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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 2 OF 2

26th October 2011
6 CHAPTER VI – SOCIO-ECONOMIC RIGHTS

6.1 Interpretation of economic and social rights

Because there are specific provisions in the South African Constitution making socio-economic rights justiciable, Yacoob J in Grootboom could quickly dispose of any argument to the contrary, but the difficult issue, as he said, was “how to enforce them in a given case”. Each situation is considered separately in context. He saw civil and political rights and socio-economic rights as being interlinked, each being necessary to enjoy the other, to advance equality and to develop the individual’s personality.

As the provisions of the South African Constitution were modelled on those in the International Covenant on Economic Social and Cultural Rights (ICESCR), United Nations material is relevant and a valuable source of guidance for South African courts. Yacoob J confirmed that the South African requirement of “progressive realisation” of housing was taken from article 2.1 of the ICESCR and that it bore the same meaning in both documents. In


3 2001 (1) SA 46 (CC), at [23]: There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

Yacoob J reiterated the link between poverty and the reduction of a person in their human dignity, which was separate from the physical discomfort of deprivalion, in Njongi v MEC, Department of Welfare, Eastern Cape 2008 (4) SA 237 (CC), at [81].


6 2001 (1) SA 46 (CC), at [45]. However, he found the UN material of little help in ascertaining the extent of the housing provision, as there was a significant distinction between a right to adequate housing in article 11.1 of the ICESCR and the right of access to adequate housing in Section 26 of the South African Constitution: ibid, at [28]. There was also a difference between the obligations on the state in both documents, the ICESCR requiring appropriate steps and the Constitution reasonable
Grootboom there was a need to balance the right to human dignity with the available resources\(^7\) of the state,\(^8\) the “available resources” term being common to the ICESCR and the Constitution. Grootboom is the seminal case not just on the right to housing and shelter, but also because of its impact on the interpretation of all socio-economic constitutional rights.\(^9\)

A review of the case law seeking enforcement of socio-economic rights emphasises the Constitutional Court’s understanding that the Constitution is to be read as a whole. The provisions for housing, health care, welfare and other socio-economic rights are not construed in isolation, but are informed by the foundational values. Human dignity comes to the fore constantly as the lodestar in all aspects of the Constitutional Court’s deliberations, whether they be for the purpose of ascertaining the threshold right, its interpretation and application to particular situations, or the limitation assessment.\(^10\) Albie Sachs confirmed that in Grootboom the Court was strongly influenced by the need to deal with rights in the Bill of Rights as interrelated and interdependent.\(^11\) The Court was guided by respect for the legislative and other measures: \textit{ibid.}

The UN Committee on Economic, Social and Cultural Rights requires that states take reasonable measures in light of their specific circumstances, the burden of proof resting on the states: M Magdalena Sepúlveda, \textit{The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights} (School of Human Rights Research Series, Intersentia, Antwerpen 2003), at 337. Magdalena Sepúlveda’s view was that the Committee needed to further elaborate the “reasonableness” requirement and she thought it desirable if it took into account some relevant domestic jurisprudence, including Grootboom: \textit{ibid}.\(^7\) The obligation on the state under the ICESCR is “to take steps, individually and through international assistance and co-operation ... to the maximum of its available resources”: ICESCR (n4), art 2(1). The Committee on Economic, Social and Cultural Rights has noted that the phrase “to the maximum of its available resources” was intended to refer to both the resources existing within a state and those available from the international community: UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” 5\(^{\text{th}}\) 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, at [13]. In view of this, it is clear that in assessing resources a court has jurisdiction to look beyond the available budget: Jane Ansah, “The Right to Development as Applied in National Law” in Mashood A Baderin and Robert McCorquodale eds, \textit{Economic, Social and Cultural Rights in Action} (OUP, Oxford 2007), at 441 fn 150.

\(^7\) The obligation on the state under the ICESCR is “to take steps, individually and through international assistance and co-operation ... to the maximum of its available resources”: ICESCR (n4), art 2(1). The Committee on Economic, Social and Cultural Rights has noted that the phrase “to the maximum of its available resources” was intended to refer to both the resources existing within a state and those available from the international community: UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” 5\(^{\text{th}}\) 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, at [13]. In view of this, it is clear that in assessing resources a court has jurisdiction to look beyond the available budget: Jane Ansah, “The Right to Development as Applied in National Law” in Mashood A Baderin and Robert McCorquodale eds, \textit{Economic, Social and Cultural Rights in Action} (OUP, Oxford 2007), at 441 fn 150.

\(^8\) David Carey Miller regarded this as the most significant aspect of the final decision, with the Court pointing out the realisation of socio-economic rights would be progressive—the most urgent need being dealt with first: Carey Miller (n5), at 215, citing Grootboom 2001 (1) SA 46 (CC), at [45].


\(^10\) To remove the difficulties caused by measuring dignity subjectively, Katharine Young advocates an objective notion of dignity and cites as an example South Africa’s constitutional protection of equality, which prohibits harm to dignity experienced according to some society-wide standard: Katharine G Young, “The Minimum Core of Economic and Social Rights: A Concept in Search of Content” (2008) 33 \textit{Yale J Int’l L} 113, at 136.

\(^11\) Albie Sachs, \textit{The Strange Alchemy of Life and Law} (OUP, Oxford 2009), at 179. The “tripartite typology of interdependent duties” (first developed by Henry Shue and endorsed by some of the General Comments issued by the UN Committee on Economic, Social and Cultural Rights) is explicitly
foundational values (especially human dignity), which necessitated that the right of access to housing not be separated from the right to human dignity, resulting in the State being obliged to take account of the qualitative dimension and not to give just a quantitative response.\textsuperscript{12}

6.2 Enforceability of socio-economic rights

Socio-economic rights can impose positive duties on the state as well as negative obligations not to interfere to prevent or reverse progress.\textsuperscript{13} It is more difficult for the courts to frame effective orders when positive duties are involved. In relation to socio-economic matters, there is the perennial problem of scarce resources and the fear of prejudicing other people's rights by prioritising those that seek a legal remedy.\textsuperscript{14} The South African Constitutional Court has grappled with the constitutional obligation on the State to take reasonable legislative and other measures within its available resources to progressively realise socio-economic rights such as those to housing and healthcare.\textsuperscript{15} It has not hesitated to intervene when the dignity

embraced by the South African Constitution in Section 7(2), which obliges the state to respect, protect, promote and fulfil the rights in the Bill of Rights: Marius Pieterse, “Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience” (2004) 26 \textit{Hum Rts Q} 882, at 888-889. Pierre de Vos has substantiated the interdependence and indivisibility of all human rights in the South African Bill of Rights, and stated that all rights are aimed at guaranteeing each individual the freedom to live his or her life with dignity and respect: Pierre de Vos, “Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution” (1997) 13 \textit{SAHJR} 67, at 70, fn 12.

\textsuperscript{12} Sachs (n11), at 179. Albie Sachs pointed out that in securing protection of the rights of particularly vulnerable people, courts are guided by the values of an open democratic society, which repudiates past “forms of oppression, hardship, division and discrimination”: \textit{ibid}, at 214. He continued, “[this society] acknowledges the foundational character of the principle of human dignity, and aspires to accept people for who they are”: \textit{ibid}.

\textsuperscript{13} A formerly widespread presumption (still prevailing in the United States) is that civil and political rights entailing negative obligations were justiciable, but that socio-economic rights imposing positive duties were not. Mark Kende sees two problems with the American constitutional tradition where the courts are reluctant to determine funding, which is regarded as preserve of the executive—first, it is an oversimplification since the South African Constitutional Court's experience is that protecting socio-economic rights sometimes requires the Court to negative government actions; second, enforcing negative rights also implicates budgetary matters: Mark S Kende, “The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective” (2003) 6 \textit{Chapman L Rev} 137, at 155-156. The US Supreme Court has not embraced President Franklin D Roosevelt's “freedom from want” as a constitutional norm: \textit{ibid}, at fn 9, citing Franklin D Roosevelt, “The Annual Message to the Congress” (6 January 1941) in 9 \textit{The Public Papers and Addresses of Franklin D Roosevelt} 663, at 672 (Samuel I Rosenman ed, 1969) (1941).


\textsuperscript{15} The South African case law has evolved from the rejection of individual rights claims to recognition of collective rights to comprehensive government programmes to address urgent social needs: Jeanne M Woods, “Justiciable Social Rights as a Critique of the Liberal Paradigm” (2003) 38 \textit{Tex Int'l L J} 763, at 790. A remedy was granted to an individual when the state was ordered to reinstate a social grant and to pay arrears with interest to a poor vulnerable woman with 100% permanent disability, who was probably
of the litigant is threatened. The range of remedies available to the Court is wide.

6.3 Separation of powers

An argument regularly used against the enforcement by the courts of socio-economic rights is that under the separation of powers doctrine, these are matters of policy more properly left to the legislature and executive. The separation of powers issue arose in the TAC case over the right to health care, when Counsel for the State argued that the questions raised belonged to the sphere of government policy and were outside the judiciary’s domain. This argument, if accepted, would have curtailed somewhat the scope of the decision in Grootboom. The judges did not retreat, as the Constitution itself had given them the task of enforcing constitutional rights and of considering whether the State had given effect to its corresponding obligations. Although conceding that the judicial arm is ill-suited to adjudicate on socio-economic issues, the Court pointed out that the Constitution obligated the courts, first, to insist that measures be taken by the State as mandated by the Constitution and, second, to test those measures against the reasonableness standard.

The South African Constitutional Court has frequently used a collaborative approach to resolve

unaware of her entitlement to arrears, Yacoob J finding that the state had acted unconscionably in relying on prescription of her claim: Njongi v MEC, Department of Welfare, Eastern Cape 2008 (4) SA 237 (CC), at [80], [85], [92]. For a review and assessment of Njongi, 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 604-607, 612.

The right to basic education under Section 29(1)(a) of the Constitution is immediately realisable: Governing Body of the Juma Musjid Primary School v Essay NO [2011] ZACC 13, 2011 (8) BCLR 761 (CC), at [37].

It is said that democracy requires accountability from the elected legislature rather than intervention by an unelected judiciary without the competencies, knowledge or resources to decide on social priorities.

Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) (TAC case).

Sachs (n11), at 181.

TAC case 2002 (5) SA 721 (CC), at [99]. The Court rebuffed any notion that it would be exceeding its remit if it found the State had failed to give effect to its constitutional obligations and in its judgment defended its position in strident terms, “[i]n so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.”: ibid.

David Bilchitz also criticised the reasonableness test, because reasonableness cannot alone provide content to adjudicate cases based on socio-economic rights; it is context-dependent and lacks a principled basis on which to found decisions: David Bilchitz, “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) 19 SAJHR 1, at 9-10.


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breaches of socio-economic rights. Starting with *Grootboom*, it found that the State should include in its housing plan provision for shelter for those who were in desperate need. The Court placed the dignity of human beings in a central position in assessing the reasonableness of state action in housing. Consideration of dignity is invariably involved in assessment of a socio-economic right. Instead of coming to a decision on the extent of the right, the Court left it to the State to build the protection to be afforded to the destitute homeless into its plans. It did not accept that the minimum core obligation formulated by the UN Committee

22 In the early cases the Court began to develop a flexible conception of the separation of powers, which benefits all branches of government, as the courts have the power to make orders that affect government policies directly and it also permits the executive and legislative branches to have a role in interpreting the extent of their obligations under the Constitution: Brian Ray, "Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights" (2009) 45 Stan J Int'l L 151, at 175. 23 2001 (1) SA 46 (CC). The extent of shelter to be provided was contextual depending on the exact circumstances of those who were homeless including factors such as the weather conditions. The plan should be balanced, flexible and cover emergency situations as well as providing for short, medium and long term needs: *ibid*, at [43]. The Court ordered that the State should build into its housing plan provisions for those “with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations”: *ibid*, at [99].

24 *Ibid*, at [83]. Cf City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd [2011] ZASC A 47. In that case the Supreme Court of Appeal found that the inflexible application of the City’s policy of not providing temporary accommodation to those most in need who were evicted from privately-owned buildings subjected them to continued violation of their dignity as its effect was that they were rendered homeless on eviction and vulnerable to eviction wherever they went because they were unable to afford other accommodation: *ibid*, at [66]-[67].

25 There are many juridical examples of how the norm of dignity has practically guided the interpretation of economic and social rights, including its use by the German Constitutional Court to give meaning to the “existential minimum” of social welfare in the German Basic Law, by which society is obliged to provide everyone with the socio-economic conditions adequate for a dignified existence: Young (n10), at 134. In refugee law a human rights approach has broadened the scope of application of socio-economic rights in New Zealand by focusing on human dignity rather than on the traditional criterion of economic proscription, which is an almost complete denial of the ability to earn a living: Adrienne Anderson, “On 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 136. In one example the New Zealand Refugee Status Appeals Authority granted refugee status to a Roma family from the Czech Republic who had experienced severe discrimination in employment, provision of health care and housing, and the education of their children, and would face the same upon return; the Authority acknowledged the dignity aspect of these types of claims and gave significant weight to the effect on the appellants of their “long experience of involuntary abasement”: *ibid*, at 138, citing Refugee Appeal No 71193/98 (Sept 9, 1999) (NZ Refugee Status App Auth), at 14-15, available at http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_19990909_71193. pdf.

Jeanne Woods thinks human dignity may be too elusive a concept to provide a foundation on which to ground the full range of human rights, as the social, economic and cultural pre-conditions of a dignified human life remain marginalised in the dominant rights discourse; she proposed human need as a more comprehensive framework for theorising social rights claims, which are indispensable to full development of the person represented by the concept of dignity: Woods (n15), at 763-764. Woods predicted that the demand for second- and third-generation rights will play a galvanising role in the ongoing struggle of the impoverished to realise fully the dream of human dignity: *ibid*, at 793.

26 In assessing reasonableness, it would not “enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent”: *Grootboom* 2001 (1) SA 46 (CC), at [41]. Eva Brems commented that this approach to progressive
on Economic, Social and Cultural Rights applied to socio-economic rights in the South African Constitution. In any event, the Court built its decision around dignity and what was reasonable rather than on a minimum core or housing on demand for the most needy. The realisation—avoiding a court enquiry on whether more favourable measures could have been adopted—did not lead to maximisation of human rights protection: Eva Brems, “Human Rights: Minimum and Maximum Perspectives” (2009) 9 HRL Rev 349, at 357.

It rejected the minimum core approach as insufficiently flexible and dependent on a level of knowledge and expertise that the Court lacked: 2001 (1) SA 46 (CC), at [33]. Yacoob J pointed out that the minimum core obligation in international law is determined generally by having regard to the needs of the most vulnerable group entitled to the protection of the right in question: ibid, at [31]. Adoption of the minimum core would have established an objective minimum standard: Ray (n22), at 159. Failure to meet that standard by the government would have meant automatic violation of the right: ibid. The view of the UN Committee on Economic, Social and Cultural Rights is that there is incumbent on every state party “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights” in the ICESCR: UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” (n7), at [10]. An assessment as to whether a state has discharged its minimum core obligation must take account of resource constraints applying within the country concerned: ibid. To succeed in attributing its failure to meet its minimum core obligations to a lack of available resources, a state “must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations”: ibid. By referring to “minimum core obligation” rather than “minimum core content” (often defined as the nature or essence of a right), the Comment has avoided the minimum content becoming the ceiling rather than the floor; instead of ranking the various components of a human right in some sort of hierarchy according to relative worth, the question changes to one of timing, so that a state that has ratified the ICESCR will ask what it must do immediately to realise the right: Audrey R Chapman and Sage Russell, “Introduction” in Audrey R Chapman and Sage Russell eds. Core Obligations: Building a Framework for Economic, Social and Cultural Rights (Intersentia, Antwerp 2002), at 9. The minimum core obligation formulation is a way to accommodate the reality that many economic, social and cultural rights (and often civil and political rights as well) require resources that are simply not available in poor countries; ibid, at 10. This approach affirms that even in highly straitened circumstances, a state has irreducible obligations that it is assumed to be able to meet: ibid. For criticism of the Constitutional Court’s rejection of the minimum core standard, see Pieterse (n11), at 897-898.

It left open the possibility of invoking the minimum core in other cases to assist in determining whether the measures taken were reasonable, but to do that it would need to have enough information to assess what would be the appropriate level in the conditions pertaining in South Africa: 2001 (1) SA 46 (CC), at [33]. For a defence of the Constitutional Court’s refusal to adopt directly the minimum core, see Kende (n13), at 153; Mark S Kende, “The South African Constitutional Court’s Construction of Socio-Economic Rights: A Response to Critics” (2004) 19 Conn J Int’l L 617, at 622-624. John Bessler has urged the Constitutional Court to move towards minimum core entitlements for HIV/AIDS-affected children without familial support in order to protect orphans and the vulnerable consistent with children’s constitutional rights and the overarching philosophy of ubuntu: 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 111. Young prefers the Court’s use of reasonableness instead of enquiring into a minimum essential core of a right, as it is more normatively open and sociologically framed: Young (n10), at 140. Karin Lehmann considers the reasonableness approach to be jurisprudentially sounder than the minimum core, which she views as inappropriate as a tool of judicial decision-making, but she takes issue with the Court’s insistence on not examining how the public purse is spent: Lehmann (n9), at 165.

As a precursor to the proportionality test, one of the requirements to justify a human rights restriction set out by the Canadian Supreme Court in R v Oakes [1986] 1 SCR 103 was a “minimal impairment” test; but the Court was not able to apply the Oakes test strictly and consistently, so it reformulated it to a reasonable impairment test: Brems (n26), at 360, 365.

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contextual assessment of reasonableness was wide-ranging considering not solely the position of the needy, but also the social, economic and historical environments and the institutional capacity for implementation of the housing programme.\textsuperscript{29}

6.4 International Covenant on Economic, Social and Cultural Rights

To supplement the analysis of the South African cases, this section will look at the obligations under the ICESCR in more depth. It is clear that its roots are firmly based on a belief in the inherent dignity of all,\textsuperscript{30} as the preamble in a somewhat circuituous fashion asserts that rights derive from it,\textsuperscript{31} and that it and rights are the foundation of freedom, justice and peace.\textsuperscript{32} Part III recognises specific rights such as to an adequate standard of living including food, clothing and housing, with continuous improvement in living conditions,\textsuperscript{33} to the highest attainable standard of physical and mental health,\textsuperscript{34} and to education directed to “the full development of the human personality and the sense of its dignity”.\textsuperscript{35}

The general obligation of states in relation to rights recognised in the ICESCR set out in article 2.1 encompasses the following elements:

- An obligation to take steps to achieve the rights immediately on ratification of the ICESCR;
- A duty to avail of externally available aid to do so;
- A commitment to use resources to the fullest possible extent;

\textsuperscript{29} 2001 (1) SA 46 (CC), at [43]. It would not be reasonable to exclude those existing in critical conditions. To take account of changing situations, the programme itself should be continuously reviewed and updated: \textit{ibid}. On the need for an adaptable housing plan, see also \textit{President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd} 2005 (5) SA 3 (CC), at [49].

The extent of deference to the other branches of government can be gauged from the reticence of the Court to impose its own views, thereby emphasising the principal role of the other branches of government in developing appropriate policies to enforce socio-economic rights; the Court also noted that enforcement of these rights required considerable flexibility, as “a wide range of possible measures could be adopted by the state to meet its obligations”: \textit{Ray} (n22), at 159-160, citing 2001 (1) SA 46 (CC), at [41].

\textsuperscript{30} Although the ICESCR is politically neutral (neither supporting nor condemning any particular socio-economic system), it is ideological to the extent that it synthesises portions of each of major political ideologies as they converge on principles of human dignity and economic, social and cultural rights: Philip Alston and Gerard Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights” (1987) 9 \textit{Hum Rts Q} 156, at 219. The UN Committee on Economic, Social and Cultural Rights asserted the ICESCR’s neutrality between political and economic systems, subject to the proviso that government be democratic, that all human rights be respected, and that those systems recognise the interdependence and indivisibility of the two sets of human rights: UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” (n7), at [8].

\textsuperscript{31} ICESCR (n4) preamble, second para.

\textsuperscript{32} \textit{ibid} preamble, first para.

\textsuperscript{33} \textit{ibid} art 11.1.

\textsuperscript{34} \textit{ibid} art 12.1.

\textsuperscript{35} \textit{ibid} art 13.1.
States are obligated to guarantee the exercise of the recognised rights without discrimination on stipulated grounds.\(^{37}\)

Some illumination of the onus imposed by article 2.1 can be found in General Comment No 3 of the UN Committee on Economic, Social and Cultural Rights on the nature of states' obligations.\(^{38}\) By ratifying ICESCR, states undertake obligations of conduct and of result.\(^{39}\) The unqualified phrase “to take steps” requires “deliberate, concrete and targeted” action within a reasonably short time towards the goal of full realisation of the rights to be achieved progressively.\(^{40}\) While recognising that full realisation of all economic, social and cultural rights takes time and requires some flexibility, the principal obligation of result is their progressive realisation, which is a clear requirement that states “move as expeditiously and effectively as possible towards that goal.”\(^{41}\)

In the light of its experience of over 10 years, the

\(^{36}\) ibid art 2.1:
Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

\(^{37}\) The stipulated grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status: ibid art 2.2. Developing countries, “with due regard to human rights and their national economy,” have the option to decline to extend the full benefit of economic rights to non-nationals: ibid art 2.3.

\(^{38}\) UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” (n7). Some observers consider that the General Comments have developed an authoritativeness usually reserved for advisory opinions and enjoy a significant degree of acceptance by state parties: Young (n10), at 143.

\(^{39}\) UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” (n7), at [1].

\(^{40}\) ibid, at [2]. The undertaking to take steps is an obligation of conduct distinguishable from and less demanding than a guarantee, but nonetheless represents a clear legal undertaking of immediate application: Alston and Quinn (n30), at 165-166.

Legislation is highly desirable and may even be indispensable in cases such as effective combating of discrimination: UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” (n7), at [3]. “All appropriate means” is not confined to legislation, which on its own may not be sufficient to achieve implementation of the rights: ibid, at [4]. The initial decision on what is appropriate rests with the states, subject to the Committee’s ultimate determination on whether all appropriate measures have been taken: ibid. The Committee tentatively urged judicial remedies, being of opinion that a number of rights in ICESCR should be capable of immediate application and therefore justiciable: ibid, at [5]. Other appropriate means may also be administrative, financial, educational and social: ibid, at [7].

\(^{41}\) ibid, at [9]. The principle of progressive realisation places a burden on states to show discernible progress towards the enjoyment by everyone of the rights established by the ICESCR: Scott Leckie, “Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights” (1998) 20 Hum Rts Q 81, at 93.
contextual assessment of reasonableness was wide-ranging considering not solely the position of the needy, but also the social, economic and historical environments and the institutional capacity for implementation of the housing programme.  

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To supplement the analysis of the South African cases, this section will look at the obligations under the ICESCR in more depth. It is clear that its roots are firmly based on a belief in the inherent dignity of all, as the preamble in a somewhat circuitous fashion asserts that rights derive from it, and that it and rights are the foundation of freedom, justice and peace. Part III recognises specific rights such as to an adequate standard of living including food, clothing and housing, with continuous improvement in living conditions, to the highest attainable standard of physical and mental health, and to education directed to “the full development of the human personality and the sense of its dignity”.

The general obligation of states in relation to rights recognised in the ICESCR set out in article 2.1 encompasses the following elements:

- An obligation to take steps to achieve the rights immediately on ratification of the ICESCR;
- A duty to avail of externally available aid to do so;
- A commitment to use resources to the fullest possible extent;

2001 (1) SA 46 (CC), at [43]. It would not be reasonable to exclude those existing in critical conditions. To take account of changing situations, the programme itself should be continuously reviewed and updated: ibid. On the need for an adaptable housing plan, see also President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC), at [49].

The extent of deference to the other branches of government can be gauged from the reticence of the Court to impose its own views, thereby emphasising the principal role of the other branches of government in developing appropriate policies to enforce socio-economic rights; the Court also noted that enforcement of these rights required considerable flexibility, as “a wide range of possible measures could be adopted by the state to meet its obligations”: Ray (n22), at 159-160, citing 2001 (1) SA 46 (CC), at [41].

Although the ICESCR is politically neutral (neither supporting nor condemning any particular socio-economic system), it is ideological to the extent that it synthesises portions of each of major political ideologies as they converge on principles of human dignity and economic, social and cultural rights: Philip Alston and Gerard Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights” (1987) 9 Hum Rts Q 156, at 219. The UN Committee on Economic, Social and Cultural Rights asserted the ICESCR’s neutrality between political and economic systems, subject to the proviso that government be democratic, that all human rights be respected, and that those systems recognise the interdependence and indivisibility of the two sets of human rights: UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” (n7), at [8].
• The aim of continuous progress to the goal of comprehensive provision of the rights; and
• The use of whatever means are appropriate to achieve the aim in the context prevailing in relation to each right in the particular state in question with encouragement to enact legislation to do so.36

States are obligated to guarantee the exercise of the recognised rights without discrimination on stipulated grounds.37

Some illumination of the onus imposed by article 2.1 can be found in General Comment No 3 of the UN Committee on Economic, Social and Cultural Rights on the nature of states’ obligations.38 By ratifying ICESCR, states undertake obligations of conduct and of result.39 The unqualified phrase “to take steps” requires “deliberate, concrete and targeted” action within a reasonably short time towards the goal of full realisation of the rights to be achieved progressively.40 While recognising that full realisation of all economic, social and cultural rights takes time and requires some flexibility, the principal obligation of result is their progressive realisation, which is a clear requirement that states “move as expeditiously and effectively as possible towards that goal.”41 In the light of its experience of over 10 years, the

36 ibid art 2.1:
Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

37 The stipulated grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status: ibid art 2.2. Developing countries, “with due regard to human rights and their national economy,” have the option to decline to extend the full benefit of economic rights to non-nationals: ibid art 2.3.

38 UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” (n7). Some observers consider that the General Comments have developed an authoritativeness usually reserved for advisory opinions and enjoy a significant degree of acceptance by state parties: Young (n10), at 143. UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” (n7), at [1].

39 ibid, at [2]. The undertaking to take steps is an obligation of conduct distinguishable from and less demanding than a guarantee, but nonetheless represents a clear legal undertaking of immediate application: Alston and Quinn (n30), at 165-166. Legislation is highly desirable and may even be indispensable in cases such as effective combating of discrimination: UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” (n7), at [3]. “All appropriate means” is not confined to legislation, which on its own may not be sufficient to achieve implementation of the rights: ibid, at [4]. The initial decision on what is appropriate rests with the states, subject to the Committee’s ultimate determination on whether all appropriate means have been taken: ibid. The Committee tentatively urged judicial remedies, being of opinion that a number of rights in ICESCR should be capable of immediate application and therefore justiciable: ibid, at [5]. Other appropriate means may also be administrative, financial, educational and social: ibid, at [7].

40 ibid, at [9]. The principle of progressive realisation places a burden on states to show discernible progress towards the enjoyment by everyone of the rights established by the ICESCR: Scott Leckie, “Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights” (1998) 20 Hum Rts Q 81, at 93.
Committee concluded that the raison d’être of the ICESCR demanded a minimum core obligation.

Debate on the rights and obligations under the ICESCR has focused on whether legislation is required to ensure progressive achievement exists independently of an increase in resources; regardless of constraints on resources, a state will have to demonstrate that it is taking steps to realise the rights progressively; in the absence of increased resources, what is required is at least the effective use of existing resources; progressive implementation can be effected by the development of the societal resources necessary for the realisation of the recognised rights for everyone: de Vos (n11), at 97.

Any deliberately retrogressive measures must be taken only after “the most careful consideration”, bearing in mind all the rights in the ICESCR and continuing to utilise fully “the maximum available resources”: UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” (n7), at [9]. It would require to be justified under the limitations provisions in art 4 ICESCR: Leckie supra, at 99. Dennis Davis pointed out a significant difference between the Committee’s approach and the concept of reasonableness developed by the Constitutional Court from international jurisprudence, ie, the former imposes on the state the obligation to implement elements of the right immediately, but the concept of reasonableness adopted in Grootboom provides far less clarity about the core content of the right: Dennis M Davis “Socioeconomic rights: Do they deliver the goods?” (2008) 6 ICON 687, at 698-699. Progressive realisation is mostly monitored through the use of indicators and benchmarks: Brems (n26), at 356. Indicators allow both comparisons and follow-up over time, yet, as Brems concluded, they are generally not suited for the evaluation of individual instances of rights restrictions: ibid.

The onus is on a state claiming inability to achieve the minimum core to show that the deficiency occurred notwithstanding every effort to use all available resources to satisfy the minimum requirement as a matter of priority: UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” (n7), at [10]. There are varying views as to whether the minimum applies primarily to the individual enjoyment of a right or to society-wide levels of enjoyment: Leckie (n41), at 101. Even in dire circumstances, states have to “strive to ensure the widest possible enjoyment of the relevant rights”: UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” (n7), at [11]. Neither is the need for monitoring and plans to promote the rights removed by lack of resources: ibid. When there are severe financial constraints, such as in a recession, states must adopt relatively low-cost targeted programmes to protect the vulnerable: ibid, at [12]. The more affluent states have an obligation to assist those less fortunate: ibid, at [14].

The minimum core concept inherits its structure from the German Basic Law, where the core or essential content of certain constitutional rights lies beyond the reach of permissible limitation: Young (n10), at 124. The Committee was the first international body to articulate the concept: ibid, at 115. Young has identified three accomplishments anticipated by the concept: first, it initiates a common legal standard; second, it purports to advance a baseline of socio-economic protection across varied economic policies and different levels of available resources; third, its minimalist connotations signal an acceptable moderation: ibid, at 121-122. The focus on the duties required to implement the rights, rather than the elements of the rights themselves, enables the analysis of realistic, institutionally informed strategies for rights protection; furthermore, the analysis of the duties that correlate to each right confronts the erroneous dichotomy of positive and negative rights: ibid, at 151.

In contrast, Lehmann believes that there are significant conceptual flaws with the minimum core, as it has inherent contradictions, and does not take into account “the starkly utilitarian choices that inform the allocation of resources among the beneficiaries of socio-economic rights”: Lehmann (n9), at 182. She pointed out that the Committee and scholars are not always clear whether their conception of the minimum core is absolute or relative and neither are they specific on how competing interests should be ranked: ibid, at 183, 185.
necessary, justiciability, progressivity, and the impact of retrograde steps. The General Comment provides answers to these questions, although academic scholars are sharply divided on some of them. While not clearly mandated by the ICESCR, legislation is advocated by the Committee and it will not be possible to achieve non-discriminatory exercise of the rights without it.45

6.4.1 Justiciability

Since some—at least—of the rights are immediately realisable, they are justiciable. The originally perceived division between negative civil and political rights, on the one hand, and positive socio-economic rights, on the other, is false.46 Even the former impose some expenditure on the state. The South African experience demonstrates that socio-economic rights are justiciable, and that judicial decisions can respect the separation of powers in a democracy in the process of promoting their universal progressive realisation. The UN Justiciability Report recounts that Sandra Liebenberg advised that the South African Constitution encompassed a wide range of socio-economic rights on an equal footing with civil and political rights and that the courts were moving towards improved protection of human rights.47 She referred to Grootboom as establishing three important principles: first, the justiciability of economic, social and cultural rights could not be determined in the abstract; second, all rights were interdependent and inter-related; and, third, it developed the

44 Justiciability refers to the ability of a court to adjudicate a dispute and order remedies for constitutional violations: Woods (n15), at fn 19. Differences of opinion on the justiciability of socio-economic rights surfaced during the drafting of the ICESCR as early as 1951, when the French representative (René Cassin) considered that recourse to legal proceedings was envisaged in the event of deprivation of those rights, but he was contradicted by the US representative (Eleanor Roosevelt), who responded that they were not justiciable: Alston and Quinn (n30), at 170.

At international level there has been little judicial attention to socio-economic rights, which has given rise to the self-fulfilling perception that they are non-justiciable—despite challenges to this perception from "a rich theoretical literature" and emerging case law from domestic courts: David Marcus, "The Normative Development of Socioeconomic Rights through Supranational Adjudication" (2006) 42 Stan J Int'l L 53, at 58-59.

45 Where existing legislation is in violation of the obligations under the ICESCR, article 2.1 would require legislative action to be taken: Alston and Quinn (n30), at 167.

46 On the arguments concerning the nature of socio-economic rights and whether they are qualitatively different from civil and political rights, see Ray (n22), at 151-152. Jürgen Habermas considers that universal equal human dignity grounds the indivisibility of all categories of human rights, the classical civil rights (the liberal rights and the democratic rights of participation) only acquiring equal value when supplemented by social and cultural rights: Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights" (2010) 41 Metaphilosophy 464, at 468.

"reasonableness" standard to determine whether the state was complying with its socio-economic obligations, the Court citing with approval the interpretation of progressive implementation in General Comment No 3. Liebenberg’s conclusion indicated that the Constitutional Court’s approach showed respect for the other branches of government. From her observations it is clear that socio-economic rights can be justiciable without infringing on the separation of powers.

There has been a trend towards the justiciability of socio-economic rights nationally and internationally. The duty not to discriminate is justiciable since it has immediate full application.

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48 Ibid.
49 She stated, *ibid.*, that *Grootboom* sought to strike an appropriate balance between the constitutional responsibility of the courts to enforce the duties imposed by socio-economic rights, and the role of the legislature and the executive in a democracy to make and implement laws and policies, thereby fostering a relationship of accountability, transparency and responsiveness between judiciary, legislature and executive.

50 The Canadian delegate at the workshop that gave rise to the UN Justiciability Report urged that the relationship between the courts and the legislature should be constructive rather than a power struggle, so that adjudicating socio-economic rights enhanced participatory democracy: *ibid.*, at [9]. He pointed out that even in a country without explicit domestic legal recognition of social and economic rights, and one in which there remained considerable caution about excessive judicial interference, there was a solid foundation on which social and economic rights could be claimed and adjudicated, and, furthermore, it was wrong to assume that adjudication of socio-economic rights was not relevant in an affluent country: *ibid.*. For an assessment of justiciability of social and economic rights in Canada, see Fons Coomans, "Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context" in Coomans (n2), at 12; David Wiseman, "Methods of Protection of Social and Economic Rights in Canada" in Coomans (n2), at 173-205.

In India the judiciary invoked powers under the Constitution to interpret and press for implementation of social and economic rights, there having been a change of attitude in the 1950s by the Supreme Court, progressively deeming fundamental rights contained in the Constitution justiciable through the requirement that all State action was to conform to requirements of justice and reasonableness: UN Justiciability Report (n47), at [11]. On enforcement of social rights in India, see Coomans *supra*, at 13; S Muralidhar, "Judicial Enforcement of Economic and Social Rights: The Indian Scenario" in Coomans (n2), at 237-267; S Muralidhar, "India: The Expectations and Challenges of Judicial Enforcement of Social Rights" in Langford (n21), at 102-123.

All the presentations on the national experiences at the UN workshop demonstrated the reasonableness requirement: UN Justiciability Report (n47), at [12]. The delegates emphasised that there were many ways to ensure the enjoyment of economic, social and cultural rights, and that both courts and treaty bodies tended to defer largely to states on how to implement rights: *ibid.*

51 An analysis by David Marcus of the case law of supranational tribunals by level of obligation confirmed that failures to respect socio-economic rights as defined in international law were in fact justiciable, but that these courts had issued virtually no decisions concerning obligations to *protect* or *fulfil*: Marcus (n44), at 55-56.

At the international level, the European system confirmed the justiciability of economic and social rights as a common European heritage with positive obligations on states: UN Justiciability Report (n47), at [13]. The Inter-American structure had particular success in implementing rights to education, but also guaranteed trade union rights: *ibid.*, at [14].

52 UN Justiciability Report (n47), at [6], [16]. Other ICESCR rights that are described with sufficient
6.4.1.1 Judicial enforcement in Europe

This subsection will review the judicial enforcement of socio-economic rights nationally in a number of countries in Europe, where quite a few constitutions invoke the importance of the two ideals of human dignity and fundamental equality. The explicit rights to work and to social security contained in the Constitution of Finland, which also guarantees the inviolability of human dignity, have been implemented by the courts. Invoking the constitutional guarantees by public authorities of adequate social, health and medical services and of support for families and others responsible for providing for children, the Helsinki Court of Appeals held in the Child-Care Services case that the city was responsible to a parent for the damage caused as a result of its delay in providing day care places.

Positive socio-economic rights guaranteed by the Preamble to the French Constitution of 1946 are legally binding on all public authorities, but their justiciability is understood differently when compared to civil and political rights. In Lefevre v Ville d'Amiens the French Supreme Court confirmed that adequate accommodation (one of the constitutional objectives to protect human dignity) includes the provision of potable water.

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clarity and precision are also justiciable: *ibid*, at [6]. In common with civil and political rights, there are some elements which need to be spelled out in more detail in national legislation, and tailored to the specific national context, needs and resources: *ibid*. Woods has counteracted the argument that the normative contents of social rights are too vague to be legally enforceable by pointing out that it overlooks the valuable work at international level to define these norms as well as the collective judicial expertise in constitutional construction: Woods (n15), at 771.


54 Constitution of Finland 1999, Section 18.

55 *Ibid* Section 19.

56 *Ibid* Section 1.


60 Pech (n59), at 270. On the development of binding socio-economic constitutional principles in France, see *ibid*, at 268-270.

61 *Ibid*, at 270. A French judge speaking extra-judicially stated that his role consisted primarily of the daily determination of the justiciability of economic, social and cultural rights, with much jurisprudence existing on rights such as those relating to work: UN Justiciability Report (n47), at [10].

62 Cour de Cassation, Troisième chambre civile, [Supreme Court, 3 Civil Chamber], Arrêt No 1362, 15 December 2004. The Court ruled that a landlord is responsible for providing access to potable water to a tenant as part of the conditions to provide reasonable accommodation. See summary in COHRE
The German Constitutional Court has imposed socio-economic duties on the state from an expansion of the positive obligations that flow from civil and political rights and has been willing to intervene to ensure that the government has taken sufficient steps where rights are manifestly violated. 63 Although a considerable margin of discretion must be given to the German state in deciding how it ought to effect socio-economic rights, a court can evaluate the reasonableness of the measures applied. 64 The courts have translated the constitutional principles of the welfare state and the concept of human dignity into state obligations to provide an "existential minimum" or "vital minimum" giving those in need access to food, housing and social assistance. 65

The Swiss Federal Court derived an implied constitutional right to basic necessities and, acknowledging its lack of competence to determine resource allocation, it said it would set aside legislation if the outcome failed to meet the minimum claim required by constitutional rights. 66 In a case in 1995 brought by three non-nationals excluded from social welfare support on the basis of their illegal status in Switzerland, it held that such exclusion was a violation of an implied constitutional right to a basic minimum level of subsistence. 67 It derived this right from, first, the constitutional principle of human dignity guaranteeing every person what they can expect from the community because of their humanity; second, the right to life

Leading Cases (n58), at 45-46. The guarantee of health, material security, rest and leisure, and the right of those incapable of working because of their age, physical or mental condition, or economic situation, contained in the 1946 Preamble (Constitution of the French Republic 1946, Preamble, paragraph 11) were the basis of a decision by the Court of Appeal of Riom to set aside a private body's implementation of a legislative measure excluding foreigners from the ambit of a welfare benefit aimed at disabled people: Pech (n59), at 274, citing CA Riom, 29 January 1996, Droit social (1996), 987.

63 Malcolm Langford, "Hungary: Social Rights or Market Redivivus?" in Langford (n21), at 255. The Germans' constitutional right to choose their occupation and place of training and the equality clause in the Basic Law (Basic Law for the Federal Republic of Germany 1949, Articles 12(1) and 3 respectively) were the foundations for the Constitutional Court's placing the onus on the state to prove that the maximum possible number of places were provided in medical school to candidates selected fairly in accordance with objective criteria: Numerus Clausus I case (1972), 33 BverfGE 303 (German Constitutional Court). See summary in COHRE Leading Cases (n58), at 46; Langford (n57), at 6; Langford, "Hungary: Social Rights or Market Redivivus?" supra, at 255; Marcus (n44), at 66.


66 Langford (n57), at 24, citing V v Einwohnergemeine X und Regierungsrat des Kantons Bern BGE/ATF 121 I 367 (Swiss Federal Court) 27 October 1995.

as a core content of personal freedom, which would no longer be guaranteed were the most minimum prerequisites for survival not guaranteed; third, personal freedom as a guarantee of all elementary aspects of personality development; and, fourth, the equality principle guaranteeing minimum material justice. The right to subsistence in this case met the conditions of justiciability, as it was oriented to the minimum required as a fundamental right and what constitutes an indefeasible prerequisite for a humanly dignified life was clearly determinable in judicial proceedings. The Court did not find a constitutional right to a guaranteed minimum income, but held that all that was constitutionally required was that which was essential for a humanly dignified existence and which had the ability to guard against an undignified existence as a beggar.

Social rights are not labelled specifically justiciable fundamental rights in the Spanish Constitution, but merely as principles governing economic and social policy that are excluded from judicial review. Notwithstanding this, the courts have succeeded in giving some protection to socio-economic rights, either directly by determining a certain minimum content of a right that should be guaranteed under all circumstances, or by recognising social rights in connection with fundamental rights that are fully justiciable.

68 The right to a minimum level of subsistence was a condition for the exercise of these other written constitutional rights. The minimum core approach is particularly evident in jurisdictions where social interests are judicially protected through civil rights: Langford (n57), at 24.

69 The Court considered that entitlements to benefits are justiciable if, first, they can be adequately defined normatively and, second, they can be concretised and implemented by the judge utilising the procedures and means at the disposal of the court.

The fact that the claimants were non-nationals was not a disqualifying factor—the Court invoked previous Federal Court decisions stressing the human-rights component which indicated that it was both a precept of humanity and also a duty inherent in the purpose of the modern state to protect those on its territory where necessary against physically perishing.

70 Constitution of Spain 1978, Articles 15-29.

71 Ibid Articles 39-52.

72 Ibid Article 53(3). See Coomans (n50), at 11.

73 Coomans (n50), at 11. Social rights and principles can act as safeguard clauses to prevent the legislature from arbitrarily restricting previously recognised social standards in two ways, first, through recognition of a minimum essential core of benefits or social institutions which must be preserved and, second, through the control of reasonableness and proportionality exercised on social policies: María José Añón and Gerardo Pisarello, “The Protection of Social Rights in the Spanish Constitutional System” in Coomans (n2), at 79-80. In 1982 in a decision on prima facie retrogressive measures, on the grounds of the obligation of public authorities to promote conditions promoting real and effective equality (Constitution of Spain 1978, Article 9(2)) and on the basis of the principle of the social state, the Constitutional Court stated, “the workers cannot be deprived without sufficient reason for it, from social achievements already obtained”: ibid, at 80, citing Decision 81/1982, at [3].

The right to health (Constitution of Spain 1978, Article 43) is not included in the explicitly justiciable fundamental rights, but it has been protected by connecting it with other fundamental rights, especially the right to information (Article 20(1)(d)), the right to privacy (Article 18), and environmental rights (Article 45). See Añón and Pisarello supra, at 91. In 2003, the Supreme Court stipulated that the information given to patients ought to be punctual, correct, true, confidential, extended over time,
In contrast with the situation in Spain, the Portuguese Constitution contains detailed justiciable rights in relation to healthcare. The Portuguese Constitutional Court held in 2002 that a statute abolishing a guaranteed minimum income scheme for all those aged 18 years or over and replacing it with another scheme that omitted to guarantee a social integration income for those aged between 18 and 25 years violated the right to a decent minimum income inherent in the principle of respect for human dignity.

The theme of human dignity has also guided the Hungarian Constitutional Court in its adjudication of the right to social security enshrined in its country’s Constitution, which contains many social rights justiciable at the behest of an individual. The government’s 1995 accurate and thorough, and placed the onus on the doctors to prove compliance with these requirements: Afôn and Pisarello supra, at 91-92, citing Decision 29 May 2003.

Constitution of the Portuguese Republic 1976, Article 64. The Constitution lists many social rights, distinguishes between various categories of people who might need, and deserve, material assistance, and is unusual in suggesting a number of ways in which the state can meet its obligations to the needy: Fabre (n53), at 18.

The Portuguese Constitutional Tribunal ruled in 1984 that abrogation of the National Health Service violated a negative obligation to protect services already established in pursuance of a constitutional duty: Portuguese Constitutional Tribunal (Tribunal Constitucional), Decision (Acórdão) Nº 39/84, 11 April 1984. Once a social service was created in fulfilment of a positive constitutional duty, the constitutional respect for the then existing right gave rise to a negative obligation not to abolish it. See ICI Justiciability Report (n65), at 32-33.

Portuguese Constitutional Court, Ruling Nº 509/02, 19 December 2002.

Constitution of the Republic of Hungary 1949, as amended. Article 70/E.

Although there are specific social welfare rights in the Constitution, the Court has been reluctant to interfere with the roles of the legislature and the executive in making political decisions on the levels of benefit that are to apply and in setting priorities in the Hungarian welfare system: Coomans (n50), at 11. The Court will not enquire into the effectiveness or reasonableness of measures adopted by the state except in very limited cases: Langford (n63), at 252. It remarked that it was only in a few exceptional cases that certain social rights in the Constitution have an element of subjective (justiciable) right: ibid, citing Constitutional Court of Hungary, Decision 28/1994, 20 May 1994 (Environmental Protection case), at [29(b)]. The Court has also demonstrated a marked reticence to base its decisions on the constitutional rights to welfare, and, where the choice existed, it has opted to derive welfare rights indirectly either from property rights (Constitution of the Republic of Hungary 1949, as amended, Article 13) or by affirming the right to a basic minimum level of survival from the right to life (ibid, Article 54(1)). Other tactics it has used to avoid directly relying on welfare rights have been to subject government actions to the test of arbitrariness or to use a proportionality analysis to balance the individual’s interests against the public interest: Langford (n63), at 253. The doctrine of legitimate expectation has prevented the precipitous deprivation of existing benefits.

Ofari Atta J of Ghana also expanded the right to life and linked it closely with human dignity, when he stated in Asare v Ga West District Assembly (Suit No 36/2007) (Ghana High Court) 2 May 2008, at 6: [T]he right to life is not limited to deprivation of life per se. It encompasses all other rights that make the enjoyment of the right complete and meaningful. Any treatment that derogates from the living of a full life constitutes violation of it. ... [T]he right to life must be read in conjunction with other rights especially the right to human dignity...

austerity plan, which involved shifting to a new system of benefits, was challenged in the courts. In the Social Benefits case, the Court stressed that the constitutional requirement of legal certainty—the most significant basis for the protection of acquired rights—necessitated a changeover period to allow those affected time to adjust to the amended provisions. In 1998 in the Welfare Act case, the Court suspended proceedings challenging the level of unemployment benefit pending receipt of a study to allow an assessment of whether regular social aid due under the Act together with other benefits would secure the minimum livelihood necessary for the realisation of the right to human dignity in line with the constitutional requirement specified in the Social Benefits case. In a majority decision in the Housing case in 2000, having found that the right to social security did not establish subjective rights and therefore a fundamental constitutional right to housing could not be derived from it, the Constitutional Court held that the basic right to human life and dignity together with the right to social security only obliged the state to provide accommodation for the homeless if human life was in imminent danger.

The Latvian Constitutional Court held that the right to social security in the Constitution was breached by a law depriving people of benefits when their employer failed to pay compulsory state social insurance premiums and the state did not do its duty to ensure collection of the payments. There was a failure to observe the objective of social insurance, which served to

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78 Constitutional Court of Hungary, Decision 43/1995, 30 June 1995. The Court evaluated the reduction or termination of social security benefits according to the criteria for the protection of property. It noted that social benefits may not be reduced below a minimal level required for the right to social security: Langford (n63), at 258. See summary in COHRE Leading Cases (n58), at 47. For an assessment of this case and related decisions, see Langford (n63), at 256-259; Uitz and Sajo (n77), at 110-113.

79 Constitution of the Republic of Hungary 1949, as amended, Article 54(1).


81 Constitutional Court of Hungary, Decision 42/2000, 8 November 2000 (Housing case). See Langford (n63), at 262-263; Uitz and Sajó (n77), at 114-115. The decision has been criticised because the Court did not delve into international jurisprudence to determine the content of social right and failed to note that an independent right to housing had been repeatedly recognised at international level: Langford (n63), at 263. A second criticism was levelled at the decision because the Court failed to develop a more robust jurisprudence for evaluating whether the state was meeting its constitutional obligations by simply meeting the demand of the minimum level: ibid.

82 Constitution of the Republic of Latvia 1922, as amended, Article 109.

83 Constitutional Court of Latvia, Case No 2000-08-0109, 13 March 2001. See summary in COHRE Leading Cases (n58), at 56-57. It was significant that—even though the objective of payments was to protect employees—the workers could not opt to pay the premiums direct to the state and could control neither their employer’s actions nor the state’s efforts to collect the monies due. The Court did not relax the obligations on the state on account of the economic hardships—its duty to collect the funds endured in financially difficult times. Efficient and effective implementation measures were
implement social justice, social security and rights indispensable for the dignity of the person.

Because the United Kingdom does not have a written constitution, there has been less scope there for an expansive jurisprudence on socio-economic issues. However, the principles of administrative law have come to the aid of some litigants and the European Convention on Human Rights (ECHR) has been the basis of some decisions favourable to claimants—particularly since enactment of the Human Rights Act 1998. The House of Lords in a majority required to comply with international obligations—legislation on its own did not suffice. The availability of social aid to those who were unable to provide for themselves was not a substitute for the constitutional right to social security in the form of social insurance, which the state was obliged to implement.

The international obligations arising under the UDHR (Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)) and the ICESCR influenced the Court's decision. It noted that viewpoints on the legal nature and binding force of these international instruments had advanced since they were introduced, citing the Limburg Principles as requiring the state to immediately undertake measures, employing all the necessary standards, to ensure implementation of the ICESCR rights at least on the minimum level: 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 (Limburg Principles). It also cited the stipulation in General Comments 3 (UN Committee on Economic, Social and Cultural Rights, “General Comment No 3” (n7)) and 9 (UN Committee on Economic, Social and Cultural Rights, “General Comment No 9” 19th Session (3 December 1998) UN Doc E/C.12/1998/24) that measures should be implemented in a reasonably short time after the ICESCR has taken effect in a state and that every state was obliged to secure implementation of the most essential liabilities at least on the basic level.

The Latvian Constitutional Court’s enthusiasm for considering international law contrasts with the attitude of its Hungarian counterpart, which rarely does so: Langford (n63), at 252. See Marcus (n44), at 64, fn 63.

For a review of the protection of welfare rights in administrative law in the UK, see Jeff A King, "United Kingdom: Asserting Social Rights in a Multi-layered System" in Langford (n21), at 279-284. The judges are generally reluctant to interfere with the political role of the legislature and the executive, but have done so when necessary. See Ellie Palmer, "The Role of Courts in the Domestic Protection of Socio-economic Rights: The Unwritten Constitution of the UK" in Coomans (n2), at 169-171. The House of Lords held that a local education authority—faced with a reduction in government funding—was not entitled to take the availability of financial resources into account when it reduced the amount of home tuition for a child, who was unable to attend school because of illness: R v East Sussex County Council, ex p Tandy [1998] AC 714 (HL). It based its decision on a strict interpretation of the statute, which had imposed a duty (not a discretionary power) on the education authority to provide education for ill children: ibid, at 749. For a review and assessment of Tandy, see Palmer supra, at 149-150.

Lord Woolf critically appraised a health authority’s actions in closing a nursing home without providing a suitable alternative for its residents: R v North and East Devon Health Authority, ex p Coughlan [2001] QB 213 (CA). He held that the closure was an unjustified breach of a promise to Miss Coughlan that she would have a home for life in the facility, which gave rise to a legitimate expectation that the health authority would not resile from its promise unless there was an overreaching justification for doing so: ibid, at [89]. The expectation related to a substantive benefit. Even though the Human Rights Act was not in force at the time of his decision, Lord Woolf considered the impact of Article 8 of the ECHR, which was relevant since the case concerned the applicant’s home: ibid, at [90]-[93]. Miss Coughlan viewed the possible loss of her accommodation in the nursing home as life-threatening: ibid, at [92]. The Court understood why she took such a serious view of the situation and accepted that an enforced move of the kind intended would be “emotionally devastating and seriously anti-therapeutic”: ibid. It found that
decision in *Ghaidan v Godin-Mendoza* found that there was a breach of Article 8 in combination with the anti-discrimination provision in Article 14 of the ECHR because of the less favourable treatment of a homosexual couple under the Rent Act 1977.\(^\text{87}\) One of the reasons Baroness Hale gave in her judgment for finding that the guarantee of equal treatment was essential to democracy was that democracy was founded on the principle that each individual has equal value and was breached by regarding others as inferior.\(^\text{88}\) As she stated:

> Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the Convention, as has often been said, is respect for human dignity and human freedom.\(^\text{89}\)

### 6.4.1.2 Judicial enforcement under the African Charter

Moving from Europe to another continent, the African Charter affirms explicitly some socio-economic rights, \(^\text{90}\) *ie*, the right to work under equitable and satisfactory conditions and to receive equal pay for equal work,\(^\text{91}\) the right to education,\(^\text{92}\) and the right to enjoy the best

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\(^\text{87}\) See *ibid*, at [117].

\(^\text{88}\) See *ibid*, at [28], [30], [70], [98].

\(^\text{89}\) See *ibid*, at [28], [30], [70], [98].


attainable state of physical and mental health" with an obligation on the states "to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick". The African Commission on Human and Peoples' Rights interpreted the Charter as containing unenumerated rights in Social and Economic Rights Action Centre v Nigeria, when it held that the internationally recognised socioeconomic rights which are not explicitly recognised in the Charter should be regarded as implicitly included. It found that the right to food was "inseparably linked to the dignity of human beings" and was therefore essential for the enjoyment and fulfilment of other rights such as health, education, work and political participation.

The Preamble to the Charter leaves no doubt that all rights are interconnected and states, "the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights". The specific embodiment in Article 5 of every individual's right to "the respect of the dignity inherent in a human being" has provided a basis on which the

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92 Ibid Art 17(1).
93 Ibid Art 16(1). In view of their condition and disabilities, mental health patients should be accorded special treatment to enable them not only attain but also sustain their optimum level of independence and performance: Purohit v The Gambia [2003] AHRLR 96 (ACHPR 2003), at [81]. As fundamental rights are at stake, the African Commission does not give much leeway to the states in relation to mental health care, and considers that the mentally ill "should never be denied their right to proper health care, which is crucial for their survival and their assimilation into and acceptance by the wider society": ibid, at [85]. Their inherent human dignity (a basic right to which all human beings, regardless of their capabilities, are entitled) was not respected and they were dehumanised by being branded "lunatics" and "idiots" in the Gambia's Lunatics Detention Act: ibid, at [57], [59]. The Act also infringed the patients' right to be heard prior to being detained and to their right to challenge the two medical certificates from general practitioners forming the basis of their detention: ibid, at [71]-[72].
94 African Charter (n91) Art 16(2). The Charter permits states to make complaints of Charter violations by other states to the African Commission on Human and Peoples' Rights, and empowers the Commission to consider, study and report on communications from individuals, groups and organisations in respect of human rights violations: ibid Arts 48-49, 55-59. See UN Justiciability Report (n47), at [15].
96 Heyns (n90), at 691. The Commission read in a right to shelter or housing deduced from the provisions on health, property and family life: [2001] AHRLR 60 (ACHPR 2001), at [60], referring to African Charter (n91) Arts 16, 14 and 18(1) respectively. The corollary of the combination of the provisions protecting the right to health, the right to property, and the protection accorded to the family forbade the wanton destruction of shelter because when housing was destroyed, property, health, and family life were adversely affected: [2001] AHRLR 60 (ACHPR 2001), at [60].
97 [2001] AHRLR 60 (ACHPR 2001), at [65].
98 African Charter (n91) Preamble, eighth para. See Odinkalu (n90), at 188; UN Justiciability Report (n47), at [15].
99 The African Charter is unlike international Covenants and regional instruments in recognising respect for human dignity as a distinct right: Odinkalu (n90), at 214. Chidi Odinkalu considers that this achieves the radical consequence of breaking down artificial barriers imposed on the implementation of
Commission has found violations of the Charter where economic and social issues have arisen in conjunction with alleged violations of civil and political rights. In the absence of an express guarantee of a right to housing, the Commission based protection for housing-related rights on the guarantee of human dignity, including the prohibition of torture and cruel, inhuman and degrading treatment also mentioned in Article 5. The Commission found in Modise v Botswana that the state had breached, inter alia, the right to dignity of a stateless man on whom it had enforced homelessness. On similar lines the Commission ruled in Amnesty International v Zambia that by forcing two political opponents to live as stateless people under degrading conditions, Zambia had deprived them of their family and deprived their families of their support in violation of the dignity of a human being guaranteed in Article 5.

6.4.2 Progressivity

Having completed my review of justiciability of socio-economic rights in Europe and under the African Charter, I am returning to the ICESCR to consider the progressivity element. In this, socio-economic rights differ from civil and political rights, which are all immediately enforceable. But the variable economic conditions pertaining in each state mean that not every socio-economic benefit can be extended to the general populace instantaneously. The continuous obligation to improve until all the rights have been fully realised is a practical solution, which is flexible enough to cater for different situations and financial changes over time.

economic, social and cultural rights, for, as Odinkalu states, "respect for human dignity is a primordial value incapable of being pigeon-holed into any artificial categories of rights": ibid. Odinkalu (n90), at 209-210.

Brems categorised the minimum core obligation as "a bottom line", which is much lower than the borderline under civil and political rights; full realisation is "a horizon line", which is not a maximum, but approaches good or best practice; in between the two lines, state behaviour may or may not conform to treaty obligations, depending amongst others on the availability of resources: Brems (n26), at 355.

The African Commission has adopted a realistic stance taking cognisance of the poverty in African countries. It has interpreted the right to health in Article 15 of the African Charter as imposing a progressive duty on the state, which is obliged "to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind": Purohit v The Gambia [2003] AHRRL 96 (ACHPR 2003), at [84].

Cf Swaziland National Ex-Mine Workers Association v Minister of Education [2010] SZSC 35 (SC of Swaziland) on the right to free primary education under the Constitution of the Kingdom of Swaziland 2005, Section 29(6).

The travaux préparatoires for the ICESCR show that supporters of the idea of progressive
When resources are so severely stretched as to require unavoidable cutbacks, states need to be very careful not to act precipitously or indiscriminately. Priority must be given to the vulnerable, international funds and aid tapped,\textsuperscript{107} cost-effective measures pursued, monitoring of progress on implementation maintained, and strategies pursued to ultimate achievement of socio-economic goals. Any regressive measures should have the least impact on the marginalised in society.

6.5 Judicial enforcement in South Africa

Reverting to South Africa, the decision in \textit{Grootboom} has been hailed worldwide as a laudable precedent for the judicial enforcement of socio-economic rights.\textsuperscript{108} However, it has been criticised for failing to lead to an effective remedy for Ms Grootboom and her unfortunate companions.\textsuperscript{109} The Court did not utilise its supervisory jurisdiction to impose a time limit on revision of the housing plan to incorporate assistance for the destitute homeless.\textsuperscript{110} Neither did it follow up to ensure that the dignity of Irene Grootboom was given the respect it deserved in the long run. This unfortunate and brave lady died in her forties eight years after achievement defended it as a necessary accommodation to the vagaries of economic circumstances, while opponents held the opposite view and feared that it enabled lame excuses to be pleaded in justification of non-implementation: Alston and Quinn (n30), at 175.

There is a view that we are collectively charged with seeking a world in which each person has the possibility of a life of dignity and that this demands that each one contributes (or at the very least does not undermine) the processes of global governance aimed at securing human dignity: Kwame Anthony Appiah, "Dignity and Global Duty" (2010) 90 \textit{BUL Rev} 661, at 671, 672, 674-675. Participation as citizens of nation-states in the creation of international institutions to achieve this aim and through other forms of collective action (such as supporting aid organisations) is urged on individuals by concern for the dignity of each human being: \textit{ibid}, at 671-672.

Habermas urged that in international relations moral obligations between states (and citizens) should be recognised as being grounded in the democratic status-bound idea of human dignity: Habermas (n46), at 478-479.\textsuperscript{108} It has been described as establishing a relationship of collaboration between the State and the judiciary whereby each branch of government brings its particular skills to bear on the problem of realising socio-economic rights: Murray Wesson, "Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court" (2004) 20 \textit{SAJHR} 284, at 307. The Court’s strategy in \textit{Grootboom} and other socio-economic rights cases may have been to devise a review standard that allowed it greater flexibility to manage its relationship with the political branches: Theunis Roux, “Principle and pragmatism on the Constitutional Court of South Africa” (2009) 7 \textit{ICON} 106, at 136.\textsuperscript{109} The Constitutional Court developed its jurisprudence in later cases to provide more valuable relief, and even based its decision to award damages to a private property owner for the absence of an appropriate mechanism to give effect to an eviction order against unlawful occupiers on the failure of the state to provide an effective remedy as required by the rule of law and entrenched in Section 34 of the Constitution: \textit{President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd} 2005 (5) SA 3 (CC), at [51].\textsuperscript{110} See Davis (n41), at 701. In later cases the Court refined its approach and retained a supervisory role: see \textit{Residents of Joe Slovo Community, Western Cape v Thubelisha Homes} 2010 (3) SA 454 (CC), at [7].
the Constitutional Court ruled in her favour. At the time of her death she was still living in a shack, homeless and penniless. In theory the claimants could have reverted to the courts to take more strident action to have the State relieve their situation, but they did not have the financial resources to do so.

It is not the judgments themselves that are the problem, according to Murray Wesson, but the State's subsequent implementation of them. The most effective means of remediying this difficulty would, Wesson submits, be for the Court to exercise supervisory jurisdiction thereby extending the relationship of collaboration with the executive.

6.6 Housing

The Grootboom litigation arose after Ms Grootboom with 510 children and 390 other adults, who had been living in appalling conditions in an informal squatter settlement in the Western Cape, decided to move out and illegally occupied someone else's land. Having been evicted, they were left homeless and were living again in intolerable conditions while waiting in the queue for their turn to be allocated low-cost housing. Their legal challenge was based on claims that the government was obliged under Section 26 of the Constitution to provide them with adequate basic shelter (a minimum core) until they obtained permanent housing and that the children had an unqualified right to shelter under Section 28(1)(c) of the Constitution.

Yacoob J amalgamated the right to access to adequate housing in Section 26(1) of the Constitution with the progressive realisation obligation on the State in Section 26(2), thereby eliminating a finding of the immediate right to a home. There was at the very least, a

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112 Ibid. The fact that her family were not yet housed in reasonable accommodation showed how difficult it was to realise the socio-economic rights in the Constitution: Sachs (n11), at 274.
113 Wesson (n108), at 306.
114 Ibid, at 307. See also Liebenberg (n21), at 100. The Constitutional Court has an increased understanding that more judicial oversight is critical and has utilised it to develop an effective enforcement mechanism: Brian Ray, “Residents of Joe Slovo Community v Thubelisha Homes and Others: The Two Faces of Engagement” (2010) 10 HRL Rev 360, at 368.
115 2001 (1) SA 46 (CC), at [4]. See Chaskalson (n14), at 603-605; Choma (n64), at 43-46, 50-51; Davis (n41), at 692-694, 697; Kende (n13), at 142-145; Pieterse (n11), at 892-894, 901-902; Rao (n80), at 237-238, 265; Lucy A Williams, "The Justiciability of Water Rights: Mazibuko v. City of Johannesburg" (2009) 36 Forum for Development Studies 5, at 14-16; Woods (n15) at 783-786.
116 2001 (1) SA 46 (CC), at [18].
117 Ibid, at [34]. Daniel Erskine considered that the judicial gloss of reading the two subsections together as mutually supportive because of their textual proximity solved the inherent conflict between them, but diminished one right by subsuming the other within the primary right: Daniel H Erskine, “Judgments
negative obligation placed on the State and others “to desist from preventing or impairing the right of access to adequate housing.”\textsuperscript{118} He regarded the prohibition on arbitrary evictions in Section 26(3) as an elaboration on the negative right.\textsuperscript{119} As Yacoob J described it, the manner in which the eviction took place did not respect the dignity of those being moved on and affected them in a fundamental way.\textsuperscript{120} At the least, the State had breached its negative obligation in relation of housing, as it had not ensured that the evictions were executed humanely.\textsuperscript{121}

The Court did not put the primary obligation under Section 28(1)(c) to provide shelter for children on the State, but instead placed this duty on the parents.\textsuperscript{122} As the children implicated in Groottboom were not in care or abandoned, the State had no separate obligation to them under Section 28.\textsuperscript{123} The Constitutional Court unanimously found that neither Section 26 nor 28 gave an entitlement to shelter or housing immediately upon demand, but that the housing programme in the Cape Metro (the supervisory tier of local government in the area) fell short of the obligations imposed upon the State in that it failed to provide for any form of relief to those desperately in need of access to housing.\textsuperscript{124} The need to give central place to

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\textsuperscript{118} 2001 (1) SA 46 (CC), at [34], citing Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC), at [78].
\textsuperscript{119} 2001 (1) SA 46 (CC), at [34].
\textsuperscript{120} “[T]he eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt.”: ibid, at [88]. The State had funded, and assisted in, the eviction of the claimants and had failed to engage in mediation aimed at reaching a settlement: ibid.
\textsuperscript{121} Ibid. Section 26(3) specifically prohibits demolition of a person’s home without a court order, as well as controlling evictions. The Western Cape High Court held that Section 26(3) modified the common law by requiring a plaintiff, who seeks to evict a person from his or her home, to allege relevant circumstances which entitle the court to issue an eviction order: Ross v South Peninsula Municipality [2000] 4 All SA 85 (C).
\textsuperscript{122} 2001 (1) SA 46 (CC), at [77]. If the parents failed, the State was obliged to intervene: ibid. The Court sought to harmonise rights and solved the conflict between an adult’s and a child’s right to adequate housing by qualifying the child’s right so that it is effectuated through the parents or family, or, in default, through governmental measures: Erskine (n 117), at 622.
\textsuperscript{123} 2001 (1) SA 46 (CC), at [79].
\textsuperscript{124} Ibid, at [95]. In formulating a solution, the Court emphasised the need to consider individual circumstances and not to rely on merely showing that its measures were capable of achieving a “statistical advance” in the realisation of the right: ibid, at [44]. According to Yacoob J, the Constitution required that everyone be treated with “care and concern” and even statistically successful measures which “fail to respond to the needs of those most desperate” might not pass the test: ibid.
\end{footnotes}

In addition to the duty to respect socio-economic rights by requiring the state to refrain from law or conduct depriving people of access to their rights, the Court set out the criteria for judging whether it had fulfilled its positive duties to protect, promote and fulfil them, \textit{ie}, the state must take reasonable
human dignity in assessing individual needs and state action came from the requirement that human beings “be treated as human beings.”

The South African Human Rights Commission was an amicus in Grootboom and the Court noted that it would monitor the efforts made by the State to comply with its Section 26 obligations in accordance with the Court’s judgment. The Commission’s efficacy must be questioned in view of the State’s failure to relieve Ms Grootboom’s personal position before her demise. While the Court’s implementation of socio-economic rights in South Africa is significant, the Order it made in Grootboom was unsatisfactory. It relied on the Human Rights Commission to monitor implementation of the declaratory order. Although the Court found that the State had breached its constitutional obligations in not protecting the claimants during their eviction, it did not recognise this or provide redress for this lapse in its Order.

legislative and other measures within its available resources to achieve progressive realisation of each of the rights: Sandra Liebenberg, “The courts and socio-economic rights: Carving out a role” (2002) 3(1) ESR Rev.

The housing policy was unreasonable not only from the perspective of the class of person excluded, but also for the effect such exclusion could have on the national housing programme as a whole; Lehmann described the Court’s approach as utilitarian, since sacrificing the interests of those desperately in need of shelter would not have led to the actual realisation of medium- and long-term housing needs; the scale of the problem was such that there would have been continuing land invasions from the landless and homeless: Lehmann (n9), at 172.

Woods considers that Grootboom illustrates that because of the collective character of social rights the standards of minimum core obligations and progressive realisation in international human rights law do not necessarily impose limitations on rights, but can be stringent criteria by which a court can measure states’ compliance: Woods (n15), at 786.

The Court made it clear that mere legislation was not enough and that the state was obliged to act to achieve the intended result, with legislation being supported by policies reasonably conceived and reasonably implemented: 2001 (1) SA 46 (CC), at [42]. As superficial compliance through development of a written programme is insufficient to meet the reasonableness standard, the deference to legislative judgments is not absolute: Ray (n22), at 160.


There was no specific right of return to Court, if the claimants’ plight was not addressed adequately or at all within a stipulated or reasonable period. In contrast in Residents of Joe Slovo Community, Western Cape v Thubelisha Homes, the Court permitted the parties to approach the Court in the event of its order not being complied with or if the order gave rise to unforeseen difficulties: 2010 (3) SA 454 (CC), at [7].

In a dispute over the eviction of squatters in Ghana, the High Court pointed out that even in Grootboom, the court did not interfere with the executive’s execution of its housing programme and did not reverse the eviction of the plaintiffs, which had already taken place: Abass v Accra Metropolitan Assembly (Misc 1203/2002) (Ghana High Court) 24 July 2002 (Sodom and Gomorrah case), at 12. Appau J distinguished
The Constitutional Court found a more precise and effective solution in *Jaftha v Schoeman*, the first case where the concept of adequate housing—briefly discussed in *Grootboom*—was considered at length and where the problem was perhaps less complicated with just one person aggrieved and a readily available remedy capable of effecting an immediate improvement. The Order was framed as an answer to prevent interference rather than as a positive obligation requiring vast expenditure by the state. Maggie Jaftha (unemployed and in ill-health) borrowed R250, which was to be repaid in instalments, but she failed to meet all of the repayments, was sued for the amount due and her house was sold to pay the debt.

The Court found that the Magistrates' Courts Act 1944, as a measure which permitted a person to be deprived of existing access to adequate housing, limited the rights protected in Section 26(1) of the Constitution. It allowed execution against the homes of indigent debtors resulting in them losing their security of tenure and, even worse, losing the chance of being re-housed so that they could enjoy conditions in which their dignity could prosper again.

Judicial oversight of the execution process would be the most appropriate method of remediying the over-breadth of the legislation. The Constitutional Court read in words to the Act so that a court would consider the circumstances before ordering a sale in execution of immovable property where insufficient movables had been found to satisfy the judgment

the situation in Ghana from the position in South Africa, where the Constitution made provision for adequate housing in order to redress the forcible appropriation of black people's land during the apartheid era: *ibid*. The Court found that the planned eviction was lawful and would not infringe the squatters' fundamental rights. Appau J referred to Yacoob J's condemnation of land invasions in *Grootboom* and his view that it might be reasonable for the state not to provide housing in response to repeated land invasions, as reasonableness must be determined on the facts of each case: *ibid*, at 12-13, citing 2001 (1) SA 46 (CC), at [92].

2005 (2) SA 140 (CC). The decision was a significant development in the Court's approach to the review of the obligations imposed by social rights: Sandra Liebenberg, "Needs, rights and transformation: Adjudicating social rights in South Africa" (2005) 6(4) ESR Rev 3, at 6. See also Brand (n2), at 217-218; Liebenberg (n21), at 93-94, 100.

The Constitutional Court (in contrast to the court below's view) found that there was a negative content to socio-economic rights: 2005 (2) SA 140 (CC), at [33]. In 1997 Pierre de Vos correctly discerned the negative element in socio-economic rights, which placed a duty on the state to respect an individual's existing access to adequate housing; therefore the specific constitutional protection from eviction in Section 26(3) was unnecessary, but was useful in overcoming courts' reluctance to explore the full range of the negative obligations engendered by socio-economic rights: de Vos, (n11), at 80-81.

2005 (2) SA 140 (CC), at [4]. In her challenge to the validity of provisions in the Magistrates' Courts Act 1944 dealing with the sale in execution of property to satisfy a debt, Jaftha relied on her constitutional right to have access to adequate housing: *ibid*, at [2]. An eviction would mean that she could not apply for state housing: *ibid*, at [12].

*ibid*, at [34].

*ibid*, at [39]. The legislation was not justifiable and could not be saved to the extent that it allowed executions where no countervailing considerations in favour of the creditor justified the sales in execution: *ibid*, at [52].

*ibid*, at [61].

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Mokgoro J, delivering the judgment in *Jaftha* on behalf of a unanimous Court, confirmed the view in *Grootboom* that any claim based on socio-economic rights “must necessarily engage the right to dignity”, which is “invariably implicated.” The lack of adequate food, housing and health care was “a blight” on people’s dignity. The UN Committee on Economic, Social and Cultural Rights also viewed the right to dignity as inherently linked with socio-economic rights and had emphasised the need not to give the right to housing a restrictive interpretation, but to see it as “the right to live somewhere in security, peace and dignity.”

The history of forced summary evictions in the apartheid days and the criminalisation of those bucking the system by remaining in occupation showed the extent to which access to adequate housing was linked to “dignity and self-worth”, as transgressors suffered “double indignity—the loss of one’s home and the stigma that attaches to criminal sanction.”

The importance to dignity of a home and the onslaught to a person’s humanity by arbitrary deprivation of the opportunity to regain a home is evident.

The Court found it unnecessary to decide whether the right of access to housing had horizontal application, but focused on the constitutionality of the eviction process on account of the

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135 Ibid, at [64].

136 Ibid, at [21], citing *Grootboom* 2001 (1) SA 46 (CC), at [83].

137 2005 (2) SA 140 (CC), at [21].


139 2005 (2) SA 140 (CC), at [27] (footnote omitted).

140 Ibid, at [39] (Mokgoro J):

Relative to homelessness, to have a home one calls one’s own, even under the most basic circumstances, can be a most empowering and dignifying human experience. The impugned provisions have the potential of undermining that experience. The provisions take indigent people who have already benefited from housing subsidies and, worse than placing them at the back of the queue to benefit again from such subsidies in the future, put them in a position where they might never again acquire such assistance, without which they may be rendered homeless and never able to restore the conditions for human dignity.

Mokgoro J noted that poverty had converted a welfare issue to a property problem: *ibid*, at [30].

141 There is a contrast between the duty of government to its citizens and the duty of one private person to another, as, first, private persons rarely have power over decisions of others remotely comparable to the power of government over its citizenry and, second, private individuals ordinarily have liberty to act for a wide variety of reasons: Kenneth W Simons, “Dworkin’s Two Principles of Dignity: An Unsatisfactory Nonconsequentialist Account of Interpersonal Moral Duties” (2010) 90 BUL Rev 715, at 732.

Habermas considers that the more deeply civil rights suffuse the legal system as a whole, the more often their influence permeates the horizontal relations among individuals and groups, collisions between competing rights in hard cases often being resolved by appealing to a violation of human dignity whose absolute validity grounds a claim to priority: *Habermas* (n46), at 469.
sale of property for a relatively trivial debt. It balanced the rights of the debtors against those of creditors and achieved a fair outcome. The remedy was satisfactory for the applicant and ensured that there would not be a recurrence. The Court was not prepared to simply declare the legislation invalid and leave it to the legislature to bring in new provisions. It steered a delicate course between two competing interests and reached an excellent decision.

The Constitutional Court favoured reconciliation of interests in preference to the triumph of one right over another when it tried to resolve a large-scale squatter issue that came before it in *Port Elizabeth Municipality.* In response to a petition signed by 1,600 people living in the neighbourhood and the landowners, the Port Elizabeth Municipality sought eviction orders against 68 people, including 23 children, who occupied 29 shacks erected on privately-owned land, where some of the squatters had lived for up to eight years. It sought a ruling that it was entitled to evict unlawful occupiers without providing alternative accommodation or land. The Court felt obliged to go beyond its normal remit and to enter the realm of judicial management to find a just and equitable solution balancing all the interests based on good neighbourliness and shared concern. Sachs J, delivering the Court’s unanimous judgment,

On the horizontal application of the South African Bill of Rights, see Liebenberg (n21), at 78-79.

*Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC). The Court sought a solution that would best comport with dignity, as there were commensurate interests on both sides of the conflict; the use of the concept of human dignity allowed the Court to contextualise its decision in light of the history of apartheid: Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” (2008) 19 *EJIL* 655, at 718, 719. See also Brand (n2), at 214, 228-229; Liebenberg (n21), at 92.

2005 (1) SA 217 (CC), at [1]-[2]. The squatters were willing to move provided they were given notice and were allocated suitable alternative land: *ibid,* at [2]. The Municipality resisted their entreaties, as they would be queue-jumping by being given alternative accommodation over those on the housing list: *ibid,* at [3].

*ibid,* at [6]. Property rights under Section 25 and the housing provisions in Section 26 of the Constitution were in contention. In Ghana, Ofari Atta J rejected a somewhat similar claim from those whose occupation or activities were tainted by illegality, when he stated, “[e]ncroachers cannot have any right to compensation or alternative accommodation”: *Asare v Ga West District Assembly* (Suit No 36/2007) (Ghana High Court) 2 May 2008, at 10.

2005 (1) SA 217 (CC), at [36]-[37]. The Municipality had not engaged properly with the squatters and the Court encouraged it to try to resolve the issue itself or to agree to the appointment of a skilled negotiator to reach a solution acceptable to the trespassers and to the landowners: *ibid,* at [61]. When the Court decided that it would not uphold the eviction order, it justified its decision to limit the right of the landowners to be free from unlawful deprivation of their land as being the choice more congruent with dignity: McCrudden (n142), at 718. In contrast in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes,* the Court ordered the residents in an informal settlement to vacate to facilitate redevelopment plans, but required the state to provide them with temporary accommodation pending their being rehoused and also gave a substantive remedy by directing the state to provide 70% of the new houses in the redeveloped area to residents of the informal settlement: 2010 (3) SA 454 (CC), at [7]. On the innovations in Joe Slovo, see Ray (n114), at 368-370. Cf *Kariuki v Town Clerk, Nairobi City Council* [2011] eKLR (High Court of Kenya, 4 March 2011).

Sandra Liebenberg approved of Sachs J’s careful analysis of the historical, socio-economic, political and legal factors that fuel occurrences such as the eviction of poor people from their homes: Liebenberg 296
pointed out the indignity to society as well as to the poor caused by homelessness exacerbated by the State. He encouraged the poor as autonomous beings not to abrogate responsibility for relieving their own plight and admonished the landowners not to stereotype the squatters by refusing to treat each one as a human being. The reconciliation of the individual with the community was evident in the concept of ubuntu, which combines individual rights with a communitarian philosophy. Mediation was compatible with ubuntu, as Sachs J considered that its use in the avoidance of “polarising litigation” could promote respect for human dignity and underline the fact that we all live in a shared society.

A similar reconciliatory attitude was adopted in Occupiers of 51 Olivia Road when the Court required the parties to co-operate together to find a solution. The City of Johannesburg wanted to evict more than 400 occupiers of buildings in the inner city because they were unsafe and unhealthy. The Court held unanimously that Section 26(2) of the Constitution

(n129), at 5.

147 "It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation."; 2005 (1) SA 217 (CC), at [18].

148 Ibid, at [41]: Those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity. At the same time those who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency.

149 Ibid, at [37]. African traditions more fully encompass the social dimensions of the person and human need, the concept of personhood having a normative content that expresses the relationship between social rights and duties: Woods (n15), at 778.

150 2005 (1) SA 217 (CC), at [42]. Sachs J adopted a Dworkinian attitude when he advocated the adoption by the judiciary of a practical route when balancing conflicting intrinsic interests, “the courts must accordingly do as well as they can with the evidential and procedural resources at their disposal.”: ibid, at [38].

151 Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg 2008 (3) SA 208 (CC). See Christiansen (n15), at 601-603; Davis (n41), at 705-706, 709; Liebenberg (n21), at 95; Ray (n114), at 361-362, 367, 368, 369.

152 2008 (3) SA 208 (CC), at [1]. At issue was whether the municipal authority had made reasonable provision for housing for those thousands of people who were said to be living in desperate conditions in the inner city and also whether eviction provisions were constitutional. The Court had made an interim order requiring the parties to engage meaningfully with each other with a view to addressing the possibilities of short term steps to improve current living conditions and of alternative accommodation for those who would be rendered homeless: ibid, at [5]. The parties reached consensus that the City would not eject the occupiers, that it would upgrade the buildings and that it would provide temporary accommodation, and they agreed to meet to discuss permanent housing solutions: ibid, at [24]-[26]. There was a conflict between the local authorities’ duty to control unsafe buildings and their obligation to provide shelter for the homeless.
obliged the municipality to engage meaningfully before ejecting people from their homes if they would become homeless after the eviction. The legislation making it a crime for people to remain in buildings after an eviction notice by the City, but before any court order for eviction, was unconstitutional. The Constitutional Court gave an instant remedy and read in words to the legislation so that it included a proviso that criminalised only those people who, after service upon them of an order of court for their eviction, continue to occupy the property.

Yacoob J placed human dignity and respect for life as the priorities for the municipality in the balance between protecting property and the housing rights of city dwellers. The Court reiterated that because dignity is a constitutional value, rights such as housing in Section 26 cannot be regarded in isolation, the requirement to bear dignity in mind involves treating people as human beings, and state action must be reasonable. There must be engagement with the people affected to try to find a solution. Sandra Fredman praised the collaborative way in which the Court dealt with the difficult task of enforcing socio-economic rights in this case, resulting in the Court’s being enabled to issue a mandatory remedy without stepping on the toes of democratic decision-makers as well as incorporating those affected so they can monitor the remedy.

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153 Ibid, at [18]. While the City has obligations to eliminate unsafe and unhealthy buildings, its constitutional duty to provide access to adequate housing meant that potential homelessness must be considered when it decides whether to evict people from buildings: Ibid, at [46].

154 Ibid, at [49].

155 Ibid, at [51], [54].

156 Ibid, at [16] (footnotes omitted):

[The City] also has the obligation to fulfil the objectives mentioned in the preamble to the Constitution to “[i]mprove the quality of life of all citizens and free the potential of each person”. Most importantly it must respect, protect, promote and fulfil the rights in the Bill of Rights. The most important of these rights for present purposes is the right to human dignity and the right to life. In the light of these constitutional provisions a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together.

157 Ibid, at [10], citing Grootboom 2001 (1) SA 46 (CC), at [82]-[83]. A holistic approach was required by local authorities when reaching decisions—they should not deal with issues of safety of buildings and housing of the evicted occupants separately: Ibid, at [44]. Bessler has called for a holistic, multi-faceted approach to protect children affected by HIV/AIDS: Bessler (n28), at 94.

158 2008 (3) SA 208 (CC), at [11], citing Grootboom 2001 (1) SA 46 (CC), at [87]. The Court developed the engagement process further in Residents of Joe Slovo Community, Western Cape v Thubelisha Homes, where it set out detailed agendas for the content of the engagement with timelines: 2010 (3) SA 454 (CC), at [7].

159 Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties (OUP, Oxford 2008), at 122. Fredman considers it possible to structure the adjudication of positive human rights duties in a way which strengthens rather than detracts from democracy: Ibid, at 123. There is scope for this in South Africa where the locus standi rules are wide permitting easy access to the courts for pursuing
On reviewing the housing litigation, it is clear that Section 26 of the Constitutional has been interpreted in the light of right to dignity in Section 10 and the constitutional value of respect for human dignity. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998 protected the dignity of unlawful occupiers, while endeavouring to allow landowners recover their property. It emphasised the individual treatment of occupiers with particular attention being paid to the most vulnerable. The consideration by the court of the availability of suitable alternative accommodation in evictions is based not just on the right to access to housing, but on the individual’s right to be treated with dignity, as there is an obligation on the State to ensure that evictions are conducted humanely. Enforcement of rights to housing is difficult for individuals and for government. The South African executive has not been vigilant to prevent illegal occupation of land and buildings. Neither has its housing programme kept pace with the demand. Lilian Chenwi observed that the South African experience shows that having a myriad of progressive laws and policies on housing rights and evictions is not sufficient, as their actual enforcement is the most vital facet.

The proliferation of informal settlements is a highly visible sign in South Africa of the shortage of housing. Provincial legislation—the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 2007—was enacted to address the elimination and upgrading of slums. Abahlali baseMjondolo Movement of South Africa, an organisation representing thousands of shackdwellers, challenged the constitutionality of section 16 of the Slums Act,

public interest litigation and where there is fertile ground for development because of the tradition of resistance to apartheid: ibid, at 122. To develop the process she advocates that the courts resile from relying on the adversarial system to solve issues involving positive obligations on the state and pay more attention to alternatives aimed at securing the appropriate response: ibid, at 123. Brian Ray deduced from the judgment that the Court continues to prefer political over legal solutions, as it expressed optimism that future engagement would be meaningful and emphasised that both parties had a duty to continue to negotiate: Ray (n22), at 194. The Court formalised the negotiation/mediation requirement it had begun to develop in earlier cases, adopting the term “engagement” to describe this requirement and explaining at length the need for engagement among the government, affected citizens and civil society organisations to develop effective socio-economic policies: ibid.


Ibid, at 128.

The virtually uncontrolled influx of refugees from neighbouring countries has exacerbated the problem, as has the attraction of comparatively rich South Africa for foreign drug peddlers.

Chenwi (n160), at 137. She continued, “[t]hough courts do have an important role in ensuring adequate enforcement of the rights to adequate housing and to protection from forced evictions, their impact is limited if their decisions are not enforced adequately.”: ibid.

Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal [2009] ZACC 31, at [16], [126].
which would oblige the owner of property illegally occupied to take eviction proceedings against the occupiers and, in default, would compel the municipality to do so.\textsuperscript{165} The plaintiffs failed in the High Court, so the matter came before the Constitutional Court, where the judges unanimously agreed on the competence of the provincial legislature to pass the legislation, as it related to housing—a concurrent national and provincial legislative competence.\textsuperscript{166} The majority held that section 16 breached the right of access to housing in Section 26(2) of the Constitution and also contravened the rule of law.\textsuperscript{167} The Court found that the legislation obliged the institution of eviction proceedings even if the owner or the municipality thought it would not be justified. Moseneke DCJ for the majority considered that this elimination of discretion eroded and considerably undermined the protections against the arbitrary institution of eviction proceedings.\textsuperscript{168}

This decision reinforced the need to treat illegal occupiers humanely and to engage with them to try to find a solution before resorting to the courts for an eviction order. Chenwi has assessed the effect of the Constitutional Court’s ruling as requiring the government to focus more on providing adequate housing rather than on eliminating slums.\textsuperscript{169}

\textsuperscript{165} The timeframe for complying with the obligation would be determined by notice issued by the provincial government, which had not yet acted to bring the section into operation: \textit{ibid}, at [49].

\textsuperscript{166} \textit{ibid}, at [40], [97].


\textsuperscript{168} [2009] ZACC 31, at [112]. Eviction was not a last resort and meaningful engagement with the occupants was not required by section 16: \textit{ibid}, at [113]-[115]. The legislation was overbroad, as it applied to all illegal occupiers, whether in slums or not: \textit{ibid}, at [116], [118]. Yacoob J, who dissented on the housing rights aspect, proposed an interpretation of section 16 in conformity with the Constitution, which effectively involved reading in six safeguards: \textit{ibid}, at [80]. This was a step too far for Moseneke DCJ, as it would have the effect of rewriting section 16 in a manner that was not apparent on its face and that was in conflict with the coercive design of section 16 to eliminate slums and informal settlements: \textit{ibid}, at [115]. He expanded on the implications of the legal uncertainty that would arise for vulnerable people and others concerned with implementing the legislation: \textit{ibid}, at [124].

6.7 Health care, water and social security

In *Soobramoney*, the first case to be brought seeking socio-economic rights, the Constitutional Court was reluctant to interfere with the executive’s role in deciding priorities in health care and in fixing budgets. Mr Soobramoney was an unemployed diabetic who suffered from heart disease and chronic irreversible renal failure. He had been availing himself of private medical treatment, but was no longer able to afford it. He asked to be admitted to the dialysis program of a state hospital, but did not qualify for admission. His claim to receive renal dialysis treatment was based on the provision in Section 27(3) of the Constitution that no-one may be refused emergency medical treatment and on the right to life in Section 11. The Court held that the right not to be refused emergency medical treatment meant that a person who suffers a sudden catastrophe which calls for immediate medical attention should not be denied ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment, but Mr Soobramoney did not fall into this category. Chaskalson P considered the Indian case of *Paschim*, where the Supreme Court in the context of a welfare state had found that a government hospital had a duty to provide timely medical assistance to a person needing life-


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saving treatment. However, he distinguished it because there was a different context in India where the treatment was available but denied.

Having rejected consideration of Mr Soobramoney’s claim under Section 27(3), the Court turned to Section 27(1) and (2) to determine his right to have access to health care services provided by the state within its available resources. It deferred to the executive, as its view was that responsibility for making the difficult decisions of fixing the health budget and deciding upon the priorities that needed to be met lay with political organs and the medical authorities; it would be slow to interfere, if the decisions were rational and taken in good faith. Sachs J remarked on our interdependence in society, which required a sharing of

177 1998 (1) SA 765 (CC), at [18]. Chaskalson P highlighted the context of historical disadvantage in South Africa, where there were great disparities in wealth as a legacy of apartheid, necessitating the transformation of society by improving living conditions—including access to adequate health services—in order to achieve the constitutional aim of a society where there would be “human dignity, freedom and equality”: ibid, at [8]. See Joan Small and Evadne Grant, “Dignity, Discrimination, and Context: New Directions in South African and Canadian Human Rights Law” (2005) 6(2) Human Rights Rev 25, at 43-44.

On the need to overcome the social problems that resulted from apartheid by establishing a society based on social justice, see President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC), at [36].

178 1998 (1) SA 765 (CC), at [20]. Chaskalson P pointed out that the right to medical treatment was a discrete right in the South African Constitution and, as it was not dependent on being inferred from the right to life, it could not mean that the treatment of terminal illnesses had to be prioritised over other forms of medical care such as preventative health care: ibid, at [19]. The right to emergency treatment in South Africa had to be interpreted in the context of the availability of health services generally. Craig Scott and Philip Alston have criticised the Constitutional Court for not considering Paschim in greater depth, as far-reaching positive duties were imposed on the state: Scott and Alston (n170), at 245-247. They considered that had Section 27(3) been interpreted in light of the right to life and the general duties to fulfil rights in Section 7 so as to generate a positive claim on resources, it would have mandated a heightened constitutional priority for emergency medical services: ibid, at 245. See also Sripati (n176), at 110-111.

179 1998 (1) SA 765 (CC), at [22]. The Court did not analyse separately the nature of his rights under Section 27(1), but focused on the state’s management of scarce resources to achieve the progressive realisation of the entitlement of everyone to have access to health care in Section 27(2).

180 Ibid, at [29]. Erskine described the Court’s purposive rational decision approach to the interpretation of conflicting rights in this case as pragmatic, acutely focusing on the exercise of rights within the reality presented, and concluded that the Court’s interpretation allowed full effect to be given to Mr Soobramoney’s rights while honouring them in relation to the overall constitutional text: Erskine (n117), at 610-611.

Kende commented that the ruling illustrated that a court can take socio-economic rights seriously and yet still respect separation of powers concerns and legislative competence: Kende (n13), at 147. The Court supported the utilitarian choice by the political organs and the medical authorities; most scholars accept that Mr Soobramoney’s interest in prolonging his life had to be sacrificed in the interest of the general welfare: Lehmann (n9), at 169. However, Woods criticised the Court’s adoption of a utilitarian perspective as “extremely problematic” reasoning in a rights context, since the point of giving policy choices the priority status of fundamental rights is to avoid the utilitarianism inherent in majority decision-making: Woods (n15), at 782. Woods has interpreted the decision as indicating that the Court would not consider the state’s resources as a whole, but in effect limited the state’s duty to whatever resources it had already allocated to health care in general, and dialysis in particular: ibid, at 780. See also Liebenberg (n129), at 5.
resources rather than priority being given to the rights of the autonomous individual.\textsuperscript{181} The threshold at which one may avail oneself of a right is fixed by adjudicating between equal claims and the balancing process is not to be regarded as limiting the right of the individual failing to qualify for the service.\textsuperscript{182} The Court accepted the reality that socio-economic rights can only be provided by the State in accordance with the resources available. It was hampered in taking action because priority-setting was the role of the executive.\textsuperscript{183} The importance of having a health care policy and implementing it was stressed. Here there was a plan which ranked entitlements to medical treatment.\textsuperscript{184}

Ray pointed out that the Court established a restrained approach to interpreting the right to health care in \textit{Soobramoney}, as it deferred to the government’s justification for the resource allocation policy by applying a basic rationality standard: Ray (n22), at 157-158. But the Court nonetheless signalled a willingness to look behind government justifications for particular socio-economic programmes where appropriate and required that the justifications also be taken in good faith, suggesting that the Court will not only test the government’s policy decisions against an objective rationality standard but will consider subjective evidence that the government’s objectively reasonable actions are designed to evade its constitutional obligations: \textit{ibid}, at 158. See also Brand (n2), at 215, 223, 227; David Langwallner, “Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual” in Oran Doyle and Eoin Carolan eds, \textit{The Irish Constitution: Governance and Values} (Thompson Round Hall, Dublin 2008), at 270-271.

Writing extrajudicially, Arthur Chaskalson indicated that where the lack of human or financial resources is put in issue by the state, more than a “bald assertion” of resource constraints will be required: Chaskalson (n1), at 33. He cited \textit{Soobramoney} as an example of where the state had to give details of the character of the constraints to be assessed on the reasonableness standard, thereby conforming to the principles of accountability and effectiveness: \textit{ibid}, at 33-34, fn 30.

The Court concluded that “available resources” has both a wide and narrow application; the wide application of the term resources means the national resources, including donor aid money, and the narrow application of resources refers to the executive’s budgeted resources for a particular section/department; while the Court took the view that budget allocation should be primarily left to the executive, the Court, however, could examine the use of resources: Ansah (n7), at 441.

\textsuperscript{181} 1998 (1) SA 765 (CC), at [54]. Woods construed Sachs J’s remarks as proposing a new framework for collective rights, which substituted interdependence for autonomy as its bedrock principle: Woods (n15), at 782. See also Blichitz (n21), at 22.

\textsuperscript{182} Contrast Young’s deduction that the decision in \textit{Soobramoney} constituted a state limitation of the right that was deemed a justifiable infringement: Young (n10), at 169.

\textsuperscript{183} Scott and Alston urged the courts not to defer unduly to the other branches of government when adjudicating on the socio-economic rights in the Constitution and to take the active role envisaged for them by promoting the values of dignity, freedom and equality to transform the living conditions of the poor: Scott and Alston (n170), at 268.

\textsuperscript{184} Dikgang Moseneke pointed out that the judiciary, being vested with substantive powers of review over the exercise of public or private power, was commanded by the Constitution to observe its transformative mission: Dikgang Moseneke, “Transformative Adjudication” (2002) 18 SAJHR 309, at 319. His assessment was that—but for a few decisions—the Constitutional Court had crafted an impressive body of progressive constitutional jurisprudence true to the overarching constitutional enterprise of transforming society: \textit{ibid}.

While Mr Soobramoney contended that the refusal by the renal unit to give him the dialysis treatment he required to stay alive was unreasonable, it was not suggested that the hospital \textit{guidelines} were unreasonable or that they were not applied fairly and rationally when the hospital decided that he did not qualify for dialysis: 1998 (1) SA 765 (CC), at [25], [44]. Madala J pointed out that constitutional rights are not absolute and may be limited by scarce resources, stating, “the Constitution accepts that it cannot solve all of our society’s woes overnight, but must go on trying to resolve these problems.”: \textit{ibid}, at [43].
In later cases where there was more scope for criticising the authorities’ guidelines and their implementation, the Constitutional Court developed the reasonableness criterion—the seeds of which had been sown in Soobramoney—and showed that it was prepared to exercise its constitutional role in upholding individual rights against the state. As a consequence of the decision, Mr Soobramoney had to face death without further medical intervention, but it is difficult to put forward a cogent argument from a legal perspective that the Court’s finding should have been different in circumstances where there were reasonable guidelines in place to deal with limited resources and where the guidelines had been applied rationally. I disagree with Wesson’s view that the approach in Soobramoney seems to have been largely abandoned and that instead Grootboom laid the foundation for the adjudication of socio-economic rights. He does not support his allegation with any evidence or arguments.

Access to health care under Section 27 was in issue again in the TAC case, which arose because the government restricted dissemination of an anti-HIV drug for pregnant mothers. The Treatment Action Campaign (TAC) wanted the restrictions lifted. Not only did the Court make a declaratory order that Section 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV, but it went further and made a mandatory order directing the government without delay to make the drug available and to take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector. It reiterated the attitude it had

185 See Hogan (n170), at 193.
186 Wesson (n108), at 285.
187 Other scholars have made reasoned criticism of the Court’s methodology in Soobramoney on the grounds that it was utilitarian, employed a basic rationality standard, or failed to marshall far-reaching positive duties latent in the Constitution by a superficial analysis of comparative jurisprudence and by not giving full force to Section 27(1) independently of Section 27(2). But they have not seriously challenged the outcome. There have been yet more scholars who have praised the Court in Soobramoney for being pragmatic, respecting the separation of powers, and requiring details of the adoption and implementation of the guidelines.
188 2002 (5) SA 721. See Brand (n2), at 220, 223-224, 228, 229; Chaskalson (n14), at 605-607; Choma (n64), at 46-48; Davis (n41), at 694-697; Erskine (n117), at 632-634; Forman (n170), at 715, 717-718, 719; Kende (n13), at 147-150; John C Mubangizi and Ben K Twinomugisha, “The Right to Health Care in the Specific Context of Access to HIV/AIDS Medicines: What can South Africa and Uganda Learn from Each Other?” (2010) 10 AHRLJ 105, at 115-116, 118-119, 131-132; Pieterse (n11), at 894-895; Woods (n15), at 786-790.
189 2002 (5) SA 721, at [135]. The Court recognised the government’s role in developing policies when it acknowledged that the mandatory orders it made did not preclude the government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods became
taken to the minimum core in *Grootboom*, ruling out a self-standing right “entitling everyone to demand that the minimum core be provided to them”, although the minimum core might be relevant in certain circumstances to the test of reasonableness under Section 27(2).

TAC had argued that *Grootboom* did not go far enough, that the Bill of Rights was based on the notion of individual rights and therefore the courts should assist an individual whose circumstances fell short of achieving the minimum core of entitlements consistent with the maintenance of human dignity. The Court rejected that argument and decided that the minimum core obligation could be satisfied through broad government programmes aimed at meeting minimum needs. While Rosalind Dixon confirmed that the Court granted a stronger remedy than it had in *Grootboom* by making a mandatory order, she pointed out the weakness in the Court’s decision by prescribing a purely declaratory remedy—with regard to the government’s general obligation to develop and implement a

available to it for the prevention of mother-to-child transmission of HIV: *ibid*. The Constitutional Court did not go as far as the High Court, which had granted a structural interdict requiring the State to submit its revised policy to the court to enable it to satisfy itself that it was consistent with the Constitution; it felt that was not necessary since the government had always respected and executed orders of the Constitutional Court and there was no reason to believe that it would not do so: *ibid*, at [129].

In 2006 the High Court made a structural interdict (an order with a supervisory component) compelling the provision of anti-retroviral treatment to prisoners with HIV/AIDS: *EN v Government of RSA* [2006] AHRLR 326 [SAHC 2006], at [32]-[33], [35]; it subsequently ordered that it be implemented forthwith: *EN v Government of RSA* 28 August 2006 (High Court, Durban and Coast Local Division). See Kent Roach and Geoff Budlender, “Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable” (2005) 122 *SALJ* 325, at 328-335.

Ray considered that the most significant aspect of the decision in TAC was the specific terms of the order, when the Court—in a marked departure from previous cases—required the government to take specific action to correct the constitutional defect, but later in the same order gave the government express permission to ignore that directive and determine for itself what specific action Section 27 required: Ray (n22), at 164.

Eric Christiansen pointed out that the order in TAC had a wide impact, as it not only resulted in a significant expansion of testing and counselling related to HIV transmission, but also identified minimum standards that presumably apply in many related healthcare circumstances; furthermore, it highlighted the additional risk that the judiciary may require greater action than might have been taken by the executive or legislature had governmental discretion been exercised in an adequate timely manner: Christiansen (n170), at 401. See also Christensen (n15), at 590; Langwallner (n180), at 271.

2002 (5) *SA* 721, at [34].

20 Sachs (n11), at 181; TAC case 2002 (5) *SA* 721, at [28].

21 Sachs (n11), at 182. Sachs, writing extra-judicially, considered that the Court’s decision made the best use of scarce resources to realise socio-economic rights and that to concede to TAC’s submission would have been to prioritise those who pursued their rights vigorously with the best lawyers: *ibid*, at 181.

If social rights are understood as collective rights, individual remedies are not necessarily the most efficacious response; TAC illustrates that a court order enforcing a constitutional legislative command ultimately will benefit specific individuals: Woods (n15), at 790. As Christiansen concluded, even a holding affecting only a single person can force the government to rethink and reformulate its response to a diverse set of social welfare needs: Christiansen (n170), at 401, citing *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) *SA* 237 (CC).
plan for the full rollout of the drug. There has been criticism of TAC for not embracing the minimum core. David Bilchitz suggested that the Order in TAC could have been improved by the Court retaining supervisory jurisdiction, the absence of which shows undue deference to the other branches of government and an unwillingness to retain responsibility for the effectiveness of its orders. Where a person’s survival is at stake, the Court should adopt a robust approach to protect the most vulnerable. TAC was not revolutionary and did not copper-fasten the right to a minimum core in all circumstances, but the Court found a more practical remedy that proved more effective than that in Grootboom.

The issue of immigrants’ entitlements to welfare was raised in Khosa. Destitute Mozambicans with permanent residency in South Africa had been refused welfare assistance on the basis that they were not South African citizens. The Court unanimously held that the provisions relating to children were unconstitutional, as they established grants for children whose parents were South African citizens but failed to provide for children who might be South African citizens and whose parents were not. The Court was divided on the rights of adult immigrants. The majority held that the Constitution vests the right to social security in

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193 Rosalind Dixon, “Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited” (2007) 5 ICON 391, at 398. Wesson considered that the crucial factor that separated TAC from Grootboom was not greater assertiveness on the part of the Court, but the fact that extending an entitlement to a drug—where medically indicated and where, if necessary, testing and counselling were available—had only limited cost-implications and did not involve issues requiring great expertise: Wesson (n108), at 296. Lehmann also identified the negligible cost implications as a distinguishing feature in TAC: Lehmann (n9), at 175. Another distinction was that the interests of the individual HIV positive pregnant women and their children were commensurate with the general public welfare that they receive treatment: ibid, at 176.

194 Wesson (n108), at fn 6, citing Bilchitz (n21).

195 Ibid. Bilchitz has proposed that there be progressive realisation of the recognition of animals as having worth in their own right, which would most likely mean that meat-eating would only be permissible where necessary for a human being’s survival, as the animals’ interest in life and to be free from suffering would outweigh the right of most humans to kill them for food: David Bilchitz, “Moving beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals” (2009) 25 SAJHR 38, at 69.

196 Iain Currie and Johan de Waal comment that the Constitutional Court’s treatment of the content of the right to health care is minimal, because its general approach to the positive dimensions of socioeconomic rights is to avoid giving them content and to adjudicate instead of the reasonableness of the implementation measures: Iain Currie and Johan de Waal, The Bill of Rights Handbook (5th edn Juta, Cape Town 2005), at 591.


198 2004 (6) SA 505 (CC), at [2]-[3].

200 Ibid, at [78], [136].
“everyone” and that permanent residents are bearers of this right, so their exclusion from the welfare scheme was not a reasonable way to achieve the realisation of the right to social security in Section 27.\textsuperscript{201} The legislation also infringed the right to equality, as it was discriminatory and unfair, and not justified under the limitation clause.\textsuperscript{202} The Court read in the words “or permanent resident” after the word “citizen” in each of the challenged provisions in the relevant legislation.\textsuperscript{203}

Mokgoro J for the majority saw that the basic necessities were essential in a country where human dignity was valued.\textsuperscript{204} She considered that the lack of funds to survive without seeking help from the community was likely to have a “serious impact on the dignity” of the permanent residents who were “cast in the role of supplicants.”\textsuperscript{205} Notwithstanding their disagreement on the outcome, dignity was accepted by all the judges as a central

\textsuperscript{201} Ibid, at [85]. Context was all important when considering reasonableness and it was relevant to consider the purpose served by social security, the impact of the exclusion from it, the relevance of the citizenship requirement to that purpose and the impact on other intersecting rights—in this case equality rights: \textit{ibid}, at [49]. Wesson thought that \textit{Khosa} sharpened the reasonableness standard to some extent and that the Court was certainly more willing than in \textit{Grootboom} to impose far-reaching financial obligations on the state where it failed to meet the reasonableness standard: Wesson (n108), at 297.

Unlike in \textit{Soobramoney} and \textit{Grootboom} where the Court specifically noted that the government policies were developed in good faith, the majority in \textit{Khosa} found that the policy judgments in this case were the result of a flawed process as evidenced by the government’s conduct throughout the litigation, when it failed to meet deadlines set by the Court and incurred a punitive wasted costs order, which the Court felt was warranted because of its wilful default in both the High and Constitutional Courts and its failure to comply with Court directions: Ray (n22), at 165-166.

2004 (6) SA 505 (CC), at [80]. The fact that the applicants were part of a vulnerable group in society was relevant and rendered them worthy of constitutional protection in circumstances where intentional, statutorily sanctioned unequal treatment stigmatised them in the community: \textit{ibid}, at [74]. A central constitutional principle is that the interests of the most vulnerable must be protected: Bilchitz (n196), at 39. Bilchitz gave \textit{Khosa} as an example of a case where, in relation to equality, the vulnerability of a particular group was an important factor in determining whether or not unfair discrimination was present: \textit{ibid}, at fn 5, citing 2004 (6) SA 505 (CC), at [71]-[74].

2004 (6) SA 505 (CC), at [89]. The minority thought that the exclusions were a reasonable limitation of the right of access to social security, and accepted the State’s argument that there were insufficient resources to provide for everyone within the country’s borders and it was entitled to prioritise its citizens: \textit{ibid}, at [120], [134].

\textsuperscript{200} \textit{ibid}, at [52] (footnote omitted):

The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.

\textsuperscript{205} \textit{ibid}, at [76]. Liebenberg pointed out that Mokgoro J subverted the normal discourse around social assistance creating dependency on the state by highlighting its role in relieving the burden on poor communities and fostering the dignity of permanent residents; she used this to illustrate how the courts can contribute to transformation by their rhetorical role in social rights judgments, which is important even where the courts feel constrained by institutional politics from making orders that will have an extensive impact on existing budgetary allocations: Liebenberg (n129), at 7.
constitutional value. Dignity was a criterion to be applied in assessing other rights and in coming to a decision on whether a limitation on a right was justifiable. The constitutional guarantee of social security was given concrete effect even though resources were limited. Perhaps this is because the extension of welfare was achievable and affordable—unlike the granting of housing rights.

Mazibuko was the first case to raise the right of access to water. Residents in Phiri, an area in Soweto, challenged arrangements for the supply of water because they considered that the free basic water allowance was insufficient and that the introduction of pre-paid meters was unlawful and discriminatory. They relied, *inter alia*, on the right of access to sufficient water in Section 27(1)(b), which led to consideration of the extent of the state’s duty under Section 27(2) to progressively realise that right within available resources. The selection of Phiri for installation of pre-paid meters founded their claim of violation of the right to equality in Section 9(1) by differentiating without rational connection to a legitimate government purpose. The absence in Phiri of the choice of using credit meters, which were installed in households in the affluent white suburbs, was the basis of their allegation of unfair racial discrimination contrary to Section 9(3). The High Court and the Supreme Court of Appeal held in their favour against the City of Johannesburg, but the Constitutional Court unanimously overturned the lower courts’ decisions and found that the state’s measures were reasonable and not in breach of equality rights.
O'Regan J delivered the Court's judgment and analysed the considerable amount of evidence presented in great detail.\textsuperscript{212} Consistently with its stance in \textit{Grootboom} and \textit{TAC}, the Court found that Section 27(1) did not grant a right to everyone on demand to sufficient water, but had to be read with the positive duty on the state in Section 27(2) to take reasonable measures within available resources to implement progressively the right of access to water.\textsuperscript{213} O'Regan J deferred to the government's better institutional capacity to decide on the level of service to provide based on the resources available.\textsuperscript{214}

One important limitation of \textit{Grootboom} is that usually there is no obligation on the state to go beyond the national targeted minimum standard for those already receiving it until all have achieved the minimum.\textsuperscript{215} On the equality aspect, the Constitutional Court found that the installation of pre-paid meters in Soweto was because the revenue generated from the water service there was much less proportionate to that received from other areas and, as the unaccounted for water was greatest there, the introduction of pre-paid meters was not irrational.\textsuperscript{216} Therefore the differentiation between categories of people was rationally connected to a legitimate government purpose and passed muster under Section 9(1).

O'Regan J used the \textit{Harksen}\textsuperscript{217} criteria to determine whether the measures were unfair discrimination.\textsuperscript{218} There was no racial discrimination, since other poor black areas did not

\begin{footnotesize}
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\item\textsuperscript{212} The state was obliged to justify its water policy in Johannesburg meticulously. Every aspect was examined, such as the purpose of the measures, which was to address the serious problems of unaccounted for water loss and the high level of non-payment of water charges in Soweto. The City of Johannesburg accepted its constitutional obligation to progressively provide sufficient water to all. It had considered the advantages and disadvantages of the various options available before selecting the solution to be implemented in Phiri as a pilot project before being rolled out to other areas in Soweto. The policy catered for those who could not afford to pay by allowing them to come forward to be means-tested and registered as indigent; those on the register were obliged to accept pre-paid meters.\textsuperscript{223} [2009] ZACC 28, at [50].
\item\textsuperscript{214} She felt it desirable that the democratically elected and accountable organ of state should have that role: \textit{ibid}, at [61].
\item\textsuperscript{215} \textit{ibid}, at [76] (O'Regan J) (footnote omitted):
In most circumstances it will be reasonable for municipalities and provinces to strive first to achieve the prescribed (and, in the absence of a challenge, presumptively reasonable) minimum standard, before being required to go beyond that minimum standard for those to whom the minimum is already being supplied. This is consistent with this Court's jurisprudence in \textit{Grootboom} where the Court held that a government policy may not ignore the needs of the most vulnerable.
\item\textsuperscript{216} \textit{ibid}, at [145]-[147].
\item\textsuperscript{217} \textit{Harksen v Lane} 1998 (1) SA 300 (CC).
\item\textsuperscript{218} [2009] ZACC 28, at [151].
\end{enumerate}
\end{footnotesize}
have pre-paid meters. \(^{219}\) According to O'Regan J's analysis, in any event, the difference between the pre-paid and credit meters was not disadvantageous to the residents in Phiri. \(^{220}\) The fact that there was no choice to have a credit meter in Phiri was not discriminatory, because those in the white suburbs had effectively little option to have a pre-paid meter. \(^{221}\) She pointed out the need for differential measures to redress poverty caused by past inequality, "correcting the deep inequality which characterises our society, as a consequence of apartheid policies, will often require differential treatment." \(^{222}\)

Unlike the lower courts, the Constitutional Court, in line with previous decisions, refused to specify a minimum core or to give content to the concept of "sufficient water". \(^{223}\) In answer to the residents' submission that it was pointless to litigate socio-economic rights if the courts were not going to specify the content of the rights, O'Regan J—conscious of the limitations on the judicial system to assess these matters—pointed out that the court's role was to hold the government to account for the reasonableness of its measures. \(^{224}\) If the government failed to act at all, the courts would oblige it to do so. \(^{225}\) It if had acted, it would assess its policy for reasonableness. \(^{226}\) A policy could be unreasonable, as in *Groothboom*, because it omitted to provide for those in desperate need, \(^{227}\) or, as in *TAC*, because its policy contained

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\(^{219}\) Ibid, at [149].  
\(^{220}\) Ibid, at [154]. Although they formed a vulnerable group, the purpose for which the pre-paid meters were installed was "a laudable, indeed necessary, government objective, clearly tailored to its purpose": *ibid.*  
\(^{221}\) Ibid, at [155].  
\(^{222}\) Ibid, at [156]. Where there is a wide wealth gap in society, the concentration of economic power at the upper end of the income distribution has tremendous effects on the distribution of power and benefits the wealthy: 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 756.  
\(^{223}\) [2009] ZACC 28, at [56]. What was a reasonable quantity amounting to sufficient water would vary depending on the contextual issues such as the geographical and temporal circumstances—the state’s obligation, after all, was to progressively implement the right of access to water within available resources, both of which can change over time.  
\(^{224}\) Ibid, at [161].  
\(^{225}\) Ibid, at [67].  
\(^{226}\) Ibid.  
\(^{227}\) Ibid. Jenny Wakely described O'Regan J's statement that a measure would be unreasonable only if it made *no* provision for those most desperately in need as an "extremely low standard" for determining reasonableness (arguably no higher than the "rationality" requirement in *Soobramoney*) and submitted that a higher standard would be constitutionally permissible without infringing on the separation of powers or on the State’s democratic legitimacy particularly in light of the express protection for socio-economic rights in the Constitution: Jenny Wakely, "Social and Economic Rights—A Retreat by the South African Constitutional Court?" (2010) 28 ILT 153, at 155. However, Wakely does not seem to have taken into account that O'Regan J went on to confirm that limitations in the policy would also be assessed for reasonableness. The limitations to be examined would presumably include those applicable to the most needy.
unreasonable limitations or exclusions. There was also an obligation on the state to keep its policy under review, and this the City had done in Mazibuko by making changes following monitoring, research and analysing surveys carried out to see how the policy was being implemented. The constitutional obligation on the government did not require it “to be held to an impossible standard of perfection” and the Constitution did not require courts “to take over the tasks that in a democracy should properly be reserved for the democratic arms of government.” Rather, through the medium of the courts, the government could “be called upon to account to citizens for its decisions” in compliance with the constitutional principles requiring government to be responsive, accountable and open.

Some elements of O’Regan’s reasoning are questionable. At times she strained the meaning of words and the text she was interpreting. However, she did keep pressure on the state by requiring a continual review of policies and making it clear that the courts would insist that this be done and be shown to be done. She enhanced understanding of the role of the courts in conflicts over socio-economic demands by illustrating how litigation arising is part of the participative democratic system of holding government accountable. Her judgment showed considerable deference to the other organs of state. It must be disheartening for some to

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228 [2009] ZACC 28, at [67].
229 Ibid.
230 Some changes had been made since the litigation started, which indicated that the City was proactive. O’Regan J commented that if the litigation has prompted the changes, this was beneficial: ibid, at [163]. It justified the considerable effort and cost of litigating. She outlined what litigation adds to a participative democracy, ibid, at [160]:

The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.

A participative democracy is a partnership between the people as a whole and government, and is distinct from a majoritarian, merely statistical conception of democracy, as it fuses democracy and state legitimacy: Sreedhar and Delmas (n222), at 749. In this passage the Constitutional Court re-emphasised that socio-economic rights play primarily a political role: Ray (n114), at 371.
232 Ibid. Davis pointed out that socio-economic jurisprudence is one important means to achieve the implementation of the critical principles of transparency, accountability and participation: Davis (n41), at 710. On the interests of all in transparency and responsiveness in a constitutional democracy, where “dialogue and the right to have a voice on public affairs is constitutive of dignity”, see Sachs J in Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC), at [627]. Jonathan Lewis has criticised the latter case: Jonathan Lewis, “The Constitutional Court of South Africa” (2009) 125 LQR 440, at 444, 455-456, 465.

233 For example, when she downplayed the significance of TAC: [2009] ZACC 28 (CC) at [64]. See Pierre de Vos, “Water is life (but life is cheap)” (13 October 2009) http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/ (visited 18 March 2010).
234 Wakely described the Court’s approach as “conservative” and found its decision surprising as it represented “a significantly deferential attitude” in comparison with some of its earlier judgments.
find that there can be no hope of compelling the state to improve their conditions until all have achieved the same standard they have already reached.
CHAPTER VII - IRISH CASE LAW ON DIGNITY

7.1 Historical development

The Irish courts have referred to dignity sporadically. Initially it was solely in the context of using the Preamble to the Constitution as an interpretative tool. One of the Constitution’s goals is to assure the dignity and freedom of the individual. It is combined with the aim of attaining true social order. As Irish society and law moved closer to Europe, the European socialist emphasis on dignity crept into Irish jurisprudence. Its significant place in the case law on the European Convention on Human Rights (ECHR) had an influence on the Irish outlook and with the incorporation of the ECHR into Irish law, European legal norms have binding force.

In contrast to the English tradition, Continental European culture and law has placed a high value on dignity. In Europe dignity was associated with republicanism, “dignities” in the sense of aristocratic privileges being extended to all citizens as a result of the French Revolution. Based on the philosophy of Jean-Jacques Rousseau, it had a communitarian emphasis and was linked with fraternity rather than with liberty, which is more highly esteemed in North America. The movement for social reform during the 19th century invoked the concept of dignity. From the middle of that century the demand for humane conditions

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1 T John O'Dowd identified four themes in the use of human dignity by Irish judges, ie, first, it is a, if not the, fundamental constitutional value; second, it implies that each human being is entitled to be treated as being of equal worth and value in and for themselves; third, it relates to a conception of the essential attributes of human personality, which are typically realised through the development of natural human capacities; fourth, it is the basis for specific rights or entitlements and helps to determine their weight and content: T John O'Dowd, “Dignity and Personhood in Irish Constitutional Law” in Gerard Quinn, Attracta Ingram and Stephen Livingstone eds, Justice and Legal Theory in Ireland (Oak Tree Press, Dublin 1995), at 165-166.
2 See State (Burke) v Lennon [1940] IR 136, at 143 (HC, Gavan Duffy J), 178 (SC, Geoghegan J); Buckley (Sinn Féin) v AG [1950] IR 67 (SC), at 80; Re Philip Clarke [1950] IR 235 (SC), at 246, 248.
3 The other aims are to achieve national unity and establish harmonious international relationships.
5 The tension between the two traditions manifested itself in Quebec, where the Francophones felt that the cultural dignity of the French was insufficiently respected by much of Anglo Canada: Catharine A MacKinnon, Are Women Human? And Other International Dialogues (Belknap Press of Harvard UP, Cambridge, Mass 2006), at 77.
7 Ibid. See also Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (Random House, New York 2001), at xvii.
8 McCrudden (n6), at 660.
of existence became a prominent socialist slogan. The "dignity of labour" supported calls for egalitarianism and the provision of social welfare by the state. The French Catholic philosopher, Jacques Maritain, was influential in bringing the concept of human dignity into practical international politics after World War II in reaction to the excesses of Nazism. He viewed human rights as essential for promotion of the common good rather than as espousing radical ethical individualism. Eschewing communism as well as liberal individualism, Maritain promoted a personalistic type of society, whose advocates he described as seeing the mark of human dignity in the power to make the "goods of nature serve the common conquest of intrinsically human, moral, and spiritual goods and of man's freedom of autonomy."

In Ireland dignity as a value has informed other constitutional rights. In his seminal judgment in Quinn's Supermarket v AG in 1971, Walsh J pronounced the equality guarantee in Article 40.1 as relating to the dignity of human beings:

[T]his provision [Art 40.1] is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and ... is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community. This list does not pretend to be complete; but it is merely intended to illustrate the view that this guarantee refers to human persons for what they are in themselves rather than to any lawful activities, trades or disputes which they may engage in or follow.

Kenny J demonstrated an extraordinarily restrictive view of equality in Murtagh Properties v Cleary, where he completely emasculated Article 40.1 in his consideration of the objection by

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10 McCrudden (n6), at 661.


12 McCrudden (n6), at 662.


the barmen's union to the employment of women in pubs. The guarantee in relation to personal rights under Article 40.3 has proven more useful in practice than the equality guarantee in Article 40.1.

O'Hanlon J made extensive references to dignity and equality in Catholic tracts, the primary school curriculum and UN texts, when he made a declaration in the High Court in 1993 in O'Donoghue v Minister for Health that the State had failed to provide for free primary education of a profoundly handicapped boy contrary to Article 42.

Because of excessive reverence for the separation of powers doctrine and a fear of intruding

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16 Gerard Hogan and Gerry Whyte, JM Kelly: The Irish Constitution (4th edn Tottel Publishing, Dublin 2004), at [7.2.05]. Some members of the Supreme Court relied on Article 40.1 in finding that the exclusion of non-ratepayers and women from juries was unconstitutional, while others considered that there was a breach of Article 38.5 because juries were not representative: de Búrca v AG [1976] IR 38 (SC). Article 40.1 was one of the constitutional provisions breached in: King v AG [1981] IR 233 (HC, SC) (the offence of loitering with intent); CM v TM (No 2) [1990] 2 IR 52 (HC) (wife's dependent domicile); W v W [1993] 2 IR 476 (SC) (approved of CM v TM (No 2)); McKinley v Minister for Defence [1992] 2 IR 333 (SC) (extension to wife of husband's common law right to sue for loss of consortium and servitium). It was also breached in: O'G v AG [1985] ILRM 61 (HC) (ineligibility of a childless widow to adopt a child already in his custody); McMahon v Leahy [1984] IR 525 (SC) (unequal treatment in extradition of an escaper); SM v Ireland (No 2) [2007] IEHC 280, [2007] 4 IR 369 (difference in maximum sentence for indecent assault based on gender of victim). Article 40.1 "requires that people who appear before the Courts in essentially the same circumstances should be dealt with in essentially the same manner": State (Keegan) v Stardust Victims' Compensation Tribunal [1986] IR 642 (SC), at 658; Dunphy v DPP [2005] IESC 75, [2005] 3 IR 585, at [30]. There was no breach of Article 40.1 in: Heaney v Minister for Finance [1986] ILRM 164 (HC) (alleged inequality in the prize bond scheme); Kerry Co-Operative Creameries Ltd v An Bord Bainne Co-Operative Ltd [1990] ILRM 664 (HC) (allocation of shares based on a member's current trading); Browne v AG [1991] 2 IR 58 (HC) (taxation of company cars also used privately by sales representatives); People (DPP) v Quilligan (No 3) [1993] 2 IR 305 (SC) (no invidious discrimination in treatment of those arrested under Offences against the State Act 1939 and those arrested on other grounds); Bloomer v Incorporated Law Society of Ireland [1995] 3 IR 14 (HC) (value of an academic qualification); McMenamin v Ireland [1996] 3 IR 100 (HC, SC) (judges' qualification for full pension); Molyneux v Ireland [1997] 2 IRLM 241 (HC) (power of arrest without warrant for aggravated assault in Dublin only); Riordan v An Taoiseach [2000] 4 IR 537 (HC, SC) (government appointment without prior public advertisement); Re Article 26 and ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999 [2000] IESC 19, [2000] 2 IR 360 (non-nationals' access to courts); Criminal Assets Bureau v PS [2004] IEHC 351, [2009] 3 IR 9 (anonymity of CAB witnesses); Gavrylyuk v Minister for Justice, Equality and Law Reform [2008] IEHC 321 (immigrants who had not been informed of deportation order permitted to seek subsidiary protection); JD v Residential Institutions Redress Review Committee [2009] IESC 59, [2010] 1 IR 262 (exclusion on grounds of age from voluntary redress scheme).


18 The separation of powers doctrine (a central feature of the Constitution) is dealt with in provisions relating to the legislature, executive and judiciary, viz, no law is to be made save by the Oireachtas
on the territory of the legislature and executive, the Irish courts have failed to deliver socio-economic rights backed by effective remedies. There were some exceptional cases where mandatory orders were made in the 1990s in the High Court.¹⁹ In 1988 Costello J in *O'Reilly v Limerick Corporation* in the High Court opened the door to the possibility of judicial activism in this area when he accepted it was arguable that freedom and dignity required the provision of basic services for homeless and deprived young people.²⁰ However, he distinguished between commutative and distributive justice,²¹ and concluded that the courts had no role in deciding the latter, stating:

I am sure that the concept of justice which is to be found in the Constitution embraces the concept that the nation's wealth should be justly distributed (that is the concept of distributative justice), but I am equally sure that a claim that this has not occurred should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts.²²

A person’s home is constitutionally inviolable because free and secure occupation of it is necessary for human dignity. When the Court of Criminal Appeal held in *Barnes* that an occupier can use retaliatory force to protect his dwellinghouse against a burglar, Hardiman J expanded on its intangible significance:

[A] dwellinghouse is at a higher level, legally and constitutionally, than other forms of property. The free and secure occupation of it is a value very deeply embedded in human kind and this free and secure occupation of a dwellinghouse, apart from being a physical necessity, is a necessity for the human dignity and development of the individual and the family.²³

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²² *People (DPP) v Barnes* [2006] IECCA 165, [2007] 3 IR 130, at [58]. On the extent of the right to use
In condemning the requirement to pay a deposit to become an election candidate as contrary to the equality guarantee, Herbert J in the High Court in Redmond v Minister for the Environment held that discrimination on the grounds of wealth attacked the dignity of the poor. This was a refreshing decision in which Herbert J was faithful to the idea of dignity enunciated by Walsh J in Quinn’s Supermarket. If applied in other areas, it could be the springboard for making a real difference to people’s lives and in achieving social justice for the underprivileged in our society.

Dignity is integral to the right to life. McCarthy J in Murray v Ireland considered the right to procreate children within marriage essential to the human condition and personal dignity. The Supreme Court was confronted with a dispute over the status of frozen embryos in Roche v Roche. As the human embryo was generally accepted as having moral qualities and a moral status, having present in it all the genetic material for the formation of life, being the first step in procreation and containing within it “the potential, at least, for life”, Murray CJ confirmed that its creation and use cannot “be divorced from our concepts of human dignity”.

There are different judicial opinions on whether a child has the right to realise its personality and dignity. They were included in the rights of the child listed by O’Higgins CJ in his dissent in G v An Bord Uchtála. Hamilton CJ and Denham J in the Supreme Court in DG v Eastern

force to effect an arrest, compare Ex p Minister of Safety and Security: Re S v Walters 2002 (4) SA 613 (CC).
Health Board agreed with his views. However, there was disagreement over children's rights between the Supreme Court judges in TD v Minister for Education.

In the Preamble to the Constitution, dignity is coupled with freedom as a constitutional aim. Rationality and free will are the raison d'être of dignity. So in the case law, the values of freedom and dignity are intertwined. Henchy J referred to them in tandem in McGee v AG, which established the right to marital privacy. Hamilton P in Kennedy v Ireland identified them as the basis of the right to privacy.

A conflict can be perceived between the claims of the common good and the individual's freedom. Henchy and McCarthy JJ (both dissenting) in Norris v AG were loath to allow the intolerant view of homosexual conduct triumph over the freedom of the individual to express a deeply personal choice in a central feature of his being. Based on Costello J's

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33 [1974] IR 284 (SC), at 326. McGee has been described as the most important decision in Irish constitutional jurisprudence: William Binchy, "Autonomy, commitment and marriage" in Oran Doyle and William Binchy eds, Committed Relationships and the Law (Four Courts Press, Dublin 2007), at 171. On McGee, see Hilary Delany, Eoin Carolan and Cíliadhna Murphy, The Right to Privacy: A Doctrinal and Comparative Analysis (Thomson Round Hall, Dublin 2008), at 34-35, 39; Doyle, Constitutional Law: Text, Cases and Materials (n14), at [4-11]—[4-12], [4-14], [4-18]—[4-19], [4-34]—[4-36], [5-07]—[5-09], [10-02], [17-16]; Leo Flynn, "Missing Mary McGee: The Narration of Woman in Constitutional Adjudication" in Quinn, Ingram and Livingstone (n1), at 96-104; Morgan, A Judgment Too Far? Judicial Activism and the Constitution (n18), at 23-24.
34 [1987] IR 587 (HC), at 593. The Irish courts have consistently described the right to privacy in a way which emphasises its connection with dignitary values: Delany, Carolan and Murphy (n33), at 37.
35 Three different concepts of the common good are operative in Irish constitutional law, ie, first, a utilitarian interpretation of the common good identified with what the majority believe to be in their own best interests in the disposition of specific "goods"; second, an ideological ideal proposed for the community by those who consider themselves to be wiser than the electorate in matters of this nature (at the time when the Constitution was drafted, this reflected a rather homogeneous picture of Irish identity as Roman Catholic, rural, and republican); third, presupposing agreement among the members of the community that there are some individual rights which are so basic that they should never be compromised, and that other individual rights may only be compromised as an unavoidable means of guaranteeing other basic rights, this approach interprets the common good as a means to an end, or at least as a subsidiary end, and includes the whole complex of institutional and social arrangements which the community recognises as instrumental or necessary for living together in harmony: Desmond M Clarke, "The Concept of the Common Good in Irish Constitutional Law" (1979) 30 NILQ 319, at 340-341.
37 [1984] IR 36 (SC), at 78, 102. On Norris, see Binchy (n33), at 164-167; Eoin Carolan, "Committed non-marital couples and the Irish Constitution" in Doyle and Binchy (n33), at 244-245; Delany, Carolan and Murphy (n33), at 35-36, 37-38, 40, 44, 58, 63, 230, 231; Doyle, Constitutional Law: Text, Cases and Materials (n14), at [3-31]—[3-32], [4-13]—[4-16], [5-35]; Morgan, A Judgment Too Far? Judicial Activism and the Constitution (n18), at 28-29.
understanding of the common good, reconciliation of individual rights with the moral aspect of society is the aim rather than one taking precedence over the other. In an essay in 1987 Costello defined the common good as “the whole ensemble of conditions which are brought about by collaboration in a political community for the benefit of each person in it.” His definition was based on the sense in which it was used in the Preamble to ensure the “dignity and freedom of the individual.” He thought it necessary “to reconcile other aspects of the common good (for example the attainment of social justice) with the need to promote, as part of the common good, the exercise of fundamental rights.”

The plaintiffs in Zappone v Revenue Commissioners invoked their dignity as human beings as the basis of a right to marry and argued that to prohibit same-sex marriage was discrimination on the grounds of gender and sexual orientation. Dunne J rejected the challenge and stated that the right to marry implied in Article 41 had always been understood as opposite sex marriage. She discerned little evidence of a consensus around the world to support a

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39 Declan Costello, “Natural Law, the Constitution and the Courts” in Patrick Lynch and James Meenan eds, Essays in Memory of Alexis Fitzgerald (Incorporated Law Society of Ireland, Dublin 1987), at 116.
40 Ibid.
41 [2006] IEHC 404, [2008] 2 IR 417, at [117]. The plaintiffs also sought, but did not pursue, recognition of their Canadian marriage under private international law; because they were domiciled in Ireland, their capacity to marry was in issue: ibid, at [1], [45], [139]. For reviews of Zappone, see Carolan (n37), at 263-266; Doyle, Constitutional Law: Text, Cases and Materials (n14), at [9-27]-[9-29]; Aisling O’Sullivan, “Same-sex marriage and the Irish Constitution” (2009) 13 IJHR M 1, at 482-483, 485-488. Contrast Minister of Home Affairs v Fourie 2006 (1) SA 524 (CC).

The lex domicilii of the parties governs the capacity to marry, while the formalities must comply with the lex loci celebrationis. Even if the marriage complies with these requirements, recognition can be withheld on the grounds of public policy. On public policy, see James Fawcett and Janeen M Carruthers, Cheshire, North & Fawcett: Private International Law (Peter North ed, 14th edn, OUP, Oxford 2008), at 908-910. Ease of dissolution of a marriage does not affect its validity; a foreign marriage contracted in accordance with a local law allowing its dissolution by mutual consent or at the will of one of the parties, with merely formal conditions of official registration, was recognised on appeal: Nachimson v Nachimson [1930] P 217 (CA). This decision has received some criticism: William Binchy, Irish Conflicts of Law (Butterworths, Dublin 1988), at 212.

On the moral arguments for recognition of same-sex partnerships, see Oran Doyle, “Moral argument and the recognition of same-sex partnerships” in Doyle and Binchy (n27), at 124-158. The crucial difference between non-sexual committed relationships and same-sex committed sexual relationships is not the presence of a sexual relationship but the willingness explicitly to assume exclusive and presumptively lifelong commitment: Oran Doyle, “Sisterly Love: the Importance of Explicitly Assumed Commitment in the Legal Recognition of Personal Relationships” in Scott FitzGibbon, Lynn D Wardle and A Scott Loveless eds, The Jurisprudence of Marriage and Other Intimate Relationships (William S Hein & Co, Buffalo, NY 2010), at 324.

42 [2006] IEHC 404, [2008] 2 IR 417, at [241]. Dunne J also refused recognition to a polygamous marriage contracted in Lebanon by parties domiciled there, even though their capacity to marry was not in doubt: H v A [2010] IEHC 497. Her refusal was based on public policy grounds and on the traditional meaning of marriage in Ireland informed and guided by the status given to marriage in the Constitution, which she indicated involved a lifelong commitment (notwithstanding the introduction of divorce).
widespread move towards same-sex marriage.\footnote{2006} lEHC 404, \[2008\] 2 IR 417, at \[242\]. Jeffrey Redding concluded that dignity is a much more complicated, contested and dynamic concept than same-sex marriage advocates and supportive courts acknowledge: Jeffrey A Redding, "Dignity, Legal Pluralism, and Same-Sex Marriage" (2010) 75 Brook L Rev 791, at 832. The core of human dignity is the distinctive capacities of human beings to reason, to relate to one another and to make and adhere to free choices: William Binchy, "Human Dignity: Its Implications for Marriage, the Family and Society" in FitzGibbon, Wardle and Loveless (n41), at 5. On the extent of recognition/rejection of same-sex marriage, see Lynn D Wardle, "Gender Neutrality and the Jurisprudence of Marriage" in FitzGibbon, Wardle and Loveless (n41), at 40-44, 62-65. For the position taken by the European Court of Human Rights, see Schalk v Austria (App no 30141/04) (2011) 53 ECHR 20; Loveday Hodson, "A Marriage by Any Other Name? Schalk and Kopf v Austria" (2011) 11 HRL Rev 170.  
\footnote{2006} IEHC 359, \[2010\] 2 IR 321, at \[39\].}

Freedom of choice in morality and religion was above interference by the law according to McGovern J in *Roche v Roche*:

> It is not for the Courts to weigh the views of one religion against another, or to choose between one moral viewpoint and another. All are entitled to equal respect provided they are not subversive of the law, and provided there are no public policy reasons requiring the Courts to intervene. Moral responsibility exists even in the absence of law and arises out of the freedom of choice of the individual.\footnote{2006} lEHC 404, \[2008\] 2 IR 417, at \[242\]. Jeffrey Redding concluded that dignity is a much more complicated, contested and dynamic concept than same-sex marriage advocates and supportive courts acknowledge: Jeffrey A Redding, "Dignity, Legal Pluralism, and Same-Sex Marriage" (2010) 75 Brook L Rev 791, at 832. The core of human dignity is the distinctive capacities of human beings to reason, to relate to one another and to make and adhere to free choices: William Binchy, "Human Dignity: Its Implications for Marriage, the Family and Society" in FitzGibbon, Wardle and Loveless (n41), at 5. On the extent of recognition/rejection of same-sex marriage, see Lynn D Wardle, "Gender Neutrality and the Jurisprudence of Marriage" in FitzGibbon, Wardle and Loveless (n41), at 40-44, 62-65. For the position taken by the European Court of Human Rights, see Schalk v Austria (App no 30141/04) (2011) 53 ECHR 20; Loveday Hodson, "A Marriage by Any Other Name? Schalk and Kopf v Austria" (2011) 11 HRL Rev 170.  
\footnote{2006} IEHC 359, \[2010\] 2 IR 321, at \[39\].}

There was a significant development in *Re a Ward of Court (withholding medical treatment) (No 2)*, when Denham J declared that there was an unenumerated right\footnote{2006} lEHC 404, \[2008\] 2 IR 417, at \[242\]. Jeffrey Redding concluded that dignity is a much more complicated, contested and dynamic concept than same-sex marriage advocates and supportive courts acknowledge: Jeffrey A Redding, "Dignity, Legal Pluralism, and Same-Sex Marriage" (2010) 75 Brook L Rev 791, at 832. The core of human dignity is the distinctive capacities of human beings to reason, to relate to one another and to make and adhere to free choices: William Binchy, "Human Dignity: Its Implications for Marriage, the Family and Society" in FitzGibbon, Wardle and Loveless (n41), at 5. On the extent of recognition/rejection of same-sex marriage, see Lynn D Wardle, "Gender Neutrality and the Jurisprudence of Marriage" in FitzGibbon, Wardle and Loveless (n41), at 40-44, 62-65. For the position taken by the European Court of Human Rights, see Schalk v Austria (App no 30141/04) (2011) 53 ECHR 20; Loveday Hodson, "A Marriage by Any Other Name? Schalk and Kopf v Austria" (2011) 11 HRL Rev 170.  
\footnote{2006} IEHC 359, \[2010\] 2 IR 321, at \[39\].}

private international law issue deserved a deeper analysis than that given by Dunne J. She did not probe the effect of non-recognition on the parties to the polygamous marriage, which was in accordance with their religious beliefs and cultural background. The human rights aspect was not explored, in contrast to the approach in *Daniels v Campbell* 2004 (5) SA 331 (CC). Neither did she consider invoking international norms to develop Irish law by embracing a broader notion of marriage to accommodate a pluralist and multi-cultural society; like heterosexual monogamous marriage, same-sex or polygamous marriage establishes a lifelong commitment respectful of the parties' autonomy and human dignity. Dunne J rightly discounted *Conlon v Mohamed* [1989] ILRM 523 (SC) as a relevant precedent. In that case a potentially polygamous Islamic religious marriage in South Africa was not recognised; however, one of the parties was not domiciled in South Africa and did not have the capacity to contract a polygamous marriage.

\footnote{2006} IEHC 359, [2010] 2 IR 321, at [39].}


See *Ryan v AG* [1965] IR 294, at 313 (HC), 344-345 (SC); Oran Doyle, "Legal Positivism, Natural Law and the Constitution" (2009) 31 DULJ 206, at 207-209; Thomas A Finlay, "The Constitution of Ireland in a Changing Society" in Deirdre Curtin and David O'Keeffe eds, *Constitutional Adjudication in European*
Article 40.3.1°. It was combined with the rights to self-determination and to refuse medical treatment. The right to be treated with dignity was in addition to the right to privacy. Since then, the self-standing right to dignity has been accepted by the Supreme Court in *Re Article 26 and the Health (Amendment) (No 2) Bill 2004*. The Court discerned in the right to private ownership in Article 43.1.1° a moral quality “intimately related to the humanity of each individual”, but since property owners must respect the rights of other members of society, Article 43.2.1° declared that their rights were regulated by the principles of social justice. Therefore, Murray CJ deduced that the property interests of the less wealthy required to be especially defended, stating, “[t]he property of persons of modest means must necessarily, in accordance with those principles, be deserving of particular protection, since any abridgement of the rights of such persons will normally be proportionately more severe in its effects.”

Charlton J dismissed wealth as a feature of the human personality in *Prendergast*, when he rejected an aspiring Irish medical student’s claim to parity with fee-paying non-Europeans in entry to university and held that the government was entitled to set the educational training policy for medicine. Individual wealth and the ability to pay fees did not trump the state aim.
to establish equality of opportunity in education. The disassociation of wealth from human dignity and the endorsement of equality of opportunity in this case could be the foundation for the courts to intervene when the other arms of government have failed to correct social deprivation.

The values of human dignity took centre stage in Hardiman J’s decision in *North Western Health Board v HW*, when he refused to order compulsory medical tests and deferred to the views of the individual, albeit those views were held on non-medical and objectively irrational grounds. In *People (DPP) v Davis* he drew attention to “the profound values, based fundamentally on respect for human rights and dignity, which underlie the need to ensure proper treatment for prisoners and other accused persons”.

### 7.2 Philosophy

The depth of philosophical assessment by the judiciary of the meaning of dignity has been shallow with a handful of exceptions. Frequently the courts have avoided dealing with the dignity factor at all, particularly if there is another value, right or express constitutional provision giving an answer to the problem. This attitude has prevented a holistic view of the Constitution. The Constitution is perceived as being out of tune with 21st century Ireland in certain respects. It has been overshadowed recently by the ECHR, which some think is a better fit for resolution of the conflicts and demands arising in modern Ireland. Apart from the direct benefits to the protection of rights from the ECHR, Colm O’Cinneide considers that its incorporation into Irish law may have the indirect effect of giving an impetus to Irish constitutional jurisprudence. The emphasis on dignity in the European Court of Human Rights may give a fillip to dignity in the Irish courts and result in more attention being paid to this prime constitutional concept.

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54 [2001] 1 IR 146 (CCA), at 154. The right to a fair trial is superior to the community’s right to prosecute: *People (DPP) v Z* [1994] 2 IR 476 (HC, SC); *PO’C v DPP* [2000] 3 IR 87 (SC), at 96-97.
55 Ivana Bacik, “Future Directions for the Constitution” in Doyle and Carolan (n14), at 135.
57 The concept of human rights is the result of a synthesis of morality and law, with human dignity playing a mediating function; human dignity served as a conceptual hinge in establishing the connection between the internalised, rationally justified morality anchored in the individual conscience and the coercive, positive, enacted law: Jürgen Habermas, “The Concept of Human Dignity and the Realistic Utopia of Human Rights” (2010) 41 *Metaphilosophy* 464, at 470.
While there are no obvious reference points for philosophical analysis in the Irish case law, a trawl of judgments does bear some fruit. The uniqueness of the individual is acknowledged. Keane J (dissenting) in O'T v B in 1997 highlighted the unique value of each person irrespective of parentage, when he ruled out the centrality to dignity and the personality of the right to know one's natural parents.58

The human personality doctrine has received judicial recognition.59 McKechnie J in Foy v An t-Ard Chiaraitheoir articulated the right of everyone to human dignity and considered that each person should have the freedom to express their own personality.60 The need to forge one's own identity and the rights to self-determination and autonomy are essential.

Dignity does not apply solely to a lonely figure. Relationships (familial and companionship) are important to the individual. Finlay CJ in AG v X had regard to the mother's relationships with her family and society where her activities occur.61 O'Higgins J in Equality Authority v Portmarnock Golf Club said that friendships are based on delight in others' company, which cannot be analysed logically.62 According to Hardiman J in an obiter dictum in the Court of Criminal Appeal, perception by others is important to the individual as well as subjective well being.63 Denham J (dissenting) in DPP v Redmond referred to the fact that a person not guilty by reason of insanity has not the status of a convict and that this perception affected a person's dignity.64

The sanctity of life and death with dignity were examined extensively by the Supreme Court in Re a Ward of Court (withholding medical treatment) (No 2).65 Lynch J in the High Court had proceeded on the basis that the right to life was not absolute and that a person had a right to die a natural death, to decline medical treatment.66 He accepted that a person may elect not

58 [1998] 2 IR 321 (SC), at 371. See Doyle, Constitutional Law: Text, Cases and Materials (n14), at 4-46—[4-52], [4-55]; Shannon (n17), at [9-216]—[9-217].
59 See Doyle, "The Human Personality Doctrine in Constitutional Equality Law" (n14).
63 People (DPP) v Davis [2001] 1 IR 146, at 153.
66 "A person has a right to be allowed to die in accordance with nature and with all such palliative care
to enforce personal rights, having autonomy over her own life, subject to the common good and public order and morality. On appeal, Hamilton CJ took the same approach and based the sanctity of human life "on the nature of man". O'Flaherty J emphasised the right to be let alone (founded on bodily integrity and privacy) and focused on the ward's quality of life. It was in her best interests that "nature should take its course ... without artificial means of preserving what technically is life, but life without purpose, meaning or dignity." In contrast, Egan J (dissenting) gave precedence to the right to life (the highest constitutional right), and therefore stated, "[i]n view of the constitutional guarantees it would require ... a strong and cogent reason to justify the taking of a life."

Denham J associated dignity with privacy. In her comprehensive judgment, she (unlike Hamilton CJ) recognised a conflict between the rights of the individual and the common good (the community interest in preserving life). Her thorough analysis of the right to life distinguished between the absolute respect for life and the lower standard for the State to defend, vindicate and protect life. She was correct in regarding the sanctity of life as not mandating preservation of life at all costs. However, she took a restricted view of human

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67 "[D]espite the fact that the right to life ranks first in the hierarchy of personal rights, it may nevertheless be subjected to the citizen's right of autonomy or self-determination or privacy or dignity": Ibid. Contrast S v Makwanyane 1995 (6) BCLR 555 (CC), at [214] (Kriegler J).
68 [1996] 2 IR 79, at 123. The naturalistic fallacy he applied to conclude that the ward ought to be allowed to die has been described as "a very dubious form of natural law reasoning": Doyle, Constitutional Law: Text, Cases and Materials (n14), at [5-04].
69 "The ward may be alive but she has no life at all. ... she is not living a life in any meaningful sense.": [1996] 2 IR 79, at 130, 131.
70 Ibid, at 134.
71 Ibid, at 136.
72 "A constituent of the right of privacy is the right to die naturally, with dignity and with minimum suffering.": ibid, at 163. "Decision-making in relation to medical treatment is an aspect of the right to privacy; however, a component in the decision may relate to personal dignity.": ibid.
73 Ibid, at 162:

The primary constitutional concept is to protect life within the community. The State has an interest in the moral aspect of society—for the common good. But, balanced against that is the person's right to life—which encompasses a right to die naturally and in the privacy of the family and with minimum suffering.

74 "The requirement to defend and vindicate the life is a requirement 'as far as practicable', it is not an absolute. Life itself is not an absolute.": ibid, at 160.
75 Ibid, at 161:

In respecting a person's death we are also respecting their life—giving to it sanctity. That concept of sanctity is an inclusive view which recognises that in our society persons, whether members of a religion, or not, are all under the Constitution protected by respect for human life. A view that life must be preserved at all costs does not sanctify life. A person, and/or her family, who have a view as to the intrinsic sanctity of the life in question are, in fact, encompassed in the constitutional mandate to protect life for the common good—what is being protected (and not denied or ignored or overruled), is the sanctity of that person's life.
dignity and did not see it as inherent. Her interpretation of the constitutional equality right was expansive.

Edwards J in the High Court stressed the importance of communication to the individual’s dignity when he enquired into the lawfulness of the detention in hospital of a South African woman kept in isolation as a probable source of an infectious disease. He posed the question, “[d]oes her right to human dignity not entitle her to be appraised of the full implications of her situation?”

Hardiman J used the Kantian terminology of the individual’s sense of worth and the importance of not using people as a means to an end in *CC v Ireland*. The social stigma attached to an employer labelled a criminal for an employee’s acts done without the employer’s knowledge or approval was a factor in the Supreme Court’s finding that the knowledge and guilty intent necessary for criminal responsibility were missing from the attempt to impose vicarious liability in the Employment Equality Bill 1996.

As can be seen from the instances of judicial comments on the philosophical basis of dignity and the meaning of life, there is no discernible coherent thread running through the Irish case law and, overall, there was no great debate on the meaning of life. Doubtless, the human personality and the dignity of the individual are key. While personality has been mentioned in

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76 “The medical treatment is invasive. This results in a loss of bodily integrity and dignity.”: ibid, at 158. See Binchy (n14), at 316-317.
77 “[A]ll citizens as human persons are equal before the law. This is not a restricted concept, it does not mean solely that legislation should not be discriminatory. It is a positive proposition.”: [1996] 2 IR 79, at 159.
78 *VTS v Health Service Executive* [2009] IEHC 106, at 63.
79 Ibid. He pointed out, ibid:

[No one has sat down to work out, or to plan, exactly what information the patient needs to have, how it is to be communicated, how issues of trust and confidence tending to undermine effective communication are to be addressed, what special skills may be necessary to ensure effective advocacy both with and on behalf of the patient, and who is to have responsibility for it.

There is a right and freedom to express one’s unique personality, subject to harmonisation with the rights of others and the common good. Self-esteem is important, but relationships with others and others’ perception of the individual are also central aspects of one’s dignity.

The expansive interpretation of the Constitution backed by deeper analysis during the fertile era initiated by Walsh J in the 1960s waned and was succeeded by a constrained formalistic period of withdrawal marked by a naïve faith in the legislature and executive to uphold human rights and secure social justice. The judiciary has taken a restricted view of its role and, on the spurious grounds of policy, has been too ready to relinquish the obligations endowed on it by the Constitution. Unlike their South African counterparts, the Irish judges have not engaged in the deep analysis of legal philosophy that is desirable to yield a cohesive body of case law charting the practical implications of constitutional rights to enlighten the populace on the meaning of the Constitution in daily life. Of course, this assessment is a generality and there have been judges who have attempted to break the mould. A brief appraisal of the performance of some of the more noteworthy figures will illustrate these views.

Many of the now well-established and frequently-cited principles of Irish law were enunciated originally by Walsh J. With his courageous scrutiny of the Constitution, he identified its core values and the basis of its equality guarantee in human dignity linked to social justice. However, not all of his judgments can survive criticism—beside his advances for equality are instances where he gave less meritorious factors precedence, eschewing the equality guarantee or avoiding consideration of human dignity for alternative options. Although he regarded the child as having an independent personality, he did not support the human dignity of unmarried fathers and his decision in Nicolaou was rightly criticised by Barrington J three decades later. Constitutional supremacy dominated his thinking. He did not treat the judicial role as inferior to that of the other arms of state. His judicial legacy will be long-

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lasting, but the potential of the equality guarantee he outlined\textsuperscript{92} has not been realised.

A significant, but less pervasive,\textsuperscript{93} contribution to Irish jurisprudence was made by Barrington J. His classification test in \textit{Brennan v AG} \textsuperscript{94} was adopted by the Supreme Court.\textsuperscript{95} He searched for norms on which to ground his decisions and was willing to act to compel the government to protect human rights.\textsuperscript{96} In \textit{Corway} he displayed frustration with the emphasis on religion in the Constitution.\textsuperscript{97} Two other defenders of human rights were Henchy and McCarthy JJ, the dissentients in \textit{Norris}.\textsuperscript{98} The former’s definition of the right to marital privacy as an unenumerated constitutional right in \textit{McGee}\textsuperscript{99} hastened the liberation of Irish society. He considered the meaning of human dignity,\textsuperscript{100} and leveraged the equality guarantee.\textsuperscript{101} Although he believed in a harmonious interpretation of the Constitution,\textsuperscript{102} he shirked from reshaping the law of torts in \textit{Hanrahan},\textsuperscript{103} McCarthy J’s humane approach was evident in \textit{JK v VW}, where he took greater cognisance than the majority of the position of the committed unmarried father, whom he considered should have natural rights.\textsuperscript{104} His commitment to equality is evident in \textit{McKinley}.\textsuperscript{105} Unlike the current Supreme Court, he did not avoid philosophical analysis and, dissenting in \textit{Cooke v Walsh}, he reserved for a future case with a full debate the issue of whether a plaintiff with no real appreciation of her plight should get only nominal damages.\textsuperscript{106}

Kenny J will be remembered for his finding in \textit{Ryan v AG} (upheld by the Supreme Court)\textsuperscript{107} that there are unenumerated constitutional rights,\textsuperscript{108} but his view that the equality guarantee did not apply to women in their work activity in \textit{Murtagh Properties v Cleary} is best forgotten—

\textsuperscript{92} \textit{Quinn’s Supermarket v AG} [1972] IR 1 (SC), at 13.
\textsuperscript{93} \textit{McDonnell v Ireland} [1998] 1 IR 134 (SC).
\textsuperscript{94} [1983] ILRM 449 (HC).
\textsuperscript{98} \textit{Norris v AG} [1984] IR 36 (SC).
\textsuperscript{100} \textit{Garvey v Ireland} [1981] IR 75 (SC), at 99-101.
\textsuperscript{102} \textit{Dillane v AG} [1980] ILRM 167 (SC).
\textsuperscript{103} \textit{Hanrahan v Merck Sharp & Dohme (Ireland) Ltd} [1988] ILRM 629 (SC).
\textsuperscript{104} [1990] 2 IR 437 (SC), at 449-450.
\textsuperscript{105} \textit{McKinley v Minister for Defence} [1992] 2 IR 333 (SC).
\textsuperscript{106} [1984] ILRM 208 (SC).
\textsuperscript{107} [1965] IR 294 (SC), at 344-345.
\textsuperscript{108} [1965] IR 294 (HC), at 313.

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although he redeemed matters by finding that reference in Article 45 to all men and women having equal rights to an adequate means of livelihood\(^\text{109}\) meant that all had a right to earn a livelihood under Article 40.3.\(^\text{110}\)

Murray CJ had a repressed perception of the judiciary’s function. In *Roche v Roche* he placed the onus firmly on the Oireachtas to make the initial policy determination to enable a legal definition to be made of when “the life of the unborn” begins to enjoy constitutional protection.\(^\text{111}\) However, he did not hesitate to address governmental lapses when social justice was endangered and the Supreme Court struck down the Health Amendment Bill in defence of the less wealthy,\(^\text{112}\) or when a moral sanction was required to reflect the public indignation at executive action in *Shortt*.\(^\text{113}\) He associated dignity with status in *PO'C v DPP*.\(^\text{114}\)

Of the current judges, Denham CJ is notable for her finding of a right to dignity in the *Ward of Court* case, where her diligent judgment was most thorough.\(^\text{115}\) Based on the concept of equality allied to the separation of powers doctrine, she upheld the application of legislation to the executive in *Howard*.\(^\text{116}\) She applies a harmonious interpretation\(^\text{117}\) and can support her comprehensive judgments by well-researched arguments.\(^\text{118}\) Similar to the South African style, she employs the tools of proportionality and reasonableness.\(^\text{119}\) She is conscious of the importance of ensuring children’s welfare\(^\text{120}\) while respecting their rights to liberty, equality and to realise their personality and human dignity.\(^\text{121}\) For her the separation of powers is not an inhibiting factor.\(^\text{122}\) Hers was the lone voice to favour of the rights of the mother and parent in *Sinnott v Minister for Education*.\(^\text{123}\) Denham CJ’s record is one of support for human

\(^\text{109}\) Constitution of Ireland 1937, Article 45.2.i.
\(^\text{112}\) *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105, at [120].
\(^\text{114}\) [2000] 3 IR 87 (SC), at 103.
\(^\text{115}\) *Re a Ward of Court (withholding medical treatment) (No 2)* [1996] 2 IR 79 (SC).
\(^\text{118}\) *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, at [19], [40].
\(^\text{119}\) *McD v L* [2009] IESC 81, at [50].
\(^\text{122}\) [2001] 2 IR 545 (SC).
An intellectual capable of impressive legal reasoning, Hardiman J produces interesting judgments that uphold individual rights against state interference.\textsuperscript{124} He has a rigid aversion to judges meddling in policy matters, which he regards as strictly the preserve of the legislature and executive.\textsuperscript{125} For him, immigration decisions are administrative issues for the executive without much judicial oversight.\textsuperscript{126} His perception of human dignity is of the adult viewed as a worthy\textsuperscript{127} secure\textsuperscript{128} member of society.\textsuperscript{129} He upholds the principle of personal responsibility in criminal law,\textsuperscript{130} but he has not recognised the presence of social justice in modern tort law.\textsuperscript{131} He located the child's constitutional rights within the family protected by the state.\textsuperscript{132} His preference is for a harmonious interpretation\textsuperscript{133} with a restricted role for proportionality.\textsuperscript{134}

In \textit{Shortt} the same stance as Murray CJ and Hardiman J was adopted by Fennelly J,\textsuperscript{135} who has a broader view of equality\textsuperscript{136} and the meaning of human dignity than some of his colleagues. Although he has articulated that the dignity of prisoners should be respected,\textsuperscript{137} this has not translated into the provision of a remedy for any claimants. He did not sideline the humanity of the natural father in \textit{McD v L}\.\textsuperscript{138}

There was a display of human empathy in McKechnie J's judgments in \textit{Foy}, where he was constrained initially by the rights of the transsexual's family and by the terms of the Constitution from finding in favour of Dr Foy.\textsuperscript{139} He expressed his personal views in \textit{GT v KAO} that the unmarried father should have more rights recognised because of the constitutional values of prudence, justice, charity and dignity, but again these views were not legally

sustainable because Article 41 has been interpreted in a narrow way to accord recognition only to the marital family.\footnote{GT v KAO (Child Abduction) [2007] IEHC 326, [2008] 3 IR 567, at [50]-[51].}

Of the current High Court judges, two of those with long service (Laffoy and Kelly JJ) deserve to be mentioned. Laffoy J held in \textit{McCann v Judge of Monaghan District Court} that the provisions for imprisonment for debt infringed the liberty of the individual and violated the constitutional guarantee of fair procedures.\footnote{[2009] IEHC276.} When faced with inequality and unfair treatment of the vulnerable and powerless, she has intervened to redress the wrong being caused.\footnote{O'Donnell (a minor) v South Dublin County Council [2007] IEHC 204.} She has not demurred from applying the equality guarantee.\footnote{SM v Ireland (No 2) [2007] IEHC 280, [2007] 4 IR 369.} Although her decision to order the release of the prisoner in \textit{A v Governor of Arbour Hill Prison} was logical, it was overturned on appeal because of the far reaching consequences.\footnote{TD v Minister for Education [2000] 3 IR 62 (HC); [2001] IESC 101, [2001] 4 IR 259. Cf DB v Minister for Justice [1999] 1 IR 29 (HC).} Also overturned on appeal has been the fearless decision of Kelly J addressed to the state in defence of neglected children in \textit{TD}.\footnote{DG v Eastern Health Board [1997] IESC 7, [1997] 3 IR 511.} In contrast, his decision to ensure the welfare of a homeless youth with a serious personality disorder by ordering his detention was upheld.\footnote{[2006] IESC 33, [2006] 4 IR 1, at [61]. Cf S v Coetzee 1997 (3) SA 527 (CC).}

To widen the analysis, the remainder of this Chapter will probe deeper into some areas where constitutional values have been examined in the Irish courts and will assess the range of application of constitutional rights. It will drill down to the rationale for some legal principles and will draw comparisons with South Africa.

### 7.3 Personal responsibility

Freedom to act brings with it accountability for one’s actions. In law the principle of personal responsibility has translated into the need for \textit{mens rea} in criminal law and has constrained vicarious liability in tort.

#### 7.3.1 Criminal law

It was held in \textit{CC v Ireland} that \textit{mens rea} is necessary for a serious criminal offence.\footnote{[2006] IESC 169, [2006] IESC 45, [2006] 4 IR 88.} Justice
required that the person's dignity be respected\(^\text{148}\) and this was not observed in crimes of absolute liability.\(^\text{149}\) Similarly, vicarious liability for crimes is repugnant and was the basis on which a provision in the Employment Equality Bill was found to be unconstitutional.\(^\text{150}\) The detriment to the individual in the eyes of society was not balanced by the laudable aim of the legislature.\(^\text{151}\) As indicated in \textit{S v Coetzee}, \textit{mens rea} is also a requirement in South Africa.\(^\text{152}\)

Before analysing the nature and purpose of \textit{mens rea} in criminal law, it would be helpful to define criminal law, but that is impossible since there is no universally accepted definition.\(^\text{153}\) The characteristics generally found in criminal conduct are that it usually involves a public wrong and a moral wrong.\(^\text{154}\) A guilty mind (\textit{mens rea}) is the traditional \textit{sine qua non} of a crime.\(^\text{155}\) It contains the mental fault ingredient of a crime and signifies intention to cause harm, or recklessness (whether deliberate or indifferent) as to the consequences of an action, but it is now sometimes deployed to describe negligence in the sense of failure to comply with a standard of conduct.\(^\text{156}\) The beginning of the modern concept of \textit{mens rea} is probably found


\(^{149}\) [2006] IESC 33, [2006] 4 IR 1, at [48]-[49], [68].


\(^{151}\) \textit{Ibid}, at 373-374 (Hamilton CJ): [W]hat is sought to be done by this provision is that an employer, devoid of any guilty intent, is liable ... to be tainted with guilt for offences which are far from being regulatory in character but are likely to attract a substantial measure of opprobrium. The social policy of making the Act more effective does not, in the opinion of this Court, justify the introduction of so radical a change to our criminal law. The change appears to the Court to be quite disproportionate to the mischief with which the section seeks to deal.

\(^{152}\) 1997 (3) SA 527 (CC).

\(^{153}\) David C Ormerod, \textit{Smith and Hogan: Criminal Law} (12th edn OUP, Oxford 2008), at [2.1]. There is a need for a global substantive criminal law. Catherine MacKinnon has called for an extension of the definition of rape as a crime against humanity to cover situations where rape has become banal, such as in South Africa: MacKinnon (n5), at 246.

\(^{154}\) Ormerod (n153), at [2.1]. The public element invariably means a degree of stigmatisation—even if the individual is diverted before trial and dealt with by way of caution; there is a marked public condemnation publicly communicated—the public has an important role in punishing wrongs that have a harmful effect on society and do not merely interfere with private rights: \textit{ibid}, at [2.1.1]. Morality and the criminal law are not co-extensive: \textit{ibid}, at [2.1.2.1]. Many acts are now prohibited simply on the grounds of social expediency: \textit{ibid}. For the most part, it is inappropriate for the law (particularly the criminal law) to intervene in people’s intimate personal lives if no harm is caused to society: \textit{ibid}, at [2.1.2.2]. A difficult question is when intervention is justified where the harm is self-inflicted or the recipient consents.

\(^{155}\) Ancient criminal law tried to make people answer for all their intentional misdeeds; exceptions to this harsh attitude were recognised gradually leading to the emergence and development of the \textit{mens rea} concept: Rollin M Perkins, “A Rationale of \textit{Mens Rea}” (1939) 52 Harv L Rev 905, at 905.

\(^{156}\) Ormerod (n153), at [5.1]. \textit{Mens rea} has no single meaning—every crime has its own \textit{mens rea} which can only be ascertained by looking at its statutory definition or the case law: \textit{ibid}, at [5.3]. The true meaning of \textit{mens rea} as a blameworthy state of mind at common law requires not only that the accused’s conduct be a voluntary expression of his will (intentional, not accidental or done in a state of somnambulism or automatism), but also knowledge of the consequences of the action (guilty
in Anglo-Saxon law. The idea of punishment for intentional wrong in secular law has parallels with penance for evil thoughts in religion.

The reception of mens rea into Anglo-American law may be ascribed to some extent to the significance of the Irish Catholic Church, which was at one time the most influential church in Britain and Ireland, but in any event there is no doubt that the Christian Church with its absorption of Hebrew thought had an impact on the legal concept. In Hebrew law, a guilty mind—initially punished on a tribal basis—evolved over time into personal guilt. It contained the seeds of personal responsibility. Christian theology influenced Anglo-Saxon law by requiring a moral basis to punishment—a guilty mind attracted a punitive sanction.
One of the conclusions Francis Sayre drew from his study of the development of the mental requisites of crime was that the strong tendency of the early days to link criminal liability with moral guilt made it necessary to free from punishment those who perhaps satisfied the requirements of specific intent for particular crimes but who, because of some personal mental defect or restraint, should not be convicted of any crime.\textsuperscript{164} Many commentators consider that \textit{mens rea} should continue as the normative base for crime.\textsuperscript{165} Despite the requirement at common law for \textit{mens rea} to be a precursor for criminal responsibility, early tendencies towards strict responsibility were revived on a large scale in the later part of the 19\textsuperscript{th} century through the literal construction of legislation on public welfare offences.\textsuperscript{166} In \textit{Woodrow}, strict liability was imposed on a tobacco retailer for possession of adulterated tobacco, although he was unaware that it was contaminated.\textsuperscript{167} In effect the statute

\textsuperscript{164} Sayre (n160), at 1004. Sayre also concluded that whatever the early conception of \textit{mens rea} may have been, as the law grew the requisite mental elements of the various felonies developed along different lines to meet exigencies and social needs which varied with each felony: \textit{ibid}, at 1019. The nature of the crime was central, criminal responsibility being more readily assigned to corporations irrespective of motive for breaches of laws protecting public health, regulating gambling and controlling the sale of liquor and food: Harold J Laski, “The Basis of Vicarious Liability” (1916) 26 \textit{Yale L J} 105, at 131-132. \textit{Mens rea}, the mental factor necessary to prove criminality, has no fixed continuing meaning; Sayre (n160), at 1016. There remained a residuum of cases where criminality was absent by reason of the general lack of a law-breaking or criminal mind, and the lack of \textit{mens rea} developed as a recognised defence—they included cases where the defendant acted under a reasonable mistake of fact, and cases where the defendant intended an act constituting only a trivial infraction of the law which without the defendant’s negligence resulted in death or some serious unintended criminal consequence: \textit{ibid}, at 1022.

\textsuperscript{165} Sayre, writing in 1933 concerning the growth of statutory offences punishable without any criminal intent, anticipated opposition from the community if a significant sanction were imposed, Francis Bowes Sayre, “Public Welfare Offenses” (1933) 33 \textit{Colum L Rev} 55, at 55-56:

\begin{quote}
Does the modern conception of criminality, which seems to be shifting from a basis of individual guilt to one of social danger, presage the abandonment of the classic requirement of a \textit{mens rea} as an essential of criminality? ... Criminality is and always will be based upon a requisite state of mind as one of its prime factors. ... To inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement.
\end{quote}

\textsuperscript{166} Glanville Llewelyn Williams, \textit{Criminal Law: The General Part} (2\textsuperscript{nd} edn Stevens, London 1961), at [75].

\textsuperscript{167} \textit{R v Woodrow} (1846) 15 M & W 404, 153 ER 907. See Williams (n166), at [76], [78]. Pollock CB considered that it was reasonable for the legislation to require dealers to be responsible for the quality of the product supplied to the public and to be aware of its character, and regarded the legislature’s policy decision imposing a duty to take care as justified on the basis of traders’ responsibility for the “goodness” of products “whether they know it or not”: (1846) 15 M & W 404, 153
criminalised negligence. The rationale for dispensing with mens rea was the difficulty for the prosecution in proving knowledge of the content where public welfare was at stake.

Twenty years later in R v Stephens, the octogenarian owner of a quarry managed by his sons as his agents was convicted of public nuisance caused by rubbish falling into a river when a wall collapsed. He sought a new trial, on the ground that the judge misdirected the jury by telling them that he would be liable for the acts of his workers in depositing the rubbish from the quarries so as to become a nuisance, though without his knowledge and against his orders. The Queen's Bench Division unanimously upheld the trial judge's direction. Mellor J identified the object of the indictment as the prevention of the recurrence of the nuisance.

He described the proceedings as criminal in form, but civil in substance. The same approach was adopted by Blackburn J, who was keen not to erode the general rule that a principal is not criminally answerable for the act of an agent. Both Mellor and Blackburn JJ attempted to remove the stigma of a crime where moral impropriety in the form of an intention to offend was absent and the protection of the public warranted a stringent deterrent to induce more care in the future by operators profiting from an economy growing increasingly more industrialised.

By 1909 the jettisoning of mens rea for a statutory offence aimed at protecting the public
had become accepted in England. The pattern in the United Kingdom was paralleled in countries such as Canada, Australia and New Zealand, but some legal systems did not follow this path. In the United States the movement towards public welfare offences commenced about the middle of the nineteenth century quite independently of the English development. The Supreme Court in Morissette v US accepted that the legislature had power to dispense with mens rea in new statutory offences. The rationale identified in Morissette for requiring blameworthiness as a precursor to a crime was the free will of the

the norm, ie, first, a class of acts which were not criminal in any real sense, but were prohibited under a penalty in the public interest; second, some (and perhaps all) public nuisances; third, cases in which, although the proceeding was criminal in form, it was really only a summary mode of enforcing a civil right: ibid, at 921-922. Remarkable exceptions—apart from these classes—were bigamy and abduction of a girl under 16 even though the abductor believed in good faith and on reasonable grounds that she was over that age: ibid, at 921.

See Jackson (n163), at 268. On bigamy, see Sayre (n165), at 74-75.

In the prosecution of a motor cab company because an employee drove its cab without a rear light on its number plate, Lord Alderstone CJ asserted, Provincial Motor Cab Co v Dunning [1909] 2 KB 599 (DC), at 602-603:

A breach of that regulation is not to be regarded as a criminal offence in the full sense of the word; that is to say, there may be a breach of the regulation without a criminal intent or mens rea. ... The doctrine that there must be a criminal intent does not apply to criminal offences of that particular class which arise only from the breach of a statutory regulation.

Strict responsibility became commonplace for minor offences relating to public welfare: Williams (n166), at [76].

Ibid, at [76] fn 2. An example is Switzerland, where the only absolute prohibition was on Press libels: ibid.

It was long-established at common law that a master was responsible for criminal libels committed by a servant without the master’s knowledge or consent; the rationale was not simply that entrepreneurs benefiting from the sale of books or newspapers should pay because they enjoyed the profits of the enterprise, but liability was attributed because publication could cause irreparable damage and the law should protect the interests of the personality as best it could: Laski (n164), at 132.

Sayre (n165), at 62, 83.

Justice Jackson distinguished new offences from ones merely adopting into federal statutory law a concept of crime already well defined in common law: 342 US 246 (1952), at 262. When common law definitions were adopted in statutes, the judiciary would not take silence on intent in the legislation as implying that intent was not necessary when it was a feature of the offence at common law: ibid. Justice Jackson resisted the prosecution’s argument for dropping the need for guilty intent in the crime of conversion, the purpose and effect of which would be “to ease the prosecution’s path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries”: ibid, at 263. It was not the judiciary’s function to extend “[s]uch a manifest impairment of the immunities of the individual” to common law crimes: ibid. For reviews of Morissette, see Herbert L Packer, “Mens Rea and the Supreme Court” [1962] Sup Ct Rev 107, at 119-121; Frank J Remington and Orrin L Helstad, “The Mental Element in Crime—A Legislative Problem” [1952] Wis L Rev 644, at 644-647.

In 1933, Sayre had discerned two cardinal principles to assist in determining practically which offences did and which did not require mens rea, where the statute creating the offence was silent as to the requisite knowledge: Sayre (n165), at 72. The first criterion was the character of the offence. He identified the dual purpose of criminalisation, as “singling out wrongdoers for the purpose of punishment or correction and of regulating the social order”—where the former purpose was the primary aim, mens rea was commonly required, but where the latter purpose was more important, the offences, which were “of a merely regulatory nature”, were frequently enforceable irrespective of any guilty intent. The second criterion depended on the possible penalty—if it were serious and imprisonment was a possibility, the individual interest of the defendant weighed too heavily to allow conviction without proof of a guilty mind.
individual and the person's capacity to choose to do right or wrong. Its basis was human dignity, although Justice Jackson did not use this term explicitly when he explained the embedded nature of *mens rea* in the US legal system.\(^{178}\) The high value placed on freedom of the individual in the US explains the attraction of the core belief that guilty intent is essential to constitute a crime at common law.

Jerome Hall did not approve of the change from proof of knowledge of the offence,\(^{179}\) and supported "the general thesis that moral culpability should remain the essence of criminal liability".\(^{180}\) Glanville Williams considered that strict liability was reprehensible, as it was "an affront to the personality", it did not deter the unscrupulous real culprits, and it abused the moral sentiments of the community.\(^{181}\) His view was that a practice of branding people as criminals who were without moral fault tended to weaken respect for the law and the social

\(^{178}\) 342 US 246 (1952), at 250-252 (footnotes omitted): The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to"...

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.

\(^{179}\) "[P]enalization of persons who are both innocent and careful smacks of an indiscriminate terrorism that is foreign to the common law.": Jerome Hall, "Interrelations of Criminal Law and Torts: II" (1943) 43 Colum L Rev 967, at 994. He identified four general characteristics of public welfare offences: first, many of them applied not to the general public but only to certain traders, particularly suppliers of food or drugs and vendors of alcoholic beverages, while others, which had more general application as to potential offenders, were restricted to very few activities, such as the driving of cars, safety of highways, and health measures; second, the regulations and the conditions of conforming to them presupposed regular inspection, licensing, and other administrative supervision of a continuous pattern of activity; third, the public welfare enactments were relatively new and represented adaptations to an intricate economy, an impersonal market, and modern invention; fourth, the modern public welfare offences were not strongly supported by the mores—their occurrence did not arouse the resentment that characterised attitudes to the perpetrators of traditional crimes: ibid, at 992-993. In addition to public welfare, *mens rea* was abrogated for certain sexual offences, bigamy and possession of drugs: ibid, at 995. Hall advocated re-examination of these exceptions to the basic principles of criminal law, and considered that criminalisation was not justified, as imposition of a penalty cast a stigma on those convicted: ibid, at 996.

\(^{180}\) ibid.

\(^{181}\) He set out the arguments for and against strict liability: Williams (n166), at [89]. A frequent justification was that it would be a waste of time to have to enquire into each case because of the large number of transgressions before the courts and the fact that usually the defendant was probably culpable, but proof of this was difficult. The creation of strict responsibility was thought to be a better way of ensuring compliance with the law than responsibility based on fault. Its proponents regarded the exclusion of an enquiry into *mens rea* as not being unjust where the penalty was small. Williams rebutted this by pointing out that the humiliation of the trial and the odium of a conviction were more pertinent. Furthermore, there was no record that the accused was morally innocent—on the contrary, a finding of guilt gave rise to a criminal record.
condemnation of those who break it.

A focus on dignity and equality in South Africa and Ireland has shaped the criminal law by restricting strict liability for offences and requiring mens rea before a finding of guilt for breaches that are not minor or regulatory matters. Likewise vicarious liability is only imposed for less serious transgressions. The criminal law tolerates some vicarious liability and strict liability on the grounds of public policy in order to protect the welfare of the community, to support social order, and where it is more effective in ensuring compliance to abandon proof of intent because of the difficulty in securing sufficient evidence of mens rea in each case.

7.3.2 Vicarious liability in tort

In tort law, vicarious liability may be necessary to support dignity. In South Africa the principle of accountability in the context of the state’s duty to ensure enjoyment of human rights has justified vicarious liability of the state for failures by the police. The state has a special responsibility (different from that of private persons), as its raison d’être is to serve and

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182 Strict liability is odious because those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities: HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn OUP, Oxford 2008), at 152. While early English law had no subtle analysis of the mental element in liability, it considered at least sub-consciously the individual’s state of mind for acts or omissions in a given set of circumstances: Percy H Winfield, “The Myth of Absolute Liability” (1926) 42 LQR 37, at 37.

183 Social order is for the benefit of each person and for the common good of all. As noted in Hogan and Whyte (n16), at [2.1.32], [2.1.42], the Supreme Court indicated in *Re Article 26 and the Offences against the State (Amendment) Bill 1940* [1940] IR 470 (SC) 478 that the maintenance of true social order was a pre-condition to assuring the dignity and freedom of the individual. Teresa Iglesias described one of the fundamental ethico-legal claims upheld in the fifth paragraph of the Preamble: “The only purpose of our socio-legal living together as a people, as a civil society under law, is our common good. This is the good of every one, and the good of all living together. These two goods, the individual and the social, are inseparable.”: Teresa Iglesias, “The Dignity of the Individual in the Irish Constitution—The Importance of the Preamble” (2000) 89 Studies 19, at 26.

protect the public. In Ireland the Supreme Court by a majority in O’Keeffe v Hickey declined to find the State liable in tort for sexual abuse of a primary school student by a school principal, as he was employed by the Catholic Church authorities and worked under their management. The State was not the employer and therefore was not vicariously liable to compensate the victim.

Vicarious liability in tort has traditionally been applied to wrongful conduct by an employee in the course of employment. The Court in O’Keeffe did not decide whether to give the common law an extended interpretation of the acts of the employee that would attach to the employer by adopting a “close connection” test as the Canadians had done. Hardiman J was quite opposed to doing so, as he stated, “it is wrong to impose the status of wrongdoer and the liability to pay compensation without fault for acts outside the scope of employment on

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187 The course of employment test articulated by John Salmond (previously couched in language resonant of power and subservience) deemed a master responsible for a wrongful act of a servant if it was either (1) authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master: RFV Heuston, Salmond on the Law of Torts (15 edn Sweet & Maxwell, London 1969), at 620. While the test has been attractive in the context of the tort of negligence, its limits have been acknowledged in relation to intentional torts: Desmond Ryan, “Making Connections: New Approaches to Vicarious Liability in Comparative Perspective” (2008) 30 DULJ 41, at 43-44.
188 The Canadian Supreme Court put a gloss on the Salmond test for employees’ unauthorised intentional wrongs and, in a case involving sexual abuse of a child in a residential care facility, it asked instead the broad policy question (based on the provision of a remedy and the deterrent effect) of whether the wrongful act was sufficiently related to authorised conduct to justify the imposition of vicarious liability, which would generally be appropriate where there was a significant connection between the creation or enhancement of a risk and the wrong that accruing from it: Bazley v Curry [1999] 2 SCR 534. The Court thought it fair that an employer engaged in a particular business should pay the generally foreseeable costs of that business: ibid, at [41]. Factors that might be considered to determine the sufficiency of the connection between the employer’s creation or enhancement of the risk might include the opportunity that the enterprise afforded the employee to abuse power, the extent to which the wrongful act might have furthered the employer’s aims, the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise, the extent of power conferred on the employee in relation to the victim, and the vulnerability of potential victims: ibid. The Court adopted the pragmatic enterprise risk theory approach in Bazley. On the day the judgment in Bazley was delivered, the Court distinguished it by a narrow majority in a companion decision concerning the sexual abuse of children, who were members of a club providing recreational activities: Jacobi v Griffiths [1999] 2 SCR 570. On vicarious liability in Canada, see Eddie Keane, “The Test for Imposing Vicarious Liability: A Debate in the Irish Courts” (2007) 2(1) QRTL 12, at 12-13; David R Wingfield, “Perish Vicarious Liability?” in Jason W Neyers, Erika Chamberlain and Stephen GA Pitel eds, Emerging Issues in Tort Law (Hart, Oxford 2007), at 399-400; Ryan (n187), at 45-55; Shannon (n17), at [14-150]—[14-153]. The Canadian judiciary has also utilised equitable principles to widen the remedy for sexual abuse: ibid, at [14-158]—[14-159].

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the basis of *pour encourager les autres*.

Declining to follow the decision of the House of Lords in *Lister v Hesley Hall Ltd*, where some of the judges—influenced by the Canadian jurisprudence—adopted the close connection test, Hardiman J was critical of its utilitarian bias. Neither was he persuaded by the Australian High Court decision in *New South Wales v Lepore* concerning liability of the education authority for sexual assault by a teacher on a student, where the judges displayed opposing viewpoints. Hardiman J believed that the true position at common law and in fact was that espoused by Callinan J (dissenting in part), who considered that vicarious liability should not be imposed because the commission of a criminal act by a teacher would be so far removed from his duties as an employee.

Four observations made by Hardiman J on tortious liability are quite revealing and indicate the values underlying his judgment: first, as a tortfeasor is branded a “wrongdoer”, stigmatisation of the paying party is legally and morally a precondition to compensate for one’s own act; second, the possibility of tortious liability has a chilling effect and leads to defensiveness; third, unpredictable tortious liability has a social and economic impact by making it difficult to gauge insurance requirements and has a very damaging financial impact; fourth, vicarious liability can be “immensely burdensome” and could only justly occur when the paying party “has a real and actually exercisable power of control, in the relevant area of behaviour, over the person for whom it is said to be vicariously liable.”

There are two themes running through these

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193 *Ibid*, at [117].
194 *Ibid*, at [51]. Hardiman J’s concentration on the control test is incorrect, as in modern conditions the notion that an employer has the right to control the manner of work of all employees is a fiction, *eg*, a professionally trained person such as a house surgeon at a hospital is a servant for whose torts the
remarks—responsibility for one’s own actions (and not for those of others) is key, and the practical impact of taking responsibility for the tort can have many negative effects on commerce that attempts should be made to avoid.

Hardiman J did not give equal consideration to the impact of the wrong on the victim nor to the effect on the victim of not recovering compensation for the wrong done to him or her. He regarded blame only from the perspective of individual responsibility, and did not contemplate faulting the system for creating the relationship between the victim and the employee. Social justice might require that the State be liable for failing to protect the individual’s personal rights.

The conflict between the desire that an innocent victim should receive financial recompense and that the State should not be “the insurer of last resort” is evident in the judgments in O’Keeffe. Arguments can be put forward to support the proponents of both viewpoints. From the State’s perspective, it is not fair that it should be expected to pay without being blameworthy simply because it could raise the financial resources to do. Unless system blame is taken into account, it is difficult to sustain the normative foundation for extending vicarious liability in the absence of either an employer/employee relationship between the State and the perpetrator, or direct control over the activities of the perpetrator without an intervening party in a position of responsibility. To reduce the question of liability simply to employer is responsible and it is unrealistic to suppose that a theoretical right to control how a skilled worker does his job can have much substance: Rogers (n190), at [20-4]. Nowadays it is common to take a “composite” approach in which the various elements of the relationship are considered as a whole: ibid, at [20-5].


197 The special relationship between a housing authority and a tenant created an implied warranty that the flat let was fit for human habitation: Siney v Dublin Corporation [1980] IR 400 (SC). In that case there was a proximity of relationship creating a general duty on one side and a justifiable reliance by the other side on the observance of that duty: ibid, at 422. Because of their relationship, a housing authority owed a duty to an indigent borrower to ensure by a proper valuation that the mortgaged house would be a good security for the loan: Ward v McMaster [1988] IR 337 (SC), at 342, 351. See Bryan ME McMahon and William Binchy, Law of Torts (3rd edn Tottel Publishing, Haywards Heath, West Sussex 2005), at [19.22]-[19.34].

In contrast, the Supreme Court held that it was unreasonable to impose a duty of care on employers to guard against mere fear of a disease even if such fear might have led to a psychiatric condition; policy considerations that disputed the imposition of liability in “fear of disease” cases included the undesirability of awarding damages to plaintiffs who had suffered no physical injury and whose psychiatric condition was solely attributable to an unfounded fear of contracting a particular disease and the implications for the health care field of a more relaxed rule as to recovery for psychiatric illness (threats of numerous large monetary awards coupled with the added cost of insuring against such liability): Fletcher v Commissioners of Public Works [2003] IESC 13, [2003] 1 IR 465, at 483-484, 518-519.

the ability to pay is a utilitarian concept that does not survive critical analysis.

In *O’Keeffe* the Supreme Court did not consider whether the State should be liable for failure to exercise adequate supervision to detect the abuse because of constitutional obligations to defend and vindicate personal rights. The European Court of Human Rights held in *Z v UK* that liability could accrue to the State for its failure to protect people by not preventing ill-treatment of which it knew or ought to have had knowledge. The duty of the State to provide for education in Article 42.4 of the Constitution could give rise to a positive obligation to monitor the schools financed by the State in order to detect wrongdoing and to preserve the integrity of the pupils whom the State rightly requires to be educated pursuant to Article 42.3.2. Similar to the constitutional position in South Africa and Germany, the Irish State has a specific social mission, which could require a distinct notion of governmental liability to reflect adequately the implications of this understanding of the State.

The issue of vicarious liability was directly confronted by the Supreme Court in 2009 in *Reilly v Devereux* just three months after its decision in *O’Keeffe*. In *Reilly* a gunner in the army alleged he was sexually abused over a number of years by his sergeant major. The Supreme Court unanimously held that the Defence Forces could not be vicariously liable for sexual abuse committed by its employees. In his judgment for the Court, Kearns J examined the formal relationship in the army structure between the two State employees—the sergeant major exercised a supervisory and disciplinary role over the gunner, but he was not in the same position as a school teacher or boarding house warden in relation to a child. Neither was the nature of the employment one which would have encouraged close personal contact where some inherent risks might exist, such as between a swimming instructor and young recruits. There was no intimacy implicit in the relationship nor was there any quasi-parental role or responsibility for personal nurturing. Kearns J read the Supreme Court’s earlier judgment in *O’Keeffe* as taking a firm stand on ruling out the close connection test for vicarious liability for systemic failure, see O'Mahony (n186), at 321-324.

199 On liability for systemic failure, see O'Mahony (n186), at 321-324.
200 (App no 29392/95) (2002) 34 EHRR 3, at [73]. See O'Mahony (n186), at 325.
201 O'Mahony (n186), at 327-328.
202 Du Bois (n185), at 175.
204 The judgment of Kearns J on behalf of the Court has attracted considerable criticism: Cox, Corbett and Ryan (n186), at [3-88]—[3-95]; Ryan (n189), at 468-471.
206 Ibid.
207 Ibid.
liability, but he did not take into account that the Court was divided and the comments on the test for vicarious liability were obiter dicta since the ratio decidendi in O'Keeffe was that the abuser was not an employee of the State. The judgment of Hardiman J in O'Keeffe influenced Kearns J, who noted the former's antipathy towards any extension of the doctrine of vicarious liability which would make the taxpayer liable for the criminal actions of the employees of State bodies in circumstances where the State was not at fault. He also referred to Hardiman J's reluctance to make findings that would raise policy issues.

In view of the confusing picture on liability of the State that has arisen in Irish law, it will be helpful to remind ourselves of the traditional and modern rationales for imposing vicarious liability. At common law vicarious liability (a form of secondary liability) was imposed on a blameless employer for the acts of an employee while acting in the course of his employment. This was contrary to common law principles where responsibility followed fault, the idea being that competent individuals, being free to choose their course of action, should accept the consequences of their decisions. The early development of vicarious liability was founded on utilitarian considerations based on the notion of a wealthy master reaping the rewards from controlling a servant. The traditional rationale has changed over the years because of various factors affecting policy, such as the risks caused by those benefiting from trade, the financial disparity between entrepreneurs and those whom they engage to put their ideas into effect, loss distribution, and deterrence of risky behaviour by

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208 Ibid, at [29].
209 Ibid, at [31].
210 Ibid.
211 On the justifications for vicarious liability, see Cox, Corbett and Ryan (n 186), at [3-56]—[3-59]; Laski (n 164), at 126-130.
212 Majrowski v Guy's and St Thomas's NHS Trust [2006] UKHL 34, [2007] 1 AC 224, at [7]. Lord Nicholls explained, ibid, at [8]:
   This principle of vicarious liability is at odds with the general approach of the common law. Normally common law wrongs, or torts, comprise particular types of conduct regarded by the common law as blameworthy. In respect of these wrongs the common law imposes liability on the wrongdoer himself. The general approach is that a person is liable only for his own acts. In Majrowski, which arose from an allegation of harassment in the form of bullying and intimidation of one employee (a clinical auditor co-ordinator) by another (his departmental manager), it was held that, unless a statute expressly or impliedly indicated otherwise, the principle of vicarious liability applied where an employee, acting in the course of his employment, committed a breach of a statutory obligation: ibid, at [2], [17], [57], [73]; [74], [78], [81]. See Ryan and Ryan (n 190), at 4, 6-7.
213 Imperial Chemical Industries Ltd v Shatwell [1965] AC 656 (HL), at 685 (Lord Pearce):
   The doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice. The master having (presumably for his own benefit) employed the servant, and being (presumably) better able to make good any damage which may occasionally result from the arrangement, is answerable to the world at large for all the torts committed by his servant within the scope of it.
214 Two competing moral principles are reflected in modern tort law—the first (by far the strongest) is
While causation is the indispensable element of every species of tort liability, the law has to make a decision reflecting a moral calculation about where in the chain of events that leads to a harmful occurrence responsibility for the occurrence is to be attributed. It restricts the ability of an injured person to seek compensation from another to those circumstances where the latter is morally bound to pay. Efficient loss distribution is morally justified only on utilitarian principles: the party who is better placed to bear the burden of an injury-produced activity does so. Using this moral justification for vicarious liability, David Wingfield has narrowed down the pertinent question to whether society is better off by making the enterprise whose activities carry an inherent risk of harm, which it is unreasonable to impose on other members of society, bear the costs of any harm that materialises from this risk or whether society is better off by making the victim bear the harm.

7.4 Prisoners’ rights

There is consensus on the broad statement that prisoners do not lose all their rights and liberties when they are imprisoned. The treatment of detainees and prisoners is governed by a requirement that their dignity be respected notwithstanding justifiable reasons for their detention or the heinous nature of their crimes. However, the nature, extent and

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See Ryan and Ryan (n190), at 3.


217 Lingfield (n188), at 406.

218 Ibid, at 411. Enterprise liability is a normative claim: Sebok (n196), at 1035.

219 Wingfield (n188), at 412-413.
implementation of their residual rights are contested issues. Two of these at least—humane detention conditions and the exercise of the right to vote—have received limited support in Irish law.

7.4.1 Humane detention conditions

Respect for dignity has become a feature in complaints by prisoners of the conditions under which they are detained. The courts have been opposed to releasing prisoners because of unsuitable facilities, but have been somewhat more sympathetic to granting them lesser relief—albeit circumscribed by the demands on the prison service to maintain order and discipline and by the de facto constraints on prisoners' liberty attributable to their incarceration as a result of their own criminal conduct. Barrington J in the High Court in State (Richardson) v Governor of Mountjoy Prison was unequivocal in his recognition of prisoners' rights of access to the courts, stating, "[t]here is no iron curtain between the Constitution and the prisons in this Republic". He accepted that the slopping out procedures in Mountjoy Prison breached the prisoner's unenumerated right to health, but dismissed her right to privacy argument. He did not analyse her right to dignity at all, although she invoked it. This can be contrasted with the South African courts' longstanding analysis of the effect of detention conditions on the dignity of prisoners going back as far as Whittaker v Roos in 1912. In simply distinguishing between the existence and the exercise of a right, Barrington J's analysis is scant—it is virtually meaningless to possess a right that one cannot exercise. An intensive examination of the justification for curtailing rights in prison and of the extent of the inroads into the prisoner's rights coupled with application of the proportionality test would have been more apt.

Although slopping out has been acknowledged by the courts and the prison authorities as

222 [1980] ILRM 82, at 90. See Byrne, Hogan and McDermott (n221), at 42, 79; Hogan and Whyte (n16), at [7.3.75], [7.4.35]—[7.4.36], [7.4.41]; Paul Anthony McDermott, Prison Law (Round Hall Sweet & Maxwell, Dublin 2000), at [8-07], [9-21].
223 [1980] ILRM 82, at 92-93. Barrington J considered that the appropriate relief would be an absolute order of mandamus and adjourned the case to see if recommendations for improvement were implemented without the necessity for an order: ibid, at 93. When it was re-entered, the court was informed that the matters complained of were in the process of being remedied and so Barrington J made no actual order of mandamus: noted by Budd J in Brennan v Governor of Portlaoise Prison [1998] IEHC 140, [1999] 1 ILRM 190, at 202. On slopping out in Scotland, see Napier v Scottish Ministers 2005 SC 229 (Court of Session Outer House, Scotland).
224 [1980] ILRM 82, at 84.
225 1912 AD 92 (SC).
breaching prisoner’s rights, it has not been eliminated in Irish prisons. The courts have not granted orders of mandamus to redress the situation, but have been tolerant of the delays in reforming the system. In Brennan v Governor of Portlaoise Prison, an application for habeas corpus, Budd J found that the threshold of “exceptional circumstances” required for making the conditional order absolute had not been reached. An order of habeas corpus would only be justified where for instance there was an element of bad faith and the prisoner’s constitutional rights were being consciously and deliberately violated or where the prisoner was being subjected to inhuman or degrading treatment seriously threatening the life or health of the prisoner and the authorities were unwilling or unable to rectify those conditions. Budd J was satisfied to rely on the prison authorities to implement the ending of slopping out in a modernisation programme.

A prisoner spokesperson for the Real IRA complained in Mulligan v Governor of Portlaoise Prison that slopping out procedures violated his personal rights under Article 40.3.1° to bodily integrity, not to have his health placed at risk, and not to be subjected to torture, inhuman or degrading treatment or punishment. Alternatively he claimed that the prison conditions amounted to inhuman and degrading treatment under Article 3 and violated his right to private life in Article 8 ECHR. He sought a declaration that his detention breached his rights and a remedy in damages. Because constitutional issues were raised, MacMenamin J confirmed that the established norms of tort law were not adequate fairly and justly to address the range of issues arising, and it was necessary to balance the positive against the negative aspects of the applicant’s detention. The attenuation of rights necessitated by imprisonment must be proportionate, the diminution not falling below “the standards of reasonable human dignity and what is to be expected in a mature society.” The obligation on a prison authority was to vindicate the individual rights and dignity of each prisoner insofar as practicable.
MacMenamin J found that the ventilation, sanitation and hygiene regime at the prison fell significantly below the standard expected at the time. The constitutional rights at issue were not absolute and the state’s duty was to defend and vindicate them insofar as was practicable. Absent evidence of overcrowding or “doubling up” in cells, he was unable to find that the use of a chamber pot in the cell actually violated the prisoner’s rights of privacy or human dignity to a degree to give rise to a cause of action. There was no violation of the applicant’s negative right to be protected against inhuman or degrading treatment, as no “evil purpose” was shown.

Based on a review of the jurisprudence of the European Court of Human Rights, the minimum level of severity required to establish breaches of the ECHR was not achieved in Mulligan. The factors to be taken into account in measuring the minimum level of severity for a breach of Article 3 ECHR as set out by the European Court of Human Rights in Bakhmutskiy v Russia include the duration of detention and “the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim”. The state is obliged to ensure that a prisoner

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.

A positive intention to humiliate or to debase the prisoner was not necessary in order to impinge on human dignity, which occurred when a prisoner’s self-esteem was lowered by living in overcrowded conditions for an extended period. The Court held that, in addition to

236 Ibid, at [43].
237 Ibid, at [90], [93].
238 Ibid, at [117]. The applicant as a Real IRA prisoner was relatively privileged to have a cell to himself at all times: ibid, at [14]. The conditions of detention did not seriously endanger the prisoner’s life or health: ibid, at [111].
239 Ibid, at [91]. Cf State (C) v Frawley [1976] IR 365 (HC), at 374 (Finlay P). On State (C) v Frawley, see Byrne, Hogan and McDermott (n221), at 40-42, 77-78.
240 [2010] IEHC 269, at [161], [164].
241 (App no 36932/02) ECHR 25 June 2009, at [88].
242 Ibid.
243 Ibid, at [96]:

[T]he Court finds that the fact that the applicant was obliged to live, sleep and use the toilet in the same cell as so many other inmates for almost six years was itself sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and to arouse in him feelings of fear, anguish and inferiority capable of humiliating
a violation of Article 3 ECHR, there was a breach of Article 13 because of the lack of an effective accessible remedy for the prisoner to complain about the general conditions of his detention. Significantly, it noted that a remedy must be effective in practice as well as in law.

The dignity claim was given some weight in Devoy v Governor of Portlaoise Prison when Edwards J acknowledged that among the residual constitutional rights of a prisoner which were not abrogated or suspended was "the right to be treated humanely and with human dignity." The individual is viewed not in isolation, but in contact with others in the community. On the facts, the Court held that the prisoner had not been isolated and therefore he had not been treated inhumanely. The state’s duty under Article 40.3.2° of the Constitution extends to protection of "the integrity of the human mind and personality" and requires that a prisoner be given the opportunity of "meaningful interaction with his human faculties of sight, sound and speech." There has been a series of claims by prisoners for damages for assault by other prisoners. In Muldoon v Ireland Hamilton P affirmed that prisoners have a right to freedom from harassment. The prison authorities are required to take all reasonable steps and reasonable care not to expose any of the prisoners to a risk of damage or injury, but the law does not expect them to guarantee an injury-free term of imprisonment. A balance has to be struck between the need to respect the dignity of all prisoners by avoiding excessively intrusive or frequent body searches in the search for weapons in order to protect prisoners from each other and debasing him.

On overcrowding, see also Orchowski v Poland (App No 17885/04) ECHR 22 October 2009.

244 (App no 36932/02) ECHR 25 June 2009, at [101].
245 Ibid, at [98].
247 Ibid:

Because man is a social animal the Court recognises that the humane treatment, and respect for the human dignity, of a prisoner requires that he or she should not be totally or substantially deprived of the society of fellow humans for anything other than relatively brief and clearly defined periods. To that extent a prisoner such as the applicant may be entitled to a degree of freedom of association as an aspect of his constitutional right to humane treatment and human dignity.

248 As the restriction on the prisoner was not in accordance with the Prison Rules, which could have been justifiably invoked, the Court made a declaration of unlawfulness but declined to order his release.
other and the demands on the prison service to provide a safe environment by supervision and reasonable security measures. Murphy J in *Bates v Minister for Justice* posed the dilemma for the authorities, "[n]o doubt prison management is a constant battle between the need to preserve security and safety on the one hand and, on the other hand, the obligation to recognise the constitutional rights of the prisoners and their dignity as human beings."

The same theme resonated in Fennelly J's judgment in *Creighton v Ireland*. In that case a prisoner had been awarded damages in the High Court for injuries suffered in a knife attack by a fellow inmate in a confined area. As it was not satisfied that White J had given the case proper consideration in the court below, where he had based the award on inadequate supervision, the Supreme Court remitted it to the High Court for further consideration.

In *Sage v Minister for Justice*, Irvine J dismissed the damages action against the state brought by a prisoner who had been viciously assaulted by two fellow inmates in Fort Mitchel Prison, Cork, in what he claimed was a revenge attack because he was believed to have informed the police about the role of another man in a murder for which he was subsequently convicted and sentenced. Irvine J was satisfied the state had not breached its duty of care and pointed out that it was not expected to be an insurer of prisoners' safety. She noted the difficulties in crafting a humane system of imprisonment that safeguards both the bodily integrity and

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252 [1998] 2 IR 81 (SC), at 86. See McDermott (n222), at [7-27].

253 [2010] IESC 50, at [4]:

> Prisons may, as an inevitable consequence of the character of persons detained, be dangerous places. Prisoners are entitled to expect that the authorities will take reasonable care to protect them from attack by fellow prisoners. What is reasonable will, as always, depend on the circumstances. As the cases recognise, prison authorities may have to tread a delicate line between the achievement of the objective of protecting the safety of prisoners and the risks of adopting unduly repressive and inhumane measures. They must balance the protective function and possible demand for intrusive searches against the need to permit prisoners an appropriate degree of freedom of movement and human dignity.

254 *Ibid*, at [15], [18], [22]. White J had not probed the facts thoroughly and avoided coming to any conclusion on the nature of the knife used or the level of overcrowding before concluding that the "prison authorities could not reasonably have been expected to have been in a position to prevent an attack on the plaintiff": *Ibid*, at [19]-[21]. On his own initiative White J had recalled one of the plaintiff's witnesses (a former British prison governor), who had agreed that the injuries would have been less extensive if there had been an additional supervising officer: *Ibid*, at [2].

255 [2011] IEHC 84, at [2]-[3], [6], [36]. Following an arson incident when he was on remand in Limerick Prison, Sage had been afforded protective custody on request in Mountjoy Prison where he was taken after sentencing: *Ibid*, at [3]-[4]. On his transfer to Cork, he maintained he believed he would remain in protective custody, but he was attacked on his second day there: *Ibid*, at [5]-[6], [14]. Evidence was given that the prison authorities in Cork had not been informed that the prisoner had concerns for his safety: *Ibid*, at [9].

256 *Ibid*, at [29].
dignity of all prisoners. The evidence of the prison authorities was more persuasive that that of the plaintiff, who did not discharge the burden of proof that the authorities had notice of his concerns for his safety in Cork. The yard where the assault occurred was supervised at the time and the emergency response was adequate and timely. The existence in prison of the weapon used in the assault did not necessarily connote negligence on the part of the defendants. Because of the conflict in evidence, Irvine J's dismissal of the claim was understandable. She took cognisance of the need to protect prisoners' dignity by avoiding over-intrusive body searches and restrictions on their movements. The authorities had reacted promptly when it became aware of concerns for Mr Sage's safety and had no reason to believe he would be at risk when transferred to Cork.

The focus in many assault cases has been the degree of knowledge the authorities had of the attacker's violent propensities—if a prisoner has attacked other inmates recently, the prison authorities could be negligent for permitting him to mix with other prisoners without close surveillance. Failure to discipline an assailant properly for prior incidents may also indicate negligence. Adequate screening can determine whether inmates are capable of living successfully with others without endangering them. How the assailant obtained the weapon is a key issue—it would be negligent to allow prisoners with known violent propensities to have access to tools in prison workshops. Monitoring of visitors can prevent smuggling of weapons into prison. Searches and supervision are subject to reasonable limits to avoid unnecessary intrusion into prisoners' lives.

The dignity of prisoners is not respected fully by the state. Calls for reform of our prison system have gone unheeded. Overcrowding is rife in some jails and impedes the privacy and

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257 *Ibid*, at [17]:

It is undoubtedly the case that the task faced by prison authorities in seeking to balance the prisoner's rights to bodily integrity against their competing right to a model of confinement, which will protect their dignity, will generate the notion of citizenship and avoid unnecessary dehumanisation is very difficult.

*Cf* *Casey v Governor of Midlands Prison* [2009] IEHC 466, at [12], [22], [34].

258 [2011] IEHC 84, at [23], [36]. The prison service's obligation was to take reasonable care for his safety, but they were not obliged to transfer him to what they considered to be the safest prison: *ibid*, at [22].

259 *Ibid*, at [24].

260 *Ibid*, at [34].

261 McDermott (n222), at [7-19].

262 *Ibid*, at [7-21].

263 *Ibid*, at [7-19].

264 *Ibid*, at [7-20].
dignity of prisoners.\textsuperscript{265} A proper balance needs to be struck between all prisoners, so that preservation of the dignity of one is not at the expense of another. We could follow the example in French law and strive to protect the dignity of the victim as well as that of the accused.\textsuperscript{266} Undoubtedly the state has a difficult task to ensure security, while respecting the dignity of prisoners. The courts have been too indulgent of the state’s neglect of prisons and of its failure to provide reasonable living conditions with adequate space for those detained, although Hogan J’s decision in \textit{Kinsella v Governor of Mountjoy Prison} is a refreshing change.\textsuperscript{267}

By constructive engagement with the executive, he achieved prompt improvement in a prisoner’s detention conditions without breaching the separation of powers.\textsuperscript{268}

The state has taken no effective measures to address the systemic causes of persistent overcrowding in prisons nor to provide sanitation facilities respectful of prisoners’ dignity. As has happened in South Africa, intervention by the courts to improve poor prison conditions can be done in a way that is consistent with the separation of powers, but makes the prison authorities accountable.\textsuperscript{269} Lack of resources is no excuse for failing to address repeatedly highlighted deficiencies. As illustrated by the cases reviewed, some judges\textsuperscript{270} have expressly accepted that the human dignity of prisoners is entitled to protection. But recognition of the state’s constitutional obligation to protect their rights has not usually produced positive outcomes for prisoners.\textsuperscript{271} Finlay P and MacMenamin J resiled from giving them a remedy because of the absence of an evil purpose, although this is not a requirement under the ECHR\textsuperscript{272} and has not been a barrier in African cases. Cases have been lost on account of findings of fact against prisoners. This is an inevitable hazard in litigation and is understandable to some extent. Failure has also ensued when the wrong order (\textit{habeas corpus}) has been sought.

\textsuperscript{265} Contrast the favourable outcomes for prisoners following judicial analysis of constitutional values in \textit{Strydom v Minister of Correctional Services} 1999 (3) BCLR 342 (W) (SA High Court, Witwatersrand Local Division) and \textit{Stanfield v Minister of Correctional Services} 2003 (12) BCLR 1384 (C) (SA High Court, Cape of Good Hope Division) with \textit{State (Richardson) v Governor of Mountjoy Prison} [1980] ILRM 82 (HC), \textit{Brennan v Governor of Portlaoise Prison} [1998] IEHC 140, [1999] 1 ILRM 190 and \textit{Mulligan v Governor of Portlaoise Prison} [2010] IEHC 269.

\textsuperscript{266} See \textit{People (DPP) v Davis} [2001] 1 IR 146 (CCA), at 151.

\textsuperscript{267} \textit{Ibid}, at [15], [17].

\textsuperscript{268} See McDermott (n222), at [2-03]—[2-04].

\textsuperscript{269} Fennelly, Murphy, Edwards, Irvine and MacMenamin JJ.

\textsuperscript{270} Hogan J’s decision in \textit{Kinsella} is a notable exception.

\textsuperscript{271} On the more robust approach taken by the European Court of Human Rights, see Liam Herrick, “Prisoners’ Rights” in Ursula Kilkeeny ed, \textit{ECHR and Irish Law} (2\textsuperscript{nd} edn Jordans, Bristol 2009), at [11.37].
7.4.2 The franchise

The Supreme Court denied equality to prisoners in relation to a fundamental right and duty of citizens in a democracy when it made a petty distinction between a prisoner's right to vote and curtailment of the exercise of the franchise in *Breathnach v Ireland.* This can be contrasted with the outcome to similar challenges in South Africa and Canada, and before the European Court of Human Rights, although in all of these cases, which were decided by a majority, the matter was controversial. In *NICRO* the South African legislation was found unconstitutional, as it breached the right to vote and did not pass the rationality test for limitation of rights. Ngcobo J (dissenting) considered that the restriction on voting rights was justified, since crime struck at the very core of the fabric of society by violating fundamental human rights such as the right to life, the right to freedom and security, the right to property and the right to dignity, and undermining the rule of law.

The majority of the Supreme Court of Canada in *Sauvé v Canada* asserted the need for clear justification for infringement of fundamental rights by the legislature, and was not persuaded that the court should defer—even in the interests of dialogue with the legislature. The

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276 *Hirst v UK (No 2) (App no 74025/01)* (2006) 42 EHRR 41.
277 *NICRO* 2005 (3) SA 280 (CC).
279 *Ibid* Section 36(1).
281 *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68, [2002] 3 SCR 519, at [9], [17]. McLachlin CJ, delivering judgment on behalf of the majority, accepted that there can be no precise proof of philosophy, politics or society's interests, but insisted that there must be convincing reasonable justification based on a constitutionally valid reason for infringement—not just “a simple majoritarian political preference for abolishing a right altogether” or vague and symbolic objectives: *ibid*, at [18], [20], [22]. She felt strongly that refusing to allow the exercise of the franchise reneged on the pledge to respect each person, “denying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual”: *ibid*, at [35], citing *August v Electoral Commission* 1999 (3) SA 1 (CC), at [17]. Gonthier J for the minority took issue with her view that temporary disenfranchisement of prisoners undermined their inherent worth and, on the contrary, he regarded deprivation of voting as part of the punishment of an autonomous individual who had made a free choice to commit a crime, and stated, 2002 SCC 68, [2002] 3 SCR 519, at [73]: *It could be said that the notion of punishment is predicated on the dignity of the individual: it recognizes serious criminals as rational, autonomous individuals who have made choices. When*
Grand Chamber of the European Court of Human Rights in Hirst v UK referred to Sauvé and the South African case of August. It found that the right to vote was not a privilege any longer, but neither was it an absolute right. Ireland was among the 13 countries listed in Hirst where all prisoners were barred from or unable to vote, but legislation has since been passed permitting prisoners to apply for a postal vote. The offender’s capacity for autonomy and participation in democracy can be strengthened by having the ability to vote while in prison. The ethics of human dignity and rights are especially relevant to the moral standing of criminals, as they normally have little social standing and are in a similar position to those who cannot be protected by any moral concept other than respect for humans as such.

7.5 Family

The institution of marriage has been designated specifically for protection in Article 41 of the Constitution. In the absence of a similar provision in the South African Constitution, the
doctorates exercise their freedom in a criminal manner, society imposes a concomitant responsibility for that choice. He considered that temporary disenfranchisement of serious criminal offenders reiterated society’s commitment to basic moral values and was “morally educative for both prisoners and society as a whole”—rather than undermining the dignity or worth of prisoners, the removal of their vote took seriously the notion that they were free actors and attached consequences to actions that violated core values: ibid, at [75], [92].

Hirst v UK (No 2) (App no 74025/01) (2006) 42 EHRR 41, at [35]-[37] (Sauvé) and [38]-[39] (August v Electoral Commission 1999 (3) SA 1 (CC)).

The states were allowed a margin of appreciation to justify restrictions on voting by prisoners perhaps on the grounds of security or the prevention of crime and disorder: (App no 74025/01) (2006) 42 EHRR 41, at [59]-[60], [69]. The legislation had legitimate aims (the prevention of crime by sanctioning the conduct of convicted prisoners, and the enhancement of civic responsibility and respect for the rule of law), but it failed the proportionality test since there was no evidence that the legislature had sought to weigh competing interests or to assess the proportionality of a blanket ban, which was “a blunt instrument” stripping indiscriminately a significant category of persons of their right to vote: ibid, at [74]-[75], [79], [82], [85]. See Stavros Tsakyrakis, “Proportionality: An Assault on Human Rights?” (2009) 7 ICON 468, at 486.

Electoral (Amendment) Act 2006 sections 2, 3.


The right to marry is a personal right protected by Article 40.3.1, and can be regulated by the Oireachtas in accordance with the common good: O’Shea v Ireland [2006] IEHC 305, [2007] 2 IR 313.

Constitution of Ireland 1937, Article 41.3.1. See Murphy v AG [1982] IR 241 (HC, SC); Muckley v Ireland [1985] IR 472 (HC, SC); Greene v Minister for Agriculture [1990] 2 IR 17 (HC); Hyland v Minister
safeguards for marriage and the family there are based on the foundational constitutional values and on human dignity. The nexus between marriage and the family in the Irish document and the omission of a clause prohibiting discrimination on the grounds of marital status have meant that less protection has been afforded to extra-marital family units, which are not given recognition.

Unmarried fathers have been the target of arbitrary differentiation and unreasonably denied the opportunity to express their identity through their relationship with their children and by participating in the lives of their offspring. The Irish courts have not considered the constitutional rights of unmarried fathers in the full light of the constitutional values of human dignity, equality and freedom. In *State (Nicolaou) v An Bord Uchtála* the Supreme Court addressed the rights (or lack of rights, as it emerged) of the unmarried father of a child sent for adoption without his consent. The father claimed that he had rights that could be exercised when the mother abrogated her entitlements, and alleged unfair discrimination based on sex and paternity. While Walsh J in the Supreme Court was willing to accept that the mother had natural rights, he did not examine when her rights could be limited. He had no hesitation in condemning all unmarried fathers to be without rights in relation to their child, irrespective of the individual circumstances. He referred to children conceived as a result of rape and to fathers who might have no interest in their children, but he sacrificed the committed fathers with the uninvolved ones. No distinction was made between responsible and irresponsible fathers. This was not the case in South Africa, when in *Fraser* the Constitutional Court found that legislation dispensing with the unmarried father’s consent to adoption in all circumstances breached the constitutional rights to equality and was

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291 Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC), at [100]. See also *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), at [28], [36]-[37]; *Booysen v Minister of Home Affairs* 2001 (4) SA 485 (CC), at [8], [10]; *Volks v Robinson* 2005 (5) BCLR 446 (CC) (majority view).


In *WO'R v EH* the Irish Supreme Court by a majority held that the concept of *de facto* family ties was not recognised under the Constitution, which defined the family as one founded on marriage. The Court unanimously accepted Finlay CJ's recognition in *JK v VW* that the natural father could have extensive rights (but not based on the Constitution), where the child was born as a result of a stable and established relationship and was nurtured at the commencement of its life by a father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family. Barrington J (dissenting) criticised Walsh J's judgment in *Nicolaou*, on the grounds that, although Walsh J referred to equality as human persons under Article 40.1, he went on to treat Mr Nicolaou (a caring parent) the same way as a natural father with no interest in his child, which amounted to unfair discrimination by treating people in different situations equally. Furthermore, the failure of the Adoption Board to inform Mr Nicolaou of the proposal to give his child for adoption, even though he had notified the Board he would oppose it, was extraordinary and Walsh J's description of its omission as "impolitic" was too mild. Barrington J considered that it was illogical to acknowledge the rights of the child and the mother under Article 40.3 and to deny that the concerned father also had rights under the same provision.

In addition to the South African example, Canadian jurisprudence can be an indicator of how the Irish courts could address the fragile legal standing of fathers. Wilson J (dissenting) in *R v Jones* pointed out the significance to identity of familial bonds from the viewpoint of fulfilling obligations rather than of exercising rights. The Supreme Court of Canada approved of this view in *Trociuk*, when Deschamps J delivering the Court's unanimous judgment based her analysis of the breach of the equality right on the impairment of dignity and stated, "[p]arents have a significant interest in meaningfully participating in the lives of their children."

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296 *Fraser v Children's Court Pretoria North* [1997] ZACC 1, 1997 (2) SA 218 (CC).
297 *WO'R v EH (Guardianship)* [1996] 2 IR 248.
300 *ibid*, at 280, citing [1966] IR 567 (SC), at 639.
301 [1996] 2 IR 248 (SC), at 284.
302 "The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world.": [1986] 2 SCR 284 (SC of Canada), at [79].
303 *Trociuk v British Columbia (AG)* 2003 SCC 34, [2003] 1 SCR 835, at [15]. In this case it was held that legislative provisions giving the mother absolute discretion to unacknowledge the biological father on the birth registration forms and not to include the father's surname in the child's surname violated the
7.6 Children’s rights

The uncertainty over the nature of children’s rights is epitomised by the divergence between the judges in *TD v Minister for Education*.\(^{304}\) The applicants in *TD* were disadvantaged children in need of accommodation and treatment in high support units. The responsible state authorities had been found to have failed in their obligations to vindicate the children’s rights. As there were delays in implementing the policy formulated by the authorities to deal with the general problem of children with special needs, Kelly J in the High Court granted a mandatory injunction directing that the facilities be provided for them in accordance with the adopted policy.\(^{305}\) The Supreme Court in a majority decision allowed the respondents’ appeal. In the High Court, Kelly J referred to the High Court case of *FN v Minister for Education* decided some five years earlier when Geoghegan J made a declaration that a minor was entitled to treatment to ensure his welfare.\(^{306}\) Kelly J approved of Geoghegan J’s identification of needy children’s rights to appropriate facilities and granted the injunction because of the delays.\(^{307}\) In *FN* Geoghegan J had endorsed the rights of the child enunciated by O’Higgins CJ in *G v An Bord Uchtála* as “a child having been born has the right to be fed and to live, to be reared and educated, and to have the opportunity of working and realising his or her full personality and dignity as a human being” and approved of his view that these rights must be protected and vindicated by the State.\(^{308}\) Geoghegan J commented that Walsh\(^{309}\) and Henchy J\(^{310}\) had made

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father’s right to equality, as they discriminated on the grounds of sex (Canadian Charter of Rights and Freedoms 1982, Section 15(1)), and were not justified under the limitations clause since they did not impair the father’s rights as little as reasonably possible (*ibid* Section 1). The absence of historical disadvantage against fathers as a group was not determinative: 2003 SCC 34, [2003] 1 SCR 835, at [20].


\(^{305}\) [2000] 3 IR 62.


\(^{307}\) [2000] 3 IR 62, at 85.


\(^{309}\) Walsh J expounded on the child’s independent natural right to life as a person, stating, [1980] IR 32 (SC), at 69:

The child’s natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and to follow his or her conscience. The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation. It lies not in the power of the parent who has the primary natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child or to terminate its existence. The child’s natural right to life and all that flows from that right are independent of any right of the parent as such.

\(^{310}\) Henchy J’s view of the child’s constitutional right was more circumscribed, his description of it being within the realms of education, [1980] IR 32 (SC), at 91:

As to the constitutional right of the child, it arises under Article 40, s. 3, by analogy with Article
similar observations.\textsuperscript{311} The South African Constitutional Court in \textit{S v M} also took the view that the child has its own independent personality and dignity.\textsuperscript{312}

Keane CJ in the Supreme Court in \textit{TD} mentioned the reservation by his colleague, Hardiman J, as to whether \textit{FN} was correctly decided and also Murphy J’s view that it was wrong in law.\textsuperscript{313} But he pointed out that the respondents had not challenged the correctness of that decision.\textsuperscript{314} On the assumption that O’Higgins CJ had stated the law correctly in \textit{G v An Bord Uchtála}, he was satisfied that Geoghegan J was correct in holding that the right claimed in \textit{FN} was one of the unenumerated rights of children which parents were obliged to protect and uphold.\textsuperscript{315} Hardiman J made his reservations (described as “weighty”) as to the nature and status of the underlying rights of the applicant, since it was unnecessary to resolve these questions in order to decide \textit{TD}.\textsuperscript{316} The concerns of Murphy J arose because Geoghegan J based his decision on far-reaching observations in \textit{G v An Bord Uchtála}, some of which were \textit{obiter} and might not represent the views of the majority.\textsuperscript{317} Like Keane CJ, Murray J highlighted that the State had not appealed against Geoghegan J’s decision in \textit{FN}, but nevertheless he took the same stance as Hardiman J and reserved his position concerning the substantive issues arising from that decision until they arose directly in other proceedings.\textsuperscript{318} Denham J in dissent stated that the constitutional issues had been established and were not disputed.\textsuperscript{319} She accepted unequivocally the finding in \textit{FN}—which decision was not put in issue—that the State was obliged to protect and vindicate children’s constitutional rights as first described in \textit{G v An Bord Uchtála}.\textsuperscript{320}

To summarise the Supreme Court’s attitude to children’s rights in \textit{TD}, one judge (Denham J) had a strong belief that they attached to the children in their own right; another (Keane CJ)

\begin{itemize}
  \item \textsuperscript{311} [1995] 1 IR 409, at 415.
  \item \textsuperscript{312} 2008 (3) SA 232 (CC), at [18]-[19].
  \item \textsuperscript{313} [2001] IESC 101, [2001] 4 IR 259, at 281.
  \item \textsuperscript{314} \textit{ibid}.
  \item \textsuperscript{315} \textit{ibid}, at 282.
  \item \textsuperscript{316} \textit{ibid}, at 345.
  \item \textsuperscript{317} \textit{ibid}, at 318.
  \item \textsuperscript{318} \textit{ibid}, at 325.
  \item \textsuperscript{319} \textit{ibid}, at 295.
  \item \textsuperscript{320} \textit{ibid}, at 295-296.
\end{itemize}
considered children had rights, but only on the assumption that *G v An Bord Uchtála* had been correctly decided; Murphy J did not accept that the *ratio decidendi* in *G v An Bord Uchtála* was as extensive as Geoghegan J held in *FN*; the remaining two judges (Hardiman and Murray JJ) reserved their position.

There has been much debate in Ireland on proposals for a constitutional amendment to strengthen children’s rights. There are concerns that because of the prime position occupied by the institution of the (marital) family under Articles 41 and 42, parental autonomy and control can take priority over the child’s welfare and best interests. The welfare of the child encompassed within the Constitution is focused on preventing serious impairment of the child’s welfare interests rather than on actively promoting them. Conflict exists between national law and Ireland’s international obligations to protect children. The general trend in international law is to regard children as individuals possessing rights independently of their parents. The emphasis has switched from parental rights to parental responsibilities in South Africa, where the courts have begun to recognise the interests of the child as occurring in communion with the interests of the parents and the common good. A provision in the Irish Constitution similar to that in Section 28 of the South African Constitution setting out the rights of the child and stipulating that the child’s best interests are paramount in every matter concerning the child would be appropriate. But even without an amendment, there is scope for improving the protection given to children in our existing legal system. Under the guise of respecting the separation of powers, the Supreme Court as guardian of the Constitution has been remiss in not intervening to protect children by directing mandatory orders to the State where warranted.

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321 Shannon (n 17), at [1-05]—[1-07].


325 Shannon (n 17), at [1-65]. See *Bannatyne v Bannatyne* [2002] ZACC 31, 2003 (2) SA 363 (CC), at [30].

326 Shannon (n 17), at [1-71].


328 Law Society of Ireland Law Reform Committee (n 327), at 8, 60; Shannon (n 17), at [1-106].
7.6.1 Corporal punishment

Is there an obligation on the state to ban corporal punishment by a parent? If corporal punishment is bad for adults, then is it not bad for children, who are people too? There is an inherent conflict between smacking, which is fundamentally violent and authoritarian, as a form of punishment and the ideals of peace, harmony and dignity contained in international human rights instruments. As we have seen, some interpret the Convention on the Rights of the Child (CRC) with the guidelines in the UN general comments as outlawing all parental corporal punishment. Legalised violence against children is prohibited, but the definition of "violence" is critical to resolving the issue. Parents may defend smacking on the grounds that it is not violence in retribution for bad behaviour but is for educational purposes—they may even say (as maintained by the parents in Christian Education South Africa) that it is warranted in service of the fundamental right to a proper education required by their duty to educate their children. This is a subjective view that is not.

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Intervention by the courts is not a breach of the separation of powers, which has to bow to the supremacy of the Constitution: David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell, Dublin 1997), at 231-232.

Pete (n324), at 447.


In particular see UN Committee on the Rights of the Child, "General Comment No 8" (2 March 2007) UN Doc CRC/C/GC/8. On General Comment No 8, see Michael DA Freeman, "Upholding the Dignity and Best Interests of Children: International Law and the Corporal Punishment of Children" (2010) 73(2) LCP 211, at 220-224. The views of a UN Committee do not prevail over Irish law where the terms of a Covenant have not been enacted: Kavanagh v Governor of Mountjoy Prison [2002] IESC 13, [2002] 3 IR 97.


The emphasis in punishment theories has shifted from retribution to deterrence, reparation to the victim, and reform of the perpetrator. The salient feature of English penal policy at the end of the 18th century has been described as "a crude utilitarianism aiming at the reduction of crime through terror": L Radzinowicz and JWC Turner, "Punishment: Outline of Developments since the 18th Century" in Davies and others (n156), at 39.

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC).

Shmueli (n324), at 210.

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The perspective of society on the value of corporal punishment as an educational mechanism has changed—particularly in Ireland where we have seen widespread child abuse by those entrusted with the care of children or in positions where they had access to them. The emphasis on parental autonomy is an obstacle to an outright ban on all corporal punishment and makes it difficult to formulate an exemption for parental punishment based on an objectively reasonable standard.\textsuperscript{336}

The supremacy of the Constitution may prevent Ireland from complying with the ECHR requirement that a state take positive steps to protect children from inhuman or degrading treatment or punishment. Following the European Court of Human Rights' decision in \textit{A v UK} the imprecise common law defence of "reasonable chastisement" should no longer be available to a parent as a defence to an assault charge.\textsuperscript{337} I will now consider whether Irish law is in conformity with the ECHR requirements. Has any gap that existed in the common law been sealed by the Non-Fatal Offences against the Person Act 1997?

Corporal punishment in schools is a thing of the past insofar as Irish law is concerned.\textsuperscript{338} There has not been as decisive a ban on parental corporal punishment.\textsuperscript{339} Statutory exceptions and definitions leave room for a parent charged with assault to plead that the force applied to the child constituted reasonable chastisement as permitted at common law, that there was a lawful excuse for the attack, or that Irish society accepts that parents can hit their children. The law is imprecise and does not provide adequate protection for children against ill-

\textsuperscript{336} Recognising the difficulties and noting the gradual development of the criminal law of assault, the Law Reform Commission recommended waiting to abolish the common law chastisement exception until parents had been re-educated: Law Reform Commission, "Report on Non-Fatal Offences Against the Person" (LRC 45-1994), at [9-212], [9-214]. See Shannon (n 17), at [2-33]—[2-34].

\textsuperscript{337} (App no 25599/94) (1999) 27 EHRR 611. See Freeman (n 332), at 235. Although it appears to support a general prohibition on physical punishment, it could be argued that this decision does not have a direct connection to the legitimacy of moderate, measured, and reasonable corporal punishment because the beatings in this case—perpetrated using an implement—were severe and unreasonable: Shmueli (n 324), at 216.

Reforms in the UK since that \textit{A v UK} did not abolish the defence of reasonable chastisement entirely and the law there retains the concept that hitting children can be not only acceptable, but right: Laura Hoyano and Caroline Keenan \textit{Child Abuse: Law and Policy Across Boundaries} (OUP, Oxford 2010), at 187.

\textsuperscript{338} Shannon (n 17), at [3-45]. The common law rule granting teachers immunity from criminal liability for punishing pupils has been abolished: Non-Fatal Offences against the Person Act 1997 section 24.

\textsuperscript{339} Section 22(1) of the 1997 Act stipulates that the Act has effect "subject to any enactment or rule of law providing a defence, or providing lawful authority, justification or excuse for an act or omission." Section 2 decriminalises assault if there is a "lawful excuse": \textit{ibid} section 2(1). Neither is an offence committed "if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person": \textit{ibid} section 2(3).
treatment in the home. Despite its positive obligation to intervene to protect rights, the Irish State continues to collude in the violation of a minor’s dignity by standing on the sidelines and declining to criminalise unambiguously an assault by a parent on a child. If children are regarded as possessing independent dignity, the idea that they are the property of their parents so as to permit authoritarian control to be maintained by violence is no longer tenable. A clear ban outlawing parental corporal punishment is necessary to comply with our international obligations.

Forbidding parental corporal punishment need not disturb the general defences that apply to all (including parents) charged with assault. In accordance with the parameters of the criminal law, parents may invoke the defence of necessity where there was a proportionately violent response to an extremely urgent situation with no reasonable alternative. Self-defence could be pleaded when faced with an attack from a violent child. The use of reasonable force to protect people or property or to prevent crime is permitted by statute. The law recognises the special relationship between parents and children, who need direction while they are growing, learning and developing into responsible adults. Discipline is a part of the guidance of children, but that is different from violence and humiliation.

I will now outline the duties imposed on parents, as the steps they take to fulfil those duties are relevant to the question of whether they may use corporal punishment as an educational tool. The primary duty to care for, protect, and raise the child rests on the parent, who may have a liability in tort law for negligence for damage or injury caused by a child because of the

340 Shannon (n17), at [2-29]—[2-30].
343 Scutt (n341), at 22.
344 Freeman (n332), at 216.
347 Stewart (n345), at 33.
348 Freeman (n332), at 221.
349 Stewart (n345), at 33. See also CRC (n331) art 18(1).
child’s dangerous propensities or because of failure to control the child properly. Article 42.1 of the Constitution refers to the right and duty of parents to provide for “the religious and moral, intellectual, physical and social education of their children.” The extent of that duty and the leeway given to parents to decide the tactics to fulfil it change in accordance with societal views, which are influenced by the law (including international instruments).

As well as condemning clearly violence and the degrading treatment of children, the CRC acknowledges parents’ rights and duties. States have to assist parents in the performance of their child-rearing responsibilities, which are underpinned by the best interests of the child. Although recognising parents’ rights and duties, the CRC places them in the context of the child’s rights and best interests. Notwithstanding the fact that the latter is a vague principle open to various interpretations in different places and times, the CRC does not give any scope for parental discretion to use corporal punishment for educational or other purposes. The parents’ rights are supplemental to those of the child.

The margin of appreciation allowed to states under the ECHR is not replicated in the CRC. Furthermore to constitute degrading treatment or punishment under Article 3 ECHR, a minimum level of severity must be reached. In A v UK the European Court of Human Rights

350 Dympna Glendenning, Education and the Law (Butterworths, Dublin 1999), at [9.113]. The incident giving rise to the claim may be attributable to the parent’s lack of success in supervising and controlling the child’s activities, or, more broadly, to some deficiency in parenting: Shauna Van Praagh, “Sois Sage”—Responsibility for Childishness in the Law of Civil Wrongs” in Neyers, Chamberlain and Pitel (n188), at 76.

351 Parents have a dual role—they are expected to foster a child’s sense of autonomy and self-fulfilment, and also to underline the child’s sense of responsibility for self and others: ibid, at 64. The rights that parents have over their children flow partly from their interest in having a relationship with them, and partly from their need to have these rights to carry out their duties: Stewart (n345), at 22.

352 Article 5 obliges states to respect their “responsibilities, rights and duties ... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.” Article 14 asserts that parents can and must provide direction to the child in “a manner consistent with the evolving capacities of the child” (art 14(1)) in the exercise of his or her right to freedom of thought, conscience and religion (art 14(2)). Ayoola JSC in the Nigerian Supreme Court stated, “[t]he right to freedom of thought, conscience or religion implies a right not to be prevented, without lawful justification, from choosing the course of one’s life, fashioned on what one believes in, and a right not to be coerced into acting contrary to religious belief”: Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo [2002] AHRLR 159 (NgSC 2001), at [73].

353 CRC (n331) art 18(2).

354 Ibid art 18(1). On the best interests of the child, see Freeman (n332), at 216-219.

355 On assessment of the minimum level of severity, see A v Ireland (App no 25579/05) (2011) 53 EHRR 13, at [164].
looked at the context. The difficulty arises in framing a provision that would allow corporal punishment by a parent below the minimum threshold of severity. The attempt by the UK to do so has not been successful and has satisfied neither abolitionists, supporters, the police nor social workers.

On one side of the fence stand paternalistic traditionalists who believe parents know best and place the authority of the family centre stage. On the other side are those—fearful of inflicting injury—who support individual rights viewing the child as an independent entity. Benjamin Shmueli has proposed an approach mid-way between these protagonists based on a relational worldview where the individual is connected to society and not isolated. His model has educational and preventative elements. He considers that an integrated approach which focuses mainly on the human rights of the child, but does not ignore parental rights, is best. He maintains that this approach is in line with the CRC that sees the child as a human being with rights and not merely as a person who needs extensive protection by society and the law.

There is much merit in the state exerting its influence to sway public opinion towards a humane method of disciplining children that does not involve corporal punishment. Indeed, the CRC obliges states to take social and educational measures to protect children. But this does not absolve the legislature from addressing the issue. Although civil remedies may be appropriate in certain circumstances, a prohibition on parental corporal punishment in

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356 "The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.": (App no 25599/94) (1999) 27 EHRR 611, at [20] (footnote omitted).

357 Freeman (n332), at 236. The Committee of Ministers of the Council of Europe continued to supervise execution of A v UK after legislation permitting a parent to hit a child was enacted following the judgment by the European Court of Human Rights: ibid, at 235. On corporal punishment in the UK, see Benjamin Shmueli, “Corporal Punishment in the Educational System versus Corporal Punishment by Parents: A Comparative View” (2010) 73(2) LCP 281, at 299.


359 ibid. They wish society to have uniform desirable norms that do not bend before different cultural viewpoints and are enforced in an egalitarian manner on the whole population: ibid.

360 ibid, at 64.

361 ibid, at 137. The criteria Shmueli lists as justification for a criminal prosecution include, first, intentional or reckless parental conduct without good faith and not in the best interest of the child; second, a negative motive (not educational, which is prima facie positively motivated); and, third, deviation from reasonable, proportionate and moderate parental conduct: ibid, at 132-134.

362 Shmueli (n357), at 320.

363 ibid.
criminal law is still necessary. Ireland has already been found in breach of its obligation under the European Social Charter to protect children against violence because it had the defence of “reasonable chastisement” and therefore corporal punishment was not fully prohibited. In 2006 the UN Committee on the Rights of the Child expressed concern at Ireland’s continuing failure to prohibit corporal punishment within the family, and urged that this be done. It also pressed Ireland to educate parents and the general public about the unacceptability of corporal punishment, to promote positive non-violent forms of discipline as an alternative, and to take into account its General Comment No 8.

7.6.2 Privacy and property interests

When students bring their personal property to school, it may lead to a conflict between the exercise of their rights of ownership and the school authorities’ right (and duty) to provide a safe environment conducive to learning. The contested property may be things like illicit drugs or weapons such as guns or knives that it may be illegal to possess, cigarettes that are a danger to health, mobile phones which, although not illegal, may be disruptive in class, or clothing accessories that are not part of the school uniform or that are forbidden by the school rules. They might be items of religious or cultural significance, which will implicate the child’s identity and human dignity, as arose in the South African case of Pillay. A balance is sought between the property and privacy rights of the students and their freedom of expression, religion and culture, on the one hand, and the school’s authority to educate, on the other.

The US Supreme Court in New Jersey v TLO held that schoolchildren have legitimate expectations of privacy, which are not waived at the school gates. However, an individual’s expectation of privacy depends on the context and the locus. The Court viewed the school’s need to maintain a proper learning environment as equally legitimate as the child’s

364 European Social Charter (revised) ETS No 163 (ESCR) Art 17.
365 Freeman (n332), at 238-241.
367 Ibid, at [40].
368 Ibid, citing UN Committee on the Rights of the Child, “General Comment No 8” (n332).
369 On the duty to ensure a safe environment, see Glendenning (n350), at [9.63], [11.255]. The State may impinge on a child’s property rights while protecting the common good: Landers v AG [1975] 109 ILTR 1 (HC), at 5-6.
370 MEC for Education: KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC).
expectations of privacy. In striking the balance between the two, it examined the reasonableness in all the circumstances of the search. There was a two-step test in determining reasonableness—the search had to be justified as reasonable at its inception and also in the manner in which it was conducted.

In the legal analysis on confiscation of a student’s belongings, the student has a favourable start by having his or her interest defined within the property prism. The school is on the defensive and has the onus of justifying the forfeiture. Non-property interests are not given the same venerated stature. A better resolution could be achieved by aiming to harmonise the rights and duties of all the parties affected beginning with a level playing pitch where all students have equal rights to education and development in a safe environment and the school has the capacity to act to provide that environment. With due regard for the rights to privacy and bodily integrity, the school authorities have sufficient latitude to foster acceptable behaviour that does not threaten the well-being of students or teachers and is conducive to the growth of all students into responsible adults.

7.6.3 Non-traditional relationships

Scientific and medical advances combined with the acceptance of non-traditional personal relationships have given rise to contentious and difficult legal issues relating to the rights and duties to children and their welfare and best interests. The Supreme Court in *McD v L* adjudicated on the position of a sperm donor known to the natural mother of the child and her lesbian partner. When the father’s rights to access and guardianship of the child were disputed, the Court decided the matter on the basis of the child’s best interests and remitted the action to the High Court to consider his access arrangements. The biological father had no constitutional rights of access or guardianship, but had a statutory right to apply to court for such orders. Fennelly J emphasised the relevance of the circumstances arising in each case, “[i]t is both right and natural to have particular regard to the context of conception, birth and subsequent family links.” On a scale of interested parties, the sperm donor did not carry much weight, as Fennelly J reasoned, “[t]o the extent that Finlay CJ and Denham J postulated a

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373 *Ibid*, at 341. In this case the search was of a 14 year-old girl found smoking cigarettes in a school lavatory contrary to a school rule: *Ibid*, at 328.
376 [2009] IESC 81, at [78].
scale for assessment of 'rights of interests or concern,' it seems likely that the sperm donor would be placed quite low, certainly by comparison with the natural father in a long-term relationship approximating to a family.”

A consideration of the dignity of the various parties might assist in reaching a resolution of these modern-day dilemmas in accordance with constitutional norms. New technologies are challenging legal systems to solve novel disputes arising from their development and application. Established principles can be adapted and new and better ways devised to cope with the legal issues arising from the ever-increasing breakthroughs in science, medicine and information technology. These issues raise concerns over privacy, property, autonomy, dignity and equality, and involve analysis of contract, tort and constitutional law. Utilitarian goals and the adaptation of cultures to enhance human flourishing can conflict with preservation of the status quo, which may inhibit scientific research and development. There is no simple answer in legal terms. A broad approach encompassing an assessment of the various interests of all the parties involved in the context of supporting innovative ways of advancing society with the aim of improving the quality of people's lives and facilitating the achievement of individuals' personal goals may be worthwhile.

### 7.7 The embryo, body parts and human tissue

The right to control one's own property is a well-established basic legal principle. The question has arisen as to whether the interests arising in scientific development can be regarded as property and, if so, whether it is appropriate to decide the rights and obligations arising solely or partly from that viewpoint. There are conflicting views as to whether humans can or should have proprietary rights over their body or body parts. Roger Brownsword identified two critical claims concerning, first, the right to control access to and use of a particular body or body part, and, second, the right to exploit commercially a particular body or body part.

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377 Ibid, at [79].
379 For an argument in favour of the existence of such rights, see Deryck Beyleveld and Roger Brownsword, "My Body, My Body Parts, My Property?" (2000) 8 Health Care Analysis 87.
380 Roger Brownsword, *Rights, Regulation and the Technological Revolution* (OUP, Oxford 2008), at 63. He posed "the burning question" whether an individual should have property claims of this kind in relation to that individual’s own body or removed body parts: *ibid.*
Let us begin by looking at the embryo. From a moral perspective, the status of the embryo depends on whether and to what extent it is thought to possess human dignity.\(^{381}\) At one extreme, is the full dignity position granting the embryo full moral status worthy of the same level of protection as an adult.\(^{382}\) At the other extreme, is the no dignity position, which views the embryo itself as having no intrinsic value or status.\(^{383}\) Between these extremes comes the intermediate stance dubbed the limited dignity position by Deryck Beyleveld and Shaun Pattison.\(^{384}\) The most popular limited stand is the proportional dignity position, which regards the moral status of the embryo as increasing with gestational development.\(^{385}\)

Having sketched the moral position, it is time to analyse the case law on the embryo. In Roche v Roche Hardiman J did not regard the fertilised but unimplanted ovum as property, and considered that the applicant wife could not rely on her personal rights under Article 40.3.1° as an alternative to having the fate of the frozen embryo decided on the basis of whether it came within the definition of “unborn” in Article 40.3.3°.\(^{386}\) All the Supreme Court judges in that case resiled from analysing the meaning of life. According to Murray CJ, as it raised contentious moral, philosophical, theological and scientific issues, it was a matter for the legislature to decide based on policy choices or for a constitutional amendment.\(^{387}\) He avoided deciding on whether frozen embryos constituted “life of the unborn”,\(^{388}\) as it was not a


\(^{382}\) Beyleveld and Pattinson (n381), at 186.

\(^{383}\) Ibid.

\(^{384}\) Ibid.

\(^{385}\) Ibid. The fundamentally different viewpoints in Europe concerning the moral status and dignity of the embryo generated a patchwork of local regulatory positions on the use of human embryos for research: Roger Brownsword, “Introduction: Global Governance and Human Rights” in Brownsword (n381), at 5. In Ireland, the issue of when human life should begin to enjoy the benefit of legal protection is contentious, as was evident in the Report on Assisted Human Reproduction, when Gerry Whyte dissented strongly from recommendations envisaging the deliberate destruction of the embryo: Commission on Assisted Human Reproduction, Report (Dublin, April 2005), at 73-76.


\(^{388}\) Constitution of Ireland 1937, Article 40.3.3°.
justiciable issue and the appellant had not succeeded in establishing it.\textsuperscript{389} Denham J was satisfied that the term “unborn” does not refer to an unimplanted embryo.\textsuperscript{390} Hardiman J (with whose interpretation Geoghegan\textsuperscript{391} and Fennelly\textsuperscript{392} JJ agreed) concluded that the “unborn” referred to “the foetus \textit{en ventre sa mere}, the embryo implanted in the womb of the mother.”\textsuperscript{393}

Moving to the other side of the Atlantic, the US District Court of the Eastern District of Virginia treated frozen embryos as property in \textit{York v Jones}.\textsuperscript{394} Justice Daughtrey of the Supreme Court of Tennessee in \textit{Davis v Davis} considered it was not helpful to ask whether pre-embryos were property in order to decide their legal status, since embryos had no intrinsic value to either party, their value lying in their potential to become \textit{children}.\textsuperscript{395} While they were neither

\textsuperscript{389} [2009] IESC 82, [2010] 2 IR 321, at [55]. The conclusion of all of the judges (except Murray CJ) was that the term “unborn” did not refer to the frozen embryo. The underlying reason for their stance was their interpretation of the goal of the Eighth Amendment inserting Article 40.3.3° into the Constitution and its language. The aim of the Amendment was to prevent abortion being legalised in Ireland. Four of the judges confined the Amendment’s reach to the child or foetus intra-womb. Murray CJ disagreed and considered that simply because the embryo existed outside the womb did not mean it was excluded from protection: \textit{ibid}, at [36].

\textsuperscript{390} \textit{ibid}, at [148]. She analysed the context in which the Eighth Amendment was passed and its wording: \textit{ibid}, at [126]-[144]. It was introduced “to copper fasten the protection provided in the statutory regime, to render unconstitutional the procuring of a miscarriage”: \textit{ibid}, at [130]. She was satisfied that the mischief to which it was addressed was that of “the termination of pregnancy, the procuring of a miscarriage, an abortion”: \textit{ibid}, at [134]. “The capacity to be born, or birth” defined the right protected and arose after implantation: \textit{ibid}, at [144].

\textsuperscript{391} From the wording of the Eighth Amendment and its historical context, Geoghegan J took the view that “the unborn” refers to a child in the womb not yet born and that the constitutional provision dealt exclusively with the baby in the mother’s womb: \textit{ibid}, at [209], [217].

\textsuperscript{392} Fennelly J was satisfied that Article 40.3.3° did not extend to nor include frozen embryos which have not been implanted: \textit{ibid}, at [229].

\textsuperscript{393} \textit{ibid}, at [183]. Hardiman J adopted this position because of the context of the Eighth Amendment—those who promoted it thought it necessary to take active steps to prevent the legalisation of abortion whether by legislation or by judicial decision: \textit{ibid}, at [178]. The frozen embryo was not implanted and therefore did not fall within the ambit of the Amendment.

\textsuperscript{394} 717 F.Supp 421 (1989). The Court held that a husband and wife were entitled to have a frozen embryo transferred from an institute for reproductive medicine in Virginia to California. A disposition agreement between the institute and the couple created a bailment relationship, which imposed an absolute obligation on the bailee to return the embryo to the bailor when the purpose of the bailment had terminated: \textit{ibid}, at 425. The plaintiffs’ claims for breach of contract and detinue were well-founded. See Natalie R Walz, "Abandoned Frozen Embryos and Embryonic Stem Cell Research: Should There Be a Connection?" (2007) 1 U St Thomas JL & Public Policy 122, at 138.

\textsuperscript{395} 842 SW 2d 588 (1992), at 598. See Walz (n394), at 129-130.

The modern view of property and legal rights over it has also generated divergent views in the less controversial and deeply personal area of the use of domain names on the internet. Questions have arisen as to whether domain names are regarded as property and whether an action lies for conversion of intangible property. Conversion of intangible property varies significantly across jurisdictions in the US: Courtney W Franks, “Analyzing the Urge to Merge: Conversion of Intangible Property and the Merger Doctrine in the Wake of \textit{Kremen v. Cohen}” (2005) 42 Hous LR 489, at 492. The US Court of Appeals held that in California the owner of a domain name could sustain an action for conversion: \textit{Kremen v Cohen} 337 F.3d 1024 (2003) (US Court of Appeals 9\textsuperscript{th} Circuit). It confirmed that a plaintiff
persons nor property, they were deserving of more respect than other human tissue because of that potential. He found that the couple who provided the gametes had decision-making rights. The societal interest as expressed in public policy is a constraint on the individuals' freedom to decide the embryos' fate. In the absence of their wishes being ascertained or a prior agreement between them, the constitutional right to privacy grounded in the concept of liberty was determinative.

In contrast, the New York Court of Appeals held in *Kass v Kass* that the disposal of embryos did not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice. As they were not "persons", Kaye CJ dealt with the dispute over their use by treating the progenitors as holding a "bundle of rights" in relation to them that could be

must fulfil three requirements to establish the tort of conversion: first, ownership or right to possession of property; second, wrongful disposition of the property right; and, third, damages: *ibid*, at 1029, citing *GS Rasmussen & Associates, Inc v Kalitta Flying Services, Inc* 958 F.2d 896 (1992) (US Court of Appeals 9th Circuit), at 906. It affirmed that the concept of property is broad and includes "every intangible benefit and prerogative susceptible of possession or disposition": *ibid*, at 1030, citing *Downing v Municipal Court* 88 Cal App.2d 345 (1948) (Court of Appeals of California), at 350.

On the historical development of conversion and its modern elements in the US, see Franks *supra*, at 494-502; Eric Kohm, "When 'Sex' Sells: Expanding the Tort of Conversion to Encompass Domain Names" (2003) 23 Loyola LA Entertainment L Rev 443, at 448-452. For a description of a domain name, see *ibid*, at 444-445. The domain name system is at the internet's core: Roy Balleste, "Persuasions and Exhortations: Acknowledging Internet Governance and Human Dignity for All" (2011) 38 Syracuse J Int'l L & Com Spring 227, at 228. Roy Balleste has advocated that we envision an internet that promotes a world public order of human dignity: *ibid*, at 230. See also *ibid*, at 231, 238-240, 248-249, 253-255. The House of Lords in a majority decision in *OBG Ltd v Allan* held that strict liability for conversion applied only to an interest in chattels, and declined to expand it to choses in action: [2007] UKHL 21, [2008] 1 AC 1. See Gregory Mitchell, "Should the tort of conversion apply to intangible property?" (2007) 157 NLJ 958.

842 SW 2d 588 (1992), at 597.

*ibid*:

[P]reembryos are not, strictly speaking, either "persons" or "property," but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law.

*ibid*, at 598, 604. The right of procreational autonomy (composed of two rights of equal significance—the right to procreate and the right to avoid procreation) is a vital part of an individual's right to privacy: *ibid*, at 600-601. In the event of a dispute over conflicting constitutional claims, the Court balanced the interests of the parties: *ibid*, at 603-604. Under contract law, the Court would have been prepared to enforce a prior agreement between the couple on the disposal of unimplanted embryos: *ibid*, at 597.


91 NY 2d 554 (1998), at 564.

Traditionally people regarded property as "things", but lawyers moved from that integrated concept to speaking about property abstractly using metaphors like "bundles of rights": Steven J Eagle, "The
exercised through joint disposition agreements.\textsuperscript{401} The Supreme Court of Massachusetts took a more restrained view of the enforceability of the parties' agreement on the use of embryos, when in \textit{AZ v BZ} it was dubious that an agreement prepared by and for the assistance of the clinic represented the intent of the husband and the wife regarding disposition of the preembryos in the case of a dispute between them.\textsuperscript{402} Moreover, even if the document had represented the couple's intentions, the Court would have declined to enforce it on the grounds of public policy upholding their privacy and liberty interests.\textsuperscript{403} Another nuance was added by the Supreme Court of New Jersey in \textit{JB v MB}, where it accepted that agreements on the use of embryos were enforceable, but public policy permitted either party to resile later.\textsuperscript{404}

From these cases, it can be seen that the trend in the US has been to assess rights in relation to the embryo from the perspective of privacy tempered by public policy. The starting point has been that freedom to contract is upheld and agreements are enforceable when they are not in conflict with public policy to further research of benefit to society. Although not overtly


JE Penner formulated two versions of the bundle of rights thesis—first, the "substantial" version, where property is a bundle of rights in the sense that property is a naturally complex normative relation that should be regarded as an historically contingent association of various rights; and, second, the "conceptual" version, which expresses the idea that "property" is a concept that is not applied on the basis of some set of necessary and sufficient criteria, but that in a particular case the various incidents or indicia of property may add up in some way, or show sufficient resemblance to a paradigm, such that "property" is correctly applied to describe it: JE Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43 \textit{UCLA L Rev} 711, at 722-723.

Instead of defining the relationship between a person and "his" things, property law discusses the relationships that arise between people with respect to things: Bruce A Ackerman, \textit{Private Property and the Constitution} (Yale University Press, New Haven 1977), at 26. Justice Pitney in the US Supreme Court approached the issue of whether news was property by looking at the relationship between the parties rather than at the relationship between the agency and the news itself: \textit{International News Service v Associated Press} 248 US 215 (1918), at 236. For a critique of \textit{International News Service}, see Penner \textit{supra}, at 715-718, 722, 816-817.

\textsuperscript{402} 91 NY 2d 554 (1998), at 564. She summarised, "[t]he relevant inquiry thus becomes who has dispositional authority over them.": \textit{ibid}. This suggests a similarity to property law: Walz (n394), at 132-133.

\textsuperscript{403} 431 Mass 150 (2000), at 158. See Walz (n394), at 133-134.

\textsuperscript{404} "[T]he better rule, and the one we adopt, is to enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos.": 783 A.2d 707 (2001), at 719. See Walz (n394), at 134-135.
expressed as such, the interests of the parties in relation to the embryo have been regarded as analogous to property rights. The embryo has generally not got the venerated status of a person or the inanimate rank of property, but its progenitors have decision-making rights over it which may be limited by public policy.

After this analysis of the position of the embryo, I will now review some decisions on rights over body parts and human tissue. Staying in the US, the case of *Moore v Regents of University of California* heard by the California Supreme Court illustrates well the divisive nature of the issues arising and the contrasting views on ways to resolve them. Mr Moore’s spleen had been removed and was used for research purposes without his knowledge. The majority held that he had a cause of action for breach of the physician’s disclosure obligations, but not for conversion. Justice Panelli dismissed the artificial attempt to construct a property-based claim—an unnecessary exercise since there were more appropriate avenues of redress that would protect privacy and dignity. Justice Mosk (dissenting) gave a more considered analysis of the nature of property, a variable concept subject to limitation, and


406 Justice Panelli pointed out that Moore did not expect to retain possession of his cells following their removal, and therefore he was unable to sustain an action for their conversion, which required retention of an ownership interest in them: 51 Cal.3d 120 (1990), at 136-137.

407 *ibid*, at 140:

O]ne may earnestly wish to protect privacy and dignity without accepting the extremely problematic conclusion that interference with those interests amounts to a conversion of personal property. Nor is it necessary to force the round pegs of “privacy” and “dignity” into the square hole of “property” in order to protect the patient, since the fiduciary-duty and informed-consent theories protect these interests directly by requiring full disclosure.

He gave three reasons why Moore’s tissue should not be treated as property, which the plaintiff needed to establish in order to ground an action for conversion: first, a fair balancing of the relevant policy considerations counselled against extending the tort; second, problems in this area were better suited to legislative resolution; and, third, the tort of conversion was not necessary to protect patients’ rights: *ibid*, at 142-143. Two policy considerations of overriding importance were, first, protection of a competent patient’s right to make autonomous medical decisions, which was grounded in well-recognised and long-standing principles of fiduciary duty and informed consent; the second one was not to threaten with disabling civil liability innocent parties engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample was, or might be, against a donor’s wishes: *ibid*, at 143.
found in effect that decision-making rights were property interests. He deduced that protection of Moore’s dignity pointed to the vesting in him of a right to profit from his own cells.

Confronted with a dispute over the commercialisation of the results of research into Canavan disease based on tissue, blood samples and genetic information donated voluntarily by the plaintiffs in Greenberg v Miami Children’s Hospital Research Institute, Inc, the US District Court of the Southern District of Florida followed Justice Panelli’s reasoning in Moore and held that no action lay for conversion, as a donor retained no property interest after the donation was made. With resonances of Justice Mosk’s dissent in Moore, the plaintiffs’ claim for unjust enrichment in Greenberg was successful.

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408 Ibid, at 165-166. Justice Mosk’s argument as to why the judiciary should adjudicate and develop tort law, even when the legislature has competence, was persuasive: ibid, at 176.

409 Ibid, at 166. Contradictory policy considerations were in tension. Justice Mosk highlighted the ethical implications and also mentioned equity—particularly when the parties were not in an equal bargaining position—as a second policy determinant promoted by recognising that every individual has a legally protectible property interest in his own body and its products: ibid, at 173-174. He stated, “[o]ur society values fundamental fairness in dealings between its members, and condemns the unjust enrichment of any member at the expense of another.”: ibid, at 174. Justice Arabian appreciated the problem outlined by Justice Mosk, but disagreed on the solution, being unwilling to decide the contentious moral, philosophical and religious issues arising simply at the level of tort law, ibid, at 149:

Does it uplift or degrade the “unique human persona” to treat human tissue as a fungible article of commerce? Would it advance or impede the human condition, spiritually or scientifically, by delivering the majestic force of the law behind plaintiff’s claim? I do not know the answers to these troubling questions, nor am I willing—like Justice Mosk—to treat them simply as issues of “tort” law, susceptible of judicial resolution. ... The ramifications of recognizing and enforcing a property interest in body tissues are not known, but are greatly feared—the effect on human dignity of a marketplace in human body parts...

410 264 F.Supp 2d 1064 (2003), at 1074. The Florida Court accepted the distinction made in Moore between the patented results of research and the excised material used in the research: ibid, at 1074-1075. In the interests of encouraging research, the claim for an extension of the duty of informed consent to cover economic interests was dismissed decisively on the basis that the plaintiffs, being voluntary donors rather than objects of human experimentation, were to be treated differently: ibid, at 1070-1071. Moreno J was wary of the consequences of requiring the sharing of information with the donors, as he stated, “imposing a duty of the character that Plaintiffs seek would be unworkable and would chill medical research as it would mandate that researchers constantly evaluate whether a discloseable event has occurred.”: ibid, at 1070 (footnote omitted). If this additional requirement were imposed on researchers, it “would give rise to a type of dead-hand control that research subjects could hold because they would be able to dictate how medical research progresses”: ibid, at 1071. Also like Moore, the individual’s expectations were relevant, Moreno J dismissing the conversion claim because “these were donations to research without any contemporaneous expectations of return”: ibid, at 1076.

411 264 F.Supp 2d 1064 (2003), at 1072. They were entitled to recompense for a continuing research collaboration, into which they had invested “time and significant resources in the race to isolate the Canavan gene”: ibid, at 1072-1073.
Stephen Munzer divided all body rights into *personal rights* and *property rights*, differentiating between them on the basis that the latter protected the choice to transfer, while the former protected interests or choices other than the choice to transfer.\(^{412}\)

There have been several instruments adopted at international and regional level regulating scientific development and requiring protection of human rights and human dignity in the process.\(^{413}\) This can be seen in the Universal Declaration on Bioethics and Human Rights adopted by UNESCO in 2005,\(^{414}\) when it continued the same theme evident in the Universal Declaration on the Human Genome and Human Rights of 1997\(^{415}\) and in the intervening International Declaration on Human Genetic Data.\(^{416}\) Dignity in the context of scientific advances concerning our genetic make-up seems synonymous with individual uniqueness and worth.\(^{417}\) The Council of Europe has stressed the imperative of protecting human dignity in instruments such as the Convention on Human Rights and Biomedicine,\(^{418}\) and the several

\(^{412}\) Munzer (n400), at 48-49. He arrayed those personal rights on two different but related spectra; the first spectrum ranged from rights that protect only interests, through rights that protect both interests and choices, to rights that protect only choices; the second ranged from non-waivable rights, through those that were waivable with qualifications, to rights waivable at the option of the right-holder; property rights in the body could be sub-divided into weak and strong varieties, a *weak property right* involving only a choice to transfer gratuitously and a *strong property right* involving a choice to transfer for value: *ibid*, at 49.


Additional Protocols to the latter on Cloning, the Transplantation of Organs and Tissues of Human Origin, and Biomedical Research. Even though regulating ethical issues does not fall within the competence of the European Union, bioethics became a central part of the EU public debate and an integral component of governance because the European authorities deemed it necessary not to neglect moral debate in the face of rising competition on the internal market. Unlike in the US, an increasing amount of European legislation dealing with the market includes ethical considerations and references to human dignity in legislation do not seem out of place.

The European Court of Justice ruled in Brüstle v Greenpeace that the concept of "human embryo" for the purpose of ascertaining the scope of the prohibition on patentability includes any human ovum, as soon as fertilised, if it is such as to commence the process of development of a human being. It also encompasses any non-fertilised human ovum capable of commencing that process because of the technique used to obtain it.

Francis Fukuyama has advocated the defence of human dignity by viable political institutions in the real world of politics and not just in philosophical tracts. South Africa has legislated to

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423 Lenoir (n422), at 4.
424 Case C-34/10 Brüstle v Greenpeace eV (ECJ, 18 October 2011), at [35].
425 Ibid, at [36]. The Advocate General had proposed that an invention should be excluded from patentability where the application of the technical process for which the patent was filed necessitated the prior destruction of human embryos or their use as base material: Case C-34/10 Brüstle v Greenpeace eV (ECJ, Opinion Adv G Bot, 10 March 2011), at [8], [119]. He pointed out in his Opinion that human dignity is a principle that must be applied to the human body from fertilisation (the first stage in its development): ibid, at [96]. See Fiona Duffy, "Seed Money" (2011) 105(4) GLSI 38.
426 Francis Fukuyama, Our Posthuman Future: Consequences of the Biotechnology Revolution (Profile Books, London 2002), at 177; Brownsword (n380), at 314. On Fukuyama's conception of human dignity, see Fukuyama supra, at 171-174; Roger Brownsword, "What the World Needs Now: Techno-Regulation,
control the use of human tissue and gametes and to regulate research in the National Health Act 2003. Consent of the donor is necessary and payment to the donor is prohibited except for reimbursement of reasonable costs. Irish legislation on these moral and ethical questions would assist in clarifying the legal implications and would give much-needed guidance to medical personnel and researchers.

7.8 Privacy

Legislation making contraceptives unavailable was found to be unconstitutional in McGe v AG, as it breached the right to marital privacy. Henchy J assessed the effect of the legislation denying access to contraceptives as being to condemn the plaintiff and her husband to a way of life which, at best, will be fraught with worry, tension and uncertainty that cannot but adversely affect their lives and, at worst, will result in an unwanted pregnancy causing death or serious illness with the obvious tragic consequences to the lives of her husband and young children. And this in the context of a Constitution which in its preamble proclaims as one of its aims the dignity and freedom of the individual ...

In the context of the right to privacy, Hamilton P in Kennedy v Ireland linked freedom and dignity to democracy, "[t]he nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society."

Getting the correct balance between the expression of the individual personality at the heart of the concept of the right to privacy and the common good in the pluralist society defined by the Constitution does not warrant deterrence by attaching the stigma of a criminal offence to what a minority regard as essential to self-fulfilment, as Henchy J stated in dissent in Norris v AG:

What are known as the seven deadly sins are anathematised as immoral by all the Christian Churches and it would have to be conceded that they are capable, in different degrees and in certain contexts, of undermining vital aspects of the common good. Yet it would be neither constitutionally

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Human Rights and Human Dignity" in Brownsworth (n381), at 217-218; Brownsworth (n380), at 314-315.
428 ibid section 60 (4)(a).
430 ibid, at 326.
431 [1987] IR 587 (HC), at 593.
432 The right to privacy inevitably engages the rights of autonomy and dignity: Binchy (n33), at 166.
permissible nor otherwise desirable to seek by criminal sanctions to legislate their commission out of existence in all possible circumstances. To do so would upset the necessary balance which the Constitution posits between the common good and the dignity and freedom of the individual. What is deemed necessary to his dignity and freedom by one man may be abhorred by another as an exercise in immorality. The pluralism necessary for the preservation of constitutional requirements in the Christian, democratic State envisaged by the Constitution means that the sanctions of the criminal law may be attached to immoral acts only when the common good requires their proscription as crimes.\(^\text{433}\)

Self-determination insists on the freedom to express one’s individuality and to live one’s life in the community by exercising rational choices. Where that choice conflicts with the norms of the majority, the latter must defer to allow the non-conforming identity flourish as an esteemed equal member of the group. This has implications for intimate personal relationships and control over one’s body. As the South African Constitutional Court did subsequently in the *Sodomy* case,\(^\text{434}\) in *Norris* the importance of dignity and freedom for the human personality was emphasised by the dissenting judges, Henchy and McCarthy JJ.\(^\text{435}\) They recognised the breadth of the right to privacy and carried out a balancing exercise between it and the common good. McWilliam J in the High Court and the other judges in the Supreme Court did not even find that the right to privacy extended to homosexual activities. The toothlessness of the equality guarantee in practice is apparent from all the judgments, McCarthy J being the only judge who left it open that the equality right could protect Mr Norris.\(^\text{436}\)

In *JF v DPP* the prosecutor refused to consent to the request of an accused facing sexual assault charges to have the complainant assessed by a psychological expert nominated by him in addition to the psychologist, who had reported to the DPP and was a witness in the prosecution.\(^\text{437}\) The DPP alleged that a second examination would breach the complainant’s rights to dignity, privacy and security.\(^\text{438}\) As the complainant himself had not supported the argument that a second examination would be “excessive, unduly intrusive or objectionable”, Hardiman J rejected the DPP’s stance on the facts, but left open the possibility that circumstances could arise where an examination could be refused because, in effect, it was

\(^{433}\) [1984] IR 36 (SC), at 78.  
\(^{434}\) *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) (*Sodomy* case).  
\(^{435}\) [1984] IR 36 (SC), at 71, 78, 95, 100.  
\(^{436}\) *Ibid*, at 104. See Binchy (n82), at 189-190.  
\(^{438}\) *Ibid*, at [13].
oppressive. He pointed out that by instigating a prosecution the complainant forfeited the right to privacy to an extent. The effect of a conviction on an accused would be significant, as he would be disgraced, lose his liberty and reputation, and be consigned to professional oblivion. These high stakes merited intruding on the complainant’s right to privacy.

A contentious contemporary issue is whether compulsory testing for HIV is justified, and, if so, in what circumstances. In Diau v Botswana Building Society the Botswana Industrial Court held that termination of a woman’s employment for refusing to undergo a HIV test constituted inhuman and degrading treatment, which conclusion was derived from “the premise that the human body is inviolable and respect for it is a fundamental element of human dignity and freedom.” Dingake J pinpointed the right to dignity as the key value underlying equality and other human rights. An individual is free “to resist any potential violation to his or her privacy or bodily integrity.” Dismissal for refusing to undergo the test constituted an assault on the employee’s dignitas, which Dingake J defined by reference to South African case law as that “valued and serene condition in her social or individual life which is violated when she is, either publicly or privately subjected by another to offensive and degrading treatment, or when she is exposed to ill-will, ridicule, disesteem or contempt.” The Court in Diau also

439 Ibid, at [31].
440 Ibid, at [27].
441 Ibid.
442 Neither did the principle of equality of arms inherent in a fair trial, which required equal treatment between the parties, allow a superior status to be given to one side’s expert: ibid, at [16], [32]-[33]. See also Mackie v Wilde [1998] 2 IR 570 (HC); Murphy v GM [2001] IESC 82, [2001] 4 IR 113, at 155, aff’g [1999] IEHC 5.
443 Policies purportedly designed for prevention and control of HIV/AIDS can themselves lead to human rights violations, either because they are poorly conceived or applied in an arbitrary and biased manner, eg, both quarantine and involuntary testing policies are counterproductive and/or harmful because they result in discrimination and excessive infringements on personal freedoms; that, in turn, drives people away from testing, eclipses the opportunity for treatment and care, and undermines prevention efforts: Vincent Iacopino and others, “HIV/AIDS and Human Rights in Botswana and Swaziland: A Matter of Dignity and Health” (2011) 34 Hastings Int’l & Comp L Rev 149, at 166.
444 The Namibian Labour Court set out the precise tests required as part of the compulsory medical examination for military service and held that no otherwise fit and healthy person may be excluded from enlistment solely on the basis of such person’s HIV status: Nanditume v Minister of Defence [2002] AHRIR 119 (NaLC 2000), at [40].
446 2003 (2) BLR 409 (BwIC), at 41. The same court had held in an earlier case that termination of the contract of employment of another employee because she tested HIV positive was unfair: Jimson v Botswana Building Society [2005] AHRIR 86 (BwIC 2003).
447 “In liberal moral philosophy human dignity is considered to be what gives a person their intrinsic worth as human beings, consequently every human being must be treated worthy of respect.”: 2003 (2) BLR 409 (BwIC), at 38.
448 Ibid.
found that the termination of her employment infringed the employee’s right to liberty,\textsuperscript{449} to which Dingake J gave a broad meaning, going beyond “mere freedom from physical constraint” to grant protection to “a narrow sphere of personal autonomy wherein individuals may make inherently private choices free from irrational and unjustified interference by others.”\textsuperscript{450}

A pre-requisite for voluntary testing is informed consent mandated by the individual’s right to self-determination and freedom to choose.\textsuperscript{451} Before consent is classified as “informed”, the person “must be made to fully appreciate the consequences and implications of his or her consent.”\textsuperscript{452} South African case law has fleshed out the parameters of informed consent. In C v Minister of Correctional Services it was held that a prisoner could validly consent to a HIV test only if he or she understood the object and purpose of the test, understood what a positive result could entail, had time and place to reflect on the information received about the test, and had the freedom to refuse the test.\textsuperscript{453} Pre-test counselling is the norm, as is post-test counselling when there is a positive test result.\textsuperscript{454} Kirk-Cohen J found that failure to obtain a prisoner’s informed consent could give rise to civil liability by way of an \textit{actio injuriarum} for invasion of privacy.\textsuperscript{455} Innes CJ in Waring & Gillow Ltd v Sherborne formulated the essential independent elements of consent as knowledge, appreciation and consent.\textsuperscript{456} Since then the additional elements of voluntariness of consent, consent not \textit{contra bonos mores} and the capacity to consent have been added.\textsuperscript{457}

When compulsory testing against the individual’s will is allowed, the concern is not usually solely the patient’s health, but rather society’s interest in protecting others.\textsuperscript{458} The \textit{Diau

\textsuperscript{449} Constitution of the Republic of Botswana 1966, Section 3(a).

\textsuperscript{450} 2003 (2) BLR 409 (BwIC), at 45. The autonomy protected encompassed “only those matters that can properly be characterized as inherently personal, such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence”: \textit{ibid}.

\textsuperscript{451} \textit{ibid}, at 41-42.

\textsuperscript{452} \textit{ibid}.


\textsuperscript{454} 1996 (4) SA 292 (T) (High Court), at 301. See Cameron (n453), at 74.


\textsuperscript{456} Fombad (n455), at 49, citing 1904 TS 340, at 344.

\textsuperscript{457} Fombad (n455), at 49 (footnote omitted).

\textsuperscript{458} \textit{ibid}, at 69. \textit{Eg}, in C v Minister of Correctional Services, the dispute arose because the defendant adopted a new policy which required prisoners who served in the kitchen to undergo an HIV test to ensure that those with the virus were not allowed to prepare or serve food and in this way, it was hoped, reduce any chances of transmitting the virus to others: 1996 (4) SA 292 (T) (High Court).
decision was influenced by international guidelines, which encouraged voluntary testing and discouraged compulsory testing of employees because it was unnecessary and promoted stigmatisation.\textsuperscript{459} The fact that the building society employer was not an arm of state did not prevent constitutional rights from having horizontal effect.\textsuperscript{460} In line with foreign jurisprudence, a broad purposeful interpretation was given to the Constitution.\textsuperscript{461}

Those who have tested positive for HIV are safeguarded from discrimination in various spheres in many countries including in the labour market in South Africa\textsuperscript{462} and India,\textsuperscript{463} and in prison in Botswana.\textsuperscript{464} In Nigeria the state breached the prohibition on torture,\textsuperscript{465} which comes under the umbrella of the right to dignity in the Nigerian Constitution,\textsuperscript{466} and also failed to provide health care as required by the African Charter\textsuperscript{467} when prison authorities detained HIV infected prisoners without giving them medical treatment.\textsuperscript{468}

As found by the South African Constitutional Court in \textit{NM v Smith}, although the worth of an individual is not reduced by being HIV positive, because of her privacy rights and autonomy she has control over revelation of information about her condition, which affects a deeply personal feature touching her dignity.\textsuperscript{469} Her consent before publication of her HIV status is essential. Patient care in the context of HIV and AIDS requires the application of strict protocols for the testing, treatment, and disclosure of a patient’s HIV status to ensure that patients are effectively treated and that their rights \textit{inter alia} to dignity, freedom and security

\begin{itemize}
  \item Fombad (n455), at 69.
  \item Hoffman v South African Airways 2001 (1) SA 1 (CC).
  \item ibid Section 34(1).
  \item Odafe v AG [2004] AHRLR 205 (NgHC 2004). See Durojaye (n463), at 134-136. Ebenezer Durojaye has criticised the decision for failing to find that the denial of treatment to HIV positive prisoners amounted to discrimination and a violation of the right to life, and for not taking a critical look at international human rights jurisprudence on the link between right to health and other rights: ibid, at 150.
  \item 2007 (5) SA 250 (CC).
\end{itemize}
of the person and privacy are protected. Edward Bloustein regarded privacy as "a dignitary tort", since the injury was "to our individuality, to our dignity as individuals". The right to privacy is not absolute and restrictions may be necessary because of society's interest in dignity and the fact that rights are reciprocal. Ackermann J indicated in Bernstein v Bester that there are limitations on the right to privacy when an individual's activities acquire a social dimension by the person entering into relationships beyond the "most intimate core of privacy". The development of the common law to provide the defence of reasonable publication in defamation actions had its origins in many countries in dignity. Justification for violation of privacy could be developed along similar lines.

7.9 Socio-economic rights

Judicial timidity in social and economic disputes has been at the expense of enforcing constitutional values in circumstances where the State's protracted inaction was inexcusable. After O'Reilly in 1988, the trail ran cold and the judiciary did not advance down the road of judicial activism, preferring the safer highway of trusting the other organs of state to fulfil their primary role under the Constitution—a misplaced trust as shown in hindsight. While Costello J held he had no power to adjudicate on distributive justice nor to award damages for past breaches of the plaintiff's constitutional rights, he did grant a declaration that the defendant was obliged to review its building programme and to vary it if housing needs for which no proposals had been made arose subsequent to the programme's adoption. In another case

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470 Veriava (n453), at 309.
472 Delany, Carolan and Murphy, (n33), at 58. See also Steyn (n190), at 7-8. An infringement of the right to privacy may be justified on a paternalistic basis to protect the individual from harm and also to protect others: see Maria (ET) v Clinical Director of the Central Mental Hospital [2010] IEHC 378, at [24].
473 1996 (2) SA 751 (CC), at [77]. Limitations on the right to privacy were justifiable in Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd 2001 (1) SA 545 (CC), S v Jordan 2002 (6) SA 642 (CC) and De Reuck v DPP (Witwatersrand Local Division) 2004 (1) SA 406 (CC), but not in Case v Minister of Safety and Security 1996 (3) SA 617 (CC) nor Magajane v Chairperson, North West Gambling Board 2006 (5) SA 250 (CC). As less restrictive means were available to protect privacy and dignity, restrictions on freedom of expression were not justified in Johncom Media Investments Ltd v M [2009] ZACC 5, 2009 (4) SA 7 (CC).
474 See National Media Ltd v Bogoshi 1998 (4) SA 1196 (SCA); Khumalo v Holomisa 2002 (5) SA 401 (CC).
six years later, Costello J modified his views on the courts’ powers, when he found that
Travellers’ constitutional right to bodily integrity was infringed by the appalling conditions
unfit for human habitation under which they were living. Construing the Housing Act 1988
in the light of the constitutional duty towards the plaintiffs and the factual position in which
they found themselves, he concluded:

If statutory powers are given to assist in the realisation of constitutionally
protected rights by a Local Authority and if the powers are given to relieve
from the effects of deprivation of such constitutionally protected rights and
if there are no reasons why such statutory powers should not be exercised
then I must interpret such powers as being mandatory.

Although he considered he could not order that serviced halting sites be provided for
particular plaintiffs or in any particular order, he did grant a mandatory injunction addressed
to the local authority to provide serviced sites at particular locations. However, the
Supreme Court has not qualified its opposition to enforcing socio-economic rights.

Respect for humanity permeates from the civil and political sphere into the socio-economic
realm. Survival *simpliciter* is not enough—living conditions suitable for the maintenance of a
lifestyle conducive to development of a person’s full potential are vital components of a
meaningful existence. This results in rights to education, work, housing, health, and welfare in
an amenable environment. There is also a view that full participation in a democracy and
enjoyment of civil and political rights is only possible when the necessities of life have been
fulfilled. The differences in quality and justiciability between civil and political rights on the
one hand and socio-economic rights on the other have been eroded in recent decades and
they are no longer corralled as strictly as they used to be perceived.

There are several ways in which the Irish Constitution could be interpreted to give proper
effect to the underlying constitutional values. The references to dignity and freedom in the

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I don’t think it is necessary to say whether I am now expressing a different view to the one
which I expressed in the case of *O’Reilly and Ors. v. Limerick Corporation*. ... Even, however, if
the view which I am now expressing represents a change of views on my part then I accept that
my views have changed.

See Hogan and Whyte (n16), at [7.3.220]; Emma Keane, “Public Interest Litigation: Socio-Economic
Interest Law in Ireland* (n22), at 57, 241-242.


479 *ibid*, at 5-7.

480 See Pierre de Vos, “Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights
Preamble deserve to be emphasised more in judgments as indicators of these values which are to be reflected in outcomes. 481

The equality guarantee in Article 40.1 has been under-estimated. The true reach and intent of Walsh J’s views in Quinn’s Supermarket 482 can be gleaned from his assessment in Crotty v An Taoiseach that the promotion of equality and social justice accorded with the constitutional goals of personal dignity and freedom. 483 Because Walsh J found that freedom, equality and social justice were compatible with the Constitution’s aims of the dignity and freedom of the individual, it can be deduced that dignity embraces social justice as well as equality. 484

The unenumerated rights in Article 40.3.1° which the State is enjoined to respect, defend and vindicate, and the obligation on the State in Article 40.3.2° to protect and vindicate the life, person, and property 485 rights of every citizen are sources on which rights to decent living


482 Quinn’s Supermarket v AG [1972] IR 1 (SC).

483 [1987] IESC 4, [1987] IR 713, at 776: The preamble [to the Single European Act] goes on to state that the parties are determined “to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.” So far as the latter aspirations are concerned no objection could be taken to them having regard to the fact that the preamble of the Constitution of Ireland sets out that one of the aims of the Constitution is to safeguard the dignity and freedom of the individual and to assist in establishing concord with other nations.


485 Traditionally there has been a bias towards upholding property rights. In post-colonial societies, when indigenous people wish to preserve their culture and to fulfil their development needs they focus on their affinity with a place and try to affirm their identity by claiming property rights. However, attempting to fit their desires within the contours of property may not express fully what they require to live a dignified life where their heritage and lifestyle preferences are respected. The experience of the San people in Botswana illustrates the futility of establishing rights to land simpliciter. They established their property and gaming rights in the High Court, when it was held in a majority decision that their native title to what became the Central Kalahari Game Reserve had not been extinguished and that the government had wrongfully deprived them of possession of their land, but the Court rejected their claim for restoration of water—the government having terminated their supplies of essential services when they removed them from the Reserve: Sesana v AG [2006] BWHC 129, [2006] 2 BLR 633. See ILO and ACHPR, Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples’ Rights on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries (ILO, Geneva 2009), at 99; K Bojosi (with comments by Alice Mogwe incorporated), Botswana: Constitutional, legislative and administrative provisions concerning indigenous peoples (ILO and ACHPR Country Report on Botswana) (ILO, Geneva 2009), at [8.2.3]; Amelia Cook and Jeremy Sarkin, “Who Is Indigenous?: Indigenous Rights Globally, in Africa, and among the San in Botswana” (2009) 18 Tul J Int'l & Comp L 93, at 121, fn 200, 129; Robert K Hitchcock, Maria Sapignoli and Wayne A Babchuk, “What about our rights? Settlements, subsistence and livelihood
The right to fair procedures can ensure that benefits already granted cannot be removed without due notice. The prior right to be heard protects against arbitrary deprivation of existing entitlements.

Although the definition of the family in Article 41.1 has been interpreted to apply only to the marital grouping, it can—even within its restricted range—place positive obligations on the State to provide tangible benefits to enable family members to thrive. Economic support to facilitate women working outside the home as well as undertaking duties as a home-maker are warranted by Article 41.2. The State has a pledge to guard marriage under Article 41.3.1° and presumably this extends to tangible measures.

As education rights in Article 42 are clearly justiciable, one might expect that there would be no hesitation by the judiciary in enforcing individual claims in this area on the grounds of the

security among Central Kalahari San and Bakgalagadi” (2011) 15 Intl J Human Rights 62, at 62, 66, 80; Sidsel Saugestad, “Impact of international mechanisms on indigenous rights in Botswana” (2011) 15 Intl J Human Rights 37, at 40-50; Julie J Taylor, “Celebrating San victory too soon? Reflections on the outcome of the Central Kalahari Game Reserve case” (2007) 23(5) Anthropology Today 3. Subsequently residents in the Reserve brought proceedings, which were successful on appeal, for the right to sink boreholes themselves for water: Mosetlhanyane v AG (BwCA 27 January 2011). The Court held in favour of the applicants on statutory and on constitutional grounds. The constitutional prohibition on inhuman or degrading treatment was an absolute and unqualified right, which involved the Court making a value judgment, in the exercise of which it was entitled to have regard to international consensus on the importance of access to water: ibid, at [19], referring to Constitution of the Republic of Botswana 1966, Section 7(1). On that basis, the Court referred to two documents—first, a UN Committee report of 2003 on the implementation of the International Covenant on Economic, Social and Cultural Rights which stated that the human right to water was indispensable for leading a life in human dignity; and, second, to the recognition by the UN General Assembly in July 2010 of the right to water, when it called on states to ensure full transparency of the planning and implementation process in the provision of safe drinking water and sanitation and the active, free and meaningful participation of local communities and stakeholders: ibid, citing International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

The social and economic benefits necessary to support a life going further than mere existence to the full flourishing of a human being cannot be obtained easily (or at all) through the property lens. The concerns of vulnerable and marginalised indigenous groups can be addressed best by a multi-pronged approach embracing socio-economic rights, cultural and ethnic identity, and property interests, while having due regard to their right to participate in determining their future: see ILO and ACHPR, Overview Report, supra, at v, ix, 123.


separation of powers. Nevertheless, there is a reticence to grant mandatory orders directed to the State to fulfil its constitutional role.

Like in India, the directive principles of social policy in Article 45 can be used by the judiciary at the very least as an interpretative aid to ascertain the existence of an unenumerated right under Article 40.3.1°. They could also be referenced to interpret statutory law.

The judiciary's fear of over-stepping the constitutional boundary and breaching the separation of powers is too cautious. The South African Constitutional Court is an example of a court fulfilling its role of protecting and enforcing constitutional rights without usurping the functions of the legislature or the executive. It has gradually become more confident in asserting itself as a defender of human rights, while simultaneously involving the other arms of government in matters properly within the ambit of political decision-making. It has left the minutiae of welfare plans to the politicians and the administrative authorities, while encouraging engagement with the people affected and showing a preference for resolution between the parties by direct negotiation or a mediated settlement. The democratic principles of transparency and accountability are applied to the executive, which the Court

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488 Gerard Hogan, “Judicial Review and Socio-economic Rights” 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 12. Brian Foley has argued that judicial deference is not defensible when constitutionality is presumed and hypothetical assumptions are made about legislative constitutional decision-making: Brian Foley, Deference and the Presumption of Constitutionality (Institute of Public Administration, Dublin 2008), at 356. He proposed substituting instead what he termed “due deference” to be extended only if the legislature justifies its answer to the constitutional question under examination, the state bearing the burden of laying this justification before the court: ibid. Tim Murphy concluded that the reason why economic rights are not afforded constitutional recognition in Ireland is because the state and its institutions (including the judiciary and virtually all political parties) are committed to a form of liberal-capitalist economic system which tacitly incorporates inequalities and poverty: Tim Murphy, “Economic Inequality and the Constitution” in Tim Murphy and Patrick Twomey eds, Ireland’s Evolving Constitution, 1937-1997: Collected Essays (Hart, Oxford 1998), at 179. On the legitimacy of judicial activism promoting social inclusion, see Gerry Whyte, “Socio-economic Rights and the Irish Constitution” in Ann Lavan ed, Social Rights and Social Cohesion (Department of Social and Family Affairs, Dublin 2003), at 60-64.


490 On the importance of establishing the state’s legal (as opposed to ethical or political) accountability,
has called to justify its decisions and actions with evidence produced from proper records. Times and circumstances change, so flexibility in policies and plans is not only permitted, but is a necessary ingredient. Good faith is a pre-requisite for state involvement in the solution to conflicts arising—the Constitutional Court has not hesitated to grant mandatory orders and to exercise supervisory jurisdiction when it doubts the *bona fides* of the government. In this it is fulfilling its constitutional mandate. By doing less it would fail to carry out its proper function.

A similar argument applies to the Irish judiciary. The South African judiciary's development of a system of judicial review applicable to social rights can be a model for the Irish judges, as it takes into account the fears that the courts could exceed the constitutional mandate to respect the separation of powers by over-reaching into the political arena and usurping the roles of the other arms of government in a democracy. There are sufficient constraints in place to ensure that the democratic boundaries are left in place, while the judiciary fulfils its proper role under the separation of powers. The reticence of the Irish judiciary to do so could be overcome by adopting a reasonableness standard in a context-sensitive review in relation to social rights. This approach would give the courts greater flexibility to manage their relationship with the political branches of government. It would avoid laying down strict rules, which might jeopardise that relationship.


491 Even though the Constitutional Court accepted the government's *bona fides*, it ordered that a decision be taken on whether to upgrade an informal settlement within 14 months: *Nokotyana v Ekurhuleni Metropolitan Municipality* [2009] ZACC 33, 2010 (4) BCLR 312.

492 Judicial review is the principal method of protecting constitutional rights when there may be scepticism about the capacity of ordinary politics (especially during stressful times) adequately to do so or when a margin of additional protection is considered desirable: Michael J Perry, *The Constitution in the Courts: Law or Politics?* (OUP, New York 1994), at 19-21, 209 fn 16.

493 The South African courts' role in taking seriously the adverse effects of policy on the poor is less dependent on specific clauses in the Constitution than on broader jurisprudential considerations that can alter existing legal concepts: Dennis M Davis “Socioeconomic rights: Do they deliver the goods?” (2008) 6 ICON 687, at 708. 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 577.


The South African example in applying constitutional principles to relationships between private parties could also be followed by the Irish courts. The seeds for finding that social and economic rights have horizontal effect in tort law have already been sown and could be nurtured to vindicate constitutional rights.\footnote{See Binchy (n486), at 11-13.}

The plight of Travellers\footnote{See Whyte, \textit{Social Inclusion and the Legal System: Public Interest Law in Ireland} (n22), at 218-219.} has received sympathy in Ireland, but frequently it has simply been a nominal sympathy that has not been translated into concrete improvements in their living conditions or into the removal of prejudice against them. They fall into the category of a vulnerable minority group, which has been the object of historic discrimination. The incorporation of the ECHR into Irish law has had a favourable—albeit limited—impact on their situation. Laffoy J held in the High Court in \textit{O'Donnell (a minor) v South Dublin County Council} that the right of a Traveller family with three severely disabled members to respect for their private and family life, and their home in Article 8 ECHR was breached by having to live with the knowledge of the local authority in severely overcrowded conditions in a mobile home.\footnote{[2001] IESC 101, [2001] 4 IR 259. See Doyle, \textit{Constitutional Law: Text, Cases and Materials} (n14), at [4-53]—[4-54], [13-19]—[13-52]; Foley (n488), at 196-204; Mullally (n83), at 301-303; Whyte, \textit{Social Inclusion and the Legal System: Public Interest Law in Ireland} (n22), at 358-362. The conclusions of Denham J (in dissent) in \textit{TD} imported a reasonableness criterion analogous to that in South Africa: Langwallner (n498), at 272.} However, the Irish Constitution could have produced the same result, if the personal rights enshrined in it had been given a purposive meaning. The Supreme Court's view in \textit{TD v Minister for Education} that the courts had no role in interfering with the role of the Oireachtas on the allocation of resources and its admonition to exercise restraint in finding any more unenumerated rights (particularly of a socio-economic nature) in Article 40.3.1º constrained Laffoy J in \textit{O'Donnell.}

The Traveller status of the family was not relevant in \textit{O'Donnell.}\footnote{Laffoy J was careful to make it clear that she was not finding that the State had a positive obligation to make provision for every Traveller family, but the case was about the particular circumstances of one family, which had three severely disabled members, who were acknowledged by the housing authority to have been living in unacceptable conditions for two years and whose plight was not going to be alleviated for more than another year.} Laffoy J distinguished \textit{Doherty v South Dublin County Council}, in which Charleton J held that an elderly homeless
Traveller couple living in an unsuitable damp caravan without toilet facilities were not entitled to have a plumbed centrally heated mobile home with an electricity supply provided for them when they opted for halting site accommodation and refused a reasonable offer of standard housing in an apartment pending the provision of a permanent place for them in a new residential caravan park.\(^{501}\) Charleton J accepted as authoritative Barron J’s judgment in University of Limerick v Ryan\(^{502}\) that the courts had a role to play in ensuring that the housing authority fulfilled its statutory duty, which involved not only an assessment of the housing needs of all (the Traveller and settled communities alike), but acting upon it.\(^{503}\)

In Doherty Charleton J differentiated between positive and negative obligations under the Constitution—the state guarantee in Article 40.3 being “a promise never to infringe a right” fell within the latter category.\(^{504}\) When it came to positive action to defend and vindicate the personal rights of the citizen, the text of the Constitution limited the State’s duty to doing as much as was practicable.\(^{505}\) Charleton J concluded that the obligation to take into account the sensitivities of various communities, including Travellers, when interpreting administrative measures was not unlimited and, following the decision of the European Court of Human Rights in Chapman v UK, he held that a nomadic lifestyle did not give rise to an automatic duty on states to intervene in favour of preserving this way of life under the ECHR.\(^{506}\) The European Court of Human Rights in Chapman was reluctant to become embroiled in policy matters which it adjudged were properly the preserve of the politicians.\(^{507}\) The same reticence is

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\(^{501}\) Doherty v South Dublin County Council (No 2) [2007] IEHC 4, [2007] 2 IR 696. See de Londras and Kelly (n498), at [4-41], [5-31].

\(^{502}\) University of Limerick v Ryan 21 February 1991 (HC).

\(^{503}\) [2007] IEHC 4, [2007] 2 IR 696, at [29]. He cited two cases, where orders were made that serviced halting sites should be provided by housing authorities within twelve months: ibid, citing O’Brien v Wicklow Urban District Council 10 June 1994 (HC), County Meath VEC v Joyce [1997] 3 IR 402 (HC).

\(^{504}\) [2007] IEHC 4, [2007] 2 IR 696, at [36].

\(^{505}\) Ibid. In certain circumstances, the State might have an obligation to intercede consistent with its financial and administrative commitments; Charlton J observed that a similar problem arose in relation to the ECHR, as there was no positive requirement to act to uphold private and family life in Article 8: ibid. Although he noted Costello J’s remarks in O’Brien v Wicklow Urban District Council that conditions which were “totally unacceptable in a Christian community and which could be relieved if the statutory powers of a local authority were exercised and without any great expense” could give rise to an obligation to intervene, the present case did not pass that threshold: ibid, at [39]. He stated, “I would find it impossible to apply the tests of culpability and of inhuman treatment where a number of offers of housing have been made, and where the best form of halting site accommodation is to be made available to the applicants within eighteen months.”: ibid, at [40].


\(^{507}\) (App no 27238/95) (2001) 33 EHRR 18, at [99]. The Court only went so far as to say it was “clearly desirable” that every human being should have “a place where he or she can live in dignity and which he or she can call home”, but it recalled that Article 8 did not give a right to be provided with a home and
evident in the Irish courts and can be seen in Charleton J's judgment, which sets a high bar to be overcome before judicial action is warranted.508

Three deficiencies in Charleton J's judgment are worth mentioning. First, although he rightly concluded that the Court in Chapman did not say that states had an automatic duty to intervene to preserve a nomadic lifestyle, he did not give sufficient weight to its finding that the vulnerable position of gypsies as a minority meant that “some special consideration should be given to their needs and their different lifestyle ... in arriving at ... decisions in particular cases” and therefore Article 8 ECHR imposed on states a positive obligation (albeit limited) to facilitate the gypsy way of life.509 Second, he did not refer to the subsequent decision of the European Court of Human Rights in Connors v UK which repeated that this positive obligation existed and strengthened it by finding that the states' margin of appreciation will tend to be narrower where the right at stake is crucial to “the individual's effective enjoyment of intimate or key rights.”510 Third, he did not consider the fact that life in a caravan was part of the Travellers' identity and that what was in contention was more than their home, but an integral part of their way of being.511

neither did any of the jurisprudence of the Court acknowledge such a right: ibid, at [99]. See Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties (OUP, Oxford 2008), at 204; Kenna (n498), at [6.34]; Colm O’Cinneide, “Equality, Irish Law and the ECHR” in Kilkelly (n272), at [3.30].

[2007] I EHC 4, [2007] 2 IR 696, at [46]:

I would add that the decisions to date show a reluctance to require state authorities to intervene with forms of welfare as an aid to the exercise of rights. Whether welfare is provided, and at what level, and in what particular circumstances, is essentially a matter of political decision. The discourse of politics in this area tends to move between the poles of urging self reliance and of offering cradle to grave support. Like a family, the resources of any nation are limited and it is a matter for political and executive decision as to what resources should be committed to what problems and with what priority. A breach of legislation prescribing such an allocation, as in housing, calls for judicial intervention. Where, however, a plea is made that the court should declare the absence of welfare support to be wrong in a particular situation of itself, the applicant should show a complete inability to exercise a human right for his or her own means and a serious situation that has set the right at nought with the prospect of serious long term harm. Any proposed intervention by the court should take into account that it is the responsibility of the legislature and executive to decide the allocation of resources and the priorities applied by them.

508 (App no 27238/95) (2001) 33 EHRR 18, at [96].

510 The Court in Connors was of opinion that a serious interference with rights under Article 8 required “particularly weighty reasons of public interest by way of justification and the margin of appreciation to be afforded to the national authorities must be regarded as correspondingly narrowed”: ibid, at [86]. On Connors, see Sandland (n506), at 493-496.

511 The European Court of Human Rights in Chapman categorised the applicant's occupation of her caravan as "an integral part of her ethnic identity as a gypsy, reflecting the long tradition of that minority of following a travelling lifestyle": (App no 27238/95) (2001) 33 EHRR 18, at [73].

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The criminalisation of trespass in 2002\(^\text{512}\) was directed at travellers. This has resonances of a similar provision in the apartheid era's Prevention of Illegal Squatting Act 1951.\(^\text{513}\) Next I will look at the case law in this area and compare the legal position in both jurisdictions.

In *McDonagh v Kilkenny County Council* members of the Travelling community refused to comply with notices served by the police directing them to leave lands owned by the Council and to remove their caravans.\(^\text{514}\) They were charged then with the offence of failing to comply with the directions.\(^\text{515}\) In addition to attacking the criminalisation provisions,\(^\text{516}\) the Travellers sought to compel the housing authority to give them priority in the provision of accommodation and, in the meantime, to consent to them remaining on the land they were occupying. Their action failed *in toto*. O'Neill J held that Kilkenny County Council had considered their housing application, which it had rightly refused based on the material presented to it. Because it was uncontested that Kilkenny County Council owned the property onto which the Travellers had moved with their caravans without the Council's consent, they were undoubtedly trespassers and in breach of the Council's rights.\(^\text{517}\) Although O'Neill J referred to jurisprudence of the European Court of Human Rights, he did not use it to inform his decision. Neither did he review critically the stance of the housing authority to the Travellers' application for accommodation, which was rejected on procedural grounds. Their failure to obtain housing resulted in them being rendered illegal by trespassing because they had nowhere to go.\(^\text{518}\) The nomadic lifestyle as a legitimate aspect of their identity central to their humanity and dignity was not recognised. The situation was akin to that found in

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\(^\text{513}\) See *Jaftha v Schoeman* 2005 (2) SA 140 (CC), at [27]; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), at [8]-[10].


\(^\text{515}\) The notices were served under section 19C Criminal Justice (Public Order) Act 1994, as amended by section 24 Housing (Miscellaneous Provisions) Act 2002, which criminalised trespass.

\(^\text{516}\) Criminal Justice (Public Order) Act 1994 section 19D.

\(^\text{517}\) The constitutional right to protection for their dwelling did not permit them to invade land and establish their dwelling on it. Just because they were disgruntled with the outcome of their application for accommodation did not mean they could take the law into their own hands. Neither could they use the defence of necessity as justification for illegal entry.

\(^\text{518}\) There was a minimum residence requirement for inclusion in the Traveller Accommodation Programme, but the problem these Travellers faced was that they had no place where they could reside legally in the area to qualify.
In December 2008 Peart J also rejected the defence of necessity in *Dublin City Council v Gavin* when the plaintiff sought an injunction to remove Travellers who were trespassing with about 30 caravans on the Council’s lands. Even though he found against the Travellers, he adjourned the question of what order the Court should make until the Council had a site ready for occupation by the Gavins. He pointed out that common sense suggested that consultations should take place between the parties to try to resolve the issues in contention. Within a year the Council returned to Court to seek an injunction against the Gavins, as it had a site available for them. Despite the “minimalist approach” taken by the Council to address the Gavins’ legitimate concerns about safety at the site proposed for them, Peart J granted the injunction with a stay for three months and hoped again that meaningful discussions would take place. The Council had complied with its duties to prepare a Traveller Accommodation Programme.

There are some common features in South Africa and Ireland—in both countries there is an obligation on the state to develop a housing plan and to keep it under review; in neither jurisdiction does an individual have an immediate right to a home. However, the South African judiciary has developed a more innovative and effective approach to solving conflicts between the homeless and property owners (whether private or the state). It places responsibility on the state to act positively to reconcile interests and to achieve social cohesion. The courts consider the effect on human dignity of being homeless. Steps taken to address homelessness and to protect property-owners’ rights are measured against human rights standards where dignity is to the fore. Everyone has the right to be treated with

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519 (App no 66746/01) (2005) 40 EHRR 9, at [94]:

It would rather appear that the situation in England as it has developed, for which the authorities must take some responsibility, places considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle while at the same time excluding from procedural protection those who decide to take up a more settled lifestyle.

520 *Dublin City Council v Gavin* [2008] IEHC 444. Because they feared for their safety on account of bad relationships with other Travellers with whom they were in dispute, the extended Gavin family did not engage with the Council who had identified what it regarded as a site suitable for their accommodation needs. Necessity did not justify an “uncontrolled and uncontrollable regime” in which people could enter another’s land and claim a right to remain until they were re-housed. The defence of necessity in emergency situations could only be invoked when the interests that were being protected were those of the property owner—not the interests of the trespasser.

521 *Dublin City Council v Gavin* [2009] IEHC 477. He urged “a fresh, imaginative and realistic approach” to dealing with an otherwise intractable enduring problem.


523 On the positive duties that ensue when human rights values are articulated in assessing the right to
respect for dignity. Property owners’ rights are not given priority over other rights—unlike the position in Ireland.® The yardstick of reasonableness is used to balance rights. The most vulnerable are protected to a much greater extent. The courts have not been content simply to exhort the parties to consult® with each other in an effort to reach a mutually acceptable solution, but have exercised judicial management® in a dynamic fashion monitoring progress to relieve inhuman conditions, taking steps to ensure that meaningful engagement actually takes place® and requiring all involved to take responsibility to act so as to achieve a resolution that respects the rights of others and advances harmony in the community.

The principles in ubuntu of respect for dignity while living in a shared society have been influential in shaping the solutions reached. The effect of not protecting the human dignity of the vulnerable impacts on the dignity of all in society and not solely on the people directly involved. The South African judges have enhanced the democratic value of equality by holding the other branches of the state accountable for fulfilling their constitutional duties. They have engaged all parties in that process to work together to devise and implement housing programmes that satisfy the needs of the vulnerable and the demands of social solidarity insofar as is reasonably possible. The state is obliged to provide an effective remedy as required by the rule of law.

The new constitutional order in South Africa prevents the branding of unlawful occupiers of buildings as criminals without a court order having first been obtained. In Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg, the Constitutional Court ordered the reading into legislation of a proviso that a crime was only committed when those who had been served with a court order for eviction failed to obey it.® In Ireland the constitutional rights to fair procedures based on Articles 34 and 40.3.1° and to liberty in Article 40.4.1° could ground a challenge to the trespass crime.

housing, see Fredman (n507), at 204-206.

524 See Mullally (n83), at 294, 295; Blake v AG [1982] IR 117 (HC, SC). However, property owners’ rights ceded to the common good in AG v Southern Industrial Trust Ltd [1960] 94 ILTR 161 (HC, SC).

525 On the key elements necessary to have a consultative process that fosters participation and deliberative democracy, see Fredman (n507), at 210-211.

526 On the need for the court to engage in judicial management, see Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC), at [36].

527 See Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg 2008 (3) SA 208 (CC), at [16]-[18]; Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 (3) SA 454 (CC), at [7].

528 President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC), at [51]. On Modderklip, see Fredman (n507), at 210.

529 2008 (3) SA 208, at [51].

530 These provisions were the basis of Laffoy J’s finding that legislation permitting imprisonment for debt
The international instruments having a bearing on socio-economic rights which have been ratified by Ireland are a ready and fertile source of guidance for the Irish courts when assessing claims for improvements in living conditions. The Irish courts have not availed themselves of their assistance—unlike their South African counterparts.

7.10 Equality

7.10.1 Substantive equality?

Walsh J’s profound statement linking equality with human dignity in Quinn’s Supermarket v AG was utilised in subsequent cases to restrict the ambit of the equality guarantee from applying to situations where the individual was involved in activities. It could have been interpreted in an expansive manner to deliver substantive equality. In Murtagh Properties v Cleary the trade union did not maintain that women were incapable of bar waitressing or inadequate as such, which gave Kenny J the latitude to hold that Article 40.1 did not apply, as it related to peoples’ “essential attributes as persons, those features which make them human beings” and had “nothing to do with their trading activities or with the conditions on which they are employed”. This viewpoint is wrong, as the antagonism towards women was based on their attributes as persons and not on their working capacity. Their female gender was innate and incapable of change. A positive aspect of the decision was Kenny J’s reliance on the Directive Principles of Social Policy in Article 45 to aid his interpretation of Article 40.1 was unconstitutional in McCann v Judge of Monaghan District Court [2009] IEHC 276. The fact that a country is a signatory to international or regional human rights treaty containing social rights may be a sufficient basis to ground judicial authority in those areas, given that asserting judicial authority may ultimately rely on individual and institutional judicial choices (rather than constitutional entrenchment): Lisa Forman, “Ensuring Reasonable Health: Health Rights, the Judiciary, the South African HIV/AIDS Policy” (2005) 33 Jl Med & Ethics 711, at 720.


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The statement in the former that all men and women have equal rights to an adequate means of livelihood was key to his finding that all people (women as well as men) had a right to earn a livelihood under Article 40.3.\footnote{[1972] IR 330 (HC), at 335-336. See Andrew S Butler, “Private Litigation and Constitutional Rights under Sections 8 and 9 of the 1996 Constitution—Assistance from Ireland” (1999) 116 SAU 77, at 92.}

Gerard Hogan and Gerry Whyte consider that the judiciary has not fleshed out the constitutional guarantee of equality.\footnote{Hogan and Whyte, (n 16), at [7.2.05] (footnotes omitted):} They saw signs of judicial re-appraisal of the restrictive version of the human personality doctrine, but speculated that the constitutional guarantee could be bypassed in favour of domestic and European legislation on equality.\footnote{Ibid, at [7.2.06].}

The scope for substantive rather than formal equality is greatly enhanced by aligning it with dignity. Human dignity evolves in meaning with a social process concerned with dynamic patterns of human expectation and interaction.\footnote{Jordan J Paust, “Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content” (1984) 27 Howard LJ 145, at 147.} Substantive equality operating by equal worth, as in South Africa, may demand different treatment to respect specific needs.\footnote{Joan Small and Evadne Grant, “Dignity, Discrimination, and Context: New Directions In South African and Canadian Human Rights Law” (2005) 6(2) Human Rights Rev 25, at 52.} This requires a contextual enquiry supported by a structure—not simply an outcome based on the subjective opinion of a judge.\footnote{Ibid, at 54-55.}

Anti-discrimination laws provide effective redress leading to structural change when they are interpreted in the light of their effect on human dignity. There are circumstances when the constitutional equality guarantee and the precept to respect human dignity have horizontal

\footnote{In contrast to comparative and international jurisprudence, jurisprudence on the guarantee of equality in the Irish Constitution is remarkably underdeveloped. To date, the debate about the differing conceptions of equality has, to a large extent, passed Article 40.1 by; Irish judges have also yet to consider whether that provision embraces the concept of indirect discrimination. ... during much of its history, Article 40.1 was effectively sidelined by a restrictive judicial interpretation of the human personality doctrine and during the heyday of judicial activism that commenced in the 1960s, the judiciary showed a marked preference for other constitutional provisions, notably Article 40.3, over Article 40.1 as a basis for their decisions.}
application, thereby affecting relationships between private individuals. Non-discrimination against vulnerable groups such as Travellers, homosexuals, migrants and asylum seekers could be addressed in a deeper way in Ireland by a focus on dignity and the real import of Article 40.1 of the Constitution. In Ireland the equality guarantee in the Constitution has been sidelined for too long and is ripe for development.

7.10.2 Public recognition

Freedom to associate with friends or colleagues of one's choice is a critical part of identity. It is undesirable, even if it were possible, to force men to allow women to become full members of all private clubs. Nevertheless, the common good demands that any public benefit or recognition be denied clubs restricted to men—the traditionally dominant sex. Therefore all clubs where alcohol is licensed to be sold should be open to both sexes—and, indeed, to members of all minority groups.

What are the contours of the concept of public benefit and recognition of clubs? The most widely known advantage of registered clubs is the entitlement to sell alcoholic drinks. In an exception to the norm, only a registered club devoted primarily to athletics can admit persons under 18 as members. A registered club may hold functions for its own benefit, and public functions for community, charitable or benevolent purposes. If it wishes to hold a lottery for members, a club does not need to seek a permit. Exemption from income tax is a benefit that a club established to promote athletics or amateur games or sports may claim. From the foregoing listing, it is clear that there are many advantages that accrue to clubs.

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543 See Butler, (n535), at 92.
544 Registration takes place following a successful court application pursuant to the Registration of Clubs Acts 1904-2004: Dermot McNamara, A Legal Guide for Clubs and Associations (First Law, Dublin 2005), at 25.
545 Sales are generally restricted to members and their guests on the club premises: ibid. See also ibid, at 39-40. Although not usually utilised by clubs, they may also operate an "off-licence" for members only: ibid, at 40-41. Subject to complying with the licensing laws, they can avail themselves of other privileges such as obtaining a permit to have a club extension when alcohol may be sold to members after the hours normally permitted: ibid, at 41. A sports club may be allowed to serve alcohol once a year to the general public attending a special event in its premises or grounds: Intoxicating Liquor Act 1962 section 14. See Constance Cassidy, Cassidy on the Licensing Acts (3rd edn Clarus Press, Dublin 2010), at [14-36]; McNamara (n544), at 42-43.
546 Registration of Clubs (Ireland) Act 1904 section 4, as amended by Intoxicating Liquor Act 1988 section 42.
547 Intoxicating Liquor Act 2000 section 29(1).
548 ibid section 29(2)(a). A registered club can organise weddings or other functions for a member or a member's family: ibid section 29(2)(b). See McNamara (n544), at 43.
549 Gaming and Lotteries Act 1956 section 23. See McNamara (n544), at 60.
addition to prohibiting the sale of alcohol by discriminating clubs, there is scope for further restrictions to be applied to them. However, given the difficult task of achieving a harmonious interpretation of the constitutional rights to freedom of association\(^551\) and to equality in these circumstances, a balance between them is required taking into account the common good and the freedom of the individual. The Constitution allows the regulation and control in the public interest of the exercise of the right to associate.\(^552\) Respect for human dignity and the aim of encouraging all to achieve their full potential should tilt the balance in favour of the restrictions.

The limitations proposed would be a significant sanction on a club. An objection might be made that it would be unfair to impose a penalty solely on the grounds of discrimination in the absence of a breach of the licensing or criminal laws, as was canvassed in the Supreme Court in *Equality Authority v Portmarnock Golf Club*.\(^553\) The decision in that case was based on an interpretation of the statute, so it did not resolve the constitutional issue. In his comments, which we can regard therefore as *obiter dicta*, Hardiman J criticised the penalisation of a discriminating club by targeting a legitimate activity.\(^554\) In view of the attenuation of the scope for achieving equality, a legislative amendment is desirable to preclude the narrow interpretation of the exemption for discriminating clubs in the Equal Status Act\(^555\) adopted by

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\(^{551}\) Constitution of Ireland 1937, Article 40.6.1°(iii).

\(^{552}\) Ibid.


\(^{554}\) [2009] IESC 73, [2010] 1 ILRM 237, at 269: The first oddity about this particular sanction is that it is imposed without any necessity to establish a breach of rule or law and indeed none is alleged. An ordinary licence to sell alcoholic drink can be lost for repeated breaches of the licensing law or on objection on the grounds of bad character. Nothing of the sort is alleged here nor is any irregularity whatsoever concerning the club’s making alcoholic drinks available.

He went on to find fault with the wording of the particular statute in dispute, stating, “there is a rule of law, and a canon of statutory interpretation, prohibiting doubtful penalisation *i.e.* the imposition of a penalty by language which is less than clear.”: *Ibid.* Geoghegan J was forthright in his condemnation of the method adopted by the legislature in the Equal Status Act 2000, *ibid*, at 280:

The method by which the Oireachtas has chosen to encourage (and in reality to force) “discriminating clubs” to abandon the “discrimination” is not merely unusual but quite extraordinary. The sanction is the future prohibition on the sale of intoxicating liquor even though that trade had nothing whatsoever to do with any alleged “discrimination”. Furthermore, the effect of the provision is that ... the “discriminating” club may continue forever “discriminating” if it is satisfied to lose its club registration and, therefore, the authority to sell liquor. ... [*]he Act provides for the unusual indirect means of enforcement in relation to “discrimination” within the internal arrangements of a club.

\(^{555}\) Equal Status Act 2000 section 9(1)(a). On the definition of a “discriminating club” and the legal consequences of being determined as such, see Cassidy (n545), at [14-24], [35-12]–[35-14].
O'Higgins J in the High Court and by the majority in the Supreme Court. The minority interpretation by Denham and Fennelly JJ is to be preferred.

In South Africa a stronger positive stance has been taken in the Promotion of Equality and Prevention of Unfair Discrimination Act 2000. There is a “duty and responsibility” on “all persons” (not just on the State) to promote equality. Ministerial regulations are mandated to require, *inter alia*, clubs and sports organisations to prepare equality plans, abide by prescribed codes of practice, or report on measures to promote equality. Race, gender and disability are singled out as particular targets for the promotion of equality. Clubs and sports associations are among the sectors included in an illustrative list where widespread unfair practices need to be addressed.

7.10.3 Contractual freedom

Autonomy as an aspect of human dignity is the foundation of the basic principle of freedom of contract. Individuals can reason and choose their route in life. They are viewed as having the capacity to take responsibility to judge and evaluate their ends and needs in the light of what is reasonable and fair in their own circumstances, and to act on this assessment. Another principle is that the parties to a contract are equals and can bargain with each other in good faith to reach a mutually acceptable agreement on terms. The dignity that is inherent in every person is also at the root of equality. Mutual respect is the associative side of dignity. A third feature is the public interest in certainty, which inspires confidence in the market place and supports the sanctity of contract.

But where deeply personal issues are concerned, contractual freedom may have to cede to society's interest in protecting the dignity of humanity. Profound moral questions are raised

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558 *Ibid* section 27(2).
560 *Ibid* section 29.
561 Brownsword (n415), at 183.
563 Brownsword (n415), at 188.
564 See Barkhuizen v Napier 2007 (5) SA 323 (CC), at [140] (Sachs J in dissent).
when an individual wishes to treat their body as a marketable commodity. Only things—not people—can be bought and sold. The Kantian command inhibiting the treatment of a person as an object prevents the marketing of body parts. It has also stopped dwarf-throwing contests and is relevant to contracts concerning the use of embryos, surrogacy and body parts. The responsibility to recognise the equal standing of others should avoid a contract to discriminate against others or imposing such an obligation on another. In Horwood v Millar’s Timber and Trading Co Ltd all three judges were united in their outright opposition to the constraints placed on a borrower in a contract under which he assigned to the lender all his earnings and covenanted that he would not leave his employment without the latter’s consent.

Sometimes autonomy and equality are absent or diminished by the imbalance of power between the bargaining sides. The apparent freedom to choose may be illusory. An assessment of the effects of the contract on the dignity and equality of the parties to it might show that one party had no real choice whether to enter into the agreement in the first place or to negotiate the terms. Unfair conditions may be oppressive. Even though there is a reluctance to interfere with contracts, they have been eroded in some circumstances when they have been deemed unreasonable. In her comparative study of fundamental rights application in contract cases, Chantal Mak found a preoccupation with the equilibrium of contractual relationships. Despite the fact that systemic bias and the effects of systemic

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566 Brownsworth (n415), at 192.
568 Benson (n562), at 224-225. A contract of self-enslavement or one that severely limits a person’s ability to participate in economic and social life or to fulfil familial or political responsibilities is void ab initio by policy: ibid, at 224.
569 [1917] 1 KB 305 (CA). The Court held that the contract was bad as being contrary to public policy, since it unduly and improperly fettered the borrower’s liberty of action. Lord Cozens-Hardy MR equated the situation to slavery, ibid, at 312:

[...]

[i]t certainly seems to me to savour of serfdom to say “You shall not leave the house in which you are living without my consent; you shall not dispose of a chair or a table in your house on which I have no charge without my consent, and if you do the whole amount of principal and interest will immediately become payable instead of being payable by instalments.”

Warrington LJ stated, “[t]he man has put himself ... almost body and soul in the power of this money-lender.”: ibid, at 314. Scrutton LJ was not using “overstrained or poetical language” by depicting the unfortunate man as “the slave of the money-lender”: ibid, at 317. The terms of the contract went far further than was reasonably necessary to protect the moneylender and were dangerous to the interests of the public: ibid, at 318.
570 Chantal Mak, Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England
exclusion prevail in social relations, recognition of the other as equal informs the contract, and
the law's task is to ensure that inequalities do not translate into legal realities.\textsuperscript{571}

In Germany this has resulted in the judicial scrutiny of contracts between banks and
individuals.\textsuperscript{572} The courts there have paid particular attention to contracts of suretyship
entered into by close relatives of the main debtor.\textsuperscript{573} Children have a right not to be subjected
to a loan guarantee that was part of a contract between a bank and their parents, if it was
given simply to comply with the bank's policy to gain as much loan security as possible, even
from people who neither profit from the loan nor know whether they will ever be able to
guarantee it, and where it is most likely that the parent-child hierarchy was influential.\textsuperscript{574}
Social inequality as well as respect for and recognition of the individual inform an assessment
of liberty.\textsuperscript{575}

The Irish courts may set aside a contract entered into under duress\textsuperscript{576} or undue influence.\textsuperscript{577}
They also have equitable jurisdiction to intervene in unconscionable bargains.\textsuperscript{578} This power

\textsuperscript{571} Susanne Baer, "Dignity, liberty, equality: A fundamental rights triangle of constitutionalism" (2009)
59 UTJ 417, at 450.
\textsuperscript{572} Ibid, citing FCC (Loan guarantee), 1 BvR 567, 1044/89, BVerfGE 89, 214 (19 October 1993). On this
case, see also Mathias Habersack and Reinhard Zimmermann, "Legal Change in a Codified System:
Recent Developments in Germany Suretyship Law" (1999) 3 Edinburgh L Rev 272, at 276-277; Klaus
Heine and Ruth Janal, "Suretyships and Consumer Protection in the European Union through the Glasses
of Law and Economics" in Aurelia Colombi Ciacchi and Stephen Weatherill eds, Regulating Unfair
Banking Practices in Europe: The Case of Personal Suretyships (OUP, Oxford 2010), at [4.2.1]-[4.2.2];
MacQueen (n475), at 376; Peter Rott, "Germany" in Ciacchi and Weatherill supra, at 257-258, 260-261.
\textsuperscript{573} If there is a striking discrepancy between the obligation incurred and the surety's financial potential,
the courts examine closely the surety's motivation and the circumstances in which the contract was
concluded: Habersack and Zimmermann (n572), at 281. The aim is to protect the surety from a lifelong
liability if the guarantee was not given as a result of an act of free self-determination: ibid. For the
agreement to be set aside, an intolerable imbalance must have been created between the contracting
parties because of the impairment of the surety's ability to reach a free and responsible decision: ibid,
at 282.
\textsuperscript{574} Baer (n571), at 450. An unintended result of section 8 of the Married Women's Status Act 1957,
which was enacted in recognition of the family solidarity, is that the beneficiary of a contract where
threats or pressure were involved may not have engaged in the intimidation, and, indeed, might not
even be aware of it. This is because section 8 of the Act provides that when a contract expressly
benefits a third party, who is the spouse or child of one of the contracting parties, the third party can
enforce it.
\textsuperscript{575} Baer (n571), at 450.
\textsuperscript{576} Smelter Corporation of Ireland Ltd v O'Driscoll [1977] IESC 1, [1977] IR 305. See Robert Clark,
Contract Law in Ireland (6th edn Thomson Round Hall, Dublin 2008), at 362.
\textsuperscript{577} O'Flanagan v Ray-Ger Ltd [1983] IEHC 83. See Clark (n576), at 387. The equitable rule of undue
influence is part of a broader general principle of public policy to save people from being victimised by
other people: Paul Anthony McDermott, Contract Law (Butterworths, Dublin 2001), at [14.45].
\textsuperscript{578} Grealish v Murphy [1946] IR 35 (HC). See Clark (n576), at 385, 391, 393, 505. Unconscionable
bargain is concerned with contracts where the stronger party knows that the weaker party labours
has been exercised sparingly and the criteria for intervention have not been considered by the Supreme Court. The concern is with procedural justice. One of the elements to the transaction that the party seeking relief must show in order to succeed is that the weaker party was under a bargaining impairment, as the parties did not meet on equal terms, and was therefore placed at a serious disadvantage. In a commercial loan or when a bank deals with a surety, the abuse of the imbalance in power between the parties where the lender is aware of the vulnerability of the customer is a critical issue. To insist on people taking responsibility for the consequences of their freely-made decisions (even though they may be foolhardy choices) respects their dignity.

The South African courts have accepted the principle that unconscionable, unduly harsh or oppressive contractual provisions could be struck down for being against public policy, but have been slow to allow fundamental rights or values to influence the law of contract in practice.

Anti-discrimination laws interfere with the prerogative not to sell goods or services to the public. They also prevent differentiation in the recruitment and treatment of employees on specified grounds, thereby encroaching on the contract of employment. There is statutory protection for recognised categories of inequality, most notably consumers and employees, and this section will analyse these areas next.

7.10.4 Consumers

It is a myth that the parties in business to consumer commerce are equal. In modern life everyday purchases are made in stores or online where there is no question of the customer negotiating the terms. Consumers have the freedom not to buy and to shop around, but they

under a special disadvantage: McDermott (n577), at [14.148].
579 Máiréad Enright, Principles of Irish Contract Law (Clarus Press, Dublin 2007), at [18-87].
580 Ibid, at [18-86]. The other elements to be shown appear to be that the other party took advantage of that weakness by exploitative conduct, that the transaction was manifestly improvident, and that she did not obtain adequate advice: ibid. Murphy J stated that the availability of “appropriate independent legal advice” would afford a bank a defence, see Bank of Nova Scotia v Hogan [1996] IESC 2, [1996] 3 IR 239, at 249. O’Donovan J considered that in the absence of any actual or constructive knowledge that a co-guarantor was not a free agent, a bank was not under any obligation to ensure she obtained independent legal advice: Ulster Bank Ireland Ltd v Fitzgerald [2001] IEHC 159, at [10]; see Patrick O’Callaghan and Aoife O’Donoghue, “Ireland” in Giacchi and Weatherill (n572), at 344-345.
582 Moseneke (n565), at 10. See also Hugh Corder, “Judicial Activism of a Special Type: South Africa’s Top Courts Since 1994” in Dickson (n82), at 358-359.
will not be able to find an alternative vendor who will treat them as equals and negotiate every term individually with them. The development of mass consumer markets, standard form dealing and carefully crafted exclusion clauses have resulted in the erosion of freedom of contract. To augment the autonomy of the customer, modern law regulates the bargaining process without directly regulating the bargain itself. Where the parties dealt on an informed consent basis and entered freely into the agreement, the sanctity of the contract will be upheld. Accordingly there is much legislation to protect consumers of goods and services by having an obligatory “cooling-off” period, bringing terms to their notice to make them aware of the consequences and prohibiting unfair conditions. Although some exclusionary provisions are declared void, the preference is to subject questionable provisions to a test of reasonableness, which is a check on the integrity of the particular bargaining situation. There is a limit to paternalist intervention to protect parties from the consequences of their own decisions. Dignity can empower people to choose, but it can also be a constraint warranting an examination of the circumstances to see if the parties chose with full knowledge of what they were doing.

Term freedom is modified, first, by regulating contracts that compromise the contractor’s own dignity, and, second, when contracts compromise the community’s vision of respect for human dignity. By adding respect for human dignity to public policy, the community takes control of what is good for contractors and society at large. Partner freedom is constrained by equality laws. The European notion of dignity as having a relational character is closely connected with solidarity and can require private actors performing vital services to take into account the needs of all citizens. Clauses in contracts can be avoided because they fail to align with the right to material conditions that make life worthwhile.

583 Brownsword (n415), at 184. See also Brownsword (n405), at 481.
584 Brownsword (n415), at 186.
585 Ibid.
586 Ibid.
587 Ibid, at 195.
588 Ibid. Public policy cannot be used to dismantle autonomy or human dignity in the name of the community of moral agents: Amnon Reichman, “Property Rights, Public Policy and the Limits of the Power to Discriminate” in Friedmann and Barak-Erez (n415), at 272.
589 Brownsword (n415), at 197.
590 Maria Rosario Marella, “Human Dignity in a Different Light: European Contract Law, Social Dignity and the Retreat of the Welfare State” in Grundmann (n567), at 132, 135, 140.
591 Ibid, at 140. This could happen when limits are placed on a tenant’s right to have her family live with her, as happened in a French case: Ibid, at 141-142, citing Cour de Cassation, 3e Civ, 6 March 1996, Dalloz 1996, 167, annotated by Lamy.
592 Marella (n590), at 142-143.
and the provision of services of general interest like telecommunications, electricity and gas in the era of privatisation might be affected. Non-discriminatory access to credit with fair contractual terms and suitable remedies against over-indebtedness are required to remove barriers to self-development.

The reticence of the South African courts to interfere with consumer contracts is evident from the Supreme Court of Appeal’s decision in *Afrox Healthcare*, when it would not set aside an exemption clause in a standard form contract for patients in a private hospital.

### 7.10.5 Employees

From one perspective, a contract of employment could be looked at as the commodification of a person—the sale and objectification of people has long been condemned as contrary to the most basic human right not to be a slave. Therefore, the labour market is subject to stricter scrutiny. An alternative view is that the employment relationship empowers people to realise their goals and to earn money to enable them to thrive in life. If an individual freely chooses to work in return for payment without duress or coercion, in the modern market economy there is no normative basis for objecting to it in principle. Concern for human

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594 Marella (n590), at 145.

595 *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA). See Corder (n582), at 358; MacQueen (n475), at 379.

The Supreme Court of Appeal also declined to develop the common law by imposing strict liability on a manufacturer in delict for unintended harm caused by defective manufacture of a product (in this case a local anaesthetic called Regibloc Injection): *Wagener v Pharmacare Ltd* [2003] ZASCA 30, [2003] 2 All SA 167 (SCA). The plaintiff alleged that the common law remedy (the Aquilian action for damages) to protect and enforce her right to bodily integrity under Section 12(2) of the Constitution was inadequate: *ibid*, at [9]. The Court found that the Aquilian action was adequate to protect her right to bodily integrity, given that there was scope for incremental development of the approach to *res ipsa loquitur* and to the incidence of the onus of proof: *ibid*, at [38]. Legislation was enacted subsequently providing for strict liability for damage caused by defective goods: Consumer Protection Act 2008 section 61.


597 The Supreme Court of Namibia put it: “unlike a commodity, it [labour] may not be bought or sold on the market without regard to the inseparable connection it has to the rights and human character of the individual who produces it.”: *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia* [2009] NASC 17, at [70], [100]. The African Commission deemed that Mauritania had failed to take effective measures to eradicate the practice of slavery, which it had officially abolished, and found that practices analogous to slavery violated the African Charter: *Malawi African Association v Mauritania* [2000] AHRLR 149 (ACHPR 2000), at [134]-[135]. It emphasised that unremunerated work was “tantamount to a violation of the right to respect for the dignity inherent in the human being”: *ibid*, at [135].

598 Control in the workplace takes place as a matter of institutional organisation rather than personal domination: Rakoff (n596), at 292.
dignity\(^{599}\) can ground intervention to nullify contracts of an exploitative nature, such as human trafficking and prostitution, as well as employment in inhumane conditions for low pay below subsistence level.\(^{600}\)

The freedom to select employees is curtailed by anti-discrimination laws.\(^{601}\) The requirement to respect the dignity of the individual in the way workers are treated is evident in anti-bullying and harassment policies, and is recognised in law.\(^{602}\) Newman J made this clear in *Horkulak v Cantor Fitzgerald International* when he pointed out, "[t]he law has developed so as to recognise an employment contract as engaging obligations in connection with the self esteem and dignity of the employee."\(^{603}\)

Participation in negotiating working conditions is mandated in some circumstances and gives workers a measure of control over their daily activities by eroding somewhat a hierarchical structure.\(^{604}\) As the worker is free to quit, work ceases to be "involuntary servitude."\(^{605}\) Contracts that restrict former employees from setting up in competition or working for other employers are examined for compliance with competition rules and could also be challenged on the basis of dignity. On the latter argument, quitting work is regarded as a positive act encapsulating a human power to start life afresh.\(^{606}\) The denial of the opportunity to do so may be tested for reasonableness taking into account the individual circumstances.

In the *Handelsvertreter* case, a commercial agent employed by a wine company succeeded in his appeal to the German Federal Constitutional Court against an injunction obtained by his former employers based on a non-compete clause in his contract of employment, which stipulated that he would be entitled to no compensation in certain circumstances provided for

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600 Human dignity has been described as "a flexible valve for broad public intervention": Guy Mundlak, "Human Rights and the Employment Relationship: A Look Through the Prism of Juridification" in Friedmann and Barak-Erez (n415), at 311.


602 On workplace bullying, see Yamada (n599), at 562-565.


604 In *RWDSU v Saskatchewan*, Wilson J (dissenting) pointed out that free negotiation was valued because it enabled workers to participate in establishing their own working conditions, and, she continued, "[i]t is an exercise in self-government and enhances the dignity of the worker as a person.": *Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 v Saskatchewan* [1987] 1 SCR 460 (SC of Canada), at [54].

605 Rakoff (n596), at 292.

606 Ibid, at 293.
in the German Commercial Code. The legislator’s rules did not sufficiently protect the agent’s economic basis of existence. The Court alluded to the basic precondition of freedom of contract—there can only be fair and just results if there is an “approximate equilibrium of bargaining power” between the parties.

The South African Constitutional Court acknowledged the disparity in power between workers and employers in the First Certification case, when it discerned that collective bargaining was based on “the recognition of the fact that employers enjoy greater social and economic power than individual workers” and workers therefore needed “to act in concert to provide them collectively with sufficient power to bargain effectively with employers.”

The working relationship is subject to other constraints that may not be spelled out in the contract of employment. It was held in Halford v UK that, in the absence of a warning that calls were liable to interception, an employee could have a reasonable expectation of privacy for telephone calls. There is probably a similar expectation that other forms of secret monitoring will not take place.

7.11 Blasphemy

The prohibition on blasphemy in Article 40.6.1°(i) of the Constitution has become controversial. The right of believers to enjoy freedom of religion does not trump the right of others to be free from religion and to express their beliefs on matters of public importance.
Since dignity is a public value, claims about its meaning cannot be grounded in private beliefs. A referendum to remove the blasphemy provision is warranted.

Accepting that the criminalisation of blasphemy is at present enshrined in the Constitution and was given legislative effect eventually in the Defamation Act 2009, every effort should be made to interpret it in harmony with the rights of all in society. The constitutional rights in contention include the freedom to express convictions and opinions, freedom of conscience and of religion, equality before the law, the parental right and duty to provide for their children’s religious, moral, intellectual and social education, and the personal rights to dignity and privacy. These should be construed in the light of the constitutional values of the dignity and freedom of the individual, while at the same time maintaining social cohesion and promoting democratic participation in a changing society.

As freedom of speech benefits democratic government, enhances the quest for truth and promotes individual self-fulfilment, its limitation is not permitted lightly. The constitutional guarantee relating to it is subject to public order and morality, as is the guarantee concerning freedom of conscience and religion. Although the preservation of

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614 Weinrib (n613), at 185.

615 The Law Reform Commission recommended that it be deleted in any revision of the Constitution: Law Reform Commission, “Report on the Crime of Libel” (LRC 41-1991), at 12, 15. This recommendation was endorsed by an advisory group established by the Minister for Justice, Equality and Law Reform: Legal Advisory Group on Defamation, Report (Dublin, March 2003), at [59].


617 Constitution of Ireland 1937, Article 40.6.1°(i).

618 Ibid Article 44.2.1°.

619 Ibid Article 40.1.

620 Ibid Article 42.1.

621 Unenumerated personal rights: ibid Article 40.3.1°.

622 Relevant also are the ECHR provisions relating to respect for private and family life (Art 8), freedom of thought, conscience and religion (Art 9), and freedom of expression (Art 10): ECHR (n4). Any restriction of these ECHR rights that are necessary in a democratic society must be prescribed by law and proportionate to a legitimate aim. Their exercise is to be secured without discrimination on the grounds of religion, political or other opinion, minority association or other status: ibid Art 14.


625 Constitution of Ireland 1937, Article 40.6.1°.

626 Ibid Article 44.2.1°.
public order is essential to enable all members of society live in peace free from fear and violence with their equal status and dignity in society recognised by the rest of the community.\(^\text{627}\) The rare threat to it is no longer a credible justification for criminalising blasphemy.\(^\text{628}\) There are other means available to provide a non-threatening supportive environment where all may strive to realise their full potential and life ambitions, and where human flourishing and respect for dignity in its broadest meaning can take place.\(^\text{629}\) The strongest argument for prohibiting blasphemy is that it causes injury to feelings in the special sphere of deeply personal religious beliefs.\(^\text{630}\) The concern is for the effect on the targets—not with the right to express moral disapproval of their beliefs.\(^\text{631}\)

I propose to consider whether it is possible to frame a blasphemy offence with a defence that does not compromise dignity. But before doing that, I will outline the legislation brought in to remedy the lacuna in the law that was identified in *Corway*.\(^\text{632}\) In the absence of a legislative

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\(^\text{627}\) Public order has two dimensions—the narrow one of *keeping the peace* by preventing fighting or violence from breaking out, and the broader one of society's interest in maintaining among us a proper sense of one another's social or legal status: Jeremy Waldron, “Dignity and Defamation: The Visibility of Hate” (2010) 123 Harv L Rev 1596, at 1604.


\(^\text{629}\) The publication of material and speech likely to stir up hatred against a group on account of listed characteristics (including religion) is an offence: Prohibition of Incitement to Hatred Act 1989 sections 1 and 2.

\(^\text{630}\) LRC Consultation Paper (n628), at [231]. In 1917 the House of Lords held that a denial of Christianity, apart from scurrility or profanity, did not constitute the offence of blasphemy: *Bowman v Secular Society* [1917] AC 406. Lord Finlay stated, “the crime of blasphemy is not constituted by a temperate attack on religion in which the decencies of controversy are maintained”: *ibid*, at 423. By then the purpose of blasphemy law had shifted from protecting religion per se, to preventing religious offence: Stephen Ranalow, “Bearing a Constitutional Cross: Examining Blasphemy and the Judicial Role in *Corway v. Independent Newspapers*” (2000) 3 TCLR 95, at 98. Later in English law the rationale of the offence moved from the public (the tendency to corrupt public order) to the private (the hurt caused to the feelings of individual citizens): LRC Consultation Paper (n628), at [121]. On *Bowman*, see O'Brien (n628), at 421.

Some commentators dismiss arguments about offended religious feelings as sentimental claims and consider that in a democracy there should be no protection against insult to feelings (even those related to values held sacred): Meital Pinto, “What Are Offences to Feelings Really About? A New Regulative Principle for the Multicultural Era” (2010) 30 OJLS 695, at 696-697. Meital Pinto has proposed that the claims of offence to feelings be reconceptualised as claims of offence to integrity of cultural identity and has argued that vulnerable cultural identities ought to be protected: *ibid*, at 697, 722-723.


definition, the Court found it impossible to say of what the offence of blasphemy consisted. By section 36 of the Defamation Act 2009, a fine of up €25,000 can be imposed for the offence of publishing or uttering "blasphemous matter" defined as that which is "grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion". \(^{635}\) *Mens rea* is a requirement, as there must be an intention to cause outrage.\(^{636}\) Excluded from protection are profit-making organisations or cults and those that employ "oppressive psychological manipulation".\(^{637}\)

Should any prosecutions ensue, there are several avenues of attack that could be launched on the legislation. First, "religion" is not defined, so the boundaries of the curtailment of free speech are neither certain nor readily ascertainable and the offence could be challenged on the grounds of vagueness.\(^{638}\) It would appear from the reference to "any" religion that Christian\(^{639}\) and non-Christian faiths are protected. But does the protection extend to polytheistic creeds or to religions which deny the existence of personal deities?\(^{640}\) The human dignity of those with such beliefs merits protection on an equal basis with adherents to more widely practiced theologies. Second, an offence could be committed by a vigorous challenge to a religious activity such as human sacrifice that denigrates human dignity and is a crime.\(^{641}\) The legislation has not been qualified by the exclusion of criminal offences from matters held sacred. Third, robust criticism of a religion's treatment of one gender (normally women) as inferior and of unequal status could lead to the critic being prosecuted. Fourth, an accused could attempt to show that virtually all religions employ oppressive psychological manipulation and curtail free thinking thereby inhibiting the exercise of freedom of conscience. This argument would fail, as the legislation would be given a purposive interpretation precluding the extension of the exclusion to established religions not generally regarded as organisations or cults.

\(^{633}\) [1999] IESC 5, [1999] 4 IR 484, at 502. The Supreme Court's decision suggests an impatience with the religious character of the Constitution and a reluctance to seek to rehabilitate its language in the light of other contemporary constitutional values: Binchy (n82), at 196. See also Daly (n623), at 249-250; Ranalow (n630), at 104, 107-110.

\(^{634}\) Defamation Act 2009 section 36(1).

\(^{635}\) *Ibid* section 36(2)(a).

\(^{636}\) *Ibid* section 36(2)(b). There is an exemption for matter having "genuine literary, artistic, political, scientific, or academic value" in the eyes of a reasonable person: *ibid* section 36(3).

\(^{637}\) *Ibid* section 36(4).

\(^{638}\) The ECHR requires that a law restricting freedom of expression be formulated with sufficient precision to enable a citizen to regulate his or her conduct: LRC Report (n615), at 12.


\(^{640}\) See LRC Consultation Paper (n628), at [107].

\(^{641}\) See *ibid*, at [237].

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Reverting to the question posed earlier concerning the possibility of designing a dignity-respecting blasphemy defence and taking the current Irish legislation as the base line, some of the defects in it that have been mentioned might be remedied by amending the 2009 Act. With regard to the first flaw, “religion” could be defined as extending beyond the Judaeo-Christian tradition to all religions—monotheistic and polytheistic, and those that deny the existence of personal deities. However, this inclusive treatment of religion might be deemed contrary to the text of the Constitution, as Article 44.1 sets the freedom of religion provisions in the context of there being one God—not multiple gods or no god at all. To exclude some from the protection against insult extended to other believers would be to fail to respect the dignity of the former and to afford them unequal treatment.

The second flaw is easily remedied by an amendment excluding criminal activities from the definition of “sacred”. A similar solution could be adopted to address the third flaw, which allows inequality to become embedded and accepted even by those whose equal dignity is denied. An amendment to permit strident critiques of inequalities in religion would correct the position. Fervent believers in the inferiority of women would not prevail by claiming a right to give expression to their deeply held tenets of male supremacy, as to do so would from an objective standpoint deny the dignity of women and humanity in general.

However, there is an overarching objection to criminalising blasphemy that falls foul of the ECHR—it is not necessary to do so in a democratic society. Maintenance of public safety or protection of the rights of others does not demand it. To categorise it as a crime is a disproportionate reaction. It has been invoked so rarely that it has been described as “a constitutional oddity”.642

In its analysis of restrictions on freedom of expression, the European Court of Human Rights has been prepared to undertake an exacting appraisal of national decisions by emphasising pluralism, tolerance and broadmindedness.643 The case law shows an evolution from a timid and overcautious stance to a more robust review, where the Court analyses the allegedly offensive nature of the contested statements in the light of more objective public sentiments,

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642 Ranalow (n630), at 95.
rather than the subjective feelings of specific individuals.\(^{644}\) It has required all exercising the freedom to manifest their religion (irrespective of whether they do so as members of a religious majority or a minority) to “tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith”.\(^{645}\) In *Klein v Slovakia* the Court held that the right to freedom of expression had been breached when a journalist was convicted of “defamation of nation, race and belief” for defaming the highest representative of the Roman Catholic Church in Slovakia and thereby offending its members.\(^{646}\)

The conclusion is that it is possible to craft a dignity-respecting blasphemy defence, but it would have considerable hurdles to overcome because of the Constitution’s Christian foundation and the ECHR’s requirements of precision in law, necessity and proportionality.

In South Africa there are doubts that the crime of blasphemy would survive constitutional challenge, as it applies only to the Christian God.\(^{647}\) The constitutional exclusion of hate speech based on religion or on race, ethnicity or gender that incites people to cause harm from the protection afforded to freedom of expression is an alternative model that Ireland could consider.\(^{648}\) The harm targeted might be confined to the narrow range of physical harm, but it would be more in conformity with constitutional values to adhere to a broader definition of harm to dignity interests.\(^{649}\) Supplementary legislation would be necessary to prohibit hate speech and to provide for remedies for breach that could include criminal sanctions.\(^{650}\) As it would not be appropriate or proportionate to criminalise comments intended to be hurtful (as opposed to harmful), the ambit of criminal activity should be confined within narrow clearly defined parameters.

\(^{644}\) *Ibid*, at 482.

\(^{645}\) *IA v Turkey* (App no 42571/98) (2007) 45 EHRR 30, at [43]. They “cannot reasonably expect to be exempt from all criticism”: *ibid*. On *IA v Turkey*, see Tsakyrakis (n284), at 484-485.

\(^{646}\) (App no 72208/01) (2010) 50 EHRR 15, at [50], [55]. The journalist had sharply criticised the prelate for calling for the withdrawal of the film “The People vs. Larry Flynt” and the accompanying poster, and he wondered why Catholics did not leave the Church as it was headed by such an “ogre”: *ibid*, at [10]-[12], [51]. The Court was unanimously of the view that the “strongly worded pejorative opinion” related exclusively to the archbishop personally and disagreed with the domestic courts’ findings that the journalist discredited and disparaged a sector of the population on account of their Catholic faith: *ibid*, at [51]. See Harris and others (n643), at 484.

\(^{647}\) *S v Lawrence* 1997 (4) SA 1176 (CC), at [149]; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), at [19], [50], [54]; Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (5th edn Juta, Cape Town 2005), at 394.

\(^{648}\) Constitution of the Republic of South Africa 1996, Section 16(2)(c).

\(^{649}\) See Currie and de Waal (n647), at 377.

\(^{650}\) In South Africa legislation has widened the constitutional conception of hate speech to encompass discriminatory speech that undermines human dignity, where the intention is to be hurtful: Promotion of Equality and Prevention of Unfair Discrimination Act 2000 sections 1(1)(xxii)(b)(iii), 10(1). See Currie and de Waal (n647), at 377-379.
8 CHAPTER VIII – REMEDIES AND SCOPE OF FUNDAMENTAL RIGHTS IN IRELAND

Having reviewed fundamental rights in substantive law in Ireland, this Chapter will consider remedies and the scope of fundamental rights in Irish law.

8.1 Remedies

8.1.1 Damages

Consideration of human dignity could affect the question of whether or not damages should be awarded and, if so, the quantum warranted. Should there be specific damages for breach of constitutional rights? Where there is no remedy in tort or contract, a strong case can be made for compensation being paid for violation of fundamental rights.

8.1.1.1 Defamation

There have been wild excesses to what is adjudged fair compensation in defamation actions. I will now look at the Irish case law. In De Rossa v Independent Newspapers the Supreme Court by a majority of four to one upheld an award of £300,000 to a politician for libel in a newspaper article alleging that he had been involved in serious crime. Hamilton CJ found that Irish law complied with the requirements of the Constitution and of the European Convention on Human Rights (ECHR), as it provided “that the award must always be reasonable and fair and bear a due correspondence with the injury suffered” and there was a requirement to set aside a disproportionately high award. He placed a high value on the emotional impact, stating, “[o]ne of the most important factors in the assessment of damages is the effect of the

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2 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (ECHR). In a complaint by the newspaper against Ireland, the European Court of Human Rights agreed with the parties that the award interfered with the newspaper’s freedom of expression, that it was prescribed by law and that it pursued the legitimate aim of protecting the reputation and rights of others: Independent News and Media plc v Ireland (App no 55120/00) (2006) 42 EHRR 46, at [109]; to be necessary in a democratic society, an award of damages following a finding of libel had to bear a reasonable relationship of proportionality to the injury to reputation suffered: ibid, at [110]; in view of the measure of appellate control and the margin of appreciation, the Court did not find that the safeguards against a disproportionate award were ineffective or inadequate: ibid, at [132]. See Cox (n1), at [13.3.2.2].
libel on the plaintiff's feelings."\(^4\) The concern was not solely with reputation and loss of good name in the eyes of the public, but with the impingement of a hurtful and humiliating attack on the individual's core personality. Denham J (dissenting) favoured guidelines being given to the jury on quantum\(^5\) and more searching scrutiny on appeal based on the criteria of reasonableness and proportionality.\(^6\) She considered large awards ineffective as a compensation mechanism.\(^7\)

The criterion of proportionality to determine whether or not an award is excessive also applies in South Africa, but the threshold to be reached before it will be upset is higher. Mokgoro J pointed out in the Constitutional Court in *Dikoko v Mokhatla*, that an appellate court would only interfere "if ... the award ... was palpably excessive, clearly disproportionate in the circumstances of the case, grossly extravagant or unreasonable or so high as to be manifestly unreasonable."\(^8\) According to Moseneke DCJ, special circumstances justifying encroachment were found when the trial court awarded high or low damages on the wrong principle or when the award was "so unreasonable as to be grossly out of proportion to the injury inflicted."\(^9\) Unlike Ireland, damages for defamation in South Africa are determined by the judge—there is no jury. This difference may influence the greater reliance placed on the assessment by the judge at first instance in South Africa. *De Rossa* and *Dikoko*, where a public official successfully sued a politician for defamation, followed somewhat similar paths and had the same outcome—notwithstanding the apparent difference between the two countries in the leeway allowed to the lower court. The majority in both cases upheld the awards and there were dissenting views in both cases that high awards should be curtailed. However, in South Africa the two judges who dissented on quantum (Sachs and Mokgoro JJ) considered the effect on the dignity of the target of the defamatory remarks and favoured a smaller award coupled with an apology and restoration of the relationship between the parties. The dignity of the

\(^{5}\) *Ibid*, at 483.
\(^{6}\) *Ibid*, at 481.
\(^{7}\) *Ibid*, at 478.
\(^{8}\) The jury should be able to compare the value of what courts usually award to people in personal injury actions. Compensation is a notional remedy in both instances. The lame do not walk after an award of compensation. The defamed do not cease to have been defamed after an award of damages. An order of damages is an artificial form by which a court gives a remedy to an injured person.
\(^{9}\) 2006 (6) SA 235 (CC), at [58] (footnotes omitted).
\(^{9}\) *Ibid*, at [95] (footnote omitted). The standard at issue was whether there was "a glaring disproportionality between the amount awarded and the injury to be assuaged", the ultimate test being whether in all the circumstances of the case the compensation was "a reasonable and just measure of the harm": *Ibid*.  

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parties was not mentioned in Ireland.

The Supreme Court of Namibia followed the Dikoko test in Trustco v Shikongo. O'Regan AJA noted that although money was not sufficient to restore the individual's reputation, in a commercialised world it could not be discounted as it carried symbolic weight and was a deterrent. She went on to compare awards in other defamation actions and, having found that the damages in Trustco were "considerably in excess of the awards generally made for defamation", she reduced them significantly. The allegations in Trustco concerned abuse of public office by an elected mayor in a land deal, but— unlike De Rossa—there was no implication of involvement in serious crimes like armed robbery, forgery, drug-dealing, prostitution and protection rackets. If financial recompense were felt to be the appropriate remedy, the gravity of the crimes imputed to De Rossa warranted a high award. However, there was no consideration of other ways of repairing the damage to De Rossa's dignity or of restoring relationships with the journalist who wrote the offensive article.

The year following the De Rossa decision, Denham J dissented in part again when the same issues arose in O'Brien v Mirror Newspapers in an appeal against an award of £250,000 for libel in an article alleging bribery of a politician in order to secure radio and mobile phone licences. The standing in the community of the person libelled was a relevant factor. By a majority the Supreme Court held that the award was disproportionately high and remitted the matter to the High Court for a new trial on the issue of damages only. When the case was re-

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10 O'Regan AJA asked the primary question whether the award was "grossly disproportionate to the injury suffered as a result of the defamation" and acknowledged that one of the difficulties in applying the test was how to quantify harm to reputation in monetary terms: Trustco Group International Ltd v Shikongo [2010] NASC 6, at [90].
13 [2010] NASC 6, at [96].
16 [2000] IESC 70, [2001] 1 IR 1, at 37. Denham J adhered to her view that instructions to juries on quantum should be altered so as to give them greater guidance and that there should be more searching scrutiny on appeal to maintain the appropriate balance between the rights of the individual and of freedom of expression: ibid. Information on the compensation granted in other libel and personal injuries actions might help to maintain a proper monetary balance, ibid, at 35: At the least, reference could be made to the level of damages in previous libel cases decided by the Supreme Court and to the level of awards in serious personal injury cases, as has been introduced in other common law countries. Such judicial guidelines may be a safeguard against a disproportionate award. In the absence of such guidelines, merely to require the award to be proportionate is an inadequate protection against a disproportionate award.
heard some six years later, the jury more than doubled the award to €750,000.17

In the libel action brought by Monica Leech, a public relations consultant, against Independent Newspapers following allegations that she had obtained public contracts from a government minister because she was having an extra-marital affair with him, an issue arose over whether the defendant should be entitled to third-party discovery of documents submitted to an inquiry into the allegations ordered by the Dáil.18 Public interest straddled both sides of the equation—on the one hand, in ensuring the viability of ad hoc inquiries by fulfilling the obligation of confidentiality to the participants, and, on the other, in full disclosure and the administration of justice.19 O’Neill J, refusing to order discovery,20 held that there were cases where confidentiality was itself in the public interest. The jury awarded her €1,872,000—a record for a libel action.21 That record was broken in November 2010 in Kinsella v Kenmare Resources when a businessman was awarded €10m damages (€9m compensatory and €1 aggravated damages)22 for a libellous press release issued by his employers after he went naked into the company secretary’s hotel bedroom in Mozambique where they were attending a board meeting.23

The size of these awards reflects the very high value the general public (as articulated by the jury) places on the individual’s dignity. False allegations of deliberate wrong-doing involving crime and corruption, and—even more so—sexual impropriety, strike at the core of a person’s being, since they concern the exercise of free will for an odious purpose affecting the person’s standing in the community. They wound their feelings and humiliate them. A good

19 ibid, at [12].
20 The parties had considerable other resources available to them, including the report from the inquiry: ibid, at [15].
22 On compensatory and aggravated damages, see Paula Giliker and Silas Beckwith, Tort (3rd edn Sweet & Maxwell’s Textbook Series, Sweet & Maxwell, London 2008), at [17-004]—[17-005], [17-008].
23 Kinsella v Kenmare Resources plc 17 November 2010 (HC). Mr Kinsella was prone to sleep-walking and an investigation by an independent solicitor on behalf of the company found there was no conscious attempt on his part to enter her room and that he had no improper motive. The press release said he was being asked to resign from the company’s audit committee. See Carol Coulter, “Businessman wins €10m libel award against ex-employers” Irish Times (Dublin, 18 November 2010), at 1; Emma Keane, “Defame Game” (2011) 105(1) GLSI 36, at 37. The case is under appeal to the Supreme Court.
reputation in society is guarded zealously and is essential for self-esteem. The significance of these rights is underlined in Article 40.3.2° of the Constitution, where the “good name” of the citizen is one of four aspects of the citizen singled out for particular state protection and vindication. Given the undoubted worth of the rights protected by defamation actions, the question must be posed as to what is the most appropriate remedy. Is society’s disapproval to be marked by the size of the award and, if so, is an extremely generous sum appropriate? Perhaps the finding that the individual has been defamed should go a considerable distance towards relieving the public opprobrium and vindicating the plaintiff. Maybe the damage caused could be redressed by other measures such as publicising the court’s findings widely and a public acknowledgement by the defendant of the falseness of the libellous remarks.

Apart from the conflict between freedom of expression and the individual’s right to a good name, there are two competing interests in play in the assessment of damages for defamation—on the one hand, the individual’s reputation which can be repaired to a large extent by an apology accompanied by publicity and is not dependent entirely on money for restoration, and, on the other, the deterrent effect to protect the individual and the community generally from a culture of malicious or careless commentary. 24 Steps have been taken in Ireland to reform the law in this area. The Defamation Act 2009 permits the parties to an action to make submissions on damages to the court 25 and the judge is obliged to give directions to the jury on damages 26 where the cause of action accrued after the commencement of the Act. 27 Previously when no guidelines were given to jurors on quantum, it was unsurprising that juries had unrealistic ideas about what was the appropriate financial recompense for a damaged reputation. As favoured by the minority in Dikoko v Mokhatla, 28 there is a school of thought that money is inappropriate reparation for hurt to one’s name and that a modest sum coupled with a public apology is more compatible with restoring respect for the dignity of the injured party. The Defamation Act provides the defendant wishing to make amends with the facility to offer to do so. 29 As occurs in Britain, 30 such an offer may lead to a discount in compensation, since damages are to be assessed having regard to all of the

25 Defamation Act 2009 section 31(1).
27 Defamation Act 2009 section 3(1).
28 2006 (6) SA 235 (CC).
29 Defamation Act 2009 section 22. See Mohan and Murphy (n26), at 51-52.
circumstances of the case, including the making of an offer to make amends, and the offering or making of an apology, correction or retraction.

8.1.1.2 Catastrophic injuries

A somewhat similar analysis could apply to damages for catastrophic injuries. If the injured party is so badly impaired as not to appreciate the extent of the impairment, should damages be reduced? Some would say yes—the non-pecuniary loss is not redressed by high damages. In fact, it is more likely that the injured party’s relatives will benefit rather than the injured person herself. There is a middle ground—instead of denying any general damages to a badly impaired individual, compensation could be awarded for infringement of the person’s dignity at a modest level.

In *Cooke v Walsh* the majority in the Supreme Court considered that compensation should be moderate where the plaintiff had “only a mild awareness or appreciation of his condition due to the severe brain damage he sustained in the accident” and therefore he had “been spared the considerable mental suffering which would follow from knowledge or appreciation of the virtual destruction of his life.” McCarthy J (dissenting) had reservations about that approach and pointed out that the trial judge did not consider the significance of the injury itself in measuring damages, but only the plaintiff’s appreciation of it.

The Supreme Court in *Sinnott v Quinnsworth Ltd* held that in assessing general damages “the objective must be to determine a figure which is fair and reasonable”, having regard, *inter alia*, “to the ordinary living standards in the country, to the general level of incomes, and to the things upon which the plaintiff might reasonably be expected to spend money.” The factors considered by the Supreme Court in *Dunne v National Maternity Hospital* included the extent to which the plaintiff had “any appreciation or awareness of his condition and of the amenities of living” which he had lost. The Court raised—but did not decide—the issue of whether a

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31 Defamation Act 2009 section 31(3).
32 Ibid section 31(4)(e).
33 A defendant may give evidence in mitigation of damages of the making or offering of an apology: Defamation Act 2009 section 24. See Mohan and Murphy (n 26), at 52.
34 Defamation Act 2009 section 31(4)(d).
36 Ibid, at 223. As the issue had not been fully debated, he preferred to await a suitable case on “the question as to whether or not an individual who has no real appreciation of his plight should be awarded other than a relatively nominal sum for general damages”: ibid.
37 [1984] ILRM 523, at 532.
plaintiff who has no awareness of his condition as a result of injuries tortiously inflicted should be entitled to nil or nominal general damages only. In *Lindsay v Mid-Western Health Board*, Morris J in the High Court held that where the plaintiff had little or no awareness of his or her condition, there was no rule of law either limiting the general damages to be awarded to a nominal figure or precluding the awarding of such damages altogether. In contrast to this view are *obiter* comments by Quirke J in *Yun v Motor Insurers Bureau of Ireland* when he countenanced no general damages at all for an unconscious plaintiff.

The House of Lords took a different stance in *H West & Son Ltd v Shephard* when in a majority decision it confirmed that general damages should be assessed objectively and therefore a permanently unconscious claimant should receive damages for loss of amenity at the top end of the scale of compensation. The majority of consultees in a study by the English Law Commission on damages for non-pecuniary loss felt that to apply a subjective test based on the victim's awareness—thereby awarding lower compensation for catastrophic injuries than for less serious ones—would be unjust and would have an anti-deterrent effect; it was considered that although permanently unconscious victims do not go through pain and suffering, substantial damages were justified by the unconscious victim's complete loss of amenity, and that failure to recognise this would be to undervalue victims and to trivialise their experiences.

Dickson J in the Supreme Court of Canada in *Andrews v Grand & Toy Alberta Ltd*—rather than attempting to set a value on lost happiness—was attracted to the functional approach, which assessed the compensation required to provide the injured person “with reasonable solace for his misfortune”, solace in this sense being taken to mean “physical arrangements which can

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40 *[1993] 2 IR* 147. The case was brought on behalf of a plaintiff who had suffered irreversible brain damage and had been in a deep coma for 18 years at the time of trial.
41 *[2009] IEHC* 318, *[2009] 7 JIC* 1701, at 22-23. Quirke J indicated that general damages in tort may be reduced, or even eliminated altogether, where there is a lack of insight into one's own condition: *ibid*, at 22.
43 *Ibid*, at [2.13]. The Law Commission did not recommend any change in the rules for general damages for permanently unconscious claimants nor for conscious, but severely brain-damaged, victims: *ibid*, at [2.19], [2.24]. It also rejected moving from the traditional “diminution of value” approach—where damages put a value on what the claimant has lost, irrespective of how the sum awarded will be spent—to the Canadian “functional” approach where damages are meant to provide comfort and solace to the claimant, by enabling him or her to obtain other means of satisfaction to replace what has been lost: *ibid*, at [2.4], [2.7].
make his life more endurable rather than 'solace' in the sense of sympathy." A similar focus on solace is apparent in the High Court of Australia's decision in *Skelton v Collins*, when it adopted a subjective approach and favoured the dissents of Lord Devlin and Lord Reid in *H West & Son Ltd*.

In Ireland there are constitutional obligations for laws to defend and *vindicate* life and personal rights. When a serious injury has been caused, it will be necessary to vindicate the person's life, bodily integrity and human dignity even (or perhaps more so) when the injury is so severe as to cause loss of consciousness and to shorten the normal lifespan. An admission of liability by a defendant is an acceptance of blame for wrongfully causing the injury and, if coupled with an apology, would go some way towards vindication. If liability is in issue, vindication requires a judicial determination on this point. We can apply to situations of catastrophic injury the Supreme Court's view in *Grant v Roche Products (Ireland) Ltd* that compensation alone payable by a drug company whose product was alleged to have caused a young man to commit suicide was insufficient vindication for his life without a judicial finding on responsibility for that drastic step.

The question is whether compensation defends against encroachment or exonerates blame in the case of serious injury. A finding on liability fulfils the need to establish blame for a catastrophic injury. Damages will be a deterrent for the minority who have more regard for material goods than for human life or dignity. However, to take the view that no compensation for non-pecuniary losses is appropriate and to rely on an admission or finding of liability alone to vindicate life and dignity would be wrong. Ackermann J in the *Sodomy* case explained that the minimum the protection of dignity required was an acknowledgement of "the value and worth of all individuals as members of our society." The constitutional value of dignity was considered by O'Regan J in *Dawood* "to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings."

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46 Constitution of Ireland 1937, Article 40.3.2°.
47 Ibid Article 40.3.1°.
48 [2008] IESC 35, [2008] 4 IR 679. Hardiman J considered that the best rendition of "vindicate" combined the definitions "defend against encroachment or interference" and "clear of blame, justify by evidence or argument": ibid, at [75].
49 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) (*Sodomy* case), at [28].
50 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), at [35]. As David Bilchitz put it, "'dignity' is
By considering the implications for the human dignity of the victim and bearing in mind society's values, a modest sum in compensation for injuries to the unaware plaintiff could be sufficient. Too high a figure runs the risk of appearing to value life and dignity only as commodities and not for their intrinsic value, whereas too low an amount would be regarded as demeaning. The same rationale can be adapted to apply to injuries caused to those who are what David Bilchitz described as "moral patients" (infants, young children, the senile and those with severe mental impairments) as opposed to "moral agents" (all adult, rational human beings). Though unable to act out of a sense of duty, moral patients have certain rights that moral agents must respect.

essentially about the recognition of worth and the consequent treatment that must be accorded to individuals who have such worth": David Bilchitz, “Moving beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals” (2009) 25 SAJHR 38, at 51. He proposed that value in an individual life be understood in terms of functionings and capabilities determined "according to what enables individual creatures to flourish as the kind of being that it is": ibid, at 62-63.

Ibid, at 42. A parallel area where rights to freedom and personal autonomy may not be adequately protected is that of detention of compliant non-competent mentally ill people. Legislation provides that in making a decision on a person's care and treatment, that person's right to "dignity, bodily integrity, privacy and autonomy" is to be respected: Mental Health Act 2001, section 4(3). However, the statutory definition of "voluntary patient" is not aimed at ascertaining whether the individual truly consented to being admitted: ibid section 2(1). The Supreme Court has held that it was not framed in terms of a person who freely and voluntarily gave consent to an admission order but rather someone who was not the subject of an admission or renewal order: EH v Clinical Director of St Vincent's Hospital [2009] IESC 46, [2009] 3 IR 774, at [41]. Adopting a paternalistic rather than a rights-based view, the Court dismissed non-compliance with the formalities required for detention where there was no gross abuse of power as a mere technicality that did not require a remedy provided the detention was in the best interests of the patient: ibid, at [50]. A voluntary patient is not free to leave, as he or she may be detained for 24 hours, during which period a psychiatrist may certify that the patient suffers from a mental disorder and should be detained: Mental Health Act 2001, sections 23, 24. Peart J justified the detention of vulnerable voluntary patients with dementia, who could not consent, until they left with a responsible family member on the basis that it was in their best interests, there was a duty of care to them and it would be grossly negligent for the hospital to release them immediately simply because there was no legal basis for keeping them: McN v Health Service Executive [2009] IESC 236. McMahon J, while acknowledging the paternal nature of the legislation, gave effect to the rights and protections specifically included in the Mental Health Act 2001, when he found that a renewal order relating to an involuntary patient which did not specify a particular period of time, but merely provided that it was "for a period not exceeding 12 months" was void for uncertainty and did not provide a legal basis for detention: SM v Mental Health Commission [2008] IEHC 441, [2009] 3 IR 188. His finding of a violation of the patient's right to liberty (albeit it did not result in immediate release of the patient, as his order was with a stay of four weeks) was a vindication of her rights and would have been "just satisfaction" for violations of a procedural nature as required by the ECHR (Art 41). See HL v UK (App no 45508/99) (2005) 40 EHRR 32, at [148]-[150]. In the United Kingdom it was held that the informal admission of compliant patients without capacity to consent was justified by the common law doctrine of necessity: R v Bournewood Community and Mental Health NHS Trust, Ex p L [1998] UKHL 24, [1999] 1 AC 458. In Bournewood the tort of false imprisonment had not been committed, since the actions taken were in accordance with the duty of care to the patient in his best interests. Lord Steyn thought it was an unfortunate result of the decision that compliant incapacitated patients did not have statutory protections and considered that “[t]heir
Compensation for future pecuniary losses poses separate problems that could be solved by the introduction of structured settlements with periodic payments, which would give financial security to the plaintiff while avoiding the risk of unjust enrichment of the next-of-kin in the event of an early demise.53 A report undertaken for the High Court recommending periodic payments justified the change by invoking the values of justice and fairness, as well as taking into account the best interests of those injured.54 In the United Kingdom the government has encouraged the use of periodic payments ostensibly simply because it is a fairer system, but in reality there are political reasons for the reform.55

Applying a dignity analysis, the plaintiff is better served by periodic payments for future pecuniary losses, as they would provide the resources to live independently without having to resort to the state for support and without the fear that a lump sum would turn out not to be sufficient. The countervailing argument that the plaintiff should have immediate control over

moral right to be treated with dignity" required nothing less: ibid, at 497. On Bournewood, see Lawrence O Gostin and Lance Gable, “The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health” (2004) 63 Md L Rev 20, at 60, 61, fn 303; Anne-Marie O'Neill, Irish Mental Health Law (First Law, Dublin 2005), at 94. The key factor according to the European Court of Human Rights was that health care professionals had exercised complete and effective control over L's care and movements: HL v UK (App no 45508/99) (2005) 40 EHRR 32, at [91]. It found a breach of his right to liberty and security (Art 5(1) ECHR), as the common law doctrine of necessity at the time was underdeveloped and his detention was unlawful because of the absence of fixed procedural safeguards to avoid arbitrariness; ibid, at [118]-[120], [124]. It also found a breach of the right to judicial review of the lawfulness of detention (Art 5(4) ECHR) since habeas corpus or judicial review proceedings were not wide enough to bear on the essential conditions for the lawful detention of a person on the ground of unsoundness of mind: ibid, at [135], [140], [142]. The absence of legal safeguards for the compliant non-competent has been described as "the Bournewood gap". See Claire Murray, "Reinforcing Paternalism within Irish Mental Health Law—Contrasting the Decisions in EH v St. Vincent's Hospital and Others and SM v The Mental Health Commission and Others" (2010) 32 DUJL 273; Darius Whelan, Mental Health Law and Practice: Civil and Criminal Aspects (Round Hall/Thomson Reuters, Dublin 2009), at [5-10]—[5-22], [5-26]—[5-40].


54 ibid, at 7, 12-15, 21, 26-27, 33. The report discounted a contrary argument that the change would deprive the plaintiff of the freedom to choose to dispose of the full capital value of the compensation as he or she wished: ibid, at 15, 22. Lump sum awards contained risks for the state as well as for the plaintiff and defendant, because if the return on investment were insufficient to meet the plaintiff's needs, the state would probably be required to fund provision for them: ibid, at 13-14.

a capitalised sum is unsound—the purpose of damages for future outlays is to restore the plaintiff to the original position and this is more likely to be done by periodic payments than by the lump sum lottery. The aim is not to put the plaintiff in a better position than before the accident by having ready access to a fund provided for future outlays over an indefinite period, but to relieve any worries about inability to meet expenses.

8.1.2 Mediation

Engagement and mediation are dignity-respecting methods of avoiding or resolving disagreements.56 There are benefits to exploring them in a co-operative spirit before there is resort to litigation. In addition to allowing the parties involved the opportunity to work out their differences themselves by reaching a mutually acceptable settlement, there could be a considerable saving in costs, resources and court time.

A community shaped by the value of harmony will put significant value in mediated solutions.57 Mediation is now encouraged in Ireland as an alternative dispute mechanism.58 The South African courts have formalised the mediation process, which promotes human dignity in recognition of the fact that we live in a shared society.59

8.2 Scope of fundamental rights

Using the Hohfeldian model60 to translate constitutional values, rights and obligations into

56 Self-determination is the intrinsic value of mediation: Jacqueline Nolan-Haley, “Self-Determination in International Mediation: Some Preliminary Reflections” (2006) 7 Cardozo J Conflict Resol 277, at 278-279. It is connected to self-governance and individual autonomy, and offers procedural justice protections, providing parties with fairness and dignity: ibid, at 278. By actively participating in the mediation process and voluntarily consenting to an outcome that is free of any coercive influences, respect for human dignity is promoted and parties’ perceptions of procedural justice are enhanced: ibid, at 278-279. See also Law Reform Commission, “Consultation Paper on Alternative Dispute Resolution” (LRC CP50-2008), at [3.140]-[3.145], [3.150]; Law Reform Commission, “Report on Alternative Dispute Resolution: Conciliation and Mediation” (LRC 98-2010), at [3.74], [3.76].


58 In 2010 the Law Reform Commission recommended that there should be a statutory framework for mediation and conciliation: LRC Report (n56), at [2.15], [2.47], [2.51], [3.04], [12.01], [12.09]-[12.10], [12.15], app (draft Mediation and Conciliation Bill 2010).

59 Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC), at [42]. See also S v Williams 1995 (3) SA 632 (CC), at [75]; Du Plessis v De Klerk 1996 (3) SA 850 (CC), at [186]; Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC), at [88]; Sidumo v Rustenburg Platinum Mines Ltd [2007] ZACC 22, 2008 (2) SA 24 (CC), at [94]; Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg 2008 (3) SA 208 (CC); Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 (3) SA 454 (CC), at [166], [337].

tangible legal concepts, it is essential to have clarity on who has rights and obligations, to give coherent answers to what those rights and obligations are in varying circumstances, to define the types of obligations owed by different actors, to specify whether the obligations are actual or potential, and to identify their triggers. Solutions develop over time as different situations affecting relationships emerge. The nature of the obligations will vary. Do they apply only to the relationship between the individual and the state or have they horizontal application? Are they negative or positive? Is there a time constraint on claiming constitutional rights?

8.2.1 Who has obligations?

Historically, a constitution was regarded as necessary to protect the individual from intrusion by the state. With the development of human rights law, its reach has expanded to cover the activities of non-state actors—at least in some spheres. As human rights are now regarded as indivisible, a cogent case can be made to apply the principles of equality, non-discrimination and other fundamental rights between private citizens. Full protection for human dignity cannot be achieved by confining constitutional rights to the vertical relationship between the citizen and the state.

8.2.1.1 The state and public enterprises

It is uncontroversial now that rights enforceable against the state can be enforced against state-owned enterprises. Depending on the context and the purpose of the right, they may also be invoked in relation to private parties. In Botswana in Diau v Botswana Building Society, which was not an organ of state but which operated in the public domain, was bound to obey the constitutional strictures respecting the liberty and privacy of its employees and forbidding discrimination and inhuman and degrading treatment. There is an analogy between the power of the state—the original rationale for introducing constitutional rights aimed at restricting government interference with citizens—and that wielded by the modern corporation (frequently operating on a global basis). In both situations there is gross inequality between the strength and influence of the powerful body, on the one hand, and the weak bargaining power residing in citizens, employees, consumers and members of the public.


62 Diau v Botswana Building Society 2003 (2) BLR 409 (BwlC) (Botswana Industrial Court).
affected by corporations' activities, on the other. Dingake J saw no reason to differentiate between state and private conduct when considering the scope of the right to liberty, equality before the law and human dignity, because, as he put it, "to draw such differentiation may authorize constitutional violations by private persons, that properly ought not be permitted." To ensure certainty in the law and to avoid a haphazard approach to constitutional interpretation, some guidelines are necessary on when and in what situations the horizontal application of rights is required. A good starting point is the principle enunciated by Friedman JP in South Africa in Baloro v University of Bophuthatswana that any activity, operation, undertaking or enterprise operating in the community and open to the public, is subject to the horizontal application of fundamental rights.

8.2.1.2 Transnational corporations

In the past decade attempts have been made to render transnational corporations (TNCs) accountable in law for their actions, which may breach human rights. With the extraordinary growth of businesses that span multiple jurisdictions and have more wealth than many countries, they have been able to evade responsibility despite having the capacity to infringe human dignity on a wide scale by their activities. The general public and the environment have been affected as well as TNCs' employees, suppliers, consumers and others in direct relationships with them. There is widespread acceptance that businesses should not infringe human rights, but there was a view (resisted by many enterprises and states) that they also

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63 See ibid, at 30.
64 Ibid, at 31.
65 1995 (4) SA 197 (B), cited in Diau v Botswana Building Society 2003 (2) BLR 409 (BwlC) (Botswana Industrial Court), at 30. Application of this principle means that rights would be enforceable against entities such as, first, corporations, multinational and local companies that engage in trade, commerce and business with the public, have employees and are involved in numerous undertakings; second, commercial and professional firms which rely on the public for their custom or support; and, third, hotels, restaurants and the like: 1995 (4) SA 197 (B), cited in 2003 (2) BLR 409 (BwlC) (Botswana Industrial Court), at 30.
had positive obligations to protect human dignity.\textsuperscript{67} I will now look at the efforts made to control TNCs and to hold them to account and will probe the underlying rationales for doing so.

As concern grew at the capacity of TNCs to endanger human rights, in 2000 the UN initiated the Global Compact, which is a voluntary network for businesses and other stakeholders that encourages corporate social responsibility\textsuperscript{68} by adhering to ten principles.\textsuperscript{69} The latter are derived from the Universal Declaration of Human Rights (UDHR)\textsuperscript{70} and other United Nations instruments in the areas of human rights, labour, the environment and anti-corruption.\textsuperscript{71}

The UN Sub-Commission on the Promotion and Protection of Human Rights adopted draft Norms on the Responsibilities of TNCs for Human Rights in August 2003.\textsuperscript{72} While confirming

\textsuperscript{67} Globalisation and privatisation of hitherto publicly provided services have extended the reach of TNCs giving them power frequently exceeding that of individual states. The respective roles and responsibilities in the human rights matrix of states and TNCs are in contention. By imposing duties to protect human rights on TNCs, some feared that this would relieve states of their well-recognised obligation to do so and might foster a laissez-faire attitude towards human rights among governments. TNCs doing business with corrupt states were accused of being complicit in human rights abuses. On corporations as complicit with governments, see Steven R Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 \textit{Yale LJ} 443, at 500-504.


\textsuperscript{70} Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

\textsuperscript{71} The exhortatory nature of the principles is evident as companies are simply asked to "embrace, support and enact, within their sphere of influence, a set of core values". Businesses are told that they "should" support and respect the protection of internationally proclaimed human rights: UN "Global Compact" (n69) principle 1. A stronger warning is given against assisting others to breach human rights, as they should "make sure" they are not complicit in human rights abuses: \textit{ibid} principle 2.

\textsuperscript{72} UN Commission on Human Rights (Sub-Commission), "Norms on the Responsibilities of Transnational
the primary responsibility of states for promoting and respecting human rights, the draft Norms pointed out that TNCs, their officers and employees had human rights responsibilities, being obliged to respect norms in UN treaties. They imposed a widespread onus on TNCs to “promote, secure the fulfilment of, respect, and ensure respect of and protect human rights” within their “spheres of activity and influence”. The UN Commission on Human Rights was not impressed with the draft Norms and did not approve them. Instead in 2005 the UN Secretary-General appointed John Ruggie as a Special Representative on human rights and business. Ruggie criticised the Norms stridently in his report in 2006 for inventing a new


Specifically included were the human rights of “indigenous peoples and other vulnerable groups”: ibid para 1. The draft Norms proposed substantive obligations for TNCs in the areas of equality of opportunity and non-discrimination (para 2), security of persons forbidding war crimes and other international crimes (para 3) and requiring security arrangements for TNCs to observe international and national standards (para 4), workers rights (paras 5-9), and consumer (para 13) and environmental protection (para 14). Recognising the necessity to give workers a just wage to live a life where their dignity was respected, they required TNCs to “provide workers with remuneration that ensures an adequate standard of living for them and their families” and that takes “due account of their needs for adequate living conditions with a view towards progressive improvement”: ibid para 8. They targeted bribery and corruption: ibid para 11. In addition to prohibiting infringements, TNCs were to have positive obligations to promote human rights (socio-economic and cultural rights as well as civil and political ones) by contributing to their realisation: ibid para 12.

avenue of international law that spoke directly to TNCs and for failing to define properly the obligations falling on states and TNCs. His report in 2008 presented a three part policy framework involving the state obligation to protect against human rights abuses, corporate responsibility to respect all human rights, and the need for remedies to address breaches of human rights standards.

Ruggie continued his work by developing Guiding Principles to make the "Protect, Respect and Remedy" framework operational. Following an extensive consultation process, they were endorsed by the UN Human Rights Council in June 2011. They start with the state’s unequivocal duty to protect human rights—grounded in international human rights law—by taking appropriate steps to prevent, investigate, punish and redress human rights abuse through “effective policies, legislation, regulation, and adjudication.” The provisions on

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82 UN Guiding Principles (n80) principle 1 and commentary. Less dogmatic is the requirement that
corporate responsibility to respect human rights place the onus to avoid infringing internationally-recognised human rights, to address adverse human rights impacts with which they are involved in their own activities, and to try to prevent or mitigate those to which they are directly linked by their relationships, on all enterprises irrespective of "their size, sector, operational context, ownership and structure." This has horizontal application and does not depend on state-involvement. The final part of the trilogy is the provision of an effective remedy as part of the state's duty to protect human rights with the Guiding Principles envisaging a range of measures not confined to judicial, administrative and legislative means.

The normative base for the protection of human rights in the globalised business world has its roots firmly in human dignity, which is inherent in every person and is the rationale for human rights and obligations. The autonomy and consciousness of those subject to humiliation generates human rights. The concept of dignity is concerned not just with the absence of indignities, but also with ensuring access to basic amenities to allow for the full development of human rights.

states “set out clearly the expectation” that TNCs respect human rights, but significantly its reach extends throughout their operations: ibid principle 2. Policy coherence is to be achieved by states ensuring that government departments, agencies and state institutions are aware of and observe the state’s human rights obligations in fulfilling their mandates: ibid principle 8. That coherence is to be maintained when states conclude international agreements or contracts—they should retain adequate policy and regulatory ability to protect human rights while providing the necessary protection for investors: ibid principle 9 and commentary. More muted is the stipulation to “promote respect for human rights” in public procurement: ibid principle 6 and commentary. When involved in multilateral institutions, states are encouraged to spread respect for human rights and to promote the Guiding Principles: ibid principle 10 and commentary. The state should foster respect for human rights in the business community by enforcing human rights-friendly laws, giving guidance and encouraging (sometimes requiring) enterprises to communicate their human rights performance: ibid principle 3. It has stricter obligations to ensure respect for human rights by businesses with which it has closer connections, ie, those that are state-owned or controlled, receive state support and services, or provide outsourced services: ibid principles 4-5. As the “host” state in conflict-affected areas may be unable to protect human rights adequately because it lacks effective control, the “home” state has a role to play to assist in ensuring that businesses are not involved with human rights abuse: ibid principle 7 and commentary. A state should deny access to public support and services for a business that refuses to co-operate in addressing its involvement in gross human rights abuses: ibid principle 7(c). State policies, legislation, regulation and enforcement measures must be effective in addressing the risk of business involvement in gross human rights abuses: ibid principle 7(d). See Sara L Seck, "Conceptualizing the Home State Duty to Protect Human Rights" in Buhmann, Roseberry and Morsing (n69), at 50-51.

83 UN Guiding Principles (n80) principles 11-14. Policies (based on a policy statement to which enterprises express commitment thereby embedding their responsibility to respect human rights) and processes should be in place to identify human rights risks, remediate adverse impacts that occur and to ensure accountability: ibid principles 15-16. A reduction in the risks of claims is a collateral benefit of continual due diligence to rule out complicity: ibid principle 17 and commentary. Remediation is obligatory in the event of a lapse with priority being given to the most severe or urgent impacts: ibid principles 22, 24.

84 ibid principles 25-31.

85 Clapham (n69), at 536.
of the human personality.86

Human rights are universal and are not contingent on being granted by the international order or the state. Their compass is not confined within narrow parameters.87 As Ruggie put it in his draft report submitting the Guiding Principles, “[t]he idea of human rights is as simple as it is powerful: treating people with dignity.”88 Since human rights are considered to be fundamental for the dignity of the individual, the individual should be protected against all violations of human rights, and not only when the violator can be directly identified as an agent of the state.89 Because dignity is vested in the individual and emanates outwards from their person, all those who come into contact and have the power to affect it bear obligations proportional to their capacity to do harm or help.90

The question can be posed as to whether TNCs are participants in society with mutual rights and duties. For Denis Arnold, the answer is “yes” on two alternative grounds: first, corporations are properly understood as agents capable of intentional action and can be duty bearers that are morally responsible for their actions; second, all corporations are populated by individual employees who are agents and, as such, are duty bearers.91 Yet another justification for regarding TNCs as bearing duties is that they frequently assert their own legal rights in society and have the resources to pursue them. Therefore justice and equality require that they carry reciprocal duties.92

86 Ibid, at 546. This intrinsic view deriving rights from human agency also has an instrumental aspect, since people have a fundamental interest in having the freedom to pursue the goals they have identified as making their lives worthwhile and in a minimal provision of health, physical welfare, and education necessary to pursue those goals: Arnold (n69), at 385. Four secure moral claims (to have a life, to lead one’s life, to freedom from cruel degrading treatment and against severe unfairness) can all be thought of as requirements of human dignity and are the grounds of human rights: James W Nickel, Making Sense of Human Rights (2nd edn Blackwell Publishing, Malden, Mass 2007), at 66, 69.

87 Andrew Clapham reasoned that non-state actors must have obligations to protect human rights and to allow for the full realisation of the human potential: Clapham (n59), at 546.

88 UNGA (n81), at [3]. The Global Compact’s principles are derived from the UDHR, whose raison d’etre is human dignity and equality.

89 Jägers (n66), at 39. The object and purpose of the provisions in the core human rights documents increasingly require that the obligations apply at the horizontal level to private entities: ibid, at 70.

90 Halpern (n69), at 139. “All participants in society interact with an individual’s dignity and thus have human rights obligations; dignity does not spring from the relationship between an individual and the state, but between an individual and all others.”; ibid, at 139-140. The placing of the individual in a community and in relationships implicates others who have mutual rights and duties: Arnold (n69), at 385.

91 Arnold (n69), at 387-388.

92 See August Reinisch, “The Changing International Legal Framework for Dealing with Non-State Actors” in Alston (n66), at 85. This is what Arnold calls the moral principle of “fair play”: Arnold (n69), at 389.
The more difficult task is to identify what precise duties TNCs have and in what circumstances. The tripartite typology of duties developed by Henry Shue is a useful tool in this endeavour. Negative obligations to respect human rights by not interfering with them can clearly be attributed to TNCs where they have a special relationship with the rights holders, such as employees, consumers and the wider community affected by their activities. Where TNCs operate in partnership with others violating human rights or when they enter into contracts with abusive states, they may be complicit in breaching people's rights and have a duty not to co-operate or to disengage.

Even when they are not embroiled in situations of abuse, TNCs may have an opportunity to take positive action to fulfil human rights by aiding the deprived. Ethical claims of imperfect obligation cannot be transcribed readily into precise legal rights. Where a TNC operates an essential service or one normally provided by the state, a credible case can be made for finding it has inherited obligations to protect human rights. This is relevant when public services and utilities are privatised, and monopolies are dismantled to make way for competition in the market.

Public acceptance of the content of human rights and of their enforceability can ensure that

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93 Henry Shue, Basic Rights: Subsistence, Affluence, and US Foreign Policy (2nd edn Princeton University Press, Princeton 1996), at 52. Shue distinguished between duties to avoid depriving, to protect from deprivation and to aid the deprived: ibid, at 52. He elaborated his typology, first, by requiring (as part of protection from deprivation) enforcement of duty and the designing of institutions that avoid the creation of strong incentives to violate duty and, second, by setting out the categories of deprived to whom the duty to aid arises (those who are one's special responsibility, who are victims of social failures in the performance of duties, and who are victims of natural disasters): ibid, at 60. See Jägers (n66), at 76.

94 Ibid, at 79-80.

95 Ibid, at 80-83.

96 From an ethical perspective, Amartya Sen deduced that we should not proceed on the assumption that we owe nothing to others, unless we have actually harmed them, as we have a basic general obligation to be willing to consider seriously what we should reasonably do: Amartya Sen, "Elements of a Theory of Human Rights" (2004) 32 Philosophy & Public Affairs 315, at 340. See also Amartya Sen, The Idea of Justice (Allen Lane, London 2009), at 372-373.

Arnold considers that the world's affluent populations may hold a common obligation to ensure that global institutions that have a direct impact on poverty and economic development, such as the World Bank, the UN and the International Monetary Fund, operate within the bounds of justice and respect human rights: Arnold (n69), at 387. On the IMF, see François Gianviti, "Economic, Social, and Cultural Human Rights and the International Monetary Fund" in Alston (n66), at 113-138; Reinisch (n92), at 63.

97 In the laws of some countries there is a legal demand to provide reasonable help to third parties: Sen, The Idea of Justice (n96), at 375. See also Sen, "Elements of a Theory of Human Rights" (n96), at 342. It is not easy to imply a legal obligation on TNCs to use the opportunities presented, except where the TNC acts de facto in place of a "failed state" and, even then, its responsibility will be mostly confined to ensuring that an individual has access to resources needed for survival: Jägers (n66), at 84-85. The size and resources of a corporation will govern the extent of the obligation: ibid, at 85.
they become a reality in law—open debate advances this process. Voluntary codes of conduct or exhortations by the UN can help. However, sometimes TNCs can profess to adhere to certain standards in order to improve their public image, while at the same time ignoring them in practice. Recently there has been depressingly stark evidence in the financial markets of the mayhem that can follow when reliance is placed on “light touch regulation”. Therefore it is worthwhile identifying those human rights that engender correlative obligations on TNCs and enshrining them as legal obligations in an international instrument. The UN draft Norms attempted to do that, but they failed to provide a normative publicly acceptable base for their proposals and were much too ambitious in equating the obligations on TNCs with the duties on states. Ruggie’s approach of requiring compliance with clear obligations and encouraging adherence to those that are still not widely accepted will be more successful.

The mechanisms for enforcing human rights against TNCs could be developed. The International Criminal Court might be given a remit to try TNCs for international crimes. Whether or not this happens depends on the political will to do so by a significant number of players. In the meantime, TNCs can be held to account before national courts. Because of the transnational nature of TNCs’ operations, this situation is not ideal. Jurisdiction may be contested or individual states may not have the capacity or resources to deal with the complexity of the legal and evidentiary issues arising.

8.2.1.3 Private relationships

Examples of countries where constitutional rights are applied horizontally are Brazil, India, Malawi, Namibia, Sri Lanka, South Africa, and Zambia. In contrast, the Canadian

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88 As Sen indicated, “the understanding and viability of human rights are ... intimately linked with the reach of public discussion, between persons and across borders. The viability and universality of human rights are dependent on their ability to survive open critical scrutiny in public reasoning.”: Sen, “Elements of a Theory of Human Rights” (n96), at 356. Apart from being legally enforceable, there are other ways, such as recognition, monitoring and agitation, which can be effective in advancing the cause of human rights: ibid, at 343. See also Reinisch (n92), at 69.


100 See Diau v Botswana Building Society 2003 (2) BLR 409 (BwIC) (Botswana Industrial Court), at 26. On the application of fundamental rights in India to private action, see Mahendra P Singh, “Protection of Human Rights against State and Non-State Action” in Dawn Oliver and Jorg 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 197-212.

101 Butler (n99), at 78.

102 See Diau v Botswana Building Society 2003 (2) BLR 409 (BwIC) (Botswana Industrial Court), at 26.

103 See ibid, at 27.

104 See ibid, at 27-28.

105 Butler (n99), at 78, fn 8.
Supreme Court found in *RWDSU v Dolphin Delivery* that the Canadian Charter did not apply to private litigation completely divorced from any connection with government.\(^{106}\)

There are several reasons why constitutional rights in Ireland apply to private relationships where there is no public element. To ascertain whether they have horizontal application, the purpose of the right as well as the text and spirit of the Constitution will be relevant. Support for the proposition that rights have horizontal application can be drawn from the fact that the Constitution is binding on the judiciary as an arm of the State.\(^{107}\) Therefore, the courts are obliged to play their part in respecting, defending and vindicating personal rights under Article 40.3.1° and in the State’s protection and vindication duties in Article 40.3.2°.\(^{108}\) As judicial acts must conform to the Constitution, the common law whether invoked in private litigation or in cases where there is a public element is subject to constitutional scrutiny. If the Constitution provides a comprehensive normative system for all law within the State, harmony with that value system throughout the legal system is desirable—particularly when the people is sovereign under the Constitution.\(^{109}\) True concern with protection of individuals’ rights from private persons requires the Constitution to apply horizontal relations when the existing private common law is inadequate.\(^{110}\)

### 8.2.1.3.1 Irish case law

Walsh J affirmed the doctrine of constitutional supremacy in *Meskell v CIE* when he stated, “the Constitution ... is superior to the common law and ... must prevail if there is a conflict between the two.”\(^{111}\) He reiterated that the courts are obliged to develop a remedy for

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\(^{107}\) Butler (n99), at 81.

\(^{108}\) *Ibid*, at 81-82.


\(^{110}\) *Roederer* (n109), at 459-460.

breach of a constitutional right where none currently exists.\textsuperscript{112} This principle has given rise to a theory of “constitutional torts”.\textsuperscript{113} It is the courts’ role to define when and which constitutional rights are enforceable between private citizens.\textsuperscript{114} The judiciary has been content to rely on tort law to fulfil a role for which it was not designed.\textsuperscript{115} Henchy J’s reluctance in \textit{Hanrahan v Merck Sharp & Dohme (Ireland) Ltd} to re-shape the contours of tort to align with constitutional norms is evident from the excuse he offered for not doing so, “the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof.”\textsuperscript{116} He conceded that judicial intervention \textit{might} be justified if it could be shown that the tort in question was “basically ineffective” to protect a constitutional right.\textsuperscript{117}

Because the Irish Constitution confers subjective rights on individuals against the state and also generates objective norms that determine the validity of all other forms of law, litigants are able to challenge the constitutionality of legislation or the common law in private law actions, even when no state action is directly involved.\textsuperscript{118} In \textit{McDonnell v Ireland}, Barrington J asserted that constitutional rights did not need recognition by the legislature or by the common law to be effective—the courts would define them if necessary and “fashion a remedy for their breach.”\textsuperscript{119} He sounded a note of caution when he said, “constitutional rights

\begin{footnotesize}
\begin{enumerate}
\item[112] [1973] IR 121 (SC), at 132-133:  
\[A\] right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and ... the constitutional right carries within it its own right to a remedy or for the enforcement of it.

\item[113] Butler (n99), at 81-82, fn 24.
\item[114] There are important distinctions between enforceability of a constitutional right against the State and against an individual, as the relationship between the citizen and the State is not the same as that between citizens: William Binchy, “Constitutional Remedies and the Law of Torts” in James O'Reilly ed, \textit{Human Rights and Constitutional Law: Essays in Honour of Brian Walsh} (Round Hall Press, Dublin 1992), at 201-202. The political ties between the citizen and the State are based on normative premises which differ from the ties between citizens as members of society: \textit{ibid}, at 202. Although a constitutional right may be enforceable against the State and against another citizen, this does not necessarily mean that the conditions for eligibility for an award of compensation against both are identical: \textit{ibid}.
\item[115] \textit{ibid}, at 207; O’Cinneide (n111), at 245-246.
\item[116] [1988] ILRM 629 (SC), at 636. See O’Cinneide (n111), at 236-238.
\item[117] [1988] ILRM 629 (SC), at 636.
\item[118] O’Cinneide (n111), at 217. Colm O’Cinneide explained it thus, “a private litigant in the private law case can assert that the law being challenged is not a binding legal norm, on the basis that it is incompatible with the Constitution, and therefore should not be applied in the case, or alternatively should be applied in a manner compatible with the Constitution.”: \textit{ibid}.
\item[119] [1998] 1 IR 134 (SC), at 148. See O’Cinneide (n111), at 239.
\end{enumerate}
\end{footnotesize}
should not be regarded as wild cards which can be played at any time to defeat all existing rules."\(^{120}\) Constitutional rights were applied directly to regulate the internal affairs of a private body in *Glover v BLN Ltd*.\(^{121}\) McCracken J distinguished *Glover* in *Carna Foods Ltd v Eagle Star Insurance Co (Ireland) Ltd*, when he held that there was no requirement for an insurance company to give reasons for cancelling or refusing to renew a policy.\(^{122}\) He did not consider that any principle of natural justice or constitutional justice applied to that decision.\(^{123}\)

The High Court applied the constitutional right to a livelihood (but not the right to equality) to the private relationship between a publican and a trade union representing the former’s employees in *Murtagh Properties v Cleary*.\(^{124}\) The courts’ reluctance to intrude on the individual’s autonomy in private relationships on the grounds of equality (even when discrimination occurs on the basis of gender, an innate immutable characteristic) exceeded the realms of what is constitutionally tolerable in *Equality Authority v Portmarnock Golf Club*, where state endorsement of discrimination against women in clubs was upheld by allowing those clubs to obtain official recognition and to hold licences granted by the state.\(^{125}\) In the High Court, O’Higgins J confirmed that as interpreted by the courts Article 40.1 of the Constitution guaranteed “process equality” and did not impose obligations on citizens in their private relations.\(^{126}\) However, neither he nor the Supreme Court considered whether the state had failed in its constitutional remit by supporting the club’s discriminatory conduct in licensing it to sell alcohol and exempting it from tax.

The relationship between a union and its members is subject to its members having the democratic right to participate in its processes as a corollary to the constitutional right to join

\(^{120}\) [1998] 1 IR 134 (SC), at 148.
\(^{121}\) [1973] IR 388 (SC). Walsh J stated, “public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures.”: ibid, at 425.
A company director’s contract had been terminated for serious misconduct and neglect without giving him prior notice of any complaints. See O’Cinneide (n111), at 220-221. The right to fair procedures under Article 40.3 of the Constitution applies to the Government’s exercise of the power of removal: *Garvey v Ireland* [1981] IR 75 (SC).
\(^{125}\) [1995] 1 IR 526 (HC).
\(^{126}\) He expressed concern at the effect of imposing constitutional rights directly in the context of purely commercial relationships between private parties, as it “would be a serious interference in the contractual position of parties in a commercial contract and with very wide-ranging consequences”: ibid, at 531. See O’Cinneide (n111), at 236.
\(^{125}\) [1972] IR 330 (HC).
\(^{126}\) [2005] IEHC 235.
The special position of a teachers' union towards pupils warranted an award of exemplary damages for its intentional breach of a child's right to free primary education. A road transport operator obtained an injunction against a competitor carrying on an unlicensed service to stop a breach of his constitutional right to earn a livelihood, as the maximum fine possible was derisory and did not protect him.

The children of a man who suffered brain damage necessitating permanent hospitalisation in an industrial accident claimed damages from his employer for the non-pecuniary benefits deriving from the parent/child relationship in *Hosford v John Murphy and Sons Ltd*. They invoked their constitutional rights as a family under Article 41 as well as a right that their father should not be prevented by injury from fulfilling his right and duty to educate them under Article 42. Costello J thought that damages would in principle be recoverable if the employer's careless act amounted to a constitutional wrong which inflicted harm on them, as “otherwise, the protective provisions of the Constitution would be vacuous and valueless.”

His analysis of the nature of the rights granted showed that Article 41.1 gave a right to protection from legislation or deliberate acts of state officials attacking or impairing the constitution or the authority of the family. The Constitution targeted arbitrary state action—not negligence. It followed that the employer’s negligent action had not infringed any constitutional right enjoyed by members of the affected family.

When a breach of constitutional rights by the state has been established, damages are not necessarily awarded. In the *Blascaod Mór* case, where legislation was declared invalid because it used pedigree as a basis of classification, Budd J refused to award damages. For

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127 *Rodgers v ITGWU* [1978] ILRM 51 (HC). See O’Cinneide (n111), at 221.
129 *Lovett v Gogan* [1995] 3 IR 132 (SC). See O’Cinneide (n111), at 226. Cf *Parsons v Kavanagh* [1990] ILRM 560 (HC). In the latter case, it was held that the right to earn one's livelihood by any lawful means carried with it the entitlement to be protected against any unlawful activity on the part of another which materially impaired or infringed that right; the plaintiff had made out a case for the granting of an injunction. There is potential for damages to be granted for breach of a constitutional right by criminal activity that is subject only to a minor sanction. The application of this principle could extend beyond the right to earn a livelihood to other constitutional rights. The courts have not limited liability to cases where there is intention to damage or to infringe a constitutional right; neither is foreseeability a requirement.
130 [1988] ILRM 300 (HC).
131 Ibid, at 303.
132 Ibid, at 305.
133 Ibid.
134 Ibid.
135 *Blascaod Mór Teo v Commissioners of Public Works in Ireland (No 4)* [2000] IEHC 130, [2000] 3 IR 565,
public policy reasons he felt that there must be considerable tolerance of the legislature.\textsuperscript{136} In any event, the plaintiffs had “largely been vindicated” by the declaration of invalidity of the legislation.\textsuperscript{137} Budd J’s explanation for his thinking this shows that how one is viewed by others is important.\textsuperscript{138} Restoring a person’s standing in the community can be more supportive of dignity than monetary compensation.

On the other hand, damages may not be sufficient to vindicate a personal right and a judicial determination may be necessary. The Supreme Court refused to strike out as an abuse of process the action \textit{Grant v Roche Products (Ireland) Ltd} brought by the father of a man who committed suicide following the taking of a prescribed drug.\textsuperscript{139} The drug company offered to settle for the full value of the claim, but the father refused to accept it. Hardiman J confirmed that the only way the deceased’s right to life could be vindicated was by a judicial hearing into the claim that his death was caused by the defendant’s wrongdoing followed by a determination of liability.\textsuperscript{140}

Laffoy J grappled with the issue of whether damages should be awarded in the problematic long-running Blehein litigation,\textsuperscript{141} in which it had been held that a statutory restriction on issuing proceedings to challenge treatment while involuntarily detained in a mental hospital infringed the constitutional right to access to the court.\textsuperscript{142} The context was important—here the fundamental right to liberty had been restricted, a serious infringement “on any consideration of the hierarchical framework of constitutional rights”.\textsuperscript{143} The difficulty in

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\textit{at 590.}\textsuperscript{136} Tolerance was required because of the balance the legislature had to strike between individual rights and the common good, and therefore there was “little justification for a regime of strict liability for infringement of a constitutional right”: \textit{ibid}, at 581, 590.
\textsuperscript{137} \textit{ibid}, at 590.
\textsuperscript{138} “The informed public is aware of their [the plaintiffs’] stance and their vindication by the pronouncements of the Supreme Court as to the unjustified discrimination against them and the infringement of their property rights.”: \textit{ibid}.
\textsuperscript{140} \textit{ibid}, at [70], [75]. He held that a finding of wrongful death, might, in certain circumstances, confer a tangible benefit on the relatives of the deceased person: \textit{ibid}, at [68], [82].
\textsuperscript{141} Blehein v Minister for Health and Children [2010] IEHC 329.
\textsuperscript{143} [2010] IEHC 329, at [12.9]. Another factor to be taken into account was the nature and extent of the adverse impact on the plaintiff resulting from such civil wrong as he would have been in a position to establish in the litigation which he was precluded from prosecuting; a significant countervailing factor was the status of the impugned legislation (in \textit{Blehein} the Act had survived for almost 60 years after its enactment, benefited from the presumption that it was constitutionally valid and had been applied consistently in the courts): \textit{ibid}.
\end{flushright}
ascertaining the measure of damages had to be distinguished from the impracticability or impossibility of providing redress.\textsuperscript{144} Public policy and the common good justified the Supreme Court's demurral from awarding damages for the \textit{ultra vires} exercise of statutory power in \textit{Pine Valley Developments Ltd v Minister for the Environment}\textsuperscript{145} and \textit{Glencar Explorations plc v Mayo County Council (No 2)}.\textsuperscript{146}

\subsection*{8.2.1.3.2 Analysis of Irish approach}

The case law shows that the use of the direct horizontal effect approach of the constitutional tort endorsed in \textit{Meskell} and \textit{Glover} is uncommon, occurring only when the existing statutory or common law has not addressed the wrong in question.\textsuperscript{147} If a remedy for the constitutional breach can be found in tort, the courts have accepted the law "warts and all". They have not attempted to develop it to bring it into conformity with constitutional norms. The scope and extent of the \textit{Meskell} doctrine is uncertain.\textsuperscript{148} It is unclear whether the constitutional tort is actionable \textit{per se} or only on proof of damage, whether liability is strict, whether all constitutional rights are actionable in the private sphere, and how the balancing process works in the resolution of private disputes where conflicting rights and interests are at stake.\textsuperscript{149}

The uncertainty has its foundation in the Supreme Court's failure to establish an overarching test to determine whether a constitutional right will be given horizontal effect, and, if so, to what degree and extent.\textsuperscript{150} The absence of guidance on horizontal effect could impact on personal autonomy, as private individuals and bodies may be unsure or unaware of the constitutional obligations that may be imposed on them.\textsuperscript{151} Timidity about applying the equality guarantee in Article 40.1 in private relations will ensure that entrenched views rooted in prejudice and stereotyping will continue unchallenged and that a powerful elite will remain

\textsuperscript{144} \textit{Ibid}, at [12.7]. Laffoy J decided to deal with the issue of whether the claim was statute-barred first, considering it undesirable (unless necessary to do so) to embark on the determination of a fundamental issue as to whether transcendent considerations existed which rendered it undesirable that the plaintiff be awarded damages: \textit{ibid}, at [12.10].

\textsuperscript{145} [1987] IR 23 (SC), at 38, 40.

\textsuperscript{146} [2001] IESC 64, [2002] 1 IR 84, at 128.

\textsuperscript{147} The courts have not analysed the legitimacy of the direct horizontal effect approach, as contrasted with the vertical "state action" or indirect horizontal effects doctrines: O'Cinneide (n111), at 223. The ambiguity in the key precedents has led to questioning of whether the direct horizontal approach has actually been established as a fixed constitutional doctrine in Irish constitutional law: \textit{ibid}, at 224.

\textsuperscript{148} \textit{ibid}, at 223. See also Colm O'Cinneide, "The European Convention on Human Rights and the Irish Constitutional System of Rights Protection: Complementary or Divergent?" in Oran Doyle and Eoin Carolan eds, \textit{The Irish Constitution: Governance and Values} (Thompson Round Hall, Dublin 2008), at 522.

\textsuperscript{149} Dawn Oliver and Jorg Fedtke, "Comparative Analysis" in Oliver and Fedtke (n100), at 480.

\textsuperscript{150} O'Cinneide (n111), at 229.

\textsuperscript{151} \textit{Ibid}, at 230.
in the ascendant. In contrast to its attitude to equality, the Supreme Court imposed constitutional norms directly to restrain private clinics, advice centres and student unions from giving information on abortion, despite the fact that they had not acted contrary to any specific common law or legislative rules.

Because of the greater caution exhibited since the early 1990s, the Irish courts develop existing law which regulates a matter within the scope of constitutional rights only where the scope of the tort is "basically ineffective" or "plainly inadequate" to vindicate the constitutional rights at issue. Costello P in *W v Ireland (No 2)* ruled out adjusting the existing law of torts where it addressed the constitutional right invoked. He accepted the *Meskell* doctrine that the Constitution was to be construed as providing a discrete cause of action for damages for infringement of a constitutional right which was not protected by common law or by statute law, and that an injunction could be granted to prohibit an infringement. He construed the

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152 On the doubt that exists as to whether Article 40.1 applies as between private individuals, see *ibid*, at 230-232.
154 *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan* [1989] IR 753 (SC). See Maria Cahill, "Constitutional Exclusion Clauses, Article 29.4.6° and the Constitutional Reception of European Law" (2011) 34 DULJ 74, at 93-96.
155 *O’Cinneide (n111), at 233-234*. This severely infringed the freedom of action and communication of the defendants, who prior to being injuncted could not have known that they were necessarily acting contrary to Irish law: *ibid*, at 234. It transpired ultimately that the State’s actions were not justified, as the European Court of Human Rights found a breach of Article 10 ECHR because the restraint imposed on receiving or imparting information was disproportionate to the aims pursued: *Open Door Counselling v Ireland* (App no 14234/88) (1993) 15 EHRR 244. See Fiona de Londras and Cliona Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Round Hall/Thomson Reuters, Dublin 2010), at [6-32].
156 *O’Cinneide (n111), at 237.*
157 [1997] IEHC 212, [1997] 2 IR 141. The victim of sexual offences by a priest subsequently convicted in Northern Ireland of sexual abuse was not entitled to damages for the delay in prosecuting him attributable to the failure of the Attorney General to endorse extradition warrants. The High Court held that the Attorney General did not owe a duty of care to the victim because there was no relationship between him and her: *ibid*, at 163. Even if he did have a sufficiently proximate relationship with her, it would be contrary to public policy to impose a duty of care on him: *ibid*, at 164. His role in the extradition process was to ensure proper compliance with the State’s international obligations: *ibid*, at 160. See Morgan and Hogan (n111), at [18-32], [18-40], [18-83]—[18-84]; *O’Cinneide (n111), at 238*. Neither do the gardaí owe a duty of care such as would create an entitlement to damages arising from the manner in which they conduct an investigation: *Lockwood v Ireland* [2010] IEHC 430.
158 [1997] IEHC 212, [1997] 2 IR 141, at 166. Costello P considered that constitutionally protected rights which are regulated and protected by existing common and/or statutory law comprise "all those fundamental rights which the Constitution recognises that man has by virtue of his rational being antecedent to positive law and are rights which are regulated and protected by law in every State which values human rights": *ibid*, at 164. His distinction between these fundamental rights and other secondary constitutional rights is unsound, as it not necessarily true that all fundamental rights are protected by the existing law; neither is it inevitable that constitutionally protected minor rights are not

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State's duty to respect, defend and vindicate the personal rights of the citizens in Article 40.3.1° of the Constitution as being implemented by the "existence of laws (common law and statutory) which confer a right of action for damages (or a power to grant injunctive relief) in relation to acts or omissions which may constitute an infringement of guaranteed rights". However, he also accepted that if a provision of the law to be applied did not adequately protect the guaranteed right in a particular case, then the law would be applied without the provision, which would be rendered invalid by the Constitution. There is a contradiction within Costello P's judgment, as he simultaneously ruled out shaping the existing law which deals with a constitutional right, and at the same time agreed that an inadequate provision in that law could be annulled.

From this review of the application of constitutional rights in private relations, some questions arise: first, when is a tort basically ineffective so as to trigger a constitutional tort? Second, what rights are enforceable between private parties? Third, what kinds of infringement give a right of redress? Fourth, what remedy is appropriate? I will address each of these in turn. Ineffectiveness is not necessarily identified with unconstitutionality—the courts should try to fill the gap. The inefficacy may be regarded as generic or contextual. Costello P took the former view in W v Ireland (No 2). The private law framework provided protection in general for bodily integrity, so he accepted the existing restrictions without interrogating their adequacy in the particular circumstances. A very narrow interpretation of the Constitution could mean that the courts would give effect to constitutional norms in private law only when the legislature, as distinct from the private parties involved, had failed in its constitutional duty to uphold fundamental rights. The current law, in the absence of "plain inadequacy", is considered to be entirely in conformity with the Constitution and immune from alteration. The law will be scrutinised not just in relation to the plaintiff's rights, but also as to whether it protects the defendant's constitutional rights.

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159 ibid, at 166-167.
160 ibid, at 167. As an example of a provision that would be rendered invalid, Costello P mentioned a limitation period which in the particular circumstance "trenched unfairly on a guaranteed right" and deprived the plaintiff of a right to compensation: ibid.
161 See Catherine Donnelly, "The Privatisation of Governmental Functions" in Doyle and Carolan (n 148), at 253.
162 Binchy (n 114), at 208.
163 ibid.
164 O'Cinneide (n 111), at 240.
165 ibid, at 241; Binchy (n 114), at 202.
166 O'Cinneide (n 111), at 241.
167 Binchy (n 114), at 209.
The answer to the second question as to which rights are enforceable will depend on the nature and extent of the particular right taking into account the text of the Constitution and its underlying values. The wording might show a clear intention that the onus of compliance rests solely on the state. Not all of the provisions in Articles 40-44, which are fundamental rights primarily for the protection of individuals, could create rights of action for breach of constitutional duty. From the cases mentioned so far, it can be seen that an individual can rely in litigation against another private actor on the rights to bodily integrity, to a livelihood, and to fair procedures under Article 40.3, and on the right of association and non-association in Article 40.6.1. Children may obtain damages for unlawful interference with their right to free primary education in Article 42.4. The rights in Article 41 apply to the family and to marriage as institutions, so an individual has difficulties (to say the least) in trying to invoke it. The wording of Article 44.2 suggests that individuals have a civil right of action against those interfering with religious activities.

The potential of the equality guarantee in Article 40.1 to be utilised in private relationships has been curbed by the countervailing right to autonomy, as well as by concerns over its impact on legal certainty and the separation of powers. Violations of human dignity, a constitutional value and recognised as an unenumerated right under Article 40.3, should, in theory, give a right of redress against private actors. Torts such as defamation and assault already give a remedy for infringements of dignity. Extension of respect for dignity beyond what is already enshrined in statute or well-established in common law will require judicial analysis and elucidation of the circumstances in which this is appropriate. Since it is the foundation for the equal worth of all human beings, human dignity as well as equality should receive consideration commensurate with that accorded liberty in the harmonisation or

169 See Binchy (n114), at 202-203. The Meskell doctrine could give horizontal protection to socio-economic rights as well as to civil and political rights. Walsh J stated, “[t]o infringe another’s constitutional rights or to coerce him into abandoning them or waiving them (in so far as that may be possible) is unlawful as constituting a violation of the fundamental law of the State”: Meskell v CIE [1973] IR 121 (SC), at 134. He did not qualify his remarks by confining them to civil and political rights, in Meskell the rights of association and dissociation in contention were raised in the context of the right to earn a livelihood, which is an economic right. Tort law involves notions of distributive justice (in addition to corrective justice) and constitutional rights have a social justice element.
170 Binchy (n114), at 203.
171 Temple Lang (n168), at 247.
172 On the potential of Article 40.1, see ibid, at 248-249; Gerard Hogan and Gerry Whyte, JM Kelly: The Irish Constitution (4th edn Tottel Publishing, Dublin 2004), at [7.2.24].
173 O’Cinneide (n111), at 232.
174 William Binchy, “Dignity as a Constitutional Concept” in Doyle and Carolan (n148), at 324.
balancing of rights.\textsuperscript{175} As a right might be enforceable in one circumstance but not in another, the context will also impact on whether a particular right can be pursued.

The third issue of the type of infringement that gives a right to redress has several possible answers ranging from strict liability through responsibility based on negligence or intent, to culpability only for intentional actions. Writing in 1971, John Temple Lang thought it would be odd if negligence were the basis of civil liability, as it was irrelevant to the state’s obligation to respect constitutional rights; therefore, superficially, reasonable care should not be a valid defence, leaving absolute liability as the logical choice.\textsuperscript{176} But Hosford took a different route, and leaned towards imposing liability only for intentional or irrational actions. Because of the difficulties (and perhaps impossibility) of framing an overarching general rule to apply in all circumstances, an alternative contextual approach addressing issues of intention and negligence in precise factual situations would be more appropriate.\textsuperscript{177}

The judiciary has focused on tort law for the answer to the final question of the appropriate remedy. Damages or an injunction are accepted options.\textsuperscript{178} However, the nature of constitutional rights varies enormously and the severity of the interference with them can fluctuate widely. Sometimes it might be more satisfactory to apply the contract model rather than tort.\textsuperscript{179} Divergence from compensatory damages for violation of constitutional rights can range from nominal damages for trivial infringements to punitive damages. The latter should be awarded for a serious breach of a constitutional right irrespective of whether the right itself is categorised as important.\textsuperscript{180} Occasionally no compensation at all may be appropriate, as the

\textsuperscript{175} See \textit{ibid}, at 325.
\textsuperscript{176} Temple Lang (n168), at 247.
\textsuperscript{177} Binchy (n114), at 207.
\textsuperscript{178} Because of the courts’ reluctance to breach the separation of powers, they may not intervene to prevent infringements of constitutional rights involving policy decisions on the application of state resources. However, \textit{Meskell} and tort law may provide a remedy in damages for actual infringements. The Supreme Court was opposed to granting mandatory relief in relation to the state’s constitutional obligation to provide for free primary education under Article 42.4 of the Constitution, but the High Court award of damages for breaching that right was not appealed: \textit{Sinnott v Minister for Education} [2001] 2 IR 545, at 631, 640, 656, 668, 669, 697-712, 715, 723-724. While the majority in the Supreme Court did not countenance granting a mandatory injunction obliging the state to implement its policy in relation to disadvantaged children forthwith, it did not seek to prevent an award of damages if a breach had actually occurred: \textit{TD v Minister for Education} [2001] IESC 101, [2001] 4 IR 259, at 285-288, 316, 334-337, 372. The courts declined to grant a health board an order permitting it to carry out a screening test on an infant whose parents had refused to consent, but it can be deduced from the judgment of Denham J in the Supreme Court that the parents would be liable to the child if disease developed: \textit{North Western Health Board v HW} [2001] IESC 90, [2001] 3 IR 622, at 723, 726-728.
\textsuperscript{179} Binchy (n114), at 217.
\textsuperscript{180} \textit{Ibid}, at 218.
court’s finding that a person’s rights have been breached is sufficient vindication—restoration in the eyes of the community is enough in the circumstances. But in our consumerist society, which places an inordinate value on money, there is a danger that the failure to be recompensed in tangible terms may undermine the value of a simple court verdict in one’s favour.

8.2.1.4 Alternative models

Before considering how the Irish system for the enforcement of fundamental rights in private law might be improved, this subsection will compare briefly how some other jurisdictions (namely the United States and Germany) have dealt with this aspect of constitutional law.

In contrast to the assumption in Ireland that the Constitution of 1937 altered private law, the US Supreme Court confined its protection of citizens to vertical state action because of the more restricted wording of the Fourteenth Amendment. This apparently firm approach has been softened by regarding the courts as part of the state and therefore restricted from enforcing unconstitutional activities in the private sphere. In *Shelley v Kraemer* the Court found that a private agreement containing a restrictive covenant preventing occupation of land by non-white people did not violate the Fourteenth Amendment, but enforcement of the racially-discriminating agreement by the courts constituted state action denying equal protection of the laws. The Court substantially modified the common law of defamation to ensure it conformed to the First Amendment guarantee of free speech in *New York Times v Sullivan*, a civil lawsuit between private parties.

The Federal Constitutional Court in Germany in the *Lüth* decision in 1958 developed the

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181 Temple Lang (n168), at 243. Unlike in the US, the Irish Constitution’s conferral of a right of action for breach of constitutional rights provides a mechanism for increasing accountability of private actors engaged in the performance of governmental functions: Donnelly (n161), at 252.

182 334 US 1 (1948). Positive action by the state courts supported discrimination, *ibid*, at 19 (Chief Justice Vinson):

These are not cases ... in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.

See Gardbaum (n106), at 389, 414; O’Cinneide (n106), at 95-96; Temple Lang (n168), at 243-244.

183 376 US 254 (1964). Justice Brennan, delivering the Opinion of the Court, precluded the courts from applying a state rule of law that would have imposed invalid restrictions on the newspaper’s constitutional freedoms: *ibid*, at 265. See Gardbaum (n106), at 389, 428-429, 432, 440; O’Cinneide (n106), at 96.
doctrine known as *Drittwirkung* (third-party effect of constitutional rights), which states that, although constitutional rights bind only governmental organs, they apply directly to all private law and so have indirect effect on private actors whose legal relationships are regulated by that law. According to the Court, constitutional rights form “an objective order of values”, where the value system “centers upon human dignity and the free unfolding of personality within the social community” and is “a fundamental constitutional decision affecting the entire legal system.” It influences private law, so that “no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.”

The American modification of the vertical state action doctrine by regarding the judiciary as part of the state and therefore precluded from enforcing activities contrary to constitutional norms in the private sphere contrasts with the position in Ireland, as does the German indirect horizontal application of constitutional norms emphasising human dignity and the place of the person in the community.

### 8.2.1.5 The way forward in Ireland

The direct horizontal approach is essentially sound and should be continued. Like what happened in the US in the vertical state action model, the courts can be regarded as part of the state, so that they cannot enforce measures contrary to constitutional norms in the private sector. The indirect horizontal effect doctrine could also be adopted as in South Africa. If the existing law cannot be remodelled, the constitutional tort is a last resort. An analysis of the scope and nature of the right in question and the extent to which it is capable and appropriate to use it to alter the legal rights and obligations of individuals is an indispensable first step. The second step is full consideration of all the constitutional norms (particularly human dignity and equality), which have been overlooked in Irish jurisprudence. The third step, following the German example, is application of those norms as an objective order of values suited to a more complex diverse society in the context of the emerging liberal democratic theory in

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186 Ibid, at 247.

187 Ibid.

188 See ibid, at 249.

189 Ibid.
Ireland. To conform with the constitutional vision of promoting the common good to assure the dignity and freedom of the individual, the person is seen as a member of the social community.

It is clear from the wording of Articles 41-43 that the norms enshrined in the Constitution are derived from natural law and not from the state. The family is identified as “a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.” Parents have “the inalienable right and duty” to provide for their children’s education. It is acknowledged “that man, in virtue of his rational being, has the natural right, antecedent to positive law,” to private ownership of property. Since constitutional rights do not depend for their existence on the state, they are enforceable against all comers insofar as they are capable of being so applied. The Constitution delineates when it is proper for the State to intervene to protect and vindicate these inherent rights.

Unlike in the US, the Irish Constitution is not inhibitory—its primary aim is not to guard against state intervention. The courts’ role is to delve into the normative issues, to interpret them...
and apply them in particular situations, so that people can understand how those norms should operate in legal harmony. Interpretation is necessary because it does not automatically follow that there is a right to sue on foot of a constitutional right—the defendant may not have a correlative obligation. The courts should make the connection between the moral framework of the Constitution and the implemented moral right. Their task is to create the legal network to deliver a constitutional vision.

The South African courts have demonstrated how the common law can be moulded to reflect constitutional norms. The Supreme Court of Appeal developed the defence of reasonable publication to defamation in National Media Ltd v Bogoshi, which was approved by the Constitutional Court in Khumalo v Holomisa as it struck an appropriate balance between the protection of freedom of expression and the constitutional value of human dignity. In contrast, the Irish courts have not produced coherent and analytically persuasive explanations of horizontality from conceptual, juridical and jurisdictional perspectives.

195 Jürgen Habermas explained that law has a more complex structure than morality because, first, it simultaneously “unleashes and normatively limits individual freedom of action (with its orientation toward each individual’s own values and interests)” and, second, it incorporates “collective goal setting, so that its regulations are too concrete to be justifiable by moral considerations alone”: 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 452. Actionable positive law can be viewed as a functional complement to morality: ibid.

196 The term “rights” tends to be used indiscriminately to cover what may in a given case be a privilege, power or an immunity rather than a right in the strictest sense: Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale LJ 16, at 30. “Duty” is the correlative of “right”: ibid, at 31-32; Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1917) 26 Yale LJ 710, at 710, 717. Instead of there being a single right with a single correlative duty resting on all the persons against whom the right avails, there are many separate and distinct rights, actual and potential, each one of which has a correlative duty resting upon some one person: ibid, at 742.


197 The Constitution has been viewed as a philosophical and theological document: Keogh and McCarthy (n190), at 108. From that perspective, its legal import needs to be articulated.

198 1998 (4) SA 1196.

199 2002 (5) SA 401.

8.2.2 Positive obligations on the state

The extent of the state's obligations to protect dignity can require it to take positive steps to prevent infringements not only by state actors, but also by private individuals. This may mean criminalisation of certain activities and follow up to prosecute, punish and rehabilitate offenders. It can also necessitate state action to ensure that the law provides an effective remedy for civil wrongs extending to judicial intervention to secure redress for individuals in addition to legislative and administrative measures.

The judiciary is an arm of the state entrusted with a particular obligation to uphold the Constitution where the other branches of government have failed to do so. Its role in fulfilling that duty is to provide a proper enforcement mechanism to deliver a remedy to those aggrieved. In Ireland a re-evaluation of the unnecessary excessive deference to the legislature and executive because of the separation of powers would be timely. If it were jettisoned, that would remove an obstacle to performance of the courts' legitimate function. A context-

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International criminal tribunals were established at the end of the 20th century to hold individuals accountable for their part in atrocities. See, eg, Prosecutor v Akayesu (Judgment) ICTR-96-4-T, T Ch I (2 September 1998); Ilias Bantekas, International Criminal Law (4th edn Hart, Oxford 2010), at [2.6], [7.3.2], [8.3], [9.3], [9.4], [9.7], [21.11.5]; Hilary Charlesworth and Christine Chinkin, The Boundaries of International Law: A Feminist Analysis (Melland Schill Studies in International Law, Manchester University Press, Manchester 2000), at 237, 312, 318-319, 323; Catharine A MacKinnon, Are Women Human? And Other International Dialogues (Belknap Press of Harvard UP, Cambridge, Mass 2006), at 238-239, 245.

On the development of an exception to state official immunity for core international crimes, see Mark A Summers, "Immunity or Impunity—The Potential Effect of Prosecutions of State Officials for Core International Crimes in States like the United States that are not Parties to the Statute of the International Criminal Court" (2006) 31 Brooklyn J Intl L 463, at 482-486.

202 The Community Court of Justice of the Economic Community of West African States held that the state was to be blamed for the inaction of its judicial and administrative authorities in not protecting a woman from violation of her human rights by a tribal practice of slavery: Korou v Niger [2008] AHRLR 182 (ECOWAS 2008). State liability arose as a result of "the tolerance, passiveness, inaction, and abstention" of the judiciary in Niger vis-à-vis the practice: ibid, at [85].

203 In the Supreme Court, the majority (including Hardiman J) has regarded the separation of powers as rigid, whereas Denham CJ has a functional conception of it which allows greater innovation on the part of the courts: Doyle (n153), at [13-21], [13-32]-[13-33], citing TD v Minister for Education [2001] IESC 101, [2001] 4 IR 259, at 367-371, 298-299. See also Jenny Wakely, "Social and Economic Rights—A Retreat by the South African Constitutional Court?" (2010) 28 ILT 153, at 154.
sensitive review allows flexibility in the judiciary’s relationship with the executive. In Lockwood v Ireland a rape victim claimed damages for the acquittal of her alleged rapist because his arrest was wrongful and therefore his confession was inadmissible. In her action against the state she based her case on negligence and breach of duty on the part of the police in invoking an invalid power of arrest. She asserted that there had been a failure to vindicate her constitutional right to bodily integrity and to ensure that justice was achieved in her case. Kearns P dismissed her claim and held that a duty of care creating an entitlement to damages from the manner in which the gardaí conduct an investigation does not arise in the absence of mala fides.

Hedigan J in G v Minister for Justice Equality and Law Reform applied the “now well established law” arising from public policy that the gardaí owe no duty of care in respect of actions taken in the course of their duty to investigate and prosecute crime. Here the gardaí brought the husband of a woman murdered in their home from the crime scene to G’s house, where he stayed and raped her. He had a history of violence and rape. The Court found that bringing the husband to G’s house after removing him from his home in order to preserve the scene of the crime was part of the gardaí’s investigatory functions and therefore no duty of care was owed to G. This was a premature conclusion based on the general rule without any considered analysis of the particular context. Hedigan J dealt with the case solely as a negligence claim and made no reference to the state’s constitutional obligations—even though the plaintiff invoked her constitutional rights. The decision is in stark contrast to the South
The UK has taken a somewhat similar approach to that in Ireland and the police there owe a duty of care in their investigative role only in exceptional circumstances. The Court of Appeal in *Desmond v Chief Constable of Nottinghamshire Police* set out the current core principle—based on public policy—that the police do not generally owe individuals a duty of care. But the police do not have (and cannot be given) a blanket immunity. In establishing whether or not a duty of care exists, it is relevant to see if the aggrieved person has other remedies, such as those available under statute, judicial review, for misfeasance in public office, for maladministration to an ombudsman, or under the Police Conduct Complaints Procedure. Other relevant factors are whether the claimant relied on the police in the event of economic rather than physical loss, and if the police assumed responsibility to the claimant to guard against the damage for which compensation is claimed. It is an established requirement in the UK that the courts consider carefully the individual circumstances in each case before coming to a decision on whether the police owe a duty of care.

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210 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).
212 [2011] EWCA Civ 3, [2011] All ER (D) 37, at [31]: “In the absence of special circumstances, the police and the Crown Prosecution Service do not generally in the interests of the whole community owe individual members of the public, be they victims, witnesses or those who are prosecuted, a common law duty of care in undertaking and performing their operational duties of investigating, detecting, suppressing and prosecuting crime. The principle is one of public policy which has regard to the practical needs of law enforcement; the need not to inhibit the police from taking difficult operational decisions and so as to avoid defensive policing; and the undesirability that judgments of policy and discretion in the most advantageous deployment of resources and so forth should be elaborately and expensively investigated in litigation or otherwise with consequent diversion of police or CPS resources. Although the core principle might lead to hardship in some individual cases, the greater public good outweighed individual hardship: *ibid.*”
213 *ibid.* at [41], [52]. State immunity in Ireland was held to be unconstitutional: *Byrne v Ireland* [1972] IR 241 (SC). See Walsh (n112), at 152. There is no presumption that a general statute does not apply to the State; the courts’ task is to ascertain the legislature’s intention primarily from the statute’s words: *Howard v Commissioners of Public Works in Ireland* [1994] 1 IR 101 (SC).
216 *ibid.* at [32], [35].
217 There have been some exceptions to the general rule, *eg*, it was held that the police owed an informant a duty to take reasonable care to avoid unnecessary disclosure to the general public of information given to the police in confidence: *Swinney v Chief Constable of Northumbria Police (No 2)* 25
The House of Lords in *Van Colle v Chief Constable of the Hertfordshire Police* was divided on the issue of whether the common law should be developed to provide a remedy in damages against the state for an individual injured by another after the police were aware of the threat.\(^{218}\) The majority upheld the core principle enunciated in *Hill v Chief Constable of West Yorkshire*\(^{219}\) that in the absence of special circumstances the police owe no common law duty of care to protect individuals against harm caused by criminals.\(^{220}\) They disagreed with Lord Bingham’s proposed “liability principle” that if a member of the public furnishes a police officer with apparently credible evidence that an identified third party presents a specific and imminent threat to his life or physical safety, the officer owes a duty to take reasonable steps to assess the threat and, if appropriate, to take reasonable steps to prevent it being executed.\(^{221}\) Their rationale was based on public policy favouring the interests of the community as a whole, since the proposed duty would encourage defensive policing and divert manpower and resources from their primary function of suppressing crime and apprehending criminals. They also rejected Lord Bingham’s view that the common law should be developed in harmony with ECHR rights.\(^{222}\) Lord Brown considered that common law claims had different objectives from those under the ECHR—the former were designed to compensate claimants, whereas the latter were intended to uphold minimum human rights standards and to vindicate those rights.\(^{223}\)

May 1999 Times Law Reports (QB). The case was dismissed on the merits because the police were not in breach of that duty. The Court of Appeal had refused to strike out the claim on the grounds that it disclosed no reasonable cause of action and held that the immunity generally conferred on police officers from actions in negligence in relation to the investigation or suppression of crime had to be weighed against the need to protect the confidentiality of informants and to encourage them to come forward without fear of disclosure of their identity; it is necessary to make a balanced assessment of all the public policy considerations in order to determine the question of immunity: *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464 (CA). See Hugh Beale and Nicola Pittam, “The Impact of the Human Rights Act 1998 on English Tort and Contract Law” in Friedmann and Barak-Erez (nl06), at 144; Ewan McKendrick, “Negligence and Human Rights: Re-considering Osman” in Friedmann and Barak-Erez (n106), at 343-344.


\(^{221}\) *Ibid*, at [44].

\(^{222}\) *Ibid*, at [58].

\(^{223}\) *Ibid*, at [138]. The situation in Ireland is different because constitutional values are supreme. The Supreme Court has held that the vindication of personal rights can be enforced through the law of tort, and not only through criminal or regulatory law: *Grant v Roche Products (Ireland) Ltd* [2008] IESC 35, [2008] 4 IR 679. Hardiman J stated, *ibid*, at [79]:

There is thus authority, both judicial and academic, for the proposition that the law of tort is, at least in certain circumstances, an important tool for the vindication of constitutional rights, and no authority whatever for the proposition that it is concerned exclusively for the allocation of damages and with nothing else whatsoever.
Under the ECHR there is an obligation in applying the law of negligence not to grant a blanket immunity to the police and to include the fair, just and reasonable criterion as an intrinsic element of the duty of care when considering the particular circumstances. The European Court of Human Rights in Z v UK concluded that the inability to sue a local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law. The right of access to the courts under Article 6 ECHR had been affirmed in Osman v UK, where the early striking out of a tort claim against the police breached that right. There the victims of a shooting incident were entitled to have the police account for their actions and omissions in adversarial proceedings. The House of Lords in Van Colle (applying the decision in Osman) held that to comprise a violation of the state’s positive obligation to protect life under Article 2 ECHR by taking preventative measures to protect an individual whose life is at risk from the criminal acts of another, it had to be shown that a public authority had, or ought to have, known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that it had failed to take reasonable measures to avoid that risk. In MC v Bulgaria, the Court noted that the police investigation was handled with significant delays and found that the effectiveness of the investigation of an allegation of rape in that case fell short of the requirements inherent in the positive obligations “to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.”

Fundamental legal norms and constitutional rights take precedence over established common law norms: O’Cinneide (n106), at 84. The common law should be developed if possible to vindicate constitutional rights. For example, in a conflict between reputation and freedom of expression, Ó Caoimh J was satisfied that he must consider whether the law of defamation as traditionally understood represented a violation of the constitutional right to freedom of expression and whether it should result in a fundamental re-statement of that law or a tempering of same: Hunter v Gerald Duckworth & Co Ltd [2003] IEHC 81, at 47. He favoured incremental development of the common law having regard to the requirements of the Constitution and the ECHR: ibid, at 59.

On development of the common law and the constitutional tort, see: Meskell v CIE [1973] IR 121 (SC); Glover v BLN Ltd [1973] IR 388 (SC).

226 Z v UK (App no 29392/95) (2002) 34 EHRR 3, at [100].
227 Ibid. The action was for the local authority’s alleged failure to take adequate protective measures in respect of the severe neglect and abuse which children were known to be suffering because of ill-treatment by their parents.
228 (App no 23452/94) (2000) 29 EHRR 245, at [154]. On Osman, see McKendrick (n217), at 332-337.
231 (App No 39272/98) (2005) 40 EHRR 20, at [184]-[185]. The Bulgarian authorities had not investigated thoroughly a girl’s rape allegation when the perpetrators maintained she had consented to sexual intercourse and there was no direct proof of rape: ibid, at [181]-[182]. As rape is an exercise of power, consent is irrelevant when the victim is not treated as an equal and hence is unable to protest because of her situation: Catharine A MacKinnon, Women’s Lives, Men’s Laws (Belknap Press of Harvard
requires criminal sanctions—a civil action for damages is insufficient.

The decisions in Lockwood and G were defective in that no consideration was given to whether a duty of care arose in the precise circumstances by application of the “fair, just and reasonable” criteria. The judges in those cases operated on the basis that a virtual blanket immunity existed in relation to the police investigation. They only countenanced an action against the police for misfeasance. Neither was any analysis done of whether the victims’ right to bodily integrity or entitlement to an effective remedy had been vindicated by an alternative form of redress. In Lockwood the state had submitted that she had a remedy in law to sue the accused directly for damages in a civil case, but Kearns P did not address this in his decision. Vindication of the plaintiff’s position was not necessarily grounded solely in damages—she could have wanted to hold the police accountable and to have the court assess whether they had protected her right to bodily integrity by carrying out an effective investigation.

The state’s obligation to protect the life, person, good name, and property rights of individuals under Article 40.3.2° of the Constitution requires positive action to prevent an infringement and this obligation is not satisfied by the possible existence of a common law remedy where a personal right has actually been infringed. The ECHR also imposes positive obligations on the state to protect and ensure respect for rights. These duties cannot be fulfilled simply by relying on the existing law of torts after the event.

In South Africa it was held in Minister of Safety and Security v Van Duivenboden that police officers are under an actionable duty to members of the public to take reasonable steps to act on information reflecting on the fitness of a person to possess firearms in order to avoid harm occurring. Nugent JA explained that what was ultimately required was an assessment, in


Hogan and Whyte (n 172), at [7.1.112].


[2002] 3 All SA 741 (SCA), at [22]. A year later the Supreme Court of Appeal held that the police had a legal duty to exercise reasonable care in relation to the grant of firearm licences and that breach of
accordance with prevailing norms, of the circumstances in which it should be unlawful to culpably cause loss. Accountability had an important role in determining whether a legal duty ought to be recognised, although accountability could sometimes be secured without damages through the political process or through another judicial remedy.

As in South Africa (and unlike the UK, which does not have a distinct concept of state liability), the positive constitutional obligations imposed on the state in Ireland have broken down the rigid distinction between private and public law. The power of judicial review of laws for conformity with the Constitution is vested in the higher courts. The Constitution with its normative base imposes additional responsibilities on the state that do not apply to private individuals and therefore facilitates the alignment of tort law with the Constitution. The Irish courts have not shown the required diligence in weighing up the duty of care owed by the police against public policy. Only intentional transgressions by the police give rise to liability. When a right that is integral to human dignity, such as life, bodily integrity or access to justice, is put in the balance, the constitutional values of dignity and freedom should be to the fore in the judicial analysis.

8.2.3 Limitation of actions

The time limitation imposed on commencing a tort action was held to apply to a constitutional tort in *McDonnell v Ireland*. The Supreme Court decreed that it was subject to the same limitation period that applied in general law and therefore the claim was statute-barred. Keane J trivialised breaches of all constitutional rights (irrespective of their serious nature) with this remark:

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this duty gave rise to an action for damages: *Minister of Safety and Security v Hamilton* [2003] 4 All SA 117 (SCA).


*McDonnell* is also inconsistent with Carroll J’s finding in the High Court that a claim for damages for unlawful interference with a constitutional right was not an action based on tort: *Hayes v Ireland* [1987] ILRM 651 (HC).
I can see no reason why an actress sunbathing in her back garden whose privacy is intruded upon by a long-range camera should defer proceedings until her old age to provide herself with a nest egg, while a young man or woman rendered a paraplegic by a drunken motorist must be cut off from suing after three years. \(^\text{238}\)

No consideration was given to the fact that the constitutional right infringed in *McDonnell* was the right to a livelihood and that it was violated in a serious manner by the loss of a person’s job on grounds subsequently found unconstitutional. \(^\text{239}\) Furthermore, the first case in which damages for breach of constitutional rights were expressly awarded was not decided until 15 years after enactment of the Statute of Limitations 1957, \(^\text{240}\) so it could not be said that the legislature intended that the same limitations should apply to constitutional torts. The Court also noted that no blame could be attributed to the plaintiff for presuming that the legislation under which he lost job did not violate the Constitution. \(^\text{241}\)

If it had wished to do so, the Supreme Court in *McDonnell* could have devised a new rule to apply to constitutional torts. A suitable solution would be for the cause of action for breach of the right to a livelihood to accrue from the date of knowledge of unconstitutionality, which in the case of a constitutional tort based on a statute declared unconstitutional should be the date of declaration of invalidity. \(^\text{242}\) The policy reasons for the limitation of the constitutional right to a livelihood could have been examined in more depth. The Court did not analyse fully the implications of that right nor attempt to test the limitation on the grant of a remedy for its breach against policy objectives. In *Tuohy v Courtney*, Finlay CJ set the parameters of the Court’s role in assessing the impact of the statutory limitation in the light of policy around the degree of hardship caused. \(^\text{243}\) If the Court in *McDonnell* had applied these parameters, the

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\(^\text{238}\) [1998] 1 IR 134, at 160. Keane J was aware that “significant differences” might arise in some contexts when general tort law was applied to constitutional rights, but it was “unnecessary to embark on those uncharted seas”: *ibid*, at 159. He found that the same policy considerations (protection of the defendant against stale claims, expeditious trials and legal certainty) applied in an action for breach of a constitutional right, and dismissed as “a classically circular argument” the proposition that an action for breach of a constitutional right with “all the indicia of an action in tort should have a different limitation period from that applicable to actions in tort generally, or indeed no limitation period at all, other than its origin in the Constitution itself”: *ibid*, at 159-160, citing *Tuohy v Courtney* [1994] 3 IR 1 (SC), at 48.

\(^\text{239}\) See Cox v Ireland [1992] 2 IR 503 (SC). Ngcobo J associated dignity with the right to choose one’s livelihood, when he stated, “[f]reedom to choose a vocation is intrinsic to the nature of a society based on human dignity”: *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC), at [59].


\(^\text{241}\) [1998] 1 IR 134 (SC), at 146.

\(^\text{242}\) O’Flaherty J acknowledged that the consequences of striking down legislation “can only crystallise in respect of the immediate litigation which gave rise to the declaration of invalidity”: *ibid*, at 144.

\(^\text{243}\) [1994] 3 IR 1 (SC), at 48: The counter-balance to these objectives is the necessity as far as is practicable, or as best it may, for the State to ensure that such time limits do not unreasonably or unjustly impose
extent of the hardship imposed on the plaintiff by restricting the time within which he could
sue to a period that expired before the statute under which he forfeited his job was declared
unconstitutional would surely have been seen to be unreasonable and unjust.

There are major exceptions to the general rule that an invalid statute, which is void ab initio,
has no legal consequences. If the natural consequences of a ruling that a statute is invalid
always ensued, the policy aims of legal certainty required by application of the rule of law and
the attainment of social order in an organised society would be shaken. To avoid a chaotic
legal system, the courts have taken a pragmatic approach and have devised methods to curtail
the reach of a finding of invalidity.

The Supreme Court in A v Governor of Arbour Hill Prison dealt with the consequences of the
findings in CC v Ireland that a provision in the Criminal Law (Amendment) Act 1935 was
inconsistent with the Constitution. Prior to the latter finding, A had pleaded guilty to an
offence under the invalid statutory provision and was serving a prison sentence for it. He
sought his release, which Laffoy J ordered in the High Court because the pre-1937 statute had
ceased to have legislative existence on the enactment of the Constitution—therefore the
conviction was a nullity and his detention lacked due process. The Supreme Court overruled
her decision and held that there was neither an express nor an implied principle of
retrospective application of unconstitutionality in the Constitution. The approach to be
taken to the application of retrospectivity was to assess whether the compulsion of public
order and the common good would allow the application to succeed. The element of good
faith on the part of the state in relying on the statute disposed the Court to hold that the
conviction should be deemed to be and remain lawful. While the declaration that a law was
unconstitutional applied to the parties to the litigation in which the issue arose, the principle

245 Morgan and Hogan (n111), at [11-84].
246 [2006] IESC 45, [2006] 4 IR 88. See Ailbhe O’Neill, “Invalidity and Retrospectivity under the Irish and
that Legislation is Unconstitutional: The Approach of the Irish Supreme Court” (2007) 36 Common L
249 Cases that had been finally decided and determined on foot of a statute which was later found to be
unconstitutional were deemed valid once the parties had exhausted their actual or potential remedies.
249 A harmonious interpretation of the Constitution necessitated looking at the document as a whole.
of prospective overruling applied to others.\textsuperscript{250}

The courts could bear in mind the requirement for an effective remedy while they are developing the broad notion of dealing intelligently with invalid statutes. Judicial review followed merely by a declaration of invalidity under section 5 of the European Convention on Human Rights Act 2003 is not an effective remedy. In \textit{Carmody v Minister for Justice, Equality and Law Reform} Murray CJ described a declaration of incompatibility as a “remedy, such as it is, ... both limited and \textit{sui generis}” and confirmed that it did not accord to a plaintiff any direct or enforceable judicial remedy.\textsuperscript{251} The courts have a duty to deliver an effective remedy to litigants and could test the consequences of a finding of invalidity for compatibility with the principles of justice. The adjudication as to what are exceptional cases requiring the invalidity to have retrospective effect should involve consideration of the impact on the dignity of the individuals concerned.

The South African Constitutional Court refused to allow the state to rely on a limitation period to preclude Mrs Njongi, a poor uneducated woman, from recovering arrears of disability grant, which it had unlawfully decided to stop paying.\textsuperscript{252} The state had acted unconscionably in deciding to oppose her claim and in the way it conducted the case.\textsuperscript{253} In \textit{Barkhuizen v Napier}, a challenge to a time limit on suing for damage to a car in a motor insurance contract, the courts accepted that the correct way of evaluating the validity of the clause was by determining whether it offended public policy as evidenced by constitutional values.\textsuperscript{254} Dignity was used to assess the weight on both sides of the scales—the dignity of autonomy.

\textsuperscript{250} Although there was no general retrospective application, the Court left open the possibility that an exception might arise in wholly exceptional circumstances in the interests of justice. In this case A’s guilty plea indicated that he accepted the validity of the charge against him at the time. He had not been able to allege any departure from natural justice in the way he had been treated but acknowledged his guilt and that his claimed release would be a windfall: [2006] IESC 45, [2006] 4 IR 88, at [169], [211], [256], [260].

\textsuperscript{251} [2009] IESC 71, [2010] 1 ILRM 157, at 168. In \textit{Carmody} the Supreme Court held that where a claim is made that a statute is invalid under the Constitution and a declaration of incompatibility with the ECHR is also sought, the constitutional issue should be decided first. See de Londras and Kelly (n155), at [2-36]—[2-38], [7-20].

\textsuperscript{252} Njongi v MEC, Department of Welfare, Eastern Cape 2008 (4) SA 237. The Court held that the state had not disavowed the unlawful decision, so the time had not started to run against her: \textit{ibid}, at [58]. In the absence of a full disavowal or full reinstatement, she would not have known that the statutory claim period had commenced: Eric C Christiansen, “Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice” (2010) 13 \textit{J Gender Race & Justice} 575, at 605.

\textsuperscript{253} 2008 (4) SA 237, at [85].


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and freedom to contract on the one hand and oppression of dignity by unfair terms on the other.\textsuperscript{255}

As the values of dignity, freedom and equality are also enshrined in the Irish Constitution, the Irish courts could employ them as yardsticks to adjudge whether a time limit sought to be imposed on bringing a claim for a breach of a constitutional right can be allowed to stand.

\textsuperscript{255} Sachs J (in dissent) felt that a strong case could be made that terms that were unreasonable, oppressive or unconscionable in a standard form contract were inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom: 2007 (5) SA 323 (CC), at [140].
CHAPTER IX – CONCLUSIONS

After my study of the provisions in the South African and Irish Constitutions affecting fundamental rights and their interpretation by the judiciary, and my analysis of the philosophical and historical origins of the values of human dignity and equality, it is time to draw some conclusions. The propositions throughout this work have been supported with illustrations from various jurisdictions demonstrating that the South African approach is not idiosyncratic on account of the apartheid legacy of oppression and profound inequalities, but is suitable for application in other countries.

9.1 Normative framework

As there was a gap of more than half a century between the dates of adoption of the Constitutions in Ireland and South Africa, they are products of different eras and historical backgrounds. However, they are both values-based and therefore each jurisdiction can learn from the other. A reader of the South African document could be left in no doubt that it places enormous emphasis on the fundamental values of human dignity, equality and freedom. The scholar of the Irish fundamental law has to look a little more closely to discern that it has a similar normative spirit.

The meaningful outcomes evident in the South African cases are products of a transformative Constitution urgently required after a turbulent history produced a dysfunctional society based on fundamentally perverse values. The judiciary in the post-apartheid era had clear signposts based on newly-adopted norms democratically chosen and supported. Even though the Irish Constitution was adopted in 1937 in different circumstances, it is set in a comparable normative framework founded on human dignity and demanding mutual respect in relationships. It is obvious even from the text that religion had a strong influence on the drafting of the Constitution. Its philosophy is founded on the fact that human beings, by

virtue of their humanity, have rights and obligations.\(^3\) In this, it anticipated the Universal Declaration of Human Rights\(^4\) by a decade. Individuals have inherent rights. While religion and conscience are deeply personal matters, they should prompt responsibility for a just and equal society.\(^5\) Social justice is a community aspiration.\(^6\)

Ronald Dworkin pointed out that fidelity to a constitutional tradition requires an appeal to the theory or principles that are either explicit or implicit in a constitution itself.\(^7\) In order to maintain ethical relevance, a constitution ought to be interpreted in the light of the changing social context.\(^8\)

### 9.2 Philosophical understandings of dignity in South Africa and Ireland

The text of the reference to dignity in the Preamble of the Irish Constitution contains similar concepts to the judicial interpretation of the fundamental constitutional values in South Africa—the individual’s freedom and dignity is set in the context of the common good prescribing social justice. It is surprising therefore that there is a notable difference in the philosophical understanding of dignity as expressed in the case law in Ireland.\(^9\) *Ubuntu*, which places the individual firmly within the community, has reinforced the South African courts’ endorsement of a communitarian perception of dignity that harmonises the rights of the individual with the reciprocal rights and duties of others in society.\(^10\) The constitutional values of human dignity, equality and freedom require the government to support the individual in the community with socio-economic benefits when necessary.\(^11\) It contrasts with the

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\(^3\) William Binchy, "Dignity as a Constitutional Concept" in Doyle and Carolan (n2), at 311.
\(^8\) Zappone (n5), at 117.
\(^9\) There is little evidence that the judicial use of the concept of human dignity has been directly affected by recent philosophical analysis: Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *EJIL* 655, at 663.
\(^10\) *S v Makwanyane* 1995 (6) BCLR 665 (CC), at [224] (Langa J), [263] (Mahomed J) (see text to n315 and n317 in Ch III). See also n326-n327 and text thereto in Ch III.
\(^11\) Neomi Rao, "American Dignity and Healthcare Reform" (2012) 35 *Harv JL & Pub Pol'y* 171, at 173. See 6.5-6.7 in Ch VI.
American association of dignity primarily with individual rights described by Neomi Rao as “a classical liberal understanding of freedom from interference.”

The South Africans have adopted the amalgamated notion of human dignity derived from the nature and spirituality of the social human being with the capacity to reason and free will. In the case law there have been references resounding of Immanuel Kant’s imperative not to treat people as objects because of their dignity stemming from these characteristics.

Dworkin’s view of the sanctity of life was endorsed, as was his stress on the importance of dignity in democracies and his interpretation of the right to equality as being the right to be treated as equals.

Perhaps because of a fear in recent decades of bringing religious beliefs into the public domain and a reluctance to analyse the various roots of natural law, the Irish courts have not taken the same path as South Africa and have not communicated a lucid reasoned philosophical base for human dignity. The Constitution’s Christian ethos is undeniable. Clearly it is a normative instrument acknowledging that rights are derived from natural law or some form of higher order than the State or the Constitution itself. Henchy J construed Article 40.3 of the Constitution in Norris in a non-religious fashion and voiced a secular version of that higher order.

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12 Rao (n 11), at 174.
13 Bernstein v Bester 1996 (2) SA 751 (CC), at [150] (O’Regan J) (see n313 and text thereto in Ch III).
14 Makwanyane 1995 (6) BCLR 665 (CC), at [26] (Chaskalson P) (see text to n307 in Ch III); Prinsloo v Van der Linde 1997 (3) SA 1012 (CC), at [31]; S v Dodo 2001 (3) SA 382 (CC), at [38] (Ackermann J) (see n84 and text thereto in Ch IV); Makwanyane v National DPP 2007 (4) SA 222 (CC), at [146] (Sachs J) (see n324 in Ch III).
15 Soobramoney v Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC), at [55] (see n305 and text thereto in Ch III). Dworkin’s views on the sanctity of life also influenced the House of Lords: Airedale NHS Trust v Bland [1993] AC 789 (HL), at 826 (Hoffmann LJ).
17 Prinsloo v Van der Linde 1997 (3) SA 1012 (CC), at [32] (see text to n301 in Ch V); City Council of Pretoria v Walker 1998 (2) SA 363 (CC), at [126], [128] (Sachs J).
19 See n191 and text thereto in Ch VIII.
20 See text to n192-194 in Ch VIII.
Hardiman J. There is a liberal democratic thread in the Constitution in addition to its Christian democratic character. As it balances the rights of the individual and the interests of society, the Constitution has the potential to promote the communitarian goal of social inclusion.

The lack of philosophical analysis leaves a void with litigants and the public free to wander directionless in a legal wilderness. The strong Irish value system has been ignored by the majority of the judges who avoid considering norms. As a result they have not expressed the coherent moral thread underpinning human dignity. The sparse legal application of the concept has not unearthed the full breadth of reciprocal respect for the inherent worth of the person as part of the community, but has been confined for the most part to individual dignity based only on random remarks.

Court decisions where the right to respect for dignity has been upheld have been based on the liberal view of preventing interference with the individual. They have not required active measures by the State to assist and protect the person living in the community as envisaged by the Constitution, hence the leeway given to the police when it comes to protecting the public against infringements of dignity by private individuals, as well as the refusal to recognise unenumerated socio-economic rights and to grant effective remedies even when the State’s abject continuous failure to uphold those express socio-economic rights that do exist in the Constitution is apparent. The State’s duty not to lend its support to the continuation of discrimination between private individuals has been ignored by the courts, which have not appreciated the attack on the status of a person in the community by being regarded as inferior on the basis of a human attribute or one’s background.

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23 *CC v Ireland* [2006] IESC 33, [2006] 4 IR 1, at [440] (see text to n80 in Ch VII).
25 Whyte (n24), at 224.
26 See 7.2 in Ch VII.
29 See 8.2.2 in Ch VIII.
31 See 7.10.1-7.10.2 in Ch VII.
9.3 Substantive rights

The fundamental constitutional values could be the basis for advancements in many areas, particularly in producing a more stringent ban on parental corporal punishment, striving towards substantial equality, recognition of the ethnic identity of Travellers, and reduction of overcrowding in prisons. Enforcement of socio-economic rights could have a powerful impact. When deciding on how to enforce social and economic rights in South Africa, the Constitutional Court invoked the principles of proportionality, fairness and reasonableness to assist it in making value judgments on issues of major social and moral importance in a principled way that was true to the letter and spirit of the Constitution.\(^{32}\) A textual analysis and logic were no longer sufficient.\(^{33}\)

Values could also be applied to develop contract law to provide further protection for consumers and for others in an unequal bargaining position with powerful institutions and corporate entities in the marketplace. In tort there is room for improvements in negligence, nuisance and trespass as causes of action to redress civil wrongs. As has been hinted at in South Africa, the law of privacy might be scoped by the engagement of values to develop the common law.

A deeper meaning could be given to human dignity by seeing it in a relational context, rather than accepting simply the restricted individualistic view taken of it in the *Ward of Court* case.\(^{34}\)

If its import had been examined in *Norris*, the same ultimate outcome could have been achieved by reference to the Irish Constitution instead of having to resort to the European Court of Human Rights in reliance on the European Convention on Human Rights (ECHR).\(^{36}\)

9.4 Scope

The horizontal application of constitutional rights between non-state parties in Irish law is

\(^{32}\) Albie Sachs, *The Strange Alchemy of Life and Law* (OUP, Oxford 2009), at 211.

\(^{33}\) Ibid.

\(^{34}\) *Re a Ward of Court (withholding medical treatment) (No 2)* [1996] 2 IR 79 (SC).

\(^{35}\) *Norris v AG* [1984] IR 36 (SC).

required to ensure the observance of constitutional personal rights in private legal relations. However, the judges do not discharge this precept consistently or regularly. There is a firm constitutional base for not only allowing, but mandating, the courts to enforce rights where the state is not a direct protagonist. In his review of Irish case law, Sibo Banda found three common features supporting this conclusion: first, there is a clear constitutional duty on the state to ensure, and an individual has a corresponding right to seek, the protection and enforcement of a constitutional right; second, the satisfaction of obligations and the exercise of individual rights is not confined to the vertical relationship an individual has with the state but will also arise out of the horizontal relationship private individuals have with each other; third, the term “State” under the Constitution includes the judiciary and so it is also expected to vindicate constitutional rights. The Hohfeldian view of jural relations can be commended, as it casts light on important distinctions within legal reasoning and avoids any commitment to a highly contestable view of justice and policy.

The positive obligations on the State to implement human rights are wider than have been recognised by the courts in Ireland. The key place played by accountability in a democracy has been emphasised by the South African judiciary, but as of yet the Irish prosecuting and enforcement authorities have been slow to change the culture of forgiving what at its mildest has been gross mismanagement of the financial sector without demanding even a plausible public explanation. Individuals are answerable for their actions to the people through the courts.

9.5 Remedies

The range of remedies utilised by the Irish courts could be expanded in line with those used in South Africa and Canada. If a court finds that the existing law does not uphold constitutional rights, but that there are policy choices to be made in arriving at a solution, it would enhance

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democracy if it made a declaration of constitutional incompatibility and allowed the legislature time to debate and enact legislation to address the lacuna in the law. In South Africa words can be read into legislation to make it compatible with the Constitution. The approach that emerged in Ireland in 2011 in *G v District Judge Murphy* of giving an effective remedy by looking at “the heart of the objective” of the constitutional provision should be replicated by more judges and they could also embrace some of the remedies employed in South Africa.

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 could also be considered. The attempts to encourage mediation to reach mutually acceptable solutions should be continued.

### 9.6 Constitutional imperatives

To allow the Constitution reach its full potential, some legal principles, such as the

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40 *Eg,* the Canadian Supreme Court suspended a declaration of invalidity of offending legislation for 12 months: *Trociuk v British Columbia (AG)* 2003 SCC 34, [2003] 1 SCR 835, at [46]. The South African Constitutional Court took a similar stance to allow parliament to correct the defect in the common law definition of marriage to the extent that it did not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities accorded to heterosexual couples: *Minister of Home Affairs v Fourie* 2006 (1) SA 524, at [162]. Where provisions in road accident legislation were unconstitutional, the Court made a declaration of invalidity, but suspended it for 18 months to allow Parliament to cure the defect; if Parliament failed to do so, the declaration would not apply retrospectively to claims finally settled or adjudicated before the date of judgment: *Mvumvu v Minister of Transport* [2011] ZACC 1, 2011 (2) SA 473 (CC), at [53]-[54], [57].

41 *Eg,* the Constitutional Court re-phrased the statute to correct an invalid reverse onus of proof, which was not justified under the limitations clause as the intrusion on the presumption of innocence of a person accused of receiving stolen goods was too sweeping: *S v Manameia* 2000 (3) SA 1 (CC), at [59].

42 [2011] IEHC 445, at [36]-[37]. More than 20 years earlier, Keane J had thought that where the constitutional validity of an Act was questioned, the High Court was confined to declaring the Act or the offending provision invalid in its entirely and he did not accept that he could declare that rights had not been vindicated by the Oireachtas in the expectation that the Oireachtas would take the necessary steps to ensure that those rights were in fact protected: *Somjee v Minister for Justice* [1981] ILRM 324 (HC), at 327. Hogan J in *G v District Judge Murphy* disagreed with this view, as it could compromise the capacity of the courts to provide an effective remedy where the Oireachtas had breached Article 40.1 by unjustly conferring a privilege or benefit on one select group of society: [2011] IEHC 445, at [36]. On the contrary, he noted that by requiring the problems created by unconstitutional omissions to be either judicially resolved or legislatively addressed, the courts contributed to “the proper and effective functioning of the political process in the manner envisaged by the Constitution”: *ibid,* at [38]. He proposed a form of declaration regarding the scope of application of the legislation thereby remedying a legislative omission that would confine the invalidity to the plaintiffs’ circumstances: *ibid,* at [40], [45]. This would be “a healthy feature of the separation of powers” and “advance the dialogue between the three branches of government”: *ibid,* at [39]. The Oireachtas could amend the legislation in future to deal with the gap exposed in the case under review and any other gaps that might become apparent: *ibid,* at [45].
interpretative techniques employed by the courts, proportionality and accountability, can be
developed further. The refashioning of torts would also be beneficial. This section will
consider each of these in turn.

9.6.1 Interpretation of the Constitution

A broad purposeful interpretation is necessary to give full effect to the spirit of a constitution
and to its underlying values. The literal or historical views are inappropriate.\(^{43}\) The courts in
South Africa and other democracies have demonstrated the effectiveness of a wider ambit in
having a significant impact on society while upholding individual rights.

Dingake J, with the support of jurisprudence from the US, captured the need to adapt to
change and to make fundamental values meaningful by a wide understanding of a constitution
in this passage from Diau:

> The provisions of our Bill of Rights are not time-worn adages. We (judiciary)
> must implement those provisions in a dynamic and purposeful manner that
does not lag behind societal developments. If we don’t, the words of the
> constitution will be beholden to the values of the past, not the present.\(^{44}\)

A harmonious interpretation of rights can give the best effect possible to all of them, taking
into account the interests of all parties and of society. This approach is preferable to a rigid
hierarchy of rights, where rights conflict with each other and one gives way to the other. The
African concept of \textit{ubuntu} is a useful guide, as the individual is seen as a member of the
community—but not at the expense of a sphere of autonomous personal intimacy honed by a
rational mind. Harmony involves a balanced mutual connectedness, but is not uniformity.\(^{45}\)

In \textit{Roche v Roche} Denham J favoured a harmonious interpretation of the Constitution\(^{46}\) that
would avoid a conflict between different provisions in it.\(^{47}\) Hardiman J in the same case

\(^{43}\) See Declan Costello, “The Irish Judge as Law-Maker” in Deirdre Curtin and David O’Keeffe eds,
\textit{Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice
T.F. O’Higgins} (Butterworth, Dublin 1992), at 163-165; Hogan (n22), at 174-176.
\(^{44}\) 2003 (2) BLR 409 (BwIC) (Botswana Industrial Court), at 44.
an interconnectedness based in our complementary differences rather than seeing all as equivalent in
value: \textit{ibid.} The value of harmony is in its ability to preserve and respect differences: \textit{ibid}, at 80. It
demands a situationally appropriate reaction to ever-changing circumstances where continual growth
occurs, requiring that it be seen as multidimensional and dynamic, and looks to the longer-term impact
(O’Higgins CJ).
adopted a similar type of construction and was satisfied that two different analyses (a linguistic one and one based on the authorities) of Article 40.3.3° led harmoniously to the same conclusion.

Unfortunately the ultimate aim of harmonising rights is not always achievable. Having analysed case law in the US and South Africa, Daniel Erskine presented a universal method to resolve conflicting rights. There are five steps involved in this process—first, define the issues by identifying the specific fundamental rights in conflict; second, classify them by evaluating each fundamental right against the background of the legal text containing the right; third, discern the policy and function of each right by establishing its aim and whether that aim is achieved under the factual scenario presented; fourth, see if equal respect for the fundamental rights in issue can be achieved by looking to whether both rights may harmoniously coexist through equal enforcement; finally, if harmonisation is not possible and the rights cannot coexist, resolve the conflict by applying the most rational and pragmatic construction of the rights to establish an amalgamated solitary right employing the most significant ends of the two conflicting rights.

A systematic interpretation using a holistic understanding of fundamental rights where dignity, equality and liberty are seen as a triangle as in South Africa is recommended by Susanne Baer. Confusion may arise by dignity being regarded as a status, which some have and others do not, rather than being inherent and incapable of being waived. Hence it is all-

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48 Constitutional rights to a fair trial take priority over the constitutional duty to promote an accused child's welfare rights: *DPP (Murphy) v PT* [1999] 3 IR 254 (HC), at 270-271.
49 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 596.
50 *ibid*, at 639-640.
51 Susanne Baer, “Dignity, liberty, equality: A fundamental rights triangle of constitutionalism” (2009) 59 UTLJ 417, at 418, 420, 446. This contrasts with imagining them as a pyramid where dignity is foundational and equality and liberty are elaborations of dignity: *ibid*, at 447. It is also preferable to seeing equality and liberty as competing items to be balanced on a scale where one trumps the other and dignity is absent: *ibid*, at 448. Baer's model is beyond isolated rights: *ibid*, at 418-419. While the pyramid founded on human dignity is a good starting point for ethical considerations, it is removed from daily injustices and may fail to protect less severe cases of inhumane treatment: *ibid*, at 447. Liberty is limited by the presence of others and is only sensible when connected with equality and based on recognition of dignity as self-determination: *ibid*, at 449. Dignity can sometimes be too abstract and foster paternalism by imposing the majority view of moral conduct on all: *ibid*, at 457. The benefits of the triangle approach are explained by Baer, “[f]undamental rights, if seen in light of one another, serve as reciprocal warnings against the isolated use of any one of them, or of any right merely to trump another. Each fundamental right has distinct meaning; yet they are not alone but are better understood as relating to one another, like a triangle.”: *ibid*, at 468.
52 *ibid*, at 457-458.
important that judges clarify the sense in which they are using the concept of dignity and give
content to the concept. The holistic understanding where human dignity draws rights
together is a reminder of their indivisibility. The involvement of human dignity, which is
multi-dimensional, facilitates adapting to changing times, whether that is growth of society in
general or working through different phases or experiences in people's lives.

The Irish courts have not developed a coherent approach to constitutional interpretation.
Oran Doyle concluded that in Irish constitutional law, "methods of interpretation function as
ex post facto justifications for intuitively reached conclusions rather than as fetters on judicial
power." It is important to have a strong judiciary respected by the public and the politicians.
As David Gwynn Morgan stated, continuation of that respect is conditional on
the judges' decisions being perceived as derived from some clearly articulated, consistently
followed and rationally grounded principles. By devising and implementing guidelines for
the interpretation and enforcement of fundamental rights—starting as outlined here—the
courts could secure an esteemed position as powerful defenders of constitutional values. The
judiciary might regenerate life in many long-dormant provisions of the Constitution and
nurture them so that they realise their potential to transform our economy into a more equal
and just society.

9.6.2 Proportionality

Since human dignity is an inherent trait, it is not always appropriate to lessen its protection by
balancing it against other rights. A harmonious interpretation of rights is the ideal aim.
But in less extreme situations a properly applied proportionality test is a principled systematic
way of resolving conflicts. The South African and Canadian courts have employed a
proportionality analysis which takes into account the context and is adaptable to different situations. Although rigid fixed rules are not appropriate when making value judgments, the methodology has to be objective and not left to the discretion of the individual judge. Human dignity is an invaluable and essential yardstick in the proportionality exercise, as it embodies and encodes elements of balancing.

Irish judges have tended to apply the proportionality principle with deference to the legislature on the objective and the means. They have ignored the impact of the measures, although there have been some exceptions. Proportionality should be applied systematically as a standard, not a rule. The South African or Canadian models could be adapted in Ireland to provide a robust framework.

There are signs of a change to a more stringent analysis of executive decisions in the Supreme Court. In Meadows v Minister for Justice, Equality and Law Reform, Murray CJ, endorsing use of the proportionality principle in association with a reasonableness standard, stated, "[a]pplication of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness." A similar stance was taken by Denham J,

by the limitations provision in the new Constitution as "the conceptual requirement established by international norms relative to proportionality or balancing": Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744, at [90]. Chaskalson P had outlined the process in Makwanyane 1995 (6) BCLR 665 (CC), at [104] (footnote omitted):

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. ... The fact that different rights have different implications for democracy... 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.

On application of the proportionality principle in the Constitutional Court, see Sachs (n32), at 208-209, 211.

Albie Sachs (writing extrajudicially) stated that the South African Constitutional Court's role in reconciling the diverse interests in an open democratic society led to abstract legal reasoning giving way to a form of adjudication in which purpose, context, impact and values took centre-stage, but "[t]his did not mean that principled legal argument and ... legal coherence gave way to vague and subjective notions of the good and the desirable": Sachs (n32), at 202-203. He continued, "[i]t became more necessary than ever to spell out the objective principles and factual material on which the judgment relied": ibid, at 203.

Ibid.


Ibid, at 33.


[2010] IESC 3. He indicated that a purely formulaic decision of the executive may not be a sufficient statement of the rationale or reasons underlying a decision and that an administrative decision affecting rights and obligations should at least disclose the essential rationale on foot of which the decision was
who said, "[a] decision which interferes with constitutional rights, if it is to be considered reasonable, should be proportionate." However, the Court was sharply divided with Hardiman J in dissent objecting to the effective introduction of the substance of an anxious scrutiny formula into Irish law. Kearns J (also dissenting) asserted that the proportionality test had no role to play in determining whether a court should intervene to quash the kind of administrative decision in issue.

A contentious issue which could very well be subject to litigation in the future is the vetting procedure for people operating in roles where they have contact with children and the vulnerable. A proportionality analysis will be relevant to ascertain if the information used breaches the rights of teachers, social workers and volunteers to their good name, to earn a living and to privacy, as well as a fair trial and the presumption of innocence.

9.6.3 The democratic mandate for accountability

The requirement for accountability stems from acceptance of personal responsibility for the consequences of decisions made. Democracy necessitates respect for the dignity of taken. The Court in Meadows raised the standard of scrutiny in judicial review decisions affecting fundamental rights: Joyce Mortimer, "Standard of scrutiny raised in judicial review decisions" (2010) 104(3) GLSI 10, at 13.

The South African Constitutional Court, reiterating its commitment to proportionality, stated, "[t]here can be no absolute standard for determining reasonableness": S v Manamela 2000 (3) SA 1, at [33].

He described it as "a decision on an ad misericordiam plea made after two merit-based hearings which were not themselves challenged." In his view, the proportionality test was more appropriate to determine if a statutory provision was compatible with the Constitution or to consider if it invaded a constitutional right more than is necessary.

See Fergal Mawe, "Innocent until proven guilty—or not?" (2010) 104(4) GLSI 20. Vetting has become widespread and extends beyond employers, voluntary organisations and church groups to universities, where it is applied to students in some courses: ibid, at 21.

In assessing the state's obligations concerning respect for private life under the ECHR, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims of the restrictions in the ECHR being relevant: A v Ireland (App no 25579/05) (2011) 53 EHRR 13, at [247], citing ECHR (n36) Art 8(2).

Mawe (n70), at 20. The Irish courts held that a statutory restriction on the right to silence was justified because there was a proper proportionality between the restriction and the entitlement of the State to protect itself: Heaney v Ireland [1996] 1 IR 580 (SC), at 590, affg [1994] 3 IR 593 (HC), at 610. This was not accepted by the European Court of Human Rights, which found that the provision extinguished the very essence of the rights to silence and against self-incrimination: Heaney v Ireland (App no 34720/97) (2001) 33 EHRR 12, at [55], [58].

In organisational terms, the principle that social power should be blocked from directly seizing administrative power finds expression in the principle of democratic accountability that occupants of political offices have vis-à-vis voters and parliaments: 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 175.
individuals by enabling the participation of all in society, listening to their views, making decisions taking their opinions into account, and informing them of the reasons for the conclusions.\textsuperscript{74}

When things go wrong, there is a call for identifying the wrongdoers in order to hold them accountable.\textsuperscript{75} In a democratic society, those responsible are answerable to the populace for the consequences of their lapse and, in the interests of the common good, should make reparation for the harm they have caused. Autonomy, which is a feature of dignity, endows an individual with the right to act in accordance with rational choices, subject to respecting a similar right in other members of society. There is an accompanying duty on individuals to accept responsibility for the results of their actions. They are accountable and ought to accept the obligation to make good the injury caused by their failings. If they do not do so and are not pursued by the state until they have made amends, their dignity as human beings is not being respected and they are being treated as less than equal adults.\textsuperscript{76}

The principle of accountability is apposite in recessionary Ireland. Whatever solution is reached by the government as representatives of the Irish people in the global marketplace for solving the complicated economic, financial and human issues attributable to reckless lending and what was in retrospect foolish borrowing, society is entitled to have the causes of the problem investigated and those responsible held to account. Where there is sufficient evidence of breaches of the criminal law, charges must be brought. In civil law, the culprits are liable to pay compensation, which democratic principles require that they do to the extent that they are able. To salvage some degree of self-respect and respect for the rest of the community, they could utilise their skills to the utmost to assist in resolving the ills they have caused to others and to society in general, which has been burdened with a financial millstone for at least a decade.

There is no outward sign of the principle of accountability having been put into practice yet.

\textsuperscript{74} Privileged access to the sources of knowledge used in policymaking and administration makes possible an inconspicuous domination over the colonised public of citizens cut off from these sources and placated with symbolic politics: \textit{ibid}, at 317.

\textsuperscript{75} See David Gwynn Morgan, "Enforcing Public Accountability: A Tour d’Horizon" (2009) 27 ILT 71.

Democracy and dignity suffers because of this undue forbearance.

9.6.4 Refashion torts

Drawing on the experience of the South African courts, it is clear that the law of torts could be refashioned. The Constitutional Court has explored the circumstances in which the common law should advance incrementally with the courts effecting the required change in tune with the spirit of the Constitution. In *S v Thebus*, Moseneke J described two instances where the need to develop the common law arises: first, when a rule of the common law is inconsistent with a constitutional provision, its repugnancy would compel an adaptation of the common law to resolve the inconsistency; second, when a rule of the common law is not inconsistent with a specific constitutional provision but falls short of its spirit, purport and objects, the common law must be adapted so that it grows in harmony with the constitution's "objective normative value system". Not every development of the common law means a complete change of the rule or the introduction of a new rule. O'Regan J in *K v Minister of Safety and Security* explained what happens in cases that fall beyond the scope of an existing rule:

A court faced with a new set of facts, not on all fours with any set of facts previously adjudicated, must decide whether a common-law rule applies to this new factual situation or not. If it holds that the new set of facts falls within the rule, the ambit of the rule is extended. If it holds that it does not, the ambit of the rule is restricted, not extended.

She emphasised the constitutional imperative to infuse the common law with constitutional values requiring the courts "to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue." But the Irish courts have been reluctant to apply the Constitution in a positive manner to ensure that the common law promotes constitutional values. In *Hanrahan v Merck Sharp*

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78 2003 (6) SA 505, at [28]. The common law's incremental development results from the rules of precedent, which derives from a fundamental principle of justice that like cases be determined alike: *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), at [16].
79 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), at [16]. Straightforward cases are decided within the framework of an existing rule which the court applies to the set of facts presented: *ibid*.
80 *Ibid*. See Banda (n38), at 274, 292.
81 2005 (6) SA 419 (CC), at [17].
& Dohme (Ireland) Ltd, the plaintiffs in a nuisance action had an uphill struggle to secure evidence that the cause of ill-health in their farm animals and in themselves as occupiers of the farm resulted from the activities of a nearly factory manufacturing pharmaceuticals. Henchy J felt constrained from shifting the onus of proof to the defendant because Article 40.3 of the Constitution, which placed a duty on the State to defend personal rights, had never been used in the courts to shape the form of any existing tort nor to change the normal onus of proof. He regarded “the State” as excluding the judiciary and confined the courts’ authority to intervene only in the case of inaction by the other arms of government or when the action taken was blatantly inadequate. If a plaintiff sues on the basis of an existing tort, the limitations of that tort normally apply.

Although Henchy J acknowledged in Hanrahan that in the absence of a common law or statutory cause of action, a plaintiff could sue directly for breach of a constitutional right, the courts have not devised sufficient alternative remedies based directly on the Constitution. There is scope for more to be done by the articulation of constitutional torts, development of the common law, and a principled-based resumption of declaring unenumerated personal rights under Article 40.3.

9.7 Lessons from the comparative study

The courts in Ireland could learn much from the South African courts’ thorough examination of the communitarian understanding of dignity. The Irish Constitution contains similar (though less prominent) norms with the person placed in society where participants have reciprocal rights and duties. The lessons from South Africa could be applied in many areas, the most pertinent of which will be summarised in this section.

85 “[T]he courts are entitled to intervene only when there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question.”: [1988] ILRM 629 (SC), at 636.
86 Ibid.
88 In recent years the courts have shown an antipathy towards declaring any further unenumerated rights. On the debate over the legitimacy of judicial activism in this way and the basis for the recognition of unenumerated rights under Article 40.3.1’, see Tim Murphy, “Economic Inequality and the Constitution” in Murphy and Twomey (n57), at 173-179.
The equality guarantee in Article 40.1 of the Constitution if aligned with dignity could be rescued from its continuous subordination to other constitutional rights such as freedom of association. South Africa enforces substantive equality which is transformative—it is not just the process equality that applies in Ireland. The circumstances when equality rights have horizontal application affecting private individuals might be explored in a contextual objective enquiry to yield a structured body of jurisprudence for future guidance. Discrimination against women and vulnerable groups—particularly Travellers, homosexuals, migrants and asylum seekers—requires to be addressed. Contrast the outcome in Norris® with that in the South African Sodomy case—dignity did not feature in the judgment of the majority in Norris.

As has occurred in South Africa and as is mandated by the constitutional obligation on the judiciary to intervene to ensure vindication of constitutionally protected rights and values, equality read in the context of the constitutional commitments to social justice, dignity and freedom could lead to the Irish courts consistently upholding socio-economic rights where the State failed to do so. Charlton J’s distinction between the State’s positive and negative obligations in Doherty and his omission to consider the Travellers’ identity is in sorry contrast to the Constitutional Court’s decision in Grootboom where it regarded rights as interrelated and it required the reasonableness of state action concerning the homeless to be assessed in the light of the constitutional value of human dignity. The High Court’s lack of consideration

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90 Equality Authority v Portmarnock Golf Club [2005] IEHC 235 (see text to n126 in Ch VIII).
92 Legislation obliging clubs to adopt and implement equality plans in targeted sectors such as gender, disability, race and cultural background—certainly where clubs receive public benefits—modelled on the South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000 would be a move in the right direction: see 7.10.2 in Ch VII.
93 Norris v AG [1984] IR 36 (SC) (see text to n434-n436 in Ch VII).
94 National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (12) BCLR 1517 (CC) (see text to n8-n11 in Ch IV and to n348 in Ch V).
96 See Binchy (n3), at 318-319.
97 Doherty v South Dublin County Council (No 2) [2007] IEHC 4, [2007] 2 IR 696 (see text to n501-n511 in Ch VII).
98 Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) (see text to n1-n9, n11-n12, n23-n29, n108-n112 and n115-n128 in Ch VI). The concept of reasonableness was central when the Constitutional Court assessed the City’s housing policy and found it unconstitutional to the extent that it excluded those evicted by private property owners from consideration for temporary
for the fate of evicted Travellers in McDonagh\(^{99}\) compares poorly with the Constitutional Court's narrow application of legislation on management of disasters in Pheko v Ekurhuleni Metropolitan Municipality where it insisted that the municipal authority resettle those unlawfully evicted in comparable conditions within a stipulated timeframe to be monitored by the Court.\(^{100}\)

The stereotyping and the denial of constitutional rights on the grounds of civil status to all unmarried fathers (the committed ones as well as the uninvolved) by unreservedly allowing adoption without their consent in Nicolaou\(^{101}\) was not replicated by the Constitutional Court in Fraser.\(^{102}\) Having found that the legislation was discriminatory, the Court ensured the cooperation of the democratic Parliament by giving it time to devise a solution.\(^{103}\)

Makwanyane established decisively that the prohibition of cruel and unusual punishment based on "the dignity of man" meant that people should not be humiliated physically or mentally.\(^{104}\) If tolerated by the state (even when it occurs without any direct state involvement), the failure to insist on civilised standards offends all in society. Whether corporal punishment should be forbidden in the home is a contentious topic in many countries (South Africa and Ireland included).\(^{105}\) There has been much international condemnation of Ireland for not prohibiting corporal punishment within the family. It is time that Ireland banned all chastisement in the home in response to the international denunciation and the many calls for change. Combined with an educational campaign and the promotion of alternative forms of discipline, a legal prohibition could headline a change in attitudes.

Similarly, the government has procrastinated for too long in heeding the denouncements of accommodation in emergency situations: City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd [2011] ZACC 33, at [87].

McDonagh v Kilkenny County Council [2007] IEHC 350 (see text to n514-n519 in Ch VII).

[2011] ZACC 34 (CC), at [53].


Fraser v Children's Court Pretoria North [1997] ZACC 1, 1997 (2) SA 218 (CC) (see text to n294-n296 in Ch VII). Notwithstanding the growth in cohabitation, the distinction in Irish law between the constitutional recognition given to the natural mothers' personal right to custody of their children and the very limited right vested in natural fathers continues: JMcB v LE [2010] IEHC 123, [2010] 4 IR 433, at [100], [105].

1995 (6) BCLR 665 (CC) (see text to n323 in Ch III).

See 4.2.1 in Ch IV and 7.6.1 in Ch VII. The Court did not deal with this aspect in Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC). The tension between protection of the child and state intrusion in family life was evident in the Constitutional Court when the majority held that the lack of automatic review on taking a child into temporary care was unconstitutional: C v Department of Health and Social Development, Gauteng [2012] ZACC 1 (CC).
overcrowding and bad conditions in prison. The Irish courts must stop their naïve indulgence of the executive by relying on it to address the State’s failure to respect prisoners’ dignity—at this stage there is no justification for the toleration of humiliating practices like slopping out and the deterioration of overcrowded conditions to such an extent that assaults on fellow prisoners are more likely to occur. The South African courts’ century-old tradition of recognising the residual rights of prisoners (expressed so well by Innes J in Whittaker v Roos) and the judiciary’s post-apartheid practice of engaging with the executive to ensure that infringements of human dignity do not continue provide a good template for Ireland. As prisoners lose the freedom to regulate their own situation when incarcerated, there is a particular duty on the State to protect them while they are in its custody. Happily there are signs that change may be on the way, as seen in Hogan J’s handling of Kinsella.

But no such change of direction can be observed in the case law concerning the civil liability of the State for the failure of the police to protect human rights. Instead of requiring _mala fides_ to establish an actionable failure and granting virtual blanket immunity from liability for botched police investigations as in _G v Minister for Justice Equality and Law Reform_, the Irish courts should apply the fair, just and reasonable criterion as an element of the duty of care and could follow the path taken in _Carmichele_. At least the courts should ensure that the police are answerable for their actions—accountability is a feature of a democratic society. Vindication of personal rights requires more than simply resorting to the established rules of tort without even considering whether the victim has an alternative remedy or can establish accountability before another forum. A remedy only for an intentional breach is insufficient.

If the police or other state employees deviate from the normal performance of their duties and abuse the public, the South African courts’ decisions in _K v Minister of Safety and Security_.

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106 See 7.4.1 in Ch VII. The United States Supreme Court in a majority decision affirmed a lower court order to the State of California to reduce its prison population to 137.5% of design capacity within two years and to submit a compliance plan for court approval: _Brown v Plata_ 131 S Ct 1910 (2011), at 1923, 1928, 1947.

107 MacMenamin J’s narrow view that prisoners only had a negative right to be protected against state intervention, which required that _mala fides_ be demonstrated to prove a breach of duty, fails to take into account the State’s positive obligation to vindicate personal rights—an “evil purpose” is not a prerequisite for a violation: _Mulligan v Governor of Portlaoise Prison_ [2010] IEHC 269.

108 1912 AD 92 (SC).

109 See 5.2.2 in Ch V.


111 See 8.2.2 in Ch VIII.


113 _Carmichele v Minister of Safety and Security_ 2001 (4) SA 938 (CC) (see text to n198-n205 in Ch IV).

114 2005 (6) SA 419 (CC) (see text to n211-n223 in Ch IV).
and *F v Minister of Safety and Security*,\(^{115}\) where they developed the common law on vicarious liability, are exemplars of best practice. When the obligation to protect rights is in issue, the existing boundaries of tort may be inadequate to accommodate the constitutional and statutory duties of the state and of the police; it will also be relevant to consider the context—perhaps the victim was vulnerable, she may have relied on the police for protection and the police may have accepted that role. This model could be adapted to adjudicate on state liability for abuse where the perpetrator is not a state employee.\(^{116}\)

The law of privacy is evolving in Ireland. It is desirable to have clear identification of the circumstances when the media can be restricted from publishing private information.\(^{117}\) The law might be developed along the lines suggested in *NM v Smith* to allow publication of such information where it was reasonable to conclude that consent had been given.\(^{118}\)

In a different context, the parameters of informed consent established in South Africa in *C v Minister of Correctional Services* could be applied if a prisoner challenged the voluntariness of consent to a HIV test.\(^{119}\) Legislation regulating research and controlling the use of human tissue modelled on the South African National Health Act 2003 would bring legal certainty in a potentially contentious sphere in Ireland.\(^{120}\) The new legislation could also regulate artificial insemination and *in vitro* fertilisation to deal in an orderly manner with the rights and duties of donors and to avoid disputes over access and guardianship.\(^{121}\) The European Court of Human Rights upheld a prohibition of *in vitro* fertilisation using donor sperm or ova in *SH v Austria*, but it alerted states to keep the law under review in this continuously evolving area which is

\(^{115}\) [2011] ZACC 37. The Constitutional Court in a majority decision extended the vicarious liability of the state to cover the wrongful act of a policeman on standby duty because there was a sufficiently close connection between the wrongful conduct and his employment assessed by giving explicit recognition to the norms involved: *ibid*, at [50], [76], [81]-[82], [88].

\(^{116}\) The factors considered by the Supreme Court in *O’Keeffe v Hickey* [2008] IESC 72, [2009] 2 IR 302 and in *Reilly v Devereux* [2009] IESC 22, [2009] 3 IR 660 were too limited—social justice was ignored: see 7.3.2 in Ch VII. Additional elements here should be the responsibility of the state for the system that created the relationship between the victim and the perpetrator as well as the role of efficient loss distribution in tort liability.

\(^{117}\) The High Court indicated that, even though the media is free to publish information regardless of public interest, freedom of expression can be curtailed to stop widespread offensive publicity of very personal or private information which could be humiliating, violate dignity or injure the claimant’s feelings to a significant extent: *Hickey v Sunday Newspapers Ltd* [2010] IEHC 349, citing *Hosking v Running* [2004] NZCA 34, [2005] 1 NZLR 1, at [125]-[127]. For the right to privacy to prevail, there must be a legitimate expectation of privacy and publication must not be justified by legitimate public concern: *ibid*.

\(^{118}\) 2007 (5) SA 250 (CC) (see text to n172-n183 in Ch V).

\(^{119}\) 1996 (4) SA 292 (T) (High Court) (see text to n453-n457 in Ch VII).

\(^{120}\) See text to n427-428 in Ch VII.

\(^{121}\) See 7.6.3 in Ch VII.
subject to dynamic scientific and legal developments.\textsuperscript{122}

If a referendum is held to remove the blasphemy provision from the Irish Constitution, it could be replaced by a provision modelled on that in the South African Constitution which excludes hate speech from the protection afforded to freedom of expression.\textsuperscript{123} The diverse character of an increasingly multi-cultural society demands more tolerance for the expression of dissenting views than in the past.\textsuperscript{124} After more than two decades in operation, it is time to review the Irish legislation prohibiting incitement to hatred,\textsuperscript{125} which has proven to be inadequate to deal with changes in technology and the advent of social networking since then.\textsuperscript{126} As was done in South Africa in 2000, consideration could be given to widening the concept of hate speech to cover discriminatory speech undermining human dignity where the intention is to be hurtful.\textsuperscript{127}

The Constitutional Court unanimously developed the law of defamation in Le Roux v Dey to allow the court to order an apology where there has been an impairment of actionable dignity in personal relationships,\textsuperscript{128} but this development has not extended yet to media defendants.\textsuperscript{129} Irish law could be expanded on the same basis, although the issue of whether the media should be ordered to apologise will need more thorough examination. Even if the bold step of a court-ordered apology is not taken, quantum should be reduced where an apology has been made or offered.\textsuperscript{130} Similarly in cases of catastrophic injuries the unaware plaintiff could receive a smaller award than a fully-conscious person.\textsuperscript{131}

The law of contract might be refined by applying constitutional values to re-assess the unequal bargaining position of the ordinary citizen with banks and other powerful institutions.\textsuperscript{132}

\textsuperscript{122} (App no 57813/00) ECHR 3 November 2011, at [118].
\textsuperscript{123} See text to n647-n650 in Ch VII.
\textsuperscript{124} The margin of appreciation given by the European Court of Human Rights has narrowed from its decisions in Otto-Preminger Institute v Austria (App no 13470/87) (1995) 19 EHRR 34 and Wingrove v UK (App no 17419/90) (1997) 24 EHRR 1: see text to n643-n646 in Ch VII.
\textsuperscript{125} See n629 in Ch VII.
\textsuperscript{126} Siobhán Cummiskey, "Face-booked: Anti-social Networking and the Law" (2011) 105(9) GLSI 16.
\textsuperscript{127} See n650 in Ch VII.
\textsuperscript{128} [2011] ZACC 4, 2011 (3) SA 274 (CC), at [10], [195]-[203]. The Court reduced the amount of damages and ordered an apology.
\textsuperscript{129} In The Citizen 1978 (Pty) Ltd v McBride the Court did not order a newspaper to apologise and left open the question of whether it was appropriate to do so where a media defendant has defamed: [2011] ZACC 11, 2011 (4) SA 191 (CC), at [134].
\textsuperscript{130} See text to n138-n141 in Ch IV and to n28-n34 in Ch VIII.
\textsuperscript{131} See 8.1.1.2 in Ch VIII.
\textsuperscript{132} See 7.10.3-7.10.4 in Ch VII.
However, as in South Africa, courts generally are reluctant to interfere with a free, equal and informed bargaining process. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* all the judges agreed in principal that constitutional values should infuse contract law to ensure that justice is done—particularly when poor vulnerable people are involved in negotiations with powerful companies.\(^{133}\)

Extension of the range of remedies\(^{134}\) and the remoulding of tort as pioneered in South Africa would be a welcome improvement.\(^{135}\) The Irish courts could play a more active role in holding the State accountable as is essential in a well-functioning democracy.\(^{136}\) The State should ensure that corporations and individuals are held to account civilly and (where appropriate) criminally before the courts.\(^{137}\) The establishment and resourcing of independent bodies to investigate white-collar crime and corruption would improve the democratic process.\(^{138}\)

### 9.8 Summary

If the Irish courts embraced the values enshrined in the Constitution in as enthusiastic a fashion as the judiciary in South Africa, the effect on the community and on the individuals in it could be quite dramatic. It would lead to a more open society embracing wholeheartedly minority viewpoints and cultures. There is much potential for the Irish judiciary to develop the case law on the Constitution to give effect to its underlying values.\(^{139}\) It is the role of all three branches of government to uphold the principles supporting a society of equals in a representative democracy.\(^{140}\) While it is the duty of every institution exercising constitutional powers to keep within the limits of those powers, it is the duty of the courts to say what these

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\(^{133}\) [2011] ZACC 30, 2012 (1) SA 256 (CC), at [23]-[24], [48], [71]-[72]. The majority held that this was not a suitable case in which to decide the issue of whether constitutional values required that the common law must be adapted to impose a duty on a lessor and a lessee to negotiate renewal of a lease and a rent review in good faith in compliance with a clause in the lease.

\(^{134}\) See text to n40-n42.

\(^{135}\) See 9.6.4.

\(^{136}\) For example, *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) (see text to n71 in Ch V), *Mazibuko v City of Johannesburg* [2009] ZACC 28 (CC) (see text to n209-234 in Ch VI).

\(^{137}\) See 9.6.3.

\(^{138}\) On the requirement for independence (of an anti-corruption unit in this case), see *Glenister v President of the Republic of South Africa* [2011] ZACC 6, 2011 (3) SA 347 (CC).

\(^{139}\) The task of the framers of constitutions is to discover and express the fundamental jural presuppositions of the accommodation that people living together have made and continue to make, while the task of the courts, apart from applying statutes and explicit constitutional provisions, is to discern and express that constitutional accommodation, and the legislators' task is to discover in it the contours of what is just in daily living: Garrett Barden, “Discovering a Constitution” in Murphy and Twomey (n57), at 9.

limits are. Judges are obliged to defend the constitution when required, and it is a breach of their constitutional duties if they do not act decisively to defend the human dignity, equality and liberty of the vulnerable. A mutually supportive relationship could develop between the judiciary and the executive, as the courts are relatively immune from public opinion and in a position to enforce or declare fundamental rights that may perhaps be unpopular with the majority of society, while politicians could point to the judiciary as the *raison d’être* for the change.

A body of jurisprudence developed incrementally and grounded on lucid consistent rationales would fulfil the judiciary’s obligation to ensure that the Constitution’s reach is not unduly confined and that it achieves its transformative potential in private relationships. In a well-functioning legal system, the case law will be refined and adapted to cope with the intricate dilemmas that can occur in a modern technology-driven society. Following the South African model, human dignity viewed in association with equality and liberty would be an excellent guide in this judicial journey.

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141 Wheare (n2), at 101.
143 Sibo Banda suggested adding the ideal of justice as personal dignity to the aims of private law in addition to it being seen as corrective justice or the promotion of economic efficiency: Banda (n38), at 296.
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