartheid regime accused of war crimes abroad retained the right to a fair trial despite the heinous and devastating nature of his activities.[115] It was alleged that Dr Basson (an employee of the South African National Defence Force) had conspired to murder members of SWAPO in Namibia by injecting them with drugs and had provided cholera bacteria to poison the water supply of a SWAPO refugee camp in order to manipulate the outcome of elections in Namibia. Sachs J in the Constitutional Court based Dr Basson's right to a fair trial

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[111] Otto Lagodny, "Human Dignity and Its Impact on German Substantive Criminal Law and Criminal Procedure" (1999) 33 *Israel L Rev* 575, at 578 (footnote omitted). In *R v Oakes* Dickson CJ referred to the accused being subjected "to social stigma and ostracism from the community": [1986] 1 SCR 103 (SC of Canada), at [29].

[112] Lagodny (n111), at 578.

[113] 2000 (3) SA 1 (CC), at [100], citing Tony Honoré, *Responsibility and Fault* (Hart, Oxford 1999), at 125:

> Our society asserts individual moral agency and it does not flinch from recognising the responsibilities that flow from it. It is upon this principle that democracy and respect for human rights are built. As Honoré has recently observed:
>
> > "[W]e do well, indeed we are impelled ... to treat ourselves and others as responsible agents. But the argument for welcoming this conclusion is not that our behaviour is uncaused—something that we cannot know and which, if true, would be a surprise—but that to treat people as responsible promotes individual and social well-being. It does this in two ways. It helps to preserve social order by encouraging good and discouraging bad behaviour. At the same time, it makes possible a sense of personal character and identity that is valuable for its own sake."

[114] 1997 (3) SA 527 (CC), at [220].

[115] *S v Basson* 2005 (1) SA 171 (CC).

and the state's interest in the prosecution of war crimes on the same humanitarian principles of dignity, equality and freedom.[116] According to Sachs J, "the clandestine use of state power to murder and dispose of opponents" showed the ultimate disrespect for these new constitutional values.[117] Endorsement by the established authorities of activities violating fundamental human rights is a betrayal of society's trust in the state to lead by example and the perpetrators should be held accountable.

The benefits of a fair trial extend beyond the interests of the accused and the effect on convicts of societal disapproval of them to upholding the dignity of the judicial system and society's entrusting of the administration of justice to the courts.[118]

In *Kaunda v President of the Republic of South Africa* the families of South African citizens, security workers who feared they would be tried as mercenaries, sought an order directing the South African government to intervene to ensure protection of their rights abroad.[119] The Constitutional Court refused to order the government to intervene. Sachs J's opinion was that the government's obligations did not stop at the borders of the country; while it had "an extremely wide discretion as to how best to provide what diplomatic protection it can offer", it had "a clear and unambiguous duty to do whatever is reasonably within its power to prevent South Africans abroad, however grave their alleged offences, from being subjected to torture, grossly unfair trials and capital punishment."[120]

Currie and de Waal have identified the three prongs to the rationale underlying the right to silence as first, reliability to ensure the truth, second, "a belief that individuals have a right to privacy and dignity which, whilst not absolute, may not be lightly eroded" and, third, "to give effect to the privilege against self-incrimination and the presumption of innocence."[121] This rationale has multiple connections with respect for dignity. Ackermann J in *Ferreira v Levin* explained the right against self-incrimination as based on dignity and the rights to privacy and autonomy intermingled with it.[122]

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[116] *Ibid*, at [126].
[117] *Ibid*, at [112].
[118] Sachs J described the presumption of innocence as protecting not only the individual on trial, but maintaining "public confidence in the enduring integrity and security of the legal system": *S v Coetzee* 1997 (3) SA 527 (CC), at [220].
[119] 2005 (4) SA 235 (CC).
[120] *Ibid*, at [275].
[121] Currie and de Waal (n20), at 751 (footnotes omitted).
[122] 1996 (1) SA 984 (CC), at [98], citing *Thomson Newspapers Ltd v Director of Investigation and Research* [1990] 67 DLR (4th) 161, at 200 a – c (SC of Canada) (Wilson J, dissenting):

5.2.2 Humane detention conditions

Detainees awaiting trial and sentenced prisoners are entitled to have their dignity respected.[123] This has been copper-fastened by the Constitutional rights to dignity in Sections 10 and 35(2)(e) and by the foundational constitutional values. Because each person has their own identity, each case should be considered individually. According to van Zyl J in *Stanfield v Minister of Correctional Services*, "[w]hat will be 'consistent with human dignity' in any particular case will, of course, depend on the facts and circumstances of each such case."[124]

> "Having reviewed the historical origins of the rights against compellability and self-incrimination and the policy justifications advanced in favour of their retention in more modern times, I conclude that their preservation is prompted by a concern that the privacy and personal autonomy and dignity of the individual be respected by the state. The state must have some justification for interfering with the individual and cannot rely on the individual to produce the justification out of his own mouth. Were it otherwise, our justice system would be on a slippery slope towards the creation of a police state."

Luban's view is that compulsory self-incrimination is humiliating, because it enlists a person's own will in the process of punishing her thereby splitting her against herself and causing self-alienation, which the law must never override on pain of violating human dignity: Luban (n110), at 833-835.

Ferreira v Levin was cited by Kearns J for the propositions of law, first, that legislation compelling examinees to answer questions put to them (even when the answers might incriminate them) should be necessary (*ie*, no other method existed which could achieve the desired object, but which was less intrusive of the examinee's right against self-incrimination); second, that the privilege against self-incrimination application depends on time, place and context (being a more powerful principle closer to a trial situation and providing greater protection when self-incrimination takes the form of oral communication rather than when the incriminating material has an objective reality): *Dunnes Stores Ireland Co v Ryan* [2002] IEHC 61, [2002] 2 IR 60, at 110, 116, 117.

[123] The Nigerian Court of Appeal held that the state has a responsibility to ensure that a person held in custody is not put in undue danger of his health and safety: *Fawehinmi v Abacha* (1998) 1 HRLRA 543, cited in Nigerian Bar Association, *Training Manual on African Regional Mechanisms for the Promotion and Enforcement of Human Rights: A Toolkit for Lawyers* (Lagos 2010), at 21. Assaulting a detainee with horse whip, inflicting blows on him with clenched fist and putting him in handcuffs overnight was held to amount to torture and degrading treatment: *Ifeanyi Anyanor v Commissioner of Police, Delta State* (2007) CHR 185, cited in Nigerian Bar Association, *supra*, at 21.

The conditions in which a detainee without trial was kept contravened Kenya's obligation to guarantee his right to respect for his dignity and freedom from inhuman and degrading treatment: *Ouko v Kenya* [2000] AHRLR 135 (ACHPR 2000), at [23]. Cf *Mao v AG of Uganda* [2003] UGCC 3 (Constitutional Court of Uganda). There was widespread utilisation of torture and of cruel, inhuman and degrading forms of treatment of prisoners held in detention in Mauritania in violation of their right to dignity in the African Charter: *Malawi African Association v Mauritania* [2000] AHRLR 149 (ACHPR 2000), at [115]-[118]. The African Commission found that the inhumane conditions in which Gambian detainees were kept in detention centres in Angola breached the same provision: *Institute for Human Rights and Development in Africa v Angola* [2008] AHRLR 43 (ACHPR 2008), at [49]-[53].

[124] 2003 (12) BCLR 1384 (C) (High Court, Cape of Good Hope Division), at [89]. Van Zylj J was critical of the prison authorities "lumping together" all prisoners suffering from terminal diseases when they refused to grant parole to a terminally ill prisoner suffering from lung cancer because of the effect of his release on the penal system and on other terminally ill prisoners: *ibid*, at [127]. He held that Mr Stanfield should have been released on parole to die with dignity in the company of his family and he placed the prisoner in a societal setting when there was an unavoidable limit on his time to enjoy his dignity on earth, stating: "The applicant is fully entitled to spend the remaining portion of his life ensconced in his own home in the consolatory embrace of his family. When the time comes for him to

Although electricity is not regarded as a necessity in South Africa given the conditions of impoverishment in which many people live, the High Court in *Strydom v Minister of Correctional Services* considered that for maximum security prisoners in solitary confinement for 18½ hours a day for all or a substantial portion of the remainder of their lives access to electricity was an indispensable requirement that could not be characterised as "no more than a comfort or a diversion" and "could be an amenity of life that makes the difference between mental stability and derangement".[125] Indefinite deprivation of electricity to enjoy at least some recreational privileges could also affect their prospects of rehabilitation and could amount to cruel or degrading treatment or punishment or detention in conditions inconsistent with human dignity.[126]

At common law in South Africa there was a long-standing recognition of the right of prisoners to be treated with dignity.[127] In 1912 the Appellate Division of the Supreme Court in *Whittaker v Roos* held in favour of two awaiting-trial prisoners, who had been unable to raise bail and had been placed in solitary confinement.[128] In what later become known as "the Innes *dictum*", Innes J was clear that prisoners retained their personal rights and personal dignity except to the extent defined by law or necessitated by their imprisonment.[129]

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pass on, he must be able to do so peacefully and in accordance with his inherent right to human dignity.": *ibid*, at [132]. Cf *Mnguni v Minister of Correctional Services* [2005] ZACC 13, 2005 (12) BCLR 1187 (CC).

[125] 1999 (3) BCLR 342 (W) (High Court, Witwatersrand Local Division), at [15], referring to *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A), at 141H-142A.

[126] 1999 (3) BCLR 342 (W) (High Court, Witwatersrand Local Division), at [15]. In *Strydom* high security prisoners wished to have electricity for recreational purposes to enable them to watch television and to listen to radio and music.

[127] This protection was developed to extend to all prisoners—whether awaiting trial, in detention without trial, or sentenced.

[128] 1912 AD 92. Prisoners awaiting trial were entitled to the special protection of the Court, since they were "in a position of peculiar difficulty and helplessness": *ibid*, at 125. The segregation order was illegal, as the differentiation it made between them and other awaiting-trial prisoners was neither warranted by the prison regulations nor necessitated by the requirements of prison discipline: *ibid*, at 121. The exceptional rigour which the segregation involved amounted to a substantial punishment: *ibid*.

[129] *Ibid*, at 122-123:

> True, the plaintiffs' freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect for what remained. The fact that their liberty had been legally curtailed could afford no excuse for a further illegal encroachment upon it. ... They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed.

The action of the prison authorities in confining the two men in punishment cells and subjecting them to consequential disabilities and discomfort—such as being prohibited from smoking, restricted in exercising, deprived of their boots in the cells, and handcuffed when being moved within the jail—was a wrongful and intentional interference with the "absolute natural rights relating to personality," to which

Hoexter JA in *Minister of Justice v Hofmeyr* approved of the Innes *dictum*, which meant "that the extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common law rights."[130] The conditions of detention open to scrutiny are not confined to the physical environment, but, as found by Hoexter JA, extend to the psychological sphere.[131] He endorsed the general approach reflected in "the residuum principle" enunciated by Corbett JA (dissenting) in *Goldberg v Minister of Prisons*.[132] The respect owed to every individual in view of each person's inherent dignity and worth applied regardless of their situation as a prisoner or

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everyone was entitled: *ibid*, at 122. This constituted an *injuria*, which is a delict dependent on intent, and, in addition to the actual pecuniary loss, it attracted compensation for "the insult, indignity and suffering" caused: *ibid*, at 123. Their ill-treatment was a serious issue, as Innes J stated, "[a] deliberate aggression upon personal dignity and personal liberty is not a trivial matter": *ibid*, at 125. He disagreed with the trial Court's conclusion that the case was not one for heavy damages, and remarked, "however reprehensible a man's views may be he is entitled to have his personal liberty adequately protected.": *ibid*.

[130] 1993 (3) SA 131 (A), at 141. The extent to which "necessary inroads" would be made on a prisoner's personal rights would depend on "the reason for his detention and the legislation applicable to him": *ibid*. While making full allowance for this, Hoexter JA considered that the Innes *dictum* was not confined to awaiting-trial prisoners, but was of general application: *ibid*. The Supreme Court unanimously upheld the award of damages to William Hofmeyr, a law student, who—although lawfully arrested and detained under emergency powers—had been held unjustifiably in isolation. His effective solitary confinement was underscored and exacerbated by "the deprivations suffered ... in regard to lack of indoor exercise, the ban on books and magazines, and the absence of a portable radio in his cell": *ibid*, at 152.

When reviewing the quantum of damages, Hoexter JA took a serious view of the effect of solitary confinement on a detainee and agreed with Diemont J's following remarks in *Hassim v Officer Commanding, Prison Command, Robben Island*, "I can think of few greater hardships than for an active man to be locked up in a small cell day and night, week after week and month after month, in enforced idleness.": *ibid*, at 157, citing 1973 (3) SA 462 (C) (SC Cape Provincial Division), at 480 B-C.

[131] 1993 (3) SA 131 (A), at 145:

> One of an individual's absolute rights of personality is his right to bodily integrity. The interest concerned is sometimes described as being one in corpus, but it has several facets. It embraces not merely the right of protection against direct or indirect physical aggression or the right against false imprisonment. It comprehends also a mental element.

[132] *Ibid*, at 141, citing *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A). Corbett JA's recognition that prisoners have residual rights and liberties, which are inviolable, is evident, 1979 (1) SA 14 (A), at 39:

> It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. Of course, the inroads which incarceration necessarily make upon a person's personal rights and liberties ... are very considerable. ... Nevertheless, there is a substantial residuum of basic rights which he cannot be denied.

Corbett JA's rejection of a rigid approach to distinguishing between "comforts" (privileges) and "necessities" (rights) was also approved by Hoexter JA, who had regard to the context in which the prisoners found themselves: 1993 (3) SA 131 (A), at 141, referring to 1979 (1) SA 14 (A), at 41. What is regarded as a comfort in some cases can be essential to physical or mental survival in others: 1993 (3) SA 131 (A), at 141.

otherwise.[133] Brand J in the High Court reiterated the position at common law in *Van Biljon*, when he held that two prisoners should be provided with anti-viral therapy which had been prescribed for them on medical grounds.[134] The Supreme Court of Appeal insisted that the humane treatment of prisoners based on constitutional values have a practical effect, when in *Minister of Correctional Services v Kwakwa* it set aside a new privilege system that withdrew advantages given to unsentenced prisoners, and Navsa JA stated:

> The manner in which we treat our prisoners should not be out of line with the values on which the Constitution is based. Human dignity and the advancement of human rights and freedoms and respect for the rule of law are not just hollow phrases. They must be made real.[135]

The promotion of transparency, accountability and good governance, and the constitutional right to information[136] ensured access to a report into the death of a prisoner from AIDS.[137]

However, it would be wrong to think that the courts over the years had upheld invariably the rights of all categories of prisoners to humane detention conditions—particularly those relating to their psychological well-being. Ogilvie Thompson JA delivering the judgment of the Appellate Division of the Supreme Court in *Rossouw v Sachs* distinguished between those detained without trial and unconvicted prisoners awaiting trial.[138] He overruled a lower court

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[133] "The plain and fundamental rule is that every individual's person is inviolable.": *ibid*, at 153 (Hoexter JA). Cf *Kruger v Minister of Correctional Services* [2005] ZAGPHC 24 (High Court, Transvaal Division), at [28], [33], [36]; *Denton v Director-General, National Intelligence Agency* (2006) AHRLR 241 (GaHC 2006) (High Court of Gambia), at [33].

[134] *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C), sub nom *B v Minister of Correctional Services* 1997 (6) BCLR 789 (High Court, Cape of Good Hope Division), at [42], [61]. See Paul Anthony McDermott, *Prison Law* (Round Hall Sweet & Maxwell, Dublin 2000), at [9-24]; Marius Pieterse, "The Potential of Socio-Economic Rights Litigation for the Achievement of Social Justice: Considering the Example of Access to Medical Care in South African Prisons" (2006) 50 *J African L* 118, at 124-126. Cf *Woods v Commissioner of Prisons* [2003] ZWSC 74.

[135] [2002] ZASCA 17, [2002] 3 All SA 242 (A), at [32].

[136] Constitution of the Republic of South Africa 1996, Section 32.

[137] *Treatment Action Campaign v Minister of Correctional Services* [2009] ZAGPHC 10 (High Court, Transvaal Division), at [23], [35]-[36], [38], [40].

[138] 1964 (2) SA 551 (AD), at 560, 564. Unlike an awaiting-trial prisoner, a detainee could be detained in custody pursuant to legislation "at any place", was not entitled to bail, and could be interrogated: *ibid*, at 559. Although he called the legislation permitting the detention of suspects or reluctant witnesses "novel and drastic" because it ran counter to the general principles of criminal law against self-incrimination and also precluded a detainee from having access to a legal adviser, Ogilvie Thompson JA accepted the doctrine of parliamentary supremacy and went on the determine that the true purpose of the continued detention authorised by the statute was to induce the detainee to speak and not to "alleviate the lot of a detainee": *ibid*, at 558-561, 564. Parliament could not be presumed to have intended to authorise maltreatment, such as impairing the detainee's physical or mental health by assaults or inadequate food or living conditions: *ibid*, at 561, 564. But neither was the detainee to be encouraged to study nor to have library facilities like convicted prisoners: *ibid*, at 562. Drawing on the analogy of the public interest in disregarding safeguards to liberty in times of extreme emergency, such

ruling which had held that a prisoner detained without trial was entitled to receive reading matter and writing materials.[139] The encouragement of prisoners to study—even though specifically mentioned in the prison regulations—received no practical judicial support in *Hassim v Officer Commanding, Prison Command, Robben Island*, where Diemont J in the Cape Provincial Division of the Supreme Court considered that prison officers had the "widest discretion" to strike a balance between rehabilitation and enforcing discipline, which in effect gave them control over whether, when and what a prisoner could study.[140] Contrary to the majority in *Goldberg*, Corbett JA's view in relation to the censorship of books and periodicals sent to prisoners detained under security laws was that the prison rules or policy could not deprive them of all access to news.[141]

Grosskopf J of the Cape Provincial Division of the Supreme Court found in *Cassiem v Commanding Officer, Victor Verster Prison* that detainees had pre-existing rights not dependent on statute and that these rights were merely controlled—not taken away—by legislation.[142] In contrast, the Appellate Division of the Supreme Court in *Mandela v Minister*

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as war, the legislature could combat subversive activities against public order and the safety of the state: *ibid*, at 562-563. Ogilvie Thompson JA also accepted the validity of the distinction between necessities and comforts, a detainee being entitled to the former as "a matter of right" but to the latter "only as a matter of grace": *ibid*, at 564-565.

[139] John Dugard criticised this decision because the court exercised "a series of choices" favouring the executive and failed to disapprove of the detention law which departed from accepted principles of justice: John Dugard, *Human Rights and the South African Legal Order* (Princeton University Press, Princeton 1978), at 336. The court did not simply declare the law, nor was it "mechanically guided to the legislative intent by fixed rules of precedent and principle": *ibid*.

[140] 1973 (3) SA 462 (C), at 476-477. Notwithstanding that the reasons given for withdrawing permission to study were "most unconvincing" and that Diemont J found the authorities' ban on legal studies "quite extraordinary", he was not prepared to interfere with their decisions: *ibid*, at 477. While he accepted that deprivation of books was a hardship for an intellectual, he drew an analogy with the hardship for some people to go without cigarettes and held that the right to use the prison library was a privilege that could be withdrawn: *ibid*.

When it came to considering segregation of prisoners, Diemont J discerned a difference between segregation and solitary confinement in the statutory code: *ibid*, at 479. The legislation did not provide for complete segregation without work: *ibid*, at 480. Hassim was prevented from doing any work, his exercise was severely curtailed, and he was confined to the same type of single cell as was used for solitary confinement for punishment purposes: *ibid*. However, he had not been given a fair hearing prior to being "marched straight off to the isolation cell" for failing to hand over library books: *ibid*, at 481. Diemont J ordered that Hassim be removed from the isolation cell, as he concluded that he had not been merely segregated, but had been placed in solitary confinement as a punishment with the probable intention that it should continue for six months, and this was invalid because he had not been given a hearing and, in any event, the period of confinement exceeded the maximum period of 30 days permitted by legislation: *ibid*.

[141] 1979 (1) SA 14 (A), at 50. He considered that a prisoner's rights extended beyond the physical to "his mental and psychological well-being", which was also "of basic importance": *ibid*, at 41.

[142] 1982 (2) SA 547 (C), at 552. A notice issued by the Minister of Justice equated detainees with awaiting-trial prisoners: *ibid*, at 550-551. As the correctness of the Innes *dictum* in respect of awaiting-trial prisoners had never been questioned, by extension it also applied to detainees: *ibid*, at 551.

of Prisons took a less sympathetic attitude to a convicted prisoner's challenge to confiscation of privileged documents by the prison authorities.[143] The Court accepted that, for the maintenance of good order, discipline and security, legislation could make inroads into the fundamental right of a prisoner to a legal adviser.[144]

Deliberate neglect of those imprisoned is unacceptable, but there is also a positive obligation to provide adequate sustenance and reasonable facilities for existing with dignity—even when resources are scarce. The condemnation of torture and of cruel and inhumane treatment and punishment has been the foundation for the recognition of the right of prisoners to live in conditions where they have sufficient space, food, bedding, and washing and toilet facilities. I will now take a closer look at the development of this jurisprudence, which has attempted to address the appalling overcrowded and pathetic conditions in which prisoners have been kept in some countries.[145]

De Swardt AJ of the South African High Court held in *Lee v Minister of Correctional Services* that the State was liable to pay damages in delict to a prisoner, who contracted tuberculosis while incarcerated in an overcrowded maximum security prison.[146] The prison authorities had not taken reasonable steps to prevent the spread of the disease and had failed to preserve the prisoner's rights to dignity and to treatment that was not inhuman or degrading.[147]

In Malawi,[148] a prisoner in *Masangano v AG*[149] claimed on behalf of himself and his fellow

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Grosskopf J respected the terms of the legislation, but he interpreted the executive's actions in accordance with the principles of justice, requiring that authority be exercised reasonably for the purpose for which it was given: *ibid*, at 552. The regulations only permitted a privilege to be withdrawn when that particular privilege had been abused and not as a means of punishment for unrelated misconduct: *ibid*, at 553. He upheld the entitlement of two Cape Malay detainees to seek redress from the Court when their rights to regular outdoor exercise, letters and visits, and to procure food and reading material were curtailed following an altercation between them and a prison officer because they greeted black detainees, with whom they were prohibited from having any contact: *ibid*, at 549, 554.

[143] 1983 (1) SA 938 (A).

[144] Jansen JA noted that fundamental rights continue after imprisonment, but might be curtailed: *ibid*, at 957.

[145] Overcrowding is perhaps the single most pressing concern facing African prisons: Jeremy Sarkin, "Prisons in Africa: An Evaluation from a Human Rights Perspective" (2008) 9 *Sur - Intl J Human Rights* 23, at 26.

[146] [2011] ZAWCHC 13 (Western Cape High Court, Cape Town), at [270]. Cf *Mukunto v AG* [1988] ZMSC 22, (1988 - 1989) ZR 31 (SC of Zambia).

[147] [2011] ZAWCHC 13 (Western Cape High Court, Cape Town), at [263], [268]-[269].

[148] Malawi had a history of overcrowded conditions aggravated by poor ventilation contributing to the deaths of prisoners. 259 inmates died in a space of about 18 months: *Masangano v AG* [2009] MWHC 31, at 52-53, 55, citing Malawi Prison Inspectorate Report 2004. See also *Achuthan (Banda) v Malawi*

prisoners that the insufficient and poor quality diet, food, clothing and bedding, and the overcrowding and other conditions in prison amounted to torture and cruel, inhuman and degrading treatment or punishment.[150] They also argued that their right to human dignity[151] was violated by the provision of only one meal a day.[152] The High Court found that the overcrowding and poor ventilation amounted to inhuman and degrading treatment of the inmates contrary to Section 19 of the Constitution.[153]

There have been similar findings in Zimbabwe, where lack of resources was not entertained as an excuse for failure to have decent prison conditions. In *Kachingwe v Minister of Home Affairs* the Supreme Court declared in 2005 that police holding cells were degrading and inhumane in violation of the prohibition in the Constitution[154] and were unfit for holding criminal suspects.[155] It made an order with extensive directions to the State to ensure that cells be of reasonable size for the number they were used to accommodate and that the conditions in which suspects were held be improved.[156] There was an obligation on the state

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[2000] AHRLR 144 (ACHPR 1995), at [4], [7].

[149] [2009] MWHC 31.

[150] This was prohibited by the Constitution: Constitution of the Republic of Malawi 1994, Section 19(3).

[151] *Ibid* Section 19(1).

[152] [2009] MWHC 31, at 12. The State defended the case on the basis that the issues were non-justiciable, being outside the judiciary's area of competence, and concerned matters of national policy and security: *ibid*, at 18. It maintained that the allocation of resources was beyond the purview of the judges, as it involved value judgments having regard to economic and policy considerations: *ibid*, at 19. The High Court dismissed these arguments, which were not applicable when the rights of prisoners were involved: *ibid*, at 28-29. It pointed out that the doctrine of non-justiciability had been criticised because it sought to protect the executive and undermined private rights while weakening the doctrine of separation of powers: *ibid*, at 27. In addition it had been argued that it had "the potential of obstructing confidence and certainty in the expectation of access to the courts for private litigants.": *ibid*. Having noted that the application of the doctrine of non-justiciability was in decline in the United Kingdom and that the human rights culture was now fully fledged, the Court did not think "that a court should adopt a hands-off approach" where there was a complaint of violation of prisoners' rights or human rights: *ibid*, at 28-29.

[153] *Ibid*, at 56. The Court asserted the judiciary's duty to protect the human rights retained by prisoners despite their imprisonment, and made an analogy between the modern view that socio-economic rights were justiciable and the justiciability of prisoners' rights: *ibid*, at 28-29, 32. It directed the State within 18 months to take concrete steps to reduce prison overcrowding by half, and thereafter by periodic reductions to eliminate overcrowding, and also to improve the ventilation in prisons and prison conditions generally: *ibid*, at 60. Although one of the specified constitutional rights of prisoners is to be detained under conditions consistent with human dignity, including "at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State" (Constitution of the Republic of Malawi 1994, Section 42(1)(b)), the Court based its decision on the general inviolability of dignity and the prohibition on inhuman and degrading treatment in Section 19.

[154] Constitution of the Republic of Zimbabwe 1979, Section 15(1).

[155] [2005] ZWSC 134.

[156] In 1999 the Court had made detailed orders directed to the prison authorities in a case concerning the severe conditions in which three US citizens awaiting-trial on terrorism and weapons charges were held in small individual cells in a maximum security prison: *Blanchard v Minister of Justice, Legal and Parliamentary Affairs* [2000] 1 LRC 671. Even though these awaiting-trial prisoners were entitled to the

to shield everyone from violations of the wide-ranging ban on degrading and inhumane treatment—not to infringe it itself.[157]

In Namibia the High Court found in *McNab v Minister of Home Affairs*[158] that the conditions in a police holding cell were degrading and inhuman and violated an arrested man's constitutional right to dignity.[159] The European Court of Human Rights has also found that overcrowding[160] and poor prison conditions are a violation of the prohibition on degrading treatment in Article 3 ECHR. In *Orchowski v Poland* respect for dignity required that the state be responsible for assuring the health and welfare of prisoners.[161] An intention to debase or

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presumption of innocence, they had not been allowed to communicate with each other, to wear their own clothes nor to receive food from outside the prison. For several weeks they had been stripped naked and shackled in leg-irons overnight: *ibid*, at 676, 682. The prison authorities maintained that their treatment was justified by the seriousness of the charges and the danger that they might escape, but the Supreme Court disagreed with this rationale and held that the prolonged duration of the ill-treatment and its physical and mental effects attained the minimum level of severity necessary to constitute a violation of Section 15(1) of the Constitution, which guarantees protection from inhuman or degrading punishment or treatment: *ibid*, at 679, 681.

Gubbay CJ delivering the unanimous judgment of the Court had recognised the need for wide-ranging deference to be accorded to the prison administrators in the adoption and execution of policies and practices they adjudged necessary to preserve order and security, but—notwithstanding this—the courts had a continuing responsibility to enforce constitutional rights: *ibid*, at 677, citing *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs* [1991] 1 ZLR 105 (S) (SC of Zimbabwe) and *Woods v Minister of Justice, Legal and Parliamentary Affairs* [1994] 1 LRC 359 (SC of Zimbabwe). Gubbay CJ condemned the use of leg-irons and handcuffs except for the prevention of escape during transportation or to restrain violent behaviour: [2000] 1 LRC 671, at 676.

[157] Gubbay CJ stated, *Blanchard v Minister of Justice, Legal and Parliamentary Affairs* [2000] 1 LRC 671, at 680:

> [T]he aim ... is to protect both the dignity and the physical and mental integrity of the individual. The prohibition relates not only to acts that cause physical pain but also to those that cause mental suffering to the victim. It is the duty of the state to afford protection against such acts by legislative and other measures, as may be necessary; not, through its officials, to be responsible for their perpetuation.

The provision in the Constitution was akin to art 7 of the ICCPR ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"): *ibid*, referring to the ICCPR (n29).

[158] [2007] NAHC 50.

[159] Constitution of the Republic of Namibia 1990, Article 8. The small, overcrowded, poorly-ventilated cell in which he was held was filthy, and infested with cockroaches and lice; toilet facilities were not private; food was served in rubbish bins: [2007] NAHC 50, at [50]. Angula AJ considered that the police officers were not responsible for the notorious horrendous conditions, but liability rested with the State: *ibid*, at [49]. Cf *Mothobi v Director of Prisons* [1996] LSCA 92 (CA of Lesotho).

[160] Sharon Dolovich considers that in the US the prohibition on cruel and unusual punishment in the Eighth Amendment would be breached if an incarcerated person suffered physical or psychological harm from living under conditions of extreme overcrowding and its attendant effects: Sharon Dolovich, "Cruelty, Prison Conditions, and the Eighth Amendment" (2009) 84 *NYUL Rev* 881, at 908.

[161] (App No 17885/04) ECHR 22 October 2009, at [120]:

> Under Article 3 the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.

humiliate is not a necessary ingredient in a violation of Article 3.[162]

In Scotland in *Napier v Scottish Ministers* Lord Bonomy had no hesitation in condemning systematic slopping out, "[i]t is clear beyond doubt that, by imposing the regime of slopping out upon prisoners, the respondents failed to accord respect to their dignity."[163] He rebutted the defence argument that only serious ill-treatment attaining a minimum level of severity fell within the scope of Article 3 of the ECHR[164] and asserted that it could be infringed by exacerbation of suffering flowing from various measures for which the authorities were responsible.[165]

5.3 Privacy and autonomy

There is a general right to privacy in the South African Constitution, a subset of which—couched in negative terms—are specific rights to be free from interference by the state and others in a tangible physical sense.[166] There is no separate right to autonomy in the South African Constitution. According to Currie and de Waal, the South African Constitution is unusual in combining protection against illegal searches and seizures with the general right to

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Constraints on resources were not an exculpatory factor, *ibid*, at [153]:

> The Court is aware of the fact that solving the systemic problem of overcrowding in Poland may necessitate the mobilisation of significant financial resources. However, it must be observed that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention ... and that it is incumbent on the respondent Government to organise its penitentiary system in such a way that ensures respect for the dignity of detainees, regardless of financial or logistical difficulties.

Should the state be unable to reach the threshold, "it must abandon its strict penal policy in order to reduce the number of incarcerated persons or put in place a system of alternative means of punishment": *ibid*.

[162] *Kalashnikov v Russia* (App no 47095/99) (2003) 36 EHRR 34, at [95].

[163] 2005 SC 229 (Court of Session Outer House), at [51]. For a review and assessment of *Napier*, see Steve Foster, "Prison Conditions, Human Rights and Article 3 ECHR" [2005] *PL* 35, at 35-37, 39, 43.

[164] 2005 SC 229 (Court of Session Outer House), at [64].

[165] *Ibid*, at [73], citing *Pretty v UK* (App no 2346/02) (2002) 35 EHRR 1, at [52]. The conditions of detention, taken together, were found to have diminished Robert Napier's human dignity and aroused in him feelings of anxiety, anguish, inferiority and humiliation, thereby subjecting him to degrading treatment: 2005 SC 229 (Court of Session Outer House), at [78].

Napier is an indication that the UK courts, applying Art 3 ECHR, may not stick rigidly to the European Court of Human Rights standard designed to apply throughout Europe, but will seek to evolve a sense of "minimum standards" which is more exacting: Stephen Livingstone, Tim Owen and Alison Macdonald, *Prison Law* (4th edn OUP, Oxford 2008), at 255.

[166] Constitution of the Republic of South Africa 1996, Section 14:

> Everyone has the right to privacy, which includes the right not to have
> a) their person or home searched;
> b) their property searched;
> c) their possessions seized; or
> d) the privacy of their communications infringed.

privacy and in making the former a component of the latter.[167] The general right to privacy extends beyond territorial and physical integrity and control over correspondence with others to the freedom to develop one's personality by making and implementing personal decisions of an intimate self-defining nature and by forming relationships.[168] As with all rights, the right to privacy is not absolute and can be limited by societal considerations and the entitlements of other members of the community.

5.3.1 Common law *dignitas*

A common law right to privacy based on *dignitas* pre-dated the Constitution. It coincided with the US model of non-interference with the individual and diminished the more a person exposed himself to society, as explained by Ackermann J in *Bernstein v Bester*:

> In South African common law the "right to privacy is recognised as an independent personality right which the courts have included within the concept of *dignitas*". "Privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state". In *Financial Mail (Pty) Ltd v Sage Holdings Ltd* it was held that breach of privacy could occur either by way of an unlawful intrusion upon the personal privacy of another, or by way of unlawful disclosure of private facts about a person. The unlawfulness of a (factual) infringement of privacy is adjudged "in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the Court".[169]

He gave the following examples of wrongful intrusion and disclosure under common law which breached confidence and invaded personal space:

> entry into a private residence, the reading of private documents, listening in to private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion, and the disclosure of private facts contrary to the existence of a confidential relationship.[170]

The *actio iniuriarum* protects the right to privacy under *dignitas*. To succeed in this cause of

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[167] Currie and de Waal (n20), at 315.

[168] In Germany the right to develop one's personality is a necessary and implicit corollary to the guarantee to respect human dignity; since it can be limited by the rights of others, the German Federal Constitutional Court has had to scrutinise complex situations to shape its contours and zealously guards the integrity of the intimate core of privacy against intrusions by others and by the state; it has distinguished between a private sphere of action in which the person's personality develops from actions taken as a consequence of interaction with society: Luis Aníbal Avilés Pagán, "Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico" (1998) 67 *Rev Jur UPR* 343, at 354-355.

[169] 1996 (2) SA 751 (CC), at [68] (footnotes omitted).

[170] *Ibid*, at [69] (footnotes omitted).

action in the law of delict, it is necessary to prove impairment of privacy, wrongfulness and intention (*animus iniuriandi*)—therefore negligence is insufficient to render the wrongdoer liable.[171] The degree of protection afforded privacy at common law is quite restricted. The plaintiffs in *NM v Smith*[172] sought its development along the lines in which the law of defamation, also protected by the *action iniurarum*, had been expanded by the Supreme Court of Appeal in *Bogoshi*.[173] The Constitutional Court in a majority decision in *NM v Smith* held in favour of the plaintiffs and awarded them damages for the revelation of private information about them without their consent on the basis that the revelations had been intentional.[174] Therefore it was not necessary to develop the common law of privacy, as they succeeded under the existing *actio iniuriarum* requiring intention. Madala J for the majority did not rule out the development of the common law in an appropriate case.[175] O'Regan J dissenting on the facts, considered that the common law of privacy should be developed by requiring the media not to negligently or unreasonably reveal private information without consent.[176] She imposed greater delictual liability on the media than on ordinary citizens because of the power of the media and their potential to cause widespread harm to individuals on account of the ease and speed of transmission of information to a large audience.[177] She pointed to the dual factors governing the media's conduct, when she explained why they had a greater obligation to respect privacy than ordinary individuals, "the media are not only bearers of rights under our constitutional order, but also bearers of obligations."[178] The right to freedom of expression was put in the balance with the duty to respect people's rights to privacy and dignity.

Sachs J in *NM v Smith*, supporting Madala J's majority judgment, also made some observations favourable to development of the common law. He approved of the development of the law of defamation in *Bogoshi* "in a way that was sensitive to contemporary concerns and realities, a well-weighted means of balancing respect for individual personality rights with concern for freedom of the press."[179] The principles developed in it were "eminently transportable to the

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[171] *NM v Smith* 2007 (5) SA 250 (CC), at [55].
[172] 2007 (5) SA 250 (CC).
[173] *National Media Ltd v Bogoshi* 1998 (4) SA 1196.
[174] 2007 (5) SA 250, at [65]. See Christopher J Roederer, "Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa's Bill of Rights" (2009) 26 *Ariz J Intl & Comp L* 427, at 479-481.
[175] 2007 (5) SA 250, at [57].
[176] *Ibid*, at [179].
[177] *Ibid*, at [177].
[178] *Ibid* (footnote omitted).
[179] *Ibid*, at [203].

law of privacy."[180] He praised *Bogoshi* for harmonising rights and looking at the context.[181] Langa CJ dissenting in part, agreed with O'Regan J that the common law must be developed in accordance with the spirit, purport and objects of the Bill of Rights, as required by Section 39(2) of the Constitution. The change should be made with regard to media defendants and he thought it "constitutionally appropriate that the media should be held to a higher standard than the average person."[182] He did not approve of negligent disclosures of private facts by individuals not in the media, but it was not something that was appropriate for the law to regulate, as "to extend that standard to ordinary people, and thus to everyday relationships, would be to extend the law too far into intensely personal space."[183]

5.3.2 Scope of constitutional privacy

The constitutional right to privacy is more extensive than that at common law. Ackermann J, in a wide-ranging and deep analysis in *Bernstein v Bester*, pointed out that the scope of privacy was closely related to the concept of identity and that privacy was based on "what is necessary to have one's own autonomous identity", not on a libertarian "unencumbered self".[184] He referred to Rainer Forst's multi-level approach to identity—first, from the abstract individual; second, to the concrete communal; third, to societal membership; and fourth, to the community of humanity itself.[185] At the third level of political discourse, concrete difference and common equality are reconciled, and membership of society requires an acceptance of the individual's obligations towards the right of every member not to be excluded.[186] The community of humanity "demands mutual respect as a universal moral duty towards persons *as moral persons*".[187]

Privacy is respect for identity and autonomy, which are aspects of individual dignity.[188]

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[180] *Ibid.*

[181] *Ibid*, at [204]:

> [I]t seeks to harmonise as much as possible respect for human dignity and freedom of the press, rather than to rank them in terms of precedence. The emphasis is placed on context, balance and proportionality, and not on formal and arid classifications accompanied by mantras that favour either human dignity or press freedom.

[182] *Ibid*, at [94].

[183] *Ibid.*

[184] 1996 (2) SA 751 (CC), at [65] (footnote omitted).

[185] *Ibid*, at [66] (footnotes omitted).

[186] *Ibid*, at fn 92, citing Rainer Forst, "How not to speak about identity: the concept of the person in a theory of justice" (1992) 18 *Philosophy & Social Criticism* 293.

[187] 1996 (2) SA 751 (CC), at fn 93, citing Forst (n186).

[188] Dignity is at the heart of the approach to privacy: Arthur Chaskalson, "Human Dignity as a Constitutional Value" in David Kretzmer and Eckart Klein eds, *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, The Hague 2002), at 140.

Ackermann J's review of German law led him to conclude, "[p]rivacy is also protected out of respect for dignity".[189] Dignity embraces privacy, but is more far-reaching than it.[190] O'Regan J in *Khumalo v Holomisa* saw privacy as supportive of dignity.[191]

In *Hyundai* it emerged that the right to privacy is broader than the reach of dignity, as juristic persons—who are not the bearers of human dignity—have privacy rights, albeit not as intense as those of individuals.[192] In *Thint* it was reiterated that a corporate entity does not bear human dignity and therefore "its rights of privacy are much attenuated compared with those of human beings."[193]

Langa DP in *Hyundai* adopted Ackermann J's view of privacy as deriving from dignity and described the contraction of the sphere where privacy can be expected as one moves further into community:

> [P]rivacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core. This understanding of the right flows ... from the value placed on human dignity by the Constitution.[194]

Currie and de Waal deduce from this that a value (perhaps the principal value) served by privacy is human dignity.[195]

5.3.3 Rationale for privacy protection

O'Regan J in *NM v Smith* identified at least two inter-related reasons for the constitutional protection of privacy, the first flowing from the constitutional conception of what it means to

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[189] *Bernstein v Bester* 1996 (2) SA 751 (CC), at [77] (footnote omitted).

[190] Personality—closely linked to privacy and dignity—has a broader reach than privacy, as it extends to relationships and moral integrity giving a more holistic view of the ethical individual: Catherine Dupré, "Human Dignity and the Withdrawal of Medical Treatment: A Missed Opportunity?" [2006] *EHRLR* 678, at 688-690. Catherine Dupré proposes a more comprehensive understanding of dignity comprising the relationship aspect in addition to the autonomy focus giving a holistic approach and providing positive protection to human rights: Catherine Dupré, "Unlocking Human Dignity: Towards a Theory for the 21st Century" [2009] *EHRLR* 190, at 194, 198.

[191] 2002 (5) SA 401 (CC), at [27] (footnotes omitted):

> It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity.

[192] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC), at [18].

[193] *Thint (Pty) Ltd v National DPP* [2008] ZACC 13, 2009 (1) SA 1 (CC), at [77] (footnote omitted).

[194] 2001 (1) SA 545 (CC), at [18], citing *Bernstein* 1996 (2) SA 751 (CC), at [77].

[195] Currie and de Waal (n20), at 320.

be a human being, implicit in which was

> the right to choose what personal information of ours is released into the public space. The more intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information.[196]

The second reason for protecting privacy flowed from the democratic need to curb the power of the state and to prevent it from denying liberty and dignity by interfering with our private space.[197] She explained the mutually supportive nature of dignity, freedom and privacy, which are central to human existence:

> The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing.[198]

The Constitutional Court in *NM v Smith* upheld the individual's right to choose what personal information to reveal to others and to prohibit or put boundaries on further dissemination of the information. Madala J, having referred to the nature and scope of the right of privacy in many jurisdictions as envisaging a concept of the right to be left alone, described it as encompassing "the right of a person to live his or her life as he or she pleases."[199] In that case

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[196] 2007 (5) SA 250 (CC), at [129], [132].

[197] *Ibid*, at [133].

[198] *Ibid*, at [131] (footnote omitted).

[199] *Ibid*, at [32]-[33]. The US and German concepts of human dignity are close to each other in the field of privacy, particularly informational privacy and data protection, which act as a buffer against the state's tendency to invade into its citizens' personal affairs; the German Federal Constitutional Court has held that under Article 1 of the Basic Law everyone has the right to informational self-determination; the American term "privacy" expresses the right to protection of the individual private sphere: Ernst Benda, "The Protection of Human Dignity (Article 1 of the Basic Law)" (2000) 53 *SMU L Rev* 443, at 450. Roberta Kwall has also pointed out that the interest served in many privacy and publicity cases in the US embodies a spiritual quality rather than an interest in property or reputation: Roberta Rosenthal Kwall, "A Perspective on Human Dignity, the First Amendment, and the Right of Publicity" (2009) 50 *BCL Rev* 1345, at 1353. Because of the high level of attention the German Federal Constitutional Court pays to dignity, the range of social interactions where privacy is protected is wider than that accorded privacy in American jurisprudence: Pagán (n168), at 359. In the US the privacy right represents the constitutional recognition of a liberty interest to make fundamental personal decisions and can be curtailed by a compelling state interest: *ibid*, at 361-362.
The different understandings of the notions of liberty and privacy in the US and Continental Europe lead to differing views on human dignity—Europeans tend to build their sense of dignity upon personal integrity and honour, being reluctant to divulge personal information, while Americans' sense of personal dignity is focused on liberty from intrusion by the state: Man Yee Karen Lee, "Universal Human Dignity: Some Reflections in the Asian Context" (2008) 3(1) *Asian J Comparative L* http://www.bepress.com/asjcl/vol3/iss1/art10/ (visited 13 April 2010), at 15.
On the rights to data protection and informational self-determination, see Kai Möller, "Two Conceptions

three HIV-positive women claimed that their rights to privacy and dignity had been violated by publication of their names and HIV status in a biography. The Court made it clear that it was not an impairment of dignity to be HIV-positive, but that the women's dignity could be infringed by publishing intimate medical facts about them without their consent.[200] In making the distinction, O'Regan J put control over disclosure of personal information within the realm of privacy, breach of which infringed dignity.[201] She had no doubt that the right to privacy protects people from the publication of private medical information without their consent and that an appropriate balance had to be struck between this right and freedom of expression.[202] O'Regan J found on the facts that publication of the applicants' names and HIV status was neither intentional nor negligent, so she dissented.[203]

5.3.4 Contextual extent of privacy

The right to privacy extends beyond the confines of the home, as is evident from *Magajane* where legislation permitting searches to detect illegal gambling was found to be too broad.[204] Van der Westhuizen J indicated that one of the considerations in assessing whether privacy had been breached or was justified was the individual's "expectation of privacy", which is "more attenuated the more the business is public, closely regulated and potentially hazardous to the public."[205] The purpose of the statutory provision is relevant. Generally there is a low expectation of privacy in business premises, but here the aim to collect evidence for a criminal prosecution was significantly intrusive.[206] Dignity and personality are adversely affected by unauthorised searches and seizures, as they invade the individual's private sphere.[207]

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of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights" (2009) 29 *OJLS* 757, at 781-782. On the German right to informational self-control, see Shelly Ann Kamei, "Partitioning Paternity: The German Approach to a Disjuncture between Genetic and Legal Paternity with Implications for American Courts" (2010) 11 *San Diego Intl LJ* 509, at 530-532.

[200] 2007 (5) SA 250 (CC), at [48], [92], [139].

[201] *Ibid*, at [139]:

> It needs to be said clearly that the stigma attached to those living with HIV/AIDS is inconsistent with the constitutional value of human dignity. Disclosing that a person is living with HIV/AIDS cannot therefore be an infringement of dignity on the grounds that members of the community may improperly think less of them because they are suffering from this frightening illness. It does undermine their dignity to the extent that it denies those living with HIV/AIDS the right to determine to whom and when their illness should be disclosed, which is itself an aspect of the right to privacy ...

[202] *Ibid*, at [136], [147].

[203] *Ibid*, at [168], [189].

[204] 2006 (5) SA 250 (CC).

[205] *Ibid*, at [50].

[206] *Ibid*, at [94].

[207] *Ibid*, at [64].

5.3.5 Conflicting interests

Even though they are closely connected and mutually supportive, at times there can be a conflict between autonomy, freedom and privacy on the one hand and dignity on the other. Waiver of dignity is not wholly within the power of the beholder.[208] Society and humanity at an overarching level have an interest in preserving dignity—even against the wishes of members of society who may not want to uphold their own dignity whether because they have a different idea of what dignity means, are willing to forego dignity as understood by others, their self-esteem is so low that they do not recognise their own dignity, or for some other reason.[209]

The conflict was analysed when the statutory ban on prostitution survived a challenge by a narrow majority in *S v Jordan*.[210] All the judges concluded that the prostitution provision did not infringe the rights to human dignity and economic activity, and that if it did limit the right to privacy, such limitation was justifiable. They differed on the question of whether the law criminalising prostitution constituted unfair gender discrimination. O'Regan and Sachs JJ, who dissented on the equality issue, pointed out in a joint judgment that the dignity of the prostitute is infringed by her own actions and choices rather than by the law.[211] They assessed the extent of the right to privacy based on the relationships between the parties. The scope

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[208] Certain degrading behaviour may be wrongful even if the victim consents, as society has an interest in preserving human dignity: Vera Bergelson, "Autonomy, Dignity, and Consent to Harm" (2008) 60 *Rutgers L Rev* 723, at 730. The concept of dignity does not reflect the subjective state of mind of the perpetrator or the victim, but instead has an "objective," normative meaning: *ibid*, at 730-731.
Consent does not override all deontological rights and duties: Kenneth W Simons, "Dworkin's Two Principles of Dignity: An Unsatisfactory Nonconsequentialist Account of Interpersonal Moral Duties" (2010) 90 *BUL Rev* 715, at 733.

[209] A preference for any one individual's rights when in conflict with those of another must be guided by respect for the equal and inherent dignity of both: Bert B Lockwood, Jr, Janet Finn and Grace Jubinsky, "Working Paper for the Committee of Experts on Limitation Provisions" (1985) 7 *Hum Rts Q* 35, at 77.

[210] 2002 (6) SA 642 (CC). Cf the Supreme Court of Canada's majority decision to uphold the constitutionality of legislation making it illegal to solicit in public for the purposes of prostitution and to keep a bawdy house: *Prostitution Reference* [1990] 1 SCR 1123. On dignity and prostitution, see Neomi Rao, "Three Concepts of Dignity in Constitutional Law" (2011) 86 *Notre Dame L Rev* 183, at 228-229.

[211] 2002 (6) SA 642 (CC), at [74]:

> To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) [Sexual Offences Act 1957] but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.

Christopher McCrudden contrasts this justification by O'Regan and Sachs JJ with their earlier strongly autonomy-based approach in the gay rights cases: Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *EJIL* 655, at 706. See also Henk Botha, "Human Dignity in Comparative Perspective" (2009) 20 *Stellenbosch L Rev* 171, at 203.

of privacy was determined by the nature of the relationship concerned.[212] It was pertinent in "core" intimate personal relationships, but not in cold commercial transactions—even those involving the sale of sex in the "penumbra" of privacy.[213] O'Regan and Sachs JJ explained:

> [C]entral to the character of prostitution is that it is indiscriminate and loveless. It is accordingly not the form of intimate sexual expression that is penalised, nor the fact that the parties possess a certain identity. It is that the sex is both indiscriminate and for reward. The privacy element falls far short of "deep attachment and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life". By making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money.[214]

Although the prostitute's privacy is reduced, she still retains the right to have her dignity respected by the police and her customers.[215] While "her expectations of privacy are relatively attenuated" and she is placed "far away from the inner sanctum of protected privacy rights", the prostitute is not stripped "of her right to be treated with dignity as a human being and to have respect shown to her as a person".[216]

The judgment of Ngcobo J for the majority in *S v Jordan* is a defensive one in response to the minority judgment of Sachs and O'Regan JJ. The minority took a broader view and looked at the social setting rather than solely at the legislation. In their dissent finding that the prostitution provision constituted unfair indirect discrimination, they pinpointed the vulnerable position of prostitutes in society.[217] There is an ambiguous attitude to prostitutes and their clients, where the former are stigmatised and the latter forgiven.

In *De Reuck* legislation banning possession of child pornography was held to be a justifiable infringement of privacy and freedom of expression of a film producer charged with importing and possessing it.[218] The film producer's rights to privacy and expression had to give way to

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[212] 2002 (6) SA 642 (CC), at [80].
[213] *Ibid*.
[214] *Ibid*, at [83], citing Justice Brennan in *Roberts v United States Jaycees* 468 US 609 (1984), at 620.
[215] 2002 (6) SA 642 (CC), at [74].
[216] *Ibid*, at [83].
[217] Andrew Foster criticised the majority and minority decisions in *Jordan*, and concluded that the Constitutional Court was applying dignity selectively and contrary to women's interests: Andrew Foster, "The Role of Dignity in Canadian and South African Gender Equality Jurisprudence" (2008) 17 *Dalhousie J Legal Stud* 73, at 90-92.
[218] *De Reuck v DPP (Witwatersrand Local Division)* 2004 (1) SA 406 (CC).

the dignity rights of the child. It was not just the dignity of the child the subject of the pornography that was infringed, but, as Langa DCJ stated, the humanity of all children was impaired.[219]

5.4 Freedom of expression

Many battles over constitutional rights are between those seeking to assert freedom of expression and those who perceive the ideas sought to be communicated as a threat to their dignity.[220] Frequently free speech has to yield to other constitutional rights or its curtailment is justified under the limitations clause.[221] Section 16(1) of the South African Constitution, contains a general guarantee to all of freedom of expression and lists several specific inclusions in the overall right.[222] The interim Constitution contained no specific exclusions, so Section 16(2) is a novelty barring from protection war propaganda,[223] incitement of imminent violence,[224] and hate speech inciting harm based on race, ethnicity, gender or religion.[225] The

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[219] *Ibid*, at [63]:

> Children's dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. ... There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available. The chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity and integrity of children.

[220] Democracy and dignity are both simultaneously empowering and legitimate forms of constraint. Sometimes the protection of democracy demands constraints on individuals' human rights to ensure that the fullest possible deliberation takes place. Those in power may be least interested in ensuring a debate on constraints and may baulk at the idea of legislating such constraints; therefore judges have to be trusted to juggle commitments to dignity and democracy in the context of individual complaints, and in the process they are usually careful not to cause a constitutional crisis by usurping the legislature: Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP, Oxford 2006), at 558-559.

[221] The principle on which freedom of expression is founded (respect for the autonomy and dignity of human beings) also gives rise to other fundamental rights, ranging from personal security and privacy to citizenship and equality; since speakers should be required to respect the fundamental rights of others, the same ideals that justify freedom of speech can determine the limits of that freedom: Steven J Heyman, *Free Speech and Human Dignity* (Yale University Press, New Haven 2008), at 2.

[222] Constitution of the Republic of South Africa 1996, Section 16(1):

> Everyone has the right to freedom of expression, which includes
> a) freedom of the press and other media;
> b) freedom to receive or impart information or ideas;
> c) freedom of artistic creativity; and
> d) academic freedom and freedom of scientific research.

[223] *Ibid*, Section 16(2)(a).

[224] *Ibid* Section 16(2)(b).

[225] *Ibid* Section 16(2)(c). Many democratic countries restrict hate speech, having weighed orators' interests to the right of free expression against both the dignitary harm to individuals and the collective harm to pluralism: Alexander Tsesis, "Dignity and Speech: The Regulation of Hate Speech in a Democracy" (2009) 44 *Wake Forest L Rev* 497, at 521. Alexander Tsesis considers that the international trend to regulate hate speech is grounded in what is meant to "secure for all citizens the prerequisites of a life worthy of human dignity": *ibid*, citing Martha C Nussbaum, "Constitutions and Capabilities: 'Perception' Against Lofty Formalism" (2007) 121 *Harv L Rev* 4, at 7. See Rao (n210), at 251-253.

hate speech provision was inserted in response to representation by interest groups.[226]

5.4.1 Rationale for freedom of expression

Ronald Dworkin has grouped the justification for free speech into the *instrumental*, which protects democracy and produces good effects for the rest of us, and the *constitutive*, which supposes that free speech is valuable, not just on account of its consequences, but because it is an essential feature of a just political society that government treat all its adult members (except the incompetent) as responsible moral agents.[227] The instrumental view considers that politics is more likely to discover truth, if political discussion is free,[228] or that government is more likely to be less corrupt if it lacks power to punish criticism.[229] The constitutive angle has two dimensions, the first being that morally responsible people insist on making up their own minds about what is good or bad in life or politics, or true or false in matters of justice or faith, so the government insults citizens when it denies them the right to hear contrary opinions that might persuade them to dangerous or offensive convictions.[230] Dworkin describes the free reception of ideas as central to dignity, "[w]e retain our dignity, as individuals, only by insisting that no one—no official and no majority—has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it."[231] Many regard moral responsibility as also having another, more active, aspect leading to the second constitutive dimension of expressing our convictions to others out of respect and concern for them and so that truth be known, justice served, and the good secured.[232] The articulation of all types of views is posed by Dworkin as dually beneficial by upholding the dignity of both the giver and the recipient. The worth of each individual is accepted by acknowledging the equality of everyone to communicate their ideas.[233]

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[226] Gilbert Marcus, *Incitement to Hatred: A Southern African Perspective* (Media Law and Practice in Southern Africa, Article 19, London 1998), at 14.

[227] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP, Oxford 1996), at 200. Justice Brennan's view was that rights of expression and of conscience reaffirmed "the vision of human dignity in many ways"; he mentioned, first, self-governance by demanding robust public debate on issues of public importance, which was vital to the development and dissemination of political ideas, and, as importantly, by forging personal political convictions; and, second, the freeing up of private space for intellectual and spiritual development: Brennan (n5), at 442-443.
In response to critics of Justice Brennan's stance on free speech, Stephen Wermiel observed that for him it was the ability of the speaker to speak that was at the core of the ideal of human dignity, which he sought to protect in the face of the countervailing interests of the majority who found the speech unwanted or offensive: Wermiel (n87), at 236-237.

[228] Dworkin (n227), at 200, citing Justice Holmes in his dissent in *Abrams v US* 250 US 616 (1919).

[229] Dworkin (n227), at 200.

[230] *Ibid*.

[231] *Ibid*.

[232] *Ibid*.

[233] Dworkin also developed his theory of citizens' obligation to comply with the laws of a legitimate state

John C Mubangizi has mentioned a third reason why freedom of expression should be given constitutional protection, which is that free speech encourages debate and improves the chances that the truth will surface.[234] This could be regarded as embraced by both of Dworkin's groupings, which overlap.[235] Eric Barendt traced the truth argument back to Milton, although it is especially associated with John Stuart Mill.[236] The three underlying reasons identified were mentioned by O'Regan J in *SANDU*.[237]

Laurence Tribe's analysis of the various rationales for free speech led him to assert that any adequate conception of it must draw on several strands of theory to protect a rich variety of

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from the principles of dignity and equality: Susanne Sreedhar and Candice Delmas, "State Legitimacy and Political Obligation in *Justice for Hedgehogs*: The Radical Potential of Dworkinian Dignity" (2010) 90 *BUL Rev* 737, at 745.

[234] John C Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (Juta, Lansdowne 2004), at 87. Steven Heyman considers that the elements of liberty correspond to the major justifications for freedom of expression, *ie*, that freedom of expression is an aspect of external freedom, essential for individual self-realisation, indispensable to democratic self-government, and promotes the search for truth: Heyman (n221), at 2.

[235] Dworkin (n227), at 201.

[236] Eric M Barendt, *Freedom of Speech* (2nd edn OUP, Oxford 2005), at 7. McLachlin J (dissenting) in *R v Keegstra*, having referred to the truth rationale for freedom of expression as dating back to Milton, acknowledged that it had been criticised as there was no guarantee that the free expression of ideas would in fact lead to the truth: [1990] 3 SCR 697 (SC of Canada), at 110-111. However, she considered it could still be argued that it assisted in promoting the truth in ways which would be impossible without freedom of expression: *ibid*, at 111. Dickson CJ (for the majority) also had doubts about the universal application of the truth rationale and cautioned against overplaying "the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas": *ibid*, at 69-70. Jacob Weinrib found it surprising that the Supreme Court of Canada had not engaged in an analysis of whether the traditional purposes of freedom of expression cohere with the values in the Canadian Charter, given the transformative implications of the Charter and the Court's indications in *R v Keegstra* that the purposes taken as underlying freedom of expression might be inadequate: Jacob Weinrib, "What is the Purpose of Freedom of Expression?" (2009) 67 *U Toronto Fac L Rev* 165, at 167.

[237] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), at [7] (footnotes omitted):

> Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

As Ryan Haigh has noted, in this passage O'Regan J demonstrated that freedom of speech is fundamental: Ryan F Haigh, "South Africa's Criminalization of 'Hurtful' Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression" (2006) 5 *Wash U Global Stud L Rev* 187, at 208, fn 138.

Cf the view of Dumbutshena AJA of the Namibian Supreme Court that in a democracy "the citizens must be free to speak, criticise and praise where praise is due"; he continued, "[m]uted silence is not an ingredient of democracy because the exchange of ideas is essential to the development of democracy": *Kauesa v Minister of Home Affairs* [1995] NASC 3; 1995 (11) BCLR 1540 (NmS), at 28.

expressional modes.[238] No adequate conception of free speech can be developed in purely instrumental or "purposive" terms.[239] Free speech is not only a means to some further end, such as successful self-government, social stability or the less instrumental discovery and dissemination of truth, but, as Tribe suggests, it is in part also an end in itself, "an expression of the sort of society we wish to become and the sort of persons we wish to be".[240] Much of our commitment to free speech is because it enhances personal growth and self-realisation.[241] Intellect and rationality cannot accommodate what Tribe described as "the emotive role of free expression—its place in the evolution, definition, and proclamation of individual and group identity."[242]

Dworkin's constitutive rationale corresponds with the theory of free speech as an integral aspect of self-fulfilment described by Barendt, who expanded on its benefits for the individual:

> Restrictions on what we are allowed to say and write, or (on some formulations of the theory) to hear and read, inhibit our personality and its growth. A right to express beliefs and political attitudes instantiates or reflects what it is to be human. ...
>
> There is perhaps something uniquely valuable in intellectual self-development. The reflective mind, conscious of options and the possibilities for growth, distinguishes human beings from animals.[243]

While the self-fulfilment argument may justify giving constitutional protection to free speech, this rationale is closely linked to general liberty or moral autonomy.[244] Barendt points out that unlimited speech justified on the basis of self-fulfilment, dignity and equality may be contrary to respect for human dignity.[245]

Currie and de Waal have noted traces of Dworkin's instrumental and constitutive arguments in the South African jurisprudence interpreting the right to freedom of expression.[246] His instrumental strand can be seen in Kriegler J's judgment in *S v Mamabolo* when he indicated that freedom of expression as the communication of ideas is essential for democracy.[247]

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[238] Laurence H Tribe, *American Constitutional Law* (2nd edn Foundation Press, New York 1988), at 789.
[239] *Ibid*, at 785.
[240] *Ibid*.
[241] *Ibid*, at 787.
[242] *Ibid*.
[243] Barendt (n236), at 13.
[244] *Ibid*, at 14.
[245] *Ibid*, at 15.
[246] Currie and de Waal (n20), at 361.
[247] 2001 (3) SA 409 (CC), at [37]:

> Freedom of expression, especially when gauged in conjunction with its accompanying

O'Regan J articulated the constitutive strand—and, indeed, the instrumental one also—in *Khumalo v Holomisa*.[248] Both strands are also evident in Mokgoro J's judgment in *Case*, where she considered that the statutory prohibition on pornography breached freedom of expression in the interim Constitution because it was overbroad.[249] Apart from seeing the dual purpose of freedom of expression, she rightly understood constitutional rights as interrelated and uniting to sustain societal interplay that is of benefit to the giver and receiver of information, which also accords with Dworkin's views. In addition to the advantage to the speaker of broadcasting ideas to another and being listened to, there is a boomerang effect in being able to refine thoughts as a result of the listener's feedback.[250]

> fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression—the free and open exchange of ideas—is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed.

Haigh cited this passage as a demonstration by the Constitutional Court that freedom of speech is fundamental: Haigh (n237), at 208, fn 138. See Allister Sparks, *Beyond the Miracle: Inside the New South Africa* (Profile Books, London 2003), at 78-82.

[248] "Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.": 2002 (5) SA 401 (CC), at [21].

[249] *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), at [27] (footnotes omitted):

> We must understand the right embodied in section 15 not in isolation, but as part of a web of mutually supporting rights enumerated in the Constitution, including the right to "freedom of conscience, religion, thought, belief and opinion", the right to privacy, and the right to dignity. Ultimately, all of these rights together may be conceived as underpinning an entitlement to participate in an ongoing process of communicative interaction that is of both instrumental and intrinsic value.

Cf the Supreme Court of Canada's finding that the Criminal Code's prohibition on possession of child pornography infringing freedom of expression was justified under the limitations clause, except for two aspects which were overbroad: *R v Sharpe* 2001 SCC 2, [2001] 1 SCR 45. The reverse onus putting the onus of disproving obscenity on the importer was held unconstitutional in a challenge to the seizure of erotica by customs authorities, although the remainder of the legislation was justified: *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* 2000 SCC 69, [2000] 2 SCR 1120 (SC of Canada).

On *R v Sharpe*, see Andrea Slane, "From Scanning to Sexting: The Scope of Protection of Dignity-Based Privacy in Canadian Child Pornography Law" (2010) 48 *Osgoode Hall LJ* 543, at 560-562, 567-569, 579-580, 584, 586.

[250] 1996 (3) SA 617 (CC), at [25] (footnote omitted):

> But my freedom of expression is impoverished indeed if it does not embrace also my right to receive, hold and consume expressions transmitted by others. Firstly, my right to express myself is severely impaired if others' rights to hear my speech are not protected. And secondly, my own right to freedom of expression includes as a necessary corollary the right to be exposed to inputs from others that will inform, condition and ultimately shape my own expression. Thus, a law which deprives willing persons of the right to be exposed to the expression of others gravely offends constitutionally protected freedoms both of the speaker and of the would-be recipients.

Freedom of expression's importance for good government and for humanity was recognised by Yacoob J in *Phillips* when he said it was "integral to democracy, to human development and to human life itself."[251] O'Regan J in *NM v Smith,* where she dissented on the facts, stressed the interrelationship between rights and also the weight to be given to freedom of expression in personal development by exchanging ideas resulting in motivation to action.[252] The outward manifestation of religion and culture are protected by the right to freedom of expression.[253] The banning of Hindu students from wearing nose studs in school limited their right to express their religion and culture which Langa DCJ said was "central to the right to freedom of expression".[254] Religious and cultural practices are "central to human identity and hence to human dignity which is in turn central to equality."[255]

5.4.2 Exclusions from protection

The South African Constitution is read as a whole. Doing so enabled Langa DCJ to indicate in *Islamic Unity Convention* that the reason for the qualifications to freedom of expression in Section 16(2) was the threat to the foundational values including dignity.[256] He found that any restriction on freedom of expression beyond the terms allowed in Section 16(2) "encroaches on the terrain of protected expression and can do so only if such regulation meets the

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[251] *Phillips v DPP (Witwatersrand Local Division)* 2003 (3) SA 345 (CC), at [23].

[252] 2007 (5) SA 250 (CC), at [145]:

> Freedom of expression is important because it is an indispensable element of a democratic society. But it is indispensable not only because it makes democracy possible, but also because of its importance to the development of individuals, for it enables them to form and share opinions and thus enhances human dignity and autonomy. Recognising the role of freedom of expression in asserting the moral autonomy of individuals demonstrates the close links between freedom of expression and other constitutional rights such as human dignity, privacy and freedom. Underlying all these constitutional rights is the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them.

[253] In liberal rights discourse, freedom of thought and conscience are each considered to be *absolutely* protected from interference by the law, but the right to *manifest* one's thought or conscience in the form of speech or other action is subject to reasonable limitation by the state on certain specified grounds: Peter G Danchin, "Defaming Muhammad: Dignity, Harm, and Incitement to Religious Hatred" (2010) 2 *Duke Forum L & Social Change* 5, at 20-21.

[254] *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC), at [94]. See Lourens du Plessis, "Affirmation and Celebration of the 'Religious Other' in South Africa's Constitutional Jurisprudence on Religious and Related Rights: Memorial Constitutionalism in Action?" (2008) 8 *AHRLJ* 376, at 396-401. The Supreme Court of Zimbabwe held that expulsion of a Rastafarian from school because of the expression of his religious belief through his hairstyle violated his right to religious expression and was discriminatory: *Dzvova v Minister of Education Sports and Culture* [2007] ZWSC 26.

[255] 2008 (1) SA 474 (CC), at [62]. See Botha (n211), at 206-207.

[256] *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC), at [32]:

> Implicit in its provisions [Section 16(2)] is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to.

justification criteria in section 36(1) of the Constitution."[257] The *Islamic Unity Convention* litigation resulted from a complaint by the South African Jewish Board of Deputies to the Independent Broadcasting Authority that an interview broadcast by a community station owned by the Islamic Unity Convention breached the IBA's Code of Conduct which prohibited the broadcasting of material "likely to prejudice relations between sections of the population, i.e. Jews and other communities."[258] In a challenge by the Islamic Unity Convention to the constitutionality of the Code, the Court held that the Code limited the right to freedom of expression and went on to consider whether the limitation was justifiable. It noted that the regulation of broadcasting was a legitimate objective and was mandated by the Constitution because of its importance to national unity and the founding values of dignity, equality and freedom. Langa DCJ considered that the labelling of people by virtue of their innate identity—particularly in view of South Africa's history of institutionalised discrimination—undermined these values.[259] The Court held that the Code went too far and was not sufficiently focused to guide broadcasters in what they might or might not broadcast. While the prohibition in the Code was declared unconstitutional and invalid, the Court's declaration of invalidity was made subject to the proviso that no protection was given to the broadcasting of material that contravened the specific exclusions in Section 16(2).

The hate speech excluded from protection is limited to that which amounts to incitement to cause harm. There are contrary views as to whether the exclusion extends to hurtful comments.[260] Ryan Haigh has pointed out that the right to express one's thoughts and to communicate freely with others "affirms the dignity and worth of every member of society,

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[257] *Ibid*, at [34].

[258] *Ibid*, at [2]. The interview dealt with Israel and Zionism as a political ideology; it was asserted that Jewish people were not gassed in concentration camps: *ibid*, at [1].

[259] *Ibid*, at [45] (footnote omitted):

> South African society is diverse and has for many centuries been sorely divided, not least through laws and practices which encouraged hatred and fear. Expression that advocates hatred and stereotyping of people on the basis of immutable characteristics is particularly harmful to the achievement of these values as it reinforces and perpetuates patterns of discrimination and inequality.

[260] In *R v Keegstra* where a teacher had been convicted of wilfully promoting hatred against an identifiable group by communicating anti-semitic statements to his students, the Supreme Court of Canada found that legislation prohibiting hate speech infringed freedom of expression, but was justified under the limitations clause; *mens rea* meant that the offence required intent to promote hatred or knowledge of substantial certainty of it as a consequence; Dickson CJ for the majority stated that freedom of expression in Canada protected all content of expression attempting to convey a meaning (except when communicated in a physically violent form): [1990] 3 SCR 697, at 37.
There is a distinction between expressive activity that is inconsistent with the dignity of all persons (dignity being a public value which requires that persons not be subject to hatred), on the one hand, and expressive activity which is merely offensive (offence being a subjective reaction rooted in the beliefs of private persons and associations), on the other: Weinrib (n236), at 184.

and allows each individual to determine what is true and to realize his or her full human potential."[261] He argues that dignity should not be used to prevent free speech not amounting to the urging of violence.[262] Control over speech during the apartheid era led to oppression and the stripping of people of their dignity.[263] Dissenters should be able to express their views. Prohibiting criticism or the airing of contrary views does not change the attitudes of racists or bigots, but, as Haigh thought, may push them underground, where they may become more dangerous.[264] Encouragement of diverse and dissenting voices is healthy in a democracy. This is in the interests of all, as the principle of suppression of views, once established, could affect oneself in another capacity or a different situation in future. Tolerance—even of one's opponents' views—is necessary for the security of all in society, as Thomas Paine stated, "[h]e that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself."[265] Haigh concluded, "[dignity] should not be used as a means to restrict essential freedoms, such as speech, thereby stripping individuals of the very qualities that they are trying to instill into society."[266]

On the other hand, Currie and de Waal submit that the hate-speech exception includes harm to dignity interests on the basis that it is the speech itself that causes the social and psychological harm, and not the audience "who may or may not be sufficiently fired up to translate the message into violent action".[267] They define hate speech as "advocacy of hatred on a listed ground, intended to cause harm to dignity."[268]

5.4.3 Limits to protection

Restrictions on freedom of expression have often been justified under the limitations clause. One of the factors to be taken into account in the limitations analysis is the nature of the right

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[261] Haigh (n237), at 208 (footnote omitted).

[262] Weinrib has criticised Ronald Dworkin's analysis of autonomy (a right to moral independence) as permitting hate speech, because he overlooks the capacity of hate speech to undermine the autonomy of others: Weinrib (n236), at 178-179.

[263] Haigh (n237), at 209.

[264] *Ibid*.

[265] Thomas Paine, "Dissertation on First Principles of Government" in Thomas Paine, *The Writings of Thomas Paine Vol III* (Moncure Daniel Conway ed, Routledge/Thoemmes Press, London 1996), at 277.

[266] Haigh (n237), at 210.

[267] Currie and de Waal (n20), at 377. Weinrib considers that hate speech may be limited because it seeks to use rights that are founded in the value of human dignity in a manner that denies the dignity of others, and the capacity of others to hold rights, including the right to free expression: Weinrib (n236), at 187.

[268] Currie and de Waal (n20), at 377.

and in South Africa freedom of expression in itself is not a foundational value. It plays a vital role in democracy, but there are more significant values to be borne in mind. O'Regan J explained in *Khumalo v Holomisa*:

> [A]lthough freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality.[269]

Because of its nature, it has been curtailed when there are more pressing values in play.

Any type of expression not specifically excluded under Section 16(2) is protected to some extent, but may be limited by the application of the foundational values. The South African courts have adopted the broad European standard of protection instead of the US position where certain categories of expression are unprotected forms of speech.[270] In *de Reuck* Langa DCJ confirmed approval of the European Court of Human Rights' approach in finding that the Section 16(1)(b) right "to receive or impart information or ideas" applied "... not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb...".[271] Hence child pornography was protected and restrictions on it were subject to justification under a limitation analysis, but it stands on the fringe of expression deserving slight protection because it is of minor benefit to the individuals in question. In view of the underlying reasons for freedom of expression, Langa DCJ did not see the statutory restrictions on child pornography as attacking "the core values of the right."[272]

In defamation actions dignity is balanced against freedom of expression, as O'Regan J made

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[269] 2002 (5) SA 401 (CC), at [25] (footnote omitted). In Germany the right to dignity has also interacted dramatically with rights to information and freedom of expression providing in the case of Germany a right to control personal information: Klug (n2), at 153.

[270] *De Reuck v DPP (Witwatersrand Local Division)* 2004 (1) SA 406 (CC), at [48]-[49]. Heyman advocates the adoption in the US of a liberal humanist approach and understanding freedom of expression within a broader conception of rights based on human dignity and autonomy; this would recognise a strong, liberal right to freedom of expression, while affording protection against the most serious forms of "assaultive speech"; his rights-based theory of the First Amendment would replace the modern conception of First Amendment issues as conflicts between the individual right to free speech and "social interests" such as dignity and equality: Heyman (n221), at 2, 4.

[271] 2004 (1) SA 406 (CC), at [49], citing *Islamic Unity Convention* 2002 (4) SA 294 (CC), at [29], quoting *Handyside v UK* (1976) 1 EHRR 737, at 754.

[272] 2004 (1) SA 406 (CC), at [59]. He continued: "Expression that is restricted is, for the most part, expression of little value which is found on the periphery of the right and is a form of expression that is not protected as part of the freedom of expression in many democratic societies.": *ibid* (footnote omitted).

plain in *Khumalo v Holomisa*:

> The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.[273]

The chilling effect of defamation laws and high awards on freedom of the press is regularly criticised—more often than not by journalists. However, in *Dikoko v Mokhatla* Swkeyiya J thought it a good thing supportive of dignity that people would desist from saying something potentially defamatory resulting in curbing free speech.[274]

The existence or extent of freedom of commercial speech was an unresolved issue in the *Laugh It Off* case, where Moseneke J described freedom of expression as "a vital incidence of dignity, equal worth and freedom" carrying "its own inherent worth" and serving "a collection of other intertwined constitutional ends in an open and democratic society."[275] The case involved a conflict between Laugh It Off Promotions CC, a small South African corporation that made social commentary by altering well-known trade marks and printing them on T-shirts for sale, and an international corporation trading as Sabmark International, whose trade mark it had altered. The Constitutional Court decided the case on the basis that Sabmark had failed to prove Laugh It Off's infringement of its trade mark, as it did not show that it was likely to suffer economic harm.[276] Sachs J, in a concurring judgment, would have upheld the decision on more substantial grounds, giving more weight to expression rights and "the uniquely expressive weight of the parodic form used."[277] He rightly regarded criticism of the status quo and branding as healthy in a democracy and supportive of human dignity.[278] Although the

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[273] 2002 (5) SA 401 (CC), at [28].

[274] 2006 (6) SA 235 (CC), at [141]:

> A person who suspects that they may possibly be about to defame someone else is cognisant of the fact that if they do, there may be legal consequences. As a result, they either refrain from making the utterance or do some background checking first. So the kinds of utterances which are chilled are those which an ordinary person may suspect to be defamatory in nature. The chilling of this kind of expression is by no means an undesirable result and is in line with the framework of intersecting rights outlined above in which freedom of expression may well have to take a back seat to dignity in certain circumstances.

[275] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC), at [45].

[276] It was not necessary to make a finding on freedom of expression relied on by Laugh It Off.

[277] 2006 (1) SA 144 (CC), at [74].

[278] *Ibid*, at [108]:

> Laughter too has its context. It can be derisory and punitive, imposing indignity on the weak at

issue of commercial speech was not ruled on in *Laugh It Off*, the Constitutional Court had recognised the individual and collective sides to expression in *SANDU* when O'Regan J indicated "the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial."[279]

The US Supreme Court took the view initially that commercial advertising was not encompassed in the right to free speech. In 1942 in *Valentine v Chrestensen* it upheld a ban on commercial advertising—even when combined with political protest, which had constitutional protection.[280] More than 20 years later in *New York Times v Sullivan* it found that paid advertising for political purposes was protected.[281] The change of direction was complete in *Bigelow* in 1975, when the Court struck down a statute in Virginia prohibiting a commercial advertisement for legal abortion services in another state.[282] The information was of interest to the women wishing to have an abortion and to the general public, who could be concerned with law reform and with legal developments in other states. Justice Blackmun distinguished *Chrestensen*, which he said was limited to upholding the ban on commercial advertising as "a reasonable regulation of the manner in which commercial advertising could be distributed."[283] It was not authority for the proposition that all statutes regulating commercial advertising were immune from constitutional challenge.[284]

To revert to South Africa, in *Phillips* the Constitutional Court in a majority decision held that freedom to receive and impart information or ideas and freedom of artistic creativity protected in Section 16(1)(b) and (c) were infringed by overbroad restrictions on places of

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> the hands of the powerful. On the other hand, it can be consolatory, even subversive in the service of the marginalised social critics. What has been relevant in the present matter is that the context was one of laughter being used as a means of challenging economic power, resisting ideological hegemony and advancing human dignity.

Free speech as a motivator for change was also referenced by McLachlin CJ and LeBel J of the Canadian Supreme Court in a joint judgment, when they stated, "[free speech] allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment": *Retail, Wholesale and Department Store Union, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* 2002 SCC 8, [2002] 1 SCR 156, at [32].

[279] 1999 (4) SA 469, at [8].

[280] 316 US 52 (1942). *Chrestensen* prevailed until the 1960s when signs of erosion of the commercial-speech doctrine began to appear: Thomas L Tedford and Dale A Herbeck, *Freedom of Speech in the United States* (5th edn Strata Pub, State College, Pa 2005), at 200.

[281] 376 US 254 (1964).

[282] *Bigelow v Virginia* 421 US 809 (1975).

[283] *Ibid*, at 819.

[284] *Ibid*, at 819-820.

entertainment selling liquor.[285] Less restrictive measures could have secured the state's interest in controlling the negative effects of the over-consumption of liquor in public places.

By a majority in *South African Broadcasting Corporation v National DPP* the Constitutional Court held that as reconciliation of rights was not possible, in the situation that arose the right to a fair trial should prevail over the right of the media to broadcast court proceedings.[286] In the interests of justice, the court should "seek to reconcile the fundamental rights at issue with its obligation to ensure that the proceedings before it are fair."[287] Although there is no hierarchy of rights in the Constitution, the Court considered that there are circumstances in which one right will take precedence.[288] The tendency is towards fair trial rather than in favour of freedom of expression and open publication of court proceedings.[289] Mokgoro J (dissenting), having said that she considered the public broadcaster had the right and freedom to disseminate information correlating with its duty to inform the public, which, in turn, had the right to receive information,[290] continued, "[i]n an open democracy based on the values of equality, freedom and human dignity, the right of the public to be informed is one of the rights underpinned by the value of human dignity."[291]

5.5 Equality

There are tests to be applied by the court in sequence in order to decide if the constitutional

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[285] *Phillips v DPP (Witwatersrand Local Division)* 2003 (3) SA 345 (CC). The challenge was brought by a licensed premises where there was striptease dancing, but the legislation was wide enough to apply to plays and concerts irrespective of whether they represented "serious works of art or the communication of thoughts and ideas essential for positive social development": *ibid*, at [15].

[286] 2007 (1) SA 523 (CC). There were political overtones, as the accused was appealing against his conviction for corruption for bribing Jacob Zuma (now President of South Africa) in order to protect a French armaments company.
Daniel Erskine analysed this case and summarised the Constitutional Court's approach, "[t]he Court recognizes the frustration in granting all rights coequal status because in such a situation none of the rights may receive full expression.": Daniel H Erskine, "Judgments of the United States Supreme Court and the South African Constitutional Court as a Basis for a Universal Method to Resolve Conflicts between Fundamental Rights" (2008) 22 *St John's J Legal Comment* 595, at 604.

[287] 2007 (1) SA 523 (CC), at [53].

[288] *Ibid*, at [55].

[289] According to the majority, "[g]iven that a court has a primary obligation to ensure that the proceedings before it are fair, that obligation will always figure large in the exercise of discretion": *ibid*.

[290] The legal relations described by Mokgoro J are as conceived by Wesley Hohfeld, who devised a scheme of opposites and correlatives in which a right and a duty are correlatives, the opposite of rights being "no-rights" and a duty being the opposite of a privilege: Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale LJ* 16, at 30. See also Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 *Yale LJ* 710, at 710. On the relevance of Hohfeld's theory of jural relations to human rights, see Shiv RS Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (Studies in International Law, Hart, Oxford 2007), at 58-59.

[291] 2007 (1) SA 523 (CC), at [120].

guarantees concerning equality have been breached under the framework elaborated in *Harksen v Lane*.[292] As described by Evadné Grant, Section 9(1) plays a "gate-keeping role".[293] A measure that does not fall foul of Section 9(1) because the differentiation has a rational connection with a legitimate purpose may still constitute unfair discrimination.[294] Allowing for the fact that to legislate is to discriminate in some fashion, the Court in *Prinsloo* distinguished between "differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination."[295] It may be justified as corrective action under Section 9(2).[296] In *Van Heerden* Moseneke J disagreed with previous interpretations of Section 9(2) as an exception to the equality code.[297] He underlined the transformative purpose of the entire of Section 9 and an integrated interpretation of the Constitution—with substantive equality (including remedial measures) reaching out its tentacles.[298]

Apart from those enumerated in Section 9(3), there are other grounds of unfair discrimination in respect of which there is no presumption of unfairness.[299] The Constitutional Court in *Prinsloo*, relying on South Africa's historical reliance on institutionalised discrimination, identified violation of human dignity as the discerning feature of discrimination, whether on listed or unlisted grounds.[300] The Court made a distinction between the guaranteed right to

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[292] Evadné Grant, "Dignity and Equality" (2007) 7 *HRL Rev* 299, at 315-316.

[293] *Ibid*, at 316. See *Harksen v Lane* 1998 (1) SA 300 (CC), at [42] (Goldstone J). A provision in the Matrimonial Property Act 1984 unjustifiably denied spouses equal protection and benefit of the law: *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC), at [58], [63].

[294] Van der Westhuizen J explained the difference between the two provisions in *Weare v Ndebele* [2008] ZACC 20, 2009 (1) SA 600 (CC), at [72] (footnotes omitted):

> Whereas the core of section 9(1) is the idea that no-one is above or beneath the law and that all persons are subject to law impartially applied and administered, the core of the right against discrimination in section 9(3) is dignity. Differentiation becomes unfair discrimination when it is based on grounds that have the potential to impact upon the fundamental dignity of human beings.

[295] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), at [23].

[296] Grant (n292), at 316.

[297] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), at [32].

[298] *Ibid*, at [31]. Since corrective action is an issue which impacts on the determination of discrimination under Section 9(3), there is a potential overlap between the application of Section 9(2) and (3); this can be seen in *Van Heerden* where the majority of the Court held that the measure was aimed at ameliorating past disadvantage, and therefore fell within the ambit of Section 9(2), while the minority held that the matter should be resolved under the non-discrimination clause, and Sachs J in a separate concurring opinion took a holistic approach focusing on substance rather than technicalities: Grant (n292), at 322-323.
Transformation involves not only the fulfilment of socio-economic rights, but also the provision of greater access to education and opportunities through various mechanisms, including affirmative action measures: Pius Langa, "Transformative Constitutionalism" (2006) 17 *Stellenbosch L Rev* 351, at 352.

[299] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), at [28].

[300] *Ibid*, at [31] (footnote omitted):

> Given the history of this country we are of the view that discrimination has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes

equality and the right to equal treatment, which does not invariably apply, "[i]n Dworkin's words, the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment."[301] In *Harksen v Lane* Goldstone J amplified the features of discrimination on an unlisted ground, relying on the potential to impair dignity or an analogous effect.[302] He cautioned against trying to be too definitive about the grounds of discrimination and illustrated their wide-ranging nature.[303] Because it determines the burden of proof, the distinction between the listed and unlisted grounds is important procedurally, but, as Grant says, "from the point of view of principle, the underlying conception that unites them is the 'potential to impair dignity'."[304]

Citizenship was held to be an unlisted ground in *Larbi-Odam* where temporarily-employed foreign teachers with residence permits claimed their dismissal as part of a redundancy programme constituted unfair discrimination, since—unlike citizens—they were not entitled to apply for permanent positions.[305] Mokgoro J in the Constitutional Court found that foreign citizens were a vulnerable group because they were a minority with little political muscle, citizenship was a personal attribute which was difficult to change, and foreign citizens were vulnerable to threats and intimidation.[306] She used the potential to impair dignity as the

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> and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity. ... In our view unfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

Recognition of human dignity understood here as the antithesis of the exclusion of humanity under apartheid is concerned with the denial of dignity and does not provide a positive definition: Joan Small and Evadné Grant, "Dignity, Discrimination, and Context: New Directions in South African and Canadian Human Rights Law" (2005) 6(2) *Human Rights Rev* 25, at 37.

[301] 1997 (3) SA 1012 (CC), at [32], citing *Taking Rights Seriously* (Harvard UP, Cambridge, Mass 1977), at 227.

[302] "There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.": 1998 (1) SA 300 (CC), at [46].

[303] *Ibid*, at [49]:

> These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted.

[304] Grant (n292), at 318.

[305] *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC).

[306] *Ibid*, at [19]-[20]. This provides some insight into the kinds of factors that might be taken into account in determining discrimination, but is not a comprehensive approach: Grant (n292), at 318.

yardstick for unfair discrimination.[307]

The determining factor in ascertaining whether discrimination is unfair is the impact it has on its victims.[308] Currie and de Waal have emphasised the central importance of dignity to understanding unfair discrimination, which is hurtful or demeaning differential treatment and occurs "when law or conduct, for no good reason, treats some people as inferior or incapable of less deserving of respect than others" or "when law or conduct perpetuates or does nothing to remedy existing disadvantage and marginalisation."[309] Goldstone J in *Harksen v Lane* set out the factors to be considered when determining whether the impact is unfair, one of which is "the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."[310] The contextual factors can be summarised as past systematic disadvantage, the nature and purpose of the challenged measure, and its effect on dignity or, as Grant has labelled them, historical disadvantage, corrective action and impact.[311] They, and others which may emerge, are assessed objectively and cumulatively to determine whether discrimination is unfair.[312]

The impact of a city council's policy of selective recovery of debts on residents of white neighbourhoods was held by the majority of the Constitutional Court in *City Council of Pretoria*

In a challenge to legislation regulating the private security industry, the majority and minority both identified refugees as a vulnerable group: *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC), at [24], [28]-[31], [82], [113], [117], [122]-[123], [127].

[307] 1998 (1) SA 745 (CC), at [20].

[308] Currie and de Waal (n20), at 244, citing *Harksen v Lane* 1998 (1) SA 300 (CC), at [50]-[51].

[309] Currie and de Waal (n20), at 244, referring to Cathi Albertyn, "Equality" in H Cheadle et al eds, *South African Constitutional Law: The Bill of Rights* (2002), at 105.

In *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), at [116] (footnote omitted), Ngcobo J explained the effect on dignity of being regarded as a second-class citizen:

> Human dignity is harmed by unfair treatment that is premised upon personal traits or circumstances that do not relate to the needs, capacities and merits of different individuals. Often such discrimination is premised on the assumption that the disfavoured group is not worthy of dignity. At times, as our history amply demonstrates, such discrimination proceeds on the assumption that the disfavoured group is inferior to other groups. And this is an assault on the human dignity of the disfavoured group.

Treating people as inferior is invidious discrimination: Waldron (n26), at 36.

[310] 1998 (1) SA 300 (CC), at [51].

[311] Grant (n292), at 320, 321, 323. Foster pointed out similarities between the *Harksen* test to analyse equality issues and the test in Canada derived from *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SC of Canada): Foster (n217), at 78-79. He considered that the focus on dignity may be particularly problematic in the area of economic and social rights, as courts are less inclined to equate unequal divisions of economic rights with dignity and self-worth, although—in contrast with *Harksen*—he was heartened by the Constitutional Court's association of dignity with socio-economic issues in *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC): *ibid*, at 88, 96.

[312] *Harksen v Lane* 1998 (1) SA 300 (CC), at [51].

v Walker to be "at least comparably serious to an invasion of their dignity."[313] Even if the discriminatory measures have some benefits for the disadvantaged, they can be unfair if the basis of the distinction is insulting to dignity. In *Moseneke v Master of the High Court* a separate system of administration of estates of deceased people depending on their colour rather than on their economic needs or geographic location was held to be unfair discrimination and also a breach of the right to dignity in Section 10 of the Constitution.[314]

If the discrimination is unfair under Section 9(3), it may still survive as a limitation permitted by law in accordance with Section 36.[315] The limitation clause requires an examination of

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[313] 1998 (2) SA 363, at [81]. Sachs J disagreed on the facts, but gave his view on what could constitute a serious impact analogous to infringement of dignity, *ibid* at [129] (footnote omitted):

> It might well be that even in the absence of concrete disadvantage, the symbolic effect of a measure (or the absence of a measure that should have been taken) could impair dignity in a way which constitutes unfair discrimination. This could arise if the selective enforcement involved deliberate targeting whether direct or disguised, or was so related in impact to patterns of disadvantage as to leave the persons concerned with the understandable feeling that once more they were being given the short end of the stick.

See comments of Small and Grant (n300), at 33, 44; Lucy A Williams, "The Justiciability of Water Rights: *Mazibuko v. City of Johannesburg*" (2009) 36 *Forum for Development Studies* 5, at 17-21, 44.

[314] 2001 (2) SA 18 (CC). Sachs J pointed out the legislation's faulty foundation notwithstanding the fact that it provided a cheap system for administering estates for black people, *ibid*, at [22] (footnotes omitted):

> The Minister and the Master suggested that the administration of deceased estates by magistrates was often convenient and inexpensive. However, even if there are practical advantages for many people in the system, it is rooted in racial discrimination which severely assails the dignity of those concerned and undermines attempts to establish a fair and equitable system of public administration. Any benefits need not be linked to this form of racial discrimination but could be made equally available to all people of limited means or to all those who live far from the urban centres where the offices of the Master are located. Given our history of racial discrimination, I find that the indignity occasioned by treating people differently as "blacks", as both section 23(7) and the regulations do, is not rendered fair by the factors identified by the Minister and the Master.

[315] An excellent insight into the judicial decision-making process and the role of proportionality in assessing the constitutionality of the limitation of rights can be seen in the writings of Albie Sachs, who said that the Constitutional Court (of which he was a member) was required to make value judgments, to establish the context, analyse the public objectives sought to be realised and the extent to which the law protected rights: Albie Sachs, *The Strange Alchemy of Life and Law* (OUP, Oxford 2009), at 208. In determining whether the extent of the limitation was proportionate, the Court gave considerable weight to governmental discretion in the choice of means to achieve a legitimate purpose and granted a margin of appreciation to the government's capacity to make factual evaluations of social priorities and areas requiring legislative intervention: *ibid*, at 208-209. The Court gauged the measure concerned with the constitutional measuring-rod of what would be permissible in an open democratic society based on human dignity, equality and freedom, which involved comparisons with other jurisdictions and checking international legal reasoning and practice: *ibid*, at 209.

Goldstone J in *Harksen v Lane* summarised the process to limit a right: "This will involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality.": 1998 (1) SA 300 (CC), at [52]. O'Regan J disagreed with the majority finding that there was no unfair discrimination against an insolvent man's solvent wife, who maintained that her property had been expropriated by the trustees of her husband's estate under the Insolvency Act 1936—she had no doubt that the extent of the impairment of the

whether less restrictive means are available to achieve the purpose of the legislation.[316]

5.5.1 Gender

In *President of the Republic of South Africa v Hugo* a prisoner, who was a single father of a child under 12, challenged the constitutionality of the pardon granted by President Mandela to mothers of children under that age.[317] He claimed it unfairly discriminated against him and his son on the ground of sex or gender in violation of Section 8 of the interim Constitution. The Court below held that the pardon was unconstitutional. The appeal succeeded, the majority finding that the pardon amounted to discrimination, but that it was not unfair.[318] The history of past discrimination against women entitled the President to redress past disadvantage. Male prisoners who felt they should be pardoned for family circumstances were entitled to petition the President individually for release. The Court recognised that equality commits to recognising each person's individual worth as a human being. It is not confined to redressing past disadvantage, but is also a positive obligation to accord equal dignity to all.[319] Goldstone J linked closely dignity and equality:

> At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the

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interests of the solvent spouse was "substantial and sufficient to constitute unfair discrimination": *ibid*, at [100]. She went on to carry out a limitations analysis and concluded that the limitation on the wife's right was not justifiable, as the interests of creditors seemed to be favoured disproportionately and there were no similar provisions in other legal systems: *ibid*, at [111].

[316] Constitution of the Republic of South Africa 1996, Section 36(1)(e). The Constitutional Court regularly uses less restrictive means arguments in its reasoning: Brems (n22), at 361. Several other jurisdictions (*eg*, Germany and Switzerland) use the "least restrictive alternative" criterion in their constitutional human rights doctrine: *ibid*, at 360.

[317] 1997 (4) SA 1 (CC).

[318] Cf *Miller v Albright* 523 US 420 (1998).

[319] Goldstone J cited L'Heureux-Dubé J's analysis of equality, 1997 (4) SA 1 (CC), at [41], citing *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-5:

> "Equality ... means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity."

The Court relied strongly on Canadian jurisprudence for its definition of equality and the placing of dignity at the forefront of individual rights.

The property system in customary marriage was found to constitute gender-discrimination, as it rendered women "extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent": *Gumede (born Shange) v President of the Republic of South Africa* [2008] ZACC 23, 2009 (3) SA 152 (CC), at [36]. The exclusion of widows in potentially polygynous Muslim marriages from the statutory provisions for spouses in intestate succession constituted unfair discrimination on the grounds of religion, marital status and gender, and was not a justifiable limitation: *Hassam v Jacobs* [2009] ZACC 19, 2009 (5) SA 572 (CC).

> establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.[320]

David Beatty cites *Hugo* as an example of a case holding that there is nothing wrong with singling out one gender for special treatment to promote greater equality between the two.[321]

Goldstone J, who wrote the majority opinion, found the pardon did not fundamentally impair fathers' "rights of dignity or sense of equal worth."[322] His views reveal an outdated attitude stereotyping the role of women in the home. However, O'Regan J (concurring) had an interesting alternative perspective to offer. She identified the disadvantage suffered by mothers in society on account of their traditional childminding role as a social fact resulting in inequality in work.[323] This view of women's inferior place in the work force attributable to the traditional role accorded to them is correct, but is not relevant in the context of imprisonment.

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[320] 1997 (4) SA 1 (CC), at [41]. See Arthur Chaskalson on the difference between equality in the US and South Africa: Arthur Chaskalson, "From Wickedness to Equality: The Moral Transformation of South African Law" (2003) 1 *ICON* 590, at 600. Laurie Ackermann refers to the additional impact of equality because of its association with dignity and discusses *Hugo*: Laurie WH Ackermann, "Equality and the South African Constitution: The Role of Dignity" (2000) 60 *Heidelberg J Intl L* 537, at 547-548. Foster reviewed *Hugo* to demonstrate problems with a dignity-centred approach: Foster (n217), at 75, 77, 88-90, 94-96.

Jeremy Waldron considers that dignity as applied in *Hugo* is mainly a negative idea, being primarily a way of blocking the impact of group characterisations on individual dignity, rather than a way of talking affirmatively about the dignity of groups: Jeremy Waldron, "The Dignity of Groups" (2008) NYU School of Law Public Law Research Paper No 08-53 http://ssrn.com/abstract=1287174 (visited 8 June 2010), at 18. He concluded, "[i]n the last analysis, *Hugo*-dignity, even when applied to groups is still an individualist idea": *ibid*.

See also Grant (n292), at 300; McCrudden (n211), at 691; Small and Grant, (n300), at 33-34.

[321] David M Beatty, *The Ultimate Rule of Law* (OUP, Oxford 2004), at 82, fn 24. Beatty criticised *Hugo* because the majority "made no serious effort to evaluate the significance of the discriminatory character of the pardon from the perspective of either of the parties to the dispute: *ibid*, at 96.

[322] 1997 (4) SA 1 (CC), at [47]. O'Regan J displayed the same attitude in describing the impact of the discrimination as "far from severe": *ibid*, at [114]. Beatty considers that even worse than this light partisan assessment of the impact on fathers was the fact that no weight at all was given to the interests of those children whose only parent was an incarcerated father—despite Mandela's primary goal in granting the pardon being to help young children: Beatty (n321), at 97.

Mokgoro J upheld the partial pardon, *inter alia*, because of political and administrative difficulties – politically it would have been impossible to release all men and women with young children "because of the sheer numbers involved" and "there would have been great administrative inconvenience in engaging in a case-by-case evaluation for each mother and father as to whether they were the primary care giver for their child": 1997 (4) SA 1 (CC), at [106].

Beatty's criticism of these three opinions was for the judges' failure to exercise the power of judicial review "in a detached and impartial way. ... they claimed a sovereignty over John Hugo, and other fathers like him, to interpret such acts of discrimination for themselves that they had no authority to make. They dismissed Hugo's own self-understanding as not worthy of the Court's respect.": Beatty (n321), at 97.

[323] "[T]he responsibility for child rearing is also one of the factors that renders women less competitive and less successful in the labour market. The unequal division of labour between fathers and mothers is therefore a primary source of women's disadvantage in our society.": 1997 (4) SA 1 (CC), at [110].

Women were not jailed simply because of their gender, but because they had breached the criminal law. The President's remission reinforced the disadvantage under which women in general laboured, as it confirmed their primary role in society as childminders rather than attempting to reverse that stereotypical attitude.[324] There was no recognition that men also had parental responsibilities—indeed, some of the male fathers imprisoned could have been the primary carers.[325]

Mokgoro J, who agreed that the pardon was unfair discrimination, but considered it justified under Section 33 of the interim Constitution, categorised the stereotyping of fathers as an affront to their dignity and equality.[326] The judgments of Kriegler J (dissenting) and Mokgoro J accord better with the concept of dignity as applying to all equally than does that of Goldstone J. The Presidential pardon did not take into account the individual circumstances of mothers who might not be the primary carers, nor of imprisoned fathers who had childminding duties. All of the judges in *Hugo* accepted the relevance of respect for dignity, but came to differing conclusions through varying routes.[327]

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[324] Kriegler J (dissenting from the finding that the pardon was constitutional) pointed out that the advantage given by the pardon to women prisoners was not for the purpose of redressing any discriminatory treatment accorded to them compared with men in the penal setting: *ibid*, at [84]. He considered that the pardon's "[r]eliance on the generalisation that women are the primary care givers" was harmful as it tended "to cramp and stunt the efforts of both men and women to form their identities freely": *ibid*, at [80].
Cf Justice Ginsburg's dissent in *Miller v Albright* 523 US 420 (1998). Her dissent reflected concerns of individual fairness, as there was not a persuasive fit between the government's means and ends in the legislation in question; she opposed the "preference" for women because she considered that unequal treatment of mothers and fathers legally reinforced gender stereotypes: Neomi Rao, "Gender, Race, and Individual Dignity: Evaluating Justice Ginsburg's Equality Jurisprudence" (2009) 70 *Ohio St LJ* 1053, at 1065.

[325] The generalisation perpetuated the attitude that men "can have only a secondary/surrogate role in the care of their children" and the pardon reinforced a view that was "a root cause of women's inequality" in society: 1997 (4) SA 1 (CC), at [83].

[326] *Ibid*, at [92] (footnote omitted):

> [D]enying men the opportunity to be released from prison in order to resume rearing their children, entirely on the basis of stereotypical assumptions concerning men's aptitude at child rearing, is an infringement upon their equality and dignity. The Presidential Act does not recognize the equal worth of fathers who are actively involved in nurturing and caring for their young children, treating them as less capable parents on the mere basis that they are fathers and not mothers.

[327] It may be that the majority was reluctant to risk political and public ire by finding that the iconic President Mandela, although well-intentioned, had erred by unwittingly perpetuating inequality.
Rory O'Connell analysed *Hugo*, as well as other cases, and concluded that the concept of dignity is "sufficiently broad so as to allow judges to invoke unarticulated norms to decide difficult issues" and might "reinforce stereotypes and prejudices rather than combat them": Rory O'Connell, "The Role of Dignity in Equality Law: Lessons from Canada and South Africa" (2008) 6 *ICON* 267, at 284.

5.5.2 Marital status

In common with many other countries, the issue of whether distinctions made on the grounds of marital status—whether between married and unmarried individuals, between married and unmarried couples, or between a husband and wife within marriage—are legally acceptable has been divisive.[328]

In *Harksen v Lane* the solvent spouse of an insolvent man was unsuccessful in her challenge to insolvency legislation, which she alleged discriminated against her because of her marriage thereby infringing her property rights.[329] The Constitutional Court in a majority decision found that she had been treated differently from other people who might have had dealings with the insolvent on the grounds of her marital status, but that the discrimination was not unfair. The legislation inconvenienced her by burdening her with resisting the claim of the trustees of her husband's estate; however, this did not violate her dignity. O'Regan J (dissenting on this aspect) regarded the legislation as adversely affecting the solvent spouse's interests and amounting to unfair discrimination, which was not justifiable under the limitations clause since the interests of creditors were favoured disproportionately. Relying on *Brink v Kitshoff*[330] and *Prinsloo*,[331] she pointed out that the anti-discrimination provision had been interpreted primarily as "a buffer against the construction of further patterns of discrimination and disadvantage" and that the desire to avoid discrimination was underpinned by the Constitution's commitment to human dignity.[332]

Sachs J—also dissenting—considered that the unfair discrimination arose because the legislation did not treat the spouses as independent entities and breached their rights to human dignity and privacy. In contrast to the majority, he viewed the legislation as representing "more than an inconvenience to or burden upon the solvent spouse", as it affronted "his or her personal dignity as an independent person within the spousal relationship" and perpetuated an archaic vision of marriage viewed in the light of constitutional values.[333] The views of O'Regan and Sachs JJ were more insightful than those of

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[328] In South Africa the series of successful sexual-oriented challenges to legislation according benefits only to "spouses" gave considerable impetus to arguments that denying these benefits to opposite-sex life partners was also unfair discrimination: Currie and de Waal (n20), at 254.

[329] 1998 (1) SA 300 (CC).

[330] 1996 (4) SA 197 (CC).

[331] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC).

[332] 1998 (1) SA 300 (CC), at [91].

[333] *Ibid*, at [118]. He discerned accurately the insidious, subtle and sometimes disguised nature of discrimination, *ibid*, at [123] (footnotes omitted):

the majority. They detected that the dignity of the spouses had been compromised by treating them as a unit.

The divisiveness in equality cases, where the Constitutional Court was required to take what Albie Sachs described as "constitutionally-guided value judgments"[334] emerged again in *Volks v Robinson*—a challenge to legislation providing for maintenance for the surviving spouse from the estate of a deceased husband or wife on the grounds that it should also have applied to heterosexual unmarried couples.[335] Mrs Robinson had been in a permanent life partnership with a man for 16 years up to the time of his death, but they did not marry although there was no legal obstacle to marriage. She claimed that the legislation was discriminatory on the grounds of marital status and that it also breached her right to dignity. The Court in a majority verdict rejected the claim of unconstitutionality on the basis that it would be invidious to impose an obligation to maintain a partner after death, but not during their joint lifetimes. Skweyiya J did not regard the differentiation based on marriage as anathema to dignity.[336] A stance influenced by constitutional values and that was more discerning than that of the majority was taken by Sachs J in a dissenting judgment[337] where he regarded the issue from the viewpoint of the family relationship rather than parsing the strict rules of matrimonial

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> [W]hat is most relevant to the question of unfairness is the assumption which puts together what constitutional respect for human dignity and privacy requires be kept asunder. This is one of those areas where to homogenise is not to equalise, but to reinforce social patterns that deny the achievement of equality ... The intrusion might indeed seem relatively slight. Yet an oppressive hegemony associated with the grounds contemplated by section 8(2) may be constructed not only, or even mainly, by the grand exercise of naked power. It can also be established by the accumulation of a multiplicity of detailed, but interconnected, impositions, each of which, de-contextualised and on its own, might be so minor as to risk escaping immediate attention, especially by those not disadvantaged by them.

Barrington J in the Irish High Court in similar fashion pointed out that treatment as an inferior can manifest itself in a superficially trivial regulation: *Brennan v AG* [1983] ILRM 449 (HC), at 481.

[334] Sachs (n315), at 210.

[335] 2005 (5) BCLR 446 (CC).

[336] *Ibid*, at [62]:

> Mrs Robinson is not being told that her dignity is worth less than that of someone who is married. She is simply told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance. It is that people in a marriage are obliged to maintain each other by operation of law and without further agreement or formalities. People in the class of relationships to which she belongs are not in that position. In the circumstances, it is not appropriate that an obligation that did not exist before death be posthumously imposed.

Ngcobo J concurring in the majority decision focused on the importance of marriage as an institution, the obligation imposed on the state by international instruments to respect and protect marriage, and the right freely to marry: *ibid*, at [81]-[85]. In their joint dissenting judgment Mokgoro and O'Regan JJ emphasised that the Constitution prohibits unfair discrimination on the ground of marital status: *ibid*, at [107]-[108].

[337] Embarrassingly for him, his judgment was over twice as long as that of the majority: Sachs (n315), at 211.

law.[338]

Like *Volks v Robinson* in South Africa, *Nova Scotia (AG) v Walsh* was a divisive case in Canada with the same outcome and, again, differing judicial interpretations.[339] There was disagreement between the judges on the application of choice and liberty to the facts and the impact on dignity. The majority felt that the dignity of those who chose not to marry and to avail themselves of that status should be respected by not imposing the benefits of marriage on heterosexual cohabiting couples. Bastarache J took the view that the dignity of common law spouses was not affected adversely and rationalised it by relying on autonomy.[340] In contrast L'Heureux-Dubé J in dissent recognised a threat to dignity.[341] She saw choice as a more complex issue and did not accept the argument that the legislation was enacted to respect choice and therefore did not violate the claimant's dignity.[342]

The divergence between the judges in these cases relating to different treatment of married and unmarried couples is a symptom of the changing attitude towards marriage emerging in society worldwide. Rory O'Connell observed in the case law a dilemma over the colliding roles

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[338] 2005 (5) BCLR 446 (CC), at [222]:

> I should add that while it is true that caring for one's family is one of life's great joys, and as such calls for no extra reward, fairness does not inevitably translate into sacrifice. ... It would indeed be a perverse interpretation of family law that obliged one to disregard the fact that the circumstances of need in which a typical survivor might find herself, were produced precisely by her selfless devotion to the deceased and their family during his lifetime. I believe it is socially unrealistic, unduly moralistic and hence constitutionally unfair, for the Act to discriminate against the powerless and economically dependent party, now threatened with destitution, on the basis that she should either have insisted on marriage or else withdrawn from the relationship.

Evadné Grant discerned a structured approach underlying the equality cases by the focus on group membership and the need to build a new society that valued diversity and difference, as mentioned by Sachs J in this case: Grant (n292), at 327, fn 162. As she stated, while individual affront played an important role in some cases, such as in the sexual orientation cases, the context in which this was considered was that of group membership: *ibid*, at 327.

[339] 2002 SCC 83, [2002] 4 SCR 325 (SC of Canada).

[340] "There is no deprivation of a benefit based on stereotype or presumed characteristics perpetuating the idea that unmarried couples are less worthy of respect or valued as members of Canadian society. All cohabitants are deemed to have the liberty to make fundamental choices in their lives.": *ibid*, at [62].

[341] *Ibid*, at [118]:

> Failing to recognize the contribution made by heterosexual unmarried cohabitants is a failure to accord them the respect they deserve. This failure diminishes their status in their own eyes and in those of society as a whole by suggesting that they are less worthy of respect and consideration. Their dignity is thereby assaulted: they are the victims of discrimination.

[342] "[I]t is incorrect to paint each unmarried cohabitant with the same brush as regards the 'choice' to cohabit. For many, choice is not an option. For those where choice is in fact an option, few structure their lives by marrying or not marrying to take advantage or avoid particular legal obligations.": *ibid*, at [157].

of autonomy and welfare in the meaning of dignity.[343]

5.5.3 Sexual orientation

Complaints of discrimination on the grounds of sexual orientation have been less favourably received in the courts than those based on gender differences. Beatty has found that South Africa is among the countries where gays and lesbians have had a higher level of success in challenging traditional laws than elsewhere.[344] He instances South Africa's Constitutional Court, the European Court of Human Rights and the UN Human Rights Committee as being sympathetic to decriminalising sexual behaviour of homosexuals in contrast with the Supreme Courts of Ireland, the US,[345] Zimbabwe,[346] and Germany's Constitutional Court (at least initially).[347]

In the *Sodomy* case, Ackermann J had no hesitation in finding that the impact intended and

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[343] "The tension that these cases highlight—between an interpretation of dignity that mandates a protection of a person's autonomy, or free choice, and one that mandates consideration for a person's needs and welfare—reflects a significant divergence in the understanding of the concept of dignity.": O'Connell (n327), at 280 (footnote omitted).

[344] Beatty (n321), at 99.

[345] The US Supreme Court decriminalised sodomy as it violated the Due Process Clause of the Fourteenth Amendment in *Lawrence v Texas*, when Justice Kennedy acknowledged that "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons": 539 US 558 (2003), at 567. It overruled *Bowers v Hardwick* 478 US 186 (1986). Neomi Rao regarded *Lawrence* as suggesting a substantial opening for the development of a European conception of human dignity, as the Supreme Court conceived of dignity as liberty to engage in sexual acts without criminal sanction and also in the broader sense of being free from demeaning condemnation by the state: Neomi Rao, "On the Use and Abuse of Dignity in Constitutional Law" (2008) 14 *Colum J Eur L* 201, at 240-241. Rao pointed out that *Lawrence* was significant as well in the adoption by the Supreme Court of European juridicial methodology, avoiding the traditional strict scrutiny or rational basis review and coming close to proportionality by examining the state's justifications for its statute, in addition to using European conceptions of dignity: *ibid*, at 242. Maxine Goodman described *Lawrence* as marking a substantial shift by advancing human dignity as part of affording liberty and not simply as shifting from a privacy to a liberty interest: Maxine D Goodman, "Human Dignity in Supreme Court Constitutional Jurisprudence" (2006) 84 *Neb L Rev* 740, at 762. Goodman stated that the novelty in *Lawrence* was the Court's explicit reference to human dignity as a guiding precept: *ibid*, at 793. Jeremy Miller remarked that the Court's focus on the demeaning impact of the statute reflected awareness that what was being protected was not the individuals' right to do what they like behind closed doors, but protection of the right to be an individual (even if a personal decision is regarded as "wrong" by others): Jeremy M Miller, "Dignity as a New Framework, Replacing the Right to Privacy" (2007) 30 *T Jefferson L Rev* 1, at 41. Reva Siegel deduced that *Lawrence* was based on entangled rationales protecting dignity as equality in addition to dignity as liberty; the case raised questions of autonomy and self-definition and of social standing and respect: Siegel (n4), at 1741-1742. See further comments on *Lawrence*: Jeffrey Goehring, "*Lawrence v. Texas*: Dignity, a New Standard for Substantive Rational Basis Review?" (2004) 13 *Law & Sexuality: Rev Lesbian, Gay, Bisexual & Transgender Legal Issues* 727; Nancy Levit, "Theorizing and Litigating the Rights of Sexual Minorities" (2010) 19 *Colum J Gender & L* 21, at 29-31, 36; Rao (n210), at 212, 257, 267, 270; James Q Whitman, "The Two Western Cultures of Privacy: Dignity versus Liberty" (2004) 113 *Yale LJ* 1151, at 1162, 1214.

[346] See *Banana v S* [2000] 4 LRC 621 (SC of Zimbabwe).

[347] Beatty (n321), at 99, citing *Sodomy* case 1998 (12) BCLR 1517 (CC).

caused by the legislation was "flagrant, intense, demeaning and destructive of self-realisation, sexual expression and sexual orientation" and went on to robustly condemn it.[348] South Africa overturned legislation making it impossible for same-sex partners to adopt children jointly and held that restricting joint adoption to married persons discriminated on the grounds of sexual orientation and marital status.[349] In addition to breaching the right to equality, it infringed dignity rights and the principle of the paramountcy of a child's best interests.[350] Guardianship and custody rights had been granted to only one of the lesbian partners, thus violating the dignity rights of the other partner by denying her due recognition as a parent, which Skweyiya AJ described as "demeaning".[351]

Goldstone J, delivering the unanimous decision of the Constitutional Court in *J v Director General, Department of Home Affairs*, found there was an analogous differentiation in the legislation confining recognition as parents and guardians of children conceived by artificial insemination to heterosexual couples.[352] Kathleen Satchwell was a South African judge, who had lived in a committed relationship with her same-sex partner for many years. She challenged the employment benefits given to judges, as some were restricted to judges' spouses. The Constitutional Court unanimously found that the legislation and regulations

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[348] "There is nothing before us to show that the provision was motivated by anything other than rank prejudice and had as its purpose the stamping out of these forms of gay erotic self-expression.": *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC), at [76]. Heinz Klug referred to the *Sodomy* case to illustrate the enrichment of the right to equality by its interaction with the right to dignity: Klug (n2), at 152-153.
Ackermann J was influenced by South African academic writing and also looked at a wide variety of foreign case law: 1998 (12) BCLR 1517, at [20], [39]-[57]. He probably used the foreign material as backing for his decision rather than seeking guidance from it, relying more on academic writing in coming to his conclusion: David L Carey Miller, "The Great Trek to Human Rights: The Role of Comparative Law in the Development of Human Rights in Post-reform South Africa" in Esin Örücü ed, *Judicial Comparativism in Human Rights Cases* (UK National Committee of Comparative Law, London 2003), at 223-224.
The Court looked at the impact on those affected not from a position of power, but responding with empathy to those who were subordinated: Peggy Cooper Davis, "Responsive Constitutionalism and the Idea of Dignity" (2009) 11 *U Pa J Const L* 1373, at 1377. It spoke not in terms of naked absolutes, but in terms unhesitatingly informed by conscientious analysis of South Africa's history and that of other nations, appealing to both logic and experience: *ibid*. Peggy Cooper Davis contrasted the US Supreme Court unfavourably with the Constitutional Court's judgment in the *Sodomy* case and called the US opinions on homosexual sodomy "acontextual, ahistoric and lacking in empathy": *ibid*. She stated that the South African Court had committed itself to constructing constitutional rights, liberties, and obligations in a way that reflected the lessons of apartheid and the principles embodied in the struggle against it: *ibid*, at 1376.
On the *Sodomy* case, see also EK Quansah, "Same-Sex Relationships in Botswana: Current Perspectives and Future Prospects" (2004) 4 *AHRLJ* 201, at 210-211.
[349] *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC).
[350] *Ibid*, at [37].
[351] *Ibid*, at [29].
[352] 2003 (5) SA 621 (CC), at [14].

concerning judges were unconstitutional, because they discriminated on the grounds of sexual orientation.[353]

The Intestate Succession Act 1987 was unconstitutional to the extent that it conferred rights of intestate succession on heterosexual spouses but not on permanent same-sex life partners. In her judgment on behalf of a unanimous Constitutional Court, van Heerden AJ confirmed the High Court finding that the legislation breached the equality and dignity rights under Sections 9 and 10 of the Constitution of the surviving partner to a permanent same-sex life partnership in which the partners had undertaken reciprocal duties of support.[354]

The Aliens Control Act 1991 facilitated the immigration into South Africa of foreign national spouses of permanent South African residents, but did not extend the same benefits to South African gays and lesbians in permanent same-sex life partnerships with foreign nationals. The Constitutional Court held that it discriminated unfairly on the intersecting and overlapping grounds of sexual orientation and marital status, and seriously limited the equality rights and the right to dignity of permanent same-sex life partners thereby breaching Sections 9(3) and 10 of the Constitution.[355] The statute discriminated in a way which was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Ackermann J cited Canadian jurisprudence in his judgment for the unanimous Court, thereby evidencing that substantive equality is achieved in Canada and in South Africa through the focus on dignity.[356] He pinpointed the deep effect of discrimination on individual homosexuals touching their very existence and rocking the twin values of equality and dignity.[357] He was

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[353] *Satchwell v President of Republic of South Africa* 2002 (6) SA 1 (CC). The Court referred to women-to-women marriages in African traditional societies: *ibid* at [12]. This is a rare instance of African perspective in South African jurisprudence: Carey Miller (n348), at 226.

[354] *Gory v Kolver* 2007 (4) SA 97 (CC), at [19].

[355] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC). See Quansah (n348), at 211-212.

[356] The Court used Canadian case law to support pivotal aspects of its decision, particularly on overlapping categories of discrimination, the notion of equality and its application to the definition of the concept of family: Carey Miller (n348), at 225. It brought foreign jurisprudence to bear on the issue of the appropriate remedy and used it to support its decision to "read in" words to correct the legislation: *ibid*.

[357] 2000 (2) SA 1 (CC), at [42]:

> The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and

conscious of the benefits—not just for the individuals involved, but for society—of equal treatment and respect for dignity of all. "[T]he bell tolls for everyone", because, as L'Heureux Dubé J of Canada said, the social costs of discrimination are high and damage the fabric of society.[358] In *Quilter v AG* Thomas J of the Court of Appeal in New Zealand had a similar view, "[i]f [the basic human rights of minority groups are being denied], it is important to spell that denial out if the basic dignity of everyone in a more enlightened age is to be secured."[359]

South Africa introduced legislation allowing same-sex marriages[360] as a result of the Constitutional Court's judgment in *Fourie* holding that the common law and the Marriage Act 1961 were inconsistent with the equality rights in Sections 9(1) and 9(3) and the right to respect for dignity in Section 10 of the Constitution to the extent that they made no provision for same-sex couples to enjoy the status, entitlements and responsibilities accorded to heterosexual couples.[361] The issue was not privacy, but enhancement of dignity and of the equality of same-sex couples by public acknowledgement of their status, as Sachs J noted, "what the applicants in this matter seek is not the right to be left alone, but the right to be

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> dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.

[358] *Ibid*, at [82], citing *Canada (AG) v Mossop* (1993) 100 DLR (4th) 658, at 698 b. See the efforts by the Supreme Court of Canada to support equality in *Chamberlain v Surrey School District No 36* 2002 SCC 86, [2002] 4 SCR 710, where there were colliding dignities in claims to freedom of religion and expression on the one hand and equality on the grounds of sexual orientation on the other; the majority held that a school board's decision not to approve books depicting same-sex parented families was unreasonable in the context of a legislative educational scheme whereby approval of books was to be considered according to the broad principles of tolerance and non-sectarianism.

[359] 2000 (2) SA 1 (CC), at fn 110, citing [1998] 1 NZLR 523 (CA), at 550.

[360] Civil Union Act 2006. South Africa was only the fifth country in the world to legalise gay unions: Adrien Katherine Wing, "The South African Constitution as a Role Model for the United States" (2008) 24 *Harv Blackletter LJ* 73, at 76.

[361] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC). Sachs J made it clear that an examination of context is imperative to ascertain the impact that an apparently neutral distinction could have on the dignity and sense of self-worth of the persons affected: *ibid*, at [151]. He pointed out that differential treatment in itself does not necessarily violate the dignity of those affected, but when separation "implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status", it becomes constitutionally invidious: *ibid*, at [152]. See also Eric C Christiansen, "Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice" (2010) 13 *J Gender Race & Justice* 575, at 595, 597-600, 609-611; McCrudden (n211), at 720.
The Massachusetts Supreme Court, in its decision on same-sex marriage, also referred to dignity and equality as affirmed in the Massachusetts Constitution and stated that it forbade "the creation of second class citizens": Susanne Baer, "Dignity, liberty, equality: A fundamental rights triangle of constitutionalism" (2009) 59 *UTLJ* 417, at 428-429, citing *Goodridge v Massachusetts (Department of Public Health)* 440 Mass 309, 798 NE.2d 941 (2003). See also *Re Marriage Cases* 43 Cal.4th 757 (2008) (SC of California); *Kerrigan v Commissioner of Public Health* 957 A.2d 407 (2008) (SC of Connecticut); Jeffrey A Redding, "Dignity, Legal Pluralism, and Same-Sex Marriage" (2010) 75 *Brook L Rev* 791, at 800-808.

acknowledged as equals and to be embraced with dignity by the law."[362] He adverted to the change in societal attitudes over time, "[t]heir love that was once forced to be clandestine, may now dare openly to speak its name".[363] The acceptance of the reality and integrity of the intimate life of homosexuals led to a change in the law.[364]

5.5.4 Group identity

South African jurisprudence highlights the dignity of groups and community.[365] It looks at the individual not as an isolated entity, but in association with family and wider society. The value of *ubuntu* in practice paints a picture of an inclusive grouping where the individual's identity is respected in the pursuit of the common good. The aim is that all members be committed to the interests of the group as a whole, or at least accept and understand restrictions necessary

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[362] 2006 (1) SA 524 (CC), at [78]. Justice Kennedy took a similar stance in *Lawrence v Texas* 539 US 558 (2003), which Nancy Levit said had a centrally communitarian thrust requiring the state to affirmatively promote behaviours it wants to support instead of simply imposing the negative onus of not intruding on people's privacy; as Levit stated, "[t]he move that Justice Kennedy makes in *Lawrence* is not just that people are free to pursue certain types of sexual relationships that they want, it is a recognition that those *relationships* are important and something the state should support": Levit (n345), at 30. In *Lawrence*, the US Supreme Court for the first time recognised "autonomy of self" as a concept of constitutional significance: Dubber (n52), at 8. Having stated that freedom extends beyond spatial bounds, Justice Kennedy continued, "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct"; he then indicated that the case involved personal liberty "both in its spatial and more transcendent dimensions": *Lawrence v Texas* 539 US 558 (2003), at 562.
In its decision decriminalising consensual homosexual practices, Delhi High Court relied on the South African *Sodomy* case, Justice Blackmun's dissent in *Bowers v Hardwick* and *Paris Adult Theatre I v Slaton* 413 US 49 (1973) to demonstrate that the right to be left alone was not merely a negative right but implied the more substantive right to private intimacy and autonomy: Pritam Baruah, "Logic and Coherence in *Naz Foundation*: The Arguments of Non-Discrimination, Privacy, and Dignity" (2009) 2 *NUJS L Rev* 505, at 515, citing *Naz Foundation v Government of NCT of Delhi* WP (C) No 7455/2001, 160 (2009) DLT 277.

[363] 2006 (1) SA 524 (CC), at [78]. The fight for lesbian and gay equality was a gradual process beginning with the decriminalisation of sodomy, then various partnership rights were recognised by the courts and finally, after ten years, marriage rights were granted by the legislature after the intervention of the Constitutional Court: Bilchitz (n5), at 69. Bilchitz used this progression to illustrate that law is evolutionary and that the great social justice movements have taken time to achieve just laws: *ibid*.

[364] The recognition of equal respect for the sexuality of others is a theme that is only beginning to percolate successfully in lesbian, gay, bisexual, and transgendered rights cases: Levit (n345), at 36.
O'Regan J differed in the remedy and she would have given immediate relief by developing the common law and reading words in to the statute: 2006 (1) SA 524 (CC), at [169]. Although the formal difference between the remedies proposed by Sachs and O'Regan JJ related to the requirements of the separation-of-powers doctrine, Theunis Roux considers that what separates the judgments is a difference of opinion concerning the way in which the Constitutional Court should build public support for decisions of constitutional principle: Theunis Roux, "Principle and pragmatism on the Constitutional Court of South Africa" (2009) 7 *ICON* 106, at 122. Cf remedy granted by the Court of Appeal for Ontario in *Halpern v Canada (AG)* (2003) 225 DLR (4^{th}) 529, at [156].

[365] The South African Constitution provides for recognition of the right of communities to self-determination: Constitution of the Republic of South Africa 1996, Section 235. See Waldron (n320), at 11-12.

to benefit the community.[366] Sonja Grover rightly indicated that a person has dignity as part of a collective and as an individual.[367] In *Merafong Demarcation Forum*, van der Westhuizen J categorised the struggle against colonialism and the apartheid regime's Bantustan policy as a struggle "for the recognition of the dignity of individuals and communities" as well as for one united country.[368]

According to Ziyad Motala and Cyril Ramaphosa, traditional African societies showed a great respect for human dignity, conceptualised in modern times as African humanism.[369] Decisions in the community were taken by consensus for the benefit of the overall group, where economic benefits were shared and "individualism was discouraged".[370] When the person is seen in the first instance as a member of a community rather than as an individual, rights only have relevance if derived from relations with others.[371]

South Africa is a rainbow nation with people of many different cultures and origins living there. It tries to accommodate the interests of each group within a framework of equal treatment of all. In *Gauteng School Bill* the Constitutional Court was asked to resolve a dispute over the constitutionality of certain provisions of an education Bill in Gauteng.[372] The task was to find

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[366] Human dignity determines the essence of a democratic legal order, *ie*, those rights citizens of a political community must grant themselves if they are to respect one another as members of a voluntary association of free and equal persons: Habermas (n1), at 469.

[367] Sonja Grover, "A response to Bagaric and Allan's 'The Vacuous Concept of Dignity'" (2009) 13 *IJHR* 615, at 617. Dignity may mean respect for individual autonomy—for the capacity of each person to choose how to live—or it may require social recognition of one's lifestyle or group: Rao (n324), at 1080-1081. See also Rao (n210), at 187-189.

[368] *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC), at [23].

[369] Ziyad Motala and Cyril Ramaphosa, *Constitutional Law: Analysis and Cases* (OUP, Cape Town 2002), at 48.

[370] *Ibid*, at 45-46, citing President Kaunda of Zambia (footnote omitted).

[371] Motala and Ramaphosa (n369), at 46. Ziyad Motala and Cyril Ramaphosa describe the South African Constitution as moving "beyond the common law and its concept of *atomistic* individuals, towards a consideration of the interests of the majority" resulting in individuals being required on occasion to make sacrifices for the common good: *ibid*, at 409. When an individual claims rights against the community, this has implications for the person's autonomy, self-worth and right to privacy: Baruah (n362), at 521.

[372] *Gauteng Provincial Legislature: Re Gauteng School Education Bill of 1995* 1996 (3) SA 165. The petitioners maintained that the legislation did not protect the minority rights of the Afrikaans-speaking community and relied on the education rights in Article 32 of the interim Constitution: *ibid*, at [5].
See George N Barrie, "*Ubuntu Ungamntu Ngabanye Abantu*: The Recognition of Minority Rights in the South African Constitution" [2000] *J South African L* 271, at 275-276; Margaret A Burnham, "Cultivating a Seedling Charter: South Africa's Court Grows Its Constitution" (1997) 3 *Michigan J Race & L* 29, at 35-36, 58, fn 108; Ross R Kriel, "On How to Deal with Textual Ambiguity, *Ex parte Gauteng Provincial Legislature: In re Dispute concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*" (1997) 13 *SAJHR* 311; Jeremy Sarkin, "The Political Role of the South African

the correct balance between the importance of overcoming systemic inequality inherited from the past, on the one hand, and preventing legally enforced or *de facto* assimilation of groups wishing to preserve and develop a distinctive identity, on the other.[373] An understanding of the other as well as respect for others' dignity and freedom are essential for the smooth running of a multi-cultural society, as sketched by Prof Carel Boshoff and Carel Boshoff IV, who advocated not closing our eyes to

> the existential reality, intensity and meaning of this intercultural encounter, to the confrontation with those other worlds outside one's own, worlds in which human lives exist with no less legitimacy and no less right to be. ... We should... try to find ways in which this encounter could proceed to an active communication, mutually recognising the others' autonomy and dignity; entering into communion, aiming at a reciprocal revelation and understanding of each other.[374]

Discrimination against defined types of people is an attack on the dignity of the group. It is countered by implementing substantive equality resulting from an investigation of the effect on the dignity of the members of the group.[375]

5.5.5 Comparative equality jurisprudence

This subsection will review developments in equality jurisprudence in other countries in order to enlighten the assessment of the South African case law.[376] The focus will be particularly on Canada, India and the US. South Africa, in common with Canada,[377] uses human dignity in law

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Constitutional Court" (1997) 114 *SALJ* 134, at 145-146.

[373] According to Sachs J, this task was primarily a matter for democratic resolution by the legislatures, and not for adjudication by the courts in the first instance: 1996 (3) SA 165, at [91].

[374] Prof Carel Boshoff and Carel Boshoff IV, "The sociopolitical conditions for democratic nation-building: an Afrikaner point of view" in Nic Rhoodie and Ian Liebenberg eds, *Democratic Nation-building in South Africa* (HSRC, Pretoria 1994), at 164, cited in *Gauteng School Bill* 1996 (3) SA 165, at fn 18.

[375] Sachs J explained in the *Sodomy* case1998 (12) BCLR 1517 (CC), at [126]:

> One of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society. The manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably—there is difference in difference. The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light. The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality.

[376] Comparative law is being used increasingly by courts on a regular basis as persuasive authority. Human rights advocates see the role of comparison as that of persuasion to an essentially moral position: Christopher McCrudden, "Judicial Comparativism and Human Rights" in Esin Örücü and David Nelken eds, *Comparative Law: A Handbook* (Hart, Oxford 2007), at 376. The use of comparative methods by judges in human rights adjudication varies immensely between jurisdictions, within jurisdictions across time, and between the types of human rights claims: *ibid*, at 376-377.

[377] On dignity in Canadian equality law, see Justin Bates, "Human Dignity—An Empty Phrase in Search of

not only as a right or as an interpretative or underlying value, but as an anchor in defining inequality.[378] Dignity can assist in reaching "a transformed society in which quality of life is improved and people's potential is freed."[379] Unlike other systems of formal equality, which have a comparative base, the South African Constitution focuses on historically disadvantaged and vulnerable people. Assessment of inequality is not a rules-bound formal procedure, but is adapted to the individual without being subjective either from the claimant's or from the judge's perspective. The individual's social relations, membership of a group and place in the wider community are taken into account by "application of the identified contextual factors, which focus attention on the effect of such discrimination on the dignity of the applicant."[380] As in German jurisprudence, the community dimension is recognised in South Africa.[381]

The Canadian Supreme Court has defined dignity in more subjective terms than the South African Constitutional Court.[382] The emphasis on feelings in Canada adds more to the concept of dignity than simply looking at dignity as status.[383] After three cases in 1995 (all with strong dissents)[384] revealing diverse approaches to equality, the Canadian Supreme Court resolved the

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Meaning?" (2005) 10 *JR* 165.

[378] In South Africa, dignity and equality are interdependent, inequality being established through group-based differential treatment or through differentiation perpetuating disadvantage leading to scarring of the sense of dignity and self-worth: Chaskalson (n188), at 140. In Canadian and South African equality law, human dignity functions as a determining factor of the discrimination test: Small and Grant (n300), at 35. See also McCrudden (n211), at 690.

[379] Susie Cowen, "Can 'Dignity' Guide South Africa's Equality Jurisprudence?" (2001) 17 *SAJHR* 34, at 42. Susie Cowen agrees with the assumption in the Constitutional Court's jurisprudence that equality "should be informed by another value, that it does not stand alone as a value": *ibid*, at 40.

[380] Small and Grant (n300), at 38. On the impact on a member of the group, see *Sodomy* case 1998 (12) BCLR 1517 (CC), at [125]. The inequality of treatment "leads to and is proved by the indignity": *ibid*, at [124].

[381] Grant (n292), at 312-313. This is clear from Sachs J's rejection of autonomy as the sole attribute of dignity in the *Sodomy* case, where he placed the individual in a social setting: 1998 (12) BCLR 1517 (CC), at [117]. The South African approach contrasts with that in Canada, which relies on individual merit or capacity: Small and Grant (n300), at 41.

[382] Grant (n292), at fn 150.

[383] "Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.": *Law v Canada* [1999] 1 SCR 497, at [53] (Iacobucci J).
Scholars criticised the focus in *Law v Canada* on dignity, as the decision's doctrinal effects were regarded as weakening the Supreme Court's equality standard: Baer (n361), at 462. Susanne Baer saw two problems with *Law*, *ie,* first, contrary to the idea of equality, it used dignity as the placeholder for a particular morality—but equality was directed precisely at forestalling the introduction of particular moralistic values into legislation; second, it employed dignity as a vehicle for paternalism: *ibid*, at 463-464. She suggested reconsidering dignity in the light of liberty and equality in order to avoid the reintroduction of problematic paternalism into constitutional law: *ibid*, at 462. As she explained, "...if dignity is read as one component in the triangle of dignity, equality, and liberty, it is not about being dignified, or about 'legitimately feeling' a certain way, but about recognizing human dignity in all its diversity": *ibid*, at 465.

[384] *Miron v Trudel* [1995] 2 SCR 418; *Egan v Canada* [1995] 2 SCR 513; *Thibaudeau v Canada* [1995] 2 SCR

internal conflict when it adopted a united front in *Law* affirming that the purpose of the equality provision in Section 15(1) of the Canadian Charter[385] was to prevent a violation of dignity.[386] Some confusion arose over the application of the dignity test in equality cases after *Law*. Different interpretations of equality and dissenting opinions continued to be seen, as in *Gosselin v Quebec (AG)* where a welfare recipient brought a class action challenging a social assistance scheme on behalf of all welfare recipients under 30, who had been subject to a differential regime.[387] The majority of five judges, in a deeply divided Supreme Court with four dissenters, held against the class action, as an examination of the contextual factors set out in *Law* did not support a finding of discrimination and denial of human dignity. The view of Arbour J in dissent supports fulfilment of basic needs in furtherance of socio-economic rights and full enjoyment of civil and political rights.[388] All judges in *Gosselin* accepted dignity as the indicator for equality, but differed in their application of it to the facts.

Individual circumstances are scrutinised closely to see if dignity has been impaired. In *Nova Scotia (Workers' Compensation Board) v Martin* the Canadian Supreme Court unanimously condemned as unjustified discrimination workers' compensation legislation excluding chronic pain sufferers from the regular workers' compensation system and providing instead benefits for just four weeks.[389] Gonthier J found that the dignity of those with chronic pain was affected by society's refusal to accept that their pain was real and on a par with other disabled people.[390]

There was considerable criticism of the use of dignity following *Law*.[391] In *R v Kapp* in 2008,

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[385] Canadian Charter of Rights and Freedoms 1982.

[386] *Law v Canada* [1999] 1 SCR 497, at [51], [88]. The Court endorsed a contextual approach based on what was reasonable rather than accepting without question the claimant's own perspective of his or her feelings: *ibid*, at [88].

[387] 2002 SCC 84, [2002] 4 SCR 429. For discussions on *Gosselin* see: Bates (n377), at 167-168; Foster (n217), at 88; Grover (n367), at 620-621; McCrudden (n211), at 701, 707, 719; Rao (n210), at 218; Robert J Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (3rd edn Essentials of Canadian Law, Irwin Law, Toronto 2005), at 298, 308-309; Small and Grant (n300), at 48-49, 53.

[388] 2002 SCC 84, [2002] 4 SCR 429, at [392]. Dennis Davis cited Arbour J's judgment as an illustration of the potential for a positive rights approach; she interpreted the right to life in the Canadian Charter as including a positive duty to provide a means of livelihood and supported her conclusion that a right to life can impose a positive obligation on the state by reference to other rights, where questions of resources were not at issue: Davis (n71), at 707-708.

[389] 2003 SCC 54, [2003] 2 SCR 504. Canadian legislation discriminating on the grounds of disability is subject to harsher analysis than on other grounds.

[390] *Ibid*, at [5].

[391] One of the critics argued that, for Section 15 claims, dignity should be replaced with a reformulated grounds analysis focusing on individual and group vulnerability on the basis that the primary purpose of

the Canadian Supreme Court—having acknowledged that substantive (not formal) equality was incorporated in the Charter—referred to the criticism of using dignity as a legal test rather than as an underlying value.[392] The Court's new interpretation in *Kapp* of *Law* restored the earlier priority given to the perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. In Canada and South Africa the focus on the context to ascertain if there is inequality resulting in infringement of dignity means "the judge is less concerned with precedent—although still concerned with certainty and continuity—and more concerned with ensuring that for the case at hand—human dignity is protected" and there are "continual reminders in the cases that the equality analysis is a guideline for courts to follow, not a set of new rules to be mechanically applied without critical analysis of the ultimate purpose."[393]

As in South Africa and Canada, judicial interpretation of the Namibian Constitution has accorded a prominent role to the underlying value of dignity.[394] Noting that similar weight was given to it in the South African Constitution,[395] the Namibian Supreme Court affirmed its pervasive nature in *Africa Personnel Services (Pty)*.[396]

Some critics objected to the prominent role played by personal feelings of affront in the analysis of unfair discrimination in South Africa and had misgivings about the suitability of the dignity-based approach with its risk of excessive individualism.[397] Grant has answered these critics and concluded that the South African approach was better than any other because it provided a coherent approach to achieving substantive equality.[398] The protection of rights formed part of an integrated scheme aimed at ensuring protection for and promotion of the

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the equality provision was to protect the vulnerable from state-imposed burdens or disadvantages, recognising the potential for the majority to marginalise minority interests understood as social and economic resources, or opportunities to access resources: R James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007) 70 *Sask L Rev* 1, at 17.

[392] 2008 SCC 41, [2008] 2 SCR 483, at [22]-[23].

[393] Small and Grant (n300), at 53. See also Cathi Albertyn and Beth Goldblatt, "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248.

[394] Constitution of the Republic of Namibia 1990.

[395] *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia* [2009] NASC 17, at fn 89.

[396] *Ibid*, at [33] (footnote omitted).

However, in Namibia infringement of dignity is not a pre-requisite in all cases for success in proving breach of a fundamental right. The Court in *Africa Personnel Services (Pty)* rejected the State's attempt to narrow the ambit of the right to engage in economic activity to individuals on the basis that it protected only the dignity interest of human persons, which the State argued would not extend to juristic persons. Adopting a purposive approach, it broadened its scope to corporations and put equality on the same footing as dignity: *ibid*, at [40].

[397] Grant (n292), at 325. See Botha (n211), at 212-214.

[398] Grant (n292), at 326-328.

inherent dignity of all.[399]

Ronald Dworkin distinguished between the right to equal treatment and the right to treatment as an equal.[400] Human dignity is an implied value underlying the US equality jurisprudence, although not highlighted—or, indeed, in some politically contentious cases not even named—as such. As early as 1944 Justice Murphy dissenting in *Korematsu* clearly had regard to the dignity of the individual when he castigated treating all those in a group as inferior on the basis of the behaviour of some of its members.[401] Ten years later the value of human dignity—although not overtly stated—was to the fore in the unanimous decision of the US Supreme Court in *Brown v Board of Education* where Chief Justice Warren described the effect of racial segregation in public schools as denigrating to the feelings of black children.[402]

The primary purpose of eliminating discrimination has been to protect the dignity of the victims. The Supreme Court recognised this in *Heart of Atlanta Motel* when it refused to accept that a hotel owner could restrict its clientele to white people.[403] Justice Brennan saw

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[399] *Ibid*, at 328.

[400] Ronald Dworkin, *Taking Rights Seriously* (New Impression with a Reply to Critics edn Duckworth, London 1978), at 227. The right to equal treatment is the right to an equal distribution of some opportunity or resource or burden, whereas the right to treatment as an equal is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else. Charles Taylor categorised Dworkin's distinctions as a liberal society adopting no particular substantive view about the ends of life, but uniting around a strong procedural commitment to treat people with equal respect: Charles Taylor, "The Politics of Recognition" in Charles Taylor and others, *Multiculturalism: Examining the Politics of Recognition* (Amy Gutmann ed, Princeton University Press, Princeton 1994), at 56. Foster has stated that for Dworkin it was the right to be treated with equal respect and concern that was fundamental, a view of dignity and equality reminiscent of the language of judges in both Canada and South Africa: Foster (n217), at 81.

[401] *Korematsu v US* 323 US 214 (1944). Referring to the exclusion of all those of Japanese descent from a military area in California during World War II, Justice Murphy was conscious of the need to hold each individual accountable for their own actions and not to stigmatise minorities: *ibid*, at 240.

[402] 347 US 483 (1954), at 494. In *Brown* Thurgood Marshall (subsequently appointed to the Supreme Court) argued and demonstrated that state-enforced segregation violated the Fourteenth Amendment; his achievement as an advocate in that case has been described as embodying "his consummate victory" amidst all his triumphs: Luke C Moore and Thelma Wyatt Cummings, "Justice Thurgood Marshall and His Legacy: A Living Legend's Unceasing Commitment to Justice and Equality" (1991) 35 *Howard LJ* 37, at 41. While Chief Justice Warren's opinion dealt squarely with education, its outgrowth rendered "separate but equal" untenable in any sphere: *ibid*.
Goodman is correct in her assessment that in this decision—often described as motivated by the Court's interest in protecting the human dignity of black school children—the Court sought not just to protect black children's public image and reputation, but to protect them from feeling inferior and discouraged: Goodman (n345), at 753. *Brown* was not simply a proportionality exercise to balance the adverse effect on black children of segregated education against the possible loss of self-esteem of white children by integrated schooling: Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?" (2009) 7 *ICON* 468, at 487-488.

[403] *Heart of Atlanta Motel, Inc v US* 379 US 241 (1964). While the main focus of the case was on the division of power between Congress and the states, the Court discerned that the aim of the Civil Rights

the common thread of humiliation and affront to dignity running through discrimination whether on the grounds of race or gender when he confronted a clash between men's freedom of association and women's exclusion from full membership of a non-profit national organisation in *Roberts v United States Jaycees*.[404]

Despite the dissenting view of Justice Black that the Due Process Clause of the Fourteenth Amendment was designed to protect against racial discrimination and his reluctance to extend it to a welfare payment,[405] the majority in *Goldberg v Kelly* insisted that a welfare recipient should be afforded a fair hearing prior to termination of benefit. Public assistance was influenced by a recognition that external forces contributed to poverty and a tradition of protecting people's dignity in the US.[406] After *Goldberg* the Court's willingness to advance human dignity in welfare rights faltered.[407] However, there have been some notable dissenting opinions including that of Justice Marshall[408] in *Dandridge v Williams*, where by a narrow majority the Court held that Maryland was entitled to impose a monetary cap on the amount of aid paid to families with dependent children regardless of the size of the family and

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Act 1964 was to uphold personal dignity. Justice Clark, delivering the opinion of the Court, referred to the fact that the Senate Committee had made it clear that its fundamental object was "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments'": *ibid*, at 250, citing S1732 S Rep No 872, 88th Cong 2d Sess (10 February 1964), at 16. Justice Goldberg, in a concurring opinion, quoted more extensively from the Senate Committee, which had stressed the personal humiliating effect of discrimination and not simply the commercial or social aspect: 379 US 241 (1964), at 291-292, citing S Rep No 872 *supra*, at 16.
The Supreme Court has addressed race and gender discrimination in a robust well-reasoned methodical fashion and has not been waylaid by attributing undue deference to claims of intrusion on freedoms of expression and association.

[404] 468 US 609 (1984), at 625. In delivering the opinion of the Court, Justice Brennan referred to the dual damage caused by discrimination—to the individual's dignity and to society by depriving it of the benefit of every member's full participation: *ibid*. The Court used a proportionality analysis to assist it in coming to its conclusions and in order to justify publicly its decision. Extrajudicially, Justice Brennan pointed out that recognition of full equality for women—equal protection of the laws—ensured that gender had no bearing on claims to human dignity: Brennan (n5), at 442.
Having analysed *Brown*, *Heart of Atlanta* and *Roberts* in her review of decisions on access to education and accommodations, Goodman concluded that human dignity retained its strength as a constitutional value, despite competing public opinion: Goodman (n345), at 765.

[405] Justice Black described a welfare payment as payment of "a promised charitable instalment" by the government: *Goldberg v Kelly* 397 US 254 (1970), at 275. While he conceded that some of the language of the Fourteenth Amendment can protect others, he described its main aim thus, "all know that the chief purpose behind it was to protect ex-slaves": *ibid*. In common with the attitude taken by judges internationally, the US Supreme Court allows considerable latitude to the states to decide on social welfare issues and in dispensing available funds: *King v Smith* 392 US 309 (1968), at 318-319.

[406] "From its founding, the Nation's basic commitment has been to foster the dignity and wellbeing of all persons within its borders.": 397 US 254 (1970), at 264-265 (Justice Brennan). The *Goldberg* holding moved the Supreme Court's human dignity focus to a realm beyond the criminal justice system: Wermiel (n87), at 232. See also Rao (n210), at 236-237.

[407] Goodman (n345), at 784.

[408] As the last Justice appointed by a Democratic President, Justice Marshall found himself in the role of "perennial dissenter" amid conservative Republican appointees: Moore and Cummings (n402), at 47.

its actual need.[409] In his judgment in which he was joined by Justice Brennan, Justice Marshall's view was that the basis for discrimination was inalterable by the children affected in the same manner as birth within or outside marriage was outside their control.[410]

The jurisprudence over the right to withdraw medical treatment has focused primarily on the liberty and best interests of the patient, rather than on the equality right.[411] The liberty interest is also central to the abortion litigation. Justice Stevens dissenting in part in *Planned Parenthood of Southeastern Pennsylvania v Casey* took a holistic view of human rights when he consolidated liberty, equality and dignity.[412]

In *Rice v Cayetano*, where the issue was the right to vote for trustees of a state agency in Hawaii, Justice Kennedy pointed out that the same suspect rationale—diminution of dignity in disregard of each person's individuality—was behind classification by ancestry and categorisation by race.[413] The Supreme Court in *Bush v Gore* identified one source of the fundamental nature of the right to vote as lying "in the equal weight accorded to each vote

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[409] 397 US 471 (1970).

[410] *Ibid*, at 523, citing *Levy* 391 US 68 (1968):

> [G]overnmental discrimination between children on the basis of a factor over which they have no control—the number of their brothers and sisters—bears some resemblance to the classification between legitimate and illegitimate children which we condemned as a violation of the Equal Protection Clause in *Levy v Louisiana*.

Lisa Crooms described Justice Marshall's contribution to our understanding of fundamental rights and constitutional equality as relying on the basic premise that personhood, citizenship and humanity, as matters of constitutional law, require a vigilant court intent on achieving lofty constitutional objectives outstripping outdated notions of liberty, justice and equality: Lisa A Crooms, "A Stone's Throw to Justice: Liberty, Equality, and Women's Rights in the Supreme Court Opinions of Justice Thurgood Marshall" (2009) 52 *Howard LJ* 559, at 582. Baer has called a move to substantive equality "the move from an understanding of discrimination as difference, and from an understanding of equality as a group right, to an understanding of discrimination as disadvantage", which "turns equality into a right to respect and recognition, enabling people to exercise their right to self-determination and to lead a dignified life": Baer (n361), at 455.

Because people's identities develop within the social world, respect for human dignity also entails a state commitment to meeting dependency needs through supporting caretaking and human development so that people can lead dignified lives: Maxine Eichner, "Families, Human Dignity, and State Support for Caretaking: Why the United States' Failure to Ameliorate the Work-Family Conflict is a Dereliction of the Government's Basic Responsibilities" (2010) 88 *NCL Rev* 1593, at 1617.

[411] The equality dimension received scant attention in *Cruzan*, where Chief Justice Rehnquist, who delivered the Court's majority opinion, dismissed it in a footnote contending that dissimilar treatment of those capable of making decisions for themselves and those lacking that capacity was justified: *Cruzan v Director, Missouri Department of Health* 497 US 261 (1990), at 287 fn 12. See Rao (n210), at 233-234.

[412] "Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term. The mandatory waiting period denies women that equal respect.": 505 US 833 (1992), at 920. *Planned Parenthood* differs from earlier abortion decisions in that the Court's decision-making was expressly informed by human dignity as part of a woman's liberty interest: Goodman (n345), at 761. See also Rao (n210), at 211, 231.

[413] 528 US 495 (2000), at 517. See Rao (n210), at 215-216.

and the equal dignity owed to each voter."[414] The requirement of due process necessitating a fair hearing was asserted by the Supreme Court in a majority decision in *Hamdi v Rumsfeld*.[415] Maxine Goodman's view is that while Justice O'Connor, writing for the plurality, did not refer to human dignity, the outcome that citizen-detainees should receive fair notice of the reasons for their being classified as enemy-combatants and a right to a hearing before a neutral decision-maker showed that human dignity partially shaped the Court's decision.[416]

Due process, liberty, privacy and dignity were invoked by the Court in *Lawrence v Texas*[417] when by a majority of six to three it overturned *Bowers v Hardwick*[418] and decriminalised intimate sexual conduct between homosexuals. Justice Kennedy encompassed succinctly the elements of freedom, privacy and dignity involved in opting for a personal relationship without fear of being branded a criminal, when he stated, "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[419]

My review of US jurisprudence shows a clear concern for protection of human dignity as a long-standing basic value in society underlying the Constitution.[420] The Supreme Court judges have not given as deep a philosophical or legal analysis of dignity as in other jurisdictions such as South Africa and Canada. Sometimes, indeed, they have avoided crediting dignity overtly

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[414] 531 US 98 (2000), at 104. In a majority decision, the Court held in *Bush v Gore* that the manual recounts in the Florida vote for President violated the Equal Protection Clause of the Fourteenth Amendment, as they did not satisfy the minimum standards required for the non-arbitrary treatment of voters. See James A Gardner, "The Dignity of Voters—A Dissent" (2010) 64 *U Miami L Rev* 435, at 453-454. For criticism of reliance on the concept of the human dignity of individual voters rather than on the dignity in their civic role of performing a public service, see *ibid*, at 254-258.

[415] 542 US 507 (2004). In *Hamdi* a US citizen captured in Afghanistan, who was categorised as an enemy combatant for allegedly fighting with the Taliban, was considered to have an entitlement to be given a meaningful opportunity to contest the factual basis for his detention before a neutral decision-maker.

[416] Goodman (n345), at 793.

[417] 539 US 558 (2003).

[418] 478 US 186 (1986).

[419] 539 US 558 (2003), at 567. He interpreted liberty as extending beyond spatial bounds to a more transcendent dimension, explaining that it "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct": *ibid*, at 562.
The Court viewed the Equal Protection Clause as guaranteeing formal equality, so it declined to invalidate the offending statute on that basis and instead held that it violated the substantive right to liberty under the Due Process Clause, which gave homosexuals "the full right to engage in their conduct without intervention of the government": *ibid*, at 578. Catharine MacKinnon has lamented the Court's focus on the privacy right to liberty instead of addressing sex equality, as she considered that the decision extended heterosexuality's substantively sex-unequal rules rather than challenging and changing them: Catharine A MacKinnon, "The Road Not Taken: Sex Equality in *Lawrence v. Texas*" (2004) 65 *Ohio St LJ* 1081, at 1089.

[420] See Erin Daly, "Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right" (2011) 37 *Ohio NUL Rev* 381.

as the rationale behind their decisions, but it can be implied that protection of human dignity was the motivating force of at least some of the judges. There can be no doubt that human dignity was the foundation for the equality decisions on race and gender. It also gave an initial impetus to substantive equality in the welfare area by grounding the due process right to a fair hearing before termination of a benefit, but it has not developed into providing substantive equality or socio-economic rights. Notwithstanding the threat to US security from international sources in the 21st century, the value of human dignity has survived in the jurisprudence to provide due process rights for those suspected terrorists who manage to challenge their detention in the Supreme Court.

The constitutional concept of equality in India has been given a wide reach because of the insistence by the courts that its interpretation should be deep and its application meaningful. Zafar Khan sees an extensive role for equality—reaching to the social and economic spheres, promoting fraternity among human beings, and protecting the status and dignity of all.[421] Gurkirat Kaur called the task of the framers of the Indian Constitution "stupendous", as "[a] people suffering oppression under a feudal system were grimly struggling to be reborn into a life of dignity and hope."[422]

The traditional idea of equality based on reasonable classification was adopted and developed by the Supreme Court initially.[423] The equality right in Article 14 of the Indian Constitution[424] forbids class legislation, but it does not forbid reasonable classification to achieve specific

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[421] Zafar A Khan, "Equality through Legislative Measures: The Law in Book versus the Law in Action" in Mohammad Shabbir ed, *Quest for Human Rights* (Rawat Publications, Jaipur 2005), at 250. The caste-ridden Indian society was ripe for equality measures, as it had resulted in the development of unequal social groups who monopolised benefits and privileges for themselves at the expense of the underprivileged, the deprived and the exploited: *ibid*, at 249.

[422] Gurkirat Kaur, *Fundamental Rights* (Shree Publishers & Distributors, New Delhi 2006), at 60. Gurkirat Kaur's assessment is that the framers showed an uncompromising respect for human dignity, an unquestioning commitment to equality and non-discrimination, and an abiding concern for the poor and the weak: *ibid*, at 61.

[423] JN Pandey, *The Constitutional Law of India* (45th edn Central Law Agency, Allahabad 2008), at 77.

[424] Constitution of India 1950, Article 14: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." The English concept of "equality before the law" has the negative implication of the absence of any special privilege for individuals and of all classes being subject to the ordinary law, whereas the American concept of "equal protection of the law" has the positive implication of equality of treatment in equal circumstances: Pandey (n423), at 73. In *Dalmia*, Das CJ set out the scope of the equal protection clause as enunciated in earlier cases, which made clear that the anti-discrimination provisions extend to laws governing procedure as well as applying to substantive law: *Dalmia v Justice Tendolkar* [1958] INSC 30, 1959 SCR 279 (SC of India), at 296-298.

ends.[425] The concept of equality based on reasonable classification was challenged[426] by Bhagwati J in a judgment on behalf of himself and two of the other five judges in *Royappa*, where he laid down a new more expansive idea of equality opposed to the dictatorial notion of arbitrary action.[427] Returning to the same theme of equality as being contrary to arbitrary action in *Maneka Gandhi*, Bhagwati J rejected "a narrow, pedantic or lexicographic approach" to the equality clause.[428] He described the central normative importance of the rights to equality, life and liberty as supportive of human dignity.[429] After this case, there was a definite change in the construction of Article 14 by the courts, as they responded to society's hopes and aspirations, and it was clear that Article 14 went much beyond the principle of classification.[430] A unanimous Supreme Court in *Nakara* assimilated the doctrines of classification and arbitrariness.[431] Equality before the law combined with the right to live with human dignity ensured that detainees could not be deprived of their rights without fair, just

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[425] Pandey (n423), at 77. The classification must not be arbitrary, artificial or evasive, and must always rest on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved: *ibid*. It has to fulfil two conditions: first, it must be founded on an intelligible *differentia*, which distinguishes persons or things that are grouped together from others left out of the group; second, the *differentia* must have a rational relation to the object sought to be achieved by the legislation: *Choudhry v State of Bihar* [1954] INSC 114, 1955 (1) SCR 1045 (SC of India), at 1049.
Group members who are similarly situated in the given set of facts must be treated similarly, but legislation can distinguish between members belonging to different, *ie*, non-homogenous classes: Justice AS Anand, "The Constitutional Model of Equality and Fraternity: The Indian Experience" in Shabbir (n421), at 20-21, citing *Dalmia*'s case [1958] INSC 30, 1959 SCR 279.

[426] Pandey (n423), at 78.

[427] *Royappa v State of Tamil Nadu* [1973] INSC 214, 1974 (2) SCR 348 (SC of India), at 386. Bhagwati J perceived the limits of formal equality, which can be intransigent: Catharine A MacKinnon, "Sex equality under the Constitution of India: Problems, prospects, and 'personal laws'" (2006) 4 *ICON* 181, at 188. Article 14 has been invoked in a wide range of cases including litigation relating to service matters, challenging executive action, dealing with the grant of contracts by government, and concerning the rules of admission to educational institutions, the imposition of tax and exemptions from taxation: Anand (n425), at 22.

[428] *Maneka Gandhi v Union of India* [1978] INSC 16, 1978 SCR (2) 621 (SC of India), at 674. He continued, "[n]o attempt should be made to truncate its all embracing scope and meaning for, to do so would be to violate its activist magnitude: *ibid*.

[429] "These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent.": *ibid*, at 667. "The entire world is a family" was the motto of Vedic civilisation: Kaur (n422), at 65. All had equal opportunity in all walks of life in ancient India: *ibid*. The Vedic age was more liberal in providing equal status to the people: *ibid*.

[430] Anand (n425), at 24.

[431] In *Nakara* the Court allowed a challenge to the liberalisation of the formula for calculation of state pensions applicable only to those retiring after a stipulated date: Pandey (n423), at 80. Desai J, delivering the Court's judgment, referred to development of equality to help the weaker sections of society or others in need of assistance, and continued, "[l]egislative and executive action may accordingly be sustained if it satisfies the twin tests of reasonable classification and the rational principle correlated to the object sought to be achieved.": *Nakara v Union of India* [1982] INSC 103, 1983 (2) SCR 165, at 179-180.

and reasonable procedures in *Mullin*.[432]

The equality provisions in the Constitution in India have not been confined to inalterable categories like race or gender, nor to static conditions. In *Randhir Singh*, where police drivers succeeded in achieving pay parity with other government drivers, the Court gave substance to the fundamental rights to equality before the law and to equal opportunities in public employment by enlivening them through the use of a directive principle providing for equal pay for equal work for men and women.[433] Reddy J did not interpret the directive principle as applying only to equivalence between men and women.[434] Affirmative action was seen by Bhagwati J on behalf of the majority in *Jain* as part and parcel of equality, and not an aberration.[435]

The constitutional aims of social justice, equality and dignity reach out to draw in the marginalised to a position of equality with other members of society, as the Court demonstrated in 1995 when it protected vulnerable workers who had been exposed to asbestos in *Consumer Education and Research*.[436] Gender equality in India includes protection from sexual harassment and the universally recognised human right to work with dignity.[437]

Article 16 of the Indian Constitution provides for equality of opportunity in public employment.

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[432] In *Mullin* the Supreme Court held that a detainee should be allowed interviews with her family and legal adviser: *Mullin v Administrator, Union Territory of Delhi* [1981] INSC 12, 1981 SCR (2) 516.

[433] *Randhir Singh v Union of India* [1982] INSC 24, 1982 (3) SCR 298 (SC of India).

[434] He was insistent that the fundamental rights should be meaningful to "the vast majority of the people" and stated, "[q]uestions concerning wages and the like, mundane they may be, are yet matters of vital concern to them and it is there, if at all that the equality clauses of the Constitution have any significance to them.": *ibid*, at 305.

[435] *Jain v Union of India* [1984] INSC 115, 1984 (3) SCR 942 (SC of India). Wholesale reservation of places in colleges for deprived sectors was not permitted, but partial reservation could sometimes be allowed to the extent necessary to fulfil the requirements of the equality provision in Article 14 of the Constitution: Pandey (n423), at 85. Equality should be real for the historically deprived: [1984] INSC 115, 1984 (3) SCR 942, at 968.

[436] "Social justice is a dynamic device to mitigate the sufferings of the poor, weak, Dalits, Tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person.": *Consumer Education & Research Centre v Union of India* [1995] INSC 91, JT 1995 (1) 636 (SC of India), at 657 [20].
In another case it was held that life insurance cover should be offered to all on equal terms and could not be confined to employees of the state and of other reputable firms, as to do otherwise would be to breach the equality clause when applied to the right to livelihood as an extension of the right to life: *LIC of India v Consumer Education & Research Centre* [1995] INSC 272, 1995 SCC (5) 482 (SC of India).

[437] Pandey (n423), at 101. Even though there was no legislation in place to provide safeguards, the Supreme Court stepped in to fill the vacuum and laid down extensive guidelines for employers and for those running institutions to ensure the prevention of sexual harassment of working women: *Vishaka v State of Rajasthan* [1997] INSC 665.

Reservation of positions for any backward class which the state considers is inadequately represented is allowed by Article 16(4).[438] The temporary exemption of certain castes[439] and tribes[440] from passing a test for promotion was challenged unsuccessfully in *State of Kerala v Thomas*, where the Supreme Court was divided on the issue.[441] The Supreme Court in *Thakur*—a challenge to affirmative action to reserve places in schools for members of castes[442] and other backward classes—approved of Bhagwati J's views in *Minerva Mills* linking equality with dignity and liberty and effectively according socio-economic rights the same status as civil and political rights.[443] Balakrishnan CJ in *Thakur* cited a passage from Bhagwati J's partially dissenting judgment in which he regarded the Directive Principles of State Policy[444] as imposing a duty on the State to act to achieve equality for the poor.[445]

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[438] The so-called "Downtrodden" group in India is not homogenous: Kaur (n422), at 74. Its three major divisions (Scheduled Castes, Scheduled Tribes and the Other Backward Classes), each having its own characteristic features, distinctive backgrounds and particular problems, comprised 30% of the population in 2006: *ibid*.

[439] The Indian Constitution allows for affirmative action in favour of "Scheduled Castes", which is an official euphemism for "untouchables": Khan (n421), at 251. Groups have been isolated and disadvantaged by their "untouchability" because of their low status in the traditional Hindu caste hierarchy, which exposed them to ill-treatment, severe disabilities, and deprivation of economic, social, cultural and political opportunities: *ibid*, at 252.

[440] Affirmative action is permitted under the Constitution for "Scheduled Tribes", who have "an astoundingly marginal share" in Indian politics and, hence, large development projects have displaced millions of them, without any compensation: Kapil Sibal, "Law, the Constitution, Weaker Sections, Women, Minorities, Scheduled Castes and their Development" in Shabbir (n421), at 2.

[441] [1975] INSC 224, 1976 (1) SCR 906. One of the majority, Mathew J, analysed the nature of equality of opportunity in depth and distinguished it from formal equality, focusing instead on the need for true equality divorced from life's hazards and irrespective of one's position in society: *ibid*, at 948.

[442] The caste system in India is a glaring example of the systematic denial of human dignity. Compounded by gender inequality, this socially structured inequality would seem to amount to an institutionalised assault on human dignity: Linda Hogan and John D'Arcy May, "Constructing the Human: Dignity in Interreligious Dialogue" in Regina Ammicht-Quinn, Maureen Junker-Kenny and Elsa Tamez eds, *The Discourse of Human Dignity* (Concilium, SCM Press, London 2003), at 82-83.

[443] *Thakur v Union of India* [2008] INSC 613, at [174]. The Indian Supreme Court has derived socio-economic rights from a constitutional text written as a guarantee of non-interference: Beatty (n321), at 155.

For a review of *Thakur*, see MP Singh, "*Ashoka Thakur v Union of India*: A Divided Verdict on an Undivided Social Justice Measure" (2008) 1 *NUJS L Rev* 193, at 193-195.

[444] Constitution of India 1950, Part IV.

[445] *Minerva Mills Ltd v Union of India* [1980] INSC 141, 1981 SCR (1) 206 (SC of India), at 324:

> The Directive Principles therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country. It will thus be seen that the Directive Principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people who do not have even the bare necessities of life and who are living below the poverty level.

From my review of the jurisprudence of the Indian Supreme Court, it is evident that the equality rights in the Constitution have been developed over the years from the confines of the relatively narrow focus of a rigid classification test to encompass the prevention of arbitrary differentiation and even more ambitiously to the attempt to realise practical equality in a wide socio-economic sphere for a substantial minority suffering from historical deprivation attributable to a variety of sources. The concept of dignity has been used by the Inter-American Court of Human Rights to adjudge whether differentiation was legitimate. Treatment of a group as inferior crossed the boundary.[446]

An approach to equality giving a prominent role to the value of dignity is best placed to achieve substantive equality. The serious comprehensive attempts to give effect to substantive equality by the judiciary in both South Africa and Canada are credited by Joan Small and Evadné Grant to the legal realisation of human dignity being at the conceptual centre of the development of their equality jurisprudence.[447] Apart from the impact of court decisions on the litigants directly concerned, the methodology of human rights litigation in countries like Canada and South Africa supports a dialogue between court and legislature, which could provoke legislative changes.[448] To inhibit frivolous claims and to avoid subjective decisions—both from the judges' and the claimants' perspectives—it is important that a recognised structure be put on the use of the concept of dignity in relation to equality. Equality may be undermined by focusing primarily on dignity and losing sight of group discrimination.[449]

By requiring a claimant to show historical group prejudice, the Namibian Supreme Court has restricted the application of the anti-discrimination clause in its Constitution. In *Müller* the Court confined claims for redress to situations of past discrimination where the dignity of all

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[446] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-American Court of Human Rts Series A No 4 (19 January 1984), at [55].

[447] Small and Grant (n300), at 54. This is "not an abstract, individualistic notion, but a concept about the relation between the individual and state, and individual and group, which is circumscribed by concern, respect and consideration": *ibid*.

[448] *Ibid*, at 54-55. An example of where a legislative change resulted from a judgment was the passing of the Abolition of Corporal Punishment Act 1997 following *S v Williams* 1995 (3) SA 632 (CC): John D Bessler, "In the Spirit of *Ubuntu*: Enforcing the Rights of Orphans and Vulnerable Children Affected by HIV/AIDS in South Africa" (2008) 31 *Hastings Int'l & Comp L Rev* 33, at 88.

[449] O'Connell has urged that attention be given to the forms of hierarchy and disadvantage (in the sense of systematic exclusion from community benefits) in society in order to redress them: O'Connell (n327), at 285. His conclusion contains a salutary warning of the misuse of the dignity concept by the judiciary not making clear its underlying contextual norms and using it to limit anti-discrimination measures: *ibid*.

was not recognised.[450]

The Namibian Constitution does not include sexual orientation as one of the prohibited grounds of discrimination in Article 10(2). Although the majority decision in *Frank* was decided on the grounds of the right to a fair hearing, O'Linn AJA for the majority was not prepared to find that a same-sex couple was entitled to be treated on an equal basis as heterosexual couples.[451] The Namibian Supreme Court's stance on sexual orientation has reflected the attitude of a conservative society, which apparently wishes to impose the views and moral standards attributed to the majority on all and to enforce those standards on the homosexual community by fear of criminal sanctions for breaching traditional values.[452] O'Linn AJA accepted that the guideline for the judiciary was to give the Constitution a broad liberal

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[450] *Müller v President of the Republic of Namibia* [1999] NASC 2; 200 (6) BCLR 655 (NmS), at 18. Herr Müller, a German citizen, married a Namibian and wanted to take her surname on marriage, but he could not do so without complying with more formalities than a woman who wished to adopt her husband's surname. He challenged the legislation relying, *inter alia*, on his rights to equality before the law and freedom from discrimination on the grounds of sex. The State successfully defended the claim on the basis that the legislation did not breach substantive equality. The Court accepted that the differentiation created by the legislation was grounded on one of the specified grounds in Article 10(2) of the Namibian Constitution, but the differentiation did not in any way impair Herr Müller's dignity. Strydom CJ explained why this was the case, *ibid*, at 20: "The Appellant, being a white male, who immigrated to Namibia after Independence, cannot claim to have been part of a prior disadvantaged group. It can furthermore not be said that the purpose of the section was to impair the dignity of males individually or as a group or to disadvantage males."
The UN Human Rights Committee subsequently found that the gender-based approach of the legislation violated the prohibition on discrimination in the ICCPR: *Müller v Namibia* UN Human Rights Committee (28 June 2002) 74th Session UN Doc CCPR/C/74/D/919/2000), at [6.8], citing the ICCPR (n29) art 26.

[451] *Chairperson of the Immigration Selection Board v Frank* [2001] NASC 1 (SC of Namibia). Apart from the fact that sexual orientation was not one of the listed grounds on which discrimination was prohibited, there was no legislative trend in favour of it—in fact the trend was in the opposite direction: *ibid*, at 132-133. The lesbian applicant had not pleaded that her right to dignity was violated, but his view would not have been different if she had done so: *ibid*, at 142. Article 14 of the Constitution gave the right to marry to men and women (Constitution of the Republic of Namibia 1990, Article 14(1)), so O'Linn AJA declined to take over the legislature's role in extending the provisions of immigration control legislation to same-sex life partnerships: [2001] NASC 1 (SC of Namibia), at 143. He considered that the legislature's failure to include in the legislation "an undefined, informal and unrecognized lesbian relationship with obligations different from that of marriage" might amount to "differentiation", but was not "discrimination": *ibid*. He also declined to regard a homosexual couple as a family, described in Article 14(3) of the Constitution as the "natural" and "fundamental" group unit of society: [2001] NASC 1 (SC of Namibia), at 119.

[452] O'Linn AJA stated that the value judgment to be made must take cognisance in the first place of "the traditions, values, aspirations, expectations and sensitivities" of the Namibian people and should be objectively derived from various sources including the Constitution and the institutions of Namibia as expressed in parliamentary debates and legislation, judicial or other commissions, public opinion as established in properly conducted opinion polls, evidence, court judgments, referenda and expert publications: *ibid*, at 106-107, 114. This extensive list can hardly be described as containing objective sources by which to gauge the import of constitutional values. See Sam K Amoo, "The Constitutional Jurisprudential Development in Namibia since 1985" in Nico Horn and Anton Bösl eds, *Human Rights and the Rule of Law in Namibia* (Macmillan Namibia, Windhoek 2008), at 55-56.

purposive interpretation,[453] but he confined it unnecessarily to conform with the majority viewpoint at the expense of the equality, dignity, freedom and privacy of those with non-conformist traits in intimate personal preferences. In my view, he retracted from the judiciary's democratic duty to uphold the rights of minorities to equality in the formation and expression of their identities. O'Linn AJA pointed out that the provisions relating to equality and non-discrimination in the Namibian Constitution corresponded to those in the Constitution of Zimbabwe.[454] The case of *Banana v S* in the Supreme Court of Zimbabwe,[455] where the majority upheld the constitutionality of the common law crime of sodomy, was cited liberally in the judgment of the Namibian Court.[456] There was a notable conflict between the views of McNally JA for the majority and of Gubbay CJ in dissent in *Banana*.[457]

Although the Botswana Court of Appeal held in *Kanane*[458] that a provision in its Penal Code targeting indecent behaviour in public or private was unconstitutional on the grounds of gender discrimination because it did not extend to women, it did not strike it down as it had been amended by the legislature to be gender neutral since the date of the offence.[459] Mwaikasu J in the High Court[460] (approving of Lord Devlin's view) had completely subordinated the individual to society leaving little room for deviation from the moral norms of the majority and ignoring any call to respect human dignity.[461] The same conservative attitude in sexual

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[453] [2001] NASC 1 (SC of Namibia), at 101.

[454] *Ibid*, at 133.

[455] [2000] 4 LRC 621.

[456] [2001] NASC 1 (SC of Namibia), at 115, 133-138.

[457] See Quansah (n348), at 213-215. McNally JA was guided by public opinion and relied heavily on the US Supreme Court decision in *Bowers v Hardwick* in finding that the criminalisation of sodomy between men was not unconstitutional, as discrimination on the grounds of sexual orientation was permissible—the law did not discriminate on the basis of gender: [2000] 4 LRC 621, at 670, 673, citing 478 US 186 (1986). The Constitution of Zimbabwe includes gender—but not sexual orientation—among the listed grounds of prohibited discrimination: Constitution of the Republic of Zimbabwe 1979, Section 23(2). Gubbay CJ distinguished the much criticised US decision and found that the common law crime amounted to gender discrimination, which was not justified under the limitations clause in the Constitution: [2000] 4 LRC 621, at 643, referring to Constitution of the Republic of Zimbabwe 1979, Section 23(5)(b).

[458] *Kanane v S* 2003(2) BLR 64 (CA).

[459] Quansah (n348), at 206. Public opinion led the Court, which put the onus on the appellant to show that the public demanded decriminalisation—a hurdle he was unable to surmount: Kealeboga N Bojosi, "An Opportunity Missed for Gay Rights in Botswana: *Utjiwa Kanane v The State*" (2004) 20 *SAJHR* 466, at 473.

[460] *Kanane v S* (Crim Trial No F94/1995) (Botswana High Court) 22 March 2002.

[461] Quansah (n348), at 205, citing transcript Crim Trial No F94/1995 (22 March 2002) unreported, at 21:

> [T]he law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.

matters prevails in Malawi, where two men—living together as husband and wife (one of whom a psychiatrist assessed as having gender disorientation)—went through an engagement ceremony and were convicted by the Blantyre Chief Resident Magistrate in May 2010 of buggery and indecent practices.[462]

My examination of jurisprudence on sodomy in southern Africa (excluding South Africa) reveals that society's conservative outlook has diverted the judiciary in some quarters at least from taking cognisance of the dignity of the individual in its equality decisions where non-conforming sexual behaviour arises. A broader comparative analysis shows that a deeper less superficial approach to human dignity is essential in order to recognise the worth of each individual and to permit each life to flourish in a society where equality is the desired norm.[463] The South African structured use of dignity in equality jurisprudence with the context in which it is being used clearly defined in accordance with constitutional norms illustrates this truth.

At the conclusion of my review of the impact of human dignity on equality in South Africa, it is pertinent to remind ourselves of the dual place of dignity in the equality analysis under Section 9 of the Constitution: first, impairment of dignity is the test of unfairness; and, second, it is one of the values underpinning the assessment of reasonable limitation on equality in a democracy.[464]

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[462] *R v Soko* [2010] MWHC 2. See Louise Price, "The Treatment of Homosexuality in the Malawian Justice System: *R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa*" (2010) 10 *AHRLJ* 524. The men were freed following a presidential pardon granted on humanitarian grounds: Godfrey Mapondera and David Smith, "Gay couple freed by Malawi presidential pardon return to home villages" *Guardian* (London 31 May 2010), at 13.

[463] Laurie Ackermann considered "that dignity, and its relationship to equality, is ... an indispensable constituent in neutrally principled and correct adjudication on issues of unfair discrimination": Ackermann (n320), at 556.

[464] The various steps to assess inequality under Section 9 can be summarised as:

1. The threshold test under Section 9(1) is whether the challenged measure differentiates between people or groups of people, and, if so, whether there is a rational connection between the differentiation and a legitimate government purpose at which it is aimed. The lack of rationality is a fatal blow to the measure.
2. If it passes the rationality examination, it may be justified as corrective action for past discrimination under Section 9(2).
3. Even if rationally connected to the legislative aim, the measure may be unfair discrimination on one of the listed grounds in Section 9(3). There is a presumption of unfairness, if the differentiation is on one of the listed grounds (Section 9(5)).
4. Alternatively, it may be unfair discrimination on an unlisted ground (*Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), at [28]). No presumption of unfairness applies in this case.
5. The impact on the victims is the test of unfairness. If the measure has the potential to impair dignity or an analogous effect, it is unfair.
6. Equality may be limited in accordance with Section 36, to the extent that the restriction is reasonable in a society based on the democratic values of dignity, freedom and equality.

More than one ground can be taken into account when assessing whether there is unfair discrimination at step 3. This is evident from the wording of Section 9(3) and from Sachs J's judgment in the *Sodomy* case, where he pointed out that an approach based on context and impact acknowledges that grounds of unfair discrimination can intersect and allows evaluation of discriminatory impact on a combination of grounds "globally and contextually, not separately and abstractly"; alternatively, he opined that "a context rather than category-based approach might suggest that overlapping vulnerability is capable of producing overlapping discrimination": 1998 (12) BCLR 1517 (CC), at [113] (footnote omitted). The more complex multidimensional approach used in South Africa is very difficult within the US constitutional context: Wing (n360), at 79.