The legal significance of human dignity

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It all starts here ™

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NOORDWES-UNIVERSITEIT

The research for this study was concluded in November 2016. The study reflects the legal position in South Africa as of this date.

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ABSTRACT

The meaning of human dignity has been elusive since its recognition by the Stoics in 128 B.C. as an attribute that distinguishes man from the rest of nature because of his ability to reason and to decide over his own fate. The Stoics were the first to adduce a universal meaning to the concept of human dignity. However, the legal protection of human dignity followed only two thousand years or so later, when dignity was shaped to mean that each person has inherent dignity in equal quantum, which cannot be violated and which has to be respected and protected by fellow human beings and the state alike.

The first part of the study unravels dignity's evolution through the history of ideas. The meaning of dignity in current law is reflected through its development in anthropology, religion, philosophy and the law. *Dignitas humana* originated in Antiquity, evolved through Christianity and the Enlightenment, and culminated in Modernity, as claims to justify man's dominion in the cosmos; to explain the norms of fitting behaviour in terms of the analogy between dignity and *imago Dei* and to justify its position as a universal source of equal rights. These three interrelated ideas, associated with the protection of human worth, allow for a moral reading of law that disallows systematic violations of dignity. As a legal concept, human dignity functions not only as a moral value but also as a universal right that guarantees in principle the respect and protection of humanity *per se*.

In the aftermath of World War II human dignity was incorporated in the *Universal Declaration of Rights* (1948) as a relatively vague concept to unite people of different ideologies and cultural backgrounds. The use of dignity in democratic constitutions increased dramatically from the 1990's in which contexts it is employed as a value or a right, or both. The dual functionality of dignity in domestic constitutions relates to the justification

for the derivation of human rights and guidelines for constitutional interpretation as well as to the status of dignity as an independent right. This duality raises questions about dignity's real meaning, the establishment of which might serve to limit inconsistent and conflicting interpretations. Otherwise, the application of dignity as a constitutional right may lead to a too broad interpretation of dignity as a pre-eminent right, without clear limits to its application. It follows that the value of and the right to dignity can overlap, which would cause interpretational problems in terms of the limitation of rights principles. Values cannot be limited in terms of proportionality analysis, whereas rights can be limited when conflicting interests are being adjudicated. In dignatarian terms, this would mean that the right to dignity and the value of dignity may overlap but cannot be absolute and limited at the same time.

Consequently, the main purpose of this thesis is to conceptualise the idea of dignity in order to establish and distinguish the contents of both the value and the right to dignity.

In the second part of the thesis, three essential and universal elements of the concept of dignity are identified, which emanate from Kant's moral ethics. The first element is the inherent dignity paradigm; which holds that everybody has inalienable dignity that cannot be limited. Recognition and respect for inherent dignity comprises the second element and the third element requires that the state must realise dignity in the context of sosio-economic rights in appropriate circumstances. In the process of conceptualising dignity its evolution needs to be researched to contribute towards an understanding of what dignity means in current law. Any attempt to conceptualise dignity in South African law must be undertaken within the framework of dignity's application in German law, because dignity is *the* central value of the *Basic Law,* where it functions as an absolute and inviolable constitutional right, whereas dignity functions as one of a triad of values in the *Constitution* and as a relative right.

Furthermore, the dignity clauses in these two constitutions are similar in many respects. To contribute to an understanding of the meaning of dignity in German and South African law, the historical process of enacting the dignity clauses in the *Basic Law* and the *Constitution* are traced and recorded. The application of dignity in these two jurisdictions is contrasted against the usage of dignity as a second order rule in US law, without a fixed content as in German and South African law.

Finally, a further purpose of this thesis is to apply dignity's three essential elements as referred to above, to the distinction of constitutional norms as rules and principles, as advocated by Dworkin and Alexy. The three elements play an indispensable role in proportionality analysis and when judges refer to foreign law and cite foreign judgments, because they indicate which element constitutes a rule or a principle and consequently which element can be limited. Applying these elements within the framework of rules and principles in instances when dignity competes with conflicting rights would provide guidelines in proportionality analysis to assess whether dignity has been infringed upon or not. It is therefore necessary to establish whether dignity functions as a rule or as a principle, or both, in South African law, in order to illustrate instances in which dignity projects inviolability as a rule or assumes the role of a right that can be limited as a principle in terms of Alexy's theory of constitutional rights.

Key words: human dignity, human rights, constitutional rights, constitutional values, categorical imperative, rules and principles, constitutional interpretation, proportionality analysis, limitations of rights.

OPSOMMING

Die betekenis van menswaardigheid as 'n begrip bly die mensdom ontwyk sedert die Stoïsyne in 128 V.C. aangetoon het dat die mens oor menswaardigheid beskik juis vanweë sy vermoëns om te redeneer en om oor sy eie lot te kan beskik, welke vermoëns hom uitsonder van en verhewe stel bo die res van die natuur. Die Stoïsyne het heel eerste 'n universele betekenis aan die idee van menswaardigheid toegedig. Geregtelike beskerming van menswaardigheid het egter eers ongeveer twee duisend jaar later gevolg, toe die begrip geslyp is tot 'n betekenis van gelyke hoeveelheid menswaardigheid vir elkeen, wat nie geskend mag word nie en wat gerespekteer en beskerm moet word deur beide die staat en die mensdom.

In die eerste gedeelte van hierdie studie word die ontwikkeling van die menswaardigheid-begrip deur die eeue heen nagevors. In die huidige regsposisie reflekteer menswaardigheid se betekenis as 'n manifestasie van sy vroeëre ontwikkeling in antropologie, godsdiens, die filosofie en die reg. *Dignitas humana* het in die Oudheid ontstaan, ontvou in die Christendom en die Verligting, en 'n hoogtepunt bereik in die Moderne Era, as aansprake om die mens se heerskappy in die natuur te verantwoord; om die norme van respekvolle optrede in terme van die analogie tussen menswaardigheid en die *imago Dei*-begrip te verduidelik en om menswaardigheid as bron van menseregte te regverdig. Laasgenoemde onderling verbonde begrippe word geassosieer met die beskerming van menswaardigheid en lei tot die slotsom dat die heersende reg beskou word as a morele agent wat sistemiese inbreukmakings verbied. Gevolglik funksioneer menswaardigheid nie net as 'n morele waarde nie, maar ook as 'n universele reg wat respek en beskerming van die mensdom *per se* en in beginsel waarborg.

Menswaardigheid is na die afloop van die Tweede Wêreldoorlog as 'n relatiewe vae begrip in die *Universele Verklaring van Menseregte* (1948) geïnkorporeer, as spesifieke oogmerk om mense met verskillende ideologiese en kulturele agtergronde te verenig. Die gebruik van menswaardigheid in demokratiese grondwette het sedert die 1990's dramaties verhoog, waarin dit aangewend word as 'n waarde of as 'n reg, of as beide. In plaaslike jurisdiksies is menswaardigheid se tweesydige funksionaliteit begrond op die regverdiging van die begrip as basis vir menseregte, as voorskrif vir grondwetlike interpretasie en dra dit ook by tot die status van menswaardigheid as 'n selfstandige reg. Hierdie dualiteit in funksionaliteit laat die vraag ontstaan na die begrip se ware regsbetekenis, aangesien toepassing van menswaardigheid inkonsekwente en teenstrydige interpretasies mag veroorsaak indien die betekenis daarvan arbitrêr vasgestel word. Verder kan die verhoogde voorkeur aan menswaardigheid as 'n primêre grondwetlike reg ly tot 'n te wye en uitgebreide interpretasie, sonder dat duidelike grense vir die aanwending van hierdie reg neergelê word. Die waarde van en reg tot menswaardigheid kan in een feitestel oorvleuel en tot interpretasie probleme ly wanneer beperkings op grondwetlike regte geplaas word. Waardes kan nie beperk word nie, terwyl regte wel beperk kan word in terme van proportionaliteits-analise. Menswaardigheid as 'n waarde kan nie absoluut geld en terselfdertyd ingeperk word as 'n reg nie.

Die hoofoogmerk van hierdie proefskrif is gevolglik om vas te stel welke inhoud aan menswaardigheid as 'n reg en as 'n waarde toegedig kan word en tot watter mate hierdie inhoud 'n rol speel tydens proportionaliteits-analise, wanneer regte teen mekaar opgeweeg word en meer gewig aan een reg toegeken word as aan 'n botsende reg.

In die tweede gedeelte van hierdie proefskrif word drie kern elemente van menswaardigheid geïdentifiseer, wat voortvloei uit die moreel-etiese filosofieë van Kant. Die eerste element bepaal dat elke mens ingebore en

onvervreembare menswaardigheid het, wat op generwyse ingeperk kan word nie. Elke mens se reg op erkenning en respek van sy menswaardigheid funksioneer as tweede element. Die derde element behels dat die staat menswaardigheid moet in bepaalde omstandighede moet realiseer in the konteks van sosio-ekonomiese regte. Om die betekenis van menswaardigheid te bepaal word die ontwikkeling daarvan deur die eeue heen nagevors, ten einde 'n idee te vorm van wat die begrip in die huidige reg behels. Enige poging om 'n vaste betekenis aan menswaardigheid in die Suid-Afrikaanse reg te heg moet onderneem word binne die raamwerk van die Duitse reg, omdat menswaardigheid as *die* sentrale waarde van die *Basic Law* geld en fungeer as 'n absolute en onbeperkte reg, terwyl menswaardigheid as een van die drietal waardes en as 'n relatiewe reg in die Suid-Afrikaanse reg funksioneer. Verder toon die onderskeie menswaardigheidsklousules in die *Basic Law* en die *Grondwet* verskeie ooreenkomste. Om 'n begrip van menswaardigheid in die Duitse en Suid-Afrikaanse reg te vorm, is dit sinvol om die historiese aanloop tot die verordening van die menswaardigheidsklousules in beide grondwette na te vors. Die toepasing van menswaardigheid in die *Basic Law* en die *Grondwet* word gevolglik gekontrasteer met die toepassing daarvan in die Amerikaanse reg, waar daar nie 'n vaste betekenins aan menswaardigheid toegedig word nie en dit nie funksioneer as 'n primêre aksiegrond nie.

Die drie kern elemente van menswaardigheid word in die finale instansie beoordeel binne die raamwerk van Dworkin en Alexy se verdeling van grondwetlike norme in reëls en beginsels. Hierdie elemente speel 'n onontbeerlike rol wanneer proportionaliteits-analise toegepas word en wanneer regters verwys na buitelandse reg en regspraak aanhaal. Die onderskeiding van watter van drie elemente as 'n reël of as 'n beginsel funksioneer is aanduidend van welke element beperk kan word in terme van proportionaliteits-analise. Dit is dus noodsaaklik om vas te stel of menswaardigheid as 'n reël of as 'n beginsel, of as beide in die Suid-

Afrikaanse reg funksioneer, ten einde te illustreer wanneer menswaardigheid 'n element van absoluutheid as 'n reël projekteer, of wanneer dit die rol inneem van 'n beginsel wat slegs relatiewe gelding het, in terme van Alexy se teorie van grondwetlike regte.

Sleutelwoorde: menswaardigheid, menseregte, grondwetlike regte, grondwetlike waardes, kategoriese bevel, reëls en beginsels, proportionaliteits analise, beperkings van grondwetlike regte

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LIST OF ABBREVIATIONS

AAASPSS	Annals of the American Academy of Social and Political and Social Science
ACHPR	African Court on Human and Peoples' Rights
AJ	Acta Juridica
AJHR	African Journal of Human Rights
AJCL	American Journal of Constitutional Law
AJIL	American Journal of International Law
art	Article
AUILR	American University International Law Review
BCICLR	Boston College International and Comparative Law Review
BCM	Black Consciousness Movements
BHRLR	Buffalo Human Rights Law Review
BPC	Black Peoples' Convention
Cardozo LR	Cardozo Law Review
CHRLR	Columbia Human Rights Law Review
CJEL	Columbia Journal of European Law
ChapLR	Chapman Law Review
CLR	California Law Review
ColLR	Columbia Law Review

CODESA	Conference for a Democratic South Africa
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
Ed	Edition
Eds	Editors
EHRLR	European Human Rights Law Review
EJIL	European Journal of International Law
EJPT	European Journal of Political Theory
ETL	Ephemerides Theologicae Lovanienses
fn	footnote
FLR	Fordham Law Review
GLJ	The German Law Journal
GLR	Georgia Law Review
HILJ	Harvard International Law Journal
HLJ	Howard Law Journal
HLR	Harvard Law Review
HRQ	Human Rights Quarterly
IdS	In die Skriflig
IJCL	International Journal of Constitutional Law
ILR	Indiana Law Review

IsraelLR	Israel Law Review
JCH	Journal of Contemporary History
JHI	Journal of the History of Ideas
JSIA	Journal of Psychology in Africa
JRE	Journal of Religious Ethichs
LiverpoolLR	Liverpool Law Review
LLR	Louisiana Law Review
MJECL	Maastricht Journal of European and Comparative Law
MJIL	Maryland Journal of International Law
MLR	The Modern Law Review
MonTLR	Montana Law Review
NDLR	Notre Dame Law Review
NJCL	National Journal of Constitutional Law
NLR	Nebraska Law Review
NZLR	New Zealand Law Review
OJL	Oxford Journal of Law
OJLS	Oxford Journal of Legal Studies
ORIL	Oregon Review of International Law
PE	Perspectives in Education
PER	Potchefstroom Electronic Law Journal (PELJ)

PL	Public Law
PLR	Pace Law Review
RECHTD	Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito
RJ	Ratio Juris
SA	South Africa
SAJCJ	South African Journal of Criminal Justice
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
SASO	South African Student Organization
SCLR	South California Law Review
SLR	Stanford Law Review
STE	Studia Historiae Ecclesiasticae
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TJHUP	The Johns Hopkins University Press
TLR	Texas Law Review
TSAR	Tydskrif vir Suid-Afrikaanse Reg
TSLR	The Stellenbosch Law Review
UDHR	United Declaration of Human Rights
UK	United Kingdom

UN	United Nations
ULR	Utah Law Review
UPJCL	University of Pennsylvania Journal of Constitutional Law
UPLR	University of Pennsylvania Law Review
URLR	University of Richmond Law Review
US	United States
USFLR	University of San Francisco Law Review
UWOLR	University of Western Ontario Law Review
VLRO	Virginia Law Review Online
WCHC	Western Cape High Court
WMBRJ	William & Mary Bill of Rights Journal
YHRDJ	Yale Human Rights and Development Journal
YJLH	Yale Journal of Law and the Humanities
YLSFS	Yale Law School Faculty Scholarship
ZAECPEHC	Eastern Cape High Court
ZAGPPHC	Pretoria North Gauteng High Court
ZaöRV	Zeitschrift fűr ausländisches öffentliches Rechts und Völkerrecht (Heidelberg Journal of International Law)

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Chapter 1: Introduction

> Human dignity is not only the individual dignity of every person, but also the dignity of the human being as a species. Everybody possesses human dignity, regardless of his characteristics, achievements, or social status; those who cannot act in a meaningful way because of their physical or psychological condition also possess human dignity. It is not even forfeited by means of "undignified" behaviour; it cannot be taken away from any human being.[1]

1.1 Conceptual background

Modernity's codification of human dignity as the basis for human rights represents the foundation of the political and legal democracies of western civilization[2] where man is regarded as the central value of the social organization. The concept of *dignitas hominis* was created in Antiquity *ex nihilo*, at a time when man was not yet seen as an individual endowed with rights, but when qualities such as personhood or rank in society determined the value of one's *dignitas*.[3] *Dignitas humana,* however; has been shaped throughout the history of ideas to denounce the differential treatment of *dignitas* and to equalise rights in contemporary law. Hence, human dignity is now assumed to accrue to all individuals equally. It is founded upon the recognition of man by man as an equally autonomous

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1 As held by the Bundesverfassungsgericht, the German Federal Constitutional Court (BVerfG) in BVerfGE 87, 209 (1992) and cited by Hennette-Vauchez 2011 *OJL* 52 fn 115.

2 "If we were looking for one phrase to capture the last fifty years of European legal history… we might call it the high era of 'dignity'" – Whitman "On Nazi Honor and the new European Dignity" 243.

3 The phrase "dignity of man" first originated in Stoic anthropology in 128 B.C., to distinguish man from the animals, because of his rational autonomy and ability of self-determination. Dignity was received in Roman society as a hierarchical norm to denote integrity or indifference to profit. Dignity also denoted the high rank of public officers like magistrates, senators and emperors, and in law denoted the degree of rank in punishment and retribution, and the difference between citizens and non-citizens. Lewis "A Brief History of Human Dignity: Idea and Application" 93; Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 15.

being[4] and the bearer of equal rights. The conceptualization of human dignity as a legal concept is relatively recent in the "history of ideas,"[5] when the link was made between legal personhood, human dignity and human rights.[6]

Post 1950 constitutional adjudication in various legal systems inspired by the generic (so to speak) idea of human dignity originates from the entrenchment of human dignity as a basic human value in the *Charter of the United Nations* (10 June 1945 – hereinafter the *UN Charter*) and the *Universal Declaration of Human Rights* (10 December 1948 – hereinafter the *Universal Declaration*). Two world wars and the Holocaust had to happen before the "inherent dignity of all human beings" (article 1 of the *Universal Declaration*), would be legally recognised in the context of equal and inalienable human rights - human rights were now, for the first time, protected by international law. This legal development resulted in the formation of a new world order in which state authority was limited and curtailed and in Europe, in the enactment of constitutions against which all law and state action could be reviewed.[7] The *Universal Declaration* is utopian and generic in character, designed to embrace all people and cultures in a secular world, and has become

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4 The foundational idea that associates the dignity of man with his autonomy emanates from the writings of the Enlightenment philosopher, Immanuel Kant, who argued that dignity requires man to be treated as an end and never as a means to an end. Kant is indeed regarded by some as the father of the modern notion of human dignity – see Bognetti "The Concept of Human Dignity in European and U.S. Constitutionalism" 79. For a further discussion regarding the significance of Kant's moral ethics in the application of human dignity in current law, see section 1.2.1.2 below.

5 The notion is historically applied in the natural-law, philosophical, ideological and religious traditions.

6 Eckert "Legal Roots of Human Dignity in German Law" 42.

7 The US Constitution, enacted two hundred years earlier, had already provided for the judicial review of all enacted law.

> the only valid framework of values, norms and principles capable of structuring a meaningful and yet feasible scheme of national and international civilized life.[8]

It is generally accepted that human dignity functions as a value in constitutional democracies even when not expressly enacted in domestic documents.[9] Modern Western constitutionalism reflects a post-war paradigm that protects individual rights - because human beings have human dignity. The value of human dignity is regarded as a *Grundnorm* in various European constitutions as well as in the *Constitution of the Republic of South Africa,* 1996 (the *Constitution*).[10]

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8 Arieli "The Emergence of the Doctrine of the Dignity of Man and his Rights" 4.

9 Habermas 2010 *Metaphilosophy* 464*.* The Constitutions of the United States, India, 1950 (albeit only in the preamble) and the Canadian *Bill of Rights,* 1960 do not expressly refer to human dignity, but the courts of these countries have acknowledged the notion as a constitutional value: in the United States in *Furman v Georgia* (1972) 408 US 238 at 273, in Canada in *R v Oakes* [1986] 19 CRR 308 at paras 334-335; in India in *Francis Coralie Mullen v Administrator, Union Territory of Delhi* (1981) 1 SCC 608 at 618-619. The *Constitution of the Republic of South Africa*, 200 of 1993 (*Interim Constitution*,) did not specifically refer to human dignity as a value, but the Court underpinned this value in only its second judgment in *S v Makwanyane* 1995 3 SA 391 (CC) para 328 (hereinafter *Makwanyane*) when it referred to human dignity as "a founding value" of the Constitution, in the context of the prohibition of cruel and unusual punishment. Also in *S v Williams* 1995 3 SA 632 (CC) paras 37 and 38 the Court proclaimed: "[t]he approach followed by the bench seems to indicate an assumption that human dignity is the universal value which is foundational to a constitutional state and its characteristic protection of human rights."

10 Sections 1 (a) and 10 respectively of the *Constitution:* "The Republic of South Africa is one sovereign, democratic state founded on the following values: (a) human dignity…" and "[e]veryone has inherent dignity and the right to have their dignity respected and protected." Art 1(1) of the *German Basic Law* of 1949: "Human dignity is inviolable. To respect and protect it is the duty of all state authority." (*Die Würde des Menschen ist unantasbar. Sie zuch achten und zu schültzen ist Verplichtung alter staatlichen Gewalt*); also the *Bioethics* decision of the French Constitutional Council (no 94-343-344 DC of 27 July 1994) in which case the safeguarding of human dignity was interpreted as an objective of the 1946 Constitution, to denounce the past regimes that "*dégrader la personne humaine*"; art 3(1) of the *Italian Constitution* of 1947: "All citizens have equal social dignity and are equal before the law, without distinction of gender, race, language, religion, political opinions, personal and social conditions." ("*Tutti i cittadini pari dignitâ pari dignitâ sociale e sono eguali davanti alla legge, senza distinzione di sesso, di razza, di lingua, di religion, di opinion politiche, di condizione personali e sociali*.") In *S v Makwanyane* 1995 3 SA 391 (CC) para 329 the Court pronounced that human dignity is the "touchstone" of the new democratic political order.

Germany's *Basic Law,* 1949 emanates from unprecedented circumstances in recent history during which the rights and freedoms of the individual were invalidated and human dignity was negated. Article 1(1) of the *Basic Law*, which stipulates that *Menschenwűrde* is inviolable and cannot be encroached upon, was enacted as a reaction against National Socialism and based upon its drafters' anti-totalitarian consensus.[11] Against this backdrop, it has to be noted that the historical background of article 1(1) "is essential for the correct understanding of the Basic Law."[12]

The *Basic Law* influenced many other domestic constitutions enacted post 1949. The same is true of the *Basic Law's* influence on the *Constitution,* constituted some forty-seven years afterwards. Like the *Basic Law*, the *Constitution* emanates from dire circumstances during which the dogma of parliamentary supremacy was used in support of the disparate conferring of rights and which were human attributes such as race and gender. The content of section 10 of the *Constitution* corresponds remarkably well with article 1(1) of the *Basic Law.* This apparent similarity is significant to the interpretation and application of section 10, as dignity in German law is inviolable and not subject to limitation, whereas dignity in section 10 is adjudicated as a relative right, which right can be limited during proportionality analysis when priority may be granted to conflicting constitutional rights.[13]

Human dignity is not textually protected in the US *Constitution.* Its meaning does not bear historical significance as it does in German and South African law; therefore the concept differs from the seemingly corresponding idea of dignity in these counties. Rather, the US

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11 Also see fn 50 below.
12 Benda "The Protection of Human Dignity (Article 1 of the Basic Law)" 36. Also see fn 219 in chapter 2 below.
13 Section 36 of the *Constitution* stipulates that all rights in the *Bill of Rights* can be limited under specified circumstances.

Constitution reflects strong themes of autonomy.[14] In US law, dignity is employed as a second-order rule to strengthen rights claims, mainly in the context of criminal law and procedure, civil rights and anti-discrimination laws, as well as in public bioethics.[15]

1.2 Motivation for this study

The drafters of the human dignity clauses in the *Universal Declaration* and the *UN Charter* introduced into their texts an all-inclusive value to embrace people of all cultures, based on the philosophical and religious history of the concept, linguistically impartial, neutral and autonomous, as a symbol of the new world order.[16] Both the *Basic Law* and the *Constitution* reflect the ideas pertaining to dignity incorporated in the *Universal Declaration* and the *UN Charter.* However, it is difficult to construe the meaning of the term "human dignity" as these documents do not define it; neither do they limit it to any particular philosophy or religion. Also, the idea of dignity is partly a product of political experience. It is difficult to see how such a complex, undefined idea can be used as a yardstick to protect human rights.[17] Although the concept differs in scope and application in different jurisdictions, it is frequently invoked by judges, political leaders and philosophers, and yet it is seldom the subject of an enquiry into its content as such. It is commonly regarded as a basic ideal "so generally recognised as to require no independent support."[18]

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14 Rao 2011 *NDLR* 221.

15 See in general Murphy 1980 *SCLR* 703-760; Paust 1984 *HLJ* 145; 148; 50; Goodman 2006 *NLR* 741-795; Rao 2011 *NDLR* 207-216 and Barak *Human Dignity The Constitutional Value and the Constitutional Right* 185-208. See also fn 451 in chapter 3 below.

16 The *Universal Declaration* does refer to various European ("… in the dignity and worth of the human person") and Anglo-American traditions ("…in the equal rights of men and women") in its preamble.

17 Dicke "The Founding Function of Human Dignity" 118.

18 Schachter 1983 *AJIL* 849.

As stated earlier, neither the *Basic Law* nor the *Constitution* defines human dignity. It does, however, contain similar elements in both texts, which similarity stems from the family semblance of the dignity clauses enacted in the *Universal Declaration* and the *UN Charter*. The like elements in the dignity clauses in article 1(1) of the *Basic Law* and section 10 of the *Constitution* relate to the *a priori* postulation of inherent dignity and the injunction that the state must respect and protect dignity. In German law, the *a priori* recognition of dignity leads to the constitutional application of dignity as inviolable, whereas in South African law inherent dignity is regarded as a relative right which can be limited when proportionality analysis is applied. This leads to interpretational difficulties, as dignity cannot be constituted *a priori* and be able to be limited at the same time. It is therefore necessary to undertake a constitutional and jurisprudential investigation regarding human dignity, in order to assess whether the self-evident recognition of dignity as related by Schachter in 1983 is valid.

1.3 Research question

This thesis will examine the extent to which the notion of human dignity provides a cogent standard for constitutional interpretation and application.

1.3.1 Analysis of research question

1.3.1.1 Problem statement

In order to address the research question, the adjudication and application of dignity as a legal concept will be studied in German, South African and US law and contrasted with applications in these jurisdictions. During this process it will have to be established whether or not the concept of human dignity displays a fixed content, taking into account the framework of dignity's inception as a normative principle in documents enacted post World War II. If dignity does indeed exhibit a fixed content, it needs to be determined whether this content is applied uniformly in terms of the rule of

law. It is difficult to define human dignity, because the concept has not until recently been regarded as a legal expression (such as causality or elements of contractual, delictual or criminal liability) and it is problematic to construe its judicial content, ambit and relevance in concrete situations.[19] As the Court held in *Harksen v Lane,*[20] quoting the Canadian court in *Egan v Canada:*[21] "[d]ignity [is] a notoriously difficult concept …It needs precision and elaboration." These difficulties notwithstanding, the *Basic Law* and the *Constitution* stipulate that dignity needs to be respected and protected. To fulfil this constitutional mandate it is critical that a principled and theoretical basis be established to protect against current and future violations of dignity and to prevent the term from being trivialised, over-used and used out of context.

One reason why it is difficult to justify the use of dignity as a legal concept is its malleability: it may assume the function of a value or a right, or both in one concrete case and the different indications of dignity may generate a variety of rules.[22] The content of dignity as a value and a right therefore

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19 The European Court of Human Rights applied the concept of human dignity in *Lawless v Ireland (Merits)* 1 EHRR 15, 39 without resorting to defining it in general terms. Courts of West Germany rely on the general constitutional provision. See Schachter 1983 *AJIL* 849. The Court held in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28 that: "Dignity is a difficult concept to capture in precise terms."

20 1998 1 SA 300 (CC) para 50.

21 1995 29 CRR (2d) 79 at 106.

22 Woolman "The Architecture of Dignity" 3. For instance, in determining unfair discrimination, the *value* of dignity informs the *right* not to be unfairly discriminated against. Consequently, the *value* of dignity informs the right to *equality* in law and the *right* to equal protection and benefit of the law – see Ackermann *Human Dignity: Lodestar for Equality in South Africa* 98 fn 32. Although s 10 of the *Constitution* stipulates that everyone has "the right to have their dignity respected and protected," thereby not constituting a right to dignity, the judges of the Court almost without exception refer to *the right to human dignity* in their judgments, as a matter of linguistic application. It is still, in various jurisdictions, uncertain whether human dignity can function as a subjective right, as it is in most instances applied as an auxiliary right to aid the enforcement of human rights such as equality, the right to life and the right to freedom of speech. In *Minister of Home Affairs v National Institute for Crime Prevention and Re-integration of Offenders* 2004 1 SA 10 (CC) para 21 the Court proclaimed that: "The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to

has to be determined and the boundaries of these aspects must be delineated in terms of the constitutional parameters, because a substantial overlap between the value and the right can occur. This delineation is necessary, because in South African law values cannot be limited in terms of proportionality analysis, whereas constitutional rights can be limited. Proportionality analysis and the limitation of rights are essential features of post-war constitutions, since state power is restricted in this process in order to protect dignity.[23]

The statement in section 10 of the *Constitution* that "everybody has inherent dignity" poses interpretational difficulties, because it constitutes an *a priori* postulation that cannot be subjected to proportional analysis, whereas it is couched in the form of a constitutional right, which can be limited. The counterpart of the South African section 10 in the *Basic Law* is seemingly less problematic as it specifies that dignity is inviolable; therefore this right is absolute and illimitable. It would be paradoxical to rely on inherent dignity and to balance this feature with the relative right to dignity, which encompasses inherent dignity. Also, it would be paradoxical or to balance inherent dignity against any of the other constitutional rights in terms of the limitation clause.[24]

This said, it is evident that dignity can present an inherent paradox when it has to be balanced against and limited by diametrically opposing rights in concrete cases, as it represents a conflict on the parts of both a claimant and a defendant. This paradox can occur in conflicts regarding the

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all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights."

23 Weinrib "Constitutional Conceptions and Constitutional Comparativism" 17.

24 The Court balanced the value of dignity against the right to freedom of expression in *Khumalo v Holomisa* 2002 SA 401 (CC).

balancing of individual/subjective rights against universal/objective rights;[25] of minority and indigenous groups' rights against collective rights;[26] of freedom of speech against group rights;[27] of socio-economic rights against

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25 The Court, like its German counterpart, is reluctant to emphasise individual freedom by relying on human dignity, as opposed to the individual's relationship within the broader community, so as to avoid the endorsement of radicalism and to justify the limitation of freedom. The Court declared in *Bernstein v Bester* 1996 2 SA 751 (CC) para 67 that: "[c]ommunity rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society." See Botha 2009 *SLR* 204.

26 In *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) para 54 the Court held that: "A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues.'" This judgment endorsed a learner's cultural right to wear a nose stud in a government school as an expression of her South Indian Tamil Hindu beliefs, thereby merging the constitutional protection of culture and religion with its formative role in individual autonomy. Also, the Cape High Court found in *Coetzee v Comitis* 2001 1 SA 1254 (C) paras 38 and 38 that the National Soccer League's employment conditions, which had the effect of denying a soccer player's transfer from one club to another for a certain period of time, thereby robbing him of remuneration, "strip the player of his *human dignity* by treating him as no more than 'goods and chattels… at the mercy of his employer.'" This decision stands in contrast to the decisions on the endorsement of limitations on contractual freedom in *Afrox Healthcare v Strydom* 2002 6 SA 21 (SCA) and *S v Jordan* 2002 6 SA 642 (CC). In this regard, the German Administrative Court utilised the so-called objective dimension of human dignity, in recognition of the state's duty to respect and protect (section 1 of the *Basic Law*) to find in the famous peep show case that such a show violates section 1, which objectifies women, although the woman participating in the show acted voluntarily (BVerfGE 64, 274 (1981.) Similarly in France the Supreme Court for Administrative Justice ruled that public authorities are prohibited from allowing dwarf-throwing competitions, notwithstanding the dwarfs' consent, as a matter of protection of and respect for the human dignity of the participants, the spectators, and the dwarf community in general. (Conseil d'Ét̀at Assemblee [CE Ass.] [Administrative Court Assembly] decision No. 136727, Oct 27, 1995. Rec.Lebon (Fr.). The latter two decisions clearly indicate interference in personal autonomy and freedom of choice.

27 The C*onstitution* protects freedom of religion, belief and opinion (s 15), language and culture (s 30), and cultural, religious and linguistic communities (s 31), all subject to the democratic values of human dignity; equality and freedom (s 7). In South Africa, freedom of speech is subordinate to the right to human dignity (*Khumalo v Holomisa* 2002 5 SA (CC) 401 para 44), whilst the First Amendment of the US *Constitution* confers absolute protection of freedom of expression, which protection is designed to promote democracy, self-actualization and public discourse. The *Constitution* confers in ss 23; 24; 26 and 27 positive rights on the state to acknowledge and protect dignity by providing a right to work, access to housing, primary healthcare, emergency health services, and a clean environment. In *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) the court held that the state has an obligation to take only reasonable measures within available resources to achieve the progressive realisation of these rights (para 38), *in casu* to provide anti-retroviral drugs to HIV patients, whilst fiscal constraints were

state policies;[28] and of the right to life against autonomous rights and/or state obligation.[29] Dignity can be limited in one instance and can take preference over competing rights in another instance when a proportionality analysis is applied. This ambiguity can result in the inconsistent application of the concept. These difficulties have led the Supreme Court of Canada (which court is usually quite productive in dignity applications) to find *obiter* in *R v Kapp* that the concept of dignity is too ambiguous to provide meaningful direction, too abstract, subjective and confusing and that

> It has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.[30]

As a result of the above discussion pertaining to the many meanings of dignity, a further aim of this thesis is to establish whether it is possible to develop human dignity into a collective legal norm in South African law, as well as to determine if comparative law could be usefully employed to develop dignity as a cogent standard for constitutional interpretation and application.

1.3.1.2 Kant's formulation of human dignity

Kant's articulation of the justification for human dignity is of particular significance for the conceptualization of dignity as a legal concept in post-

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given priority in *Soobramoney v Minister of Health (Kwa Zulu-Natal)* 1998 1 SA 765 (CC) para 28: "If all the persons in South Africa who suffer from chronic renal failure were to be provided with dialysis treatment – and many of them, as the appellant does, would require treatment three times a week – the cost of doing so would make substantial inroads into the health budget. If this principle were to be applied claiming access to expensive medical treatment or expensive drugs, the health budget would have to be dramatically increased to the prejudice of other needs which the state has to meet."

28 [2008] SCC at 22, as cited by White 2011 https://www.law.kyu.edu.ecm.

29 Weisstub "Honor, Dignity and the Framing of Multiculturalist Values" 265. For example, in cases of abortion where a court has to separate legal and ethical issues either to protect the life of an unborn foetus or to uphold the right to autonomy of the mother.

30 2008 *EJIL* 698.

war constitutionalism.[31] He argues that dignity is determined by the intrinsic worth of the autonomous individual; therefore autonomy forms the basis of man's dignity who can reason and regulate his own fate within his perception of morality.[32] He recognized two types of value, namely *dignity* (seen as "absolute inner worth" that acts as parameter of moral value) and *price*, that encompasses the measurement of dignity's value.[33] Dignity is a quality of

> absolute, intrinsic value, above any price, and thus excluding any equivalence,

which indicates the intrinsic worth of the autonomous individual.[34] Kant[35] derived his instruction to uphold human dignity as an ethical action through application of the categorical imperative:

> Man does not exist as a mere means for any use or will, but as an end in himself. Thus, he always has to be regarded, in all his actions both towards himself and to other reasonable beings, as an end too.

The categorical imperative was explained by way of a practical imperative in the following famous phrase:

> Act in such a way as to treat humanity, whether in your own person or that of another, always as an end, never merely as the means.[36]

For Kant dignity is not only connected to the individual, but to humanity and morality.[37] The content of morality is rooted in a legitimised duty based on reason and respect for another's dignity.[38]

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31 Also see fn 4 above.
32 Englard 1999-2000 *Cardozo LR* 1918. Also see footnotes 4 and 31 above.
33 Kant *Groundwork of the Metaphysics of Morals* 434-435 as discussed, emphasised and quoted by Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 21.
34 Englard 1999-2000 *Cardozo LR* 1918.
35 Kant *Groundwork of the Metaphysics of Morals,* as quoted by Eckert "Legal Roots of Human Dignity in German Law" 46.
36 Kant *Groundwork of the Metaphysics of Morals,* as quoted by Eckert "Legal Roots of Human Dignity in German Law" 46.
37 Eckert "Legal Roots of Human Dignity in German Law" 46.
38 "Every man has a legitimate claim to respect from his fellow men and is in turn bound to respect every other." Kant *Groundwork of the Metaphysics of Morals,* as quoted by Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 21.

Kant[39] then connected the duty to respect the dignity of others to the duty towards oneself as the content of the categorical imperative:

> the respect that I have for others or that which another can require from me… is therefore the recognition of a dignity in other human beings.

Therefore one can deduce that the *a priori* fact of inherent dignity in both article 1(1) of the *Basic Law* and section 10 of the *Constitution* corresponds with Kant's claim that inherent dignity has an

> absolute, intrinsic value, above any price, and thus excluding any equivalence.[40]

The absolute status of inherent dignity is justified through the categorical imperative, which is in turn sustained by the practical imperative that man is never to be used as a means to an end. The second component of the formulations in both constitutions pertaining to the injunction to respect and protect dignity coincides with Kant's explanation that the justification for one's own inherent dignity is simultaneously constituted by a human being's reciprocal recognition and respect of another's dignity. [41]

In applying the problem statement as discussed above to the application of the dignity clauses in the two constitutions under discussion and within the framework of Kant's categorical imperative, it is clear that the German postulation of dignity as inviolable corresponds with Kant's categorical imperative. However, although the inherent component of section 10 of the *Constitution* is stated as an *a priori* fact, section 10 is generally interpreted

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39 "… just as he cannot give himself away for any price (this would conflict with his duty of self-esteem), so neither can he act contrary to the equally necessary self-esteem of others, as human beings, that is, he is under obligation to acknowledge, in a practical way, this dignity of humanity in every other human being. Kant in *Doctrine of Virtue* 6:462 as quoted by Sensen 2011 *EJPT* 82.

40 Also see fn 34 above.

41 Kant connected the link between rights, freedom and equality, and by implication, dignity: "this right comes to him who is a member of the commonwealth as a human being… a being who is in general capable of having rights." See Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 22.

as a complete unit and therefore as a relative right.[42] This application contradicts the idea that dignity is inviolable and would result in the non-protection of inherent dignity, as inherent dignity is reduced to the status of a right that can be outweighed by another right during a proportionality analysis. Contrariwise, if it is found that inherent dignity was infringed upon under article 1 (1) of the *Basic Law*, no balancing in the two tier limitation process between dignity and other rights is applied.

1.3.1.3 The essential elements of human dignity

Scholars such as Neuman,[43] McCrudden[44] and Feldman[45] agree that human dignity encompasses at least three essential elements, implying the existence of a universal minimum content in domestic and comparative judicial interpretation. The extrapolation of dignity's essential elements derives from the concept's evolution throughout the history of ideas and the current consensus that everybody has equal dignity which has to be respected and protected. These elements are:

(a) the ontological[46] claim, which holds that everyone has inherent dignity, refers to man's unique qualities that are priceless and irreplaceable in the Kantian sense;

(b) the second core element demands recognition and respect for inherent dignity and refers to types of treatment that are inconsistent

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42 Barak *Human Dignity the Constitutional and the Constitutional Right* 247. For opposing views, see Venter "Human Dignity as a Constitutional Value: a South African Perspective" 340 and Botha 2009 *SLR* 197. Also see fn 113 in chapter 3 below.

43 Neuman "Human Dignity in United States Constitutional Law" 241; 271.

44 2008 *EJIL* 698.

45 Feldman 1999 *PL* 684.

46 In philosophy, ontology refers to a branch of metaphysics that studies the fundamental characteristics of things and subjects, inclusive of their basic composition and what it cannot consist without. It also relates to questions regarding the existence and arrangement of reality. See Anon date unknown https://www.ontology.co/.

with the recognition of and respect for inherent dignity, as required by international and national law;[47] and

(c) the third core element holds that the state is obliged to realise human dignity in providing existential minimum living conditions, which are embodied in the second-generation social and economic human rights. This element is referred to as the "limited-state claim" and embodies the Kantian idea that the state should exist for the sake of the individual, and not *vice* versa.[48]

Dignity's first essential element coincides with Kant's claim that inherent dignity is inviolable, as expressed through the practical and categorical imperatives.[49] Based on this conception, it is necessary to divide the elements formulated specifically in section 10 of the *Constitution* into two separate components: the inherent dignity paradigm and the instruction to respect and protect dignity. This is essential because the components do not enjoy the same legal status: the first component is illimitable, whereas the second component functions as a relative right. Dignity adjudication in German law follows this path.

1.3.1.4 Forms and functions of human dignity

1.3.1.4.1 Dignity as a value

Human dignity as a foundational value was recognized in international human rights documents with many countries following suit by enacting the same in their constitutions, thereby generating the paradigm of inherent and equal dignity as the moral justification for enumerated human rights in transnational and national public law. Constitutional values

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47 Beyleveld and Brownsword in "Human Dignity in Bioethics and Biolaw" 11.
48 This claim is expressed through Kant's practical imperative as discussed in section 1.2.1.2 above.
49 See discussion in section 1.3.1.2 above.

function as a guide for constitutional interpretation.[50] These abstract values draw meaning from their domestic roots, history and traditions and signify a commitment to change from a previous regime - for the better. They are thus context-specific and culture-contingent and people with other values may come to different conclusions. For example, it is generally accepted that the enactment of human dignity as inviolable in the *Basic Law* is a reaction against National Socialism.[51] Similarly, the value of human dignity in the *Constitution* represents a reaction against past discrimination and authoritarianism.[52] Dignity functions as the supreme value in the *Basic Law*[53] and as one of the triad of values in the *Constitution.*[54] In US law, dignity does not function as a normative principle, but merely as a value to strengthen rights claims. In South Africa, the value of dignity as a norm specifically functions to reinforce rights claims, to determine the scope[55] of human rights and to harmonise contending rights and values.[56] The value of dignity coincides with Kant's categorical imperative, as described by O'Regan J in *Makwanyane*:[57]

> The importance of dignity as a founding value of the new *Constitution* cannot be overemphasized. Recognizing a right to dignity is the acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched.

This reasoning coincides with the formulation in section 10 of the *Interim Constitution* as well as the instruction in Kant's categorical imperative. As

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50 *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para 149.
51 Also see the discussion in chapter 2.14. Also see fn 11 above.
52 Also see the discussion in chapter 2.15.6 below.
53 The Federal Constitutional Court held in the *Life Imprisonment* case that: "The freed human person and his dignity are the highest values of the constitutional order." See BVerfGE 187, 227-228 (1977).
54 Sections 1(a); 36 and 39 of the *Constitution.*
55 Limitations on fundamental rights need to be justified in the so-called second stage enquiry in terms of the provisions of s 36, by recognising that the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." In this proportionality analysis, the court will take into account the impact of the limitation on human dignity.
56 Chaskalson 2000 S*AJHR* 201-204.
57 *S v Makwanyane* 1995 3 SA 392 (CC) para 328.

a result, one can argue that the Court established dignity's theoretical underpinnings in South African law in *Makwanyane,*[58] based on Kant's moral philosophy. Notwithstanding the recognition of inherent dignity in SA law, its most controversial aspect lies at the intersection between dignity as a value and dignity as a right because inherent dignity, which is absolute in the Kantian sense, cannot be balanced with the relative right to dignity that encompasses inherent dignity.[59] One can argue that, notwithstanding the establishment of dignity's theoretical underpinnings in *Makwanyane*,[60] the Court's application of the inherent dignity component of section 10 in some cases is inconsistent with true Kantian ethics, which holds that dignity is irreplaceable and priceless.

1.3.1.4.2 Human dignity as a constitutional right

Human rights derive from the value of the "inherent dignity of the human person"[61] – so too the right to dignity. In most constitutions, contrary to the *Basic Law*, dignity operates not as an absolute right but as a relative right that may be subject to limitations under proportionality analysis.[62] In a number of constitutions, such as the German, South African and Israeli *Basic Law,* dignity is both a positive and a negative right, not only imposing limitations on state action but also obliging the state to progressively realise dignity.[63] In South African law, the scope of the value of dignity is the same as the scope of the right, which results in an overlap

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58 1995 3 SA 391 (CC).
59 Also see fn 24 above.
60 1995 3 SA 391 (CC). Also see the discussion in chapter 2.15.6.5 below.
61 Preambles to the *International Covenant of Civil and Political Rights* (1967) and *International Covenant on Social, Economic and Cultural Rights* (1967). Also see the discussions in chapter 3.4.1 and 3.6.1 below, as well as *ANC v Sparrow* 01/16) [2016] ZAEQC 1 (10 June 2016) p 40 para 20.
62 According to Weinrib, the two stage analysis employed by courts to establish whether infringement upon a right is constitutional was developed by German law and incorporated in many other jurisdictions thereafter, which is also a characteristic of the post-war paradigm of constitutional rights jurisprudence. See "The Postwar Paradigm and American Exceptionalism" 93. Also see the discussion in chapter 5.3.3.4 below.
63 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 367.

between the right and the value.[64] Similar to German Law, the content of section 10 of the *Constitution* embodies the three essential elements of dignity that stem from Kant's categorical imperative.

The general rules in respect of proportionality analysis also apply to the right to dignity. With this in mind and in terms of the research question and problem statement in this thesis, it needs to be established whether the general limitations clause applies to section 10, being the inherent dignity paradigm in terms of Kant's categorical imperative, in totality, because this would indicate whether inherent dignity has been infringed or not.

1.3.1.4.3 Dignity as a rule and a principle

The validity of the three essential elements of dignity, as sustained by Kant's categorical imperative, can be tested within the framework of Dworkin's and Alexy's distinction between rules and principles, as subcategories of norms. Rules have absolute validity and are mutually exclusive, whereas principles function as "optimization requirements", whose realisation is restricted by neutralising rules and principles. They function concurrently.[65] Alexy[66] argues that a special feature of the distinction between principles and rules is that rules a conflict between principles is resolved by a process of proportional analysis, in terms whereof one principle could outweigh and take preference over the other, thereby limiting the scope of the lesser principle. Principles are realised to the greatest extent possible, to varying degrees and within factual and legal possibilities, whereas rules can be realised or not.[67] As Alexy[68] argues: "[w]hat separates them is the way the conflict is resolved."

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64 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 367.
65 Alexy *A Theory of Constitutional Rights* 47.
66 Alexy *A Theory of Constitutional Rights* 85. Also see Teifke "Human Dignity as an 'Absolute Principle'?" 94.
67 Alexy *A Theory of Constitutional Rights* 48.
68 Alexy *A Theory of Constitutional Rights* 49.

In applying Alexy's classification of norms to section 10, it becomes evident that the first essential element of dignity displays the features of a rule ("[e]veryone has inherent dignity".) Inherent dignity acting as a rule cannot be limited, as any limitation would cause a violation. Treating the inherent component of section 10 as a rule coincides with Kant's categorical imperative to the effect that human worth has no price and cannot be traded off against anything in the world.[69] Any proportionality limitation would offend the categorical imperative. It is theoretically unsound to accord inherent dignity the status of a principle, as it would be a contradiction to acknowledge and to limit dignity at the same time. This application results in the untenable conclusion of the minority judgment in *S v Jordan*[70] that prostitutes' dignity is diminished as a result of their own conduct, whereas the Court in *Mohamed v President of the Republic of South Africa*[71] cited the *dictum* of the German Administrative Court that

> Human dignity is an objective, indisposible value, the respect of which the individual cannot waive validly.

Whilst it is correct that the *Constitution* confers a relative function on the right to dignity by way of the general limitations clause, the injunction that "[e]veryone has inherent dignity" cannot be subject to restriction, because the *Constitution* would then contradict itself as a result of the normative meaning ascribed to the value of dignity. Furthermore, it can be argued

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69 Also see fn 104 in chapter 3 below.

70 2002 6 SA 642 (CC). The minority held at para 74 that: "Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body."

71 2002 3 SA 893 (CC) para 62 fn 55.

that the second component of section 10 displays the features of a principle, because "the right to have one's dignity respected" (a negative right) and "protected" (a positive right) can in concrete cases be realised only to a greater or a lesser degree, in terms of Alexy's description of principles as "optimization requirements."

1.3.1.4.4 Criticism against the constitutional use of human dignity

The constitutional use of human dignity has proliferated in the past fifty years resulting, according to McCrudden,[72] in usage by the courts

> merely to disguise, for example, the absence of a theory on how to resolve conflict between incommensurable values. Instead of making a choice between conflicting rights, they present the conflict as an issue internal to dignity.

He argues that the concept accordingly lacks an agreed objective standard to balance conflicting interests and rights in hard cases, resulting in a

> smokescreen behind which substantive judgments are being made, but unarticulated as such, and therefore uncontestable.[73]

Notwithstanding the "minimum core" (McCrudden's terminology) content and constitutional status of human dignity as a legal notion, its "incompleteness" attracts criticism, because of its general meaning and because of the different ideas of what its essential elements are.[74] Despite universal acceptance of dignity's essential elements, agreement dissipates when passionately contested issues such as abortion, euthanasia, hate speech and the distribution of social and economic benefits have to be adjudicated. As McCrudden[75] argues:

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72 2008 *EJIL* 722
73 2008 *EJIL* 722.
74 McCrudden 2008 *EJIL* 679-680.
75 McCrudden 2008 *EJIL* 698. For solutions to the problems regarding the universal understanding of the essential elements, see McCrudden 2008 *EJIL* 698, 710 and Carozza 2008 *EJIL* 934-939.

> human dignity (and with it human rights) is exposed as culturally relative, deeply contingent on local politics and values, resulting in significantly diverging, even conflicting, conceptions.

If there is no agreed principled basis for defining dignity in one way rather than in another, the rule of law, which requires that legal decisions be made openly, prospectively and clearly, will be breached. Consequently, if McCrudden is correct, the "very possibility of the rule of law is undermined",[76] Carozza[77] argues that because of this contested use of human dignity, domestic precedents and international adjudication will become

> indistinguishable from the arbitrary or idiosyncratic preference of a judge for some norm over some other one.

The controversy surrounding the meaning of dignity is mirrored in judicial comparativism, as judges in some instances use the concept to either agree with or divert from the commonality aspect of dignity. If there is no principled basis to protect human dignity there could be no grounds for a global *ius commune* of human rights (for example the norm of the right to life in capital punishment cases and the right to abortion) and the whole area of reliance on foreign law in domestic jurisdiction would remain contested. If conceptions of dignity are not similar in the jurisdictions involved, it would be quite pointless to rely on a hypothesis or paradigm of human dignity to validate a "judicial borrowing" - either to justify a different outcome or to confirm a similar outcome.[78] Carozza suggests that a process be followed by the

> working out of the practical implications of human dignity in varying concrete contexts

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76 2008 *EJIL* 940

77 2008 *EJIL* 940.

78 Carozza 2008 *EJIL* 933. Compare also his example of importing Islamic understandings of gender perspectives into US law in reference to the value of the *shari'a* as justification.

to solve the problem of incommensurable values.[79] In other words, he proposes that the principle of subsidiarity[80] and its co-terminous principle of pluralism be utilised in adjudicating global human rights norms.[81] Significantly, the judgment of the European Court of Justice in the *Omega Spielhallen*[82] case points in this direction. In this judgment the court found that dignity may have significantly varying meanings and scope in the member states, and in essence that Germany's approach and perspective was not necessarily the same as that of other states. This pluralistic approach signifies an understanding of the context-specific role of human dignity, even though different countries may have similar constitutional terms and comparable legal issues. Schachter indirectly supports this diversifying effect of culture on the meaning of dignity, by stating that

> [its] intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors.[83]

1.4 Choice of legal systems

Germany has the most comprehensive and developed theorisation and body of dignatarian jurisprudence of any country – by both the Federal Constitutional Court (BVerfG) and by legal scholars. Therefore it is only natural that South Africa's dignity jurisprudence be compared with Germany's, as the Court also acknowledged the relevance of German

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79 Carozza 2003 *TLR* 1082.

80 The principle of subsidiarity is defined in article 5 of the *Treaty on European Union* (1992), which prescribes that decisions should be made at Union level as closely as possible to the individual through a process of checks and balances at national, local or regional level. It is also a principle in Catholic social thought, which views decentralization in favour of the individual or smaller organization as preferable, so as to ensure personal development and achievement.

81 Carozza 2008 *EJIL* 1085. Carozza explains that the functioning of human dignity in adjudication and the principle of subsidiarity "mediate the polarity of pluralism and the common good in a globalized world." See 2003 *AJIL* 38. McCrudden concurs with Carozza's claim – see 2008 *EJIL* 719.

82 *Omega Spielhallen und Automatenaufstellungs- GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I – 9609, as quoted and discussed by McCrudden 2008 *EJIL* 710.

83 1983 *AJIL* 710.

jurisprudence for the interpretation of the core values of the *Constitution.*[84] Furthermore, the German and South African systems bear a family semblance. The European, South African and Indian political systems are based on social democracy, and share a "post war (World War II) conception of constitutionalism" founded on political-legal and religious traditions of human dignity (the so-called egalitarian principles). This perception of human dignity is multicultural because of the deep-rooted cultural and historical differences in the populations of these nations, and are linked with the "older values of communitarianism" that reflect a specific conception of individual realisation within the broader context of the social state.[85] These "older values" were translated into the abstract notion of human dignity in European constitutionalism, and enacted as concrete foundational (central) values of human dignity in various constitutions, to aid the textual interpretation of open-ended provisions.

It would be meaningful to compare the dignity jurisprudence of the US, where dignity is not employed as a first order rule but solely as a value to strengthen rights-claims, with the application of dignity in Germany and South Africa, where dignity plays a multi-functional role. The political system of the US differs significantly from the European and South African models, because it stems from the classical liberal or neo-liberal notion of political governance, with individual freedom and liberties as its foundation. This system protects individual autonomy against state interests, thus realising an absolute view of rights. It does not restrict the actions of private parties in the exercise of their autonomy. Whereas the US system emphasises individual rights, the German and South African systems stress communitarian values. It is useful to compare dignity adjudication in Germany and South Africa, because the elements in article

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84 *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 92 and *S v Mhlungu* 1995 3 SA 867 (CC) para 92.

85 Rao 2008 *CJEL* 244.

1(1) of the *Basic Law* and section 10 of the *Constitution* bear a similar content, and share the context of reacting to prior violations of dignity. Contrariwise, it is useful to compare the differences of dignity adjudication in US law with the application of dignity in German and South African law, as dignity has no specified content in US law and there is no historical context of prior violations of dignity. This process would indicate whether dignity has the same universal meaning across jurisdictions.

1.5 Hypotheses and assumptions

For the purposes of this study, the following hypotheses and assumptions are considered:

1.5.1 Hypotheses

(a) Everybody has inherent human dignity.

(b) Everybody has a right to have their inherent dignity respected and protected.

(c) The concept of dignity displays three essential elements in law, namely the paradigm that everybody has equal inherent human dignity, that everybody has a right to the respect and protection of his dignity, and that the state is progressively required to realise dignity through the enforcement of socio-economic rights.

1.5.2 Assumptions

(a) Inherent human dignity is inviolable. It functions as a rule (a category of constitutional norms), therefore it does not play a role in proportionality analysis. Rules have absolute validity and need not be balanced against other rules or principles.

(b) The right to have one's dignity respected and protected functions as a principle, which is not absolute in the framework of rules. Therefore

the right to respect and protection of dignity functions as a relative right that can be limited during proportionality analysis.

(c) Human dignity is not a neutral concept- this is also true for dignity's functioning in law, culture, religion, history, politics or *boni mores.* There are, regardless of the minimum core contents of human dignity, different conceptions of dignity, depending on whether it is generated from within a specific religious and/or political dimension, individual freedom perspective, or historical conjunction. It does not have the same meaning for those who do not share the same perspectives. Dignity is different for different jurisdictions, but it serves as a common foundational linguistic value.

1.6 Research methodology

In order to answer the research question a literature study is undertaken in the course of which the dignity-adjudication of the constitutional systems of Germany, South Africa and the US are investigated. Dignatarian jurisprudence in South Africa cannot be judged in isolation from the German application, because the dignity clauses in the two constitutions have similar wording and these countries have similar histories regarding past transgressions of dignity. Therefore a historical exposition of the enactment of the dignity clauses in Germany and South Africa will provide insight into the meaning assigned to dignity in these countries. It is also fruitful to compare dignity adjudication in these jurisdictions to US examples, because dignity does not have a fixed meaning in US law and does not enjoy the same pre-eminence in that legal system. Furthermore, the purpose of this study, being a possible conceptualisation of dignity, is served by comparing the models of constitutional interpretation of the dignity clauses in the *Basic Law* and the *Constitution,* to point out similarities and differences in order to reach a conclusion regarding dignity's essential elements. Although comparative law is not a delineated legal discipline but rather a method of advancing learning and information,

the central quest in this thesis is to seek for a universal commonality in the application of dignity, in order to establish the legal meaning of dignity.

The wide scope and nature of this thesis is necessitated by the fact that human dignity has an interrelated historical, philosophical, religious and legal background. Therefore, primary sources of law including case law are consulted, as well as secondary sources such as textbooks, journals and electronic materials.

1.7 Limitations of study

Any study regarding the legal significance of human dignity can at most be a work in progress. Every day, the fast changing world causes new threats and challenges to the inherent dignity of humanity. The purpose of this study was merely to point out that there is a theoretical basis to justify protection of dignity in German and South African law and that the concept of dignity plays a very different role in US law. Although there is a multitude of scholarly writings on dignity, it lacks discussion of a principled basis to justify decisions pertaining to infringement or non-infringement of dignity. More extensive research within the field of the body of international and domestic law is still necessary to reach consensus as to protection of dignity-as-a-rule and dignity-as-a-principle.

1.8 Structure and overview of the thesis

In chapter two of this thesis the development of the notion of human dignity is studied via an overview of the concept of *dignitas* as a hierarchical distinction of social structures, which evolved into the current idea of equal human dignity. The inception and subsequent extension of the phrase *dignitas humana* is traced via divergent legal, philosophical and religious routes. This chapter also records the history of the inception of the dignity clauses in the *Basic Law* as well as in the *Constitution*, in order to conceptualise an understanding of Germany's and South Africa's application of dignity.

Dignity's minimum content or essential elements are discussed in chapter three, in the framework of Kant's moral ethics and specifically his formulation of the categorical imperative that man is never to be used as a means to an end. In addition, the interface between human dignity as a constitutional right and value will be considered, by distinguishing between constitutional values and constitutional rights, as dignity pertains to both, and is thus given content through political and legal interests.

Chapter four critically analyses the role of human dignity as the basis for human rights in international law, Germany and South Africa, and the different role assigned to dignity in US law. It also explores whether or not the concept of dignity can be adequately protected by applying purposive interpretation.

The question whether the concept of dignity provides a cogent standard for constitutional adjudication in Germany and South Africa is assessed in chapter five, based on the findings made in the previous chapters. In this chapter a model for the constitutional interpretation of section 10 of the *Constitution* is proposed, along the lines of Dworkin's and Alexy's distinction between rules and principles as constitutional norms.

Chapter six offers a conclusion and recommendations to implement the constitutional model proposed in chapter five, in order to provide sufficient constitutional protection to human dignity.

Chapter 2: The development and evolution of the concept of human dignity

"Dignity seems at home in law."[1]

2.1 Introduction

Julius Caesar, renowned Roman soldier and statesman, felt compelled to defend his *dignitas* upon returning to Rome after defeating the Gauls (mostly for his own purposes) in an illegal war. By law, he had to dismantle his army (because his term as governor had ended) before entering Rome. Faced with a choice to defend his *dignitas* or to run the risk of facing possible criminal charges as a private citizen for his military actions whilst governor (although Rome had hugely benefitted from his actions) he crossed the river Rubicon (it formed the southernmost border of his former province - Cisalpine Gaul - with Rome) in early 49 BC to lead his army into Rome, causing the second civil war in one generation.[2] However, Caesar's unorthodox lifelong efforts to enrich and defend the *dignitas* of himself, his family and that of Rome, led to his murder in 43 BC.[3] His rejection of the *mos maiorum* (the way we do it) – *inter alia* by showing clemency to his enemies once he had defeated them gave the perception that he offended Rome's *dignitas.* Three years before Caesar's murder, his outspoken and long-time enemy, the Stoic and ultra-conservative senator Marcus Porcius Cato (the younger) famously committed suicide to preserve his *dignitas*. He valued his *dignitas* in death higher than in life, after suffering defeat against Caesar's army in the battle of Thapsus. Olden-day *dignitas,* then,

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1 Waldron "Dignity, Rank, and Rights" 3.

2 In 87 BC the proconsul Gaius Marius, who was married to the sister of Caesar's father, returned to power in Rome after the first civil war and killed everyone perceived to have impugned his *dignitas.*

3 An anecdote in Rome has it that Caesar as a young soldier was captured by pirates who demanded 20 talents for his release, the going rate at the time as ransom for a young patrician. Caesar, however, demanded that the price be raised to 50 talents, which he himself subsequently paid, thereby increasing his *dignitas.*

was a concept worthy of fierce protection, and in extreme cases required of one to send oneself into exile, to declare war, or to commit suicide or murder.

The societal and legal framework in ancient Rome was marked by a hierarchical system based on class structures,[4] which framework was reflected in unequal treatment in law. This paradigm inevitably resulted in the inegalitarian application of, firstly, *dignitas,* and secondly,

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4 The English word class derives from the Latin *classis* which refers to men called to arms. The *Oxford English Dictionary* defines class *inter alia* as: "1. A set or category or things having some property or attribute in common and differentiated from others by kind, type or quality; 2. A system of ordering society whereby people are divided into sets based on perceived social or economic status." Class structures in civilisation developed gradually after the disintegration of the primitive communal societies and were believed to have originated in ancient Egypt, Assyria and Babylonia at the end of the fourth and the beginning of the 3rd millennia B.C.; in India and China, in the 3rd-2nd millennia B.C.; and in Greece and Rome, in the first millennium B.C; during the Neolithic Period, when tools and production techniques were developed, and the domestication of animals and plants took place. Control of these new areas of labour spurred humanity into areas of intellectual development, resulting in the division of wealth, and eventually in the formation of a class of wealthy freemen, an oppressed class consisting of freemen who were being driven into slavery because of debt or taken as prisoners of war, and an intermediate class aspiring towards wealth. In Rome, the first division of class structures apparently appeared when its sixth king, Servius Tullius, who ruled in the sixth century BC, enrolled all able-bodied and free men and divided them into five different groups, according to wealth and their ability to provide their own arms, food, horses, etc. This division resulted in different status being accorded to the members of the different groups: see Anon date unknown www.massline.org/Philosophy/ScottH/MLM-Ethics-Ch4. A fundamental element of Roman society was the strict boundaries between the plebeians, equestrians and patricians. In order to be recognised, status and rank had to be publicly displayed, and the clothing of upper-class men had distinct features to make them stand out. After 212 A.C., these differentiations subsided when peregrini were granted full citizenship. In the third century A.C., a legal division was made between honestiores (more honourable people – senators, soldiers, municipal officers) and humeliores (more insignificant people – including all other groups). This legalisation of inequalities resulted in the imposition of more severe penalties (in criminal law) on the latter group – crucifixion, torture, corporal punishment. Of course, the distribution of inequality in society was not restricted to the Romans. Aristotle divided society into slaves and free men, the poor, the middle class and the rich (in his Politics); in The New Testament frequent references are made to the rich and the poor, slaves and free men; whilst Thomas Aquinas divided society into strict social orders as a result of the dissolution of the feudal orders. The Enlightenment philosophers advocated a democratic and egalitarian society with equal dignity for everyone, and eventually, the liberty; equality and fraternity resulting from the French Revolution caused a transformation of the social classes in Europe.

paradoxically, human dignity. Historical *dignitas* denoted an acquired personal status in a specific social framework, whilst the "dignity of a human being" referred to a philosophical claim as well as a characteristic that distinguished humanity from lower forms of life because of their ability to reason, to exercise free will, and to reflect.[5] The idea of "human dignity", which was used to explain man's elevated position in the *logos,* was formulated by the Stoics of Greece in 128 B.C. It was transmitted as such in Roman society via the works of Cicero, the Roman jurist and philosopher. Although the term "human dignity" is not found in the Bible, Christianity also reflects the Stoic claim, as both the Old and New Testaments hold that man is created in the image of God: *imago Dei* (Genesis 1:27, Psalms 24:7-10 and Ephesians 4:24;) therefore man has as essential element dignity, that must not be violated.[6] Furthermore, it formed the basis of the reasoning of the Renaissance philosophers, jurists and politicians who developed natural law in the sixteenth and seventeenth centuries.[7] However, Samuel Pufendorf's classification of human beings as being regarded by law as persons[8] bearing innate rights and therefore equal by nature, incorporated human dignity in natural law.[9] The emergence and recognition of individualism in law led to the recognition of equal inherent dignity. The incorporation of the idea of human dignity in systems of natural law resulted in the development of the notion of the intrinsic (equal) rights of every human being, totally divorced from the old idea of status or rank, and embodied as such in the American

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5 Eckert "Legal Roots of Human Dignity in German Law" 43; Starck "Religious and Philosophical Background of Human Dignity" 180.

6 Starck "Religious and Philosophical Background of Human Dignity" 181; Bognetti "The Concept of Human Dignity in European and U.S. Constitutionalism" 89; 2006 *JRE* 666-667.

7 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 19; Arieli "The Emergence of the Doctrine of the Dignity of Man" 13.

8 In ancient Rome, the concept of a 'person' had no legal content, but was used as a synonym for a human being. This usage was still applied in the Middle Ages. See Eckert "Legal Roots of Human Dignity in German Law" 47.

9 Eckert "Legal Roots of Human Dignity in German Law" 44; Habermas 2010 *Metaphilosophy* 474.

and French declarations of human rights.[10] In addition to the contribution of Pufendorf, the formulation of the famous philosopher of the Enlightenment, Immanuel Kant, who argued that humanity itself is dignity, and that this dignity is to be respected by protagonists and antagonists alike, is regarded as the basis of modern-day inherent human dignity. This application led to the differentiation of the idea of public law human dignity and the social "dignitas" concept of private law.

Developments in Catholicism during the 1930's led to the inclusion of a secularised idea of individual human dignity in the *Irish Constitution* of 1937. From 1942 onwards, Catholicism linked human dignity with human rights, which manifested as a reaction against the travesties of dignity in general through secularism and different political ideologies. Thereafter, inherent dignity was incorporated as an apolitical and neutral notion in both the *UN Charter* and the *Universal Declaration*. This development foreshadowed the inclusion of dignity in the German *Grundgesetz* (*Basic Law*) of 1949 as an absolute and inviolable right and value which regulates the whole body of German law and which counterbalances any action that reduces a person to being a means to an end. It was only forty-seven years later that South Africa followed the path of institutionalising human dignity, thereby ending a long regime of oppression and unequal treatment based on differentiating between qualities such as skin colour. The history of dignity in the US is quite different. The US enacted its Bill of Rights as early as in 1776 (almost fifteen years before the publication of Kant's first works on philosophy.) The Bill of Rights contains no textual reference to human dignity. In US law, human dignity is applied as a value underlying the protection of the constitutional rights and does not function as a first order rule.

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10 Eckert "Legal Roots of Human Dignity in German Law" 44.

2.2 On the legal roots of human dignity

Modern human dignity relies heavily on its Kantian pillars of moral autonomy and individuality, which implies that man, while free, is bound by moral obligations in relation to society and subordinate to the moral laws of the natural law tradition.[11] Kant's endowment of inherent universal dignity to man acted as an inspiration for the drafters of the Universal Declaration, as well as certain modern constitutions adopted after World War II.[12] It is generally accepted that Kant's dignity philosophy was influenced by the Stoic claim regarding man's unique position in the cosmos - in fact Kant acknowledged this influence himself.[13] Contemporary dignity indicates a secularied (judicial) notion in the context of human rights and a limitation of state power – a significant break from its philosophical and religious roots. Dignity's attribute of inherent equality forms the basis and justification of human rights - independent from religious or state recognition. The idea of human dignity, applied in various manifestations, such as a right or an obligation with specific content;[14] or as a substantive right (for example article 1 of the *Basic Law*) as well as an intrinsic background value and an interpretative tool in constitutional

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11 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 182.

12 Englard 1999-2000 *Cardozo LR* 1921. The influence of Kant's moral philosophy, with emphasis on freedom, rationality and equality, is most significant in German law. His categorical imperative, claiming that men should always be treated as ends and not as mere objects, was echoed in the *Microsensus Case* 27BVerfGE (1969) (translated by Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 300: "The State violates human dignity when it treats persons as mere objects."

13 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 35. Kant stated in *Religion within the Boundaries of Mere Reason,* 6:57: "These philosophers [Stoics and others] derived their universal moral principle from the dignity of human nature, from its freedom (as an independence from the power of the inclinations), and they could not have laid down a better or nobler principle for foundation. They then drew the moral laws directly from reason, the sole legislator, commanding absolutely through its laws. And so was everything quite correctly apportioned." See Sensen 2011 *EJPT* fn 62 at 82.

14 The Court held in *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 36: "Dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected."

interpretation[15] then, is a modern development in both international and domestic law.

It is trite that law is practised in its societal context; that it is created and developed by societies' changing values, because human sociology evolves. The modern concept of human dignity is *the* area of legal development that has to be seen against the abolition of hierarchical class structures that prevailed in different civilizations throughout history, that caused the unequal treatment of specific classes of persons or individuals, and that was sustained by the application of differential *dignitas* in private and criminal law. Historically, human dignity has fulfilled a paradoxical role – it was simply not available to everyone. Waldron[16] (building on the ideas of Vlastos) has convincingly argued that aristocratic privileges should be equalised in favour of the ordinary man, so that there would be only one rank:

> Every man a duke, every woman a queen, everyone entitled to the sort of deference and consideration, everyone's person and body sacrosanct, in the way that nobles were entitled to deference or in the way that an assault upon the body or the person of a king was regarded as a sacrilege.

He refers to the proverbial saying "[e]very Englishman's home is his castle", which implies that, irrespective of the modesty of the dwelling, rights of privacy are to be respected for peasants just as they are for the nobility. Furthermore, the rights of prisoners of war, specifically those of the ordinary soldier and detainee, should be based upon the privileges that were historically extended to noble warriors, knights, gentlemen and the like. Consequently, there should be only one rank, which is a very high one indeed, to which everybody belongs. In this context, Whitman states

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15 It is stated in *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 36 that: "Human dignity…informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights." Also see fn 550 below.

16 Waldron "Dignity, Rank, and Rights" 32; 33.

that, specifically in continental Europe, human dignity has been "levelled up" as a result of the dissemination of hierarchies and

> an extension of formerly high-status treatment to all sectors of the population.[17]

He expresses the further opinion that the absence of a collective memory of a feudal society in the US is the reason for the absence of a specific doctrine of human dignity in the US.

In addition, scholars such as Schachter, Neuman and McCrudden agree that (as a result of its historical roots as well as of modern constitutional development, namely its incorporation into human rights texts), human dignity has a universal minimum content, namely the inherent dignity paradigm, the claim to be respected by others, and the dignity claim in the relationship between the individual and the state.[18]

Whilst "human dignity is of utmost importance to modern constitutional thought,"[19] the question under discussion is: to what extent did the historical roots of the traditional concept of *dignitas* and the later

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17 Whitman "'Human Dignity' in Europe and the United States: The Social Foundations" 47. Spiegelberg in "Human Dignity: A Challenge to Contemporary Philosophy" at 42-43 aptly describes the difference between the general notion of dignity and human dignity as follows: "Dignity in general…is a term of many meanings. It applies to all sorts of carriers, human and non-human, and indicates primarily certain distinctive qualities which give them a rank above others that do not have these qualities. In fact, dignity in the general sense is a matter of degree. It reflects an aristocratic picture of reality in the tradition of the "Great Chain of Being" with higher and lower dignities. Such dignity is subject to change, to increase and decrease: it can be gained or lost. It finds expression in such dignities as are conferred on "dignitaries" through honours or titles, and can be expressed in dignified or undignified comportment… Human dignity is a very different matter. It implies the very denial of an aristocratic order of dignities. For it refers to the minimum dignity which belongs to every human *qua* human. It does not admit of any degrees. It is equal for all humans. It cannot be gained or lost. In this respect human dignity as a species of dignity differs fundamentally from the genus." This description also encapsulates the fundamental difference between common law dignity and public law human dignity. For a discussion regarding the similar history in Germany under the *German Basic Law* see Ackermann *Human Dignity: Lodestar for Equality in South Africa* 154. Also see the discussion in section 2.6 below.

18 Also see the discussion in chapter 3.4.

19 Starck "Religious and Philosophical Background of Human Dignity" 181.

contemporary notion of human dignity contribute to the formation of a normative principle in modern law? It is generally accepted that the concept of "dignitas hominis" developed in the Graeco-Roman world, therefore the evolution of this concept is investigated from its Stoic roots and subsequent application in different disciplines. In addition, the interconnectedness of human dignity with the private law concept of *dignitas* is analised*,* because dignity's evolution was influenced by social forms of dignity through the ages.

2.3 On the etymology of dignitas

Dignitas,[20] a Latin singular noun which means "[a] being worthy, worth, worthiness, merit,"[21] is derived from both the Latin nouns *decus,* meaning

> anything that ornaments, embellishes, adorns, honours, a deed of honour, moral dignity, virtue, desert, honour

and *dignus,* meaning "appropriate, suitable; worthy."[22] The adjective for *decus* is *decorus,* meaning "becoming; fitting; seemly; proper; suitable; decorous."[23] *Decus* is derived from the impersonal verb *decere,* meaning "to show; to think" and the verb *dignor,* meaning "to deem worthy or deserving." [24] From the use of *decere, dignitas* also acquired an assimilated meaning by infusion of the Greek philosophers' formulation of an axiom, to include the meaning of worthiness speaking for itself, as an

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20 German: *Würde*; English: dignity; Italian: *dignità*; Afrikaans: *waardigheid*; French: *dignité*; Spanish: *dignidad*; Greek: *αξιοπρέπεια*.

21 Lewis and Short *A Latin Dictionary.*

22 Derived from the Proto-Indo-European root dek: see anonymous date unknown *dnghu.org/indoeuropean.html*.

23 Lewis and Short *A Latin Dictionary.*

24 Lewis and Short *A Latin Dictionary.* The impersonal verb *decet* is related to the Greek meaning "to seem or to show." There is, however, no direct translation of *dignitas* in the Greek language. "Decent" in the English language roots from the Latin participle *decent,-tis.* See Lebech 2009 http://eprint.nuim.ie.

accessory to the outward appearance of respect.[25] In this sense, then, a reflection of *dignitas*.

The English term "dignity" is defined in the *Oxford English Dictionary* as

> the quality of being worthy and honourable; worthiness; worth; nobleness; excellence.

It includes "honourable or high estate, position, or estimation; honour, degree of estimation" and collectively "persons of high estate or rank." English dignity derives from the twelfth century Old French *digneté* and the later Modern French *dignité,* (which stems from the Latin *dignus*), meaning an honourable office; excellence that demands respect.[26] Generally speaking, dignity means an entitlement to respect - in the traditional sense, fundamentally differential and egalitarian.[27]

2.4 On the social framework of dignitas in Roman times

Dignitas in ancient Roman society denoted the following meanings: firstly, it indicated a hierarchical distinction in civil life to differentiate the *principes* (patricians, or wealthy aristocrats, born from consular families) from the rest of the population; secondly, it was seen as a virtue of integrity in the Aristotelian sense of reward or learned habit from a specific way of life to unlock the possibilities of life, for example an indifference to profit; thirdly, it was seen as an intangible value of public standing in high public offices (*dignitates*), which had to be achieved by acts (administrative, political or military) of virtue and sacrifice and recognised as such in the traditional Roman social and political framework; and lastly, it was applied in law as a

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25 Lebech 2009 http://eprint.nuim.ie.

26 Anon date unknown http.atilf.fr/academie9.htm*:* "Valeur éminente, excellence qui droit commander le respect. La dignité de la personne humaine. La dignité de la pensée, du travail."

27 Hennette-Vauchez remarks that there are today still professions that display "remnants of the ancient legal concept in contemporary jurisprudence," for example the dignity and privileges that attach to the judiciary and speakers of parliament: See 2011 *IJCL* 46 footnotes 81; 82 and 83.

measurement of quantification with regards to compensation.[28] It follows that there is no direct translation for *dignitas* in the English language, as it is connected to a man's personal self-esteem, although his public standing was hugely enhanced by unimpeachable dignity, being the sum total of elements such as pride, achievements, family and ancestors.[29]

The Romans were traditionalists at heart, conservative and not very receptive to new ideas (which were one of the reasons why Julius Caesar was seen as an outcast, despite the fact that he was responsible for legal and social modernizations during his reign.)[30] The state's collective *dignitas* was perceived to be earned by the lifelong work of the eldest statesmen, even if accomplished through bribery or the abuse of connections and influence. An aristocrat's *dignitas* was in turn passed on through the generations, which was why Julius Caesar felt it necessary to defend his family's *dignitas.*[31]

The patricians held their families' *dignitas* in high regard and protected it fiercely. It could be enriched by alliances with families with higher *dignitas;* also by forming political connections; by heroic acts; and by having

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28 Donelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 15; Lewis "A Brief History of Human Dignity: Idea and Application" 93.

29 Meier *Caesar: A Biography* 50. Cicero made frequent use of the concept of *dignitas* in his writings, combining the concept with *auctoritas,* and defined it as: *"Dignitas est alicuius honesta et cultu et honore et verecundia digna auctoritas"* – dignitas is someone's virtuous authority which makes him worthy to be honoured with regard and respect: See Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 23.

30 Meier *Caesar*: *A Biography* 59.

31 Meier *Caesar: A Biography* 59. Cato the Younger, a politician and philosopher during Caesar's period as senator and dictator, publicly discredited Pompeius Magnus in 57 BC in canvassing for the consulship, to the point where Pompeius had to prepare public defences to reinforce his *dignitas.* Marcus Antonius, an erstwhile supporter of Julius Caesar and lover of Cleopatra, queen of Egypt, famously committed suicide in 30 BC to protect his *dignitas,* rather than having to face the humiliation of being taken into custody by his political enemy, Pompeius Magnus.

influential clients (*clientela*) and patrons (*patroni*).[32] Romans' *dignitas,* then, was a marker of social status and had political connotations.[33]

2.5 On the origin and etymology of the concept human dignity

Dignitas humana/hominis refers to the phrase "human dignity," which has its roots in Stoic moral anthropology, dating back to 128 BC. Linguistically, human[34] stems from the Latin *homo*, meaning in general "a human being, a man as a reasonable or moral being."[35] The combination of *homo* with *dignitas* (it is now being used as an adjective) changes the meaning of the terms so that they now denote a collective quality in all humans *qua* humans. The quality of dignity is now possessed by the human species in general. Although *dignitas* retains its original meaning of respect; moral dignity; virtue; honour, it now also denotes a more objective concept of general application. It implies that all people are born with *dignitas,* without having to earn it through their actions.

2.6 On the Stoic heritage of human dignity

The term "dignity of man" (as opposed to the traditional *dignitas,* referring to an individual's social status, as well as to that of the state) emanates from Stoic moral anthropology,[36] and specifically the writings of Panaetius of Rhodes,[37] a Greek philosopher, who used the term first in 128 BC in his

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32 Meier *Caesar: A Biography* 53.

33 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 23.

34 German: *mensch*; Italian: *umano*; Afrikaans: *mens*; French: *humain*; Spanish: *humano*; Greek: *ανθρώπινη*.

35 Lewis and Short *A Latin Dictionary.*

36 Stoism is a development of Hellenistic philosophy that originated in Athens around 300 BC, and espouses as central principles both man's reason and self-control according to nature, and to lead a virtuous life is to live calmly and ethically. The Stoic principles gained popularity in Rome and were discussed mainly in the writings of Roman philosophers Seneca and Cicero. Emperor Justinian ordered the closing down of all philosophy schools in Rome in 529 AC because of their pagan character, amidst the emergence of Christianity.

37 Born *circa* 185 BC and died *circa* 109/110 BC.

best-known treatise, "On Appropriate Actions".[38] He was thought to have introduced the Stoic principles to Rome via Cicero, who quoted passages from "On Appropriate Actions" in his work with the corresponding name, *De Officiis.* This later became the *locus classicus* of the notion of human dignity*.* Although the Greek text is lost, evidence of Panaetius' writings in the quotes of Cicero led scholars to agree that Panaetius was the originator of the idea of the "dignity of man." Cicero, however, is regarded as the primary source of this formula,[39] which "became part of the bloodstream of Western culture."[40]

Panaetius espoused a four *personae* ethical theory, in which the notion of *decorum* (fitting/appropriate)[41] is central to conditions of personhood.[42] The first *persona* is universal and based on the shared ability of practical reason (the capacity to make a moral choice) of all human beings and seen as a part of the divine in each person; the second *persona* is the mental, physical and temperamental nature of the person; the third *persona* is wealth, accidents and opportunities bestowed by change; and the fourth *persona* is experienced as a result of deliberated actions, namely studies and hard work.[43] The first *persona,* being *ratio,* is the exceptional characteristic that distinguishes people from animals, and from which the notion of the dignity of man is derived.[44] All human beings possess equal reason and morality *per se,* which represent a portion of

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38 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 22.

39 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 22; Englard 1999-2000 *Cardozo LR* 1905.

40 Nussbaum 2008 www.bioethics.gov.

41 Gill "The Four Personae Theory in Cicero" 169; Edwards *Death in Ancient Rome* 14*.*

42 The modern conditions of personhood can be seen as rationality, self-consciousness, moral responsibility and legal responsibility. Gill "The Four Personae Theory in Cicero" 170.

43 Edwards *Death in Ancient Rome* 14.

44 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 25; Barilan *Human Dignity, Human Rights and Responsibility: The New Language of Bioethics and Biolaw* 46.

the divine in each of us, are worthy of equal respect, and are independent of individual characteristics.[45] Even if human beings have different capacities,

> moral/rational capacity is fundamentally equal, and a source of our equal worth across all that divides us.[46]

The Stoic concept of human dignity is thus inalienable and egalitarian.[47] Inequalities are justified in nature, as human beings rule over animals because of our capacity to reason. This is why slavery was permitted (as the soul is seen to be free) and women could not participate in politics:[48] "human dignity" was not protected by law.

It is widely accepted that Cicero[49] was the first Roman jurist to have used

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45 See Nussbaum 2008 www.bioethics.gov: "Male or female, slave or free, king or peasant, all are alike of boundless moral value, and the dignity of reason is worthy of respect wherever it is found."

46 Nussbaum 2008 www.bioethics.gov.

47 Cicero criticized government for not respecting the differentiations of dignity according to rank. His view is that equality *per se* is inequitable when it disregards status or rank. See Eckert "Legal Roots of Human Dignity in German Law" 43.

48 Nussbaum criticizes Stoic thought in this respect because it claims to respect human dignity without protecting violations of dignity and without placing an obligation on the state to fulfil dignity (the capabilities approach). She favours the Aristotelian idea that capacities are "unfulfilled and incomplete" and need to develop in circumstances created by government in order for people to be able to lead a "minimally decent human life." See 2008 www.bioethics.gov. The Stoic claim differs from the view of Plato and Aristotle, who see society as non-egalitarian – see Ritschl "Ethical Maxims from Theological Concepts of Human Dignity?" 95. Cicero himself sanctioned slavery in his *De re publica* on his reasoning that, while all human beings share the ability to reason, not everyone has the same mental capabilities, and human dignity does not exclude natural hierarchies amongst men and nations: "Do we not see that the best people are given the right to rule by nature herself, with the greatest benefit to the weak? Why then does god rule over man, the mind over the body, reason over desire, anger and the other flawed portions of the mind?... The rule of kings and magistrates and fathers and nations direct their citizens and allies in the same way that the best part of the mind, wisdom subdues the flawed and the weak parts of the same mind, such as desires, anger and other disturbances," as quoted in Saastamoinen 2010 *JHI* 14.

49 1.30: 105-107.

the phrase[50] in *De Officiis* (Regarding Duties), albeit only once in his writings.[51] The passage can be translated as follows:

> But it is always important for all officials to remember how much preference the nature of man has over beasts and other animals, their only sense is to satisfy needs… Hereof it can be understood that the pleasures of the body cannot have enough priority over the **dignity of man**… On the contrary, the nourishment of the body must be seen in relation to virtue, and not to pleasures. But also, if the excellence and nature of man is considered, we will understand how shameful it is to be indulged in luxury and to live luxuriously and easily, rather than honestly, happily and soberly. [52]

Cicero borrowed this phrase from Stoic moral anthropology in order to formulate his vision of man's uniqueness in the possession of logic and reason.[53] In his view, these qualities establish a *societas* (natural fellowship) among human beings. This notion of human dignity is based on neither religious concepts[54] nor social status, but it is a purely philosophical/ethical concept.[55] Human dignity, then, did not equal society's morality, as opposed to *dignitas*. *Dignitas hominis* entailed a collective notion of the distinguished characteristics of the human species, but the notion was still explained in terms of the ontological status of man and did not form a "semantical bridge to the egalitarian meaning of the

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50 Lebech 2009 http://eprint.nuim.ie; Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 23; McCrudden 2008 *EJIL* 569.

51 This passage reads as follows: "Sed pertinet ad omnem officii quaestionem semper in promptu habere, quantum natura hominis pecudibus reliquisque bestiis antecedat; illae sentiunt nisi voluptatem…Ex quo intelligitur corporis voluptatem non satis esse **dignam hominis** praestantia…Itaque victus corporis ad valetudinem referatur et ad vires, non ad voluptatem. Atque etiam si considerare volumus, quae sit in natura hominis excellentia et dignitas, intellegemus quam sit turpe diffluere luxuria et delicate ac molliter et vivere, quamque honestum, parce continenter severe sobrie." See Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 21.

52 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 20, 21.

53 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 20.

54 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 27.

55 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 27: "This expression could be understood as pure ethics and thus could be combined with Judaeo-Christian beliefs."

modern concept."[56] The Stoic claim had enormous influence on cultures whose communities were defined by hierarchy.[57] Kant utilized the ideas of moral respect by stating that principles must be tested to establish if they conform to a universal law of nature.[58] Equal respect, freedom, individual autonomy and human dignity form the basis of Kantian thought. His most famous dignity-assertion is that respect for human dignity means that each person is an end-in-himself (their *Selbstzweckhaftigkeit*); that people should never be treated as mere objects or as means to an end.[59] These formulations also influenced the thoughts of Grotius in his writings on international obligations, in formulating the laws between sovereign states (*ius gentium)*. His view was that the natural rights of human beings are inalienable, and are to be respected by states, because of the human capacity to reason.[60]

2.7 On dignitas in Roman law

Although Roman private law was a dynamic body of law that was constantly adapted to provide for economic growth and social development, it was saturated with inequalities reflecting the hierarchical and patriarchal nature of life in Rome. Discrimination against women,[61] the

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56 Habermas 2010 *Metaphilosophy* 473.

57 Nussbaum 2008 www.bioethics.gov; Ritschl "Can Ethical Maxims de Derived from Theological Concepts of Human Dignity?" 95.

58 Nussbaum 2008 www.bioethics.gov.

59 Nussbaum 2008 www.bioethics.gov.; Eckert "Legal Roots of Human Dignity in German Law" 46. For a further discussion regarding Kant and his impact on human dignity discourse, see para 2.10 below.

60 Eckert "Legal Roots of Human Dignity in German Law" 48; Arieli "The Emergence of the Doctrine" 13 fn 31.

61 Just as woman could not participate in public life or state activities, they were denied the binding force of the legal actions of a *paterfamilias,* which institution was accorded only to a man. In the post-classical age, women were allowed legal guardianship of their children: Kaser *Roman Private Law* 68.

young,[62] slaves (*servi*),[63] non-citizens (*peregrini*)[64] and people with disabilities[65] was part and parcel of Roman law, without their having recourse to a (non-existent) normative set of principles of equality. However, in understanding the public law concept of dignity, the legacies of the *dignitas* dogma in Roman law and its protection under the *actio iniuriarum* could shed light on its application as a value and a right under a bill of rights at present and for many years to come.[66]

Roman law is a principled system of rational law (as opposed to divine authority disclosed by sacred texts,) which relates to the needs of society, and it was empowered by virtue of the collective will, namely the *res publica.*[67] Like English law, Roman law developed casuistically*,* and was created, *inter alia,* by interpretation and the opinions of jurists in concrete cases. The law of delict fulfilled mostly the functions of modern criminal law, which in Rome was restricted to crimes against the state or society,

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62 Apart from principled limitations regarding legal capacity by the law of persons, Stoicism taught that "external goods" such as, *inter alia,* the lives of one's children, have no real value and they should not be the object of attachment. Cicero, the epitomic Stoic, declared, on being notified of his son's death: "I was already aware that I had begotten a mortal." See Nussbaum 2008 www.bioethics.gov.

63 Slaves were regarded as legal objects that were incapable of having public and private rights: Kaser *Roman Private Law* 69. However, Ulpian recognised the *persona servi* by granting the slave a right in his own name, albeit to be instituted by the slave owner, to claim for assault and defamation, thereby recognising the dignity of the slave. Honoré "Ulpian: Pioneer of Human Rights" 86-87. Justinian states that "a slave does not suffer a loss of status by being manumitted, for while a slave… and where the change is one of dignity, rather than of civil rights, there is no loss of status. Loss of status can arise from loss of citizenship or in minor cases, a loss of liberty." See Moyle *Institutes of Justinian Title XVI Book 1 Of Loss of Status* 23.

64 Only a Roman citizen as a free man could act as a litigant: *Peregrini*, whose civil rights were regulated under the *ius gentium,* were not protected under criminal law and could not legally marry a Roman citizen. They were granted Roman citizenship as from 212 AD. See Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 368.

65 A blind man was not accorded the privilege and "luxury" of a private suit, as he was regarded not to be able to show respect for and see the distinguishing emblem of a magistrate. See MacMullen 1986 *TJHUP* 514.

66 Burchell "The Protection of Personality Rights" 650.

67 Arieli "The Emergence of the Doctrine" 12.

namely murder, sacrilege or high treason.[68] The protection of a person's or state's *dignitas* was enforced by a system of obligations and prohibitions rather than being protected as a right.[69] Infringement of *dignitas* constituted an *iniuria,* as a source of delictual liability. *Iniuria* (insulting behaviour or contumelious conduct) is a specific delict, which constituted one of the four main delicts of the *ius civile.*[70] Although the elements for *iniuria* were restricted during the time of the Twelve Tables (8.2 – 4) to various forms of physical assault on free men and slaves (such as bodily injury; probably also unlawful detention and rape),[71] it was extended both by the activities of the praetors (exercising the *ius honorarium)* under specific edicts as well as by Roman jurists to also include almost any intentional offence that caused intangible harm to a person's personality, inclusive of honour.[72] Ulpian, the classical Roman jurist who is regarded

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68 Thomas, Van der Merwe and Stoop *Historical Foundations* 358.

69 After the classical period, all the forms of *iniuria* were eventually also treated as crimes, with slaves being lashed with whips, free persons of low rank being subjected to whipping with cudgels, and others being punished with exile or the forfeiture of property: Frier *A Casebook on the Roman Law of Delict* 180.

70 Thomas, Van der Merwe and Stoop *Historical Foundations* 359; 377 - 380. *Iniuria* as a type of delict to protect personality rights has to be distinguished from *iniuria* (wrongfulness) as a requirement for delictual liability.

71 Kaser *Roman Private Law* 215; Thomas, Van der Merwe and Stoop *Historical Foundations* 379. Fixed penalties were payable in three instances: the disablement of a limb was expiated by retaliation (pursued in the victim's discretion); for the breaking of bone with the fists or a club, 300 *asses* were granted in the case of a free man, and 150 in the case of a slave; and for all other insults, 25 *asses.* This redress had become derisory as a result of the devaluation of money, and praetors instituted the system of the personal assessment of compensation. Consider the famous anecdote of Labeo, jurist and contemporary of Ulpian, quoted by Aulus Gellius: "There was the certain L. Veratius, a terrible nuisance and fearfully irresponsible. He used to take delight in slapping the faces of free men with the palm of his hand, after which went around accompanied by a servant with a purse of *asses,* ordering the servant to pay and when he had slapped a man, he would order 25 *asses* to be paid out on the spot. Therefore, says Labeo, the praetors afterwards decided that this law should be abolished and abandoned and laid down in their edict that they would give 'recoverers' for estimating injury." See Crook *Law and Life in Rome* 251.

72 With the expansion of the Roman Republic, the citizens of Rome developed a strong sense of honour and infringement hereof was consequently punishable by law.

as the pioneer of human rights,[73] stated that *iniuria* could be inflicted on a person's body (*corpus),* dignity *(dignitas)* or reputation (*fama).*[74]

A person's *dignitas* could be diminished by abducting a Roman *materfamilias'* companion,[75] by tearing a Roman citizen's toga in the streets of Rome (this type of *iniuria* resulted both in insulting behaviour and damage to property),[76] by subjecting a person to vulgar abuse,[77] by preventing a person from using public amenities[78] or fishing (unless the fisherman were trespassing),[79] - thus interfering with a person's natural freedom, or by infringing a woman or child's chastity, either directly or indirectly through persons in the *paterfamilias' postestas.*[80] A debtor could temporarily pledge his *dignitas* in favour of his creditor for the period of the debt, and forfeit it on default, giving the creditor the freedom to insult him.[81] The people of Rome, the government, and the state had collective *dignitas,* and infringement thereof was regarded as high treason and punishable by exile or death.[82]

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73 Honoré "Ulpian: Pioneer of Human Rights" 78.

74 Thomas, Van der Merwe and Stoop *Historical Foundations* 380.

75 It was regarded as inappropriate for Roman women to walk alone in the streets, and if their companions were abducted, it caused the impression that the women were prostitutes. This type of *iniuria*, which prohibits attacks on the chastity of a person, was constituted by the second edict of the praetor: Thomas, Van der Merwe and Stoop *Historical Foundations* 379. The jurist Ulpian, however, declared that the compensation would be less if the woman was a minor or dressed as a prostitute: Frier *A Casebook on the Roman Law of Delict* 183.

76 Thomas, Van der Merwe and Stoop *Historical Foundations* 381.

77 This type of *iniuria* was established by the first specific edict of the praetor to prohibit actions or words intended to diminish a person's reputation: Thomas, Van der Merwe and Stoop *Historical Foundations* 380-381.

78 Kleyn and Viljoen *Beginnersgids vir Regstudente* 35.

79 Crook *Law and Life in Rome* 251.

80 Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 345; Crook *Law and Life in Rome* 251.

81 Hahlo and Kahn *The South African Legal System and its Background* 460.

82 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 24. In the realm of international law, the status of sovereign states is acknowledged by honouring their dignity in the *Vienna Convention on Diplomatic Relations* (1962) as referred to by McCrudden 2008 *EJIL* 569.

Compensation could be claimed from the wrongdoer by way of the *actio iniuriarum,*[83] which was a penal action (*actio poenalis)* with a strong element of vengeance in it. It was a highly personal and subjective action in which the victim had to prove his hurt feelings by not later than a year after the infringement (failing which the hurt feelings were deemed to have subsided), and only against the perpetrator.[84] In the determination of compensation, the victim had to estimate a monetary amount which would ease his hurt feelings (*solatium),* and the judge could grant this amount or a lesser amount according to what seemed *bonum et aequum* in the circumstances, but might exceed it only in exceptional cases.[85] The plaintiff's action could also be dismissed if he had claimed more than he was entitled to.[86] Hence, the protection of *dignitas* in Roman law developed casuistically through the experience of the ordinary citizen and served as a parameter for society's perception of the infringement of a person's dignity, albeit based on social distinction and inequality.

2.8 On dignitas in Christianity

In Christianity, man is regarded as having dignity because he is created in the image[87] of God (*imago Dei*).[88] As a result, man enjoys special status,

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83 The principles of liability (in private and criminal law), remedies and compensation were received in South African law and other legal systems based on Roman Dutch law.

84 Thomas, Van der Merwe and Stoop *Historical Foundations* 382.

85 *Atrox iniuria* was inflicted in a public place like the theatre or the forum, or if it was committed against a public officer or a senator of a higher rank. Frier *A Casebook on the Roman Law of Delict* 177; 191.

86 Kaser *Roman Private Law* 146.

87 Different interpretations have been offered on the relational "image" between God and man, and may refer to certain aspects of humanity – the human shape, or the ability to reason. The original meaning refers to a visual image, and, as explained by the Sages, is thus iconic of the relationship between God and man. Man is therefore a reflection of God: Lorberbaum "Blood and the Image of God" 56.

88 The idea of *Imago Dei* is thought to have originated in Mesopotamia and ancient Egypt, as the Mesopotamian king in Assyria and Babylonia was regarded as the image of a god. According to Biblical scholars, *Genesis* resulted in an popularisation of this view, as this divine image is now reflected not only in kings but in every human being created in His image: Lorberbaum "Blood and the Image of God" 55.

below that of God but above the rest of creation.[89] It is man's dignity, then, that bestows upon him a special status above the rest of creation.

The earliest known reference to the Latin *dignitas* by a Christian writer is found in the sermons of Pope Leo 1, who reigned from 440-461 AC. The passage

> Realize, o Christian, your dignity. Once made a "partaker in the divine nature," do not return to your former baseness by a life unworthy [of that dignity]

is still today being used as the opening sentence of the moral questions of Catholic Catechism.[90] He confirms that man is created in the image of God,[91] thereby echoing the Ciceronian account of man's elevated status over the rest of the cosmos by virtue of people's capacity to reason and to control their bodily desires.[92] Leo also formulated the instruction to men to imitate God in their actions (as reiterated by Aquinas), and proposed that baptism confers dignity on Christians.[93]

Thomas Aquinas (1225-1274), contrary to Leo, stated that human dignity did not root in theology, but in nature. He claims that man's dignity cannot be detached from his connection to God as part of the Holy Trinity, which

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89 Genesis 1:26: And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish in the sea, over the fowl in the air, and over the cattle, and over the earth, and over everything creeping that creepeth upon the earth. 27: So God created man in his own image, in the image of God created he him, male and female created he them. Also see fn 6 above.

90 Sensen 2011 *EJPT* 71.

91 "Wake up then, o friend, and acknowledge the dignity of your nature. Recall that you have been made 'according to the image of God.'" Sensen 2011 *EJPT* 71.

92 "If… the desires of the body are stronger, the soul will shamefully lose the dignity proper to it, and it will be calamitous for it to be a slave to what it ought to govern. But if the mind, submissive to its Ruler and to heavenly gifts, tramples on the lures of earthy indulgence and does not allow 'sin to reign its own body,' reason will hold a well-ordered leadership." Sensen 2011 *EJPT* 71.

93 "If we reflect upon the beginning of our creation with faith and wisdom, dearly beloved, we shall come to the realisation that human beings have been formed according to the image of God precisely with a view that they might imitate their Designer. Our race has this dignity of nature, so long as the figure of divine goodness continues to be reflected in us in a kind of mirror." Sensen 2011 *EJPT* 71; Lewis "A Brief History of Human Dignity: Idea and Application" 94.

entails that not only does man's reason distinguish him from animals, but his likeness to God obliges him to act in a godly manner.[94] In consequence of the fall of man, and in contradistinction to man's likeness to God, man's dignity has been reduced accordingly.[95] Furthermore, he regarded dignity as being based on hierarchy as a godly principle, because men in paradise and angels in heaven were divided into ranks.[96]

Although the *imago Dei* concept establishes the basis for equality and freedom,[97] it is still hierarchical. Man's dignity is sourced from his special place in the universe, as well as the difference in standing between man and God, which could be overcome only by God's grace and forgiveness. When sin was committed, dignity was accordingly lost, or waived. Furthermore, as the church's attitude towards slavery; its persecution of heretics, its lack of tolerance towards other religions, its independent authority;[98] and its gender discrimination were deeply hierarchical, as was

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94 Englard 1999-2000 *Cardozo LR* 1908. Aquinas used the term *dignitas* and its derivatives 185 times in his *Summa Theologiae* in the context of a person's or entity's value, to indicate a person's or entity's place in the cosmos. For example, plants have more dignity than rocks, and angels more dignity than human beings. See Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 19.

95 Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 19. As men share in God's dignity, human life is sanctified, and homicide is punishable by death, because there is no religious recourse for compensation: "Whoever sheds the blood of man, by man shall his blood be shed, for in God's image did He make man." as quoted in Lorberbaum "Blood and the Image of God" 57. St Augustine (354-430) in his works *De Genesi ad litteram* and *De Trinitate* stated that the fall of man greatly offended God's image in man, which could be restored only with the Atonement. Lewis "A Brief History of Human Dignity: Idea and Application" 49.

96 Eckert "Legal Roots of Human Dignity in German Law" 43; Starck "Religious and Philosophical Background of Human Dignity" 44.

97 Starck argues that Christianity was the beginning of philosophical and practical individualism, of which the theological basis is the individual's direct relationship with God, which is part of every society and resulted in the declaration of human rights. See "Religious and Philosophical Background of Human Dignity" 183.

98 Fundamentally, the authority of the church co-exists independently with that of the secular world, as opposed to the Islamic and Judaist positions, which negate the distinction between the church and secular sphere and recognise only one law, that of the will of God, as disclosed in the *Koran* and the *Torah*. Christianity, however, defined itself as a "church," which is an institution of "salvation and grace which rules itself by its appointed ministry, inside the world and yet outside of it." Hence, the church as representative of God possessed the monopoly of grace and salvation. Both church and state recognise each other's institutional independency,

Christian societal organisation as a whole. Christian dignity, as in the Graeco-Roman understanding, was subordinate to the *dignitas* of rank.[99]

2.9 On dignitas and human dignitas in Judaism

Jewish religion is fundamentally theocratic in that it acknowledges only the authority of the Torah-Halacha (the Bible as well as the body of religious Jewish laws) and rejects the Augustinian distinction of the city of God and the city of man. Man's value is exclusively derived from God, and not from its intrinsic worth or from human dignity.[100] As the sanctity of life is a central theme in the Hebrew Bible,[101] everything was viewed as being created by God in His honour, in His image.

Kavod, the only Hebrew word for honour,[102] respect, glory or a "[h]ierarchical concept of status and demand for subordination",[103] conventionally translated from the Hebrew as dignity, is seen as an attribute of God and God's divine presence in the world.[104] The phrase

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which development was influenced by Hellenistic philosophies, and Christian ethics and theology were specifically influenced by Stoicism. This division of authority resulted in the independent development in law, politics, society and philosophical ideas. See Arieli "The Emergence of the Doctrine" 15-17. The characteristic co-existence in Western society between the state and church was facilitated by a split in the church during the Reformation as well the questioning of Christian beliefs by the humanists of the Renaissance as a result of the development of science in the Enlightenment. See Lewis "A Brief History of Human Dignity: Idea and Application" 95.

99 Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 19.

100 Englard 1999-*2000 Cardozo LR* 1906.

101 Lorberbaum "Blood and the Image of God" 55.

102 Shultziner notes that there is a linguistic semblance between the Hebrew *kavod* as honour and the connotation in English of respect and honour within the expression *to dignify* or *dignified,* which can be traced to the *dignitas* of ancient Rome, in the context of the dignity of high office or counsel (*dignitates*). "Human Dignity: Functions and Meanings" 83; 84.

103 Safrai "Human Dignity in Rabbinical Perspective" 100; Kamir "Kavod and Kvod Ha-Adam in Israeli Society and Law" 244.

104 Lorberbaum "Blood and the Image of God" 56; Kamir "Kavod and Kvod Ha-Adam in Israeli Society" 244. Kamir states that, although the phrase kvod ha-adam was conveniently translated to mean "human dignity" to connect the *Basic Law,* 1992 with the *Universal Declaration of Human Rights* (1948), it has a loaded meaning in contemporary Israeli law, culture and society, and is as such not distinct from the remaining values contained within "dignity", namely honour, glory and respect, and

"human dignity" (*Kvod Ha'adam*) is not mentioned in the Bible,[105] but the concept in the rabbinical perspective is derived solely from divine dignity, and as such is subordinated to God's dignity (*kvod ha-makom).*[106]

Human dignity *per se* is established in rabbinical sources, firstly as a distinction between respect/honour as a result of status, and secondly as religious formulas that are incompatible with human dignity but have the potential to be transformed into human dignity in specific situations.[107] These formulas include respect for parents, teachers, elders, high priests, a bride, the poor, women, the community and the majority.[108] As the Rabbis viewed their teachings as well as functions within the community as being designed to be shared by all, they developed a sense of respect and dignity above that of the individual, which resulted in a constellation of rights with human dignity being twice subordinated, namely to that of God as well as to the dignity of the community or the many.[109] Human dignity in Judaism, then, is culture-specific and based on a hierarchical system.

2.10 On human dignitas in the Renaissance

The transition from status-based *dignitas* to human dignity as an intrinsic feature of humanity can be historically traced back to reactions during both the Renaissance and the Italian Humanistic period in the fifteenth century,

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thus does not correlate precisely with the "dignity" of the *Universal Declaration.* However, human dignity, honour, glory and respect were not included in the *Declaration of Independence* (1948) which established the State of Israel in 1948 (as a result of the efforts of the Zionist movement which emphasised honour.) Included were the Zionist values of the Jewish settlement in Israel, as well as *inter alia* liberty, justice and peace. This gradual shift in perspective from an emphasis on honour (which is hierarchical) to the idea of universal human dignity "is sufficiently fundamental to be viewed as an ideological revolution" (See 232-246.) Margalit (*A Decent Society* 43*)* believes that "the concept of human dignity evolved historically out of the idea of social honour", as quoted in Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 47.

105 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 21. Also see footnotes 6 and 89 above.

106 Safrai "Human Dignity in Rabbinical Perspective" 99.

107 Safrai "Human Dignity in Rabbinical Perspective" 100.

108 Safrai "Human Dignity in Rabbinical Perspective" 100.

109 Safrai "Human Dignity in Rabbinical Perspective" 99.

as against the pessimistic portrayal of man and his misery during the medieval era.[110] It is widely believed that the famous poet and prominent humanist Francesco Petrarca (1304-1374) was responsible for initiating this approach, whose ideas generated a new literary genre dedicated to the dignity of man.[111] Several famous books from this period were published with references to human dignity appearing in their titles.[112] The central theme is the confirmation that man is created in the image of God.

The most influential version of composition in this genre was the never-delivered oration of Pico della Mirandola (1463-1494), who also based his view of dignity on the idea of man's likeness to God in *De hominis dignitate* (1486).[113] Pico expressed the opinion in the first part of his *Discourse* that man is created by God within the "universal order" or the "chain of being", which ranges from God to the lowest animals, and that man's initial dignity lies in his undetermined place in that chain. Man's dignity roots in his ability to choose his own place in this chain, to be able to transform himself into a sublime human being, and as a result of his

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110 Cardinal Lothar di Segni (1160-1216), who later became Pope Innocent III, wrote on the misery of man in *De miseria humanae conditionis,* which is divided into three sections titled "The Misery Entrance Upon the Human Condition", "The Guilty Progress of the Human Condition", and "The Damnable Exit from the Human Condition". See Sensen 2011 *EJPT* 79; Englard 1999-2000 *Cardozo LR* 1910, Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 20.

111 *De remediis utriusque fortunae.* Petrarch's views on man's dignity centred upon a remedy to cure the misery of the human condition. Englard 1999-2000 *Cardozo LR* 1911; 1912.

112 Bartholommeo Fazio (1450) *De Excellentia et Praestantia Hominis,* who believed that man's dignity consisted mostly of the mission for celestial salvation, and Giannozzo Manetti (1452) D*e Dignitate et Excellentia Hominis,* who identified man's dignity in his creative powers, as manifested by his technical, artistic and intellectual achievements. His arguments were both theological and naturalist: human beings, as creatures of God, are superior to the rest of the creation, and they portray the image of God through the perfection of their bodies and souls. Sensen 2011 *EJPT* 79, Englard 1999-2000 *Cardozo LR* 1912, 1913. Manetti saw that the dignity of humanity, being born having equal dignity, roots from man's excellence. See Lewis "A Brief History of Human Dignity: Idea and Application" 94.

113 Pico was set to deliver his oration, consisting of nine hundred philosophical theses (*conclusions)* in 1487, in the hope of inciting public discussion on the topic. However, Pope Innocent VIII forbade public discussion because he judged thirteen of these theses to be heretical. The oration was eventually published in 1496, posthumously, by Pico's nephew, Gian Francesco.

ability to reason, to be able to choose his own fate.[114] Human beings then, are special, because they have freedom to choose their own fate – to make autonomous decisions, unlike mere animals. Pico's vision already represents a change from the metaphysical to the non-theological. His is a secular and individualistic claim of human dignity divorced from office and hierarchy, which leads in time to the modern concept of individuality and subjectivity.[115]

2.11 On human dignitas in the Enlightenment

The Enlightenment is synonymous with opposition to convention, tradition, religion and authority, and with a concomitant quest for knowledge. David Hume (1711-1776), a Scottish proponent of empiricism, deduced in his essay on the dignity and purpose of human beings that empirical facts indicate a specific behaviour in a worthy manner. People are naturally inclined to behave in a worthy manner, and whilst they have a self-image of being worthy, a person will aspire to live up to this image. Although human beings are not born with dignity, they tend to become worthy as a result of these aspirations and actions. This view of dignity is naturalistic,

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114 In the beginning of his *Discourse* Pico addresses Adam through God: "Constrained by no limits, you may determine it for yourself, according to your own free will, in whose hand we have placed you…It will be in your power to degenerate into the lower forms of life, which are brutish; you will have the power, according to your soul's judgement, to be reborn into the higher orders, which are divine." Sensen 2011 *EJPT* 79, Englard 1999-2000 *Cardozo LR* 1912; 1915; Lewis "A Brief History of Human Dignity: Idea and Application" 94.

115 Englard 1999-2000 *Cardozo LR* 1916. This partly new formulation of human dignity in the Renaissance was described by Cassirer as follows: "Within the humanist movement itself there was a perpetual tension between the call of Cicero and that of Christ, between the classical exaltation of human freedom and creativity and the Christian awareness of sin and evil, between the song of life and the dance of death. Not only the 'dignity of man' but also the 'misery of the human condition,' whether expressed or not, was an integral part of renaissance anthropology", as quoted in Englard 1999-2000 *Cardozo LR* 1916. Wilhelm von Humboldt (1767-1835) also proposed the idea of individuality by demanding that the state waive differentiation of its citizens based on race or religion and rather judge them according to their individual features, as this discrimination on the basis of race or religion was seen as inhumane and contrary to true human dignity. See Eckert "Legal Roots of Human Dignity in German Law" 46-47.

as empiricism (and not metaphysics) shows that a person may act worthily.[116]

Englard informs us that the specific literary genre dedicated to dignity in the Renaissance waned during the Enlightenment, but the emphasis in philosophy; law and politics moved gradually from the perception of man as a creature to man as a person and individual.[117] There was consequently a desire for freedom from authority and for secularisation.[118] Secularisation led to individualism, liberalism, religious tolerance and the development of science, culminating in the characteristic Western co-existence of state and church[119] as well as in declarations of human rights. Such individualism now permeates all aspects of society and characterizes both civic law and civic life.[120] This development resulted in

> the central existential claim of modernity – man's autonomy, his capacity to be lord of his fate and the shaper of his future.[121]

John Locke (1632-1704), in his *Second Treatise of Government* (1689), saw man's identity as his ethical self. Man has individuality subject to God because of his possession of characteristics like rationality, responsibility, the desire to pursue happiness, and memory, which characteristics are common to all men. Because of their commonality these features assert the equality of all men, not only in the context of the social contract but

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116 Lewis "A Brief History of Human Dignity: Idea and Application" 94.

117 Englard 1999-2000 *Cardozo LR* 1917. This notion eventually developed into individualism, liberalism, the development of science, and the advent of the protection of individual rights. Kant described this development as "mankind's exit from its self-imposed immaturity," as quoted in Barroso 2012 *BCICLR* 336.

118 McCrudden 2008 *EJIL* 659-660. Immanuel Kant, the German philosopher, described this period as the Enlightenment: "man's exodus from his self-incurred tutelage. Tutelage is the inability to use one's understanding without the guidance of another. Dare to know (*Sapere aude*!) Have the courage to use your own understanding: This is the motto of the Enlightenment" in his essay on the same topic in *Introduction to Contemporary Civilization in the West,* vol I, p 1071, as quoted in Arieli "The Emergence of the Doctrine" 6.

119 See fn 98 above.

120 Starck "Religious and Philosophical Background of Human Dignity" 183.

121 Arieli "The Emergence of the Doctrine" 12.

also in the exercise of political power.[122] This attribution of natural rights to the individual, which bind the state, influenced the drafters of the US *Constitution* one century later.[123] Locke's claim is often seen as the first properly enunciated natural rights theory.[124]

The transition from the Renaissance idea of dignity was more prominent in the works of Samuel von Pufendorf (1632-1694), who incorporated the concept of human dignity into his secularised doctrine of natural law.[125] Pufendorf regarded a "person" as "*homo consideratus cum statu suo,*" having innate rights, although he denied their effect on the state, as the state's function, he thought, was not to preserve individual rights but to provide security and public welfare.[126] He claimed that man has dignity (using the word *dignatio* to distinguish hierarchical *dignitas* from inherent equal human dignity) because of his privileged position in the created world. Therefore man is equal because of this common rational nature.[127]

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122 Englard 1999-2000 *Cardozo LR* 1917.

123 Eckert "Legal Roots of Human Dignity in German Law" 46. Other English philosophers who also influenced the recognition of human rights were John Milton (1608-1674), who demanded the right of self-actualisation, inclusive of freedom of speech, freedom of the press and the abolition of censorship; Thomas Hobbes (1588-1679), who advocated that human beings had natural rights, but only in primeval conditions, which rights had to be guaranteed by the sovereign, and infringement could result in *bellum omnium contra omnes*; and Edward Coke, who emphasised the recognition and legal effect of the fundamental rights of the English people, which demanded protection against groundless arrest and protection of property. *The Habeas Corpus Act,* 1679; the *Declaration of Rights,* 1688 and the *Bill of Rights,* 1689 embodied these protections, initially only in respect of traditional privileges and parliamentary freedoms, later in the form of rights for all free citizens, and eventually in the form of human rights. See Eckert "Legal Roots of Human Dignity in German Law" 45-46.

124 Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 40.

125 Eckert "Legal Roots of Human Dignity in German Law" 44.

126 Eckert "Legal Roots of Human Dignity in German Law" 48.

127 In *De Iure Naturae et Gentium Libri Octo,* Pufendorf wrote that: "For indeed the word 'man' is said to have a certain dignity, and the last as well as the most telling reply with which the rude insults of other men is met, is, 'I am not a dog or a beast, but as much a man as you are…' Now since human nature belongs equally to all men, and no one can live a social life with a person by whom he is not related as at least a fellow man, it follows, as a precept of natural law, that 'Every man should esteem and treat another man as his equal by nature, or as much a man is he is himself', as quoted in Englard 1999-2000 *Cardozo LR* 1918. Interestingly,

The formulation of man's social character (his *societas*) as the basis of human nature (which he believed was divinely established and which could be developed and realised only in the social context) led to the embodiment of man's common features as the origin of rights. Consequently, it is only from human relations that human dignity is derived (*dignatio nominis humani*).[128] This idea is normative and constitutes the founding formulation of human rights, as it differentiates between public and private law *dignitas*.[129]

Hugo Grotius (1583-1645), who experienced the horrors of the Thirty Years War in Europe and the English Civil War, as well as exile from the Netherlands (as it later became known,) reformulated the rules governing the *ius gentium* in *De iure belli ac pacis* (1625), by claiming that the *ius naturale* is the law of reason, without which neither society nor state could exist. His experiences during his period in exile led him to formulate a framework of universal moral principles that would bind all states as the basis for international law. The validation of natural law is rooted in the most basic need of society, namely that people should live peacefully amongst one another.[130] In treating the remains of slain soldiers, funeral rites are to be upheld and followed, which obligation is connected to

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Pufendorf referred to Cicero's *De Officiis* over 70 times in his *De Iure Naturae et Gentium Octo.*

128 Eckert "Legal Roots of Human Dignity in German Law" 44.

129 Luhman is quoted in Barrett 2005 *SAJHR* 531 as claiming: "Pufendorf's attempt to combine very disparate ideas about the original natural state (Grotius, Hobbes, Spinoza) into one theory led to formulations which gave rise to the idea of human (but not necessarily anti-social) rights by birth. This made it possible to undercut traditional distinctions or to present them as mere products of private law. For instance, there were no longer humans with or without *dignitas,* as in the tradition of aristocratic societies, but human dignity [dignatio] was seen as a characteristic of every human being and thus became a barrier for the differentiated performance of private law."

130 Arieli "The Emergence of the Doctrine" 13 fn 31.

dignity.[131] According to Arieli, Grotius' significance lies in the secularisation of natural law well beyond the formulation of the Stoics and Cicero.[132]

It was during the 1750's that mens' and women's perceptions regarding themselves changed fundamentally, which change laid the foundations specifically for the American, French and Scottish declarations of rights. These perceptions reflected a development in moral views and theories (inclusive of sympathy and empathy towards humanity) and new perceptions about the human body, resulting in the humanising of penal practices and campaigns against torture.[133] The 1776 *American*

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131 "The most obvious explanation is to be found in the dignity of man, who surpassing other creatures, it would be a shame, if his body were left to be devoured by the beasts of prey…For to be tore by wild beasts… is to be robbed of those honours, in death, which are due to our common nature… Consequently, the rites of burial, the discharge of which forms one of the offices of humanity, cannot be denied even to enemies, whom a state of warfare has not deprived of the rights and nature of men", as quoted in McCrudden 2008 *EJIL* 658-659.

132 Arieli "The Emergence of the Doctrine" 13 fn 31.

133 Hunt *Inventing Human Rights: A History* 112*,* stating: "Torture ended because the traditional framework of pain and personhood fell apart, to be replaced, bit by bit, by a new framework, in which individuals owned their bodies, had rights to their separateness and to bodily inviolability, and recognized in other people the same passions, sentiments, and sympathies as in themselves." Hunt believes that this new profound morality rooted from the reading of epistolary novels, a newly-developed form of the novel built around the personal letters of the characters. She refers to the internationally popular novels *Julie,* published in 1761, a year before the *Social Contract,* and the *New Héloïse,* a tragic love story, as evidence of a new psychological capacity to identify with the plights of the disadvantaged: "Couriers, clergy, military officers, and all manner of ordinary people wrote to Rousseau to describe their feelings of a 'devouring fire', their 'emotions upon emotions' and their 'upheavals upon upheavals.'" (at 36). Whitman states that as of approximately 1750, and specifically regarding Western Europe, there were two distinctions of punishments as between high-status and low-status persons, eg high status persons were beheaded, and low status persons were hanged. Traditional forms of low-status punishment included imprisonment, enslavement, mutilation, branding and whipping, coupled with "a good measure of public exposure." High-status persons like aristocrats, clerics and political agitators (eg Voltaire and Mirabeau) were detained in cloisters or fortresses and permitted to have servants, wear their own clothing and receive visits from friends and doctors, without any humiliating public exposure. In Europe, a process of the generalisation of high-status forms of execution began with a "levelling up" of low-status punishments after the French Revolution, which meant that beheading was to be the standard form of death penalty irrespective of class. The generalisation of other forms of punishment to those of high-status persons gradually followed until approximately 1980, when all forms of punishments were standardised. However, this practice was not emulated in the US and Britain. High-status punishments were abolished or "levelled down"

Declaration of Independence posited not only the existence of equal, inalienable, individual rights, freedoms and privileges, but also *mero motu* established democratic government.[134] The 1789 French *Declaration of the Rights of Man and the Citizen* (*Declaration de droits de l'homme et du citoyen)* declares that "[m]en are born free and remain free and equal in rights." However, the "rights of man" were literally limited to certain classes of men, as race,[135] gender,[136] freedom[137] and property[138] remained fundamental constraints on equality. The rights were there in theory, but not in practice.

Article 6 of the French *Declaration of the Rights of Man and the Citizen* (1789) (everyone is "equally admissible to all public dignities, offices and employments") democratised hierarchical dignity for every citizen.[139] The philosophy of Jean-Jacques Rousseau (1712-1778) became associated with a communitarian character to justify human rights, and dignity in this

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and low-status forms of punishments were continued in American penitentiaries, thus also equalising punishments for everybody. This is the reason why the US penal system is much harsher than that of Europe. See "'Human Dignity' in Europe and the United States: The Social Foundations" 47-49.

134 The second paragraph of the preamble of the *American Declaration of Independence,* 1776.

135 Universal male suffrage was denied to black people in the US until the *Civil Rights Act* of 1964 abolished such discrimination.

136 Mary Wollstonecraft, in *Vindication of the Rights of Man* (1790) and *Vindication of the Rights of Women* (1796), utilised dignity as part of her description of her ideal political state. See McCrudden 2008 *EJIL* 660. Gender discrimination was eliminated only in the twentieth century. Finland granted voting rights to woman in 1906; the Netherlands in 1919; the US in 1919 (only to White women); France in 1944, Italy in 1945; Belgium in 1948 and South Africa in 1930, and electoral rights in 1943.

137 The *American Constitution* of 1787 entrenched not only the institution of slavery but infamously quantified slaves as three-fifths of a person for the purposes of electoral appointment. The French Revolution abolished slavery for one year only. See Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 43.

138 Property restrictions excluded many freeborn White citizens from political, social and economic rights. See Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 43.

139 "All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents." McCrudden 2008 *EJIL* fn 29 at 660.

sense became closely related to republicanism in the late 18th and early 19th centuries. This communitarian character

> exhibit[ed] more concern for equality and fraternity, and less exclusive emphasis on liberty.[140]

The ideas of the French and American Revolutions and subsequent human rights declarations had a profound influence on Immanuel Kant (1724-1804,)[141] the renowned German philosopher and the most often quoted source for the modern inherent dignity claim.[142] Whilst Pufendorf claimed that human dignity is rooted in the social nature of man (which is determined by divinity), Kant emphasised man's freedom and autonomy, which originate from his possession of free will. He claimed that dignity is determined by the intrinsic worth of the autonomous individual; therefore, autonomy constitutes the basis of the dignity of man as a rational being who regulates his own fate within the perception of morality. In turn, morality, perceived as autonomy, is a purpose in itself for the rational being:

> Hence, only morality and humanity, insofar as the latter is capable of the former, possesses [sic] dignity.[143]

Kant recognised two types of value, which correlate with two sides of human nature: *dignity* (seen as "an absolute inner worth", to act as the parameter of moral value), and *price,* which constitutes the measurement

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140 Rousseau's influence on North America was more evident in areas that emphasised equality, education and material security. See Donnelly 2009 www.udhr60.ch/ report/donnelly-HumanDignity 43.

141 Kant lived all of his 80 years as a bachelor in the town of Köningsberg, the then capital of East Prussia, and never travelled more than ten miles outside his home town. He attended the University of Köningsberg and studied classics, physics and philosophy. Kant was notorious for his punctuality: his neighbours famously recounted that they would set their watches to half past five every afternoon when he took his daily walk, up and down eight times, on his small avenue. Interestingly, Kant was also a physicist – he won the Berlin Academy Price in 1754 for discovering the nature of the earth's rotational speed. Kant was influenced by the German philosophers Christian von Wolf and Martin Knützen.

142 McCrudden 2008 *EJIL* 569.

143 Englard 1999-2000 *Cardozo LR* 1918.

of value of the material world, and man's animalistic nature.[144] Dignity is a quality of "absolute, intrinsic value, above any price, and thus excluding any equivalence," indicating the intrinsic worth of the autonomous individual.[145] To prove the notions of dignity and moral worth, Kant devised three central concepts in *Groundwork of The Metaphysics of Morals*: namely the categorical imperative; autonomy and dignity.[146]

Moral value is determined by moral law, which is comprised of commands that govern the will, and which is exercised by reason. These commands are referred to as imperatives - hypothetical or categorical/ practical. An action that is as good as the means to achieve an end is a hypothetical (also technical or prudential) imperative. The categorical imperative refers to an action that is *per se* good and applies to all rational men, irrespective of whether it serves as a determinate end or not. It is

> a standard of rationality and represents what is objectively necessary in a will that conforms itself to reason,[147]

commanding immediate conduct and without any other purpose as a condition, and forming the basis of particular (moral) actions. *Categorical* refers to universal application, and *imperative* refers to the principle upon which man ought to act. As the categorical imperative does not prescribe specific rules of conduct, it serves as a mere abstract formula. Kant[148] derived his instruction to uphold human dignity as an ethical action by way of the categorical imperative:

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144 "Man regarded as a *person…* is exalted above any price;…he is not to be valued merely as a means… he possesses a *dignity* (absolute inner worth) by which he exacts *respect* for himself from all other human beings in the world." Kant *Groundwork of the Metaphysics of Morals* 434-434 as discussed by, emphasised and quoted by Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 21. Waldron in "Dignity and Rights" 13 states that although the German *Würde* is conventionally translated as dignity, the German connotation of *Würde* is closer to the meaning of "worth," which relates to Kant's usage of dignity.

145 Englard 1999-2000 *CardozoLR* 1918.

146 Barroso 2012 *BCICLR* 359.

147 Barroso 2012 *BCICLR* 358-359.

148 Kant *Groundwork of the Metaphysics of Morals,* as quoted in Eckert "Legal Roots of Human Dignity in German Law" 46.

> Man does not exist as a mere means for any use or will, but as an end in himself. Thus, he always has to be regarded, in all his actions both towards himself and to other reasonable beings, as an end too.

The categorical imperative was explained through a practical imperative in the following famous phrase:

> Act in such a way that you treat humanity, both in your person and in the person of each other individual, always at the same time as an end, never as a mere means.[149]

This morality necessitates that man is a human moral creature, or what Kant calls *homo noumenon* (as opposed to the animalistic man, *homo phaenomenon* or *animal rationale*).[150] Existence does not exclusively presuppose dignity: dignity requires morality, self-responsibility, the ability to perform self-determination, and respect.[151] For Kant, then, dignity is not connected to the individual, but to humanity and morality.[152] The content of morality is linked to a legitimised duty, based on reason and respect for another's dignity.[153] Human dignity equals a life of personal freedom and respect for human rights.[154] However, in this respect Englard[155] argues that

> Kant's notion of dignity constitutes a moral postulate rather than a social value. It signifies that using another person as a mere means is a violation of the actor's moral duty. In other words, the violation of the categorical imperative diminishes the actor's dignity rather than that of the victim.

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149 Kant *Groundwork of the Metaphysics of Morals,* as quoted in Eckert "Legal Roots of Human Dignity in German Law" 46.

150 Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 21.

151 Eckert "Legal Roots of Human Dignity in German Law" 46. Because of dignity, "humanity in his person is the object of the respect which he can demand from every other man." Kant *Groundwork of the Metaphysics of Morals,* as quoted in Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 21.

152 Eckert "Legal Roots of Human Dignity in German Law" 46.

153 "Every man has a legitimate claim to respect from his fellow men and is in turn bound to respect every other." Kant *Groundwork of the Metaphysics of Morals,* as quoted in Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 21.

154 Kant connected the link between rights, freedom and equality, and by implication, dignity: "this right comes to him who is a member of the commonwealth as a human being… a being who is in general capable of having rights." See Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 22.

155 1999-2000 *Cardozo LR* 1919.

Kant[156] then connects the duty to respect the dignity of others to the duty towards oneself as the content of the categorical imperative:

> the respect that I have for others or that of another can require from me… is therefore the recognition of a dignity in other human beings.

He described the non-recognition of another's dignity as a vice (*laster*).[157]

In conclusion, Kant posited that "humanity itself is a dignity,"[158] thereby reinforcing dignity's absolute and intrinsic character. It is this "broadening" of the strict Kantian moral conception of dignity that was connected to human rights in the formulation of modern constitutions.[159]

2.12 On human dignity in the nineteenth century

The nineteenth century saw a period of the assertion of rights in civil law through the codification of personality rights, which were unconditionally conferred on human beings *per se*, specifically in northern Europe. Hence, the idea that man is a distinct person because God is a distinct person, which concept ultimately qualifies man's dignity, became secularised. This process was initiated *inter alia* by the *Prussian Code* of 1794, in which a clear distinction between a human being and a person was made.[160] Yet not all human beings were automatically regarded as persons having

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156 "… just as he cannot give himself away for any price (this would conflict with his duty of self-esteem), so neither can he act contrary to the equally necessary self-esteem of others as human beings, that is, he is under obligation to acknowledge, in a practical way, this dignity of humanity in every other human being." Kant in *Doctrine of Virtue* 6:462 as quoted by Sensen 2011 *EJPT* 82.

157 Englard 1999-2000 *Cardozo LR* 1919.

158 Kant *Groundwork of the Metaphysics of Morals,* as quoted in Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 23.

159 Englard 1999-2000 *Cardozo LR* 1921. Surprisingly, Kant endorses certain concepts of dignity in the older Roman sense, by enumerating the rights of the sovereign executive as the distribution of offices, the distribution of dignities, and the right to punish. "Civil dignities" are described as the hereditary titles of nobility. However, in referring to a modern concept of politics based on equal rights, Kant explained that the establishment of new dignities would be incompatible with a fully legitimate regime ("the general will"), although it might be better to acknowledge and respect the already established "dignities". See Donnelly 2009 www.udhr60 .ch/report/donnelly-HumanDignity 22-23.

160 Eckert "Legal Roots of Human Dignity in German Law" 49.

innate rights. A "person" is defined as follows: "[m]an shall be called 'person' as far as he is endowed with certain rights in society."[161] Expanding on this concept, the *Civil Code of Western Polish Galicia* of 1797 posited that men are to be regarded as persons because they have rights,[162] whilst the *Austrian Civil Code* of 1811 stated that men have innate rights.[163] Although man's general legal capacity and inherent rights were thus legally recognised in private law, this development set the stage for the recognition of these rights of the individual against the state by freeing man from state control over private law matters such as delicts and contracts, and consequently, in a human rights context. Inevitably, with man becoming the bearer of rights, the abolition of slavery, universal suffrage, active citizenship, better social conditions for the lower classes and the dissolution of hierarchies were necessary consequences for a life of dignity.

In another strand of development, the prevailing concept of human dignity (for example man's legal subjectivity) became associated with social reform in Europe during the first half of this period,[164] whilst the US developed its rights-based doctrine into a liberal-democratic model of political governance. Simon Bolivar, Latin American statesman and military leader, critisised slavery as a "shameless violation of human dignity" and any laws endorsing it as "sacrilege."[165] The preamble of the decree of 1848 of the French Republic, which was a result of the revolution of the

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161 Section 1.1.1. See Eckert "Legal Roots of Human Dignity in German Law" 49.

162 "Considering their rights, men shall be regarded as persons. Persons only, and not objects, shall have rights." (s 26). And: "Innate rights of man are the following…" (s 29). See Eckert "Legal Roots of Human Dignity in German Law" 49.

163 "Each man has innate rights, which are obvious because of reason, and shall therefore be regarded as person." (s 16) See Eckert "Legal Roots of Human Dignity in German Law" 49.

164 Friedrich Schiller, the German poet, philosopher, playwright and historian, wrote in his epigram *Würde des Menschen* (1798): "give him food and shelter;/When you have covered his nakedness, dignity will follow by itself." See Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 36.

165 McCrudden 2008 *EJIL* 661.

same year, states that slavery is "an affront to human dignity."[166] Similarly, the socialist movement influenced writers such as Pierre-Joseph Proudhon (1809-1865), who believed that man has a personal sense of dignity in relation to his fellow men, in the realm of justice.[167] Peter A Kropotkin (1842-1921) saw human dignity to be the basis of his naturalistic concept of morality and justice.[168] Ferdinand Lasalle (1825-1864), founder of Germany's Social Democratic Party, connected human dignity to the state's duty to alleviate the poverty and hunger of the working and lower classes, which had, like everyone else, a right to a "dignified human existence" (*menschenwürdiges Dasein*).[169] It is this notion of dignity that was first introduced into the Weimar Constitution of 1919.[170]

The idea of human dignity was, however, not without criticism: the positivistic movement denied any existence to the idea,[171] resulting in the disappearance of the close connection between a person, human rights and legal capacity.[172] In an important development, Otto von Gierke (1841-1921) in his *Deutsches Privatrecht I* (1895) criticised this view in that he regarded the legal recognition of a person as a human being as

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166 McCrudden 2008 *EJIL* 661.

167 He wrote in *De La Justice Dans La Révolution et Dans L'Eglise* 299 (1888): 1.Man, by virtue of the reason with which he is endowed, has the capacity to feel his dignity in the person of his like, as well as in his own species, and to affirm himself both as individual and as species. 2. Justice is the product of this capacity: it is the respect of human dignity, spontaneously experienced and reciprocally granted, in whatever person or circumstance it finds itself compromised, and to whatever risk it exposes us." See Englard 1999-2000 *Cardozo LR* 1919-1920.

168 Englard 1999-2000 *Cardozo LR* 1920.

169 Eckert "Legal Roots of Human Dignity in German Law" 47; Englard 1999-2000 *Cardozo LR* 1920-1921. By the 1940's most Western states were actively realising the political commitment of becoming welfare states.

170 Englard 1999-2000 *Cardozo LR* 1921. Art 151 par 1 states: "The organization of economic life must respect fundamental justice and provide a humane existence for everyone." This notion of dignity limits economic freedom in favour of fundamental justice.

171 Whilst positivism denied the moral and philosophical dimension of the law, it provided justification for the protection of basic rights such as the rule of law and due process in fundamental rights statutes, but in this process did not condemn the infringement of basic rights by the state. See Starck "Religious and Philosophical Background of Human Dignity" 184.

172 Eckert "Legal Roots of Human Dignity in German Law" 51.

the basis of all subjective rights, and argued that this right includes personal dignity, which constitutes the basis of all private and public rights.[173] Eberle states that the modern constitutional idea in Germany centres on the views not only of Kant but also on those of Von Gierke.[174] Arthur Schopenhauer in 1937 criticised Kant's notion of "human dignity" as vacuous and without any real basis.[175] Dignity's religious or metaphysical basis was negated by Karl Marx in 1847, who stated that its use by a fellow socialist was taking "refuge from history in morality."[176] In consequence, Marx denounces dignity's moral and metaphysical dimensions, leaving man to be defined exclusively by social relationships and in a scientific context.[177] For Friedrich Nietzsche, who viewed man as being dispossessed of rights or duties, thus being the "absolute man",[178] an individual's dignity was relevant only when he was used as an instrument. Significantly, and most probably as a reaction against the socialist movement, the Catholic Church at the end of the nineteenth century adopted human dignity as being central to its doctrine of man's being created in the image of God; also to substantiate its teachings about the sanctity of life as the basis for its doctrine denouncing murder, abortion ("the dignity of the unborn child"), euthanasia and the scientific exploitation of embryos. The outcome of this approach was a communitarian concept

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173 Eckert "Legal Roots of Human Dignity in German Law" 51; Eberle *EJ* 2008 *ORIL* 21.

174 Eberle 2008 *ORIL* 7.

175 "…this expression 'Human Dignity' once it was uttered by Kant, became the shibboleth of all perplexed and empty-headed moralists. For behind that imposing formula they concealed their lack, not to say, of a real ethical basis, but of any basis at all which was possessed of an intelligible meaning: supposedly cleverly enough that their readers would be so pleased to see themselves invested with such a 'dignity' that they would be quite satisfied." As quoted in McCrudden 2008 *EJIL* 661.

176 McCrudden 2008 *EJIL* 661.

177 Starck "Religious and Philosophical Background of Human Dignity" 184-185.

178 "…every human being… only has dignity in so far as he is a tool of the genius, consciously or unconsciously: from this we may immediately deduce the ethical conclusion, that 'man in himself', the absolute man possesses neither dignity, not rights, nor duties: only as a wholly determined being serving unconscious purposes can man excuse his existence." See McCrudden 2008 *EJIL* 661.

of human dignity; the recognition of human relations and what was essential for the promotion of the common good, because it highlighted the limits on rights to ensure human well-being.[179]

2.13 Contemporary human dignity

The notion that there is a dignity inherent in man, in the public law sense, entered national constitutions in Europe and the Americas during the first half of the twentieth century: in Mexico in 1917, in Weimar Germany and Finland in 1919, in Portugal in 1933, in Ireland in 1937 and in Cuba in 1940.[180] Heritages of the political influence in these enactments are visible in the socialist character of the Finnish constitution, Catholicism in the constitutions of Ireland, Spain and Portugal, and the social/democratic and Catholic character of the various constitutions in Central and South America, for example.[181]

Moyn[182] remarks that the inception of human dignity in international documents post World War II can be attributed to Catholicism, and more specifically to the Irish *Constitution* of 1937 and the actions of Popes Pius XI and XII. The (controversial, at the time) inclusion of the secular idea of "the dignity and freedom of the human person" in the Irish *Constitution* constitutes a religious fusion of Christian principles and social democracy. Thereafter, from the 1942's onwards, Catholic thinking linked "the dignity of the human person" with "human rights."[183] Pius XI, in an interview with the *New York Times* in late 1938, anticipated the wording of the *Universal Declaration,* which was drafted nearly ten years later:

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179 McCrudden 2008 *EJIL* 662.
180 McCrudden 2008 *EJIL* 664.
181 McCrudden 2008 *EJIL* 664.
182 Moyn 2014 *YHRDJ* 57.
183 2014 *YHRDJ* 57. Moyn notes that Jacques Maritain, prominent Catholic thinker and member of the taskforce which was mandated to draft the *Universal Declaration,* linked the idea of human dignity to human rights in 1942 only, at the earliest.

> Christian teaching alone gives full meaning to the demands of human rights and liberty because it alone gives worth and dignity to human personality.[184]

Following this allusion, Pius XII's Christian message to the world in 1942 contained five principles, of which "the dignity of the human person" was the very first.[185] Thereafter, as Moyn[186] remarks, individual dignity came to be commonly used across the Atlantic during the later phases of World War II. Political Catholicism's democratic idea of individual dignity is rooted in a reaction against the travesties of dignity by secularism, materialism, relativism and the subordination of natural law to the whims of the masses.[187] As a result, dignity entered constitutionalism as part of world history and is a legacy of Christian Democracy, which manifested itself in global religious constitutionalism.[188]

The notion of global inherent dignity as the basis of human rights was shaped by the reaction against the atrocities of World War II, especially the ideology that gave rise to National Socialism and fascism. Both the *UN Charter* and the *Universal Declaration* codified the inherent dignity of humanity as a norm in international law. The *UN Charter* and its founding documents reflect the historical background of its development,[189] in contradistinction to the purposes of the *Covenant of the League of Nations 1919*, which was adopted after World War I specifically to protect minorities.[190] The *Universal Declaration* was the first declaration of rights

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184 Moyn 2014 *YHRDJ* 56.
185 Moyn 2014 *YHRDJ* 57.
186 2014 *YHRDJ* 57.
187 Moyn 2014 *YHRDJ* 57.
188 Also see the discussion in section 14.3 below regarding the influence of Catholicism on the German *Basic Law*.
189 The Preamble promises to protect humanity from war and reaffirms "…faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."
190 Arieli "The Emergence of the Doctrine" 1-3. The first section of the Preamble begins: "Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world…"

historically to identify human dignity as the basis of rights.[191] Delegates attending the 1945 San Francisco conference to establish a United Nations' organization voted for a declaration of rights to be included in the *UN Charter.* As a result of the dignitaries' preconceptions regarding previous drafts for an international bill of rights, "human dignity was in the air."[192]

In 1946 UNESCO mandated a number of philosophers to investigate the justiciability of universal rights cross-culturally, the group included Jacques Maritain of France,[193] Richard McKeon of England and John Humphrey of Canada.[194] Although they came from different philosophical and cultural backgrounds, they reached consensus on the nature of the theoretical basis for human rights, after having compiled a document consisting of four hundred pages based on input from various sources such as Catholic and Jewish bodies and the International Labour Organization. Thereafter,

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191 Dicke "The Founding Function of Human Dignity" 111-112.

192 Dicke explains that the initiative to draft an international bill of rights began with President Roosevelt's "Four Freedoms", the *Atlantic Charter*, and the 1942 *Declaration of the United Nations*, and individuals and non-government organisations motivated the reference to human dignity as the value the protection of which would result in the honouring of human rights. One of the prevailing concepts informing the notion of human dignity in the early forties was the natural law view based on the traditional Christian doctrine that man was created in God's image. The Catholic Bishops in the US prepared a draft referring to an excerpt from St Thomas Aquinas, as follows: "[Dignity is] a synonym for human worth, the inherent excellence of the human person as distinguished from any other living creature." A draft from the American Jewish Committee referred to Jewish traditions: "All that we must cherish must rest on the dignity and inviolability of the person." A third view depended on the natural law concept of dignity in the Enlightenment, which implies that all men have reason as endowed by nature, and are therefore equal. This notion has its roots in Stoic philosophy. See "The Founding Function of Human Dignity" 112-113.

193 Jacques Maritain was a prominent French Catholic philosopher who is believed to have brought the philosophy of human dignity into international politics after WW II. He saw dignity as a fact with metaphysical or ontological status, as well as a moral entitlement. Interestingly, at the same time Jean Paul Sartre was arguing that genuine human dignity could be achieved through existentialism – which was common ground with Maritain. See McCrudden 2008 *EJIL* 662; 678.

194 It is believed that John Humphrey produced the first draft of the Declaration, which made no reference to human dignity. Cassin had redrafted Humphrey's text, with the inclusion of human dignity, in reference to the *UN Charter.* See McCrudden 2008 *EJIL* 676 -677.

the three philosophers Pen-Chung Chang (a Chinese diplomat), Charles Malik (a US Ambassador and rapporteur of the Human Rights Commission) and Rene Cassin (a French legal advisor to De Gaulle during World War II) were tasked with assisting the Chair of the human rights commission, Eleanor Roosevelt, with the drafting of the International Bill of Rights. Human dignity was enacted as the central objective. It was described from a pluralistic, non-theological perspective and in general terms so as to avoid having to arrive at a philosophical decision (and thus to avoid the inevitable attendant disagreements) regarding the source of rights and duties.[195] In explaining the rationale for the inclusion of human dignity Eleanor Roosevelt said:

> in order to emphasize that every human being is worthy of respect… it was meant to explain why human beings have rights to begin with.[196]

It is believed that the basis of the Preamble of the *UN Charter* was drafted by General Jan Christian Smuts, South-African prime minister and a former member of the British War Cabinet.[197] Although his draft did not explicitly refer to human dignity, the term was apparently subsequently inserted after his suggestion to this effect to Malik.[198] However, the notable reference to human rights as the basis for the United Nations' policies was made by General Smuts.[199] Moyn[200] remarks that Virginia Gildersleeve, a former dean of Barnard College in New York, made cosmetic changes to

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195 The major advantage to this approach, according to Shultziner, is: "the abstention from a *philosophical* decision regarding the source and cause for rights and duties paves the way for a *political* consent concerning the specific rights and duties that *ought* to be legislated and enforced *in practice* without waiving or compromising basic principles or belief." See "Human Dignity: Functions and Meanings" 7.

196 McCrudden 2008 *EJIL* 677.

197 Interestingly, Smuts, as a well-respected member of the Commonwealth and the Imperial War Cabinet, was responsible for drafting the British proposals for a peace settlement. He also authored the highly influential pamphlet in 1918 entitled: *The League of Nations: A Practical Suggestion.* See Dubow 2008 *JCH* 48. For Smuts's role in the enactment of human rights in the *Universal Declaration*, see generally Dubow 2008 *JCH* 52-55.

198 McCrudden 2008 *EJIL* 676 fn 154.

199 McCrudden 2008 *EJIL* 676.

200 Moyn 2014 *YHRDJ* 59.

Smuts's draft of the preamble and, as was recently discovered by Charles Beitz, singlehandedly introduced the suggestion of "the dignity and worth of the human person" to the drafters of the *UN Charter*.[201] The inclusion of the term "dignity" in the *Universal Declaration* drew for its foundations upon the *UN Charter.* As in the case of the *UN Charter,* human dignity was not included in the first draft of the *Universal Declaration* prepared by John Humphrey - it was subsequently included by René Cassin in his redraft of Humphrey's draft.[202]

The *Universal Declaration* refers to human dignity in five places: twice in the Preamble, in article 1, and then again in referring to social and economic rights in articles 22 and 23 para 3.[203] Arieli argues that the legitimizing function of human dignity in the *Universal Declaration* is rooted in the ideas of the Enlightenment and of the American and French Revolutions, to effect democracy and liberalism, the basic tenets of Modernity.[204] Kant's philosophy provides the necessary connection

> between a possible metaphysic and secularism, which is the existential dimensions of Modernity and of modern history.[205]

The insight of the Enlightenment was the *causa* for the bringing about of a new world order in which humanity has universal dignity and equal rights, independent of hierarchy, which culminated in the codification of human rights in the *Universal Declaration.*[206] This progression provided the necessary connection between legal subjects; human dignity and human rights, by the extension of Kant's moral concept of dignity (man's

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201 Also see McCrudden 2008 *EJIL* 655.
202 McCrudden 2008 *EJIL* 657.
203 Dicke "The Founding Function of Human Dignity" 114-115.
204 Arieli "The Emergence of the Doctrine" 5.
205 Arieli "The Emergence of the Doctrine" 7.
206 Kant's basic philosophy is explained by Arieli: "Whether dealing with the nature and limits of pure reason or the nature of ethics, morality, human freedom and history, or the true aims of a cosmopolitan order, his basic assumption is man's capacity to shape his individual and collective existence according to the highest ideals implied in the concept of the dignity of man and his existential autonomy and freedom." See "The Emergence of the Doctrine" 7.

obedience to his self-imposed laws) to embody human dignity equally, inclusive of man's moral obligation to obey such laws.

From 1945 onwards, human dignity came to be used in many domestic constitutional texts; human rights charters;[207] regional texts[208] and international humanitarian law texts.[209] Although the US *Constitution* does not explicitly refer to human dignity, the first reference to the concept was made in the dissenting judgment of Murphy J in 1944 in *Korematsu v United States*[210] (with reference to the rights of prisoners of war). The concept has subsequently been employed by the Supreme Court to broaden, interpret and develop the constitutional protection of rights such as liberty, autonomy, equality and respect.[211] Modern Western constitutionalism reflects a post-war paradigm that places emphasis on the realisation of the value of human dignity in a communitarian context, through a state's commitment to social welfare. In current law, human dignity is difficult to define. It functions as a generic concept to protect dignity on three levels: that of the whole human species; the dignity of groups within the human species; and the dignity of individuals.[212]

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207 Eg *The International Covenants on Civil and Political Rights, on Economic, Social and Cultural Rights* (1967), the *Convention of the Elimination on all forms of Racial Discrimination* (1965), also the *Rights of Children* (1989); the *Rights of All Migrant Workers and Members* (1990); *Protection of All Persons against Enforced Disappearance* (1992) and the *Rights of Disabled Persons* (2007).

208 Eg *Charter of Fundamental Rights of the European Union* (2000); the *Inter-American Convention of Human Rights* (1978), *Revised Arab Charter on Human Rights* (1994) and the *African Charter on Human and Peoples' Rights* (1986).

209 The *Geneva Conventions* (1949) and its Protocols.

210 323 U.S. 214 (1944). Also see the discussion in chapter 3.6.1.6.

211 Goodman 2005 *NLR* 84.

212 Feldman *Civil Liberties and Human Rights in England and Wales* 126.

2.14 On the enacting history of human dignity in the Basic Law of the Federal Republic of Germany

2.14.1 Introduction

The *Basic Law*[213] is rooted in circumstances which are part of world history that are linked by themes of transgressions of dignity and subordination of natural law. Its drafting was an evolutionary step in constitution-making directed at the curtailment of unlimited state power and the prohibition of the negation of human personhood. The Parliamentary Council (*Parlamentarischer Rat*), which was the constituent assembly for the *Basic Law*, convened in Bonn from September 1948 until May 1949 to draft a constitution for a united Germany, at that stage controlled by the Allies. The Allies consisted of the US, UK and France - with the exclusion of East Germany, which was controlled by the Soviet Union.[214] It had as specific instructions derived from its constituting framework, the Frankfurt Documents (also referred to as the "birth certificate" of the Federal Republic,)[215] the tasks *inter alia* of guaranteeing rights and freedoms for the individual and rectifying the shortcomings of the Weimar Republic, the previous dispensation in Germany, that permitted unfettered presidential powers and the dismantling of the democratic system by extremist forces that referred to fundamental rights as mere proclamations and aspirations

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213 The *Grundgesetz (Basic Law)* was promulgated on 8 May 1949, exactly four years (to the hour!) after Germany's unconditional surrender to the Allies in order to end World War II. The term can be traced to the Latin phrase *leges fundamentalis.* It was originally intended not only as a temporary constitution to eventually also include East Germany, but to emphasise the fundamentality of its principles too. Although the term "Basic Constitutional Law" better described the meaning of *Grundgesetz,* the Minister Presidents voting in the Parliamentary Council conceded to the use of *Basic Law* to avoid confusion. See John and Koch 2010 http://ssrn.com/ abstract=1520819, at 16; 17.

214 John and Koch 2010 http://ssrn.com/abstract=1520819 at 15; 16; 20; 21.

215 The Frankfurt Documents were drafted by a Six-Powers Conference in London, as preparation for negotiators to draft a constitution for Western Germany. See John and Koch 2010 http://ssrn.com/abstract=1520819 at 15; 16; 20; 21.

of the state,[216] valid only subject to the laws and not *vice versa.*[217] The *Basic Law,* and particularly article 1(1), which protects human dignity unreservedly, was enacted as a reaction against the system of National Socialism, and was based on an anti-totalitarian consensus among its drafters.[218] In the light of Germany's history during the two world wars, the historical background of article 1(1) "is essential for the correct understanding of the Basic Law."[219]

2.14.2 The Parliamentary Council

From 10 to 23 August 1947 a convention consisting mostly of constitutional experts and representing the western states in Germany was held on the island of Herrenchiemsee in preparation for the negotiations of the Parliamentary Council.[220] The deliberations of the Assembly of Herrenchiemsee resulted in a draft constitution with a complete report detailing *inter alia* the governing principles as well as a catalogue of unamendable human rights, which was submitted to the

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216 John and Koch 2010 http://ssrn.com/abstract=1520819 at 21. Several of the fundamental rights in the *Basic Law* are verbatim reproductions of corresponding articles in the Weimar Constitution. Importantly, the difference established in the *Basic Law* is a constitutional commitment to judicially enforced norms. See Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 44.

217 Dürig "An Introduction to the Basic Law of the Federal Republic of Germany" 13.

218 Weinrib notes that dignity is the binding force for individual liberty and the limitation of state action: "The defeat of the Nazis meant more than the military defeat of a particularly evil, expansionist dictatorship. It also precipitated the creation of legal mechanisms to circumscribe every aspect of public authority." See 2005 *NJCL* 329.

219 Benda "The Protection of Human Dignity (Article 1 of the Basic Law)" 36. As the Federal Constitutional Court held in the *Abortion* case in 1975: "the Basic Law contains principles … which can only be explained by the historical experience and by the moral-ethical recollection of the past system of National Socialism." See Benda "The Protection of Human Dignity (Article 1 of the Basic Law)" 38.

220 Some of the prominent members were Theodor Heuss and Carlo Schmid (who were also members of the Parliamentary Committee that drafted the *Basic Law,*) as well as Otto Suhr, Adolph Süsterhenn and Paul Zürcher. In the brief time allotted to them – from the 10th to the 23rd of August 1948 – they drew the outline for the *Basic Law* that remains viable today. See Schäuble 2012 www.bmi.bund.de/SharedDocs/ Reden/EN/.../bm_herrenchiemsee_en.ht. Also see footnotes 222 and 225 below.

Parliamentary Council for consideration in the drafting process of the *Basic Law*.[221]

The Parliamentary Council consisted of sixty-five members representing the then parliaments of the eleven states of Germany (excluding East Germany), all of them elected by their co-members.[222] The Council consisted exclusively of members of the State Parliaments experienced in constitution-making and politics. Almost half of them had participated in high-profile institutions before Hitler's accession to power in 1933, including the parliament of the Weimar Republic, state parliaments, and parliaments of Prussian provinces, and some had been members of the national assembly who participated in the framing of the Weimar Constitution in 1919.[223] Notably, the Social Democratic Party (SDP)[224] and the Christian Democratic Union (*Christlich Demokratische Union* (CDU)),[225] which included a strong Catholic contingent, comprised the main political constituency of the Parliamentary Council,[226] in which there

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221 John and Koch 2010 http://ssrn.com/abstract=1520819 at 21.

222 Golay *The Founding of the Federal Republic of Germany* 18; John and Koch 2010 http://ssrn.com/abstract=1520819.

223 John and Koch 2010 http://ssrn.com/abstract=1520819 at 21.

224 Prof Dr. Carlo Schmid was the leader of the SDP and both the Chairman of the main committee and of the Occupational Statute committee, as well as a member of the council of elders and the committee on basic rights. In 1946 he became a full professor of law at Tübingen and held different ministerial positions in Württemberg-Baden, whose constitution he authored. He was elected vice-president of both the first and second Bundestag and was a member of the German delegation to the Council of Europe's consultative assembly. His wide cultural interests are reflected in his translations of Baudelaire, Rostand and Calderon. See Golay *The Founding of the Federal Republic of Germany* 269.

225 The CDU was led by Dr. Konrad Adenauer from North-Rhine-Westphalia, one of the founders of the party, who was elected the first Bundestag chancellor of the first government of the Federal Republic, and was re-elected in 1957. He studied law and economics at the Universities of Munich, Freiburg and Bonn, and held a doctorate in law. He was a member of the Prussian upper house before World War I and became president of the Prussian Staatsrat in the Weimar era. In 1934 and 1944 he was imprisoned by the Nazis. Dr Adenauer was elected president of the Parliamentary Council See Golay *The Founding of the Federal Republic of Germany* 19; 265.

226 Möllers 2009 *ILR* 418. Rosen explains that the religious influence was particularly strong after the war. Most public figures on the political front that had not been discredited in the war had strong religious affiliations. The Catholic influence was

was also a classical-liberal contingent in the Free Democratic Party (FDP).[227] As McCrudden notes, the constituting idea of human dignity is especially prevalent where socialist or catholic principles, or both, play a role.[228] It may also be worth noting that the phrase "human dignity," as contained in the *Basic Law,* originated not from the committee tasked with cataloguing human rights - the "Committee on Fundamental Questions" - but from the Editorial Committee of the Parliamentary Council.[229]

2.14.3 Influences on the human dignity clause in the Basic Law

Moyn[230] argues that the inception of dignity as part of the constitutional tradition of the 1940's correlates strongly with religious constitutions in general (which includes the *Basic Law*) and Christian Democratic constitutions in particular, such as the Irish *Constitution* of 1937. According to him, religious constitutionalism rendered the framework within which human dignity first became judicialised, and this occurred in post-war Germany too:

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predominant via the political input of Konrad Adenauer, the first federal chancellor. Interestingly, many prominent members of the judiciary and academics in Germany were Catholics. This was true of Dürig and Ernst-Wolfgang Böckenförde (judge of the Federal Constitutional Court), for instance. See *Dignity Its History and Meaning* 80.

227 Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 45. Professor Dr. Theodore Heuss, leader of the FDP, was a member of the main committee, the council of elders and the committee on basic rights. Dr Heuss was an active member of the German liberal movement, editing literary and political journals, and represented the German Democratic Party in the Berlin city council, and from 1924 to 1928 and 1930 to 1933 in the Reichstag. The Nazis prohibited him from public office in 1933 and burned two of his books. He was twice elected president of the Federal Republic and published a number of books on art, literature and politics. See Golay *The Founding of the Federal Republic of Germany* 272.

228 2008 *EJIL* 673; Möllers 2009 *ILR* 418. Also see the discussion in section 13 above.

229 Möllers 2009 *ILR* 418. The editorial committee was an *ad hoc* committee established by the council of elders, consisting of Dr. Thomas Dehler (FDP); Herr Georg-August Zinn (SPD) and Dr Heinrich von Brentano. The lasting influence of this committee manifested not only in questions of style and uniformity of presentation, but in a number of substantive amendments, which were accepted by the main committee. See Golay *The Founding of the Federal Republic of Germany* 21.

230 Moyn 2014 *YHRDJ* 44. Also see the discussion in section 2.13 as well as footnotes 182-187 above.

> This newer constitutionalism crystallized precisely in the 1930's when it seemed to so many as if secular liberalism had no future. It was initially part of a replacement package for that secular liberalism, and it remained so in Germany in 1949.[231]

And:

> The most decisive and illuminating context for the move to constitutional dignity, it turns out, is not in the shocked conscience "after Auschwitz" but in political Catholicism before it. Political Catholicism remained dignity's dominant framework for decades thereafter, when the Holocaust still did not figure in moral consciousness.[232]

Moyn[233] explains that although the prevailing idea of dignity during the pre-war period derived from the egalitarian notions of rank and hierarchy, events in international Catholicism resulted in the reassignment of dignity from rank and group dignity (of collective entities such as workers and religious sacraments like marriage) to an individualised concept of dignity that culminated in the inception of human dignity in the Irish *Constitution* of 1937, which, in that era, constituted a "minority political choice in the landscape of political Catholicism." New ideas in international Catholicism resorted to the "dignity of the human person" to counterbalance the "depersonalized individual" depicted by secular liberalism.[234] The policy of the Christian-Democratic party in post-war Germany, led by Catholics, was based upon the Christian God and human dignity as a reflection of Christian Democracy, which connected the "dignity of the human person" with human rights, as a result of the efforts of Jacques Maritain, the main theoretician of civil society Catholicism and interpreter of the *Universal Declaration.*[235]

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231 Moyn 2014 *YHRDJ* 44. Moyn explains that, well before 1939 countries of Central and Eastern Europe abandoned their democratic constitutions in favour of totalitarianism. It is therefore significant that the Irish *Constitution*, during these years, constitutionalised the religious idea of human dignity.
232 Moyn 2014 *YHRDJ* 45.
233 Moyn 2014 *YHRDJ* 46.
234 2014 *YHRDJ* 48.
235 Moyn 2014 *YHRDJ* 56.

As has been discussed above in this chapter, regarding the evolution of the concept of dignity in the history of ideas, the changing notion of dignity also influenced German law. Post World War II, the *Universal Declaration* and *Charter of Human Rights* furthermore reflected this influence.[236] In addition, the Parliamentary Committee could also draw upon examples of dignity clauses in other domestic instruments. Eckert[237] suggests that the roots of article 1(1) could firstly be traced to the inclusion of dignity in the constitution drafted by the Frankfurt Parliament in 1849 (section 139) after the revolutions of 1848 regarding the prohibition of inhuman and degrading punishment: "[f]ree people shall respect the human dignity of a criminal." According to Eckert,[238] the provision in article 151 of the Weimar Constitution regarding the guarantee of a humane existence for everybody[239] and human dignity as the yardstick for the limitation of economic freedom also influenced the wording of article 1(1). Moreover, the preamble of the *Constitution of Ireland,* 1937 and the Italian *Constitution* of 1947[240] also served as examples for the framers of the *Basic Law.*

The influence of the afore-mentioned dignity-provisions is clearly in the *Constitutions of the German Länder*, all enacted after World War II but before the *Basic Law*, which in turn cross-fertilized the first draft of the Assembly of Herrenchiemsee. These provisions *inter alia* provide as follows:

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236 See the discussion in section 13 above. Also see Unger "Human Dignity Shall Be Inviolable' - Dealing with a Constitutional Taboo" 190.
237 "Legal Roots of Human Dignity in German Law" 52.
238 "Legal Roots of Human Dignity in German Law" 52.
239 Botha points out that the Weimar *Constitution* "linked human dignity to the idea of the social state." See 2009 *SLR* 179.
240 Moyn 2014 *YHRDJ* 60.

Table 2-1: Dignity provisions in constitutions of the German *Länder* after World War II

Document	Article	Description
The *Bavarian Constitution* of 2 December 1946	Preamble	"Mindful of the physical devastation which the survivors of the 2nd World War were led into by a godless state and social order lacking in all conscience or respect for human dignity..."[241]
	Article 100	"Legislative, executive and judicial powers shall respect the dignity of the human being."[242]
The *Constitution* of Bremen 21 October 1947	Article 5 par 1	"The state shall recognize and respect the dignity of the human being."[243]
The Wűrttemberg-Baden *Constitution* of 30 November 1946	Preamble	"… a confession to the dignity and the eternal rights of man."[244]
The Rheinland-Phalz *Constitution* of 24 May 1947	Preamble	"… with the determination to secure the freedom and dignity of man."[245]
The Free Hanse-City of Bremen *Constitution* of 21 October 1947	Preamble	"… shaken by the annihilation, which the authoritarian government of the National-Socialists in disregard of the

241 The preamble was written personally by Christian Democrat Alois Hundhammer. See Moyn 2014 *YHRDJ* 59.
242 Eckhart "Legal Roots of Human Dignity in German Law" 53. (Translation also provided by Eckhart.)
243 Eckhart "Legal Roots of Human Dignity in German Law" 53. (Translation also provided by Eckhart.)
244 Bendor and Sachs 2013 http://ssrn.com/abstract=1743439 at 4.
245 Bendor and Sachs 2013 http://ssrn.com/abstract=1743439 at 5.

Document	Article	Description
		personal freedom and dignity of man has caused… ."[246]
Constitution of the Länder Hesse of 1 December 1946	Article 3	"Life and health, honour and dignity are inviolable."[247]
	Article 27	"The social and economic order rests upon the recognition of the dignity and personality of man."[248]
	Article 30	"Working conditions have to be such, that health, dignity, family life and the cultural needs of the working people are secured."[249]
Constitution of Rhineland-Palatinate of 18 May 1947	Preamble	"… with the determination to secure the freedom and dignity of man."[250]
Constitution of Saarland of 15 December 1947 (at the time not yet part of the Federal Republic)	Article 1	"Everybody's right to life, liberty and respect for his human dignity determines, within the limits of the public good, the order of the community."[251]

As a result, the first two articles in the draft document of the Assembly of Herrenchiemsee stipulated that

246 Bendor and Sachs 2013 http://ssrn.com/abstract=1743439 at 4.
247 Bendor and Sachs 2013 http://ssrn.com/abstract=1743439 at 5; Eckhart "Legal Roots of Human Dignity in German Law" 53.
248 Bendor and Sachs 2013 http://ssrn.com/abstract=1743439 at 5.
249 Bendor and Sachs 2013 http://ssrn.com/abstract=1743439 at 5.
250 Bendor and Sachs 2013 http://ssrn.com/abstract=1743439 at 5.
251 Bendor and Sachs 2013 http://ssrn.com/abstract=1743439 at 5.

(a) [t]he state shall exist for the sake of man and not man for the sake of the state.[252]

(b) [t]he dignity of the human personality is inviolable. All public authority shall respect and protect human dignity. [253]

2.14.4 The meaning of human dignity

The members of the Parliamentary Council were unable to agree upon dignity's theoretical foundations.[254] In the discussions of the Main Committee the Christian-Democrats (who constituted about half of the delegates) and their Bavarian ally, the *Christlich-Soziale Union*,[255] saw dignity as an expression of a universal moral canon with a definitive Christian origin; not as a concept to be rediscovered, but as a pre-existing attribute in the framework of the tradition of natural law.[256] Dignity not only established the individual's right to freedom, but it also served as the foundation for the imposition of obligations on individuals, such as obedience to God.[257] Post World War II, Germany was inspired by an "over-moralized discourse and a naïve belief in natural law", as Dr

252 This opening sentence, drafted by Dr. Carlo Schmid, was not included in the *Basic Law* as a result of criticism by Dr. Theodor Heuss, who successfully argued that it was a fundamental error to view the democratic state and the individual as opposed to each other. See Golay *The Founding of the Federal Republic of Germany* 177.

253 Eckhart "Legal Roots of Human Dignity in German Law" 52; 53. (Translation also provided by Eckhart.) Also see Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 357; Eberle 1997 *ULR* 972. One of the sources of this clause was the Kreisau circle of resistance fighters, who tried to assassinate Hitler on 20 July 1944. Helmuth von Moltke noted the following objective for a new state, in case they succeeded in overthrowing Hitler: "The recognition of the inviolable dignity of the individual as the basis for the desired legal and peacetime order." See Schäuble 2008 www.bmi.bund.de/SharedDocs/Reden/ EN/.../bm_herrenchiemsee_en.ht

254 Eckert "Legal Roots of Human Dignity in German Law" 53; Möllers 2009 *ILR* 419.

255 Rosen *Human Dignity Its History and Meaning* 91.

256 Möllers 2009 *ILR* 419. Also see Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 357 and Eberle 1997 *ULR* 972.

257 Mathis "Human Dignity as a Two-edged Sword" 142; Eberle 1997 *ULR* 972.

Süsterhenn of the CDU confirmed to the delegates at the second plenary session:

> We must get back to recognizing that man does not exist for the State, but the State for man. For us, freedom and the dignity of human personality have the highest value…. There are … rights prior to and superior to the State, resulting from the nature and being of man and his associations which the State has to respect. Every power of the State finds its bounds in these natural, God-given rights of the individual, the family, the local communities of town and country, and the occupational groups.[258]

One of the drafts of the main committee reflected this influence:

> Resolved to secure a lasting respect for and a safeguarding of human dignity, the German people acknowledges these God-given inviolable and inalienable human rights and freedoms to be the basis of freedom, justice and peace.[259]

The Social Democrats and Free Democrats resisted the reference to natural law in article 1, because they feared such an approach might open the door for doctrinal interpretation and for drawing conclusions regarding Germany's future social policy:

> To erect natural law as an absolute is a dangerous business. I recommend a reading of Kant on this subject where he says that, in general, natural law tends to manifest itself to each one in a way which best suits his own interests.[260]

Schmid and Heuss ultimately devised a neutral formula for the recognition and protection of human dignity, whilst their individual formulas referred to the *a priori* status of human dignity.[261] Schmid held that:[262]

> The dignity of human life is protected by the State. It stems from rights that guarantee mankind protection against everyone.

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258 Golay *The Founding of the Federal Republic of Germany* 176-177.
259 Golay *The Founding of the Federal Republic of Germany* 177.
260 Golay *The Founding of the Federal Republic of Germany* 178.
261 Golay *The Founding of the Federal Republic of Germany* 178.
262 Translated by Schutte BC, quoted by Golay *The Founding of the Federal Republic of Germany* 214. ("Die Wűrde, menschlichen Lebens wird vom Staate geschűtzt. Sie ist begrűndet in Rechten, die dem Menschen jedermann gegenűber Schutz gewärhen.")

Heuss[263] stated that: "[t]he dignity of human existence is protected by state law."

According to the Social Democrats, dignity symbolised the freedom of the individual to be in control of his own life; a freedom which the state may fundamentally not restrict.[264] The only lawful reason to restrict this freedom lay in the acknowledgement of humanity's freedom and rights to self-determination.[265] In addition, dignity had a democratic-political dimension that had roots in the political commitment to re-establish a democratic Germany – and not in morality, Christianity, or natural law.[266] This view was based on a "classical strand of liberal constitutional pluralism", because it emanated from the democratic consensus of a community, as an expression to commit to the particular but not universal idea of human dignity.[267] The Social-Democrats and Free Democrats (a nineteenth century liberal party) resisted the use of "eternal rights" as referred to in the Frankfurt Documents, because of the possible difficulties the phrase might give rise to in constitutional interpretation, and instead proposed a neutral formulation that enacted dignity, together with the balance of human rights, as anterior to the state: "[h]uman dignity shall be

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263 Translated by Schutte, quoted by Golay *The Founding of the Federal Republic of Germany* 214. ("Die Wűrde des menschlichen Wesens steht im Schutz der staatlichen Ordnung.")

264 Mathis "Human Dignity as a Two-edged Sword" 141; 142.

265 Mathis "Human Dignity as a Two-edged Sword" 142. As Dr. Carlo Schmid held when he addressed the Parliamentary Council: "Should equality and liberty be granted absolutely and without any restriction? Should it also encompass those who singularly strive to achieve power and then having done so destroy freedom? I personally believe that the principles of democracy in itself [sic] cannot nuttier the means for its removal. Democracy rises to more than a mere: product of usefulness only where courage is found to believe in it as something that is necessary to preserve human dignity. Should this courage be found, then so should the courage to be intolerant of those who abuse democratic principles to destroy it." See Irving date unknown www.nizkor.org/hweb/people/f/funke-hajo/Irving-02.01.shtml. Interestingly, it was Schmitt's legal theory that influenced the Parliamentary Council's decision to entrench human dignity. See Schwartzberg *Democracy and Legal Change* 29.

266 Möllers 2009 *ILR* 420.

267 Möllers 2009 *ILR* 420.

inviolable."[268] Reference to the concept of human dignity as such emanated from its violation and the degrading treatment of humanity during World War II; thus it was framed retrospectively in negative terms.

Like those who enacted human dignity as a general principle in the *Universal Declaration,* the framers of the *Basic Law* were successful in avoiding the grounding of dignity on any particular religious or theoretical foundation.[269] In the perspective of their different understandings of dignity, the framers

> agreed to the use of a particular form of wording and were conscious that they were only agreeing on words but not on their meaning.[270]

This line of thinking corresponds with the claim made in 1956 by Dürig, the famous German dignitarian and constitutionalist from Tübingen and arguably the most influential commentator on fundamental rights in the *Basic Law,* to the effect that dignity encompasses a moral claim rooted in man's "humanness."[271] Dürig explains that the framers of the *Basic Law* agreed upon the specific concept of humanness (*Menschenauffassung*) as part of a prevailing world-view (*Weltanschauung*) that justifies the application of human dignity as a normative concept to encompass religious and philosophical views.[272] Therefore Dürig understands dignity as a "moral, legally incorporated claim" which guarantees basic rights unreservedly.[273]

Although the adoption of human dignity in the *Basic Law* was not contested by the three main parties (except by the "most dogmatic of legal

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268 Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 357; Eberle 1997 *ULR* 972.
269 See the discussion in section 14.3 above. Also see Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 358.
270 Mathis "Human Dignity as a Two-edged Sword" 142.
271 Ackermann *Human Dignity: Lodestar for Equality in South Africa* 215, referring to Dürig's article "Der Grundrechtssatz von der Menschenwűrde."
272 Ackermann *Human Dignity: Lodestar for Equality in South Africa* 215.
273 Möllers 2009 *ILR* 423.

positivists of the framers"[274]) there was controversy regarding the meaning of dignity from the beginning. Carlo Schmid, who understood dignity as

> a quality, an attribute that determines the human and that distinguishes humans from other creatures,

argued that the term should well be defined.[275] Theodore Heuss,[276] on the other hand, saw dignity as a "non-interpreted thesis" that should not be defined:

> no one in power should have the prerogative to define it. Definitions are ruled or governed by interests, and it is better to leave the term “human dignity” undefined than to tailor it to the interests of a government.[277]

The final draft of article 1 provides that

(a) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(b) The German people, therefore, acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(c) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Enders[278] informs us that the Parliamentary Council originally intended that the entire content of article 1 should serve as a preamble to the chapter on fundamental rights, in order to clarify their spirit and purpose and to demonstrate the Council’s commitment to the enforceability of the

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274 Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 357.
275 Dalferth 2013 http://dspace.library.uu.nl/bitstream/handle/1874/294440/c8.pdf?sequence=1 at 147.
276 Dalferth 2013 http://dspace.library.uu.nl/bitstream/handle/1874/294440/c8.pdf?sequence=1 at 147.
277 Dalferth 2013 http://dspace.library.uu.nl/bitstream/handle/1874/294440/c8.pdf?sequence=1 at 147.
278 Enders 2010 *RECHTD* 2.

classical human rights. Human dignity enacted in a preamble as an open-ended and non-executable "un-interpreted thesis" was meant to serve as a yardstick for the interpretation of these rights.[279] Instead, the drafters reached a compromise to the effect that human dignity was to be included only in article 1 and not in the preamble.[280] There was an "overlapping consensus" that human dignity was a necessary inclusion to represent a rejection of National Socialism and its moral transgressions.[281] The framers intentionally distinguished between the recognition of dignity as at most a proclamation in the *Universal Declaration* of 1948, and a constitutional provision to legalise human dignity as an unamendable and absolute right that could trump all other rights,[282] not subject to any form of balancing, as a reviewable function of the Federal Constitutional Court within the counter-majoritarian process of judicial review.[283] This development was remarkable, as human dignity was absent from the constitutional traditions of the pre-World War II Western world, with the exception of the Irish *Constitution* of 1937.

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279 Enders 2010 *RECHTD* 2.

280 Tiedemann P "Human Dignity as an Absolute Value" 26.

281 Möllers 2009 *ILR* 418; McCrudden 2008 *EJIL* 665. Rosen informs us that by the end of World War II Catholicism had undergone a significant re-orientation of its opposition to the democratic and egalitarian ideas which emerged during the French Revolution, in favour of a concept of family and society that embodies a purported divinely ordained descending hierarchy of authority: "To put it bluntly, the nineteenth century Catholic notion of dignity was part of the Catholic church's long war against the principles of the French Revolution. Catholics were now prepared to associate human dignity with equal rights and democracy and so to ally themselves with secular liberalism against the regimes to the East. Thus the church was happy to endorse Article 1 of the Grundgesetz with its emphasis on the pre-eminent place of human dignity and the inference that dignity ("therefore") functions as the ground for the assertion of "inviolable" and "inalienable" human rights held equally by all. See *Human Dignity: Its History and Meaning* 92.

282 Benda "The Protection of Human Dignity (Article 1 of the Basic Law)" 36.

283 Möllers 2009 *ILR* 418. Enders, however, argues that the Parliamentary Council's original intention to include the contents of article 1 in a preamble to the fundamental rights provisions demonstrates their intention not to enact dignity as a new fundamental right, which claim has important implications for the interpretation of dignity in concrete cases. See 2010 *RECHTD* 2 and further discussion in chapter 4.5.3 below.

With regards to the second component of article 1, in referring to Von Bernstorff, Ackermann[284] notes that the Editorial Committee most probably deliberately elected to prefer the *duty to respect* over the *duty to protect*. This precedence roots in the inviolability of dignity itself, because if conflicting duties were balanced without regard to the result achieved, the inviolability of dignity would be irrelevant.

The centrality of human dignity and the basic rights provisions received relatively little attention in the debates of the Parliamentary Council in comparison with issues such as the vertical and horizontal separation of powers, unification with East Germany, and the role of religion in public life.[285] The recognition that human dignity was the dominant principle in the *Basic Law* originated only in the first half of 1950 when the horrors of the Holocaust were disclosed and became evident.[286] As the narrative of the war changed, so did the interpretation of the core principle of the *Basic Law* to reflect the "never-again" (*Nicht wieder*!) narrative.[287] Scheppele[288] remarks that:

> … as the Holocaust moved to the centre of understandings of what World War II was about, the meaning of the German Basic Law shifted to emphasize the "never again" message of human dignity, the rights provisions, and their protection by the Constitutional Court as the central animating spirit of the text.

2.14.5 The influence of Kant

It is generally accepted that the formulation of article 1(1) in the *Basic Law* stems from Kantian moral theory as opposed to his legal theory.[289] Although Kant's moral theories were discussed by the Parliamentary

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284 Ackermann *Human Dignity: Lodestar for Equality in South Africa* 124.
285 Scheppele 2013 *YJLH* 33.
286 Scheppele 2013 *YJLH* 33.
287 The "never again" narrative in German law resulted over time in an interpretative paradigm in domestic jurisdictions through the use of comparative law. Also see the discussion in chapter 4.4.2 and fn 234 below.
288 2013 *YJLH* 35.
289 Fletcher 1984 *UWOLR* 178; Rosen *Dignity Its History and Meaning* 80.

Council, no special preference was given to him, as the works of other philosophers were discussed too.[290] As Moyn[291] argues

> … West Germans writing the Basic Law weren't yet concerned by the Jewish tragedy. And while it is certainly true that Kant occasionally referenced dignity, none of his political disciples have made anything of this fact and his current philosophical disciples have only started highlighting dignity in the last few years. For that matter, there were no Kantians in Germany of note after World War II (including in the rooms where the Basic Law was prepared and debated), nor really anywhere else.

Nevertheless, Fletcher[292] informs us that the National Socialist background to the invocation of Kant's moral theory as a reaction against totalitarianism should not be overlooked:

> After the terrors of that regime, German constitutionalists appropriately looked to their tradition in order to vindicate the centrality of the individual in the structure of constitutional values. National Socialist jurists had in fact endorsed a racist version of utilitarian thought. For them, the Right was whatever was useful to the German Volk. The Kantian reaction thrust the individual centre-stage. The character should not exist for the sake of the play, but the drama of social life should evolve with respect for the integrity of every character.

The application of the categorical imperative that prohibits the employment of individuals as means to an end, which represents one foundation of Kant's moral theory, implies that the state may not violate this supreme principle. The Federal Constitutional Court has honoured this principle through the legal application of human dignity as a moral guarantee, with specific reference to Kant's moral philosophy.[293] That article 1(1) does not refer to dignity as a right *per se* but refers to the *duty* to respect and protect dignity is evidence of its source in Kantian moral theory.[294] This formulation demonstrates that dignity serves as an objective value, which

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290 Möllers 2009 *ILR* 423.
291 Moyn 2014 *YHRDJ* 40.
292 1984 *UWOLR* 178; 179. Also see Eberle 1997 *ULR* 967.
293 Möllers 2009 *ILR* 423. Also see the discussion regarding the GVerfG's application of the *Objektformel* and the state's duty to respect and protect dignity in chapter 5.2.5 below.
294 Fletcher 1984 *UWOLR* 179. The BVerfG, however, regards dignity not only as an objective constitutional value but also as a subjective right. Also see the discussion in chapter 5.2.3 below.

reflects the Kantian canon that the state exists solely for the sake of man.[295] Significantly, the protection of *rights* follows textually by way of article 2, and only after the imposition of duties, which guarantees the individual's right to the free development of his personality.[296] In Kant, this formulation forms the perfect synthesis between individual freedom and the objective authority of law, contrary to the (previous) traditional theory of rights in German law that drew no distinction between state and society.[297] The *Basic Law* reconfigured Kant's moral philosophy to postulate dignity as a human right. As Englard[298] explains:

> The shift to a notion of dignity as a fundamental human right could be achieved only by renouncing the *actuality* of moral freedom in persons, and replacing it with its general and equal *potentiality* in human beings. Thus, the idea of humanity's intrinsic worth was maintained, though it became attributed universally to the empirical human person as such.

2.15 On the development and enactment of human dignity in South Africa

2.15.1 Introduction

General JC Smuts's incantation of "the dignity and worth of the human person" in the early 1940's had finally come full circle in South African constitutional law when the recognition and protection of equal dignity was entrenched in section 10 of the *Constitution.* The new dispensation marked the end of parliamentary supremacy and analytical positivism and introduced a supreme constitution, justiciable rights and judicial review, which necessitated a legal revolution, as all provisions not in compliance

295 Dürig "An Introduction to the Basic Law of the Federal Republic of Germany" 13.
296 Article 2 provides that "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."
297 Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 45.
298 1999-2000 *Cardozo LR* 1921.

with the *Constitution* are deemed to be unconstitutional.[299] Similar to the German *Basic Law*, the *Constitution* was born in dire circumstances during which the unequal distribution of rights based on discriminatory issues such as race loomed large.[300] In the previous judicial framework, dignity was not accorded to individuals in equal quantum; therefore there was no harmonisation between the Stoic claim and the Roman application of status-based dignity. In the new constitutional framework, however, human rights are protected by an objective value system in which human dignity constitutes one of a triad of values. Like the right to life, it has been described as one of the "most important"[301] of the human rights; the "cornerstone"[302] of the *Constitution* and the "touchstone of the new political order."[303] At long last, the evolutionary concept of the recognition and protection of equal dignity is now part and parcel of South African law.

The first notion of the evolutionary concept of constitutional dignity that arose in South African society was rooted in the collective dignity of

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299 Section 2 of the *Constitution* posits that any law which is inconsistent with the *Constitution* is invalid; thus prescribing that "invalid law" inclusive of common, private, customary law and statutes, must eventually be harmonised to epitomise the values enunciated in the *Constitution.* The Court stated in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44: "there are not two systems of law, each operating in its own field with its own highest court… There is only one system of law. It is shaped by the Constitution, which is the supreme law… is subject to constitutional control."

300 In *Minister of Post and Telegraphs v Rasool* 1934 AD 167 at 177 Beyers JA held that, with regard to the common law principle that everyone is equal in law: "… the principle that all are equal in the eyes of the law is doubtless subject to qualification, and as far as the Transvaal is concerned, it was clear that Europeans and non-Europeans were never in important respects equal in the eyes of the law" (author's translation.)

301 *S v Makwanyane* 1995 3 SA 391 (CC) paras 146; 327-330. Also see fn 555 below.

302 *National Coalition for Gay and Lesbian Equality v The Minister of Justice* 1998 1 SA 6 (CC) para 28; *Ferreira v Levin* 1996 1 SA 984 (CC) para 47; *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) paras 31-33; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41; *Teddy Bear Clinic for Abused Children v Minister of Constitutional Development* 2014 2 SA 168 (CC) para 52. In *Christian Education of South Africa v Minister of Education* 2000 4 SA 757 (CC) para 36 Sachs J held that the concepts of self-worth and human dignity form the cornerstone of human rights. Also see fn 553 below.

303 *S v Makwanyane* 1995 3 SA 391 (CC) para 329.

marginalised groups, as a reaction to legalised unequal treatment. Themes of collective dignity and resistance to the infringement of these groups' dignity were included in the political documents of the movements fighting for equal rights. Although developments in international law after World War II did not produce a human rights culture in South Africa, the Roman Catholic Church as from 1951 onwards picked up on the teachings of their counterparts in the rest of the world to criticise apartheid on the basis that it infringed upon human dignity. It was only from 1982 onwards that the Dutch Reformed Church opposed apartheid as a denial of the *imago Dei* canon, which therefore impaired human dignity.

International documents and the dignity formulation of the South African Law Commission influenced the content of section 10 of the *Interim Constitution.* This formulation constituted the first entrenchment in South African law of Kant's categorical imperative that everybody has a right to the recognition and protection of his dignity. Section 10 of the *Constitution* finally embodies the Kantian elements of contemporary dignity, namely that everybody has inherent dignity which has to be recognised and respected. In addition, the differential feature of the common law *dignitas* contributed to the Constitutional Court's generic understanding of dignity to the effect that it encompasses *fama* and bodily integrity, previously exclusively protected by the common law remedy of the *actio iniuriarum*.

2.15.2 Collective dignity

Although it was a fundamental principle of the common law during the 1900's in South Africa that everybody is "equal in the eyes of the law", this principle was overridden by state and legislative provisions as justification for the "separate but equal" policy of the government.[304] Whether such an intrusion of the common law amounted to humiliation or undignified

304 *Minister of Post and Telegraphs v Rasool* 1934 AD 167.

treatment was never a legal consideration. It is an invariable consequence that South Africa's history of apartheid "assaulted the human dignity of persons on the grounds of race and colour alone."[305] As a result, the notion of the collective dignity of African people developed during this era as a reaction against unequal treatment, which resulted in the humiliation and indignity of the oppressed group - long before dignity was individualised in the *Constitution.*[306] Possibly the very first and sole judicial reference to the infringement of both individual and collective dignity in the context of apartheid was made by Gardiner AJA[307] in his dissenting judgment in *Minister of Post and Telegraphs v Rasool*[308] (*Rasool*) in 1934, well before the concept of equal individual dignity was developed in other legal systems:[309]

> In view of the prevalent feeling as to colour, in view of the numerous statutes treating non-Europeans as belonging to an inferior order of civilisation, any fresh classification on colour lines can, to my mind, be interpreted only as a fresh instance of relegation of Asiatics and Natives to a lower order, and this

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305 *S v Makwanyane* 1995 3 SA 391 (CC) para 262; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 10.

306 Apartheid itself, rooted in the ontological primacy of race, was a purported collective right.

307 Frederick Gardiner was born in London in 1874 from an Irish father and Austrian mother. The family immigrated to South Africa in 1878. Gardiner studied at the Universities of the Cape of Good Hope and Oxford. He was admitted to the bar in London and the Cape, and practised until 1910, when he was appointed Attorney-General of the Cape Province. In 1914 he was appointed as judge at the Cape Supreme Court, where he served as judge-president from 1926. In addition to later being an acting judge of the Appellate Court, Gardiner J authored a leading academic text book on criminal law and procedure. See Loveland *By Due Process of Law? Racial Discrimination and the Right to Vote in South Africa 1855-1960* at 176.

308 Rasool was an ethnic Indian living in Pietersburg, who instituted action against the Minister of Post and Telegraphs because he found the division of post offices into European and Non-European sections personally offensive, as he refused to share the facilities with Black people rather than with Whites or Coloureds, although he conceded that the facilities were equal. At the time, the Hertzog government argued that s 3(2) of the *Post Office Administration and Shipping Combinations Discouragement Act*, 10 of 1911, which empowered the minister to "issue such instructions as he may deem necessary for the conduct of and guidance of officers in carrying out the provisions of the act", was wide enough to authorise the segregation of the post offices without having to pass new legislation. On appeal, the majority ruled against Rasool, holding that a racial classification as such was not unreasonable.

309 1934 AD 167 at 189 – 191.

> is what I consider humiliating treatment. Such treatment is an impairment of the *dignitas* of the person affected, and it is the Legislature only that can cause that impairment.

Here Gardiner AJA harmonised the common law principle that prevents the impairment of a person's individual *dignitas* with the indignity experienced by a group of people resulting from humiliating treatment. This hierarchical downgrading of race in law coincides with the application of the old status-based concept of *dignitas,* before the concept evolved into the legalisation of the Stoic idea of individualised dignity in international law post World War II, and in many domestic constitutions thereafter. The theoretical basis of this *dictum,* namely that everybody, inclusive of groups, is entitled to equal dignity, can be regarded as the precursor of constitutional dignity worldwide, before the concept was recognised by Catholics in approximately 1937 and in international law after World War II.[310]

Post *Rasool*, judicial references to dignity in the context of undignified treatment based on race were scarce, notwithstanding developments in international law after World War II. In politics, the 1959 *Manifesto* of the Pan Africanist Council (PAC)[311] is most probably the first South African document that refers to the infringement of dignity as experienced by a minority group in the context of differential treatment rooted in race. This is significant as the ANC's *Freedom Charter* of 1955 does not refer to human dignity. With regard to dignity, the *Manifesto* stipulates that

> They [the African people] hold the granting of "right" on the basis of ethnological origin to be the entrenching of sectional arrogance and the

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310 See the discussion in section 2.13 above.

311 The Pan Africanist Congress is a political party that broke away from the ANC during 1959 as a result of ideological differences regarding the *Africanist* character of the members. The PAC was banned together with the ANC after the Sharpeville massacre in 1960. It refused to take part in the *Convention for a Democratic South Africa* (CODESA) but took part in the 1994 elections. See South African History Online date unknown http://www.sahistory.org.za/topic/pan-africanist-congress-pac.

> continued maintenance of contempt for human worth and disregard for human dignity.[312]
>
> They [the African people] do not, and will not tolerate or foster sectional arrogance, and continued contempt for the worth of the human personality and the disregard for human dignity.[313]
>
> To create an organisational machinery for the galvanising of the oppressed exploited and degraded African masses into an irresistible social force bent upon destruction of all factors and forces that have reduced that stature of man and retarded his growth and also bent upon the creation of conditions favourable for the restoration of man's worth and dignity and for the development of the African personality.[314]

The collective feeling of indignity experienced by Black people caused by apartheid was recounted by Nelson Mandela in his address to the Rivonia court in 1962, when he stood accused of sabotage and conspiracy:

> the lack of human dignity experienced by Africans is the direct result of the policy of white supremacy. White supremacy implies black inferiority. Legislation designed to preserve white supremacy entrenched this notion.[315]

During the 1960's many political organizations were established that promoted the Black Consciousness (BC) philosophy[316] and had as their primary purpose making Black people aware of their inherent dignity and worth. In *S v Cooper*[317] (*Cooper*) Boshoff J, in the framework of possible offences of terrorism committed by nine accused against state security, referred to various instruments of several Black Consciousness

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312 Para (j).
313 Para (j).
314 Para (m).
315 Mandela *Long Walk to Freedom* 321.
316 After the ANC and PAC were banned in 1960 a political vacuum existed, as there was no resistance movement against Black oppression. Black university students, who saw themselves firstly as Black people and secondly as Black students, first recognized the need for an organization to represent the voice of Black people. In 1968 a group of Black students led by Steve Biko formed the South African Students Organization (SASO), which developed the idea of BC to instil in Black people the realisation that they should recognize and embrace their own indigenous value systems. Implied in these value systems is the belief that any system that forces Blacks to renounce them is to be rejected and denounced. Another significant aspect of BC is the cry for cohesive group solidarity as a force of resistance in the struggle for liberation. Steve Biko particularly instilled the idea that Black people must embrace their own sense of dignity and worth, therefore BC is primarily a state of mind and attitude to life. See South African History Online date unknown www.sahistory.org.za/introduction-black-consciousness-movement.
317 (TPD) (unreported) case number CC254/75 of 15 December 1976.

Movements (BCMs) at the time, which included the concept of collective dignity in their constitutions. The BCMs had strong connections with the Christian Church, through which they sought to recover a common humanity and individual dignity. Their references to human rights were based on concerns for the religious and spiritual dimensions of freedom, although their views regarding individual rights were undeveloped.[318] Boshoff J cited the following excerpts from these documents in *Cooper*:[319]

Table 2-2: References in *Cooper*[320] to dignity contained in documents of the BCM

Document	Article	Description
South African Student Organization 1968 (SASO)[321]	Preamble	"… human dignity and promoting consciousness and self-reliance of the Black community;"[322]
SASO policy manifesto 1971	Clause 4(b)(ii)	"The basic tenet of black consciousness is that the black man must reject all value systems that seek to make him a foreigner in the country of his birth and reduce

318 Dubow *South Africa's Struggle for Human Rights* 85.

319 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 19.

320 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 19.

321 In December 1968 at Marianhill in Durban, Black student leaders from different Black universities, dissatisfied with NUSAS, the White-dominated National Union of SA Students, formed SASO, which was primarily responsible for formulating the concept of BC. Steve Biko, a medical student at Natal University, was one of its founders. Biko terminated his studies in 1972 to dedicate his life for promoting adult constituencies against White oppression. See South African History Online date unknown www.sahistory.org.za/topic/south-african-student-organisation-saso.

322 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 19.

Document	Article	Description
		his basic human dignity."[323]
Black People's Convention 1972 (BPC)[324]	Preamble clause (iv)	"There is a crying need in South Africa for Blacks to re-assert their pride, human dignity, group identity and solidarity through a political movement…"[325]
	Resolution 51/74 clause 4	"the absolute importance of the developmental stages of infancy and childhood for inculcating a positive sense of self-love, pride and dignity in black children,"[326]
	Resolution 21/72 clause (i)	"to call upon the leaders of the Bantustans to forthwith withdraw from this system in an effort to preserve their own dignity and to demonstrate with the

323 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 21. This phrase originated from a speech presented by Steve Biko in Cape Town in 1971. See South African History Online date unknown http://www.sahistory.org.za/archive/quotes-steve-biko.

324 The BPC was constituted at a congress held at Edenvale in Natal in 1972 by a group of Black people and White students from liberal universities, who wished to promote Black solidarity and to foster the BC philosophy. In addition, the BPC drew attention to the idea of Black Communalism, thereby contributing to Black Consciousness and radical socialism. The BPC, SASO and South African Students Movement (SASM) were the three most militant organizations to emerge from the BCMs, which continued their struggle despite having been banned. Steve Biko was named honorary life president after he died in detention in 1977. See South African History Online date unknown www.sahistory.org.za/topic/black-people's-convention-bpc.

325 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 27.

326 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 39.

Document	Article	Description
		struggle of the black people."[327]
Composite report of the interim executive of the 4th General Student Conference		"… it was stated that every Black man was convinced that he [Shezi] had died in the struggle, protecting the dignity, self-respect and human-beingness of his mothers and sisters who were being violated against on Germiston station."[328]

Boshoff J also discussed several press releases which referred to the cause of the BCM against oppression and unequal treatment:

Table 2-3: References to dignity in press releases by BPC and SASO

Document	Date	Description
Press Release by MOTLALEPULA KGWARE, president of BPC	Tuesday 9 January 1973	"This is more realistically an indication that Black people in this country are no longer prepared to suffer lying down but are prepared to fight for their own well-being and dignity at all costs."[329]

327 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 54.

328 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 63.

329 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 96.

Document	Date	Description
Joint Press Statement from BPC and SASO on the Frelimo Rallies	25 September 1974	"The very fact that Whites are said to be irate against the rally**,** shows that they wish to continue our oppression and have no desire whatsoever to recognise the dignity of the Black man."[330]

During the court proceedings much mention was made of the death of Mthuli Shezi,[331] at the time interim vice-president of the BPC. According to what was reported, Shezi died as a result of an accident at the Germiston station, whilst the BPC believed that he was in actual fact assassinated "as a result of his determination to defend the dignity of his fellow Black men."[332] At the funeral of Shezi in Thembisa, a pamphlet apparently drawn up by SASO was distributed, depicting the deceased's struggle against assaults on the dignity of the Black people:

> HE DIED WHILST DEFENDING AND PROTECTING THEM AGAINST MORAL, PSYCHOLOGICAL AND PHYSICAL ASSAULTS BY AN ARROGANT, RACIST, MONOLITHIC WHITE SOCIETY THAT SEES

330 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 126.

331 Mthuli ka Shezi, born in 1947, was a playwright, cultural activist and intellectual of the BCM. He was the president of the SRC at the University of Zululand and was later appointed as vice-president of the BPC. Through his writings and plays he introduced the ideas of Black Consciousness to a wider audience. He died in hospital as a result of serious injuries sustained after being pushed in front of an oncoming train at Germiston station in 1972, reportedly by a White station cleaner and boss of a female worker whom he had previously tried to drench with a hose pipe when Shezi rescued her. The White man recognized Shezi at the station a few days after the incident and apparently pushed Shezi in front of the train, as was related by Shezi in hospital shortly before he died. See South African History Online date unknown http://www.sahistory.org.za/people/mthuli-ka-shezi.

332 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 98.

> NOTHING OF VALUE, WORTH, INTEGRITY, HONOUR AND DIGNITY IN THE BLACK MAN[333]
>
> HIS ASSASSINAT10N IS OUR PAINFUL REMINDER ABOUT THE URGENCY WITH WHICH BLACK PEOPLE SHOULD FIGHT FOR THEIR LIBERATION AND HUMAN DIGNITY.[334]

At the unveiling of Shezi's tombstone on 17 December 1973 a tribute by the BPC read as follows:

> Mthuli ka Shezi stood upright and with dignity against all the indignities and assaults directed at the Black lives.[335]
>
> Mthuli ka Shezi had freed himself from Psychological oppression and had realised that the assaults on our dignity are part of a warfare to instil inferiority complexes on the Blacks.[336]
>
> In defence of the inherent dignity and pride of the Black man he will rank as a Black martyr and shall live in our minds as a symbol of Solidarity and the Black Struggle for liberation.[337]

The preamble of the *African Charter of Human and Peoples' Rights* (1982) recognises the process of the actualization of dignity for Africans in order to express equality and liberation - "still struggling for their dignity and genuine independence." Albert Luthuli[338] referred to this struggle in his

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333 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 99.

334 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 99.

335 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 101.

336 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 99.

337 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 101.

338 Chief Albert John Luthuli, born in 1898 near Bulawayo, became Africa's first Nobel Prize winner in 1960. He was President-General of the ANC from December 1952 until his death in 1967. After completing a teaching course in Edendale near Pietermaritzburg, Luthuli ran a small primary school in the Natal uplands. It was at this time that Luthuli became actively involved in Christian religion and teaching, which profoundly influenced his political stance and beliefs for the rest of his life. In 1920 Luthuli received a government grant to attend a higher teaching course at Adams College near Durban, at the time regarded as one of the best schools in southern and central Africa. From this period Luthuli became actively involved in his profession and the community, assuming leadership roles in the Natal Natives Teachers Union and the Adams College football team, and he held the chieftaincy of the Groutville tribe from 1935 for 17 years. In 1938 he attended an international missionary conference in India, and in 1948 spent 9 months on a church-

Nobel lecture *Africa and Freedom* on 11 December 1961, after the Nobel Prize for Peace was awarded to him in 1960, stating that Africans'

> strivings for nationhood and national dignity have been beaten down by force.[339]

This struggle for collective dignity manifested in the documents of the freedom movements referred to above, as quoted in *Cooper*. From these it is possible to distil a concept of dignity that emanates from assaults on the dignity of groups who had to tolerate discrimination; an ideal that many black South Africans were prepared to die for. It has to do with the normative status of a group of people having distinct identity, struggling for the recognition of their right to democratic self-governance, nationally and globally. The distinct identity of Black people originated because of the infringement of their collective dignity, as "they had no dignity worth protecting."[340]

In a prepared press release for 9 September 1974, accused number two in *Cooper,* Justice Myeza, together with the publications director of SASO, Norman Dubasane, discussed Mozambique's liberation by Frelimo during the course of 1974. The newspapers subsequently refused to publish this release, but it was nevertheless produced in *Cooper* as evidence relating to the charges against the accused. The release held that "the dignity of the Black man has been restored in Mozambique."[341] The restoration of

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sponsored tour of the USA. Insights gained during these trips shaped his political mind and he became involved in politics at the relatively late age of 50 years. Throughout his political career he maintained the idea of using non-violent action to attain change in South Africa, and enjoyed domestic and international respect for his impeccable moral character. See South African History Online date unknown http://www.sahistory.org.za/people/chief-albert-john-luthuli.

339 Luthuli "Africa and Freedom."

340 *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) para 145.

341 *S v Cooper* (TPD) (unreported) case number CC254/75 of 15 December 1976 p 119. The restoration of collective dignity is not to be equated with the restoration of the "civil and human dignity of victims" (the preamble and various sections of the *Promotion of National Unity and Reconciliation Act* 134 of 1995) of the Apartheid system by way of the testimonies of the victims, as deployed by the Truth and Reconciliation Commission (TRC).

black people's dignity in Africa had been a major theme in freedom narratives, as was confirmed by Albert Luthuli:

> Our people everywhere from north to south of the continent are reclaiming their land, their right to participate in government, their dignity as men, their nationhood. Thus, in the turmoil of revolution, the basis for peace and brotherhood in Africa is being restored by the resurrection of national sovereignty and independence, of equality and the dignity of man.[342]

The ANC declared in a public statement following its Annual 39th Conference held in Bloemfontein on 15-17 December 1951 that the purpose of the proposed national mass action against unjust racial and discriminative laws was to achieve

> the creation of conditions which will restore human dignity, equality and freedom to every South African.[343]

Following the new constitutional dispensation, the *Constitution* is restoring the collective dignity of Blacks by acknowledging that each person has inherent human dignity which has to be respected and protected.[344] This injunction manifests specifically in the equality analysis employed by judges to interpret provisions in the *Bill of Rights* in order to establish whether discrimination impairs dignity. It also functions as an interpretative tool in the context of transgressions of dignity committed in the apartheid era.[345] The contextualization of dignity in the framework of South Africa's history resulted in the paradigm of a "grand narrative" in South African constitutionalism,[346] as evidenced by the *dictum* of O'Regan J in *Makwanyane*:[347]

> Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of

342 Luthuli "Africa and Freedom".
343 Naiker 30 June 1972 www.anc.org.za/show.php?id=2595.
344 Section 10.
345 De Vos 2001 *SAJHR* 13.
346 Also see the discussion in chapter 4.4.4 below.
347 1995 3 SA 391 (CC) par 329.

> human dignity is the touchstone of the new political order and is fundamental to the new Constitution.

The theoretical basis for collective or group (human) dignity is debatable, as the source of human rights is individual dignity rooted in Kant's categorical imperative. However, in South African context the desire for respect as members of a group resulted in the very first constitutional recognition of the concept of collective dignity, a concept which preceded the recognition of the principle of individual dignity as protected by section 10 of the *Constitution*. In current law, the collective dignity of humanity, "shared dignity," is granted protection as a human right against being infringed upon and violated by certain actions.[348] As Feldman[349] argues, collective dignity is one of the subcategories of the generic notion of dignity, which

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

Burchell[350] remarks that the rights to dignity and equality have a symbiotic relationship, and an infringement of the right to equality can manifest in an infringement of group or individual dignity:

> Infringements of the right to equal treatment of persons who may form part of historically vulnerable groups or other persons, and invasions of their privacy, are particular manifestations of group or individual dignity.

The notion of collective dignity that arose in South Africa in the era before the *Constitution* can thus be described as a subcategory of the generic concept of equal and inherent dignity that was adopted in the *Universal*

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348 Neuhäuser "Humiliation: The Collective Dimension" 21-33.
349 Feldman *Civil Liberties and Human Rights in England and Wales* 126. Also see fn 212 above, as well as fn 206 in chapter 3.
350 Burchell *Personality Rights and the Modern Actio Inuriarum* 329.

Declaration in 1946 and in the *Basic Law* as a result of the evolution of the concept in the first half of the nineteenth century.[351]

2.15.3 On human dignity in theology

2.15.3.1 Human dignity in Catholicism

As has been discussed previously, Catholicism first connected the secular idea of human dignity with individual rights in the Irish *Constitution* of 1937. This doctrine was propounded in South Africa too.[352] However, the Catholic Church maintained a strict state/church divide and held that although the Church should not be involved in party politics, its members should

> follow their conscience and defend human rights when these were threatened by the state.[353]

It was only during the late 1960's that the Catholic Curch adopted a more critical public stance against apartheid that necessitated defining it as an infringement of human dignity, thereby opening the door for non-sectarian collaboration in matters of human rights and social justice.[354] In a similar vein, the Dutch Reformed Mission Church Synods in 1978 and 1982 held that the church was, in terms of its prophetic calling, obliged to criticise the state if its policies could not be reconciled with the gospel,

> because thereby the human dignity of not only the disadvantaged populations, but the human dignity of all involved is affected.[355]

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351 See the discussion in section 14 above.
352 It was not only the Catholic Church that voiced criticism against apartheid. Starting in the late 1960's, the Anglican Church (see, in general Dlwati *The Church as a Social Conscience: The Quest for Human Dignity* 60-98) and the Methodist Church (see, in general Brackney (ed) *Human Rights and the World's Major Religions* 128) actively criticized apartheid.
353 Denis 2013 *ETL* 414.
354 Denis 2013 *ETL* 423.
355 Pauw 2010 *Scriptura* 301.

In true Catholic tradition Denis Hurley, archbishop of Durban from 1947-1992, added his voice to those of the black political movements, at that stage the sole opposition of the South African government's apartheid policy. As far back as 1951, when the Catholic hierarchy was first established in South Africa, he criticised apartheid as an affront to human dignity.[356] In 1965 Owen McCann, archbishop of Cape Town, wrote that a declaration by the Church against racism would "uphold the dignity of all men as sons of God and brothers of Christ."[357] Archbishop Hurley held in a lecture in Cape Town in January 1964 that "the evil of apartheid is that it refuses recognition of human dignity…"[358]

In a similar vein, advocate Herbert Vieyra,[359] a pioneering lay Catholic and a member of the Third Dominican Order,[360] argued in various talks and papers during the 1950's and 1960's that every person's human dignity has to be recognised, especially in the face of apartheid laws that denied this recognition for Blacks.[361] According to him, human beings are endowed with dignity and inalienable rights, which were being infringed upon by apartheid. These rights are:

> The right to existence, to dignity, sustenance, worship, to integrity, use and normal development of his faculties, to work and the fruit of work, to private ownership of property, to marriage and the procreation and education of children and to association with his fellow man.[362]

Vieyra also criticized the "double standards" of White Catholics who on the one hand professed that God died for the collective sins of all people, but

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356 Anon date unknown http://legacy.fordham.edu/campus-recources/enewsroom/topstories.
357 Denis 2013 *ETL* 415-416.
358 Denis 2013 *ETL* 418.
359 Born from Jewish parents in 1902, who emigrated from the Netherlands in 1896, Vieyra studied law at the University of the Witwatersrand, qualified as a lawyer in 1927, and became an advocate in 1947. Advocate Vieyra was appointed judge of the Supreme Court in 1963 and died of a heart attack in 1965. See James 2008 *STE* 4.
360 An organisation of lay people affiliated to the Dominican Order, a religious community of friars within the Catholic Church. See James 2008 *STE* fn 3.
361 James 2008 *STE* 1.
362 James 2008 *STE* 6; 7.

on the other hand denied equal human dignity to Black people in South Africa. He accused them of being nominalists and voluntarists who placed too much emphasis on the differences between people, rather than adhering to the Catholic principle that everybody is equal in the eyes of God.[363] At a conference organized by Vieyra and the Joint Council for Catholic Africans and Europeans (JCCAE)[364] early in March 1951, of which he was elected the first president in 1941, Vieyra proclaimed that Christian realism is based on the dignity of all men, which should be the sole determination between White and Black people.[365]

In December 1952, the JCCAE held that it would not support the Defiance Campaign launched in 1952 by the ANC and the PAC,[366] since the Council was wary of the fact that the Campaign was not being conducted without hatred

> because there is no strong moral probability that such a campaign will be able to achieve a new order in society, more in accord with justice and charity.[367]

Although many Black members were dissatisfied with this statement as they believed that the Defiance Campaign was the culmination of many years of indignities suffered,[368] it was to become the characterization of the Catholic Church's general policy for criticising the government's apartheid legislation. On the one hand, the Church was wary of the consequences of challenging governmental policies directly or

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363 James 2008 *STE* 12.
364 The JCCAE was a sub-committee of the Catholic Federation and was structured to facilitate interracial cooperation within the church. Both were allegedly dismantled in 1967. See James 2008 *STE* fn 51.
365 James 2008 *STE* 12.
366 The ANC and the PAC launched this campaign as a civil disobedience strategy in reaction to the *Criminal Law Amendment Act* 8 of 1953, which forbade civil disobedience campaigns. By 1952 over 8000 people had been arrested for defying laws on curfews, passes and separate amenities. See James 2008 *STE* 12.
367 James 2008 *STE* 12.
368 James 2008 *STE* 12.

encouraging laymen to denounce apartheid,[369] and on the other hand wanted to appease the government as a result of its decision to close down all the Catholic schools in accordance with the *Bantu Education Act* 47 of 1953, when state subsidies in respect of these schools were discontinued.[370] In addition, the Church was during the 1950's still in the hands of missionaries, despite having received its own hierarchy in 1951.[371] Only two missionaries were Black, and afraid of being expelled from the country if they publicly opposed apartheid, they instead concentrated on their pastoral duties.[372] In lamenting this stance of the Church, Archbishop Hurley in a memoir written in 2004 shortly before he died, stated that:

> Unfortunately, on the question of racism, the South African hierarchy missed the boat. We had thought not in advance of the opportunity given by the topic of human dignity and, of course, by the time racism was mentioned it was too late for us to make application for the right to intervene on the subject.[373]

It was only from the late 1980's that the Catholic Church embarked on a more public and vigorous stance against apartheid, most probably as a result of Pope John Paul II's address to the Special Committee of the United Nations organization against apartheid in 1984, when he stressed that his predecessor Paul IV stated to the same organization in 1974 that the Church was committed to the "cause of promoting human dignity."[374] He reiterated that the principle governing this obligation was that

> Man's creation by God "in his own image" (Gen *1,27)* confers upon every human person an eminent dignity; it also postulates *the fundamental equality of all human beings.*[375] (emphasis in original text)

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369 James 2008 *STE* 13.
370 Denis 2013 *ETL* 419.
371 Denis 2013 *ETL* 419.
372 Denis 2013 *ETL* 419.
373 Denis 2013 *ETL* 411.
374 Pope John Paul II "Address to Members of the Special Committee of the United Nations Organization Against Apartheid."
375 Pope John Paul II "Address to Members of the Special Committee of the United Nations Organization Against Apartheid."

In his address to the South African bishops in Rome in 1987 John Paul II explicitly held that the Church has a duty to address political injustices. As a result, Archbishop Hurley and seven others, in a strongly worded pastoral letter written in 1988, called for the abolition of apartheid and the lifting of restrictions opposing organizations, holding that "human dignity is the centre of the transformation we all desire."[376]

It is significant to note that two prominent opponents of the apartheid regime, ASP Mda[377] and AM Lembede,[378] who shared similar theological

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376 Hurley 1988 http://www.sacbc.org.za/wp-content/uploads /2013/05/PASTORAL-LETTER-OF-THESOUTHERN-AFRICAN-CATHOLIC-BISHOPS-CONFERENCE-ON-STATE-ACTIONS.

377 Ashby Solomzi Peter Mda was born on 6 April 1916 in the Hershel district near Lesotho and died on 7 December 1993 in Bloemfontein of heart failure. He and his siblings studied at a local Catholic school and thereafter he furthered his studies at other Catholic institutions. After various stints as a gardener and kitchen boy, he found a teaching job at St John Berchman in Orlando in 1938. By 1936 he was actively involved in politics and threw himself behind the then leader of the ANC, Dr AB Zuma. During this period he played an active role in the formation in the ANC Youth League and participated in a campaign of African teachers for higher wages in 1940. Mda regarded the wage campaign as a turning point in his career, because he was also a devoted Catholic who saw teaching as vocation, and the Catholics were opposed to the wage campaign. Thereafter he was mandated by the League, amongst others, to draw up the Freedom Charter. In 1948 he was elected president of the Youth League and later set up a working committee to oversee the League's activities. He committee was comprised of Nelson Mandela, Walter Sisulu and Oliver Tambo. The League presented the Programme of Action to the ANC in 1949 as their leading document. See South African History Online date unknown http://www.sahistory.org.za/people/ashby-solomzi-mda.

378 Anton Muziwakhe Lembede was born on 21 March 1914 in Eston, Kwa-Zulu Natal, and died in 1947. His mother was a teacher who home-schooled him until the elementary school stage. In 1927 he converted to Catholicism and began to attend the Catholic Inkanyezi School, where he performed very well academically and even taught other learners. He secured a scholarship to study at the prestigious Adams College near Durban from 1933-1935, where Albert Luthuli was one of his teachers. After 2 years of teaching he obtained a distinction in Latin in the matriculation equivalence exams. Thereafter he obtained the BA and LL.B degrees within 6 years through UNISA. In 1943 he changed career and started serving articles at the law firm of Dr Pixley ka- Isaka Seme, veteran ANC leader in Johannesburg, in which period he revived his friendship with his ANC compatriots ASP Mda and Jordan Ngubane. He received an MA in Philosophy in 1945 through UNISA and qualified as a lawyer in 1946, whereafter he enrolled for a doctorate in law. In 1944 he was instrumental in the formation of the ANC Youth League and was an architect of the 1949 Programme of Action. Throughout his political career he was a staunch critic of communism, believing that communism was set to destroy African Nationalism. See South African History Online date unknown http://www.Sahistory .org.za/people/anton-muziwakhe-lembede.

views with those of Vieyra on the subject of human dignity, were practising Catholics.[379] They turned away from liberal politics as a result of their disillusionment with the prevailing political system.[380]

2.15.3.2 Human dignity in the Reformation

The idea, in reformist theology, that man possesses inherent human dignity, is based on the doctrine that man is created in the image of god. Calvin, the prolific theologian of the Reformation, did not explicitly refer to human dignity, but based his anthropological teachings on the moral law that a human being has innate worthiness (*nobilitas*) which is rooted in the image of God.[381] According to Calvin, the creational dignity expressed by the *imago Dei* has not been destroyed as a result of the fall of man.[382] In conjunction with this benefit, the common grace of God is bestowed on all mankind.[383] Man has a reciprocal duty not to violate the God-given dignity of another, and this feature is the foundation of the individual's spiritual and civil liberties.[384] Vorster[385] argues that although Calvin did not use the term human dignity as it is understood in modern constitutionalism, he paved the way for understanding the human being as having dignity through his relationships with humankind, due to the *imago Dei* idea.

Calvin's teachings manifested in the views of the Dutch Reformed Church (DRC) in South Africa in the early 1970's pertaining to the countries' politics. The first explicit reference to human dignity made by the DRC was made in 1971 by a commission on racial relations mandated by the Dutch Reformed Church in Africa (DRCA).[386] An *ad hoc* commission produced a

379 James 2008 STE 10; Walshe *The Rise of African Nationalism in South Africa* 342.
380 James 2008 *STE* 10.
381 Vorster 2010 *IdS* 44, *Supplement 3* at 199.
382 Vorster 2010 *IdS* 44, *Supplement 3* at 200.
383 Vorster 2010 *IdS* 44, *Supplement 3* at 201.
384 Vorster 2010 *IdS* 44, *Supplement 3* at 201.
385 Vorster 2010 *IdS* 44, *Supplement 3* at 211.
386 Pauw 2010 *Scriptura* 296. However, Beyers Naudé was the most well-known member of the DRC and advocate against apartheid, who during his life-time

report published as *The Bible and the relationships between races and the peoples,* consisting of an introduction and six chapters, discussing *inter alia* the church's role in race relations in the light of Scripture.[387] In the fifth chapter, human dignity is discussed as the very first principle in the framework of biblical norms as the "basis of all human relations". This claim is rooted in two biblical texts:

> Because God created man [sic] in his image (Gen 1:28) nobody may despise another on the grounds of faith, cultural or racial differences. Because peoples and nations are equal before God, He shows no partiality (Acts 10:34; Rom 2:11; Eph 6:9; Gal 2:6, etc.) People who impair the human dignity of another, usually do it out of superiority, which is unbiblical, and injures the feelings of the other person to such an extent, that tension results. … [Such] attitudes can be seen in our society in South Africa and are strongly condemned in the light of Scripture on the grounds of the human dignity of all people. To be treated with dignity is one of the major needs of the Black man in our country.[388]

Chapter Six of the Report critically examines issues such as the land divide, the political exclusion of blacks, and major socio-economic problems specific to the South African historical background.[389] In applying the norms discussed in the previous chapters, the writers expressed their sorrow at

> situations where the dignity of Blacks is injured, for instance with regard to such matters as common worship, the forms of address, facilities for worshipping in white areas, "pass laws", etc.[390]

In 1982 the World Alliance of Reformed Churches (WARC) convened in Ottawa. This event was attended by a number of Black and White South African theologians. Apartheid was given a prominent place on their agenda.[391] The central theme of the conference was human dignity and

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advocated the values of reconciliation in Christ and human dignity. See Fouché, Burnell and Van Niekerk 2015 *JSIA* 1-10.

387 Pauw 2010 *Scriptura* 298.
388 Pauw 2010 *Scriptura* 298.
389 Pauw 2010 *Scriptura* 298.
390 Pauw 2010 *Scriptura* 298.
391 Alan Boesak of South Africa was elected president of the WARC. See Pauw 2010 *Scriptura* 301.

reconciliation in Christ.[392] The opening statement of its "Resolution on Racism in South Africa" held that "God in Jesus Christ has affirmed human dignity." Human dignity was explicitly connected with reconciliation in Christ, a theme which was endorsed by the synod of the DRMC in 1982 and referred to in subsequent publications.[393]

Although the DRC based its theory of human dignity on the theme of reconciliation, this link refers to a theory that is context-specific in the South African apartheid framework – not as the basis of universal human rights, but of "all human relations."[394] The reference to *imago Dei* coincides with the application of the principle in Catholicism, which refers to universal and egalitarian dignity "because peoples and nations are equal before God, He shows no partiality."[395] Dignity here is not defined, but seen negatively from the perspective of infringement through the medium of apartheid. This brings the idea of human dignity in the reformation a step closer to the constitutional principle of dignity.

2.15.4 Initial formulations of individual dignity in politics and law

Given the governing National Party's stance taken against human rights and its protection through international law, it is not surprising that the principle of dignity was slow to take form in law and politics during the apartheid era, notwithstanding the prominent role it had assumed in the BCM and in theology.[396] Nevertheless, the preamble of the *Tricameral*

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392 2010 *Scriptura* 301.

393 In 1978 this synod was responsible for the *Confession of Belhar*, which rejected any ideology that emphasised racial differences in people.

394 See fn 388 above.

395 See fn 388 above.

396 In 1989 the South African Law Commission explained South Africa's stance taken against international law, and its local impact: "it cannot be envisaged that human rights norms as enshrined in international law can to any extent play a part **-** let alone a significant part - in the decision of the protection of group and individual rights in South Africa. Safety does not lie in the hope that our courts will apply the norms of international law", as quoted by Sarkin 1998 *UPJCL* 179. Further, a panel consisting of three South African lawyers (Marinus Wiechers, Arthur Chaskalson

Constitution of 1983[397] proclaims that the Republic's constitution regulating the newly-instituted tricameral parliament[398] *inter alia* aims to "respect and to protect the human dignity, life, liberty and property of all in our midst." Here law still endorsed colour, as equal citizenship for Blacks and fundamental rights for all were conspicuously excluded.[399] This aim "to respect and protect human dignity" can be described as a mere declaration and aspiration of the state, similar to the provisions of the *Weimar Constitution* of 1919.[400] It was not based on the entrenchment of individual rights against state authority.

Worldwide opposition to apartheid during the 1980's caused the National Party government to reconsider its mindset against the protection of civil liberties and fundamental rights, and as a result the recognition of human dignity in politics and law was beginning to take shape. On 23 April 1986 the Minister of Justice, Kobie Coetsee, instructed the South African Law

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and Gerhard Erasmus) was appointed in 1998 to provide a preliminary version of a constitution for Namibia's Constitutional Assembly before a final constitution was drafted by a Standing Committee, representing the political parties and the three South Africans involved. According to Wiechers, some of the proposals for a constitution drew heavily on the provisions of the *Universal Declaration* and the *European Convention for the Protection of Human Rights and Freedoms.* See Spigno "Namibia: The Supreme Court as a Foreign Law Importer" 161. The preamble of the *Constitution of the Republic of Namibia*, 1990 stipulates that: "w**hereas** recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace" (Emphasis in the original text.) Article 8 ("Respect for Human Dignity") of the same *Constitution* provides that: "The dignity of all persons shall be inviolable. (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed. (b) No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

397 *Republic of South Africa Constitution Ac*t 110 of 1983.

398 The Tricameral Parliament consisted of The House of Assembly (White representatives); The House of Representatives (Coloured representatives) and The House of Delegates (Indian representatives) led by an executive president who had substantially more powers than its predecessor, the prime minister. This shift reduced the powers of parliament. The respective Houses had a proportional vote count of 4:2:1. See South African History Online date unknown http://www.sahistory.org.za/archive/tricameral-parliament#sthash.QyxjbtKp.dpuf.

399 Blacks attained automatic citizenship in the homelands ("Bantustans") where they were born and had no legal rights outside these homelands.

400 See the discussion in section 14.1 above.

Commission (the "Law Commission")[401] to investigate the entrenchment of "group and human rights", although the government's motives were debatable, as they were endeavouring to appease international relations and in all probability expected that the Law Commission would produce a document protecting human rights "premised on the notion of racially defined group rights."[402] The Law Commission's findings were compiled in three reports, which included provisional bills of rights, published in 1989, 1991 and 1994, to the effect that a bill of rights is a *sine qua non* for the protection of human rights in South Africa. The conclusions contained in the first two reports eventually resulted in the acceptance of a draft bill of rights by all the parties represented at CODESA in December 1991.[403] These developments culminated in the National Party's *Draft Charter of Fundamental Rights,* published on 2 February 1993 in *The Argus,* of which article 3 stipulates that the State shall, in its legislative, executive and judicial acts, respect and protect the human dignity of every person. The *Draft Charter of Fundamental Rights* was influenced by reports of the Law Commission, which in turn drew upon comparative constitutional law, particularly that of the US, Canada, Germany and the *European*

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401 The SA Law Commission was established by the *South African Law Commission Act,* 19 of 1973 to "make recommendations for the development, improvement, modernization or reform" of South African law. During these years, the Commission mostly confined its activities to the development of the common law. The 1986 instruction was attended to by a sub-commission under the chair of Judge PJJ Olivier, to whom the government's change of heart regarding the entrenchment of fundamental rights can be attributed. Olivier J became a foremost advocate for human rights and acted as a self-imposed mediator between the commission and the government, to introduce the idea of a bill of rights to the members of the government and appease their sentiments against equal rights. See De Vos 1992-1993 *CHRLR* 286. As from 2002 the Commission has been known as the South African Law Reform Commission, which name change was mandated by the *Judicial Matters Amendment Act* 55 of 2002.

402 Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 31.

403 De Vos 1992-1993 *CHRLR* 285-286. The Commission concluded at 41 of Project 58: *Working Paper 25 Group and Human Rights* (1989) that: "Our survey of the main, currently relevant, schools of thought shows that the idea of the existence of certain fundamental human rights is a recurring theme in most philosophical movements. It is only in the extreme form of positivism, where most moral considerations are placed outside the science of law, that there is no room for the existence of fundamental human rights."

Convention on Human Rights.[404] This document signals a "power shift" transfer from autocracy to democracy in South Africa.

During the course of its tenure the Law Commission[405] formulated the following articles in its provisional drafts of a bill of rights, to codify the protection of human dignity:

Table 2-4: Proposed formulations by SA Law Commission to protect human dignity:

Document	Article	Description
SA Law Commission Project 58: First Report on Group and Human Rights (1989)[406]	2	"The right to human dignity and equality before the law, which means that there shall be no discrimination on the ground of race, colour, language, sex, religion, ethnic origin, social class, birth, political or other views or any disability or other natural characteristic: ..."
SA Law Commission Project 58: Summary of Interim Report on	"Article 9: Good name and reputation and dignity."	"(a) Everyone has the right to the protection of his or her good name

404 Davis 2003 *IJCL* 186.

405 Judge of Appeal G Viljoen was chairperson of the Law Commission until December 1998 and was succeeded by Judge HJO van Heerden, whilst Judge PJJ Olivier was vice chairperson of the Law Commission for December 1998. Judge Olivier SC, as he then was, was a member of the Law Commission from 30 September 1982 until 1 March 1986, when he became a full-time member. He served as such until 31 March 1995. Advocate GG Smit was a full-time member until 31 December 1995. Other members appointed during the 1988-1989 period were Prof DJ Joubert, dean of the Faculty of Law of the University of Pretoria; Mr JE Knoll, practising advocate; RP McLaren SC and Dr WGM van Zyl, regional court President. Advocate McLaren resigned in late 1990 after which Prof CRM Dlamini, Registrar: Academic at the University of Zululand, became the first black person to be appointed as a member of the Commission. He served until 31 December 1995. See SA Law Reform Commission *Fourteenth Annual Report 2012-2103* p 11; 119.

406 At 471.

Group and Human Rights (1991)[407]		and reputation.[408] (b) Everyone has the right to the recognition and protection of his or her dignity."

A comparison between the two formulations in the reports of 1989 and 1991 indicates that the Law Commission regarded dignity and equality as being on an equal footing in their first report, without connecting dignity with rights and without analysing the idea into different elements. In the *Interim Report* the authors explained their suggestion of separating dignity from equality as per their *First Report*:

> The right to dignity merits separate mention and properly belongs to the right to a good name and reputation…[409]

The Law Commission's connection of dignity with the right to a good name and reputation (*fama*), being personality rights protected respectively under the common law by the *actio iniuriarum* and the action for defamation,[410] has proven to be a visionary piece of legal drafting, as

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407 At 45.

408 In their *Interim Report* the Law Commission amended the human dignity clause to be read in conjunction with the clause pertaining to one's good name, reputation and dignity (Project 58: *Summary of Interim Report on Group and Human Rights* 45 article 9). This amendment was based on the differentiation of the common law remedies against the infringement of *dignitas* pertaining to one's feelings of self-worth; good name and reputation.

409 SA Law Commission Project 58: *Interim Report on Group and Human Rights* (1991) at 304.

410 In terms of the common law, the generic idea of the protection of one's *dignitas* is dogmatically separated into protection for *corpus* (unlawful deprivation of personal liberty,) *dignitas (*insult to one's feeling of pride and worth and impairment of privacy) and *fama* (reputation), which is defined by De Villiers as: "The specific interests that are detrimentally affected by the acts of aggression that are compromised under the name of injuries are those which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation. By a man's reputation here is meant that character or moral or social worth to which he is entitled amongst his fellowmen, by dignity that valued and serene condition in his social and individual life which is violated when a person is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt." See *Roman Dutch Common Law of Injuries* 24, also quoted in *R v Umfaan* 1968 TS 62 at 67.

Froneman J found four years later in *Gardener v Whitaker*[411] that the right to dignity includes *fama.*[412] Seven years after the Law Commission's formulation, the Supreme Court of Appeal held in *National Media Limited v Bogoshi*[413] that the right to dignity includes *fama,* which decision was endorsed four years thereafter by the Court in *Khumalo v Holomisa.*[414] Although the Commission referred to dignity in the perspective of the common law right to one's good name and reputation; already there is an acknowledgement that everyone is entitled to the right to dignity. This acknowledgement constitutes an equalisation of the notion as opposed to the private law conception of *dignitas,* which is concerned with an individual's sense of self-worth.[415] In this regard, Burchell[416] confirms that:

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411 1995 2 SA 672 (EC) para 689D. During the interim phase of the *Constitution,* the provincial courts made inconsistent decisions on the issue of the common law protection of *fama* in the framework of the constitutional protection of dignity. In *Potgieter v Kilian* 1996 2 SA 276 (N) reputation was excluded from the right to dignity as protected by section 10 of the *Interim Constitution,* based on the reasoning that the common law meaning of words takes preference if the words used in legislation are unclear. Froneman J's reasoning was confirmed in later judgments in the Western Cape, and eventually by the Constitutional Court in *S v Zuma* 1995 2 SA 642 (CC). Also see the discussion in chapter 4.3.8.

412 This formulation by the Law Commission also foreshadowed the express direct horizontal application of the *Constitution* to legal relationships between private persons (natural or juristic), although the Court, with a majority of nine to two and shortly before the enactment of the *Final Constitution*, found in *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 67 that the *Interim Constitution* operated only with indirect application: "The provisions of the Constitution are not in general capable of application to any relationship other than that between persons and legislative organs of the State at all levels of government… The indirect application of the *Interim Constitution,* however, did not affect the Court's powers to amend the common law, as s 35(3) of the *Interim Constitution* stipulates that "in the interpretation of any law and in the application and development of the common law and customary law, a court shall have due regard for the spirit, purport and objects of this Chapter."

413 1998 4 SA 1196 (SCA) para 1207D-I.

414 2002 SA 401 (CC).

415 As O'Regan J noted in *Khumalo v Holomisa* 2002 SA 401 (CC) para 27: "In our new constitutional order, no sharp line can be drawn between these injuries to personality rights."

416 Burchell "The Protection of Personality Rights" 653. The Federal Constitutional Court differentiates dignity from personality rights through having created a general right to the protection of the individual personality by reading art 2(1) (personal liberty) in conjunction with art 1 (dignity) and by allowing limitations on all other

> symbiotic growth of both the personality rights protected by the actio iniuriarum and equivalent rights under the Constitution is inevitable and highly desirable,

and further

> the further potential which lies within the *actio iniuriarum* to protect dignity in a Bill of Rights is enormous.

The expansion of the common law is supported by the *dictum* of Kentridge AJ[417] to the effect that

> Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.

The connection of dignity with reputation coincides with the broader use of the concept in international law, which connotes that inherent dignity is impaired when an individual is subjected to degrading and humiliating treatment.

2.15.5 On dignity and dignitas

It is no wonder that the South African Law Commission connected the private law concept of *dignitas* with constitutional dignity. As has been discussed earlier,[418] Gardiner AJA already in 1934 made the connection between common law *dignitas* and infringement by legislation on the collective dignity of groups in his dissenting judgment in *Minister of Post and Telegraphs v Rasool.*[419] The protection of personality rights,[420] rooted in Roman law, was received as such in our law of delict as well as in

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rights except dignity. See Mahlman "Human Dignity and Autonomy in Modern Constitutional Orders" 382 fn 82.

417 *S v Zuma* 1995 (2) SA 642 (CC) para 15, quoting from *Attorney-General v Moagi* 1982(2) Botswana LR 124,184.

418 See fn 310 above.

419 1934 AD 167 at 189 – 191.

420 Personality rights are rooted in the legal recognition of human autonomy (in the Kantian sense) and the postulation of subjective rights by Samuel von Pufendorf. In *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) the court confirmed the existence of the following personality rights: life, dignity (honour), reputation, image and bodily integrity.

criminal law. As South Africa has a rich personality rights jurisprudence,[421] several academics have recognised the link between the dogmatics of private law *dignitas* and its consequential doctrinal basis in human rights,[422] because some of these personality rights correspond with the human rights enunciated in the Bill of Rights (for example the rights to freedom, bodily integrity, human dignity and privacy). Against this backdrop Van der Vyver[423] remarked that

> ...the right to human dignity is among those which the courts in South Africa have always attributed to the norms of natural law.

Burchell[424] argues that delictual protection of *dignitas* is

> undoubtedly one of the most impressive and enduring legacies of Roman law, and a feature which places the South African Law of Delict in the forefront of the protection of what is arguably the most fundamental of all human rights.

Fundamentally, the common law concept of *dignitas* is rooted in its status-based and inegalitarian understanding in the Roman social framework; thus viewed from society's distinctive perception of a person's status, character and position, presumably attained by birth, profession; wealth or gender, and interpreted widely by the courts,[425] so as to include feelings of

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421 Ackermann *Human Dignity: Lodestar for Equality in South Africa* 87.

422 Also see Ackermann *Human Dignity: Lodestar for Equality in South Africa* 87.

423 Van der Vyver 1995 *SALJ* 598; 599.

424 Burchell "The Protection of Personality Rights" 650, also quoted in Ackermann *Human Dignity: Lodestar for Equality in South Africa* 87.

425 *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C), the *locus classicus* judgment on the protection of the right to privacy in South African law. *In casu*, Watermeyer AJ interpreted *dignitas* so widely as to encompass the protection of all personality rights except against the *corpus* and *fama,* and by implication, also the right to privacy, which is protected by s 4 of the *Constitution,* conferring public law protection akin to the *actio iniuriarum* in private law. De Villiers describes the wide interpretation as follows: "It is clear from the Digest that the word 'dignitas' must be understood in a wide sense, and not merely as an equivalent to the elevated public position of the Roman citizen. Injuries against dignity evidently comprise all those injuries which are not aggressions upon either the person or the reputation; in fact, all such 'indignities' are violations of the respect due to a free man, as such (*vide Huschke; Gaius,* p 152)", in *Roman Dutch Common Law of Injuries* 25.

chastity,[426] reverence,[427] privacy[428] and self-respect,[429] judged subjectively against the ubiquitous *boni mores* of society (and in criminal law, the criterion of reasonableness).[430] In criminal law, courts have based a complainant's *dignitas* on factors such as the presumed commodification of one's body; hence, prostitutes and homosexuals could not rely on impairment of dignity.[431] Only the serious impairment of *dignitas* would constitute a violation, and courts have applied differential aspects such as age, social standing, gender, race and the master-servant relationship to establish whether the *iniuria* was to be regarded as serious or not.[432] For common law *dignitas* to be justiciable it has to be "distributed unequally" in society,[433] and furthermore, the aspiration to a better *dignitas* through access to housing; education; wealth and autonomy (within the state's

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426 De Wet and Swanepoel *Strafreg* 231.

427 *Kleyn v Snyman* 1936 POD 19.

428 *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C).

429 *Whittington v Bowles* 1934 EDL 142; *R v Van Tonder* 1932 TPD 90 at 93; *R v Terblanche* 1933 OPD 65 at 68.

430 The subjective aspect of evaluation carries an element of arbitrariness, as a court must, as in Roman law; first consider whether a person has proved *dignitas* in the specific circumstances before this *dignitas* could lawfully be regarded as impaired.

431 *R v Van Tonder* 1932 TPD 90; *S v Jordan* 2002 6 SA 642 (CC). However, *dignitas* is perceived to be context-specific and dynamic, evolving with the passing of time and the demand of a society's changing morality. See De Villiers *Roman Dutch Common Law of Injuries* at 25: "Whether an act is to be placed amongst those that involve insult, indignity, humiliation or vexation depends to a great extent on the modes of thought prevalent amongst any particular community or at any period of time, or upon those of different classes or grades of society, and the question must to a great extent therefore be left to the discretion of the Court where an action on account of the alleged injury is brought. It will be seen that some acts which were considered injurious amongst the Romans peculiar to their manners and modes of thought, would hardly be considered as such at the present day." In this respect, the Court applied dignity in a similar way in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 (CC) 1517.

432 Thirion J held in *S v Bugwandeen* 1987 1 SA 797 (N) para 796A that: "The test requiring *iniuria* to be serious, in so far as it can be regarded as a test at all, is so nebulous as to lead to arbitrariness in its application", as quoted in Milton *South African Criminal Law and Procedure: Common Law Crimes* 504-505.

433 In adjudicating liability for assessing maintenance resulting from delict, the Supreme Court of Appeal quoted Van Leeuwen in *Van Vuuren v Sam* 1972 (2) SA 633 (A) as authority that the *qualitas et dignitas* of the person seeking maintenance must be taken into account in assessing the amount payable (p 643); therefore a man who was previously rich is entitled to maintenance according to his state of *qualitas et dignitas,* and is entitled to more maintenance than a man of meagre means.

positive duties), would also be unequally distributed.[434] *Dignitas* is, in terms of the common law, not equally inherent in everyone - it is a subjective perception of a particular community at a specific time, echoing arbitrary and undefined values[435] - whilst inherent human dignity is pivotal in protecting the right to equality in terms of section 9 of the *Constitution.*[436] Consequently, common law *dignitas* cannot endorse the demand for equal opportunities or substantive equality such as affirmative action.[437] Common law legitimises an arbitrary and inegalitarian conception of *dignitas.* A doctrinal transformation was necessary before law could recognise equal inherent dignity in every person. Constitutional *dignitas*, in turn, "has a more objective and broader dimension."[438]

The Commission's formulation of two elements of dignity, consisting of recognition and protection, is of particular importance in constitutional dignity's history, as it was the first ever proposition in South African law to

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434 Barrett 2005 *SAJHR* 529. In the *First Certification* judgment, the Constitutional Court stated, regarding the justiciability of socio-economic rights: "A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits." *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 77, as quoted in Currie and De Waal *The Bill of Rights Handbook* 571.

435 Barrett 2005 *SAJHR* 529. Also see De Botton, as quoted in Barrett 2005 *SAJHR* 529 fn 28: "Every society holds certain kinds of people in high esteem, while condemning or ignoring others, for having the wrong skills, accent, temperament, gender or skin colour. Yet these definitions of success are far from permanent or universal. Qualities or skills that would result in high status in one place have a marked tendency to grow irrelevant or to be frowned upon in another."

436 Goldstone J held in *President of the Republic of South Africa v Hugo* 1994 4 SA 1 (CC) para 41 that: "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the recognition that all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."

437 *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC).

438 Van der Westhuizen J in *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 170.

encapsulate the Kantian canon of a reciprocal duty to rights,[439] although the Commission did not refer to Kant at all.

2.15.6 On the history of the enactment of the human dignity clause in the Constitution of South Africa, 1993

2.15.6.1 Introduction

It is fascinating to learn how history during one era affected ideas in a later era. This is true for the transplantation of human dignity as the basis of human rights and as a human right itself, via the *Universal Declaration* and the *Basic Law,* into other international human rights documents and national constitutions. Dignity's inclusion and subsequent codification in the *Interim Constitution*[440] (and by way of incorporation into the *Final Constitution*) followed as a necessary consequence of its past transgressions. As its position in the *Basic Law* has to be understood in the context of World War II, the enactment of human dignity as a right in the *Interim Constitution* has to be understood in the light of South Africa's apartheid history.[441] Therefore the framers of the human dignity clause in the *Interim Constitution* gave it "the highest priority from the outset", as Du Plessis and Corder[442] confirm:

> The denial of this human right, protected in many international human rights instruments, most notably the Universal Declaration of Human Rights (art 1) and the African Charter of Human and Peoples' Rights (art 5), was so pervasive that its inclusion here, immediately after the rights to equality and life, was completely uncontroversial.

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439 In *The Metaphysics of Morals* 209 Kant explains that "Every person has the right to be respected by the other fellow-persons and he (or she) herself, in turn, is under duty to respect the dignity of other persons." Also see fn 153 above and the discussion in chapter 3.4.2.

440 In this chapter, for the purposes of identifying the two *Constitutions,* the term *Final Constitution* will be used instead of the *Constitution.*

441 See fn 155 in chapter 4 below.

442 Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 149.

2.15.6.2 The enactment of the human dignity clause

South Africa's road to democracy and a justiciable bill of rights was well on its way in May 1993, when delegates to the MPNP set up seven technical committees to advise them regarding certain constitutional issues and to facilitate agreements for negotiation in the National Assembly.[443] The Technical Committee on Fundamental Rights mandated with the drafting of a bill of rights during the transition was chaired by Prof Lourens M du Plessis.[444]

The other members were Prof Hugh Corder,[445] Adv. Zak

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443 The Technical Committee on Fundamental Rights' mandate was controlled by Constitutional Principle II, drafted and adopted by the MPNP and incorporated in the *Interim Constitution,* which stipulates that "Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter Three of the Constitution."

444 He was born on 31 May 1949; studied law at NWU and obtained a LL.D in 1979 under the supervision of Prof JD van der Vyver with a thesis titled "The Juridical Relevance of Christian Justice." From 1973 he lectured at the Department of Jurisprudence at NWU and became professor in 1981. In 1977 he acted as leader of a group drafting and distributing the Koinonia Declaration, a profound critique of the apartheid system, two weeks before an all-White general election. He held exploratory discussions with members of the then banned African National Congress in Dakar, Senegal in 1987 and acted as a member of the Executive Council of the Reformational Movement of South Africa during 1981-1986. During the years 1988-2011 he was professor at the Department of Public Law at the University of Stellenbosch. In 1989 he held discussions with the African National Congress in Harare, Zimbabwe at a conference on The Role of Law in a Society in Transition. See Anon date unknown http://news.nwu.ac.za/experts/lourens-marthinus-du-plessis. Prof Du Plessis was nominated to become a member of the Technical Committee by the Ciskei government, a member of the Concerned South Africans Group, which represented the Conservative Party, even though he was a signed up member of the ANC. See the interview with Prof H Corder, Constitutional Court Oral History Project on 4 January 2012, available at http://www.historicalpapers. wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-C16-001. Also see Spitz and Chaskalson *The Politics of Transition* 50.

445 He was born in 1954 in Rondebosch, Cape Town, studied law at UCT and Cambridge (LL.M) and obtained his LL.D at Oxford in 1982. In mid-1983 he became a lecturer in law at the University of Stellenbosch and from then on became closely involved with NUSAS and various other organizations, academics and lawyers opposed to apartheid. He became a lecturer in law at UCT in 1987 and was the dean from 1999 until 2008. He is at the time of writing Head of Public Law at UCT. He was nominated by Zola Skweyiya of the ANC to be part of the

Yacoob,[446] Gerrit Grové[447] and Sbongile Nene.[448] This committee received preliminary bills of rights from the twenty-six political parties involved as well as the government, lawyers and academics, and the South African Law Commission. As a result of these submissions the Technical Committee first proposed the following formulation for the human dignity clause in their *Fourth Progress Report*:[449]

Technical Committee, even though he did not support any political party. See the interview with Prof H Corder, Constitutional Court Oral History Project on 4 January 2012, available at http://www.historicalpapers.wits.ac.za/ inventories/inv_pdfo/ AG3368/AG3368-C16-001.

446 Zakeria "Zac" Mohammed Yacoob was born on 3 March 1948. He became blind at the age of 16 months because of meningitis. He studied law at the University of Durban Westville, obtained a LL.B in 1972 and was admitted as an advocate at the Natal Provincial Division of the Supreme Court in 1973. He had been a United Front activist during the 1980's. During his practice as an advocate he handled mainly human rights matters and he defended many accused in political cases against Apartheid and unjust laws. In 1998 he was appointed judge of the Constitutional Court and remained so until his retirement in 2013. He also acted as Acting Deputy Chief Justice of South Africa. See SA History Online date unknown http://www.sahistory.org.za/people/justice-zac-yacoob#sthash. JFshZqLq.dpuf. He was a representative for the ANC during his tenure as a member of the Technical Committee in the MPNP. See the interview with Prof H Corder, Constitutional Court Oral History Project on 4 January 2012, available at http://www.historicalpapers. wits.ac.za/ inventories/inv_pdfo/AG3368/AG3368-C16-001; Spitz and Chaskalson *The Politics of Transition* 254.

447 Gerrit Grové, then deputy chief state law advisor employed by the Department of Justice as a legislative drafter, was the government's representative during the MPNP and acted as the National Party's technical advisor. He was also heavily involved in drafting the National Party's *Charter of Fundamental Rights* of 1993. During the deliberations Grové emphasised that he was not being influenced by the National Party and specifically by Kobie Coetzee, the Minister of Justice, to advance the government's objectives. He was at times consulted by the ANC and attended bilateral meetings as a legal advisor for both the NP government and the ANC. See Davis 2003 *IJCL* 186 and Spitz and Chaskalson *The Politics of Transition* 254-255.

448 She was a social worker from the Urban Foundation and represented the IFP. She holds an MA in sociology from the University of Zululand. See the interview with Prof H Corder, Constitutional Court Oral History Project on 4 January 2012, available at http://www.historicalpapers.wits.ac.za /inventories/inv_pdfo/AG3368/ AG3368-C16-001. As she was the only non-lawyer of the five members Technical Committee and was mostly concerned with women's issues, she did not play a significant role in the Committee's output. See Spitz and Chaskalson *The Politics of Transition* 404-405.

449 *The Constitution of the Republic of South Africa Act,* 200 of 1993 came into operation on 27 April 1994.

> Every person shall have the right to respect for and protection of his or her dignity.[450]

Of all the major parties, apparently only the ANC proposed amendments to the clause, as they wanted to include personal integrity under the right to dignity. They argued that this would ensure respect for the person in all its dimensions.[451] Although the Technical Committee did not volunteer information on the source of the clause, one can thus safely assume that the inception of section 10 of the *Interim Constitution* is based on section 9(b) of the Law Commission's proposed bill of rights as contained in their *Interim Report*,[452] although the framers of the *Interim Constitution* excluded the Law Commission's connection of dignity with the right to a good name and reputation. According to Du Plessis and Corder:[453]

> Mention must also be made of the SA Law Commission's unpublished third Bill of Rights proposal, a provisional draft of which, contained in a Discussion Document ("Besprekingstuk"), was made available to the Technical Committee on Fundamental Rights during the Transition at the Multi-Party Negotiating Process at Kempton Park.

Du Plessis and Corder[454] furthermore suggest that "the formulation suggested originally was never questioned or altered." Spitz and Chaskalson[455] mention that

> the lack of discussion over the clause bespoke the tacit consensus among negotiators that a right to human dignity should provide a framework in which all other fundamental rights could be respected and observed.

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450 Multi-Party Negotiating Process, Technical Committee on Fundamental Rights, *Fourth Progress Report 3 June 1993.* The Committee mentioned in an explanatory note at par 2.8 that it had also provided for the protection of dignity in the framework of persons who were arrested and detained.

451 Spitz and Chaskalson *The Politics of Transition* 371.

452 SA Law Commission Project 58: *Summary of Interim Report on Group and Human Rights* (1991) at 45 (art 9(b).) Also see footnotes 407-409 above.

453 *Understanding South Africa's Transitional Bill of Rights* 31.

454 *Understanding South Africa's Transitional Bill of Rights* 149. The Negotiating Council accepted the proposals of the Technical Committee on Fundamental Rights on 28 May 1993. See Multi-Party Negotiating Process, Technical Committee on Fundamental Rights, *Fourth Progress Report* 3 June 1993 para 1.

455 Spitz and Chaskalson *The Politics of Transition* 371.

In this respect, the history of the enactment of dignity coincides with that in the *Basic Law* – it was accepted unreservedly and no debate was necessary regarding its theoretical foundations. Du Plessis[456] explains that although ideological tensions between the two opposing yet complementary human rights traditions of liberationism and libertarianism, which came to exist in South Africa over the fifty years in the pre-constitutional period were evident in the submissions made to the Technical Committee, these traditions share common liberal-democratic values such as life, human dignity, freedom of belief, religion and expression. The inclusion of the protection of dignity in the *Interim Constitution* was therefore not questioned.

2.15.6.3 Influences on the human dignity clause

According to Du Plessis,[457] the text of the Interim Constitution was influenced to a great extent by the *Universal Declaration*, the *International Covenant on Economic, Social and Cultural Rights* (1966); the *International Covenant on Civil and Political Rights* (1966), and the *European Convention of Human Rights and Fundamental Freedoms* (1950.) In addition, the formulations of the Law Commission were influenced by international documents.[458] It is not stated in any of the minutes pertaining to the deliberations of the Technical Committee nor the reports of the Law Commission whether article 1(1) of the Basic Law played a role in the formulation of section 10. The formulations in the aforementioned documents provide as follows:

456 See Du Plessis "A Background to Drafting the Chapter on Fundamental Rights" 92.
457 Du Plessis "International Law and the Evolution of (domestic) Human-Rights Law in post-1994 South Africa" 311.
458 See fn 403 above.

Table 2-5: Dignity formulations in international documents and the *Basic Law* relevant to section 10 of the *Interim Constitution*

Universal Declaration, 1946 (article 1)	Basic Law, 1949 (article 1(1))	International Covenant on Economic, Social and Cultural Rights, 1966 (preamble)	African Charter on Human and Peoples' Rights, 1982 (article 5)
"All human beings are born free and equal in dignity and rights."	"Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."	"Recognizing that these rights [equal and inalienable rights] derive from the inherent dignity of the human person, ..."	"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status."

However, in comparing these documents it is clear that section 10 conspicuously contains the most common elements with article 1(1) of the *Basic Law,* therefore a deduction that dignity shares a root element with or family resemblance to the *Basic Law* is not unjustifiable. All the elements of Kant's categorical imperative are embodied in both the formulations of the *Interim Constitution* and the *Basic Law*, whilst the other documents only connect dignity with rights guarantees.

2.15.6.4 The formulation of dignity as a constitutional right in the Interim *Constitution*

The express formulation of dignity as an independent fundamental right in the *Interim Constitution* without a connection with other fundamental rights such as privacy, slavery, inhuman and degrading treatment and punishment - in relation to comparable dignity clauses in other human

rights instruments - was unique at the time, with the exception of article 1(1) of the *Basic Law.*[459] The enactment of dignity as a separate constitutional right differed substantially from the situation in the international agreements that were used as models by the MPNP.[460] Fedtke[461] remarks that art 1 of the *Universal Declaration;* Art 11(1) of the *American Convention on Human Rights* (1969); art 5 of the *African Charter on Human and People's Rights,* (1982); and art 8(1) of the *Constitution of Namibia,* 1989, for example, all connect dignity with the guarantee of other fundamental rights.[462] Past transgressions of dignity are undoubtedly the reason for the special protection of dignity in the *Interim Constitution* as in the *Basic Law.*

The unique formulation of dignity in section 10 of the *Interim Constitution* implies that, as in the second component of article 1(1) of the *Basic Law*, Kant's categorical imperative was taken one step further, in that dignity was now postulated as an independent human right.[463] As has already been said, the constitutional obligation to recognise and protect dignity is rooted in Kant's categorical imperative, which holds that human beings

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459 Fedkte *Die Rezeption von Verfassungsrecht* 270.

460 Fedkte *Die Rezeption von Verfassungsrecht* 269. In a similar vein, Chaskalson remarked that "The reluctance to give dignity the status of a discrete right in human rights instruments may be due to the breadth of its meanings and the difficulty of defining its limits. Greater certainty is achieved by enumerating the rights of personality to be protected. Where this has been done, the entrenchment or implication of a residual right of dignity might be thought to have an open-ended quality which would be unmanageable." See "Human Dignity as a Constitutional Value" 134-135.

461 *Die Rezeption von Verfassungsrecht* 270.

462 The drafts of most of the political parties to the Technical Committee combined dignity with other rights, whilst the draft of the government on behalf of the National Party largely corresponded with that of the Human Rights Commission per s 3: "The State shall in its legislative, executive and judicial acts respect and protect the human dignity of every person." See *Government's Proposal on a Charter of Fundamental Rights* (2 February 1993) and Fedtke *Die Rezeption von Verfassungsrecht* 270.

463 In *S v Makwanyane* 1995 3 SA 392 (CC) para 328 O'Regan J held that: "[r]ecognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern." Also see the discussion in chapter 2.14.5 above regarding Kant's influence on article 1(1) of the *Basic Law,* as well as fn 156 above.

have a reciprocal duty to recognise and protect one another's human dignity. Kant's moral theory is equally applicable to the state; therefore constitutional dignity implies that the state exists for the sake of man and not *vice versa.*[464]

2.15.6.5 Establishing dignity's theoretical underpinnings in *Makwanyane*

The Court established dignity's theoretical underpinnings in the seminal *Makwanyane* judgment,[465] its second decision and its first decision to be based upon constitutional dignity that was handed down on 6 June 1995.[466] *In casu,* dignity's theoretical basis can be analysed in the framework of both the Stoic claim that man has dignity because of his rational capabilities and Kant's categorical imperative. *Makwanyane* marks the interpretation of dignity's normative traits in South African law, which permeates the legal system horizontally and vertically, and reflects the non-positivist coalescence of law and morality as a feature of the post-war rights protection paradigm.

As has already been explained, the basis of Kant's categorical imperative is that dignity is a quality of "absolute inner worth", inherent in all human

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464 Section 10 of the *Interim Constitution* places positive and negative duties on the state: negatively to be free from oppression, and positively to be free from hunger and homelessness, in the context of socio-economic rights. The justiciability of the state's affirmative obligations resulting from the infringement of dignity could be based on s 7(4)(a) of the *Interim Constitution,* which stipulates that "When an infringement of or threat to any right entrenched in this chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court for appropriate relief, which may include a declaration of rights." However, Basson doubts whether the claim to second generation human rights results from the protection awarded by section 10 of the *Interim Constitution,* because these rights "only receive scant attention in the interim Bill of Rights. An extensive interpretation of s10 to include enforceable socio-economic rights, such as the right to work and the right to shelter or health, does not appear to be indicated." See Basson *South Africa's Interim Constitution Text and Notes* 25. Also see the discussion in chapter 3.4.3 regarding the state's obligation to recognise the intrinsic worth of human beings.

465 1995 3 SA 392 (CC), handed down on 5 April 1995.

466 Interestingly, five of the eleven concurring judges (being Chaskalson CJ, Langa J, Mahomed J, Mokgoro J and O' Regan J) held that the death penalty infringes s 10 of the *Interim Constitution.*

beings.[467] *In casu* O' Regan J[468] held that the recognition of dignity as a right "is an acknowledgment of the intrinsic worth of human beings"; therefore the death penalty infringes upon human beings' dignity. This reasoning coincides with the formulation in section 10 of the *Interim Constitution* that *"everyone* has the right to respect for and protection of his or her dignity" (own emphasis.) Kant's categorical reference implies universal application (inherent dignity) and his imperative refers to the obligation that dignity should be upheld (respected and protected); therefore man should always be treated "at the same time as an end, never as a mere means."[469] In German law the Federal Constitutional Court derived the application of the mere object formula or *Objektformel* that man cannot be made a mere tool or object of the state from Kant's categorical imperative, as is confirmed in the *Life Imprisonment*[470] case:

> It is contrary to human dignity to make the individual the mere tool [*bloßen Objekt*] of the state. The principle that "each person must always be an end in himself" applies unreservedly to all areas of the law; the intrinsic dignity of the person consists in acknowledging him as an independent personality.[471]

Chaskalson J[472] applied the mere object formula in *Makwanyane* in a similar way by holding that the death penalty:

> strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.

The inherent and inalienable quality of dignity causes it to function as the basis of constitutional rights, thereby providing a broad protective scope for these rights. In *Makwanyane,* O'Regan J held that dignity functions as

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467 Kant *Groundwork of the Metaphysics of Morals* 434, as quoted by Donelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 21. Also see fn 144 above.
468 *S v Makwanyane* 1995 3 SA 392 (CC) para 328.
469 Kant *Groundwork of the Metaphysics of Morals,* as quoted in Eckert "Legal Roots of Human Dignity in German Law" 46.
470 BVerfGE 45, 187, 227-228.
471 As quoted by Ackermann *Human Dignity: Lodestar to Equality in South Africa* 126. Also see fn 146 in chapter 3 below.
472 *S v Makwanyane* 1995 3 SA 392 (CC) para 26.

> the foundation of many of the other rights that are specifically entrenched in chapter 3.[473]

For Kant, dignity is connected to humanity and morality, because individual autonomy is based on reason and a legitimized reciprocal duty to respect another's dignity; therefore "humanity itself is a dignity."[474] The formulation in section 10 of the *Interim Constitution,*

> [e]very person shall have the right to respect for and protection of his or her dignity,

encapsulates Kant's construction of duty in his categorical imperative, which was echoed by O'Regan[475] in *Makwanyane*:

> Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.

And:

> Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution.[476]

2.15.6.6 The founding of dignity as a constitutional value

Unlike freedom and equality, dignity was not posited as a constitutional value in the *Interim Constitution.*[477] However, in *Makwanyane* Chaskalson

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473 O' Regan J in *S v Makwanyane* 1995 3 SA 392 (CC) para 328.

474 Kant *Groundwork of the Metaphysics of Morals*, as quoted in Donnelly 2009 www.udhr60.ch/report/donnelly-HumanDignity 23. Also see fn 158 above.

475 *S v Makwanyane* 1995 3 SA 392 (CC) para 328.

476 *S v Makwanyane* 1995 3 SA 392 (CC) para 329.

477 Du Plessis explains that the formulation in s 33(1) of the *Interim Constitution,* which stipulates that limitations on rights must be reasonable and "justifiable in an open and democratic society based on freedom and equality," was arrived at as a result of a compromise between the Technical Committee and some of the negotiating parties, who believed that the Technical Committee's initial formulation of "a free, open and democratic society" did not sufficiently emphasise the primacy of equality in the new dispensation. Therefore, the Technical Committee proposed the formulation of "a free, open and democratic society based on the principle of equality", which was rejected by "the more vociferous libertarians" who held that the balance between liberty and equality would be disturbed. See "A Background to Drafting the Chapter on Fundamental Rights" 94.

and O'Regan JJ[478] "found" dignity as a root value of the new constitutional order:

> Respect for life and dignity which are at the heart of *section* 11(2) are values of the highest order under our Constitution.

In a similar vein, O'Regan J[479] held that

> The importance of dignity as a founding value of the Constitution cannot be overemphasised.

Langa J followed suit in *S v Williams*[480] by declaring that

> The simple message is that the State must, in imposing punishment, do so in accordance with certain standards; these will reflect the values which underpin the Constitution; in the present context, it means that punishment must respect human dignity and be consistent with the provisions of the Constitution.

In *Ferreira v Levin*[481] Ackermann J connected the value of freedom with the value of dignity, in order to define the right to freedom as widely as possible:

> Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and

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478 *S v Makwanyane* 1995 3 SA 392 (CC) para 111.

479 *S v Makwanyane* 1995 3 SA 392 (CC) para 328. *In casu*, Mokgoro J held in par 310 that: "As this constitution evolves to overcome the culture of gross human rights violations of the past, jurisprudence in South Africa will simultaneously develop a culture of respect for and protection of basic human rights. Central to this commitment is the need to revive the value of human dignity in South Africa, and in turn re-define and recognise the right to and protection of human dignity as a right concomitant to life itself and inherent in all human beings, so that South Africans may also appreciate that 'even the vilest criminal remains a human being.'"

480 *S v Williams* 1995 3 SA 632 para 38, handed down on 9 June 1995. Langa J further commented at para 76 that the *Constitution* "sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value…"

481 1996 1 SA 984 (CC) para 49, handed down on 6 December 1995.

> fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity. Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own…

Although dignity is regarded as one of the constitutional values during the interim phase as a result of its reading in in *Makwanyane,* no hierarchy of values was established, in contradistinction to the pre-eminence that dignity as a value enjoys in German law as a result of its inviolability and eternal status. It is generally accepted that dignity as a value in German law represents a reaction against National-Socialism and in South African law is a response to past discrimination and authoritarianism.[482] Weinrib[483] explains that the enactment of human dignity as a value in post war social-democratic or post-liberal orders resulted in dignity as a rights-protecting mechanism that "reconfigured the relationship between the individual and the state." In the South African context, Chaskalson[484] concurs that:

> The affirmation of [human] dignity as foundational value of our constitutional order places our legal system in line with the development of constitutionalism in the aftermath of the second world war.

Dignity as a value in the interim constitutional phase functions in three ways to validate human rights: it acts as the basis for constitutional rights in the *Bill of Rights;* it serves as an interpretative principle to establish the scope of these rights; and it plays a role in determining the proportionality of legislation to limit constitutional rights.[485] Essentially, dignity as the basis of fundamental rights connects law with morality and disposes of positivism, to indicate what law ought to be rather than what law is.

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482 *S v Makwanyane* 1995 3 SA 392 (CC) para 262; *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 92; *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* (CC) (unreported) case number CCT 19/16 of 8 November 2016 para 5.

483 Weinrib 2005 *NJCL* 330.

484 Chaskalson 2000 *SAJHR* 196.

485 Venter "Human Dignity as a Constitutional Value: a South African Perspective" 341-342.

The application of dignity as a value in the decisions discussed above might have foreshadowed its inclusion as one of the triad of values of the *Final Constitution.*[486]

2.15.6.7 The adjudication of dignity as a constitutional right in the interim phase

Dignity was established as the basis of constitutional rights in *Makwanyane*. As a result, in concrete cases dignity can overlap with rights such as life,[487] equality,[488] the right to the freedom and security of the person,[489] freedom of speech,[490] the right to a fair trial[491] and the right not to be subjected to cruel and unusual punishment (corporal punishment.)[492] The *Interim Constitution* placed the protection of human dignity on an equal footing with the balance of the constitutional rights. Hence, dignity functions as a relative right, in contradistinction to the absolute feature of dignity in the *Basic Law* and the *Constitution of Namibia.*

As the protection of dignity is implicit in the protection of the balance of the constitutional rights, one can argue that an infringement of the overlapping rights causes an infringement of dignity too. This general and liberal approach to the interpretation of rights could provide individuals with the greatest possible protection afforded by the *Bill of Rights.*[493] However, such a connected interpretation of dignity's scope might not coincide with purposive interpretation favoured in South Africa, as section 33(1) of the

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486 See the discussion in section 2.15.7 below.
487 *S v Makwanyane* 1995 3 SA 392 (CC) paras 57; 95; 144; 216; 271-272; 317; 327-337.
488 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41; *Harksen v Lane* 1998 1 SA 300 (CC) para 50; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 31.
489 *Ferreira v Levin* 1996 1 SA 984 (CC) para 147.
490 *Gardener v Whitaker* 1995 2 SA 672 (E) para 690.
491 *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC) para 43; *Ferreira v Levin* 1996 1 SA 984 (CC) para 49.
492 *S v Williams* 1995 3 SA 632 (CC) paras 28-29; 53; 89.
493 The interpretational principles regarding a generous approach to the protection of constitutional rights are discussed in *S v Zuma* 1995 2 SA 642 (CC) para 41.

Interim Constitution stipulated that constitutional rights could be limited only under the stringent requirements of reasonability and necessity, thereby placing too great an onus on the state to prove the justifiability of a limitation of a constitutional right.[494] Where a purposive approach is adopted, the prominence and purpose of the right to dignity would enjoy preference over its scope.[495]

2.15.7 On the history of the enactment of the human dignity clause in the Final Constitution of South Africa, 1996

2.15.7.1 Introduction

The *Final Constitution* replaced the *Interim Constitution* on 3 February 1997. In general, differences between the two constitutions can be attributed to principles established by the Constitutional Court during the interim phase and in other instances to the ANC's majority bargaining powers in the Constitutional Assembly. To what extent the *Makwanyane* judgment influenced the members of the technical Sub-Committee of Theme Committee Four, appointed to draft the fundamental rights contained in the *Constitution,*[496] when they formulated section 10 of the *Final Constitution* is unknown, as neither their minutes nor their explanatory memoranda contain any references to dignity's theoretical

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494 Also see *Ferreira v Levin* 1996 1 SA 984 (CC) para 173. In their *Eleventh Progress Report,* the Technical Committee stipulated that although every fundamental right could be limited, any limitation is restricted in the sense that the essence of the right in question could not be negated by the purported limitation. Dignity was one of the rights contained in the categories of rights which were subject to the stricter form of review. See Spitz and Chaskalson *The Politics of Transition* 290-291.

495 Also see the discussion in chapter 4.4 below regarding the application of purposive interpretation and protection of human dignity.

496 The Theme Committees consisted of nominated members of parties in the Constitutional Assembly, specifically mandated to assist with submissions from the political parties and the broader public, and to compile reports for discussion in the Constitutional Assembly. On 15 August 1994 the Constitutional Assembly passed a resolution under Rule 20 of the Standing Rules to appoint six theme committees, of which the Committee Four on Fundamental Rights was one. See *Constitutional Assembly, Briefing Document for Theme Committees* (Second Draft) 1; *The Constitutional Assembly: Annual Report 1996* p 10.

underpinnings as established by this decision. Yet dignity was such an important concept for the Technical Committee that they proposed its inclusion as a central value with freedom and equality, to inform the interpretation of other rights.[497] In addition, the Technical Committee also reformulated section 10 of the *Interim Constitution*, which reflects the importance accorded to the concept by case law in the previous phase:

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

The enshrinement of inherent human dignity as an *a priori* fact brings South African law, like international law and the law of several other domestic jurisdictions, in line with dignity's evolution from a status-based concept to an egalitarian principle rooted in Kant's categorical imperative.

2.15.7.1.1 Submissions to the Theme Committee and the formulation of section 10

The final constitutional text was produced by Theme Committees appointed by the Constitutional Assembly, whose selection was based on proportional representation. These Theme Committees produced reports to the Constitutional Assembly for deliberation and acceptance into the final constitutional text. Under Theme Committee Four[498] a technical Sub-Committee of four advisors was established to provide technical advice and to assist with the compilation of reports.[499] The Committee was

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497 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 20.

498 Theme Committee Four held 32 meetings between 19 September 1994 and 14 August 1995. By 20 June 1995 it had processed 5 634 submissions, the bulk of which came from the public. Another 1360 submissions were received after the Theme Committee had completed its work. By the end of the process Theme Committee Four had introduced 33 reports and explanatory memoranda and a draft Bill of Rights which was tabled at the Sub-Committee of the Constitutional Committee on 9 and 10 October 1995. See *The Constitutional Assembly: Annual Report 1996* p15.

499 *The Constitutional Assembly: Annual Report* 1996 p 10.

composed of Ms S Liebenberg (as she then was)[500] convenor, Prof H Cheadle,[501] Prof CJR Dugard[502] and

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500 Sandra Liebenberg was born on 26 February 1965 and studied law at UCT. She obtained a LLM (with distinction) in 1995 at the University of Essex in the UK and a LLD in 2011 at Wits. From January 1997 to December 2003 she was a senior researcher in the Socio-Economic Rights Project at the University of Western Cape, and she was promoted to associate professor in 2001, whereafter she became H.F. Oppenheimer Chair in Human Rights Law, Law Faculty, University of Stellenbosch: January 2004 – present. She has authored 3 books on socio-economic rights and is the author and co-author of many contributions in books, journal articles, research papers, policy reports and submissions. She has acted as expert advisor and assisted in drafting heads of argument and *amici* submissions for various NGOs involved in a range of significant socio-economic rights cases. Also, she was a founder of Economic and Social Rights in South Africa*, and the editor* until 2003. She serves on the editorial boards of the *SAJHR;* the *Human Rights Law Journal and Speculum Juris.* In addition, she holds memberships in many non-governmental organizations and international organizations. See Anon date unknown http://www.ohchr.org/Documents/HRBodies/CESCR/Elections2016/SandraLiebenberg.pdf. On 6 April 2016 she was elected to serve on the prestigious United Nations Committee on Economic, Social and Cultural Rights, for a period of 4 years. See Anon 7 April 2016 http://www.timeslive.co.za/local/2016/04/07/Maties-prof-elected-to-UN-committee.

501 Michael Halton Cheadle was born on 30 July 1949. He obtained a BA Hons and B.Proc at UNISA and a Batchelor of Law from Wits. In 1972 Cheadle was one of the founders of the General Factory Workers Benefit Fund and assisted in expanding the African Textile Workers Industrial Union. Thereafter he was actively involved in helping to establish new unions in sectors where none existed. He was placed under a 5-year banning order in 1974 after addressing the newly established National Union of Textile Workers in January 1974 in Durban. During the period 1992 – 1995 Cheadle acted as an independent expert for the National Manpower Communications as well as special advisor to the Minister of Labour, when he was involved in drafting the *National Economic Development and Labour Council Act*, 1994; the *Labour Relations Act,* 1995 and the *Mine Health and Safety Act,* 1996. In March 1999 he was co-founder of the Resolve Group, which provides integrated human resources and labour related services for companies and governments worldwide. See Anon date unknown http://www.sahistory.org.za/people/michael-halton-cheadle. In addition, he has been involved in drafting the *Special Pensions Bill,* the *Electoral Bill* and the *Public Management Bill*, 2014, as well as several labour laws for law reform in Botswana, Lesotho, Mozambique, Namibia, Swaziland; Tanzania, Nigeria and Zimbabwe. He is also a lawyer and co-founder of Cheadle Thompson and Haysom Attorneys, having acted as judge in both in the High Court and Labour Court. Cheadle is a professor in public law and emeritus professor at UCT. He was the first South African to be nominated as an expert on the ILO Committee of Experts on the Application of Conventions and Recommendations, International Labour Organisation, Geneva. See Anon date unknown http://www.bchc.co.za/ about/halton-cheadle/.

502 Christopher John Robert Dugard was born on 23 August 1936 in Fort Beaufort and obtained his BA from US in 1956 and LL.B in 1958. In 1980 Cambridge University conferred a LL.D on him. He started his academic career as a lecturer in law in

Prof IM Rautenbach.[503] The draft bills of rights of all the political parties in the Constitutional Assembly included the recognition and protection of human dignity in different guises.[504] In their submission to the Theme Committee, the SA Law Commission specifically referred to past transgressions of human dignity as the reason for its inclusion as a separate right, in their *Final Report on Group and Human Rights* (1994):

1961 at the University of Natal in Durban, eventually becoming the dean of the law faculty at Wits in 1975. During the period 1978-1990 he was the director of the Centre for Applied Legal Studies at Wits, whilst primarily being engaged in public education in the areas of human rights, labour law and laws affecting the black community, through the media of publications, research, lectures, seminars and litigation. From 1995-1997 he was the director of the Lauterpacht Research Centre for International Law at Cambridge. In 1998 he was appointed as the Chair in Public International Law at the University of Leiden. Also in 1998 he was appointed emeritus professor at Wits; in 2000 at the University of Pretoria; honorary professor at the university of the Western Cape in 2001; honorary professorial research fellow, Wits in 2004; honorary professor of law, UCT in 2004; in 2007 visiting professor, Centre for Human Rights, the University of Pretoria; and from 2007 onwards, honorary professor of public international law at the University of Leiden. He is a member of the Institut de Droit International. In 1997 he was appointed to the UN International Law Commission and since 2000 the Special Rapporteur to the UN Commission on Human Rights and International Humanitarian law in the Occupied Palestinian Territory. He is the author of an extensive corpus of books; chapters in books, journal articles, policy documents and lectures. See Anon date unknown journals.cambridge.org/article_S092215650700458X and Anon date unknown http://law.leiden.edu/organisation/publiclaw/publicinternationallaw/staff/john-dugard.html.

503 Ignatius M Rautenbach was born on 5 May 1943 in Bethlehem and obtained a BA Law and a LLB in 1963 and 1965. In 1975 a LLD was conferred upon him by UNISA and the subject matter of his thesis was the right to freedom of movement. He lectured between 1965 and 1969 at the University of Fort Hare and from 1970 at the University of Johannesburg, which lectureship was suspended by service between 1980 and 1984 at the Department of State Development and Planning. He conducted research at the University of Michigan and the Max Planck Institute for International Law and Comparative Law in Heidelberg, Germany. He is co-author with EFJ Malherbe of *Constitutional Law*, a textbook in print since 1993. In 1992 he was a member of a constitutional law workshop at CODESA. In addition, he was a member of the Commission for the Demarcation of the Provinces in 1994 and authored extensively on constitutional and human rights law. See Anon date unknown http://www.litnet.co.za/author/im-rautenbach/.

504 Fedtke *Die Rezeption von Verfassungsrecht* 270.

> As South Africa's history is one of gross disregard for human dignity, it is appropriate to include in the bill of rights an article protecting human dignity. Suffice it to say that the Commission accepts the above formulation.[505]

The SA Law Commission proposed that the same wording as that of section 10 of the *Interim Constitution* be adopted in the *Final Constitution.*[506] It also referred to article 11 of the *American Convention on Human Rights,* 1996:

> [e]veryone has the right to have his honour respected and his dignity recognized.[507]

In their submission, the Inkatha Freedom Party (IFP) saw dignity as a philosophical concept which was to be disclosed in a constitution as "social dignity", to act as a parameter for equality and privacy as well as for the assessment of the protection of human rights; an assertion for the social goals of the state; recognition of the individualised aspect of human rights and the supremacy of the individual over society; and the expansion of the scope of human rights to include personal aspects of human development.[508] The IFP notes that dignity also plays a role in family rights, where "both spouses shall have equal rights, obligations and dignity."[509]

According to the Democratic Party, section 10 of the *Interim Constitution* sufficiently protected dignity and could be replicated in the *Final Constitution.*[510] Furthermore, the protection of dignity was connected with privacy against state interference, to guarantee "an inviolable sphere of

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505 SA Law Commission Project 58: *Final Report on Group and Human Rights* (1994) at 27.

506 Para 4.28 of the SA Law Commission's *Final Report on Group and Human Rights* (1994) Project 58.

507 SA Law Commission's *Final Report on Group and Human Rights* (1994) Project 58 fn 42 at 27.

508 Anon date unknown http://www.constitutionnet.org/vl/item/theme-committee-no-4-submission-block-no-2-human-dignity-right-life-privacy.

509 Anon date unknown http://www.constitutionnet.org/vl/item/theme-committee-no-4-submission-block-no-2-human-dignity-right-life-privacy.

510 Anon date unknown http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993

privacy" for everybody.[511] Human dignity has a communitarian aspect, which reflects the development of the free human personality in the perspective of the common and customary law.[512]

Human dignity is a fundamental right which stands in close proximity to equality and freedom and informs the ideas of liberty and equality, as the National Party argued.[513] They remarked that the right to human dignity, in addition to its immense impact on the *Constitution*, is a fundamental right sufficiently protected by section 10 of the *Interim Constitution,* stating that

> There can be no greater violation of human dignity (except the violation of life itself) than the violation of a person's human dignity. It is for this reason that our present bill of rights specifically prohibits slavery or forced labour in section 12 and provides for the protection of the human dignity of detained persons in Section 25(1)(b) of the Constitution, 1993.[514]

In their explanatory memorandum to the Constitutional Committee, the Sub-Committee held that dignity is a core fundamental right that is reflected as such in an array of public international documents, which

> constitutes the moral justification for many universally accepted fundamental rights.[515]

This observation confirms the theoretical underpinnings of dignity as established in the *Makwanyane* judgment as well as in several other decisions in the interim phase.[516] The Sub-Committee specifically referred to the assertion of "inherent dignity" in the preamble of the *Universal Declaration,* and therefore, in the absence of any indication to this effect, one can safely assume that the first component of section 10 that contains

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511 Anon date unknown http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993.
512 Anon date unknown http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993.
513 Anon date unknown www.constitutionnet.org/files/3232.PDF p1.
514 Anon date unknown available at www.constitutionnet.org/files/3232.PDF p1.
515 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p14.
516 Also see the discussion in sections 2.15.6.5 and 2.15.6.7 above.

the phrase "inherent dignity" was inspired by this international document.[517]

The Sub-Committee remarked that dignity is multi-faceted and can overlap with other inter-related rights such as equality, privacy and personality rights, as evidenced by formulations in international public law instruments such as the *African Charter on Human and Peoples' Rights,* 1982*;* and the *American Convention on Human Rights,* 1996, in addition to the *Universal Charter*.[518] In these documents the core right to dignity is not subject to limitation, although connected rights may be derogable in exceptional circumstances.[519] Nevertheless, the Sub-Committee proposed that dignity should be postulated as a free-standing right without a connection to other fundamental rights to

> provide a residual basis for the development of protections against possible degrading and demeaning treatment in the future.[520]

The Sub-Committee connected the infringement of dignity as a result of degrading and demeaning treatment with common law *dignitas*, stating that

> In essence our common law recognises the core of the right to dignity namely protection against degrading and demeaning conduct and its open ended nature provides an appropriate vehicle for the horizontal application of the constitutional right, where there is no legislative remedy provided.[521]

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517 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p14.

518 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p14; 17. Also see the discussion in section 2.15.6.3 above as well as clauses referenced in table 5, regarding the influences of international documents on s 10 of the *Interim Constitution*.

519 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p14.

520 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p14.

521 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p16.

Reference was made to the constitutions of Germany and Namibia, in which the right to dignity is specifically enumerated.[522] The Sub-Committee noted that no clear content was ascribed to dignity in comparative law, as it is more often than not associated with other fundamental rights such as the right to protection against cruel and unusual punishment and against servitude, and the rights to liberty of the person, privacy and equality.[523] The postulation of dignity as a free-standing right in both the *Interim* and *Final Constitutions* expresses the priority adduced to dignity by the framers because of past transgressions.

Against this backdrop, the Sub-Committee suggested that the right to dignity be divided into two sections. The first component was

> The inherent dignity in every natural person shall be respected by all and protected by the state.[524]

It should not be subjected to any limitation, which reservation was to be included elsewhere in the *Bill of Rights.*[525] This proposition is akin to the position in the international documents that the Sub-Committee had referred to, namely that the core right to dignity is not subject to limitation,[526] as well as in the *Basic Law* and the *Constitution of Namibia,* 1989.

It was proposed that the second component should read "every person shall be entitled to a good name and reputation", which closely resembles

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522 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda (Vol 1) 9 October 1995* p14. The Democratic Party in their submission also referred to article 1 of the *Basic Law*, stressing the difference between the *Basic Law, which* specifically enumerates dignity, and other national documents, which do not. See Anon date unknown http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993 at 1.

523 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p14. Also see the discussion in section 2.15.6.4 above.

524 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p 19.

525 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p 19.

526 Also see fn 519 above.

the formulation of the SA Law Commission in 1991 in their draft bill of rights.[527] According to the Sub-Committee, the reason for this division was to allow for the non-limitation of the right to dignity; to not leave the right to a good name and reputation to inference from the right to dignity; and to allow non-preference of the right to reputation in cases of balancing with the right to freedom of speech.[528] In this respect the Sub-Committee referred to the German courts' interpretation of the right to dignity, which includes one's good name and reputation.[529]

At the 21st meeting of the Constitutional Assembly the representatives of the Democratic Party enquired whether the Sub-Committee's distinction between the right to dignity and the right to a good name was based on submissions to the Constitutional Assembly or from international examples, to which the Sub-Committee replied that it emanated from a recent court decision and the common law.[530] Subsequently, the meeting agreed that the proposed second component as described above would be deleted and that the first component should be redrafted.[531] The Constitutional Assembly eventually did not consent to this addition or to the proposed inviolability of the right to dignity.[532]

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527 S9(b) in Project 58: *Summary of Interim Report on Group and Human Rights* (1991).

528 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p19 fn 5.

529 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p15. In *Gardener v Whitaker* 1995 2 SA 672 (EC) at 690H Froneman J discussed the German application of the right to a good name and reputation as included in the right to dignity. Also see the discussion in chapter 4.3.8 and fn 161 below.

530 Constitutional Assembly, *Minutes of the 21st Meeting of the Constitutional Committee* (14 June 1995) p 6.

531 Constitutional Assembly, *Minutes of the 21st Meeting of the Constitutional Committee* (14 June 1995) p 6.

532 Constitutional Assembly, *Constitutional Committee (Sub-Committee) Draft Bill of Rights Explanatory Memoranda (Vol 1) 9 October 1995* p19. In negotiations pertaining to the *Interim Constitution,* the Technical and Ad Hoc Committees decided as early as on 28 May 1993 that no right would be illimitable except for rights that are normally absolute and inviolable, such as freedom from torture and

Adding the sub-clause pertaining to a right to a good name and reputation to the right to dignity in the *Final Constitution* would have been unnecessary in the light of the protection already afforded to reputation by the deeply embedded common law principle of defamation, as well as the decision in *Gardener v Whitaker*[533] in the Eastern Cape High Court during the interim phase, in which Froneman J held that the right to dignity also included *fama.*[534]

After various redrafts of the human dignity clause in different sections of their proposed bill of rights,[535] the Sub-Committee formulated the final wording for section 10 in their *Refined Working Draft,*[536] which was adopted as such by the Constitutional Committee.

2.15.7.1.2 Human dignity as a constitutional value

Human dignity was not incorporated in the preamble of the *Final Constitution*, although the Sub-Committee recommended this inclusion.[537] In a similar vein, the National Party in their submission to the Sub-Committee stated that the concept of dignity

> is so fundamental that it should be broadened by elevating the reference to "the dignity and value of mankind" to a position of an inviolable and prepositive value. This would provide the right with a greater impact in the

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the freedoms of conscience, belief, thought and opinion. See Spitz and Chaskalson *The Politics of Transition* 287.

533 1995 2 SA 672 (EC).

534 See the discussion in section 15.5 as well as footnotes 410-414 above.

535 The Technical Committee initially intended to include the right to dignity in ss 1 and 3, thereafter in ss 5 and 9, and finally in s 10 of their bill of rights. One of the provisional drafts stated that: "The inherent dignity in every person shall be respected by all and protected by the State" (s 9.) Another held that "Human dignity is the foundation of a just society; the state therefore must respect and protect the rights declared in this Bill" (s 1.) See Constitutional Assembly, Constitutional Committee (Sub-Committee) (Vol 2) *Formulations* p3; 5; Constitutional Assembly, *Refined Working Draft* 30 October 1995 p 5 and Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p 21.

536 Constitutional Assembly, *Refined Working Draft* 30 October 1995.

537 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p 20.

> whole Constitution. This could be achieved by way of a preamble to the bill of rights or by formulating the opening sections of the bill in such a way that such an effect is attained.[538]

Also, the Democratic Party propounded that dignity should be accorded a central place in the *Constitution*, similar to its position in the *Basic Law*:

> Given the importance of dignity it should be emphasised in the preamble of the constitution that human dignity is a cornerstone of the Constitution as expressly provided for in Article 1 of the German Basic Law.[539]

Furthermore, the Sub-Committee advised that dignity should be included in the interpretation clause as a central value informing the interpretation of other rights.[540]

Consequently, dignity was included as such in section 1 of the *Constitution* in conjunction with equality and freedom, as well as in sections 7(1), 36(1) and 39(1)(a). According to Du Plessis,[541] the enshrinement of dignity as a value illustrates the progress in the South African legal landscape post the apartheid era, like the situation in Germany after World War II:

> The occurrence of the triumvirate of human dignity, equality and freedom in several places in the 1996 Bill of Rights tells where we in South Africa were coming from when we first tried to establish our fledgling constitutional democracy – exactly what article 1 of the Basic Law does with reference to Germany's unique (and sad) holocaust history.

He points out that there is a perpetual tension between freedom and equality in human rights discourse; consequently dignity in the *Final Constitution* functions as a wedge between the two former values.[542] This tension is especially prevalent in a society such as South Africa's, where the disparity between privileged and underprivileged groups looms large –

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538 Anon date unknown www.constitutionnet.org/files/3232.PDF p 1.
539 Anon date unknown http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993.
540 Constitutional Assembly, Constitutional Committee (Sub-Committee) *Draft Bill of Rights Explanatory Memoranda* (Vol 1) 9 October 1995 p 20.
541 Du Plessis 2005 *PER* 92.
542 Du Plessis 2005 *PER* 93.

> It was therefore eminently sensible of the authors of the 1996 Constitution to come up with a textual strategy that can help negotiate the seemingly insoluble tension between freedom and equality: the inclusion in the constitutional sections referred to above of the value of human dignity with its particular history (also and especially in Germany) curbs the tendency to over-concentrate attention – in an "either… or" manner – on the fear of the haves and have nots, and it demands deference to the worth and eminence of both the have nots and the haves as dignified human beings.[543]

Du Plessis's insight was echoed by Ngcobo J in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*:[544]

> This history [apartheid] serves to remind us where we have come from as a nation and where we are going. Indeed it serves to remind us of the goal that we have fashioned for ourselves in the Constitution, namely, to establish a new society founded on human dignity, equality and fundamental freedoms. It also helps us to understand the plight of millions of people living in deplorable conditions and in great poverty. It reminds us that at the heart of our constitutional democracy lies the commitment to address these conditions and to transform our society into one in which there will be human dignity, freedom and equality. This history enables us to understand the difficult challenge facing government in addressing the housing shortage.

2.15.7.1.3 The application of human dignity post 1997

The identification of dignity as one of the three foundational values of the "highest order" in the *Final Constitution*[545] leads to its becoming the basis of all fundamental rights in the *Bill of Rights,*[546] so that it now lies at the "inner heartland of our rights culture."[547] These values were indeed enacted not only as a rejection of apartheid and to redress the injustices of the past,[548] just as National Socialism was denounced in Germany after

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543 Du Plessis 2005 *PER* 93.

544 2010 3 SA 454 (CC) para 191.

545 *S v Makwanyane* 1995 3 SA 391 (CC) paras 111 and 329; *Bhe v Khayelitsha Magistrate* 2005 SA 580 (CC) para 48; *S v Dodo* 2001 3 SA (CC) 382 paras 35 and 75. In *Minister of Home Affairs v Watchenuka* 2004 1 SA 21 (SCA) para 26 the Court held that "The inherent dignity of all people – like human life itself – is one of the foundational values of the Bill of Rights. Also see Chaskalson 2000 *SAJHR* 196.

546 *Dawood v Minister of Home Affairs* 2000 3 SA 396 (CC) paras 35 and 36; *Ferreira v Levin* 1996 1 SA 984 (CC) para 49; *Minister of Home Affairs v Watchenuka* 2004 1 SA 21 (SCA) para 26; *De Reuck v Director of Public Prosecutions* 2004 1 SA (CC) 406 para 62.

547 *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) para 98.

548 *S v Makwanyane* 1995 3 SA 391 (CC) paras 329 and 391; *S v Mamabolo* 2001 SA 3 409 (CC) para 41; *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para

World War II,[549] but to protect the citizenry against future violations of dignity.[550] To this end, dignity as a value[551] which has roots in Kant's categorical imperative and holds that everybody should be treated as "ends in themselves, never merely as a means to an end"[552] is frequently applied by the Court as a mechanism to protect the rights in the *Bill of Rights*.[553] This principle is confirmed by the *dictum* of Van der Westhuizen J in *South African Police Service v Solidarity obo Barnard* [554]

> Philosophical thinking on human dignity by, for example, Immanuel Kant has influenced this Court's jurisprudence, including the emphasis that "human worth is impaired when persons are treated, not as ends in themselves, but as mere objects". Human dignity is not only concerned with an individual's understanding of her self-worth, but more broadly affirms the inherent – and equal – worth of all human beings. The recognition of this right represents a break from a past which systematically denied the dignity of most South Africans. Because the right to human dignity affirms the intrinsic worth of every person, it is foundational to several other rights in the Bill of Rights. The right to and value of dignity therefore also inform constitutional interpretation and adjudication at multiple levels.

The right to dignity was described by the Court as the most important of the human rights (together with the right to life)[555] and "a cornerstone of

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36; *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 59; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) paras 21-22; *S v Dodo* 2001 3 SA 382 (CC) para 404D; *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) paras 143 and 241. Also see footnotes 385 and 386 in chapter 3 below.

549 *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 92; *S v Mhlungu* 1995 3 SA 867 (CC) para 92. See also discussion in chapter 4.3.8 and fn151.

550 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35. Also see the discussion in section 15.7.1.3 above.

551 The minimum basic content of dignity as a value holds that everybody has inherent dignity, which has to be respected and protected vertically and horizontally. Also see the discussion in chapter 3.4.

552 *S v Dodo* 2001 3 SA (CC) 382 para 38.

553 O'Regan J held in *S v Makwanyane* 1995 3 SA 392 (CC) para 328 that: "Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern." Also see paras 313 and 316 as well as *S v Williams* 1995 3 SA 632 (CC) para 28; *Coetzee v Comitis* 2001 1 SA 1254 (C) para 180 and *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) para 63 and fn 302 above.

554 2014 6 SA 123 (CC) para 172.

555 Also see fn 301 above.

our Constitution",[556] which "lie[s] at the heart of the constitutional framework."[557] Given this importance, dignity functions as a relative right that can be limited in appropriate circumstances,[558] in contradistinction to the position in German law. Dignity as a right serves in conjunction with the rest of the constitutional rights to protect the value of dignity. The content of dignity as a right is the same as the value of dignity[559] and intersects as such with the rest of the constitutional rights, as the basis of human rights.[560] Therefore the right to dignity overlaps not only with the value of dignity, but also with the normative zones of other constitutional rights, such as the right to equality, the right to life, the right to freedom and security of the person, the right to privacy, the right to freedom of expression, and the socio-economic rights.[561] In the overlapping zone, dignity either fortifies other rights[562] or conflicts with these rights, in which instance the rules of proportionality will apply.[563]

2.16 Conclusion

Julius Caesar's *dignitas* was worth dying for and, frankly speaking, for committing and justifying murder. In Antiquity this valuable asset was historically reserved for male members of the aristocracy and certain patriarchal classes embedded in hierarchical society. It was not within the reach of women, children, slaves, non-citizens, the lower classes and - in Medieval Europe - of non-Christians. The Stoic conception of man's equal

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556 Also see fn 302 above.
557 Per O'Regan J in *S v Makwanyane* 1995 3 SA 391 (CC) para 342.
558 *S v Makwanyane* 1995 3 SA 391 (CC) paras 338-339; *S v Williams* 1995 3 SA 632 (CC) para 54; *National Coalition for Gay and Lesbian Equality v The Minister of Justice* 1998 1 SA 6 (CC) para 28; *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 37; *S v Mamabolo* 2001 SA 3 409 (CC) para 41.
559 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 367.
560 *S v Makwanyane* 1995 3 SA 392 (CC) paras 144 and 328.
561 Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 257.
562 See Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 271 and cases listed in fn 136.
563 *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 27 and *Le Roux v Dey* 2011 3 SA 274 (CC) para 72.

dignity emanating from his elevated position in the *cosmos*, which was perpetuated by the writings of the Roman jurist Cicero, did not reduce the inegalitarian paradigm of *dignitas* that could be diminished by one's own conduct and insulting behaviour. In contrast, Modernity symbolises the rejection of hierarchical preference as a normative basis for inegalitarian treatment. Differential social patterns of *dignitas* that came to be legally recognised in the *ancien regime* were equalised via a constitutional guarantee of each person's inherent dignity.

In Christianity the idea that man is created in the image of God and has accordingly special status above that of the rest of creation accords with the secular claim of Stoicism that man has an elevated position in nature because he has dignity. Whereas dignity emanates from the concept of the *imago Dei* in Christianity, in Stoicism dignity has its roots in nature and not in secular laws or social structures. It is only since the Enlightenment and the revolutions of the 17th and 18th centuries, when law came to see man as a right's-bearing legal subject divorced from any classification beyond his simple existence that *dignitas humanis* was democratised and universalised. Kant's concept of dignity as being based on man's autonomy and the moral instruction to obey his self-imposed laws of reason and respect was central in connecting the idea that man has equal rights because he has dignity. Although personality rights were codified in northern Europe in the nineteenth century and dignity was included in certain constitutions in the early nineteen hundreds, it was not yet connected with human rights and individual rights.

During the 1930's Catholicism expounded further on the principle of *imago Dei* by including the secular claim of "the dignity and freedom of the human person," as in the Irish *Constitution* of 1930. The inclusion of this phrase in the preamble was as a result of the actions of Popes Pius XI and XII to denounce oppression and subordinations of natural law. It is no wonder then that "dignity was in the air" when the *UN Charter* and

Universal Declaration were incorporated to include human dignity as a neutral idea and basis of human rights. These declarations acted as the models for many domestic constitutions to follow, that included dignity as either a value or a right or both. Although the concept of human dignity developed separately from the idea of human rights, dignity is now legalised as the basis of human rights. Constitutional dignity can be seen as a legacy of Christian Democracy, which manifested in a so-to-speak global religious-secular constitutionalism.

The various stages of human dignity's evolution from antiquity to modernity were not connected in the history of ideas. Rather, the development took place as a reaction to hegemonic oppression, as evidence of a desire to break with the past and to bring about a new dispensation. This is true of both Germany and South Africa. The inclusion of inviolable dignity in the *Basic Law* followed as a necessary consequence on the relegation of dignity by National Socialism. The *Basic Law* is an embodiment of Kant's categorical imperative, although the Parliamentary Council did not refer to Kant at all when they deliberated the text of Germany's constitution. Dignity in South African constitutionalism was similarly enacted as a reaction against the violations of dignity perpetrated during the apartheid regime.

Many Black South Africans died with dignity during the struggle against apartheid. During this process the first notion of constitutional dignity that developed in South Africa derived from the collective dignity of marginalised groups, as a reaction against unequal treatment. Collective dignity is a subcategory of the generic notion of dignity, which excludes discrimination between groups on irrelevant grounds. The enactment of dignity in the *Interim* and *Final Constitutions* followed as a given taken the significance of dignity in international law and many other domestic constitutions post World War II. Although neither the Technical Committee mandated to draft the *Interim Constitution* nor the Theme Committee,

mandated to draft the *Final Constitution,* mentioned the moral ethical theories of Kant, the Court established dignity's theoretical underpinnings in *S v Makwanyane*[564] in the framework of the categorical imperative. As a result, effect is given to the constitutional injunction that everyone has inherent dignity, which has to be respected and protected.

564 1995 3 SA 392 (CC).

Chapter 3: Towards a conceptualization of human dignity

"Omnis definitio in lege periculosa est, parum est enim, ut non subverti posset."[1]

3.1 Introduction

Law, and more specifically public law,[2] lacks a principled definition of human dignity. The modern legal notion of dignity displays a complex character of crossbreed interaction between an illustrative quality and a prescriptive concept, the so-called is-ought dilemma in law, a legal phenomenon which was described by Habermas[3] as a "fusion of moral content with coercive law." Dignity represents a "wide moral view",[4] a metaphysical notion which implies an objective moral principle on the one hand and on the other hand legal recognition of equal human rights. Paradoxically, modernity's notions of democracy and universal suffrage are no guarantee of the protection of a human being's intrinsic rights.[5] Also, postmodernism with its rejection of philosophical reflection on the spiritual dimension of humanity does not provide an explanation for the need for an agreement about human dignity in current law. The reaction of the West against legal positivism[6] and the rise of a post-positivistic legal culture that connects law with morality[7] led to the prominent role of human

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1 Javolenus *Digesta* 50.17.202. (All definition in law is dangerous, because there is little that cannot be subverted/because there is not much to prevent it from being inaccurate.)

2 For a discussion regarding the private/public law distinction of dignity and human dignity in South African law, see chapters 2.15.5 and 5.3.6.

3 Habermas 2010 *Metaphilosophy* 470.

4 Shultziner "Human Dignity: Functions and Meanings" 85.

5 In recognition of mankind's history of imperialism, colonialism, totalitarianism, discrimination and two world wars, the Preamble of the *Universal Declaration of Human Rights* 1948 (hereinafter the *Universal Declaration*) states that: "Whereas disregard and contempt for human rights have resulted in barbaric acts which have outraged the conscience of mankind..."

6 Legal positivism, described by Kommers as quoted by Eberle 2009 *ORIL* 15, is a "self-contained, rational, deductive system of rules and norms… a science of law marked by its own internal standards of validity."

7 The "jurisprudence of values" in Europe was initiated by Gustav Radbruch's article *Five Minutes of Legal Philosophy,* and in the Anglo-Saxon tradition, by John

dignity in the interpretation of social facts and ethical values.[8] Here, Kant's influence extends far beyond philosophy and ethics – but also to law: his idea of moral freedom subject to the categorical imperative roots law in moral ethics.[9] Indeed, "Kant himself viewed law as the unifying basis for his theory of ethics."[10] The ripeness of the international community for the introduction of dignity into law was marked by its reaction against the atrocities of National Socialism and fascism in the wake of World War II.[11] As Weisstub[12] suggests:

> Dignity, perhaps more than any other concept, has emerged as a convergence point for what is perceived to be a non-ideological humanistic point of departure towards a social liberal ideal.

With regards to the position in Germany, Eberle[13] claims that

> In re-founding society on rational idealism, particularly the moral theory of Kant, it is obvious Germans sought to anchor the legal order to an overarching moral ideal that would obligate man and authority to act in accord with an ethical frame that included dignity, autonomy, responsibility, and community boundness; this ethical frame would help cabin the proclivities of human nature.

As a result of international developments post World War II to protect human rights and the enactment of the *Basic Law*, the German constitutional order now rests on an objective and moral value system. The Federal Constitutional Court expressly stated in Federal Constitutional CourtE 39,1 (41) that:

Rawls's *A Theory of Justice* (1971). See Barroso 2012 *BCICLR* 337 fn 33. Also see O'Regan "The Constitutional Jurisprudence of Laurie Ackermann" 8.

8 Barroso 2012 *BCICLR* 336; 337.

9 For a discussion of Kant's moral ethics and the application of the categorical imperative, see chapter 2.11; 2.14.5 and 2.15.6.5 above.

10 Eberle 2009 *ORIL* 19.

11 Barroso 2012 *BCICLR* 336; Mahlmann "Human Dignity and Autonomy in Modern Constitutional Orders" 372, Eckert "Legal Roots of Human Dignity in German Law" 52; Whitman "'Human Dignity' in Europe and the United States: The Social Foundations" 47; Benda "The Protection of Human Dignity (Article 1 of the Basic Law)" 39. Also, the second paragraph of the preamble of the *Charter of the United Nations,* 1945 gives recognition to the atrocities of two world wars: "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."

12 Weisstub "Honor, Dignity and the Framing of Multiculturalist Values" 263.

13 Eberle 2008 *ORIL* 15.

> The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.[14]

Today it is accepted that dignity is a fundamental value of most western constitutions enacted after 1948 and thus functions as a constitutional and legal principle,[15] a so-called utilitarian ideal, as confirmed by Schachter:[16]

> Political leaders, jurists and philosophers have increasingly alluded to the dignity of the human person as a basic ideal so generally recognised as to require no independent support. It has acquired a resonance that leads it to be invoked widely as a legal and moral ground for protest against degrading and abusive treatment. No other ideal seems so clearly accepted as a universal social good.

The South African Constitutional Court has quoted this *dictum* with express approval as being applicable to the *Bill of Rights.*[17]

3.2 Problems in defining human dignity

As dignity is an abstract concept, positive law has through interpretation to create concrete meaning in specific cases.[18]

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14 As quoted by Ackermann *Human Dignity: Lodestar for Equality in South Africa* 118-119.

15 This is irrespective of whether dignity is expressly enacted in constitutions or not, as in the US and French *Constitutions* and the *European Convention of Human Rights* (1950). See Habermas 2010 *Metaphilosophy* 464. By contrast, the late Justice Antonin Scalia, US Constitutional Court Judge, confirmed in a debate with LR Barroso at the University of Brasilia in 2009 that human dignity cannot be invoked by judges and courts, as the US *Constitution* contains no human dignity clause. See Barroso 2012 *BCICLR* 352 fn 159. Furthermore, Rao claims that human dignity should not be applied in the jurisprudence of countries if dignity is not rooted in their legal tradition. See 2011 *CJIL* 244.

16 Schachter 1983 *AJIL* 848-849.

17 In *Carmichele v The Minister of Safety and Security and The Minister of Justice and Constitutional Development* 2001 4 SA 398 (CC) 10. See Ackermann *Human Dignity: Lodestar for Equality in South Africa* 119.

18 Eberle claims that: "Savigny's historical Pandectist reconception of Roman Law in the 19th century was another notable example of legal system-building on abstractly conceived principles. Working within the Kantian rubric of moral freedom, Savigny's inspired private law project set out the basis for a German idea of freedom in which people could exercise freedom, human autonomy, human will, and human personality. Rights delineated spheres of freedom in which people

Carozza[19] argues that this process amounts to "a classic example of the *determinatio* of moral principles through the positive law." However, the difficulties experienced in defining the phrase have raised concerns regarding the degree of judicial discretion in the application of human dignity, as well as the extent of the ideological manipulation that the concept could be subjected to.[20] Consequently, dignity has been described as "a loose cannon, open to abuse and misinterpretation."[21] The Court referred to dignity as "a notoriously difficult concept… It needs precision and elaboration."[22] Two judges of the European Court of Human Rights, in dissent, referred to dignity as a "dangerous concept."[23] In philosophy and medical ethics, the concept is rather vague and ambiguous[24] and its pervasiveness attributes to the controversy.[25]

The Canadian Supreme Court held in *R v Kapp*[26] that the concept is too subjective and abstract to be applied as a legal test, and furthermore

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could exercise free will, known as the theory of subjective rights." See 2008 *ORIL* 16 fn 29.

19 Carozza "Human Dignity in Constitutional Adjudication" 465.

20 Carozza "Human Dignity in Constitutional Adjudication" 459. Also see the claim of Kretzmer with regard to the Israeli Supreme Court: "It is hoped that the Court will now start refining the concept so as to prevent its use as a catch-all phrase, which, if it means anything, may also mean nothing", in "Human Dignity in Israeli Jurisprudence" 174 - 175.

21 Gearty *Principles of Human Rights Adjudication* 85.

22 *Harksen v Lane* 1998 1 SA 300 (CC) para 50, quoting the Canadian Court in *Egan v Canada* 1995 29 CRR (2d) 79 at 106.

23 *Vereinigung Bildender Künstler v Austria* no.68354/01, ECHR 2007-II, as quoted by Carozza "Human Dignity in Constitutional Adjudication" 459.

24 Spiegelberg states in "Human Dignity: A Challenge to Contemporary Philosophy" 53 that: "I conclude that even philosophers have thus far not given a clear sense and a convincing defence of the idea of human dignity."

25 Macklin articulates that "dignity is a fuzzy concept, and appeals to dignity are often used to substitute for empirical evidence that is lacking or sound arguments that cannot be mustered." (See "Cloning and Public Policy" 212.) She also states in "Dignity is a Useless Concept" that "Dignity is a useless concept in medical ethics and can be eliminated without any loss of content", arguing that the principle of dignity in medical treatment and research is already sustained by principles of medical ethics, and amounts to nothing more than respect for persons, and in cases of assisted suicide, only means respect for a person's autonomy. (See 2003 http://www.ncbi.nlm.nih.gov/pmc/articles/PMC300789.)

26 SCC 41 (2008) para 22.

> it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.[27]

In the South African context, Davis J[28] warned that the Constitutional Court

> has given dignity both a content and a scope that make for a piece of jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer.

Despite these difficulties, not only is dignity frequently invoked worldwide in a constitutional context, *inter alia* as the basis for an individual's entitlement to rights[29] and to curtail interference in the exercising of rights,[30] but transnational borrowing and references to dignitarian jurisprudence are common (most notably with regards to death penalty cases.)[31] In this regard Beyleveld and Brownsword[32] state that

> Dignity appears in various guises, sometimes as the source of human rights, at other times as itself a species of human rights (particularly concerned with the conditions of self-respect); sometimes defining the subjects of human rights, at other times defining the objects to be protected; and sometimes reinforcing, at other times limiting, rights of individual autonomy and self-determination.

However, it is generally accepted that

> a violation of dignity can be recognized even if the abstract term cannot be defined.[33]

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27 SCC 41 (2008) para 22.
28 As quoted by Botha 2009 *SLR* 172 fn 5.
29 Clapham *Human Rights in the Private Sphere* 148-149; Wood 2008 AJ 47.
30 Botha 2009 *SLR* 171.
31 Carozza 2003 *TLR* 1082: "…the tendency of courts in death penalty cases … to consistently place their appeal to foreign sources on the level of the shared premise of the fundamental value of human dignity is a paradigmatic example of naturalist examples at work. Despite differences in positive law, in historical and political context, in religious and cultural heritage, there is the common recognition of the worth of the human person as a fundamental principle to which positive law should be accountable."
32 Beyleveld and Brownsword 1998 *MLR* 661-662.
33 Schachter 1983 *AJIL* 849, referring to the general application of dignity by the German court without attempts to define it as well as the decision of the European Court of Human Rights in *Lawless v Ireland* (Merits) 1 EHRR 15,39 on 1 July 1961. In a similar vein, Fabricius AJ held in *Advance Mining Hydraulics v Botes* 2000 1 SA 851 (T) para 16.4 that "Human dignity is violated when persons are subjected

Kretzmer[34] confirms that

> Conduct which violates the essential humanity of every individual and turns him or her into a mere object to serve the interests of society or of others must be regarded as a violation of human dignity, even if it also involves violation of an unprotected right.

Human dignity has multiple meanings which are derived from the diverse sources of the idea. *Dignitas* refers to the ancient Roman use of a person's elevated status in society, whilst *dignitas hominis* refers to the Stoic account of man's elevated standing in the universe because of his ability to reason. The Judaeo-Christian account of dignity roots in the notion that man is made in the image of God, and therefore deserves equal respect. (Today however, the evolution of the idea of human dignity into a concept of constraint and freedom is thought to have replaced the idea of God and/or nature as the foundation of inalienable rights.)[35] Kant, the most influential philosopher of the Enlightenment, formulated an understanding of dignity based on man's autonomy to make his own decisions, but at the same time he is being bound to obey duties imposed by moral law. For Kant, individual autonomy lies in man's dignity, which ultimately entails that nobody should be treated as a means to an end.[36] Dworkin, a contemporary liberal philosopher, argues that human beings have rights because of their dignity, but at the same time admits that the concept is ambiguous.[37] Even the modern sources for dignity as an

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to conduct that is degrading and humiliating. This is a core right, but in its very nature there is no precisely defined content. I agree that it is deceptively illusive, but the concept does require that persons be treated as recipients of rights and not as objects subjected to statutory mechanisms without a say in the matter. The State exists for the people, not the other way round."

34 "Human Dignity in Israeli Jurisprudence" 174.

35 Klug *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* 6-10.

36 Mahlmann argues that the German Constitutional Court's decision to strike down anti-terrorism laws that allow the air force to shoot down hijacked aircraft because the dignity of the passengers and crew require that they not be objectified and sacrifice their lives in favour of a greater ideal is the most representative adjudication of the Kantian version of human dignity not to treat a person as a means to an end. See 2010 *GLJ* 6-32.

37 *Taking Rights Seriously* 198.

utilitarian ideal and source of human rights, the *UN Charter* and *Universal Declaration,* abstain from defining dignity.[38]

The fundamental diversity in dignity's origins illustrates the differences in the history of ideas to justify the reasons why humanity deserves to be treated with respect. It also illustrates the rationale for the significant variation in the constitutional use of human dignity by different courts, when the abstract and broad principle of dignity is applied in concrete cases. Venter[39] encapsulates the multiple meanings and applications of human dignity within the framework of its historical development succinctly:

> Against this background it is clear that one should not in this world of pluralistic life views expect that the constitutional recognition and elevation of human dignity would ensure the emergence of a monolithic notion of human dignity.

The diversity in the application of dignity could be attributed to the fact that the concept is abstract and extra-legal. It is meant by the drafters of the *UN Charter* and *Universal Declaration* to represent an objective and universal idea, not to be culturally contingent. There is consensus though

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38 The drafters of these international documents did not articulate a specific understanding of the term; it was rather based on a colloquial use in favour of other terms. Also, legal application of the term then was in its infancy. Schultziner states that there is a major advantage to this approach, "for the abstention from a philosophical decision regarding the source and cause for rights and duties paves the way for a political consent concerning the specific rights and duties that ought to be legislated and enforced in practice without waiving or compromising basic values of belief. Thus, the different parties that take part in a constitutive act can conceive human dignity as representing their particular set of values and worldview. In other words, human dignity is used as a linguistic-symbol that can represent different outlooks, thereby justifying a concrete political agreement on a seemingly shared ground." (See "Human Dignity: Functions and Meanings" 5.) Also see McCrudden 2008 *EJIL* 655 and 678. For a discussion regarding the decision to include dignity specifically in these international documents, see chapter 2.13 above.

39 Venter "Human Dignity as a Constitutional Value: a South African Perspective" 348.

that human dignity is the source of human rights[40] and functions as a fundamental value to aid in constitutional interpretation.[41]

Given the constitutional challenges faced by the human dignity doctrine, the following questions need to be answered by way of comparative analysis: firstly, does the concept itself display a common meaning in different jurisdictions, and secondly, for what purposes is the concept utilised by different courts[42] and in consequence hereof, what functionality does human dignity display in these (dignitarian) conceptions?

3.3 Human dignity's fusion of moral law with legal theory

Hannah Arendt[43] wrote in the aftermath of World War II that not one man, but men, inhabits earth. Therefore one can deduce that human beings eventually function within a legal order, which is expected to provide just and fair social and political results. Individual rights, as enforceable claims against others, derive from this idea of a true and just legal order.[44] This system guarantees that, through the exercise of these rights, personal choices are respected and realised. John Rawls based his first principle of justice on the idea of a just and fair political system:[45]

> A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.

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40 Various human rights documents refer to human dignity as source for these rights- see fn 29 above and footnotes 95 and 96 below.
41 *Dawood v Minister of Home Affairs* 2000 3 SA 396 (CC) para 35; Habermas 2010 *Metaphilosophy* 464; Chaskalson 2000 *SAJHR* 204.
42 Carozza "Human Dignity in Constitutional Adjudication" 459.
43 *The Human Condition* 234.
44 Fletcher 1984 *UWOLR* 175. Also see Dworkin *Taking Rights Seriously* 113.
45 *A Theory of Justice* 3; 4.

Kant's notion of a just legal order in terms of his legal theory (as opposed to his ethical theory) closely resembles that of Rawls, although it was written earlier in history, in 1797, in *The Metaphysics of Morals.* He argues that a just legal order should be one that accommodates differences in choice and preference. The exercise of a right provides the framework within which private and conflicting rights are to be adjudicated. He defines rights as a set of rules and conditions that enable individuals to behave in a way that would be compatible with the choices of others, because these choices "are universalized across the legal system as a whole."[46] The state has the power to protect the structure of these rights-as-choices against infringement or interference.[47]

According to Dworkin,[48] the purpose of rights is to protect individuals from certain majority decisions, even if these purport to act in a perceived communitarian interest - he sees individual rights as "trumps" that outweigh collective goals. For this reason, rights cannot be arbitrarily limited and any limitations must be justifiable and reasonable.[49]

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46 Fletcher 1984 *UWOLR* 175. Also see fn 10 in chapter 4.

47 Fletcher 1984 *UWOLR* 175.

48 *Taking Rights Seriously* 22.

49 The limitation clause (s 36) in the *Constitution* prescribes that rights may, in certain circumstances, give way to overriding social issues, subject to the prerequisite of an open and democratic society based on human dignity, equality and freedom. The US Constitution does not provide for the limitation of rights, but it is established through judicial interpretation. Whilst the *First Amendment* provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances", the courts held that states may enact legislation prohibiting obscene speech; defamation; fighting words; words creating a clear and present danger to public order and misleading and false advertising. Also, the *Basic Law* does not contain a limitation clause, but includes specific limitation provisions to most fundamental rights. For example, art 2(1) stipulates that "Everyone shall have the right to free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code." See Currie and De Waal *The Bill of Rights Handbook* 165 footnotes 6 and 7.

An understanding of Kant's moral and legal theories is imperative to an understanding of human dignity as an *a priori* constitutional value and as the basis for human rights. Kant's notion of morality was first published in *Groundwork to the Metaphysics of Morals* in 1785, in which he argued that human reason, as the distinctive feature of humanity, informs people to act out of respect for the universalised law-like conduct of themselves and others. To act because of reason is to act exclusively out of a moral duty. This notion of duty is connected to respect for the human dignity of ourselves and others. Such dignity is ultimately the supreme value to be respected as an end-in-itself, so that humanity should never be treated as a means only (the categorical imperative.) Kant's moral system requires internal compliance, whilst the legal system demands external compliance. In addition, the moral system exclusively accentuates the fulfilment of duties, whereas the legal system expands on the notions of objective rights and enforceable personal rights. [50] Habermas[51] describes the differences between the two systems as follows:

> This common foundation of morality and law often obscures the decisive difference that whereas morality imposes duties concerning others that pervade all spheres of action without exception, modern law creates well-defined domains of private choice for the pursuit of an individual life of one's own. Under the revolutionary premise that everything is permitted which is not explicitly prohibited, subjective rights rather than duties constitute the starting point for the construction of modern legal systems.

Fletcher[52] claims that the revival of Kantian thinking in the past few decades is on the one hand responsible for the recognition of the need for the protection of human dignity by the current legal domain, and on the other hand for a decline in the application of the opposing theory of utilitarianism. The basis of utilitarianism is that the moral rightness of an act is determined by its consequences.[53] It holds that the only important

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50 Fletcher 1984 *UWOLR* 175; 176.
51 2010 *Metaphilosophy* 471.
52 1984 *UWOLR* 171.
53 1984 *UWOLR* 171.

consequences are those that are beneficial for humanity as a whole and which feature the absence of pain and the intensity of pleasure or, in Fletcher's words:

> An act is right if in the predictable future it will generate a net gain in the pleasure or welfare of the affected parties.

The reaction against utilitarianism is manifested through the revival of Kantian thinking, which more specifically resulted in an emphasis on the theory of human rights.[54] Habermas[55] confirms this:

> After two hundred years of modern constitutional history, we have a better grasp of what distinguished this development from the beginning: human dignity forms the ‘‘portal’’ through which the egalitarian and universalistic substance of morality is imported into law. The idea of human dignity is the conceptual hinge that connects the morality of equal respect for everyone with positive law and democratic lawmaking in such a way that their interplay could give rise to a political order founded upon human rights.

Fletcher argues that the Kantian moral ideal is communitarian because man's focus is now not on himself but "on the vindication of the dignity of all humankind."[56] The human species is connected and united through the individual as his noumenal self. Yet Kant's legal theory regarding individual rights, which roots in the idea of a just legal order, is essentially and fundamentally liberal because it stresses "the centrality of individual rights and the resulting spheres of individual dominance."[57] Whereas today's capitalist world is based upon liberalism, it is confronted with obligations to

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54 Wood, the US Kantian scholar, writes, in respect of his country: "At such a time it is not difficult to see some truth in Kant's sombre account of the evil in human nature. It even becomes easier to sympathize with his stern, moralistic insistence that people must subject their ways of thinking to rational criticism and reform their ways of acting through a fundamental change of heart. Still more than that, however, the age needs Kant's sober, principled hope for a more rational, cosmopolitan future. In other words, we need to recapture an authentically Enlightenment conception of the human condition, especially an interpretation of that conception that makes clear the Enlightenment's unrealized radical potential." See *Kant's Ethical Thought* xv.

55 2010 *Metaphilosophy* 469.

56 1984 *UWOLR* 176.

57 1984 *UWOLR* 176.

accept and include communitarian values.[58] Nowhere is this dichotomy more evident than in the application of socio-economic rights, through which liberal-democratic rights must be reconciled with social-democratic values.[59] This tension is also present in adjudicating the conflicting rights of an foetus against the autonomy of his mother; when the human dignity of a convicted murderer with some prospects of eventual freedom from a life sentence must be weighed against the state's duty to protect; and in adjudicating the consequences of the institution of marriage that leads to unequal treatment for same-sex marriages.

Article 1(1) of the *Basic Law* of Germany is rooted in the Kantian notion of a reciprocal duty to rights:

> Human dignity shall be inviolable. To respect and protect it shall be the *duty* of all state authority.

In this regard, Fletcher[60] confirms that

> Significantly, Article I of the constitution does its job without invoking the doctrine of rights. The state has a duty to respect and protect human dignity and according to the standard interpretation, private individuals have the duty to respect each other's dignity. But there is no reference to a right in this respect. Article I stands in contrast to Article II, which provides that every individual has a right to the free development of his personality. That Article I relies implicitly on the notion of duty rather than of rights reflects its source in Kant's moral theory.

The idea of connecting rights with duties follows not only from constitutional tradition in Germany since the 1849 St. Paul's Church *Constitution* and the 1919 Weimar *Constitution,* but also from the 1789 French *Declaration of the Rights of Man and the Citizen* and other

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58 1984 *UWOLR* 178; Barroso 2012 *BCICLR* 352.

59 Fletcher lists further examples such as: the duty to rescue or render help in cases of emergencies, failing which people can be held tortiously and criminally liable; the limits of defence force action against enemies; reconciling the conflict between negligence and strict liability in tort law; and determining the scope of reciprocal obligations between proximate parties not bound by reciprocal contractual agreements (with reference to US law.) See 1984 *UWOLR* 178.

60 1984 *UWOLR* 179.

European systems.[61] Section 7(2) of the *Constitution* resembles the Kantian injunction of rights and corresponding duties: "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights." This instruction is confirmed in *Carmichele v Minister of Safety and Security* (hereinafter *Carmichele*)[62] regarding the vertical operation of the *Bill of Rights.* In addition, section 8(2) of the *Constitution* stipulates that

> A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

Although there are frequent but fragmented references to human dignity in US constitutional law, it is not yet employed as a basis for relying on duties to protect rights.[63]

3.4 The basic elements of human dignity

Human dignity, in its most basic form, refers to an attribute of humanity. Weisstub[64] relates that

> Albeit ambiguous, dignity is signalling a term that goes to the heart of what constitutes the quality of humanness.

Notwithstanding differences in legal culture and historic, social and religious backgrounds, countries worldwide have given prominence to human dignity in their constitutional systems. However, dignity displays different functions in different concrete cases, namely as a right, a principle or a legal value. This led Moon and Allen[65] to declare that

> The appeal to respect for human dignity can be made to assert a value that ought to be shared by all; to invoke a principle to stand alongside other fundamental principles (including in particular the principle to equal

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61 Eberle 2008 *ORIL* 17.
62 2001 4 SA 938 (CC).
63 Also see the discussion in section 3.4.1 below.
64 Weisstub "Honor, Dignity and the Framing of Multiculturalist Values" 269.
65 As quoted by Hughes *Human Dignity and Fundamental Rights in South Africa and Ireland* 67.

> treatment) to determine how that other principle should be applied; and to claim a remedy for a self-standing right.

Despite the lack of consensus on dignity's theoretical foundations, Schachter,[66] Neuman[67] and Feldman[68] identified that dignity has come to display three basic elements in the adjudication of individual rights claims.[69] The origin of these elements is to be found in the *Universal Declaration,* and specifically the first and fifth paragraphs of the preamble (own emphasis):

> Whereas *recognition of the inherent dignity* and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

And:

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

In current law, these elements are part and parcel of the generic concept of human dignity, even if the notion is disapproved of or if a particular community's concept of the basic elements differs.[70] As such, dignity is an ideal to aspire to – with universal meaning, devoid of ideological and political influences.[71]

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66 1983 *AJIL* 849-854.

67 Neuman "Human Dignity in United States Constitutional Law" 241; 271. Also see Beyleveld and Brownsword *Human Dignity in Bioethics and Biolaw* 28-29; 63-66.

68 Feldman 1999 *PL* 684.

69 Also see McCrudden 2008 *EJIL* 679; Botha 2009 *SLR* 189-190; Rao 2011 *NDLR* 187-189 (who views these elements as inherent dignity, communitarian dignity and dignity as recognition); Botha 2009 *SLR* 189; Barroso 2012 *BCICLR* 360 (who sees these elements as intrinsic value, autonomy and community value.)

70 McCrudden 2008 *EJIL* 679; Rao 2011 *NDLR* 187.

71 Neuman "Human Dignity in United States Constitutional Law" 250. He is of the opinion that dignity, thus defined, may be contrasted against "organic theories of nationalism that submerge the individual, with authoritarian political doctrines that condemn human nature as degraded by sin, with racist doctrines of biological inferiority and with aristocratic doctrines of national hierarchy."

The first element, the ontological[72] claim, refers to man's unique qualities, which are priceless and irreplaceable and constitute every individual's inherent dignity.

Recognition and respect for inherent dignity epitomises the second core element and relates to types of treatment that are inconsistent with recognition and respect for inherent dignity, as required by international and national law texts.[73] Beyleveld and Brownsword[74] identify the first and second elements as "human dignity as empowerment" and "human dignity as constraint" on free choice. The former typically plays a background role in international human rights instruments, and the latter plays a foreground role assigned in these instruments, when competing elements of other social values (such as the interests of the individual against that of the community) are to be weighed against each other. They state that intrinsic dignity is

> a seminal idea that acts as the source of the fundamental freedoms to which all humans (*qua* human) are entitled. In this context, human dignity as empowerment (specifically the empowerment that comes with the rights to respect for one's dignity as a human, and the right to the conditions in which human dignity can flourish) is the ruling conception.[75]

Further, they argue that there are two interpretations of dignity as constraint: one constrains free choice as a collective good in accordance with each society's vision; the other interpretation is based upon the view that it is as wrong to diminish one's own dignity as it is to diminish the dignity of others. McCrudden refers to this aspect as the "relational claim"[76] - in other words, this claim emphasises the relationship and expectations of the individual *vis-à-vis* the perceptions of his community -

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72 In philosophy, ontology refers to a branch of metaphysics that studies fundamental characteristics of things and subjects, inclusive of their basic composition and what it cannot consist without. It also relates to questions regarding the existence and arrangement of reality. See Anon date unknown https://www.ontology.co/.

73 Beyleveld and Brownsword *Human Dignity in Bioethics and Biolaw* 11.

74 Beyleveld and Brownsword *Human Dignity in Bioethics and Biolaw* 11.

75 Beyleveld and Brownsword *Human Dignity in Bioethics and Biolaw* 11.

76 McCrudden 2008 *EJIL* 679.

the so-called dignity of recognition, being the social dimension of dignity. This view includes the shared beliefs of a community as well as state-imposed norms that can influence human flourishing.[77] Recognition can restrict inherent dignity in favour of collective goals as well as impose duties and responsibilities towards one another.

Expanding on the relational claim, human rights instruments have underpinned a further idea regarding the relationship between the individual and the state. The third common element of human dignity is referred to as the "limited-state claim" and embodies the Kantian idea that the state should exist for the sake of the individual, and not *vice* versa. To acknowledge inherent human dignity, the state is required to progressively provide existential minimum living conditions, which are embodied in the second-generation social and economic human rights.

In constitutional use, these three elements overlap and can be conflated by courts. From jurisdiction to jurisdiction, ideas regarding the ontological claim may differ, and following this divergence, courts may not agree in their understanding as to what treatment is inconsistent with inherent dignity. These perspectives in turn influence the perceptions of courts and state policies regarding the role of a state in constitutional interpretation.[78] Different jurisdictions may support opposite conclusions. Can it be said that there is an "overlapping consensus"[79] across jurisdictions regarding the essential elements of human dignity?

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77 Barroso 2012 *BCICLR* 373.
78 McCrudden 2008 *EJIL* 680.
79 Barroso 2012 *BCICLR* 374, referring to the term coined by John Rawls, which "identifies basic ideas of justice that can be shared by supporters of different religious, political and moral comprehensive doctrines."

3.4.1 Every human possesses intrinsic dignity, as a result of his humanness

Dignity in its broadest sense, and at a minimum, encompasses the inalienable, inherent and intrinsic worth[80] or values of each individual – in the Kantian sense:

> the worth of a person has no price, admits of no substitute, cannot be traded off for anything in the world.[81]

Ackermann[82] explains Kant's theory by quoting Henkin:

> On the highest level, dignity is a quality of worth or excellence, and when used in the compound term "human dignity", it suggests all that for Kant is inherent in the human "personhood" of every human being.

In similar vein, Sachs J confirmed the inherent dignity claim in *S v Lawrence:*[83]

> Indeed, there is a core to the individual conscience so intrinsic to the dignity of the human personality that it is difficult to imagine any factors whatsoever that could justify it being penetrated by the state.

And further in *ANC v Sparrow*:[84]

> In other words, a person's dignity is intrinsic to his or her existence as a human being.

Inherent dignity comprises the totality of the uniqueness of a human being's nature; his intelligence and his sensibilities, which are possessed by everyone in equal quantum. For inherent dignity is by definition the very antithesis of the ancient hierarchical *dignitas* as well as the differential

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80 Human dignity and human worth are, in Kantian terms, synonymous, and reference throughout this thesis to the one will also imply the other. Also, the French translation for *dignitas* is *valeur,* meaning intrinsic worth. The reference in the preamble of the *UN Charter* to the "dignity and worth" of the human person is to the same concept. Thus, the term "intrinsic worth" may be used interchangeably with "inherent dignity."

81 Waldron 2008 *AJ* 4.

82 Ackermann 2004 *NZLR* 649.

83 1997 4 SA 1176 para 168.

84 01/16) [2016] ZAEQC 1 (10 June 2016) p 39 para 5.

claim of private law *dignitas.*[85] This element of dignity resonates with the Ciceronian Stoic claim of man's unique dignity, which roots in his ability to reason and his self-actualisation, in contrast with the rest of nature. It also resonates with the Judeo-Christian tradition that emphasises man's nature as a creation in the image of God. Today, Catholic thought reverts to inherent dignity to protect foetuses from abortion and to oppose the death penalty.[86] The ontology of inherent dignity then refers to the universal and egalitarian character of humanity as such, independent of any political or religious system. Réaume[87] describes this element of dignity aptly as:

> To ascribe human dignity to human beings not as empirical matter, but as a moral matter - that is, to treat it as an inherent aspect of humanity – is to treat human beings as creatures of intrinsic, incomparable, and indelible worth, simply as human beings; no further qualifications are necessary. In this basic sense, dignity is ascribed to human beings independently of their particular accomplishments or merits of praiseworthiness. It refers to a kind of worth that is not contingent on being useful, or attractive, or pleasant or otherwise serving the ends of others.

For Habermas, the universalistic element of inherent dignity represents the fabric that binds the human family together.[88] Therefore inherent dignity cannot be gained or lost. In a legal sense, it constitutes an *a priori* value of humankind that demands respect from state and individuals. The *dictum* of the Constitutional Court in *Minister of Home Affairs v Watchenuka*[89] is illustrative of this point:

> Human dignity has no nationality. It is inherent in all people citizens and non-citizens alike - simply because they are human.

Botha[90] states that the theological and metaphysical foundations of this claim are considered to be problematic in an era which is characterised by

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85 See chapter 2.2 and 2.4 for a discussion regarding the development and meaning of *dignitas.*

86 Botha refers to Hofmann, who criticises this thought, which has "conflated" dignity with biological human life. See 2009 *SLR* 189.

87 Réaume 2003 *LLR* 31.

88 Habermas 2010 *Metaphilosophy* 469-470.

89 2004 4 SA 326 (SCA) para 24.

90 2009 *SLR* 189.

fragmentation and the pluralisation of belief systems. Furthermore, the equal allocation of dignity in instances of conflicts of competing rights will result in courts employing cultural and other values, and so inherent dignity can be seen as pluralistic. This leads Feldman[91] to explain that

> The nature of dignity, culturally and contextually specific as it is, and dependent as much on the viewpoint of the observer as on the aspirations of the protagonists, may sometimes need to be treated with cautious awareness of its limitations, as well as it strengths.

When dignities compete, the abstract idea of human dignity is too general to function on its own, but social, historical and cultural factors that shape a nation will indicate the weight to be allocated to whichever right is being interpreted.[92] Implicit in the inherent element of human dignity is the acknowledgement and acceptance of diversity and differences in human beings and cultures. According to Carozza,[93] the inconsistencies and controversies in the constitutional adjudication of human dignity across jurisdictions rarely arise from the perspective of inherent dignity. Where the requirements and ambit of dignity are uncertain, it is the social, political and cultural context that contributes to an amplification of the broad understanding of dignity.[94]

A myriad of international, regional and national human rights documents refers to the equal inherent dignity of each human being.[95] Kant's claim of

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91 Feldman *Civil Liberties and Human Rights in England and Wales* 133.

92 Weisstub "Honor, Dignity and the Framing of Multiculturalist Values" 265.

93 Carozza "Human Dignity in Constitutional Adjudication" 460.

94 Carozza claims that: "in those cases, the commonality of understanding across jurisdictions quickly dissipates and the meaning of dignity becomes 'elusive' and 'amorphous (quoting Rao 2011 *CJIL* 203), even to the point of being arguably just an 'empty shell'"(quoting McCrudden 2008 *EJIL* 698.) See "Human Dignity in Constitutional Adjudication" 460.

95 For example, the preamble of the *Universal Declaration* affirms that: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Both the second preambles of the *International Covenant on Civil and Political Rights* (1967) at 52-53, (hereinafter cited as the *International Covenant on Civil and Political* Rights) and the *International Covenant on Economic, Social and Cultural Rights* (1967) proclaim that "these rights derive from the inherent dignity of the human person." Principle VII par 2 of the *Helsinki Final Act* (1975) reads that

equal inherent dignity is regarded as the basis of human rights.[96] Dicke points out that the UN General Assembly determined in 1986 that new human rights instruments should "derive from the inherent dignity and worth of the human person."[97] Consequently, inherent dignity was enacted in the major conventions on the *Rights of Children* (1989), the *Rights of Migrant Workers* (1990), *Protection against Forced Disappearance*, and the *Rights of Disabled Persons* (2007).[98] In 1993 delegates from 170 governments who convened at the Vienna Second World Conference chose inherent dignity as central to the protection and development of human rights.[99] Although the *European Convention on Human Rights* refers only to human rights and freedoms, the concept of inherent human dignity has been applied by the European Court of Human Rights in a variety of cases, particularly in those regarding torture, the rights of prisoners and sexual identity.[100]

Eberle[101] traces inherent dignity to Kant's ethical theory based on man's

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states "will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights all which derive from the inherent dignity of the human person and are essential for his free and full development." The *African Charter on Human and Peoples' Rights* (1982) guarantees respect for every human being's inherent dignity (art 5). Art 3 ("Rights to Dignity") of the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (2004) stipulates that "Every woman shall have the right to dignity inherent in a human being." The preamble of the *American Declaration on the Rights and Duties of Man* (1948) declares "All men are born free and equal in dignity and in rights."

96 Beyleveld and Brownsword *Human Dignity in Bioethics and Biolaw* 53.

97 Dicke "The Founding Function of Human Dignity" 119.

98 McCrudden 2008 *EJIL* 669.

99 The second preambular paragraph of the *Vienna Declaration and Programme of Action* declares that "all human rights derive from the dignity and worth inherent in the human person and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms." Incidentally, it was after the inception of *The Declaration and Programme of Action* that human dignity was constitutionally protected in a number of national constitutions.

100 Frowein "Human Dignity in International Law" 124 - 131.

101 Eberle 2008 *ORIL* 18.

rationality and autonomy.[102] This theory holds that, because a human being is regarded as a person, he is elevated above any price or value and therefore is not to be valued

> merely as a means to ends of others or even to his own ends, but as an end in himself.[103]

Everything in the universe either has a price or is priceless: something that cannot be replaced by an equivalent item is priceless and has dignity.[104] For Kant,[105] "humanity itself is dignity", as man is entitled to equal respect by other human beings, which results from man's moral duty to

> acknowledge, in a practical way, the dignity of humanity in every other human being

– as ends in themselves, or *Selbstzwecke.* Man can only claim autonomy, and consequently dignity, if he respects other human beings, which obligation he imposes upon himself by his own moral laws (which in the Kantian sense will become a universal law) and guided by the categorical imperative:

> Act only according to that maxim by which you can at the same time will that it should become a universal law,[106]

and:

> every rational being must act as if he, by his maxims, were at all times a

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102 However, McCrudden states that Kant's idea of dignity is "notoriously contested territory." See 2008 *EJIL* 659.

103 The Kantian influence resonates in the Court's *dictum* in *S v Dodo* 2001 3 SA 382 (CC) 423 para 38: "To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as end in themselves, never merely as means to an end."

104 Barroso 2012 *BCICLR* 360.

105 *Groundwork of the Metaphysics of Morals* 209.

106 *Foundations of the Metaphysics of Morals* (1975) 39-41, as quoted by Eberle 2008 *ORIL* 18.

> legislative member in the universal realm of ends.[107]

This is the central idea for rooting law in moral freedom: a system of *a priori* abstract reasoning, based on moral principles[108] to establish the legal basis for the protection of human dignity. The drafters of the German *Grundgesetz*[109] (hereinafter the *Basic Law*) applied this central reasoning in terms of which protection of inherent human dignity is an *a priori* principle (*Grundwert*) designed to accomplish this goal.[110] As the Federal Constitutional Court emphasised in the *Life Imprisonment Case*:[111]

> It is contrary to human dignity to make the individual the mere tool (*blosses Objekt)* of the state. The principle that "each person must always be an end in himself" applies unreservedly to all areas of the law; the intrinsic dignity of the person consists in acknowledging him as an independent personality.

There is a strong link between the principled application by the Federal Constitutional Court of the *raison d'etre* for the protection of human dignity and the first component of section 10 of the *Constitution,* which is posited as a categorical imperative: "everyone has inherent dignity."[112] *A priori* status is given to the inherent dignity paradigm in that "expression was given of what was presumed by implication to exist."[113] The second component of section 10 posits that inherent dignity must be respected

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107 *Foundations of the Metaphysics of Morals* (1975) 39-41, as quoted by Eberle 2008 *ORIL* 18.

108 Eberle 2008 ORIL 20; Kommers and *Miller The Constitutional Jurisprudence of the Federal Republic of Germany* 362.

109 *Basic Law for the Federal Republic of Germany*, 1949.

110 Eberle 2008 ORIL 20; 21; Kommers and Miller 1984 *The Constitutional Jurisprudence of the Federal Republic of Germany* 362.

111 BVerfGE 187, 227-28 (1977), as quoted by Eberle 2008 *ORIL* 12.

112 O'Regan J in *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35 confirmed that: "The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and crudely denied. It asserts to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings." Also see Ackermann 2004 *NZLR* 347 and *S v Dodo* 2001 3 SA 382 (CC) para 35: "The human dignity of all persons is independently recognized as both an attribute and a right in section 10 of the Constitution…" Also see the discussion in chapter 5.3.3.3 below regarding the operation of inherent dignity as a rule in South African constitutional law.

113 Venter "Human Dignity as a Constitutional Value: A South African Perspective" 340; Botha 2009 *SLR* 197. Also see footnotes 409-411 below as well as footnote 42 in chapter 1 above.

and protected. Inherent dignity here connects with the universal human rights of each individual as the basis for these rights, in equal quantum. In this sense dignity reflects two sides of a coin, the so-called two faces of Janus:[114] one portraying universal moral values, and the other constitutionally protected human rights.

Inherent human dignity forms the basis of first generation fundamental human rights such as the rights to life;[115] property and equality; freedom of religion; freedom of speech and expression; and freedom from arbitrary arrest and detention; the rights to physical and mental integrity (which include the prohibition of cruel and unusual punishment);[116] and equality and privacy.[117] These rights relate to negative liberty: the "classical liberal idea of freedom from interference, the right to be left alone"[118] as applied in US constitutional law. In this context, autonomy[119] is the basis of dignity to ensure freedom from state interference in order to provide to the individual "the ability to choose without state interference,"[120] the so called "negative freedoms" in US constitutional law. For example, freedom of expression strongly focuses on the liberty and autonomy of the individual, sustained by the provisions of the First Amendment. Freedom of speech is

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114 Habermas 2010 *Metaphilosophy* 470.

115 The concept of human dignity cannot give complete protection of an indeterminate right to life in cases such as the death penalty, abortion and assisted suicide. See Barroso 2012 *BCICLR* 363.

116 In an appeal against a decision from the Commissioner of *Correctional Services* not to grant medical parole for the applicant on grounds of a terminal illness, Van Zyl J held that terminally ill prisoners have a right to a humane and dignified death outside prison: "To insist that he remain incarcerated until he has become visibly debilitated and bedridden can by no stretch of the imagination be regarded as humane treatment in accordance with his inherent dignity. On the contrary, the overriding impression gained from the third respondent's attitude in this regard is that the applicant must lose his dignity before it is recognised and respected." See *Stanfield v Minister of Correctional Services* 2004 4 SA 43 (C) para 124.

117 Barroso 2012 *BCICLR* 363.

118 Rao 2011 *NDLR* 203.

119 Barroso discusses dignity as an essential element of autonomy separate from inherent dignity but indeed as one of the three essential components of dignity. See 2012 *NCICLR* 367.

120 Rao 2011 *NDLR* 204.

afforded unlimited protection, to the point that uncivil speech receives constitutional protection.

Whilst other concepts of dignity often require a decision regarding conflicts of interest between individuals as well as a contingent cultural view (such as fundamental rights adjudication regarding life, and specifically abortion and assisted suicide), the inherent aspect of dignity relates to the relationship between the individual and the state. In the US, inherent dignity is frequently referred to in decisions regarding freedom from state interference, in areas such as privacy, freedom of speech, and sexual relationships,[121] and in the prohibition of cruel and unusual punishment. For example, inherent dignity is invoked in cases where the scope and limitations of autonomy and freedom are challenged against individual choice and self-determination, such as in cases pertaining to abortion and sexual preferences. In the US, the majority decision in *Planned Parenthood of Southeastern Pennsylvania v Casey*[122] relied heavily on personal autonomy and dignity as central to protection by the Fourteenth Amendment in adjudicating a woman's right to choose an abortion.[123] Her right to choose is constitutionally protected by her right to liberty,[124] of which dignity is the basis. Justice Stevens[125] stated that

> Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term. The mandatory waiting period denies women that equal respect.

In this decision, the competing inherent dignity of the foetus as the basis of its right to life was minimized in favour of the mother's autonomy to choose

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121 Rao 2011 *NDLR* 187.
122 505 US 833 (1992).
123 Rao 2011 *NDLR* 211. Justice Stevens emphasised in *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992) at 851 that: "The authority to make such traumatic and yet empowering decisions is an element of basic dignity and autonomy… A woman's decision to terminate her pregnancy is nothing less than a matter of conscience."
124 This was the central legal question in *Roe v Wade* 410 US 113 (1979).
125 505 US (1992) 921.

an abortion. Similarly in South Africa a woman's right to choose abortion in the early stages of pregnancy trumps the right to life of the foetus under certain circumstances, whilst in Germany the right to life of the foetus has preference over the mother's autonomy to end her pregnancy (under certain circumstances), as a matter of constitutional priorities.[126] In democracies such as the US, Canada, the UK, France and Hungary, human dignity is not interpreted to give preference to the life of the foetus against the right of the mother to terminate her pregnancy.[127]

The concept of equal inherent dignity has been applied in South African law to realise substantive equality as required by section 9 of the *Constitution,* specifically regarding the *sequelae* of the apartheid legacy. Ackermann[128] explains that

> Blacks were treated as a means to an end and hardly ever as an end in themselves; an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.

O'Regan J in her concurring judgment in *Makwanyane*[129] held that:

> The new Constitution rejects this [apartheid] past and affirms the equal worth of all South Africans.

The Court connected discrimination and differential treatment, which denied black South Africans' inherent dignity, with its apartheid past. In *Prinsloo v Van der Linde*[130] the Court explained that:

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126 The Federal Constitutional Court held in the *First Abortion* judgment (BVerfGE 39,1 (1975)) as well as the *Second Abortion* judgment (BVerfGE 88,203 (1993)) that a foetus is the bearer of human dignity as protected by Art 1(1) of the *Basic Law.*

127 Bognetti "The Concept of Human Dignity in European and US Constitutionalism" 85. The Hungarian Constitutional Court declared that: "It has been constantly stated by the Constitutional Court that among the rights to be weighed against the State's duty to give increased protection to foetal life, the mother's right to self-determination – as part of the right to human dignity- is the most important one" in Decision 48/1998 (IX.23) AB par 3(b). See McCrudden 2008 *EJIL* 689.

128 Ackermann 2004 *NZLR* 650.

129 1995 3 SA 391 (CC) para 329.

130 1997 3 SA 1012 (CC) para 32.

> Given the history of this country we are of the view that "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period in our history during which the humanity of the majority of our inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.

And further:

> unfair discrimination, when used in this second form in s 8(2) [of the interim *Constitution*] in the context of s 8 [of the interim Constitution] as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.[131]

In a similar vein the Court quoted the following dictum from *President of the Republic of South Africa v Hugo*[132]

> At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.[133]

In addressing past discrimination against gays and lesbians, the Court also connected inherent human dignity to substantive equality:

> The sting of the past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether as individuals or in their same-sex relationships, do not have the inherent dignity of or are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and rationality.[134]

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131 1997 3 SA 1012 (CC) para 33.

132 1997 4 SA 1 (CC) para 41. The Court referred to a *dictum* of the Canadian Supreme Court in *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-105: "Equality, as that concept is enshrined as a fundamental human right in the *Charter,* s.15 means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens that demean them, that treat them as less capable for no good reason or that otherwise offend fundamental human dignity." For criticism against the Court's use of a so-called Canadian concept of dignity, see Roux 2008 *AJ* 186 as well as footnotes 103-108 in chapter 4 below.

133 1997 3 SA 1012 (CC) para 34.

134 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 42.

A person's right to exercise his sexual preferences (the right to equality) is often expressed by the equal and inherent dignity paradigm. The Constitutional Court held in *Minister of Home Affairs v Fourie* that:[135]

> [Discrimination] denied to gays and lesbians that which was foundational to our Constitution and the concepts of equality and dignity, which at that point were closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[136] the Court stated that

> At its least, it is clear that the constitutional concept of dignity requires us to acknowledge the value and worth of all members of our society.

In the US, the Supreme Court declared Texas' law against sodomy invalid in *Lawrence v Texas*.[137] Again, the Court relied on an individual's rights to choice and autonomy:[138]

> [Adults] may choose to enter upon this [homosexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.

In *Obergefell v Hodges*[139] Justice Kennedy held that there is no differentiation between the dignity of gays and lesbians and that of heterosexual persons, in the framework of a "right to marriage", who are entitled to the protection of the Due Process and Equal Protection clauses:

> They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[140]

The death penalty is banned in Europe and many other countries, whilst the US continues to be an exception amongst democracies. No asserted competing interest in retribution can account for the complete

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135 2006 1 SA 524 (CC) para 50. This discussion was in reference to the *dictum* of the Court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 42.
136 1999 1 SA 6 (CC) para 28.
137 539 US 588 (2003).
138 539 US 588 (2003) 567, as quoted in Rao 2011 *NDLR* 212.
139 135 S. Ct. 1039 (2015). Also see fn 247 below.
140 135 S. Ct. 1039 (2015) at 28.

objectification of the convicted "as a means to an end." The Court in *Makwanyane*[141] stated that

> It strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.

Also in *Makwanyane,* O'Regan J[142] pointed out that

> Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.

Justice Brennan, renowned in the US for his dignitarian judgments, stated in *Furman v Georgia*[143] regarding the provisions of the Eighth Amendment that:

> The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual," therefore, if it does not comport with human dignity.

And in *Gregg v Georgia*[144] he expressly referred to the "common human dignity" of all human beings:

> The fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded.[It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

In German law, the mere object formula of dignity or *Objektformel* (based on Kant's categorical imperative) corresponds with the claim of universal inherent dignity. This approach is confirmed in the *Life Imprisonment*[145] case:

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141 1995 3 SA 391 (CC) para 26 per Chaskalson J.
142 1995 3 SA 391 (CC) para 328.
143 408 US 238 (1972) 270.
144 428 US 153 (1976) 230.
145 BVerfGE 45, 187, 227-228. However, in the *Microcensus* case, in which the Federal Constitutional Court held that the requirement of the state to record and register a person's personal information such as the vacation and recreational trips undertaken by his household, would be tantamount to treating him as an object. The Court held that as the legislation requiring such information was not of a

> It is contrary to human dignity to make the individual the mere tool [*bloßen Object*] of the state. The principle that "each person must always be an end in himself" applies unreservedly to all areas of the law; the intrinsic dignity of the person consists in acknowledging him as an independent personality.[146]

For example, the German Federal Administrative Court found in the "*Peep Show*" judgment[147] in 1981 that the dignity of women performing strip tease in front of peep holes for "unseen men" who had paid for the show by the insertion of a coin in a machine was impaired, although they had acted voluntarily and despite having willingly commercialised their bodies. The court refused to grant an entertainment license to the applicants on the grounds that it violated the women's dignity, who would be degraded to the level of objects. "Public morals", in the perspective of human dignity, formed the basis of the Federal Administrative Court's reasoning. In *Mohamed v President of the Republic of South Africa*[148] the Court cited a *dictum* of the Administrative Court that

> Human dignity is an objective, indisposible value, the respect of which the individual cannot waive validly.

The *Peep Show* decision was upheld by the same court in 1990, but the court based its founding solely on a morality judgment of the public, and not by reason of the violation of the participants' dignity.[149] In the famous *Dwarf Tossing* case[150] in 1995 in France, the Council of the State as well

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personal nature nor was the information available to the outside world, such legislation did not violate dignity or the right of the free development of one's personality. See BVerfGE 27, 1, (1969), as quoted by Botha 2009 *SLR* 184; Mahlmann "Human Dignity and Autonomy in Modern Constitutional Orders" 379 fn 54; Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 356-358.

146 As quoted by Ackermann *Human Dignity: Lodestar to Equality in South Africa* 126.

147 BVerfGE 64, 274 277-280 (1981) as quoted in Botha 2009 *SLR* 184.

148 2002 3 SA 893 (CC) para 62 fn 55.

149 Klein "Human Dignity in German Law" 158. Möllers criticises the Court's application of the *objektformel* by arguing that in a democratic society people are autonomous beings and are able to make rational decisions by providing reasons for their actions – human rights and democracy are grounded in human dignity. See Möllers 2009 *IsraelLR* 433.

150 *Wackenheim v France* Conseil d'État Assemblee [CE Ass.] [Administrative Court Assembly] decision No. 136727, Oct 27, 1995, Rec.Lebon (Fr.), *available at* http:/www.juricaf.org/arret/FRANCE-CONSEILDETAT-19951027-136727, as

as the United Nations Human Rights Committee applied similar reasoning by confirming a ban on the traditional public throwing of dwarves (for compensation and wearing protective gear) for short distances by paying customers. Incidentally, earlier, in 1992 in Germany, the administrative courts prohibited these performances on the ground that the dwarves were reduced to "projectiles", or objects, in the perspective of the violation of their dignity.[151] Although the court's reasoning implies a serious interference in personal autonomy, these decisions confirm that inherent dignity cannot be gained or waived in any circumstances.[152]

In these decisions the divergence from US to German and South African law is further illustrated by the courts' communitarian thinking, in contrast to the emphasis on autonomy in US constitutional law. Protection of negative liberty, which relates to freedom from state interference and libertarian values, are predominant in US law.[153] Protection of an

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quoted by Barroso 2012 *BCICLR* 376 and Rao 2011 *NDLR* 226. In this decision, Mr Wackenheim challenged a policy decision of the French Ministry of Interiors on the banning of professional dwarf-tossing, which in turn, resulted in the banning of dwarf-tossing in the cities of Morsaung-sur-Orge and Aix-en-Provence. The Administrative Court Assembly upheld the statute-based authority of the police to keep public order and peace, and found that human dignity is a basic element of public peace. According to Mr Wackenheim, this policy interfered with his right to earn a living and his economic liberty. On appeal to the highest administrative court (Conseil d'État), the Court upheld the ban on dwarf tossing, ruling that it affronted human dignity as part of the public order, which has to be controlled by the municipal police. The Court's decision was confirmed by the United Nations Human Rights Committee.

151 Klein "Human Dignity in German Law" 158.

152 Compare the *dictum* of Justice Brennan in *Gregg v Georgia* 428 US 153 (1976) 230: "…even the vilest criminal remains a human being possessed of common human dignity" with the Court's *dictum* in *Makwanyane* 1995 3 SA 391 (CC) para 137 "every person, including criminals convicted of vile crimes" [possesses dignity]. In contradistinction, the Court found in the much criticised decision of *Jordan v S* 2002 6 SA 642 (CC) that a prostitute's dignity is diminished as a result of her own conduct that commercialises her body; rather than resulting from a law which criminalises the conduct of the prostitute but not that of her patron. See Botha 2009 *SLR* 203.

153 Rao quotes from Post ("Three Concepts of Privacy" 2001 *GLR* 2087): "Autonomy refers to the ability of persons to create their own identity and in this way to define themselves. Dignity, by contrast, refers to "our sense of ourselves as commanding (attitudinal) respect." Unlike autonomy, dignity depends on intersubjective norms that define the forms of conduct that constitute respect between persons. That is

individual's inherent dignity through the furthering of autonomy fits into this constitutional model. As such, inherent dignity is perpetual and not dependent on changing social norms. By contrast, German and South African constitutional law have a communitarian character[154] in the light of the perspective that community values and respect are the primary sources of dignity, as negative liberty *per se* is regarded to be insufficient for human flourishing.[155]

3.4.2 Every human being's intrinsic dignity must be recognised and respected by others

Samuel Pufendorf,[156] writing in the natural law tradition in the eighteenth century, claimed that natural rights are derived from human dignity or *dignatio* (his choice of word) as conceptualised by the Stoics[157] and not from state authority (and thus cannot be taken away by state authority.) Dignity is of particular importance to the human rights idea as it carries with it the claim that each human being is the bearer of these rights.[158] Human rights provide a guarantee that basic rights are to be respected by, at least, the State. These rights are regarded as special entitlements or, in Dworkin's words, "trumps" that give rise to a claim of respect and equal treatment against the state and by private persons.[159] Yet Kant's formulation of dignity as a moral aspiration that man should be treated as an end-in-himself and never as a mere means to achieve any type of

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why modern legal systems so often set autonomy and dignity in opposition to each other…" See 2011 *NDLR* 219 fn 149.

154 Rao 2008 *CJEL* 219-220. However, according to McCrudden, South Africa appears to be caught in between the two issues. See 2008 *EJIL* 699.

155 Rao 2011 *NDLR* 220.

156 See chapter 2.9 above for a discussion regarding Pufendorf's concept of human dignity.

157 Cancik "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero" 31, 32.

158 See, *inter alia,* article 1 par 2 of the *Basic Law;* s 10 of the *Constitution* and article 6 of the *Universal Declaration* "Everyone has the right to recognition everywhere as a person before the law "

159 Dworkin *Taking Rights Seriously* 22.

objective provides the basis for the proposition that people are to be treated with respect and dignity:

> Every person has the right to be respected by the other fellow-persons and he (or she) herself, in turn, is under duty to respect the dignity of other persons. Humanity in itself, is dignity. Therefore no person should be used as a means to an end…But he should always be used as an end and his dignity and personality is derived exactly from this reality. The dignity by which the human being knows himself above all non-human creatures and even "objects", which could be used as a means to an end.[160]

Kant's formulation of this moral law has two legs: the first entails that to act in accordance with reason, which is humanity's distinctive feature, is to act solely out of duty to uphold one's moral laws, and that that is, in turn, "law-like" conduct.[161] To act out of respect for this "law-like" conduct is to act out of a self-imposed duty. Kant links this formulation of duty with respecting each other's human dignity, as well as that of oneself. Therefore,

> humanity and human dignity are the supreme values and they must be respected as ends in themselves.[162]

In *South African Police Service v Solidarity obo Barnard*[163] Van der Westhuizen J, in the context of affirmative action and substantive equality, referred to Kant's claim of reciprocal duties:

> … this idea also gives effect to another Kantian way of understanding dignity – that it "asks us to lay down for ourselves a law that embraces every other individual in a manner that extends beyond the interests of our more parochial selves". Measures to further substantive equality recognise this and embrace the importance of advancing societal members' welfare, material position and interests. The dignity of all South Africans is augmented by the fact that the Constitution is the foundation of a society that takes seriously its duties to promote equality and respect for the worth of all. Because affirmative substantive equality measures are one way in which these duties are given effect, these measures can enhance the dignity of individuals, even those who may be adversely affected by them.

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160 Kant *The Metaphysics of Morals* 209.
161 Fletcher 1984 *UWOLR* 174.
162 Fletcher 1984 *UWOLR* 175.
163 2014 6 SA 123 (CC) para 175, quoting Woolman "The Architecture of Dignity" 36.

Contrasting the US application of dignity, Benda[164] (quoting Durham) states that American culture views the meaning of human dignity in a context different from that of Germany:

> In the USA, dignity is connected with self-confidence. If here one talks about dignity, one example is the worker living close to poverty but not prepared to accept public support. To treat everybody with dignity means to help them and to respect them but not to undermine their self-confidence. In Germany the concept of dignity has more to do with duty- the ideal of the moral law as seen in Kant's philosophy.

By extension, and as a result of significant historical development, the legal recognition[165] of respect for human dignity found its way into formal international, regional and national structures, to encapsulate a new legal relationship between state and individual. Consequently, modern constitutional states safeguarded themselves against "formal change inconsistent with their normative foundations"[166] inclusive of respect for human dignity. According to Weinrib[167]

> Proscribing state violation of human dignity became the highest aspiration of these new instruments. This aspiration has transformed the theory and practice of liberal democracy generally, and not only in the failed states defeated in WWII.

She refers to this development as the "postwar rights-protecting paradigm."[168] Respect for human dignity is central to the post-war constitutional tradition in the perspective of violations of dignity, which cannot be justified by any nation's perceptions of a particular cultural, religious or political practice, or in the name of majoritarian politics.[169]

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164 Benda "The Protection of Human Dignity (Article 1 of the Basic Law)" 37.

165 For a discussion regarding the different strands of "recognition", see Rao 2011 *NDLR* 243-244.

166 Weinrib 2005 *NJCL* 329.

167 Weinrib 2005 *NJCL* 333.

168 Weinrib 2005 *NJCL* 333. She observes that *a priori* and fundamental constitutional principles are important elements of post-war rights protection. These principles are protected against formal amendment, generally. Also, state authority is limited and delineated in order to protect human dignity. The post-war constitutional concept prescribes an established methodology to purposive interpretation and a proportionality analysis when rights have to be balanced.

169 Weinrib "Constitutional Conceptions and Constitutional Comparativism" 17.

Rights coupled with state duties such as the protection of socio-economic rights are common in European constitutional systems and reflect a value-ordered system, as opposed to a value-neutral system such as is embodied in the US Constitution.[170] The late Oscar Schachter, a leading international law expert, noted that the idea of human dignity functions to delineate the scope and content of state power.[171] This observation is particularly true for the German system, which requires that

> public authority originates from and operates within the legitimizing framework of rights protection.[172]

For Schachter,[173] the concept of respect for dignity is embodied in the idea of the freedom of choice of an individual, groups or communities, which in turn is expressed through a "strong emphasis on the will and consent of the governed." In other words,

> respect for the intrinsic worth of a person requires that the person is entitled to have his or her own beliefs, attitudes, ideas and feelings.[174]

In *Prince v President of the Law Society Cape of Good Hope*[175] Ngcobo J gave recognition to diversity among individuals with regards to religious freedom:

> The right to freedom of religion is especially important for our constitutional democracy which is based on human dignity, equality and freedom. Our society is diverse. It is comprised of men and women of different cultural, social, religious and linguistic backgrounds. Our Constitution recognises this diversity. This is apparent in the recognition of the different languages; the prohibition of discrimination on the grounds of, amongst other things, religion, ethnic and social origin; and the recognition of freedom of religion and worship. The protection of diversity is the hallmark of a free and open society. It is the recognition of the inherent dignity of all human beings. Freedom is an indispensable ingredient of human dignity.

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170 Eberle 2008 *ORIL* 5.
171 1983 *AJIL* 850.
172 Weinrib 2005 *NJCL* 338.
173 1983 *AJIL* 850.
174 1983 *AJIL* 850.
175 2002 2 SA 794 (CC) para 49.

This view is reflected through the subjective aspect of human dignity, namely how one feels about others, as opposed to the objective aspect of human dignity, which refers to how one treats the other.[176] In a similar vein, Chaskalson,[177] former president of the Court, points out that

> In a broad and general sense, respect for dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.

Habermas[178] explains the progression from respect to recognition as follows:

> The transition from morality to law calls for a shift from symmetrically intertwined perspectives of respect and esteem for the autonomy of the other to raising claims to recognition for one's own autonomy by the other. The morally enjoined concern for the vulnerable other is replaced by the self-confident demand for legal recognition as a self-determined subject who "lives, feels, and acts in accordance with his or her own judgment." Thus the legal recognition claimed by citizens reaches beyond the reciprocal moral recognition of responsible subjects; it has the concrete meaning of the respect demanded for a status that is deserved, and as such it is infused with the connotations of the "dignity" that was associated in the past with membership in socially respected corporate bodies.

Here the dignity of the human person is constituted by his relationship to society, because respect for dignity is reflected through the lens of institutional systems and cultural views. Yet this wide inclusivity for respect

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176 1983 *AJIL* 851. Compare the references of Feldman to the objective and subjective elements of human dignity: "In relation to the subjective aspect of dignity, the law of human rights will typically be concerned to prevent treatment which damages a person's self-respect and physical or moral integrity. With regard to the objective aspect, the law will usually have to go further, imposing positive duties on people to act in ways which optimise the conditions for social respect and dignity." See 1999 *PL* 682. Schachter and Feldman's observations resonate with the *dictum* of Sachs J in *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 124: "The violation of dignity under section 10, on the other hand, contemplates a much wider range of situations [than violation of dignity and self-worth under the equality provisions]. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It also could be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity."

177 Chaskalson "Human Dignity as a Constitutional Value" 134.

178 2010 *Metaphilosophy* 472.

of individual choice does not detract from reciprocal individual responsibility, which is analogous to the obligation of mutual respect in the Kantian sense. The *Universal Declaration* embodies the interrelatedness of an individual's personality and autonomy by and through his society.[179] "Everyone" as referred to in various articles is expected to "act towards one another in a spirit of brotherhood."[180] Glendon[181] relates that

> "Everyone" is depicted as situated in a variety of specifically named real-life relationships of mutual dependency: families, communities, religious groups, workplaces, associations, societies, cultures, nations and an emerging international order. Though its main body is devoted to individual freedoms, the Declaration begins with an exhortation to act in "spirit of brotherhood" and ends with community, order, and society.

The recognition of dignity focuses on a process of self-actualisation and identity-building, rather than being rooted in a metaphysical or theological claim.[182] According to Henkin,[183] dignity requires

> the full development of the individual's personality, respect by society and by one's neighbours, security for one's "honour" and self-esteem.

Rao[184] claims that "dignity as recognition"

> depends essentially on how one's choices and relationships are viewed by the broader social and political community, by the *attitude* expressed about one's relationship by the law.

Representing this claim for the recognition of dignity are the third-generation solidarity rights, which create a political demand for the state and individuals to respect and give legal effect to human beings' personal choices.[185] In concrete cases the individual's freedom can be limited in favour of the dignity of his community, but recognition of dignity goes further than a mere protection of individualism, in that there is a constant

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179 Glendon "A World Made New" 148.
180 Article 1.
181 "A World Made New" 148.
182 Botha 2009 *SLR* 189.
183 Henkin "Human Dignity and Constitutional Rights" 211.
184 Rao 2011 *NDLR* 259.
185 Rao 2011 *NDLR* 243.

shift of and eventual balancing between the (sometimes conflicting) interests of the individual and his society.[186] Yet the paradox in this relational concept of dignity is explained by the exclusion of

> both a radical, abstract individualism and a "thick" form of communitarianism in which the collective takes precedence over the individual.[187]

Hence, state policies reflecting particular social norms prescribe guidelines or standards for the protection of dignity. Dignity in this respect is not solely inherent and universal, but is socially constructed and can often conflict with inherent dignity.[188] For example, in France, the Constitutional Council upheld a law making it illegal for Muslim women to wear the burqa or full veil in public on the grounds that it denounces the women's human dignity and does not reflect French values.[189] Conversely, in South Africa the Constitutional Court found in *MEC for Education: KwaZulu-Natal v Pillay*[190] that human dignity encompasses the "unique set of ends" of each individual so that a Hindu female learner may wear a nose stud in school as an expression of her South Indian Tamil Hindu culture. Langa CJ connects the recognition of the individual's dignity in relation to respect by his community in his judgment:

> According to Gyekye, "an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons". This thinking emphasises the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity. Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.[191]

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186 *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC).
187 Botha 2009 *SLR* 219.
188 Rao 2011 *NDLR* 221; *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 177.
189 Conseil constitutionnel [CC][Constitutional Court] decision No. 2010–613DC, Oct. 7, 2010, J.O. 18345 (Fr.). 7, 2010, J.O. 18345 (Fr.).
190 2008 1 SA 474 (CC) para 64.
191 2008 1 SA 474 (CC) para 53.

The contingent and cultural-specific nature of dignity as recognition is illustrated by the paternalistic judgment of the Court in *S v Jordan,*[192] in contrast to the strong emphasis on equality in the gay rights cases. It was found that commodification through prostitution devalues the human body, and therefore human dignity is willingly "diminished" in the eyes of the community. The Court upheld prostitution as a crime, but the minority pointed out that criminalization constitutes unfair discrimination in seeing the prostitute as the primary offender and the patron as at most an accomplice. Writing for the minority, O' Regan and Sachs JJ held that:

> The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished … by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.[193]

Thus constitutionally recognised social standards are regarded as paternalistic policies, designed for the benefit of the individual and the community, so as to prevent "undignified" behaviour, however implausible in application. Here the constitutional endorsement of social norms conflicts with inherent dignity and autonomy. In addition, this judgment raises questions about the role of the law in "sustaining systemic disadvantage."[194] In cases regarding artistic freedom, the dignity of groups can trump autonomy. The Court found in *De Reuck v Director of Public*

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192 2002 6 SA 642 (CC). The judgment is regarded as "paternalistic" as it is based on the (debatable) presumption that the Court can place itself in the role of a father of the citizenry by judging what is morally best for them, or *in casu,* act in the interests of the individual. *In casu,* however, the Court failed to distinguish between constitutional standards for the protection of sexual associations that have already been afforded constitutional protection, such as gay and lesbian sexual engagements, and prostitution. The commodification of a prostitute's body was the rationale for the finding of immorality and therefore the sanctioning of criminality. This is a classic case of "dignity as constraint", where individual autonomy must give way in favour of collective interests. See also fn 74 above.

193 *S v Jordan* 2002 6 SA 642 (CC) para 74.

194 Botha 2009 *SLR* 203.

Prosecutions[195] that laws prohibiting child pornography are constitutional because:

> Child pornography is universally condemned for good reason. It strikes at the dignity of children.[196]

Langa J explained that:

> Children's rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth.[197]

Recognition here is seen from the perspective of the community or groups and not from that of the individual; thus the perspective is reversed. *In casu* the court held that

> There is obvious physical harm suffered by the victims of sexual abuse and by those children who yield to the demands of the paedophile and the pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available.[198]

Human rights law is the legal mechanism that embodies the claim for respect and protection of rights, and equalises these rights and entitlements.[199] Article 55 of the *UN Charter* pledges to create conditions between nations to promote "respect for, and observance of, human rights and fundamental freedoms", whilst article 55(c) promotes

> universal respect for the observance of human rights and fundamental freedoms.

In terms of article 2 of the *Universal Declaration,* everyone is regarded as the bearer of these rights, which are enumerated in the articles following. Similarly, the *International Covenant on Civil and Political Rights* (1967),[200] *the International Covenant on Economic, Cultural and Social Rights*

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195 2004 1 SA 406 (CC).
196 2004 1 SA 406 (CC) para 61.
197 2004 1 SA 406 (CC) para 63.
198 2004 1 SA 406 (CC) para 63.
199 Rao 2011 *NDLR* 243.
200 Dec 16, 1966, 993 U.N.T.S. 171.

(1967)[201] and other Conventions proclaim that human rights, which derive from the inherent dignity of the person, must be respected and enforced. Human dignity is protected through the enforcement of these rights.[202]

Dignity as recognition roots in the idea that both the individual and the groups[203] to which he may belong are constituted by his community, that his desire to belong translates into a desire to be accepted and thus respected for his choices of living and modes of self-actualisation,[204] and thus that everybody is interconnected. It ultimately requires that political systems and individuals respect one another equally. Inherent dignity is not affected by this claim for recognition, as it continues to exist irrespective of recognition as such. Recognition goes further than inherent or equal dignity, however: it entails that individual and group differences are recognised and respected on a subjective level.[205] Feldman[206]

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201 Dec 16, 1966, 993 U.N.T.S. 3.

202 Chaskalson "Human Dignity as a Constitutional Value" 2011 *AUILR* 135.

203 Modern constitutions protect various group rights, such as race, ethnos, religion and languages.

204 In *South African Police Services v Solidarity obo Barnard* 2014 6 SA (CC) para 173 the Court held that: "The concept of dignity also concerns an individual's sense of self-esteem, and encompasses the idea that one is permitted to develop one's talents optimally." The Court found in *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA) that conditions imposed on asylum-seekers and refugees, which prohibit them from employment and study, amount to an infringement of their human dignity and education. The Court held at para 27 that "The freedom to engage in productive work even where that is not required in order to survive is indeed an important component of human dignity, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth is the fulfilment of what it is to be human is most often bound up with being accepted as socially useful." In a similar vein, the Court found in *South African Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC) para 31, subsequent to a judgment of the High Court that the applications of the applicants against the respondents to relocate illegal informal traders to an unknown destination in an unknown time-period were not urgent and against prohibition of trading in certain areas in the central business district being demarcated for informal trading, that "It must be added that the eviction of the traders involved constitutional issues of considerable significance. The ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it they faced 'humiliation and degradation'" – quoting from the *Watchenuka* judgment para 32.

205 Rao 2011 *NDLR* 248.

206 *Civil Liberties and Human Rights in England and Wales* 126. Also see the discussion in chapter 2.15.2.

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

To this end, recognition demands that state policies weaken individual liberty and autonomy and may trump inherent human dignity.[207] For example, prohibitions against hate speech[208] and defamation[209] are designed to enforce inclusivity and respect between citizens and groups and to create boundaries of civility. The effect of hate speech is a denial of equal citizenship, which affects the right to recognition:

> Recognition is the most fundamental right that individuals have, a right that lies at the basis of all their rights. At the same time, mutual recognition is the bond that constitutes the political community. For these reasons, individuals have a duty to recognise one another as human beings and citizens. Hate speech violates this duty in a way that profoundly affects both the targets themselves and the society as a whole.[210]

Unlawful infringement of an individual's *dignitas* results in infringement of the value of human dignity, in the perspective of the individual's standing

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207 Rao 2011 *NDLR* 249; *South African Police Services v Solidarity obo Barnard* 2014 6 SA (CC) paras 177-178.

208 Hateful speech is proscribed by a number of international conventions, for example s 20 (1) of the *International Covenant on Civil and Political Rights* (1967) and s 4 of the *International Convention of the Elimination of All Forms of Racial Discrimination* (1965). In the US, the First Amendment protects hate speech, in general and as long as it does not contain fighting words. See Rao 2011 *NDLR* 252 fn 276 in discussion in section 6.2.6.2 below. In South Africa, like most other democracies, freedom of speech is protected, whilst hateful speech is prohibited by ss 16(2); 30; 31 and 235 of the Constitution. Also see the discussion in chapter 5.3.9.

209 In the US, individual reputation is protected through the libel laws of the different states, which do not violate the First Amendment, although this protection constitutes a limitation on freedom of speech. The Federal Constitutional Court found that an individual's reputation must be balanced against free speech rights. This Court articulated in the *Lűth* case (BVerfGE 7, 198 (1958)) that the scale should rather tilt in favour of freedom of speech, particularly when the intellectual rallying of opinions is at stake.

210 Heyman *Free Speech and Human Dignity* 171, as quoted in Rao 2011 *NDLR* 251.

in his community. The Court, in *Khumalo v Holomisa,*[211] ruled that human dignity trumps freedom of speech:

> The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the value or worth of an individual.[212]

The Court cited the much quoted *dictum* of the Canadian Supreme Court in *R v Keegstra*[213] to demonstrate its approach to the protection of groups in the context of hate speech:

> A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which she belongs. The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance… Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.[214]

The position is very different in the US, due to the status of freedom of expression in the First Amendment. According to McCrudden,[215] human dignity has not yet been invoked in favour of an argument against hateful speech, most probably because of its slim chances of succeeding.

Defamation or harm to one's reputation violates one's dignity as perceived by one's community and reduces one's feelings of self-worth:

> The dignity that defamation law protects is thus the respect (and self-respect) that arises from full membership in society. Rules of civility are the means by which society defines and maintains this dignity.[216]

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211 2002 5 SA 401 (CC).
212 2002 5 SA 401 (CC) para 27.
213 [1990] 3 S.C.R. 697.
214 [1990] 3 S.C.R. 697 at 746-747. Also see McCrudden 2008 *EJIL* 703-704 and Rao 2011 *NDLR* 251.
215 2008 *EJIL* 704.
216 Post 1986 *CLR* 691, 711 as quoted in Rao 2011 *NDLR* 253.

The *Basic Law* was the first domestic constitution after World War II to embody the rights-protecting paradigm:

> Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority,[217]

which is binding on "the legislature, the executive and the judiciary as directly enforceable law."[218] Accordingly, the state cannot treat individuals, being masters of their own fate, as mere objects or as a means to achieve a purpose, in the broadest sense.[219] It is widely accepted that the acknowledgement of a duty to respect human dignity draws from Kantian roots.[220]

Article 1 (1) is constituted as a basic right and also interpreted as such by the Federal Constitutional Court.[221] An amplified interpretation of article 1 (1) is that "everybody has the right to his or her inviolable dignity."[222] Inviolability entails that encroachments upon dignity are not subject to proportionality, which is absolute and can never be compromised. By contrast, violations of other enumerated rights (*Grundrechte*) such as the right to development of the personality, the right to be equal before the law, the right to life, the right to freedom of expression or the right to assemble are all subject to proportionality.[223] As the individual can very often be an object of the state pertaining to social development as well as an object of legislation, the crystallized requirement for undignified treatment is an affront to an aspect of personality, or humiliation of

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217 Article 1 (1) of the *Basic Law.*
218 Article 1 (3) of the *Basic Law.*
219 *Tape recording* judgment BVerfGE 30,1,25 (1970).
220 Fletcher 1984 UWOLR 178; Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 362.
221 Klein "Human Dignity in German Law" 147.
222 Klein "Human Dignity in German Law" 147, referring to BVerfGE 61,126,137 (1982).
223 Klein "Human Dignity in German Law" 148; Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 399.

psychological worth.[224] The German guarantee of human dignity is encapsulated by the Federal Constitutional Court in the *Life Imprisonment*[225] case:

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

Human dignity embodies an objective and subjective dimension in German law.[226] The subjective element[227] provides negative liberty against the state as posited by article 1(1) of the *Basic Law*, whilst the objective element, which is an individual basic right, not only imposes duties on the state to realise a dignified existence,[228] but also requires individuals to respect one another's dignity. On a deeper level, the German concept of the state's duty to protect human dignity is not unlimited, even if the threat

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224 Klein "Human Dignity in German Law" 150. Also see the examples listed by Schachter 1983 *AJIL* 852. The Federal Constitutional Court found in the second abortion case that a pregnant woman, who is legally obliged to take part in a counselling procedure which is directed towards an avoidance of abortion, is not treated as an object of the state and therefore has not suffered a violation of her dignity. She is rather treated as a partner of the process, as the law recognises her autonomy and responsibility. See BVerfGE 88, 203, 281 (1993). Klein discusses further examples on pages 151-152 in which the Court found that the individual was not placed in the position of an object: where an accused who has the mental and physical ability to follow criminal procedure and to exert his procedural rights, either through himself or his counsel, is not treated as an object of criminal prosecution; and a person who has been convicted of support of an agent provocateur was not treated as an object. Klein lists the following examples on page 151 in which the Federal Constitutional Court found that human dignity was violated: in instances where the maxim *nulla poena sine culpa* is applicable, in instances of extradition where the individual has reasonable fears of being tortured in the extradited country, section 1 would be violated; and in instances of life imprisonment without the reasonable possibility of freedom at a later stage.

225 45 BVefGE 187 at 227, as quoted by Eberle 1997 *ULR* 973.

226 Kommers and *Miller The Constitutional Jurisprudence of the Federal Republic of Germany* 372.

227 The Court in *Carmichele v Minister of Safety and Security and the Minister of Constitutional Development* 2001 4 SA 938 (CC) para 54 categorised the individual's rights under the *Bill of Rights as* "subjective rights", thereby aligning itself with German jurisprudence. See Ackermann *Human Dignity: Lodestar for Equality in South Africa* 97.

228 Weinrib 2003 *NJCL* 340.

does not emanate from the state itself or from an omission to act, but by extension emanates from the offender whose competing dignity may be at stake. The *Second Abortion*[229] case demonstrates that the state's duty to protect has limits set by the periphery of the rights to dignity, life and bodily integrity of the woman.[230] Whilst the concept of human dignity is inviolable and thus not subject to proportionality, preference should be given to the duty to respect when infringements by the state on basic rights come to the fore.[231]

Man's legal image has been developed by the Federal Constitutional Court through definition *vis-à-vis* his relationship to and within the community: "[o]n the contrary: citizens are members of and bound to society."[232] In a similar vein, the Court held in the *Mephisto*-case[233] that man is "an autonomous person who develops freely within the social community." Limitations on basic rights[234] do not affect human dignity, nor is the individual made to be an object of the state:

> The image of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favour of a relationship

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229 BVerfGE 88, 203 at 254.

230 Ackermann *Human Dignity: Lodestar to Equality in South Africa* 124.

231 Ackermann *Human Dignity: Lodestar to Equality in South Africa* 124. Also see the discussions in chapter 4.4.3 above and chapter 5.3.3.4 as well as footnotes 221-211 in chapter 5 below.

232 Klein "Human Dignity in German Law" 150, quoting from BVerfGE 27; 344; 351 (1970); Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 362.

233 30 BVerfGE 173, 193 (1971). In this judgment, the Court included in its vision of the community not only the living, but also the dead, in finding that the human dignity of the deceased writer Klaus Mann trumps the right to freedom of art and science, as the posthumous publishing of his novel *Mephisto* impinges on his human dignity. See Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 358; 362.

234 Article 19 of the *Basic Law* provides that: "(1) In so far as a basic right may… be restricted by or pursuant to law, such law must apply generally and not solely to an individual case… (2) In no case may the essential content of a basic right be encroached upon." Although the Federal Constitutional Court qualified the right to life in its abortion judgments as "the vital basis of the dignity of man", or as a "supreme value", human life was not the subject of absolute protection, as in cases of the violation of human dignity. See Klein "Human Dignity in German Law" 153-154.

> between individual and community in the sense of a person's dependence on and commitment to the community, without infringing on a person's individual value.[235]

Incidentally, Sachs J made a similar comment in *National Coalition for Gay and Lesbian Equality v Minister of Justice*:[236]

> While recognising the intrinsic worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures…

In a similar vein, Van der Westhuizen J confirmed in *South African Police Service v Solidarity obo Barnard*[237] that

> An atomistic approach to individuals, self-worth and identity is not appropriate. This Court has recognised that we are not islands unto ourselves. The individual, as the bearer of the right to dignity, should not be understood as an isolated and unencumbered being. Dignity contains individualistic as well as collective impulses. Its collectivist attributes, including that we are "social beings whose humanity is expressed through . . . relationships with others", find resonance in the South African idea of *Ubuntu*, which foregrounds "interdependence of the members of a community".

In German constitutional law, the recognition of an individual's dignity is circumscribed by the right to the unfolding of his personality, which relates to undefined freedoms or personality rights[238] (*Persönlichkeitsrechte*), as

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235 Klein "Human Dignity in German Law" 150, quoting from BVerfGE 4,7,15 (1954). Article 29(1) of the *Universal Declaration* provides a similar view of the individual's responsibility towards his community: "Everyone has duties to the community in which alone the free and full development of his personality is possible." According to Kommers, this *dictum* resonates with Kantian moral philosophy. See Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 362.

236 1998 12 SA 1517 (CC) para 117.

237 2014 6 SA 123 (CC) para 174, quoting *Dawood v Minister of Home Affairs* 2000 3 SA 396 (CC) para 30 and *S v Makwanyane* 1995 3 SA 392 (CC) para 221 respectively.

238 Personality rights have not been comprehensively defined by the Federal Constitutional Court. It approaches its adjudication on a case-by case basis, "reminiscent of the Anglo-Saxon tradition" and by taking into account prevailing current conditions as well as changing social norms. It stated in the *Eppler* case (BVerfGE 54, 148) at 153: "Because of the aforementioned special character of the general right to personality, the Federal Constitutional Court, as well as the Federal High Court of Justice have refrained from fully defining the content of the protected right; rather, they have both dealt with the right on a case-by case basis. Thus

protected by article 2 (Personal Freedoms) of the *Basic Law,* which posits that:

(a) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

(b) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Historically, personality rights in German private and constitutional law root in Kant's ideas on moral personality.[239] For Kant, the development of an individual's personality and talents are a moral right, which must be recognised and respected by the state.[240] Personality rights include a right to have official records reflect a sex change; a right to have one's paternity rights established; and a right to having personal information honoured and protected, akin to the American concept of privacy protected by the Due Process Clause.[241]

In US constitutional law, human dignity is utilised as a value to aid in the interpretation of certain constitutional rights,[242] mostly in dissenting

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[they] have recognised the following aspects of the general right to personality: the right to a private, secret, intimate sphere of life,… to personal honour and the rightful portrayal of one's own person,… to one's own image and spoken word, … and under certain circumstances, the right not to have statements falsely attributed to oneself. These manifestations of the constitutionally protected right of personality must be duly observed when dealing with court decisions concerning conflicting interests under private law." See Ackermann *Human Dignity: Lodestar to Equality in South Africa* 129; Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 399.

239 Fletcher 1984 *UWOLR* 178-182.

240 Eberle 1997 *ULR* 993.

241 Eberle 1997 *ULR* 976.

242 Neuman "Human Dignity in United States Constitutional Law" 270.

judgments; rather than being considered as an autonomous right.[243] Although the Court held in *Roper v Simmons*[244] that

> The Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons,

the US *Constitution* lacks textual protection of human dignity. It does not protect a hierarchy of constitutional values, but rather provides a structural basis for the protection of personal freedom and liberties.[245] Rao[246] proposes that dignity could be "discovered" or read in as an unenumerated constitutional right (similar to privacy):

> One could plausibly argue, following the reasoning in precedents on unenumerated rights, that most constitutional rights respect and protect human dignity.

The originalist reasoning of Justice Thomas (in dissent) in *Obergefell v Hodges*[247] gives recognition only to inherent dignity without recognising the right to the respect and protection of dignity, an incomplete and underdeveloped vision of dignity in relation to the German and South African application:

> Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal and endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

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243 Barroso 2012 *BCICLR* 347; Goodman 2006 *NLR* 740; Henry 2011 *UPLR* 169; Barak *Human Dignity The Constitutional Value and the Constitutional Right* 262. See also discussion in section 6.1.6.1 below.

244 543 U.S. 560 (2005).

245 In various decisions, dignity has been held as a value underlying the First, Fourth, Fifth, Sixth, Seventh, Eighth and all aspect of the Fourteenth Amendments. See Barak *Human Dignity The Constitutional Value and the Constitutional Right* 198-199, as well as cases listed by him.

246 Rao 2011 *CJEL* 244. For a different take on the possibility of deriving a right to dignity from a fundamental right in US law, see Barak *Human Dignity The Constitutional Value and the Constitutional Right* 187.

247 135 S. Ct. 1039 (2015). Also see fn 277 below.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.[248]

Section 7(2) of the *Constitution,* which requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights" places South African constitutional law firmly within the post-war rights-protecting paradigm.[249] It is significant to note that section 10 of the *Constitution,* which posits that

> everyone has inherent dignity and the right to have their dignity respected and protected,

employs the exact same words as the *Basic Law* in article 1(1), namely "respect" and "protect". Chaskalson,[250] arguing in the natural law tradition, states that

> respect for human dignity, and all that flows from it, is an attribute of life itself and not a privilege granted by the state.

In *Makwanyane*[251] Justice O'Regan articulated that

> Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.[252]

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248 135 S. Ct. 1039 (2015).

249 The Court held in *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 62 that the state must employ positive action to protect individual rights.

250 Chaskalson 2000 *SAJHR* 196. Also see Venter "Human Dignity as a Constitutional Value: a South African Perspective" 345: "… it stands to reason that the inclusion of human dignity in section 1 of the Constitution was inspired by article 1(1) of the *Grundgesetz.*"

251 1995 3 SA 391 (CC).

In Minister of Home Affairs v Watchenuka[253] the Court emphasised that

> While that person [a non-citizen] happens to be in this country, for whatever reason, it [human dignity] must be protected, and is protected by s 10 of the Bill of Rights.

And:

> Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection is the touchstone of the new political order and is fundamental to the new Constitution.[254]

In their judgments referring to inherent human dignity the Court connected recognition and respect for dignity with the conspicuous denial of dignity during the apartheid system:

> We are emerging from a period of our history during which the humanity of the majority of the inhabitants of our country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.[255]

In *The Citizen 1978 (Pty) Ltd v McBride*[256] Ngcobo J stated that

> Thus human dignity is one of the defining features of our constitutional democracy. It underscores the proposition that in us inheres the inalienable right to be treated with dignity regardless of our position in society, and to have that right respected and protected. Indeed, it seeks to reverse the dehumanising effect of the apartheid legal order, which emphasised the inferiority of black people and the superiority of white people. And it has an important role to play in establishing the new society envisioned in the Constitution.

In a similar vein, the Court held in *Jaftha v Schoeman*[257] that

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252 *S v Makwanyane* 1995 3 SA 391 (CC) para 328. In a similar vein, Van Zyl J in *Stanfied v Minister of Correctional Services* 2004 4 SA 43 (C) para 125 held that: "To insist that he remain incarcerated while being housed in the said facilities constitutes a blatant denial of his most basic right to be treated with dignity and respect, regardless of the crime he has committed and the period of his sentence that he has actually served."

253 2004 4 SA 326 (SCA) para 24.

254 *S v Makwanyane* 1995 3 SA 391 (CC) para 329.

255 *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 22.

256 2011 4 SA 191 (CC) para 147.

> The situation under apartheid demonstrates the extent to which access to adequate housing is linked to dignity and self-worth. Not only did legislation permit the summary eviction of people from their land and homes which, in many cases, had been occupied for an extremely long time, it branded as criminal anyone who was deemed to be occupying land in contravention of it. In this sense a person was made to suffer double indignity – the loss of one's home and the stigma that attaches to criminal sanction.

Van der Westhuizen J expressed the opinion in *South African Police Service v Solidarity obo Barnard*[258] that

> The recognition of this right represents a break from a past which systematically denied the dignity of most South Africans.

Makgoka J of the High Court of South Africa (Gauteng Division, Pretoria) *mero motu* invoked the provisions of section 10 of the *Constitution* in three different matters, dealing with the content of returns of service from sheriffs pursuant to motion applications.[259] All three notices of motion were served on the defendants' respective domestic workers, who were indigenous African women. The returns read that the documents were served respectively on "Bongiwe, a domestic helper"; "The Domestic Faith"; "Eliza, Domestic worker." *In casu* the Court found that the deputy sheriffs, who were tasked with the servicing, never bothered to establish the recipient's marital status or surnames, and that this

> conduct is decidedly undignified, demeaning, and in clear violation of s 10 of the Constitution.[260]

The Court further declared that

> The mindset discernible in the returns of service referred to above has no place in an open and democratic society premised on the foundational values of human dignity and respect. The sheriffs perform a critical task in

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257 2005 2 SA 140 (CC) para 72.
258 2014 6 SA 123 (CC) para 172.
259 *Standard Bank of South Africa v Caster Transport CC* (ZAGPPHC) (unreported) case number 13700/2012 of 4 June 2014.
260 *Standard Bank of South Africa v Caster Transport CC* (ZAGPPHC) (unreported) case number 13700/2012 of 4 June 2014 para 3.

> the administration of justice, and thus have an abiding duty to treat everyone with dignity, irrespective of their race and social standing.[261]

Dignity in this context is about the recognition of the past struggles of disadvantaged groups, and the achievement of substantive equality.[262]

In *Robinson v Volks*[263] Davis J, in the Cape High Court, connected the recognition of domestic life partnerships with respect for "dignity of difference":[264]

> It is surely trite to claim that our constitutional society recognises the dignity of difference. It accords respect for the existence of a domestic life partnership and those who live within this arrangement.

In casu he stated further that

> To ignore them [domestic partnerships] and to impose a particular religious view on their world is to undermine the dignity of difference and to render the guarantee of equality somewhat illusory insofar as a significant percentage of the population is concerned.[265]

Incidentally, this decision was overturned by a majority judgment of the Constitutional Court on the grounds that the survivor of a heterosexual domestic partnership is not legally entitled to receive pension benefits, in contrast to the position of a survivor of a marriage under section 1 of the *Maintenance of Surviving Spouses Act* 27 of 1990. The Court held that

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261 *Standard Bank of South Africa v Caster Transport CC* (ZAGPPHC) (unreported) case number 13700/2012 of 4 June 2014 para 6.

262 As Sachs J stated in *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 126: "One of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society. The manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably - there is difference in difference. The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light. The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality."

263 2004 6 SA 288 (C) 299 para I.

264 For a critique of the use of the term "dignity of difference" see Ackermann *Human Dignity: Lodestar to Equality in South Africa* 103.

265 299 para D.

such exclusion is not unconstitutional, because marriage is an internationally recognised social institution. Because of this recognition,

> it follows that the law may distinguish between married people and unmarried people.[266]

The aspiration for recognition has resulted in the legal acknowledgement of the equal rights of homosexuals and transsexuals to ultimately achieve general social acceptance and respect.[267] Courts have focused not only on an individual's autonomy to freely choose his sexual partners, but have emphasised that the state and the community must respect these choices. By engaging in policies to give effect to the equal recognition of homosexual preferences, states seek to dispose of a lack of tolerance by the community and the stigmatization of sexual conduct. The much criticized decision of the US Supreme Court in *Bowers, Attorney-General of Georgia v Hardwick,*[268] which criminalised sodomy in 1986, was repudiated in 2003 in *Lawrence v Texas*,[269] which in turn invalidated Texas' criminal law on sodomy. Justice Kennedy stated that:

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266 *Volks v Robinson* 2005 5 BCLR 446 (CC) para 60. Also see the discussion of this case in chapter 5.3.5 (footnotes 286-289.)

267 Rao 2011 *NDLR* 257.

268 478 U.S. 186 (1986). The constitutional issue at stake was not privacy or autonomy, but whether Georgia's *Federal Constitution* conferred a fundamental right for homosexuals to engage in sodomy, which was consequently negated by the Court, with a (sharply divided) majority of five to four. Justice White stated on pages 181-182 that the US *Constitution* requires the Supreme Court, in cases of "… rights not readily identifiable in the Constitution's text" to "identify the nature of the rights qualifying for heightened judicial protection." The issue of human dignity was clearly premature. Berger J was a tenacious supporter of the *Bowers* case and an outspoken critic of Brennan J, renowned for his dignatarian judgments in US constitutional law. Ackermann quotes Berger as follows: "Respect for 'human dignity' is clearly spun out of the thin air; it is an evangelistic exhortation rather than a constitutional mandate. And it would transform the judicial function from inquiry into what the law *is* into what a given judge considers it *should* be." See *Human Dignity: Lodestar for Equality* 170 fn 228. Also see *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 55.

269 539 U.S. 558, 578-579 (2003), as quoted by Rao 2011 *NDLR* 257. Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 116 referred to the minority judgment of Blackmun J in *Bowers, Attorney General of Georgia v. Hardwick* 478 U.S. 186 (1986), stating that the court "made it clear that the much-quoted 'right to be left alone' should be seen not simply as a

> The petitioners are entitled to respect for their private lives. The state cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the Government.

Consequently, the Court gave recognition to the petitioner's negative liberty and acknowledged an individual right to engage privately in chosen sexual conduct. The court found that the protection of human dignity is a constitutional requirement and that a personal choice of sexual preference is central to personal dignity and autonomy, protected by the right to liberty entrenched in the Fourteenth Amendment.[270]

In Germany an individual's choice of sexual preference is embodied in personality rights, which allow the free development of personality and require that society respect these choices. The Federal Constitutional Court pronounced in the *Transsexual Case*[271] that:

> Human dignity and the constitutional rights to the free development of personality demand, therefore, that one's civil status be governed by the gender with which [a person] is psychologically and physically identified.

The common law crime of sodomy was decriminalised in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[272] on the grounds of unconstitutionality pursuant to discrimination and the unequal treatment of gay men.[273] According to Ackermann J:

> negative right to occupy a private space free from government intrusion, but as a right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation. Just as 'liberty must be viewed not merely *negatively* or selfishly as a mere absence of restraint, but *positively* and socially as an adjustment of restraints to the end of freedom of opportunity', so must privacy be regarded as suggesting at least some responsibility on the state to promote conditions in which personal self-realisation can take place."

270 539 U.S. 558, 574 (2003).

271 49 BVerfGE 286 (1979) as quoted by Rao 2011 *NDLR* 262.

272 1999 1 SA 6 (CC).

273 Notwithstanding the decriminalization of sodomy, the age of consent for same-sex activities was set at 19 by the *Sexual Offences Act* 23 of 1957. The *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 set the consensual age for same-sex activities at 16, thereby constituting the law as

> There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.[274]

Further in the context of equality and discrimination, the Court held in *Hoffman v South African Airways*[275] that

> The interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination.

Long-awaited judicial acknowledgement of a right to same-sex marriage[276] in US constitutional law has come to fruition in *Obergefell v Hodges,*[277] although the decision was not based on human dignity but on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Justice O' Kennedy, writing for the majority of 5-4, held that the fundamental liberties protected by the Due Process clause include certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.[278] This judgment entrenched "equal dignity"[279] for gays and lesbians by recognising that the institution of marriage is executed between two persons, and not exclusively between "a man and a woman."

Two years prior to this case, a heavily split Supreme Court (with a majority of 5-4) in the *United States v Windsor*[280] (hereinafter *Windsor*) declared section 3 of the *Defense of Marriages Act*[281] invalid by virtue of the liberty

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gender and orientation-neutral. The former inequalities were finally declared unconstitutional in *Geldenhuys v National Director of Public Prosecutions* 2009 2 SA 310 (CC).

274 *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28.

275 2001 1 SA (CC) para 43.

276 Dignity issues lie at the heart of equal respect and recognition of the legal consequences of same-sex marriages.

277 135 S. Ct. 1039 (2015).

278 135 S. Ct. 1039 (2015) 10.III.

279 135 S. Ct. 1039 (2015) 28.

280 No.12-307 [U.S. June 26, 2013].

281 Pub.L. 104–199, 110 Stat. 2419 (1996). In terms of this act, federal states were empowered to negate the legal recognition of same-sex marriages because of the

provisions of the Fifth Amendment,[282] in ruling that the exclusionary definition of same-sex couples *vis-à-vis* that of heterosexuals were

> treating those persons as living in marriages less respected than others...[283]

Hence, constitutional recognition was given indirectly to same-sex marriages, but not to a *right* to same-sex marriages[284] as in *Lawrence v Texas,*[285] where the Court posited a free-standing right to sexual freedom. Rao[286] argues that a separate right to recognition is foreign to US law, and when dignity becomes relevant it is as such and in part only derivative of individual rights.[287] It is rather rooted in the jurisprudence of the European Court of Human Rights, which customarily reverts to dignity as recognition in relation to personality rights:

> Dignity as recognition reflects a strongly communitarian understanding of the individual. In this view, a person's dignity depends only in part on rights and must include recognition and validation by the community and state.[288]

In this respect, Eberle[289] writes that the marked differences between the legal systems of the US and Germany and other countries regarding the

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barring of same-sex spouses from the traditional definition of "spouse", which was exclusively "heterosexual", thereby effectively repudiating same-sex marriages: "**SEC.3. DEFINITION OF MARRIAGE:** (a)IN GENERAL – Chapter 1 of title 1, United States Code, is amended by adding at the end the following: **"§7. Definition of 'marriage' and 'spouse'** In determining the meaning of any Act of Congress, or of any ruling or regulation, or interpretation of any of the administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." Consequently, same-sex spouses were not entitled to certain benefits such as insurance benefits for government employees, the filing of joint tax returns and taxes on income, gifts, inheritances and property sales.

282 Rao 2013 *VLRO* 30.

283 No.12-307 [U.S. June 26, 2013] 26.

284 Justice Scalia, in his dissent, has predicted that the Court might recognise a right to same-sex marriage in a future case to be adjudicated. See Rao 2013 *VLRO* 32.

285 U.S. 558 (2003). See also fn 137 above.

286 Rao 2013 *VLRO* 31-33.

287 She states that a free-standing right to recognition does not receive approval in the processes of the Supreme Court's evolving understanding of equal protection and due process jurisprudence. As such, there is also no common law interpretational support for a right to recognition. See 2013 *VLRO* 35.

288 Rao 2013 *VLRO* 33.

constitutional protection of one's personality can be ascribed to the fact that US private law does not have a comprehensively developed concept of personality rights, and therefore US constitutional law "had no ready base to stand on." Contrariwise, respect for an individual's dignity as a legal principle in South African constitutional law is rooted in Roman law, being embodied as such in personality rights.[290] Chaskalson sees the rights to life and human dignity as

> the most important of all human rights and the source of all other personal rights.[291]

Akin to South African law, the association between human dignity and personality rights is apparent in German law.[292] These jurisdictions place a high premium on recognition and respect for individual fulfilment within a community, whilst the US *Constitution* emphasises autonomy and freedom, which is protected by privacy rights and without reference to the individual's communal relationship.

3.4.3 The state should recognise the intrinsic worth of every human being

The third element of human dignity, which constitutes the limited-state claim and holds that dignified existential conditions are to be recognised and realised by governments through the provision of adequate living

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289 Eberle 1997 *ULR* 963 and fn 593. The US constitutional system does not employ personality rights, despite the efforts of Judges Warren, Brandeis and Pound, who advocated a notion of "inviolate personality."

290 In South African law, damages for the infringement of a person's *dignitas* as part of these personality rights are protected in private law (specifically through the delictual action *actio iniuriarum*) and in criminal law, which consists of the serious, unlawful and intentional infringement of dignity. Another route would be to claim damages by way of a constitutional delictual action. Also see the discussions in chapters 2.15.5 above and 5.3.6 below.

291 *S v Makwanyane* 1995 3 SA 391 (CC) para 144.

292 The BVerfG ruled in 54 BVerfGE 148, 153 (1980) that these personality rights relate to undefined freedoms and that "Their function is, in the sense of the ultimate constitutional value, human dignity, to preserve the narrow personal life sphere and to maintain its conditions, that are not encompassed by traditional concrete guarantees." See Rao 2011 *NDLR* 245.

circumstances, is an expansion of the second essential element of human dignity. The emphasis here is on the state's obligation to realise inherent dignity through the recognition and enforcement of socio-economic rights.[293] Connecting these rights with state duties reflects a value-ordered constitution, in contrast to the US Constitution, which is value-neutral.[294] In Chaskalson's[295] opinion socio-economic rights are

> rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or, in the case of people unable to look after themselves, without appropriate assistance?

This principle is echoed by the *dictum* of Zondo J in his dissenting judgment in *Malan v City of Cape Town*:[296] "having a home is very important to the dignity of any person," in the context of a state organ's duty to take all reasonable steps to enable a lessee to rectify a breach in a lease agreement before applying for an eviction order.

Substantial equality in the sense of equal human dignity can be attained only through the provision of the *existential minimum*[297] living conditions, namely second generation socio-economic rights. Schachter,[298] in reference to the objective aspect of human dignity, states that governments have an obligation to recognise a

> minimal concept of distributive justice that would require satisfaction of the essential needs of everyone.

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293 The Court reiterated in *Jaftha v Schoeman* 2005 2 SA 140 (CC) para 39 that: "The importance of access to adequate housing and its link to the inherent dignity of a person has been well emphasised by this Court. In the present matter access to adequate housing already exists. Relative to homelessness, to have a home one calls one' own, even under the most basic circumstances, can be a most empowering and dignifying human experience."

294 Eberle 2008 *ORIL* 5.

295 2000 *SAJHR* 204.

296 2014 6 SA 315 (CC) para 127.

297 This terminology is the literal translation of the concept employed by German authors and courts, namely *Existenzminimum.* See Barroso 2012 *BCICLR* 371 fn 315.

298 Schachter 1983 *AJIL* 852. In referring to a list of kinds of conduct that "denigrate worth and dignity of an individual", he lists "degrading living conditions and depravation of basic needs."

Article 22 of the *Universal Declaration* echoes this instruction:

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

Accordingly, German and South African[299] constitutional law have confirmed that socio-economic rights can be protected by courts, although it may not entirely be conditional on legislation.[300] As has been stated above, it is clear that the recognition and protection of human dignity does not operate on an individualised basis only - it is also aimed at the affirmation of the worth of each member of society to promote participation in economic, political and social life, resulting in a strengthened community and therefore a healthy, democratic society.[301] The Court confirmed its view regarding collective responsibility in *Khosa v Minister of Social Development:*[302]

> Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of the society.

And further regarding collective responsibility in the context of evictions of the poor, the Court held that

> 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.[303]

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299 These include the rights of access to land (s 25), housing (s 26), health care, food, water and social security (s 27), and education (s 29).

300 See Barroso 2012 *BCICLR* 371. In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 44 the Court held that dignity is foundational to these rights, that they are justiciable, and that the state is under a positive obligation to take positive action to realise these rights.

301 Grant 2012 *LLR* 242.

302 2004 6 SA 505 (CC) para 74.

303 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 18.

In accordance with the post-war rights-protecting paradigm, section 7(2) of the Constitution mandates the state to "respect, protect and fulfil the rights in the Bill of Rights" to the extent that the state is obliged to employ both positive and negative actions[304] to protect these individual rights, inclusive of socio-economic rights.[305] This means that the state is required to take reasonable legislative steps[306] within its available resources to progressively realise these rights.[307] As the Court explained in *Government of the Republic of South Africa v Grootboom,*[308] the specification of reasonableness is directly related to the human dignity of the applicants:

> It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent human dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.[309]

The court held in *Sarrahwitz v Maritz*[310] that the human dignity of a "vulnerable purchaser" of immovable property is infringed when the seller

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304 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

305 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 62.

306 This provision is mandated by s 2 of the *International Covenant on Economic, Social and Cultural Rights* (1967)*:* "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."

307 According to Sunstein: "What the South African Constitutional Court has basically done is to adopt an *administrative law model of socioeconomic rights*." See Kende 2003 *ChapLR* 145 (emphasis in original text.)

308 2001 1 SA 46 (CC).

309 Para 83.

310 *Sarrahwitz v Maritz* 2015 ZACC 14. This matter was an appeal from the Eastern Cape High Court, after the applicant's application for leave to appeal was dismissed by the full bench of the High Court as well as the Appellate Court. The appeal was upheld and the order of the High Court set aside. Consequently, the Court rectified the *Alienation of Land Act*, 68 of 1981 by reading in words to confer a right on a vulnerable purchaser to take transfer of residential property for which the full purchase price was paid in one payment and/or in less than a year, if the

is subsequently sequestrated and the registration of transfer had not been effected through effluxion of time and other difficulties. In these matters a property, although being paid for in full, will fall in the insolvent estate of the seller in terms of the provisions of the common law. *In casu* the Court held that the provisions of *The Alienation of Land Act,* 68 of 1981, which protect buyers who had paid for the immovable property in two instalments in a period of one year or longer, are unconstitutional on the grounds that they discriminate against buyers who pay the purchase price in one instalment within a year after the date of sale. These purchasers are not protected against the insolvency of the seller. Further, the impugned provisions are inconsistent with the applicant's constitutional rights to access to adequate housing, dignity and equality. Mogoeng CJ[311] stated that:

> It is difficult to conceive of an instance where the refusal to transfer a home to a vulnerable purchaser who has paid in full, coupled with inevitable homelessness, would not outweigh the advantage to creditors of the seller's insolvent estate. The situation is compounded by the indignity to which the prospective homeowner is exposed and the denial of equal protection and benefit of the law to people like Ms Sarrahwitz.

Desai J applied similar reasoning in *The University of Stellenbosch Legal Aid Clinic v The Minister of Correctional Services,*[312] wherein he held that certain sub-sections of section 65J(2) of the *Magistrate's Court Act*, 32 of 1945 pertaining to emoluments attachment orders as a result of consent to judgment by debtors in the event of default are unconstitutional. The court held that, although the debtors voluntarily consented to judgments and the attachment orders of their salaries or wages, these provisions are unconstitutional as a result of a lack of judicial oversight pertaining to the debtors' financial positions and means to repay the debts. This lack of

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seller had become insolvent. This right to transfer will arise only if there is a possibility that the purchaser is likely to become homeless should transfer not take place. The Court ordered the trustee of the insolvent seller's estate to transfer the house to the applicant.

311 *Sarrahwitz v Maritz* 2015 ZACC 14 para 64.

312 2015 5 SA 221 (WCC).

judicial oversight where the clerk of the court is mandated to grant judgment against low income earners may lead to a substantial reduction in salary or wages and could result in other loss such as a loss of shelter, health and family life. The court stated that:

> The ability of people to earn an income and support themselves and their families is central to the right to human dignity (See Section 10 of the Constitution). Any court order or legislation which deprives a person of their means of support or impairs the ability of people to access their socio-economic rights constitutes a limitation of their right to dignity.[313]

South African and US law diverge on the aspect of government's obligation to take positive action in order to protect enumerated rights. The classical liberal ideology entails a strict separation between law and politics, with clearly defined boundaries between the three branches of government, whilst transformative constitutionalism requires a new dialogue between the judiciary and government to protect the interests of those who are marginalised by poverty and structuralised inequalities.[314] In the US, the Due Process Clause draws a distinction between state action and inaction in an individual's personal matters, whilst section 10 of the South African *Constitution* requires government to protect and consequently realise individual rights.[315] Not only does the US Constitution lack textual protection of socio-economic rights, but the Supreme Court rejects adjudicating these rights pursuant to the court's role in the separation of powers doctrine on the grounds that the judiciary lacks competence to make these decisions - it is part of the obligation of the legislature and not of the courts, and separation of powers issues are

313 *The University of Stellenbosch Legal Aid Clinic v The Minister of Correctional Services* 2015 5 SA 221 (WCC) para 41. Incidentally, on appeal to the Court, Zondo J did not confirm the order of constitutional invalidity made by the High Court, but rather ordered the reading in, and severance of, certain words in section 65J(2)(a) and (b) in order to remedy the constitutional defect. See *The University of Stellenbosch Legal Aid Clinic v The Minister of Correctional Services* (CC) (unreported) case number 127/15 of 13 September 2016.

314 Liebenberg *Socio-economic Rights under a Transformative Constitution* 58.

315 Chaskalson 2011 *AUILR* 1391.

minimized because the US Constitution fundamentally protects individual rights.[316] The Supreme Court explained that

> Whether freedom of choice that is constitutionally protected warrants federal protection is a question for Congress to answer, not a matter of constitutional entitlement.[317]

The US constitutional state is traditionally based on the classical liberal model, in terms of which the state is to refrain from interference with the individual's liberties, and is based on civil and political rights; the so-called negative rights. This model of constitutionalism pursues minimal interference in free markets and the private spheres of people's family life. Any redistributive measures in favour of the poor are to be accomplished through state-provided benefits and services[318] and not as a result of a constitutional mandate. Hence, in the US the constitutional recognition and protection of human dignity in the context of socio-economic rights are currently unrecognised by the Supreme Court.[319]

Although the *Basic Law* does not incorporate socio-economic rights, the Federal Constitutional Court held that the state should secure "the minimum requirements for an existence compatible with human dignity."[320] The *Basic Law* describes Germany as a social, law-based state (*Sozialer Rechtsstaat*) which requires that government takes positive state action in the areas of socio-economic rights.[321] As a constitutional principle, the

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316 Kende 2003 *ChapLR* 152.
317 *Harris v McRae* 448 U.S. 297, 318 (1980) as quoted in Kende 2003 *ChapLR* 153.
318 Liebenberg *Socio-economic Rights Adjudication under a Transformative Constitution* 61. Henkin, in explaining the differences between constitutional rights in the US and international human rights, notes that: "For whatever the text and the theory of the U.S. Constitution, the impression common around the world that Americans care for and enjoy only civil-political rights not economic-social rights is essentially mistaken… The United States, I repeat, is a welfare state. Public education has long been provided by every state. Social security, welfare assistance, and health-aid are provided by combined federal-state authority." See "International Human Rights and Rights in the United States" 47.
319 Also see the discussion in section 6.1.6.3 below.
320 BVerfBE 40, 121 (131) as quoted by Ackermann *Human Dignity: Lodestar to Equality in South Africa* 155.
321 Articles 20 and 28 of the *Basic Law.*

social law-based state prescribes guidelines for the judiciary and executive to positively advance peoples' economic and social welfare. The Federal Constitutional Court has specifically linked state action with reference to human dignity.[322] State intervention in the marketplace, such as measures to regulate prices of essential goods and the freedom of competition, is justified as being in the general interest of the community, as it guards against exploitation and poverty. The divergence caused by the social-state model from classical-liberal legal theory is described by De Wet[323] as follows:

> The social-state principle, in order to secure social justice, is thus required to counter-balance the consequences of the Classical-Liberal theory according to which the state is only obliged to protect individual freedom against abuse of state power. The Classical-Liberal position leaves socio-economic relationships to self-regulation by the community (free market.)

Liebenberg[324] argues further that

> In German constitutional law, the social-state principle thus plays an indispensable role in protecting the values and interests underpinned in socio-economic rights. It thereby assists in counteracting the bias towards individual liberty and negative constitutionalism in classical-liberal legal theory.

3.5 Constitutional modes of the recognition and protection of human dignity

Whilst human dignity is accorded textual protection in various treaties and covenants in international law, it is judicially recognised and protected via different paths in domestic constitutional law. It can vary from formal,

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322 Liebenberg *Socio-economic Rights Adjudication under a Transformative Constitution* 127; De Wet 1995 *SAJHR* 34.

323 As quoted by Liebenberg *Socio-economic Rights Adjudication under a Transformative Constitution* 128.

324 Liebenberg *Socio-economic Rights Adjudication under a Transformative Constitution* 128. Compare also the view of De Wet in 1995 *SAJHR* 44: The German Constitution expressly recognizes that the duty of the state is no longer limited to protecting individual liberties. The social law-based state recognizes that human dignity and liberty in the modern era is not only dependent on protection against state intervention, but on comprehensive state participation in community life. There can be no return to a 'laissez faire, laissez passer' system.

textual protection, such as in the *Basic Law* and the *Constitution,* to the absence of explicit protection, where the mode of adoption and protection do not derive solely from the constitutional text, such as in the US, Canada and France. In the following section these modes of protection will be discussed briefly and according to the exposition of Cohn and Grimm;[325] therefore no specific recognition to these authors will be made in the footnotes of this specific section, unless otherwise indicated. In these constitutions human dignity is not defined, however.

3.5.1 Human dignity formally protected as a judicial norm

The Constitutions of Germany, Namibia, Puerto Rico and the Czech Republic posit human dignity as absolute, which means "inalienable" and "inviolable". Because of the special status accorded to human dignity as an absolute right in German law; it is subject neither to proportionality nor to limitation and therefore its scope is interpreted on a narrow basis.[326] Any possible limitation on dignity would be unconstitutional *per se.* In effect, dignity always trumps in cases of conflicts with other enumerated rights. As a result, only a few cases were considered by the Federal Constitutional Court in relation to dignity as an absolute right – rather, dignity is adjudicated in the context of the infringement of other fundamental rights with reference to article 1 of the *Basic Law,* in which instance dignity is interpreted widely. Hence, dignity is utilised as a tool to guide interpretation in instances of the encroachment of other rights, as in jurisdictions which protect dignity formally, but subject to balancing and proportionality.

Chapter 1 of the *Charter of Fundamental Rights of the European Union* (2000)[327] explicitly refers to human dignity as inviolable, which statement

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325 '"Human Dignity' as a Constitutional Doctrine" 197-202.
326 Also see the discussion in section 6.2.3 below.
327 2000/C 364/01.

is followed by instructions to protect the rights to life, physical and mental integrity, the prohibition of torture and inhuman or degrading treatment or punishment and the prohibition of slavery, forced labour and human trafficking. This recognition of dignity as inviolable represents a judicial standard for European human rights adjudication, which also influences dignity decisions in the UK.

3.5.2 Human dignity formally protected, but subject to proportionality and limitations

Section 10 of the South African *Constitution* posits that

> [e]veryone has inherent human dignity and the right to have their dignity respected and protected.

Dignity functions both as a constitutional right and as a value that "informs many, possibly all other human rights."[328] Dignity is referred to as the first of a triad of values in section 1(1) of the *Constitution,* which validates limitations on fundamental rights in terms of the proportionality clause 36. Although proportionality analysis rejects the idea of an absolute right, dignity is strengthened by its mutual recognition as a constitutional value, and may trump fundamental rights in cases of conflicts.

The *Basic Law* of Israel, 1992 protects "life, body and human dignity" in section 8, limitations on which can be justified only

> by law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.

328 *Dawood v Minister of Home Affairs* 2000 3 SA 396 (CC) paras 35 and 36. Also see the discussions in sections 6.1.5 and 6.2.4 as well as in chapter 5.3.2.1 and 5.3.2.2.

3.5.3 Human dignity not textually protected, but recognized as a "rhetoric/discursive/linguistic element"

In the absence of textual protection of human dignity in the US Constitution, courts rely on the application of the concept as rhetoric and a linguistic element rather than a normative doctrine. The body of dignity law in the US currently points to its being used as an "interpretative tool for fleshing out other established rights and doctrines."[329] Cohn and Grimm argue that case law in the UK and Israel, prior to dignity's constitutional enactment, points to references *pertaining* to dignity, rather than being based on normative principles, as is the situation in the US.

3.5.4 Human dignity not textually protected, but recognised as a constitutional principle

Human dignity is not formally protected in the *Constitution* of France's 1958 Fifth Republic, but both the Conseil Constitutionnel (Constitutional Court) and Conseil d'Ét̀at (Council of State) recognise human dignity as part of the constitutional system within each of their jurisdictions. The preamble of the Constitution of the Fifth Republic refers to the French people's "attachments to the rights of man and principles of sovereignty", and states that

> each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights,

in consequence whereof the Conseil Constitutionnel rules that

> the protection of human dignity against all forms of enslavement or degradation is a principle of constitutional law.

This principle has been extended to the protection of civil/political and social rights also. The protection of dignity is further enacted through a variety of statutes, with specific reference to the penal process, bioethics

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329 Cohn and Grimm "'Human Dignity' as a Constitutional Doctrine" 197.

and public health. According to Cohn and Grimm, dignity has been exclusively decided in relation to other rights and not as a free-standing principle, as in the case of other similar jurisdictions. The Conseil d' État has most contributed to the body of dignity law, in the context of upholding the administration's duty to keep the peace, one decision of which is the well-known dwarf-tossing case.[330]

3.5.5 Human dignity not formally protected, but recognised as an underlying constitutional principle through rhetorical adaptation

In contrast to the discursive use of dignity by the US Supreme Court judges, their Canadian counterparts in *Morgentaler* expressly found that

> The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter,

thereby elevating human dignity as a tool to protect constitutional rights, "albeit inconsistently and without the formulation of a discernible doctrine."

Human dignity is utilised in a similar way in the decisions of the European Court of Human Rights (hereinafter ECtHR.) Although the formal protection of dignity is lacking in the *European Convention of Human Rights* (1950), the ECtHR has found that

> the very essence of the Convention is respect for human dignity and human freedom.[331]

As in Canada, dignity has been employed as a tool to protect other fundamental rights and not as a distinctive principle.

The protection of human dignity is not based on a foundational principle in British constitutional law, although there are references to dignity via the *Human Rights Act,* 1998 and under the auspices of the *European Convention of Human Rights* (1950).

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330 Also see fn 150 above.
331 Also see the discussion in chapter 4.1 and fn 5 in chapter 4 below.

3.6 The interface between constitutional values and constitutional rights

Writing in seventeenth century England, John Locke argued that each person has a responsibility to God to obey the laws of nature. Locke believed that individuals are endowed with reason and have a natural right to freedom, which is limited only by the duty to respect the natural rights of others. The natural rights of men could be protected only in a political community sustained by the rule of law and for the common good of all. If governments abuse the power entrusted by the people and violated their rights, they lose the authority to act, and to achieve this end, people may use violence.[332]

In current law in modern European, Canadian, Indian and South African society, the post-war constitutional paradigm is doctrinally characterised not only by distinctive constitutionalised foundational rights to protect individuals against state intrusion, but also by interconnected substantive values which radiate through the total legal system. This system has similarities with Kant's notion regarding human dignity's fusion of moral law and legal theory. As explained above in section 3.4, human dignity acts as a rights-protecting principle in constitutional systems of liberal democracies developed after World War II. The values that provide the framework for constitutional interpretation in these constitutions comprise "an objective value order" which obliges states to act negatively and positively.[333] Fundamental rights are protected horizontally and vertically against encroachment and also serve as a yardstick for unconstitutional legislation.[334] The social, religious and cultural ideas that underlie conceptions of human dignity caused the development of values-based constitutionalism, which inevitably resulted in the limitation of rights in

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332 Freeman *Human Rights: An Interdisciplinary Approach* 24.
333 Weinrib 2004 *NJCL* 235.
334 Weinrib "The Postwar Paradigm and American Exceptionalism" 92.

favour of political and social needs in a communitarian context. This is in contrast to US rights-based constitutionalism that primarily roots in liberty and individuality.[335]

Antecedent to the post-war rights-protecting development in liberal democracies is the US constitutional system, which

> stands as the indigenous textual amalgam of US experience, its great achievement being the entrenchment of popular sovereignty as the expression of self-governing people.[336]

Eighteenth century America linked the concepts of religious liberty with the struggle for political freedom and incorporated Lockean ideas in the *Declaration of Independence* (1776):[337]

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation;
>
> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed…

American constitutionalism protects rights as "trumps", in Dworkin's words, and not by way of a hierarchy of values. Values are regarded as incorporated in the concept of negative liberties, enforceable against government and democratic interests.[338] Consequently, the US *Constitution* lacks textual endorsement of the limitation on and balancing of individual rights through proportionality review, as is the case in postwar

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335 Rao 2008 *CJIL* 204.
336 Weinrib "The Postwar Paradigm and American Exceptionalism" 85.
337 Freeman *Human Rights: An Interdisciplinary Approach* 26.
338 Rao 2008 *CJIL* 245. She quotes Kommers who states that: "The notion of dignity inherent in the new constitutionalism of the postwar era has a core meaning that seems to differ from the core meaning of what we Americans understand by liberty, and these meanings are often found in the different images of society and personhood that they protect." See Rao 2008 *CJIL* 246.

liberal democracies. The Supreme Court can, under proportionality review, determine that a constitutional right has been violated, but simultaneously find that state action is justified.[339] US constitutionalism favours an approach to rights as trumps against non-constitutional issues, such as governmental policies, which in turn weaken rights-protection. Weinrib[340] criticises this approach, albeit before the era of the Warren Court (in reference to the liberal majority of the Supreme Court in the US during 1953-1969 when Earl Warren served as chief justice,) in which individual rights enjoyed absolute protection, with undefined scope and unrelated to each other. She argues that:

> No directive connected the subjective rights to an objective normative order; stipulated purposive interpretation of the rights to forward the principles of that order; or narrowed limitation of rights to strict justification standards.[341]

There are indications however, that the Supreme Court's dignity adjudication is increasingly reflecting the European concept of human dignity, since its decision in *Lawrence v Texas*[342] regarding freedom to engage in sodomy without state prohibition and other related cases regarding sexual freedom.[343]

3.6.1 Human dignity as a constitutional value

3.6.1.1 Introduction

Human dignity as the ultimate guiding principle of a legal order represents a reaction against positivism and lies at the heart of constitutional liberalism, as manifested in the post-war paradigm. According to Weisstub,[344] modern constitutionalism is pervaded by a form of "soft

339 2008 *CJIL* 249.
340 "The Postwar Paradigm and American Exceptionalism" 99.
341 "The Postwar Paradigm and American Exceptionalism" 99.
342 539 U.S. 558 (2003). Also see the discussion above in chapter 3.2.1.
343 *United States v Windsor* No.12-307 [U.S. June 26, 2013] and *Obergefell v Hodges* 135 S. Ct. 1039 (2015).
344 Weisstub "Human Dignity and the Framing of Multiculturalist Values" 272.

pragmatism", a form of universalised bedrock constitutional truths that is unquestioned but is nonetheless subject to a process of the balancing of interests in concrete cases. These values, however, can be minimised in response to political, social and economic pressure. Within this framework constitutional principles are not necessarily neutral and value-free and are subject to extra-legal ideas such as economic and political factors. Pure theorists, however, deny these influences in constitutional adjudication and share the Kantian ideal of a notion of constitutional universalism.[345] The idea that international law and domestic justice are fundamentally connected was first developed by Kant in his famous essay *Perpetual Peace*.[346] Kant argued that a liberal theory of international law is based on normative individualism, which dictates that the individual is the primary nucleus value of a state and that the rights of states are derivative of the rights provided to them by individuals. Thus conceived, the state is to function for the benefit of individuals; therefore the same function is conferred on international law, namely to respect and protect individuals. Consequently, the principles of international law are to be congruent with the principles of domestic law.[347] Yet reality paints a different picture, as the relevant question is to what extent politics can prescribe judicial decisions?

This relates to the difficult question in constitutional law regarding the relationship between rights and values, as rights pertain to an individual or a group's entitlements against the state, whilst values point to non-rights issues that reflect public policy goals and social concerns. In this respect the maxim *iudicis est ius dicere non dare* (it is the task of a judge to interpret the law, not to make it)[348] might to a certain extent not be relevant

345 Weisstub "Human Dignity and the Framing of Multiculturalist Values" 273.
346 Also see the discussion in chapter 4.2.
347 Tesón 1992 *ColLR* 53-54.
348 A misunderstanding of the doctrine of separation of powers led to the rigid application of this rule in SA law. See Botha *Statutory Interpretation: An*

in the post-war paradigm, as judges are expected to interpret open-ended constitutional provisions (which provide limited constraints on rights-adjudication), reform and modernise common law, test the constitutionality of laws and prescribe transformative measures for government to ensure the equal dignity of all. Consequently the multifunctional aspect of constitutional interpretation and the role of judges in this process can cause tension, as confirmed by Chaskalson:[349]

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

3.6.1.2 Theoretical content of constitutional values

In all legal systems, prescriptive propositions are indicated by values, principles and rules[350] which are structurally interdependent.[351]

Introduction for Students 50. Narrowly interpreted, this maxim means that courts are bound by a textual interpretation of legislation and that only the legislature may alter deficiencies or supplement legislation. However, s 39 of the *Constitution* confers on courts the power to develop common and customary law in the spirit of the *Bill of Rights* and to direct the legislature to rectify unconstitutional law. This is with regards to the courts' overarching obligation to develop law as a result of changing social conditions, which was confirmed by Innes J in *Blower v Van Noorden* 1919 TS 890 at 905: "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the Legislature."

349 "Dignity and Justice for All" 2009 *MJIL* 32.

350 Esteban 1995 *MJECL* 131.

351 In *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para 150 the Court referred to this interdependency: "The Bill of Rights does specifically identify a number of rights for special constitutional protection. Each is independently delineated, reflecting historical experience pointing to the need to be on guard in areas of special potential vulnerability and abuse. Each has produced an outgrowth of specialist legal learning. Yet enumerating themes for dedicated attention does not presuppose or permit detaching the listed rights from the foundational values that nurture them. Nor does it justify severing the rights from the underlying values

Constitutional values constitute the framework within which legal principles are to be adjudicated, based on moral, religious, social, economic and political views. Thus, they function as a guide to constitutional interpretation.[352] They are akin to common law values or standards such as equity, *boni mores, bona fides* and reasonableness. Principles are differentiated from values by the idea that they refer to the "ought to be" ideal, while values relate to "what is good" and indicate the preferences of a legal system, such as human dignity, equality and democracy.[353] Values are configured indeterminately, whilst principles have a defined structure and, in line with their "ought to be" designation, cause legal rules to be enacted from their functioning through judicial adjudication, eg the principle of proportionality.[354] According to Esteban[355]

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that give substance and texture to the Constitution as a whole. On the contrary, in a value-based constitutional democracy with a normative structure that is seamless, organic and ever-evolving, the manner in which claims to constitutional justice are typified and dealt with should always be integrated within the context of the setting, interests and values involved." See also s 7(1) of the *Constitution,* which proclaims that "The Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

352 The Court proclaimed this view in *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para 149: "The values of the Constitution are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project. They are implicit in the very structure and design of the new democratic order. The letter and the spirit of the Constitution cannot be separated; just as the values are not free-floating, ready to alight as mere adornments on this or that provision, so is the text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not simply to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protections promised by the Constitution. And by their nature, values resist compartmentalisation."

353 Esteban 1995 *MJECL* 131.

354 Esteban 1995 *MJECL* 131. The role of values and principles is illustrated by the *dictum* of Chaskalson J (with regards to the *Interim Constitution)* in *S v Makwanyane* 1993 3 SA 391 (CC) para 104: "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. This is implicit in the provisions of *section* 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case

> Even if it is not possible to establish a rigid order of values within a legal system which could give the "right solution" for a case, a flexible order of priorities may still be established. In this interaction, legal principles play a role in the choice between conflicting values, establishing a standard that may validly act as a criterion of decision between the values at stake.

For example, section 195 of the *Constitution* prescribes certain listed principles to be adhered to by the state in conducting public governance and administration, subject to the overarching democratic values enshrined in the *Constitution.*

Venter[356] describes a constitutional value or principle as

> An abstract concept, it indicates a standard or a measure of good. A constitutional value may therefore be deemed to set requirements for the appropriate or desired interpretation, application and operationalisation of the constitution and everything dependent thereupon. If something were not to conform to the standards of a particular value, it would mean that the standards of a lower, different, conflicting or extra-constitutional measure is being applied, which would therefore lead to unconstitutional results. Constitutional values may therefore be said to be distinguishable but related to principles in the sense that the principles of the constitution would be founded in and give expression to the values. For example, the principle that the law must be applied fairly and equitably, is founded in and gives expression to the values of justice and equality.

Rao[357] states that

> Constitutional "values" such as human dignity are really principles that set out general guidelines or possibly aspirations for action by the state and also for the interpretation of rights.

> basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of *section* 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge said, "the role of the Court is not to second-guess the wisdom of policy choices made by legislators.""

355 Esteban 1995 *MJECL* 131.
356 Venter "Utilising Constitutional Values in Constitutional Comparison" 35.
357 2008 *CJEL* 223.

For Dworkin,[358] "rules are applicable in an all-or-nothing fashion" and as such, dictate a particular outcome and furthermore, rights operate like rules in that they establish the individual's entitlement to be free from state interference.[359] Values and principles are categories of norms that are distinct from legal rules, however.[360] A specific characteristic of these norms is that they function as a foundation of a group of other norms, so that they play a structural role within the legal order. In addition, these norms are accomplished, contrary to rules, on different levels. The capability of their achievement is determined by opposing values and principles; consequently they are not mutually exclusive, but concurrent. Alexy[361] argues that a special feature of the theory of principles and rules is that rules are applied in the form of subsumption, and principles are applied in the form of balancing. A conflict between principles is resolved by proportional analysis in terms whereof principles are weighed against each other and one principle can take preference over the other; thereby limiting the scope of the principle not taking preference. By contrast, rules are norms which can either be valid or invalid, whereas a conflict between rules has the inevitable effect that one of them would outweigh the other when proportionality is applied.[362]

These abstract constitutional values draw meaning from their domestic roots, history and traditions, and signify a commitment to change from a previous regime - for the better. They are thus context-specific and culture-contingent and people with other values may come to different conclusions. For example, it is generally accepted that the enactment of human dignity as inviolable in the *Basic Law* is a reaction against National

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358 *Taking Rights Seriously* 22, as quoted in Rao 2011 *CJEL* 223. Also see fn 69 in chapter 1 above.
359 Rao 2011 *CJEL* 223.
360 Esteban 1995 *MJECL* 131.
361 Alexy *A Theory of Constitutional Rights* 85. Also see Teifke "Human Dignity as an 'Absolute Principle'?" 94.
362 Esteban 1995 *MJECL* 131. Also see the discussion in chapter 5.3.3.2 below.

Socialism.[363] Similarly, the value of human dignity in the *Constitution* represents a reaction against past discrimination and authoritarianism.[364] In this respect Barak[365] explains that each legal system is characterised by an external and internal context. The external context relates to the historical and social background that led to the recognition of human dignity as a constitutional value. The internal context is based on the constitutional architecture that consists of the constitution's structure in general, and specifically, of the normative status accorded to the value of human dignity in the constitution. It follows that the transnational differences in these contexts can lead to different understandings of the value of human dignity and the implications thereof. The combined effect of all these elements causes the value of dignity to have a broad reach and to enable judges to

> give expression of a society's conception about the humanity of the person as a constitutional value.[366]

3.6.1.3 The theoretical content of human dignity as a value

Taking into account the discussion in section four above regarding the essential elements of human dignity as well as Venter's definition, it is clear that the value of human dignity presents a very distinct image of man as having inherent dignity within a communitarian and social context. This contextualised, dignatarian image is associated with European values and manifests in the post-war constitutional paradigm. The values of individual freedom and autonomy as conveyed by the US Constitution differ fundamentally from this model. The emphasis on values in the post-war paradigm has the necessary effect of minimising constitutional rights,

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363 Also see the discussion in chapter 2.14 above.
364 Also see the discussion in chapter 2.15.6 above.
365 Barak "Human Dignity The Constitutional Value and the Constitutional Right" 364-365.
366 Barak "Human Dignity The Constitutional Value and the Constitutional Right" 364-365.

which is not associated with the US idea of negative liberty.[367] Feldman[368] describes this dualistic function of dignity as follows:

> We must not assume that the idea of dignity is inextricably linked to a liberal-individualistic view of human beings whose life-choices deserve respect. If the state takes a particular view of what is required for people to live dignified lives, it may introduce regulations to restrict the freedom which people have to make choices which, in the state's view, interfere with the dignity of the individual, a social group or the human race as a whole... The quest for human dignity may subvert rather than enhance choice and in some circumstances may limit rather than extend the scope of traditional 'first generation' human rights and fundamental freedoms.

In the negative liberty sense, dignity as a value reflects individual freedom and supports constraints on state interference, and not on judicial participation in the formulation and enactment of policies. In most liberal democracies, these policies are specified and implemented by legislative branches, whilst law and politics are totally independent in US constitutionalism.[369]

The value of human dignity fulfils a normative function in international law. The first paragraph of the preamble of the *Universal Declaration* stipulates that

> … recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

The fifth paragraph of the preamble states that

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

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367 Rao 2011 *CJEL* 236.

368 1999 *PL* 685.

369 "What makes our constitutional culture "constitutional", in other words, is first that it recognizes that there is a distinction between law and politics, between what our Constitution does or can plausibly be read to do and what we might like to do; and second that the members of this culture know, understand, and respect the distinction." See Kramer 2006 *CLR* 1439; 1444.

According to Dicke,[370] the reference to "faith" in the fifth paragraph of the preamble calls for undisputed "recognition" of dignity, and

> excludes an interpretation of 'recognition' as an act which constitutes dignity.

Therefore dignity is *a priori* constituted, which simultaneously demands the obligation to recognise dignity. This obligation is facilitated by the reconnection of peoples' faith in fundamental human rights and in dignity, which are the "foundation of freedom; justice and peace in the world." In addition, "all members of the human family" have inherent dignity, in equal quantum. As has been explained in section 2.1 above, the roots of this normative function of human dignity relate to Kant's ethical theory regarding man's rationality and autonomy and hence that man is an end-in-himself, having equal rights because he has inherent dignity. The notion of inherent dignity is judicially recognised as the basis of human rights.[371]

3.6.1.4 Human dignity as a constitutional value in German law

Human dignity operates as the highest legal value in Germany[372] as a result of the unique wording of article 1 of the *Basic Law.* This principle is confirmed by Kommers and Miller:[373]

> There is no debate in Germany… as there is in the United States, over whether the Constitution is primarily procedural or value-orientated. Germans no longer understand their Constitution as the simple expression of an existential order of power. They commonly agree that the Basic Law is fundamentally a normative constitution embracing values, rights and duties.

The Federal Constitutional Court held in the *Lűth* decision[374] in 1958 that the rights enacted in the *Basic Law* are guided by human dignity and constitute "an order of values that radiate to the whole body of law"; therefore it is applicable to relations between the individual and the state

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370 "The Founding Function of Human Dignity" 114.
371 See fn 96 above.
372 The *Life Imprisonment* case: "The freed human person and his dignity are the highest values of the constitutional order." BVerfGE 187, 227-228 (1977).
373 As quoted by Rao 2011 *CJEL* 219.
374 BVerfGE 7, 198, 204 (1958).

and individuals *inter se.*[375] This principle is further demonstrated by the Court's elaboration:

> This value-system, which centres upon human dignity and the free unfolding of the human personality within the social community, must be looked upon as a fundamental constitutional decision affecting all areas of law, public and private.[376]

The value of dignity lies at the basis of all enumerated basic rights. In the *Census Act* case,[377] the Federal Constitutional Court held that

> The focal point of order established by the Basic Law is the value and dignity of the individual, who functions as a member of a free society with free self-determination. The general personality right, as laid down in art 2 (1) in tandem with art 1 (1) serves to protect these values – along with other, more specific guarantees of freedom.

For example, the Federal Constitutional Court held in the abortion judgments that human life is "the vital basis of the dignity of man" and "a supreme value", but has not attempted to base its findings on the absolute protection of human life, contrary to the absolute protection of human dignity.[378] Rather, it held that the right to life and the state's duty to protect it are

> to be determined by weighing (their) importance and need for protection against other conflicting legal values.[379]

The rooting of law in *a priori* moral principles in the German *Rechtsstaat*[380] is directly attributed to the influence of Kant and resulted in "the modern

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375 Klein "Human Dignity in German Law" 147. Eberle states that: "The dignitarian value-ordering of the German Constitution is also evident in the close interaction between public and private law. Since human dignity constitutes the architectonic principle of the German legal system, it radiates into and affects private law and, indeed, the whole legal system. Under this doctrine, known as the Third Party Effect *(Drittwirkung),* the norms of the GG enter into and influence the norms of private law, as private law can do the same with respect to constitutional law. The whole legal system as a whole operates in tandem." See 2008 *ORIL* 5.

376 BVerfGE 7, 198, 205 (1958), as quoted by Eberle 2012 *LiverpoolLR* 204.

377 BVerfGE 65, 1, 41 (1983) as quoted by Klein "Human Dignity in German Law" 153.

378 Klein "Human Dignity in German Law" 153.

379 BVerfGE 88, 203, 254 (1993).

380 According to Eberle, the German notion of *Rechtsstaat* refers not only to commitment to the rule of law, but includes the idea of "a state committed to

re-founding of German society."[381] These moral principles exist independently and limit state authority in order to give effect to man's dignity by treating him as an end in himself, as required by article 1(1) of the *Basic Law*. As Eberle[382] explains:

> Based on this principle, the [*Basic Law*] sets out a state order bound by reason, an independent moral structure extrinsic to authority and man.

To reach this end, the Federal Constitutional Court interprets the objective dimension of basic rights as conferring duties on the state to create conditions in order to realise human dignity within the framework of these moral principles. Eberle[383] concludes that

> By interpreting basic rights as establishing an "objective" ordering of values, centered around human dignity, the Constitutional Court transformed those values into principles so important that they must exist "objectively"–as an independent force, separate from their specific manifestation in a concrete legal relationship. So conceived, objective rights form part of the legal order– the *ordre public*, thereby becoming part of the governing principles of German society.

The value of human dignity furthermore provides the basis for the protection of human rights in German society. Each enumerated basic right is a manifestation of human dignity and as such, rights and dignity are interrelated and interdependent. Consequently, the individual is not the sole focus of the legal order, but the communitarian dimension of the *Basic Law* is demonstrated by the fact that all individuals, as well as the

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reason, rationality, neutrality, equality and fair notice to impending legal measures. We might think of the *Rechtsstaat* as committing the state to an exterior, extrinsic system of reason, which constrains and directs authority along a pre-established path of ideas."

381 Eberle 2008 *ORIL* 20. He quotes from Kant (*Foundations of the Metaphysics of Morals with Critical Essays 47* p 43-44): "Here philosophy must show its purity as the absolute sustainer of its laws, and not of the herald of those which an implanted sense or who knows what tutelage nature whispers to it. Those may be better than no laws at all, but they can never afford fundamental principles, which reason alone dictates. These fundamental principles originate entirely *a priori* and thereby obtain their commanding authority, they can expect nothing from the inclination of men but everything from the supremacy of the law and due respect from it."

382 2009 *ORIL* 21.

383 Eberle 2012 *LiverpoolLR* 204.

state, share the obligation to respect one another's dignity, in order to foster solidarity and social welfare.[384]

3.6.1.5 Human dignity as a constitutional value in South African law

The values of human dignity, the achievement of equality and the advancement of human rights and freedoms amongst other values as posited in section 1 of the *Constitution* represent the foundation of the new constitutional dispensation in South Africa,[385] contrary to the discriminatory system of its predecessor, previous to 1994.[386] O'Regan J in *Makwanyane*[387] expressly articulated the importance of these constitutional values in redressing the injustices of the past and bringing about change on all levels of society:

> No-one could miss the significance of the hermeneutic standard set. The values urged upon the court are not those that have informed our past. Our history is one of repression not freedom, oligarchy not democracy, apartheid and prejudice not equality, clandestine not open government.

In a similar vein, in *Minister of Finance v Van Heerden*[388] the Court held that

> Yet, burdensome though the process is for some, it needs to be remembered that the system of state-sponsored racial discrimination not only imposed justice and indignity on those oppressed by it, it tainted the whole of society and dishonoured those who benefitted from it. Correcting the resultant injustices, though potentially disconcerting for those who might be dislodged from the established expectations and relative comfort of built-in advantages, is integral to restoring dignity to the community as a whole.

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384 Eberle 2012 *LiverpoolLR* 206.

385 Human dignity, together with the values of equality and freedom was referred to by Kriegler J as "three conjoined, reciprocal and covalent values to be foundational to the Republic" in *S v Mamabolo* 2001 3 SA 409 (CC) para 41.

386 In *S v Makwanyane* 1995 3 SA 391 (CC) para 312 the Court stated that: "Our new Constitution, unlike its dictatorial predecessor, is value-based. Among other things, it guarantees the protection of basic human rights, including the right to life and human dignity, two basic values supported by the spirit of *ubuntu* and protected in Sections 9 and 10 respectively. In terms of Section 35, this Constitution now commits the state to base the worth of human beings on the ideal values espoused by open democratic societies the world over and not on race colour, political, economic and social class."

387 *S v Makwanyane* 1995 3 SA 391 (CC) para 322.

388 2004 6 SA 121 (CC) para 145.

The spirit of the preamble of the *Universal Declaration* and its applicability to the new constitutional order was encapsulated by Nelson Mandela in his inaugural address to the nation on 10 May 1994:

> We enter into a covenant that we shall build the society in which all South Africans, both black and white, will be able to walk tall, without any fear in their hearts, assured of their inalienable right to human dignity; a rainbow nation at peace with itself and the world. Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another and suffer the indignity of being the skunk of the world. Let freedom reign. The sun shall never set on so glorious a human achievement! God bless Africa.[389]

Therefore, the cluster of constitutional values in the *Constitution* has drawn its meaning from the country's chequered past regarding the institutionalisation of discrimination, to signify change from authoritarianism and transformation to an equal society. This ideal is illustrated by the *dicta* of O'Regan J in *Dawood v Minister of Home Affairs*[390] (hereinafter *Dawood*)

> The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings;

and in *Makwanyane*:[391]

> Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution.

Ngcobo J (in dissent) found in a similar vein in *The Citizen 1978 (Pty) Ltd v McBride*:[392]

> The Constitution proclaims human dignity to be one of the foundational values of our constitutional democracy. Human dignity is specifically mentioned in section 1 of the Constitution in order to contradict our racist past. For this reason, the Constitution holds human dignity up as not only a human right that is given constitutional recognition, as with freedom of

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389 As quoted by Chaskalson 2009 *MJIL* 25.
390 2000 3 SA 936 (CC) para 36.
391 1995 3 SA 391 (CC) para 329.
392 2011 4 SA 191 (CC) para 143.

> expression, but also as a fundamental value upon which the legitimacy of the sovereign state is based. The Republic was "founded on" the value of human dignity, and failure to uphold that value is both a violation of a constitutional right and a threat to a bedrock principle that underpins the legitimacy of the state.

Implicit in the underpinning of these constitutional values is a culture of recognition and respect for human rights.[393] In *Soobramoney v Minister of Health, Kwa-Zulu Natal,*[394] the Court confirmed this fundamental objective:

> the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, human rights and social justice.

Building on the idea that dignity acts remedially to redress the injustices of the past, Botha[395] points out that

> dignity, it seems, provides a shared vocabulary which links the universality of human rights to local historical struggles, spans the divide between the old and the new legal order, and enables the mediation of conflicting constitutional values.

It can be said that human dignity adjudication is context-specific, as this value in post-apartheid South Africa is directed at redressing the injustices of the past and the realisation of an equal society.[396] Mathopo AJ illustrated this idea by dismissing an appeal against a sentence in the magistrate's court for *crimen iniuria* and assault, regarding the pejorative

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393 Bray 2004 *PE* 39.

394 1998 1 SA 765 (CC) para 8. The Court made a similar statement in *S v Makwanyane* 1995 3 SA 391 (CC) para 124: "We have made the commitment to 'a future founded on the recognition of human rights, democracy and peaceful co-existence… for all South Africans.'"

395 2009 *SLR* 201.

396 Langa J confirmed this in *Investigating Directorate: Serious Economic Offenses v Hyundai Motor Distributors (Pty) Ltd* 2001 1 SA 545 (CC) para 21: "The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respect the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on social justice, democratic values and fundamental human rights." However, Botha warns that there is a danger that "dignity could be used as a centrepiece of a narrative which *overemphasises* the break between the old and the new, which legitimises continuing inequality and degradation in the name of the Constitution's ideal of universal human dignity." See 2009 *SLR* 201.

use of the word *kaffir* by a white student directed at a black woman relating to a parking dispute:

> In our racist past it [the *k*-word] was used to humiliate, denigrate and dehumanise Africans. This obnoxious word caused untold sorrow and pain to the feelings and dignity of the African people of this country. The appellant cannot claim that he did not know that the use of the word is offensive and injurious to the dignity of the complainants. I agree with the trial court's finding that such conduct seeks to negate the valiant efforts made to break from the past in a country like ours which is founded upon the democratic values of human dignity and the advancement of human rights and freedoms.[397]

With regards to the significance of human dignity as a constitutional value, Venter[398] argues that

> human dignity is the primary nuclear value of the Constitution, supported by equality and freedom

as a result of the primacy of human dignity in sections 1, 7(1), 36(1) and 39(1) in relation to the other values. This hierarchy would become relevant, however, only whenever a conflict of values is at stake. He states that non-racialism and non-sexism are derivatives of equality, and that the values of the rule of the law, the supremacy of the Constitution, and democracy are "limited to structural and procedural considerations."[399] Although the *Interim Constitution* of 1993 did not contain textual reference to human dignity as a constitutional value, section 10 posited that

> Every person shall have the right to and respect for and protection of his or her dignity,

and section 25(1)(b) provided that every detainee must be "detained under conditions consonant with human dignity."[400] Hence, human dignity acts

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397 *Prinsloo v The State* (SCA) (unreported) case number 534/13 of 15 July 2014 para 20.
398 "Human Dignity as a Constitutional Value: a South African Perspective" 339; 342.
399 "Human Dignity as a Constitutional Value: a South African Perspective" 339.
400 Venter "Human Dignity as a Constitutional Value: a South African Perspective" 339-340.

as a "lodestar"[401] in constitutional interpretation to ultimately indicate the "what is good" ideal.[402]

As discussed in section four above, the value of all individuals' inherent worth encompasses three essential elements, and this notion is also reflected in the South African constitutional paradigm, although the Court has not attempted to define the value of dignity. In accordance with the post-war constitutional paradigm, the first component of section 10 of the *Constitution* enacts the value of inherent human dignity *a priori*, which is formulated in terms of a constitutional categorical imperative and links the justification thereof to the right to have one's dignity recognised and respected.[403] The first component of section 10, being a value judgment, connects with the constitutional value of human dignity and refers to an attribute of humanity:[404] "everyone has inherent dignity." As such, the first component is not subject to limitation in terms of section 36 of the *Constitution,* as only rights, in contradistinction to values, are subject to limitation.[405] Therefore the first component grants absolute protection to the principle of inherent dignity, which interpretation is in line with the phenomenon of the inviolability of dignity in German law.[406] The second component of section 10 postulates the "right to have their dignity

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401 O'Regan J used the word "lodestar" in connection with human dignity in *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) para 156, as a guide to interpretation in cultural diversity issues. Also consider the *dictum* of the Court in *S v Williams* 1995 3 SA 632 para 77 regarding the abolition of corporeal punishment: "The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that even the vilest criminal remains a human being possessed of common human dignity, citing Brennan J in *Furman v Georgia* 408 US 328 (1972) 273.

402 See the discussion in chapter 3.4.1 above as well as Esteban 1995 *MJECL* 131.

403 *Robert James Stransham-Ford v Minister of Justice* 2015 5 SA 50 (GP).

404 *S v Dodo* 2001 3 SA 382 (CC) para 35.

405 Also see the discussion in chapter 5.3.3.3 below.

406 Also see the discussion in chapter 5.2.4 below.

respected and protected"[407] and translates into the "right to dignity" as applied in a constitutional context, which right is subject to limitation.[408] Venter[409] and Botha[410] support the claim that the first component of section 10 is not subject to limitation. Botha[411] argues that

> On this interpretation, section 10 does not simply confer a subjective right which, like all rights, is subject to limitation. In addition to conferring a right, it also declares the belief of the founders of the Constitution that the dignity of the person exists prior to its recognition in a constitution and that, accordingly, the negation of the inherent dignity of the person – in distinction to limitations of the rights to have one's dignity respected and protected – cannot be justified in the name of countervailing interests.

Barak[412] maintains that this interpretation is in conflict with the "accepted view" that the right to dignity is a relative right and therefore subject to limitation. He argues that the two components of section 10 should be interpreted as a unit rather than as aspects of the generic idea that everybody has inherent dignity, which has to be respected and protected, thereby adding to the status of dignity as a constitutional right. Whilst it is correct that the *Constitution* confers a relative function to the right to dignity by way of the general limitations clause, the injunctive that "everyone has inherent dignity" cannot be subject to restriction, because the *Constitution* would then contradict itself as a result of the normative meaning ascribed to the value of dignity. According to Barak, the aspect of the inviolability of dignity in German law does not comport with the inherent dignity postulation in South African law. It can be said that the first component of section 10, however, embodies the inherent dignity paradigm, which is mirrored by the wording of article 1(1) of the *Basic Law*

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407 The second component, namely "the right to have their dignity respected and protected", is identified as follows: "[the] relevant *right* continued to be one to the enjoyment of respect and to the protection of a pre-existing human attribute, human dignity." See Venter "Human Dignity as a Constitutional Value: a South African Perspective" 340.

408 Also see the discussion in chapter 5.3.3.4 below.

409 "Human Dignity as a Constitutional Value: a South African Perspective" 340. Also see fn 113 above.

410 2009 *SLR* 197.

411 2009 *SLR* 197.

412 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 247.

and its conceptualisation of human dignity. Therefore the value of dignity in German and the value of dignity in South African law are aligned within the framework of this paradigm. This idea points towards the universal and inclusive character of the essential elements of human dignity.[413]

The idea that dignity is a foundational value of the *Constitution* is confirmed by O'Regan J in *Makwanyane*[414]

> The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognizing a right to dignity is the acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched.

Chaskalson J[415] relates this development to post-war constitutionalism:

> The affirmation of [human] dignity as foundational value of our constitutional order places our legal system in line with the development of constitutionalism in the aftermath of the second world war.

Kantian ethics, in terms whereof the individual, whilst free, can be truly autonomous and dignified only if he respects the dignity of his fellow men,[416] is clearly mirrored in this fusion of morality and law. In addition, state authority is curtailed so that individuals can never be used as a means to an end.[417] The coupling of rights with duties - in this respect, one

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413 For a discussion regarding the universality of human rights, and human dignity specifically, see chapter 4.2 and 4.3 below.

414 1995 3 SA 391 (CC) para 328.

415 Chaskalson 2000 *SAJHR* 196. Also see Klare 1998 *SAJHR* 151.

416 In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28 Ackermann J explained (albeit with regards to a definition of human dignity) that: "At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society."

417 In *Dodo v The State* 2001 3 SA 382 (CC) 423 para 38 the Court stated that: "Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end." In a similar vein Chaskalson J declared in *S v Makwanyane* 1995 3 SA 391 (CC) para 26: "[the death penalty] is also an inhuman punishment for it "...involves, by its very nature, a denial of the executed person's humanity, and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state" citing *Furman v. Georgia*, [1972] USSC 170; 408 U.S. 238, 290 (1972) (Brennan J, concurring.) Likewise, Sachs J found in *Mohunram v National Director*

of the essential elements of dignity, namely the right to have one's dignity recognised, respected and protected in terms of section 10 (horizontally and vertically) - forms the basis of the value of dignity,[418] and this notion has consistently been applied by the Court.[419] The duty-element of dignity was recognised by the Court in *Beja v Premier of the Western Cape*:[420]

> The Constitution of the Republic of South Africa (hereinafter referred to as the "Constitution") has as its primary objective the protection and the restoration of human dignity; it means simply that human beings be treated as human beings. We have a duty, more particularly public representatives and government to promote human dignity. This duty must be fulfilled responsibly and with the utmost maturity. A failure to do this diminishes us all.

In the premises, it is submitted that the emphasis on human dignity as a value in the South African context is based on the Kantian idea of the fusion of the right to have one's dignity recognised and protected with the *a priori* acknowledgement of inherent dignity in terms of the categorical

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of Public Prosecutions 2007 4 SA 222 (CC) para 146 that excessive punishment as a deterrent is contrary to human dignity: "Deterrence as a law enforcement objective is constrained by the principle that individuals may not be used in an instrumental manner as an example to others if the deterrence is set at levels beyond what is fair and just to those individuals. To do otherwise is to breach the constitutional principle of dignity." In *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 173 Van der Westhuizen J held that "Every person should be treated as an end in herself and not as a means to an end only. This is what blunt utilitarianism would allow."

418 *S v Makwanyane* 1995 3 SA 391 (CC) paras 328 and 329.

419 *S v Makwanyane* 1995 3 SA 391 (CC) para 313. However, Venter correctly argues that a seemingly young Court (as at the time of writing in 2001) might "show a lack of sensitivity for the distinction between rights and values." He refers to a *dictum* of the Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28: "As we have emphasised on several occasions, the right to dignity is a cornerstone of our Constitution. Its importance is further emphasised by the role accorded to it in section 36 of the Constitution…" Furthermore, he adds: "There can be no doubt that it is not *the right* to dignity that is the cornerstone of the Constitution, but the *value* of human dignity. Furthermore section 36 expressly does not refer to human dignity as a right, but as a value characterizing 'an open and democratic society'." See "Human Dignity as a Constitutional Value: a South African Perspective" 341. In addition, Woolman refers to "analytical confusion, as a matter of doctrine" as a result of the Court's use of dignity as a value in *S v Williams* 1995 3 SA 632 (CC) para 77, to challenge juvenile whipping in terms of the right to dignity, the right to equality, and the right to be free from cruel, inhuman and degrading treatment. See "The Architecture of Dignity" 23.

420 2011 3 SA 401 (WCC) para 1.

imperative, as enacted in the first component of section 10 of the *Constitution*. As such, this application of human dignity as a value conforms to the essential elements of dignity, namely the ontological claim, the relational claim, and the limited-state claim.

Section 7(1) of the *Constitution,* which posits that the rights enacted in the *Bill of Rights* "affirm the democratic values of human dignity, equality and freedom", embodies the Kantian fusion of morality with law. Moreover, section 7(2) requires that "the state must respect, promote and fulfil the rights in the Bill of Rights."[421] Referring to the German system, the Court held in *Carmichele*[422] that the *Constitution* is based on an "objective, normative value system",[423] which requires the state to take positive measures to protect this value system. These measures entail not only that the state must refrain from the infringing upon basic rights, but that positive measures must be implemented to protect the constitutional values.[424] To this end, dignity functions as an interpretive tool to develop the common law.[425] For example, in *Carmichele*[426] and *NK v Minister of Safety and Security*[427] the Court held that the Minister of Police was liable for delictual damages because of *ommissiones* by policemen and prosecutors to take reasonable steps to ensure the protection of the

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421 The *dictum of the* Court in *Glenister v President of the RSA* 2011 3 SA 347 (CC) para 189 confirms the principled notion of state-duty resulting from section 7(2): "Implicit in s 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective." See Ackermann *Human Dignity: Lodestar to Equality in South Africa* 96 and 97.

422 2001 4 SA 938 (CC) para 54.

423 In *S v Makwanyane* 1995 3 SA 391 para 10, citing *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) 328 - 329, Chaskalson J confirmed that the *Constitution* requires a normative reading of its provisions. See Hughes *Human Dignity and Fundamental Rights in South Africa and Ireland* 127.

424 Botha 2009 *SLR* 200.

425 Botha 2009 *SLR* 200; Ackermann *Human Dignity: Lodestar for Equality in South Africa* 8, 260. He quotes a *dictum* from O'Regan J in *NK v Minister of Safety and Security* 2005 6 SA 419 (CC) para 17: "The overall purpose of s 39(2) is to ensure that our common law is infused with the values of the Constitution."

426 2001 4 SA 938 (CC) para 44.

427 2005 6 SA 419 (CC) para 57.

plaintiffs' human dignity and safety, thereby extending the principles of vicarious liability to state inaction in these instances.[428]

The limited-state claim as an essential element of dignity is encapsulated in the communitarian aspect of the rights *cum* duties notion, as the ideal of equal dignity relates to the state's duties to realise socio-economic rights.[429] In accordance with the objective dimension of human dignity as discussed by Schachter,[430] which relates to how one treats another, governments have a duty to realise a minimum concept of distributive justice. Fletcher[431] explains succinctly that

> The Kantian ideal is clearly communitarian, for our focus is not on ourselves, but on the vindication of the dignity of all mankind.

The dictum of Chaskalson J in *Soobramoney v Minister of Health, Kwa-Zulu Natal*[432] illustrates this notion:

> There will be times when this requires [the state] to adopt an holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.

This idea is especially true in the context of the Court's equality jurisprudence,[433] which translates into an acknowledgement of

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428 For more examples confirming positive measures to be taken by the state in realising its obligation under s 7 of the *Constitution*, see the cases listed by Botha 2009 *SLR* 200 fn 167. Also see the discussion in chapter 5.3.3.4 and 5.3.3.5 below.

429 In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 18 the Court stated that: "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. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence. Hence the need for special judicial control of a process that is both socially stressful and potentially conflictual."

430 1983 *AJIL* 851.

431 1984 *UWOLR* 176. Compare also the Court's *dictum* in *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 74 – see fn 272 above.

432 1998 (1) SA 765 (CC) para 31.

everybody's equal worth by treating the individual as an equal as opposed to providing equal treatment.[434] Substantive equality requires the recognition of racial, gender, social, economic, cultural and other differences between groups in society as well as an instruction to eliminate disadvantages between groups and lesser status attaching to groups.[435] This concept of human dignity as a constitutional value also requires governments to recognise the urgency of the socio-economic needs of people and to enact reasonable policies to cater for the different needs of different groups in society.[436] Liebenberg[437] asserts that, in the light of the instruction in section 39(1) of the *Constitution* that the government must actively promote the constitutional values in interpreting the rights contained in the *Bill of Rights*, the "primary orientation" of the *Constitution*

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433 For a discussion regarding critiques against the use of human dignity as a value in the Court's equality jurisprudence see Liebenberg 2005 *SAJHR* 5-6. Also see the discussion in chapter 5.3.5 below.

434 Liebenberg 2005 *SAJHR* 14. Sachs J argued as such in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 123: "The former [the violation of dignity and self-worth under the equality provisions] is based on the impact that the measure has on a person because of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members; it is the inequality of treatment that leads to and is proved by the indignity." In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) the Court dismissed an appeal from the City of Johannesburg Municipality against a decision of the Supreme Court of Appeal that it need not provide access to housing for the occupiers of a building in respect of which an eviction order was granted on the basis that the Municipality was differentiating between providing emergency access to housing for victims of private landowners as opposed to those relocated by the Municipality for other reasons. The Supreme Court of Appeal's finding that this differentiation amounts to discrimination and consequently an infringement upon the rights to dignity and equality was approved by the Court.

435 Liebenberg 2005 *SAJHR* 14. She quotes Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 129: "At the heart of the equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. The indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream..." He further states that "Equality means equal concern and respect across difference as opposed to uniformity which can be the enemy of equality" (para 132).

436 Liebenberg 2005 *SAJHR* 15 and 16.

437 *Socio-economic Rights Adjudication under a Transformative Constitution* 98.

points towards positive rather than negative constitutionalism. She further argues that

> Herein lies the major distinction between transformative as opposed to preservative constitutionalism. Transformative constitutionalism is committed to positive measures to redress both the legacy of the past as well as new and emerging forms of subordination that deny human dignity, equality and freedom in our society.

The enactment of the constitutional values is also rooted in norms and standards implicit in international human rights law, thereby contributing to the universaliation of human rights.[438] Sachs J described human dignity as "the cornerstone of human rights."[439] As has already been shown, human dignity is regarded as the basis of human rights. The Court has applied this normative function in its human rights jurisprudence, as explained by O'Regan J in *Dawood v Minister of Home Affairs* (hereinafter *Dawood)*:[440]

> Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life.

Chaskalson J,[441] writing extrajudicially, confirms this application of dignity as a value by the Court:

> As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony.

Botha[442] points out that dignity as a value and as the basis of rights has been employed by the Court in relation to the rights against cruel, inhuman

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438 Botha 1994 *SAPL* 237; Bray 2004 *PE* 39.
439 *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 36, as quoted by Botha 2009 *SLR* 199.
440 2000 3 SA 936 (CC) para 36. *In casu* O'Regan J "found" the right to family life in the right to dignity, as the *Constitution* does not specifically refer to a right to family life.
441 2000 *SAJHR* 204.
442 2009 *SLR* 199 and 200 and cases listed in footnotes 150-162.

and degrading punishment,[443] equality, personal freedom, privacy, freedom of expression, religion, occupation, property, the right to vote, socio-economic rights such as access to housing and social security, cultural life, the right to a fair trial and the presumption of innocence. As such, dignity reinforces rights claims. This relationship between dignity as a value, dignity as a right, and other human rights is described by O'Regan J in *Dawood*[444] as follows:

> Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.

Ackermann[445] confirms that (with regard to equality and unfair discrimination):

> In determining what unfair discrimination is, it is the *value* of dignity that informs the *right* not to be unfairly discriminated against. It is of course also

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443 In *S v Williams* 1995 3 SA 632 (CC), a case regarding the decriminalising of juvenile whipping, the Court held that: "The simple message is that the state must, in imposing punishment, do so in accordance with certain standards; these will reflect the values which underpin the Constitution; in the present context, it means that punishment must respect human dignity" (para 38.) In a similar vein, Van Zyl J held in *Stanfield v Minister of Correctional Services* 2004 4 SA 43 (C) para 129 that to deny a terminally ill prisoner the right to die at home amounts to an infringement of s 10 of the *Constitution*: "From this it is clear that the third respondent has failed to accord the applicant the dignity inherently forthcoming to him. This may be attributable to the strict, if not rigid, policy developed by the Department in apparent conflict with the provisions of section 69 of the Act and also with the provisions of section 35(2)(e) of the Constitution, which assures the applicant that he has the right to 'conditions of detention that are consistent with human dignity' (para 89 above). It is likewise in conflict with the provisions of section 10 of the Constitution, in terms of which he has the right to have his inherent dignity respected and protected. It is doubtful whether the third respondent took cognisance of these provisions, or of the all-important provisions of section 39(2) of the Constitution, which enjoins a person interpreting any legislation to 'promote the spirit, purport and objects of the Bill of Rights'".

444 2000 3 SA 939 (CC) para 35. Compare also the *dictum* of Ngcobo J in *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) para 147: "It [human dignity] permeates every right. The demand for equality and freedom is a demand to be treated with dignity. It is indeed difficult to think of any right in the Bill of Rights which is not informed by human dignity."

445 *Human Dignity: Lodestar to Equality in South Africa* 98 fn 32.

> the *value* of dignity that informs the *right* to equality before the law and the *right* to equal protection and benefit of the law.

However, constitutional values do not give rise to substantive rights with consequential enforceable claims, as was found by Chaskalson J in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders*:[446]

> The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.

This distinction by the Court is demonstrated by the definitions of Venter and Esteban regarding constitutional values and principles, as discussed in section 4.1 above. The Court's reasoning is based on the injunction of section 39(1) which posits that, in interpreting the rights in the *Bill of Rights,* courts must

> promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

As such, human dignity provides a normative guideline for the interpretation of the *Constitution* and acts as a guideline to resolve conflicts between rights and values.[447]

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446 2005 3 SA 280 (CC) para 21. Also see Woolman "The Architecture of Dignity" 23.

447 For example, there is always a conflict between freedom of expression and human dignity, as was evidenced by Ngcobo J in *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) para 153: "While the law of defamation therefore protects the legitimate interests that an individual has in his or her reputation and thereby furthers the value of human dignity, the defences to defamation are important in balancing the right of the claimant to human dignity and the right of the defendant to freedom of expression. We must therefore analyse these defences in the context of the constitutional commitment to freedom of expression and the value of human dignity."

3.6.1.6 Human dignity as a constitutional value in US law

3.6.1.6.1 Background

Human dignity first entered US constitutionalism in the dissenting judgment of Frankfurter J in *Glasser v United States*,[448] handed down in 1942. In 1944 Murphy J, also dissenting, invoked the "dignity of the individual" as being infringed upon by a military order, in *Korematsu v. United States.*[449] The first majority judgment that refers to "human dignity" occurs in 1952 in *Rochin v. California,*[450] wherein the Supreme Court condemned the use of force "so brutal and so offensive to human dignity in securing evidence from a suspect", as incompatible with the Due Process clause. Thereafter the Supreme Court employs dignity as a value to strengthen rights claims in a plethora of decisions, mainly in the context of criminal law and procedure, civil rights and anti-discrimination laws, as well as public bioethics.[451] In the post-World War II era, Justices Brennan[452] and Kennedy[453] are the foremost proponents of the idea that

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448 315 US 60 (1942), as quoted by Barak *Human Dignity The Constitutional Value and the Constitutional Right* 194.

449 323 U.S. 214, 240 (1944), as quoted by Jackson 2004 *MontLR* 16. *In casu* the Supreme Court rejected the challenge of Korematsu (a Japanese American) against his detention and deportation by the military into relocation camps, solely on the grounds of his ancestry, as unconstitutional. In his dissenting judgment, Murphy J held at 240 that: "To give constitutional sanction is to adopt one of the cruellest of rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups." Krolikowski informs us that prior to his appointment as a Supreme Court judge, Justice Murphy served as Mayor of Detroit and Governor of Michigan, during which time he developed an "accentuated sensitivity to the severe problem posed by extreme racism in America." This theme manifested in his jurisprudence, as he believed that human dignity was protected by the US Constitution, based on a shared humanity. See 2013 *PLR* 1259.

450 342 U.S. 165, 174 (1952), as quoted by Jackson 2004 *MontLR* 16.

451 See in general Murphy 1980 *SCLR* 703-760; Paust 1984 *HLJ* 145; 148; 50; Goodman 2006 *NLR* 741-795; Rao 2011 *NDLR* 207-216 and Barak *Human Dignity The Constitutional Value and the Constitutional Right* 185-208.

452 The opinions of Justice Brennan were instrumental in establishing dignity as a constitutional value in US law during his thirty-four year term as a judge of the Supreme Court. He employed dignity as a unifying theme in his judgments, in his extra-judicial speeches and writings, and particularly in his judgments pertaining to cruel and unusual punishment. Justice Brennan also advocated the right to die with

dignity as a value underlies the US Constitution.[454] Notwithstanding their contribution to the body of US dignitarian law and the prominence of human dignity in post-war western constitutions, some commentators see the role of dignity in the Supreme Court's jurisprudence as "episodic and underdeveloped."[455] Others claim dignity as *the* fundamental value:

> human dignity is not merely one of the fundamental values of the American constitutional system, it is the fundamental value.[456]

Whereas the moral ethics of Kant was influential in shaping the western world's concept of constitutional dignity, the influence of this philosophy on US constitutionalism is less pronounced. Although human dignity does not function as an enforceable first-order rule in US constitutionalism or as a normative principle, it is utilised as a constitutional value (additional to autonomy and privacy, which are similarly not textually protected,) in an indirect way, to interpret and strengthen recognised constitutional concepts such as liberty, equality, freedom of expression and due

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dignity in his minority judgment in *Cruzan v Director, Missouri Department of Health* 497 U.S. 261 (1990). For a discussion regarding Justice Brennan's role in US dignity jurisprudence, see in general: Parent "Constitutional Values and Human Dignity" 47-52; Paust 1984 *HLJ* 153-184; Barak *Human Dignity The Constitutional Value and the Constitutional Right* 199-201; Werniel 1998 *WMBRJ* 222-239.

453 Justice Kennedy wrote his most significant dignity decisions for the majority, employing dignity as a value to strengthen claims on autonomy and liberty (*Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992) and *Lawrence v Texas* 539 US 558 (2003)); equality and discrimination (*Rice v Cayetano* 528 US 495 (2000) and *United States v Windsor* 133 S.Ct. 2675 (2013)); cruel and unusual punishment (*Roper v Simmons* 543 US 551 (2005)) and the landmark case of *Obergefell v Hodges* 135 S. Ct. 1039 (2015), in which same-sex marriages were legalised on the ground of equal dignity.

454 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 199-204.

455 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 188 and Rao 2011 *CJEL* 202, describing the application of dignity as "intuitive" and "tentatively." Murphy suggests that: "The concept suffers from vagueness and badly needs refinement (perhaps ‘specification’ would be more accurate)." See 1980 *SCLR* 753. On state level, three constitutions refer to human dignity: Montana, Illinois and Louisiana - as well as the constitution for the territory of Puerto Rico. See Barak *Human Dignity The Constitutional Value and the Constitutional Right* 190. For a discussion regarding the influence of the Montana dignity-clause on that of Puerto Rico, see Jackson 2004 *MontLR* 21-27.

456 Murphy 1980 *SCLR* 703; 745. Also see Parent "Constitutional Values and Human Dignity" 47 and Goodman 2006 *NLR* 743; 748.

process.[457] The content of dignity as a value has not yet been formulated by the Supreme Court, but the concept is employed in two forms in order to strengthen rights claims. Firstly, inherent dignity is employed in the context of negative liberty, as an aspect of autonomy, to ensure a minimum of state interference with property, bodily integrity and privacy.[458] In the second instance, "dignity as recognition"[459] is applied by the Supreme Court to give effect to one's autonomous (equal) personal choices and relationships, not evaluated from the petitioner's perspective, but rather from the viewpoint of one's broader social and political community.[460]

The Supreme Court applies dignity as a value to interpret and strengthen various constitutional rights. In this respect Goodman[461] argues that

> human dignity is a well-developed and robust core value but only in certain types of cases, typically those where public opinion favours advancing human dignity interests above competing state interests.

She observes that the Supreme Court invokes dignity as a value in eight broad categories: Fourteenth Amendment substantive due process claims; Fourteenth Amendment equal protection claims, Fifth Amendment self-incrimination claims, Fourth Amendment search and seizure claims, Eighth Amendment cruel and unusual punishment claims, Fourteenth Amendment right to die claims, Fourteenth Amendment procedural due process claims, and First Amendment freedom of expression claims.[462] These manifestations will be discussed according to the following *capita selecta*:

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457 Neuman "Human Dignity in United States Constitutional Law" 270. Human dignity appears mostly in concurring and dissenting judgments in the US Law Reports. See Krolikowski 2013 *PLR* 1267.

458 Rao 2011 *CJEL* 207. Also see the discussion in section 4 above.

459 Also see the discussion in section 4.2 as well as fn 184 above.

460 Rao 2011 *CJEL* 257. Also see *Lawrence v Texas* 539 US 588 (2003) and *Obergefell v Hodges* 135 S. Ct. 1039 (2015).

461 2006 *NLR* 740.

462 2006 *NLR* 757.

3.6.1.6.2 Eighth Amendment cruel and unusual punishment claims

In a very Kantian manner, Schachter[463] argues that certain actions are

> incompatible with the basic ideas of the inherent dignity and worth of human persons

and that respect for inherent dignity means that human beings are not to be treated as instruments or objects to satisfy the means of others or of the state. This claim resonates with Kant's categorical imperative to the effect that inherent dignity is priceless and cannot be infringed upon in any way. The prohibition against cruel and unusual punishment is one of the manifestations of the German mere object formula, implemented to prevent violations of inherent dignity. In the US context, however, this prohibition is applied only to advance dignity, and is not rooted in any theoretical basis as to why man has equal dignity. Although the Supreme Court held in *Trop v Dulles*[464] that

> [t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man,

it does not apply the equal and inherent dignity paradigm as a basis to substantiate why inmates on death row and why those who are not, along with the rest of the population, have equal dignity that cannot be violated. Therefore the Supreme Court treats human dignity as alienable. Equal dignity concerns of offenders do not outweigh the state's obligations in retribution, deterrence and incarceration.[465] Notwithstanding the Supreme Court's express commitment to human dignity as an underlying concept of the Eighth Amendment;[466] it has not yet declared unconstitutional federal

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463 1983 *AJIL* 849.

464 356 U.S. 86 (1958) at 100. *In casu,* the petitioner's citizenship was forfeited by a court-martial, because he deserted his troops during wartime. Brennan J wrote a concurring opinion.

465 *Greg v Georgia* 428 U.S. 153 (1976) at 183-185.

466 In *Roper v Simmonds* 125 S. Ct. 1183 (2005) at 560 the Supreme Court held that: "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man." The Eighth Amendment provides that: "Excessive bail shall not be

death penalty statutes,[467] holding that their validity is subject to public opinion, which opinion must also coincide with human dignity.[468] The difference between the Western application of the object formula in the cruel and unusual punishment cases and the US approach is illustrated by the Supreme Court's differentiation between the constitutionality of the death penalty for normal offenders and that of youths less than eighteen years of age[469] and mentally incapacitated convicts.[470] For these convicts the death penalty is unconstitutional, whereas in Kantian terms the death penalty for humanity is unconstitutional, because everybody has equal dignity, which is inalienable. Therefore one can conclude that the value of dignity in the cruel and unusual punishment cases in US law operates as a secondary principle.

3.6.1.6.3 First Amendment right to free speech and protection of another's public image

According to Dworkin,[471] freedom of speech is a particular expression of respect for dignity.[472] He argues that dignity is about autonomy and

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required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

467 However, in *Furman v. Georgia*, 408 U.S. 238 (1972), the Court held that certain death penalty statutes were unconstitutional, because the application of these statutes was discretionary and discriminatory.

468 In *Gregg v. Georgia*, 428 U.S. 153 (1976) the majority held at 175 that: "In assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." Earlier in the judgment (at 173,) Stewart J stated that "public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must also accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'"

469 In *Roper v Simmonds* 125 S. Ct. 1183 (2005) the Supreme Court declared the death penalty for juvenile offenders unconstitutional.

470 In *Atkins v Virginia* 536 U.S. 304 (2002) the Supreme Court held that the death penalty for mentally retarded offenders is unconstitutional.

471 *Taking Rights Seriously* 197-204.

472 In *Cohen v California* 403 US 15 (1971) at 24, Justice Harlan held that: "no other approach would comport with the premise of individual dignity and choice upon

choice, therefore speaking freely is an aspect of these, and a restriction on speaking would result in a violation of dignity. But only choices that do not interfere with and limit the choices of others warrant respect for dignity. This claim coincides with Kant's categorical imperative to the effect that each person must respect the dignity of others as his own. Here dignity is implicit on both sides of a dispute, as speaking can be a manifestation of the dignity of the speaker and at the same time a deprivation of the victim's dignity. In the US, hate speech is protected by the First Amendment, providing that the speech does not contain fighting words,[473] whereas hate speech is prohibited in general in the *Basic Law* and the *Constitution.*

When the values of free speech and dignity collide in the libel or reputational decisions, the dispute cannot be resolved by dignity only. US libel law protects individual reputation, albeit not the reputations of public officials or public figures.[474] Under state law, dignity concerns pertaining to privacy/liberty interests and protected by the Fourth; Fifth and Eighth Amendments are weighed against dignity concerns in competing First Amendment claims.[475] The privacy/liberty aspect is similar to the right to the free unfolding of personality in German law.[476] In these matters the Supreme Court acknowledges that the protection of private personality is governed by individual states, but dignity is applied as a constitutional value to protect reputation.[477] As Justice Steward held in *Rosenblatt v Bauer,*[478] the protection of reputation reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty.

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which our political system rests," as quoted by Goodman 2006 *NLR* 740 and Barak *Human Dignity The Constitutional Right and The Constitutional Value* 198.

473 Rao 2011 *NDLR* 252.

474 Rao 2011 *NDLR* 253.

475 Goodman 2006 *NLR* 763; Rao 2011 *NDLR* 253.

476 Goodman 2006 *NLR* 763.

477 Goodman 2006 *NLR* 763.

478 383 U.S. 75 (1966) at 92, as quoted by Goodman 2006 *NLR* 763.

However, the value of dignity as applied in the protection of reputation matters has not yet prevailed against the conflicting right to freedom of expression as protected by the First Amendment.[479] Here dignity also fulfils a secondary role to the protection of the constitutional rights.

3.6.1.6.4 Fourteenth Amendment due process or equal protection to economic assistance

The US Constitution does not sanction a right to economic assistance based on the value of human dignity, in contrast to the *Basic Law* and the *Constitution,* that place positive obligations on the state to take affirmative steps to respect, promote and protect the right to dignity by providing existential minimum living conditions for their citizens and permanent residents (the third essential element of the concept of dignity.)[480] Although Brennan J in *Goldberg v Kelly*[481] (a case involving welfare recipients whose benefits were terminated) connected living a life with dignity with the petitioner's constitutional claim,[482] the Supreme Court has since this ruling held back on advancing human dignity in welfare rights adjudication.[483] As Goodman[484] argues, the Supreme Court's decisions regarding the role of dignity in the welfare rights cases are somewhat contradictory. Whereas dignity underlying women's rights to choose to have an abortion prevailed in cases such as *Roe v Wade*,[485] the Supreme Court ruled in *Harris v McRae*[486] that pregnant women choosing an abortion are not entitled to receive federal funds for the constitutionally

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479 Goodman 2006 *NLR* 763.
480 See the discussion in section 4.3 above.
481 397 U.S. 254 (1970), as quoted and discussed by Goodman 2006 *NLR* 761 and Glensy 2011 *CHRLR* 116. *In casu* the Supreme Court held that a prior evidentiary hearing must be conducted by a commissioner of social services before the benefits of welfare recipients could be terminated.
482 Brennan J held at 264-265 that: "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its border."
483 Goodman 2006 *NLR* 762; Glensy 2011 *CHRLR* 117.
484 Goodman 2006 *NLR* 762.
485 410 US 113 (1979).
486 448 U.S. 297 (1980).

protected right to have an abortion.[487] The majority judgment did not refer to human dignity at all.[488] In the US application, human dignity as a value does not outweigh competing state economic interests, especially where the state is obliged to interfere.[489] In these matters human dignity does not play any constitutional role.

3.6.1.6.5 Contrasts in the application of human dignity between Germany, South Africa and the US

The normative role of human dignity in Germany and South Africa derives from its constitutional protection to this effect– in Germany as the highest constitutional value and as an inviolable right, and in South Africa as one of a triad of constitutional values, and also functions as a relative right. In these jurisdictions, dignity functions as a *Grundnorm* and a first order rule. Dignity does not enjoy constitutional status in US law; therefore the concept is not rooted in a philosophical, theological nor in any historical context. In German and South African law, dignity is inextricably linked to Kant's moral ethics and the "never again" reaction against past violations of human dignity. The evolutionary idea of "levelling up" of *dignitas,* which resulted in legalisation of *dignitas humana,* is absent in US law. The robust protection of individual rights and freedoms in US law commands that the value of dignity only be fragmentally employed in order to strengthen autonomy and negative liberty. A conceptualisation of dignity, analogical to the application of the three essential elements in German and South African law, did not develop as such in US law. The object formula, based on Kant's categorical imperative, is not a recognised legal norm in US law. This results in unequal application of the inherent dignity paradigm. In addition, the second and third essential elements of dignity as applied in German and South African law have no relevance in US law, because the

487 Goodman 2006 *NLR* 762.
488 Goodman 2006 *NLR* 762.
489 Goodman 2006 *NLR* 763.

US constitutional system in general protects the individual from state interference, without requiring that these rights be respected and protected by the state. Lastly, the "communitarian" Kantian foundations of human dignity remain undeveloped in American constitutionalism.

3.6.2 Human dignity as a fundamental right[490]

3.6.2.1 Introduction

Human dignity is implicit in the human rights doctrine.[491] Although the right to dignity *per se* is not posited in international law treaties (rather the right to respect and the protection of dignity as discussed in section 3.4 above) dignity is regarded as *the* central human right and the legitimising mechanism to regulate the relationship with other rights. In contrast to the doctrine of subjective legal rights, human rights are a *sui generis* category of rights (moral and human, as opposed to legal rights, which have legislation or custom as legitimising source)[492] accruing by definition to *Homo sapiens* by virtue of their humanness. Human rights are equal and universal rights – in other words, every individual is the bearer of these rights, which cannot be waived. These "fundamental human rights" were

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490 In congruence with Neuman, terminology in this thesis regarding human rights will be used as follows: "human rights" are referred to in context with internationally recognised human rights inclusive of certain rights posited in national law - to give effect to international law obligations; individual rights protected by national constitutions are "constitutional rights" (certain rights such as human dignity and freedom of speech circumscribe both these rights) and the umbrella term "fundamental rights" refers to both human rights and constitutional rights. See 2003 *SLR* 1865.

491 Burchell states that "The Constitutional Court has correctly recognized the pivotal nature of the right to dignity in any human rights ideology." See *Personality Rights and Freedom of Expression: The Modern Actio Inuriarum* 329. Ackermann J referred to several decisions that described the right to dignity as a "cornerstone of the *Constitution*" in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28.

492 Henkin explains that "the human rights idea declares that every individual has legitimate claims upon his or her own society for certain freedoms or benefits. Few, if any, human rights are absolute: they are *prima facie* rights and may sometimes bow to compelling public interest. Dworkin suggested that human rights ordinarily 'trump' other public interests." See Henkin 1989 *AAASPSS* 11.

originally, in the aftermath of World War II, codified in the *Universal Declaration* and the *UN Charter,* and thereafter sporadically in various international documents and, in many national constitutions, as positive law. As a result, positive law created rights and remedies in terms whereof the individual enjoys *ex lege* protection of his individual rights *qua* constitutional rights against state intrusion. This process of "transference" of *a priori* recognised universal human rights entails *a posteriori* enactment of legal rights in the domestic legal order. Although the United Nations General Assembly declared that the *Universal Declaration* is not a binding resolution, the body of international human rights law is primarily contained and legislated in *International Covenant of Civil and Political Rights* (1967) and *International Covenant on Social, Economic and Cultural Rights* (1967)*,* in addition to customary human rights law and general principles of law recognised by states*.*[493]

3.6.2.2 Legitimisation of dignity as a right

Human rights derive from the value of the "inherent dignity of the human person."[494] They are essential to guarantee a dignified life and protect individuals from treatment inconsistent with human dignity.[495] The scope of application of dignity as a right is determined in relation to other rights in cases where it is explicitly referred to as a right in constitutions. Consequently, the right will have different ranges in different jurisdictions. Unless specifically excluded, as in the German system, dignity operates not as an absolute right but as a relative right that may be subject to

493 Henkin "International Human Rights as "Rights"" 1979 *Cardozo LR* 429 fn 16.

494 Preambles to the *International Covenant of Civil and Political Rights* (1967) and *International Covenant on Social, Economic and Cultural Rights* (1967). Also see the discussions in sections 3.4.1, 3.6.1 and footnotes 96-99 above, as well as *ANC v Sparrow* 01/16) [2016] ZAEQC 1 (10 June 2016) p 40 para 20.

495 This is based on the common law principle of *ubi jus, ibi remedium* (where there is a right, there is a remedy). See *Minister of the Interior v Harris* 1952 4 SA 769 (SCA) at 780.

limitations under proportionality analysis.[496] As a result of the absolute character of the right to dignity in German law, political considerations regarding the limitation of rights are not relevant.[497] The second step in the two-tier approach is to establish whether the constitutionality of the limitation of rights is unnecessary in instances of infringement upon the right to dignity.[498] In a number of constitutions, such as the German, South African and Israeli *Basic Law,* dignity is both a positive and a negative right, not only imposing limitations on state action but obliging the state to progressively realise dignity.[499] These aspects of dignity in essence represent the "post-war rights-protecting paradigm."[500]

Human rights, inclusive of the right to human dignity, have a "suprapositive aspect"[501] (contrary to norms enacted in treaties and constitutions) that derives legitimacy from "a normative force independent of their embodiment in law", which could include natural law; religions; universal morality or the underlying ethical values of a particular culture.[502] Human dignity embodies the suprapositive aspect of human rights, which legitimises the relative and universal characteristics of these rights. Dicke[503] encapsulated this aspect by quoting Schwartländer:

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496 According to Weinrib, the two stage analysis employed by courts to establish whether infringement upon a right is constitutional was developed by German law and incorporated in many other jurisdictions thereafter, which is also a characteristic of the post-war paradigm of constitutional rights jurisprudence. See "The Postwar Paradigm and American Exceptionalism" 93. Also see the discussion in chapter 5.2.3 below.

497 Grimm "Dignity in a Legal Context and as an Absolute Right" 387. Also see the discussion in chapter 5.2.3 below.

498 Grimm "Dignity in a Legal Context and as an Absolute Right" 386.

499 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 367. Also see the discussion in section 3.4 above.

500 See the explanation in section 4 and fn 168 above.

501 Neuman explains that: "In referring to these principles as suprapositive, I do not mean to assert that they apply of their own force *within* the legal system to trump positive law, but rather that they supply an external standard of normative evaluation, which the legal system fully or partially internalizes as a positive fundamental right." 2003 *SLR* 1868 fn 10.

502 Neuman 2003 *SLR* 1868.

503 See "The Founding Function of Human Dignity" 118-119.

> The normative validity of human rights claims is founded on the function of different human rights claims under particular historical circumstances to express and to represent the *a priori* unconditioned dignity of human beings. Dignity of human beings is, in other words, the source from which the validity and universal authority of human rights is derived, and at the same time dignity functions as a critical yardstick to answer the question of which historically conditioned claims shall be recognized as human rights.

Nonetheless, the notion of rights may be ambiguous as it relates to different legal relationships and principles. In human rights context, these rights may refer to claims of individuals against the state (such as civil and political rights), whilst these claims could be based on a metaphysical concept such as the distinctive nature of humanity, or on a religious foundation such as *imago Dei*. Conversely, rights claims sometimes are based on an *a priori* perspective, as opposed to a claim based on common good interests (such as socio-economic and cultural rights), which could result in many different moral interpretations that may not support individual human rights claims.[504] However, whilst theories[505] abound to justify the source of human rights in order to explain the existence and nature of these rights; their scope and limitations, the *Universal Declaration* and the *UN Charter* abstain from supplying a definition of and a theoretical basis for human rights, but rather accede to a preconception of dignity as the basis for these rights. These international documents view human rights as a-political and universal and provide no single and encompassing theory for the individual's relationship to society.[506] Henkin[507] correctly argues that

> We are not told what theory justifies "human dignity" as the source of rights, or how the needs of human dignity are determined. We are not told what conception of justice is reflected in human rights, or how preserving human rights will promote peace in the world.

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504 Shestack "The Jurisprudence of Human Rights" 71-73.

505 For a detailed analysis of historical and modernist theories regarding the sources of human rights, see Shestack "The Jurisprudence of Human Rights" 75-113. Also see Gewirth 1978-1979 *GLR* 1143-1170.

506 Henkin "International Human Rights and Rights in the United States" 32.

507 "International Human Rights and Rights in the United States" 33.

That dignity is regarded as the basis of human rights was also confirmed by O'Regan J in *Makwanyane,*[508] without reference to any theoretical foundation:

> This right therefore is the foundation of many of the other rights that are specifically entrenched in chapter 3.

The US genealogy of constitutional rights does not include reference to the protection of human dignity. In addition, the US does not adhere to principal human rights conventions. It is still deemed that American exceptionalism should maintain the unique character of its constitutional rights and not join the human rights regime of countries that do not share American ideals.[509] An originalist interpretation of the Constitution would prevent a formulation of the right to dignity, as the framers of the Constitution did not include the protection of dignity in its enactment.[510] The concept of human dignity in terms of its essential elements is not sufficiently developed in US law. As a value, only the inherent component of dignity is recognised, albeit it is used in descriptive manner and not as a cause of action. Rao[511] furthermore argues that the recognition of dignity as a right would upset the internal constitutional balance, which is rooted in individual liberty, whilst the concept of dignity is based on the communitarian and social aspects of human rights.

Contrariwise, section 39(2) of the *Constitution* obliges the Court to accommodate human rights via international law into its domestic system when the provisions of the *Bill of Rights* are interpreted. Also, the German

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508 1995 3 SA 391 (CC) para 328. This point was reiterated by Chaskalson in para 144: "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others." Also see *Ferreira v Levin* 1996 1 SA 984 (CC) para 49.

509 Henkin "International Human Rights and Rights in the United States" 52.

510 See the discussion in chapter 4.3.5 regarding interpretational methodologies and its effect on the adjudication of dignity.

511 2008 *JIL* 220.

Constitutional Court proclaims a principle of "openness to international law" and takes into consideration interpretations of the European Convention (to the extent that the level of protection is not diminished) in construing constitutional rights.[512] These applications in German and South African constitutionalism contribute to the universalization of human rights.

3.6.2.3 Human dignity as a constitutional right in German law

Dignity as a constitutional right functions in a unique and twofold way in German constitutionalism. Firstly, dignity is regarded as having been violated when a person is used as a means to achieve someone else's goal, in terms of the object formula, which roots in Kant's categorical imperative.[513] It is trite that a person must be seen as an end-in-himself, even in extreme circumstances.[514] Barak[515] argues that this understanding of dignity is narrower than the value of dignity, which encompasses all aspects of humanity. Only the aspects of humanity that refer to a person as an end-in-himself in terms of the object formula fall within the scope of the constitutional right to dignity. As a result, a detachment occurs between the scope of the value and the right to dignity.

Secondly, the *Basic Law* contains a "basket clause",[516] which is a provision stating that actions that limit an individual's freedom of choice and which do not fall within any of the other constitutional rights will fall within the category of the basket right. In German law the right to the development of one's personality constitutes a basket right. This regulation leads to a narrow scope of application of the right to dignity, because

512 Neuman 2003 *SLR* 1898.
513 Barak "*Human Dignity: The Constitutional Value and the Constitutional Right*" 370; Klein "Human Dignity in German Law" 150. Also see fn 145 above.
514 See fn 36 above.
515 "Human Dignity: The Constitutional Value and the Constitutional Right" 370.
516 The right to life in the Constitution of India is a basket-right. See Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 373 and fn 39.

limitation analysis is applied only during the first stage to establish whether infringement resulted in the violation of dignity. The second stage of analysis is not relevant. As such, the right to dignity is joined to the other constitutional rights by acting as an indicator for the infringement of such a right. Thus the right to dignity is interpreted as protection against the limitation of the other constitutional rights, if such limitation leads to infringement upon human dignity. Such a limitation would not be subject to proportionality, because it mirrors the absolute character of the right to dignity in terms of the object formula.[517] In this respect the inviolable component of the right to dignity in German law truly coincides with Dworkin's formulation[518] to the effect that rights should act as trumps in order to protect human beings against political decisions, as individual rights should not be overridden by collective goals and purposes.

The essential elements of dignity were shaped by the *Basic Law* as the first constitution after World War II to construct the post-war rights protecting paradigm. In this paradigm, respect for and the protection of human dignity draw on the Kantian notion that individuals cannot be treated by the state as mere objects to achieve a purpose; therefore the state exists for the sake of the individual, and not *vice versa.* It can be said that German constitutionalism concretely applied the principles embodied in the preamble of the *Universal Declaration*, interpreted them in terms of Kantian ethics, and conceptualised human dignity in the process.

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517 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 372 – 373; Klein "Human Dignity in German Law" 150.

518 *Taking Rights Seriously* 22. Also see fn 159 above.

3.6.2.4 Human dignity as a right in South African law

3.6.2.4.1 The content and scope of the constitutional right to human dignity

The widest possible interpretation of the right to dignity holds that dignity encompasses the protection of all the fundamental rights, thereby indicating that an infringement of any fundamental right would simultaneously constitute an infringement of the right to dignity. Barak[519] explains that the scope of human dignity as a constitutional right is determined by and equal to the fulfilment of the constitutional value of human dignity, whether it is interpreted broadly or narrowly. In other words, when judges adjudicate a claim regarding an infringement upon human dignity, the essential elements of the value of human dignity as discussed above in section 4 are implicit in dignity so protected. In addition, the value of human dignity in the perspective of a society's historical, economic, social, political and cultural status contributes to the interpretation of dignity's scope.[520] Therefore the scope of the value of dignity is the same as the scope of the right and leads to an overlap between the right and the value.[521] As most constitutions recognise a relative right to human dignity, general rules in respect of limitations on constitutional rights also apply to the right to human dignity.[522] The exception is German law, where the constitutional architecture of dignity as an absolute right that is not subject to limitation and proportionality

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519 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 367.

520 For example, the inviolable status of dignity in German law is attributed to the negation of national fascism and the grave violations of dignity during World War II. In South Africa, the right to dignity (and invariably of the right to equality) is interpreted against the background of the non-recognition of everybody's inherent dignity during the apartheid regime.

521 This is the case in South Africa and Israel. See Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 367.

522 In constitutions that do not recognise dignity as an independent right, such as the Indian *Constitution,* dignity as a "daughter-right" is derived from a "mother-right" such as the right to life. Also see the discussion in chapter 5.3.3.4.

results in a narrower interpretation of the right than of the value of dignity.[523]

Dignity as a right protects aspects relating to "conduct and ideas that directly offend or denigrate the dignity and worth of individuals", in Schachter's[524] words. Fabricius J conceptualised the idea of undignified suffering in the context of assisted suicide in *Robert James Stransham-Ford v Minister of Justice.*[525] He held that there is no dignity in

> 15.1 Having severe pain all over one's body;
>
> 15.2 being dulled with opioid medication;
>
> 15.3 being unaware of your surroundings and loved ones;
>
> 15.4 being confused and dissociative;
>
> 15.5 being unable to care for one's own hygiene;
>
> 15.6 dying in a hospital or hospice away from the familiarity of one's own home;
>
> 15.7 dying, at any moment, in a dissociative state unaware of one's loved ones being there to say good bye.

In instances where dignity as a right overlaps with the value of dignity, Barak[526] notes that the following methodological aspects, which refer to the limits of dignity as a right, are relevant: 1) does the right to human dignity exclusively operate to protect any aspect of human behaviour; 2) what is the function of the right to human dignity in instances of a complementary overlap between the right to human dignity and other

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523 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 367; Klein "Human Dignity in German Law" 148-149.

524 1983 *AJIL* 852. For example, in *Advance Mining Hydraulics v Botes* 2000 2 BCLR 119 (T) para 127B the Court ruled that an omission to warn an examinee of his right to legal representation before compelling him to answer questions that he did not comprehend resulted in a "blatant affront" to his dignity.

525 2015 4 SA 50 (GP).

526 Barak discusses a third instance not relevant to the current discussion, namely where rights recognised in a partial bill of rights, such as the case in Israel, also include the constitutional right to human dignity. See "Human Dignity: The Constitutional Value and the Constitutional Right" 370; 373-374.

constitutional rights? It is submitted that a further aspect is relevant regarding the scope of dignity as a right, namely to what extent does the right protect the three essential elements of human dignity? As discussed in section 4 above, these elements refer firstly to the ontological claim, namely that each individual has inherent human dignity; secondly, that this canon must be recognised and respected by others (the relational claim that translates into dignity-as-recognition); and lastly the "limited-state claim", which is embodied by the Kantian claim that the state should exist for the sake of the individual and requires that minimum living conditions be established by states. In the following sections, these aspects, as well as the extraordinary function of the right to dignity in German law, will be discussed.

3.6.2.4.1.1 The exclusive operation of the right to dignity in instances of the protection of the essential elements of human dignity

3.6.2.4.1.2 The right to dignity as a rights-generating principle

A constitution may specifically accord an exclusive domain for the operation of the right to human dignity. In a constitution which contains a rich, comprehensive bill of rights and includes all the civil and political rights recognised in international law (such as the *Constitution*), dignity's exclusive domain as a constitutional right is diminished, which necessitates a wide interpretation of the dignitarian right. Consequently, dignity's scope is already included in the remaining constitutional rights – such as the right to equality, of which dignity constitutes the underlying component.[527] However, dignity's scope can expand beyond the range of the current constitutional rights to exclusively apply within the margins of a newly-found right that is not specifically entrenched in a constitution. In

527 Sachs J, concurring in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 120, pointed out that dignity is "the motif which links and unites equality and privacy, and indeed, runs through the protection offered by the Bill of Rights."

this respect, and in the South African context, dignity as protected by section 10 of the *Constitution* functions as a rights-generating mechanism to establish new constitutional rights not included in the *Bill of Rights*. O'Regan J applied this function of dignity in *Dawood*[528] to found a right to family life as a derivative (or "daughter-right", to follow Barak's argumentation) of the primary right – human dignity, which is otherwise not protected as an independent right in the *Bill of Rights.*[529]

A further extension of the right to family-life as the "daughter-right" of human dignity was established in *Dladla v City of Johannesburg.*[530] Wepener J of the South Gauteng High Court found that the gender separation rules of a shelter for the homeless that did not permit spouses or life partners to live together go to the heart of family life and therefore

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528 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC). She argued at para 36 that: "In this case, however, it cannot be said that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relationships than the right to dignity in section 10. There is no specific provision protecting family life as there is in other constitutions and in many international human rights instruments. The applicants argued that legislation interfering with the right to enter into such relationships infringed the rights to freedom of movement and the rights of citizens to reside in South Africa. It may well be that such legislation will have an incidental and limiting effect on these rights, but the primary right implicated is, in my view, the right to dignity. As it is the primary right concerned, it is the right upon which we should focus."

529 It is interesting to note that the Court held in the first certificate case of the *Constitution* (*Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC)) paras 96-100 that the omission of family rights and the right to marry in the *Bill of Rights* could be overcome by applying the values of dignity, equality and freedom as well as the right to dignity.

530 *Dladla v City of Johannesburg Metropolitan Municipality* 2014 4 SA 51 (GJ). The applicants, Dladla and several other residents, were evicted from a building and relocated to a temporary overnight facility run by Metropolitan Evangelical Services (the second respondent), as the City of Johannesburg's temporary accommodation policies were not yet finalised. The rules of the second respondent provided, *inter alia,* that genders are to be separated, as a result of which spouses and life partners could not live together. The City of Johannesburg approved of these rules and policies. It was argued on behalf of the applicants that these rules infringed upon their rights to dignity, freedom, privacy and security of the person, and that the second respondent should be interdicted from implementing them. Wepener J ruled that the segregation rule went against the root and heart of the right to dignity and family life and as a result the limitations on these rights could not be justified and were therefore unconstitutional.

infringe upon the right to dignity.[531] The Court connected the right to family life as established in *Dawood*[532] with the right of a family not to be split up, as a communal family life

> establishes a reciprocal and enforceable duty of financial support between the spouses and a joint responsibility for the guardianship and custody of children born of the marriage.[533]

Fabricius J applied the rights-generating function of dignity to found a "once-off" right to die in *Robert James Stransham-Ford v Minister of Justice*[534] as a daughter-right from the mother-right human dignity. Robert James Stransham-Ford was a terminally ill patient who brought an urgent application in the High Court in Pretoria for legal authorisation to assist in his suicide, as he held that the extreme suffering that he had to endure because of his illness constituted an infringement of his right to dignity. Fabricius J granted the urgent application on 30 April 2015, without knowing that the applicant had died peacefully some 2 hours earlier, and he delivered reasons for his judgment on 4 May 2015. However, the court made it clear that the order related only to the Applicant and that it could not be seen as legalisation of the common law sanction against assisted suicide. Although the court was faced with the unique situation that the judgment could not be enforced, Fabricius J held that the court's order was not moot, because the ruling was based on the development of the common law regarding the legalisation of assisted suicide.

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531 *Dladla v City of Johannesburg Metropolitan Municipality* 2014 4 SA 51 (GJ) para 38.

532 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC).

533 *Dladla v City of Johannesburg Metropolitan Municipality* 2014 4 SA 51 (GJ) para 33.

534 2015 4 SA 50 (GP). According to Kommers and Miller, there is no prospect that the BVerfG would formulate a right to die in the near future in the light of the Nazi killings of thousands of incurably ill people. See *The Constitutional Jurisprudence of the Federal Republic of Germany* 398. See also fn 198 in chapter 5.

3.6.2.4.1.3 Protection of the essential elements of human dignity through the right to dignity

Dignity can also function exclusively as a free-standing right, where no other constitutional rights can be identified to protect the value of dignity.[535] This function has specifically been applied by the Court in matters to protect the interests of married partners or life partners; the interests of intimate associations that go beyond the legal margins of marriage or life partnerships to relationships between grandparents and grandchildren; where no other right could protect the language interests of a party before court;[536] where survivors of same-sex relationships were accorded spousal pension benefits;[537] and to protect the interests of female heirs against customary law norms regarding male primogeniture.[538]

In the previous instances dignity generated rights for individuals – rights which were non-existent pre-1994. In a similar vein, the Supreme Court of Appeal ruled in *National Media Limited v Bogoshi*[539] that the right to

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535 Woolman "The Architecture of Dignity" 19-20.
536 Woolman "The Architecture of Dignity" 20.
537 *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC).
538 Woolman "The Architecture of Dignity" 13 and cases quoted in footnotes 42-44 and 48.
539 1998 4 SA 1196 (SCA). This development was confirmed by the Constitutional Court in *Khumalo v Holomisa* 2002 5 SA 401 (CC) and *Van der Merwe v Road Accident Fund* 2006 4 SA 230 para 40, with the Court declaring that personality rights include "mental integrity, bodily freedom, reputation, privacy, feeling and identity." Common law drew a distinction between the concepts of *dignitas,* which is protected by the *action iniuriarum,* and *fama,* which is protected by the action for defamation. Froneman J in *Gardener v Whitaker* 1995 2 SA 672 (E) recognised that the right to human dignity as envisaged by s 10 of the *Constitution* encompasses the common law right to reputation. He argues at paras 690G-H that: "The right to respect for and protection of human dignity in s 10 of the Constitution is one that also appears in international human rights instruments and seems to encompass something broader than the Roman-Dutch concept of *dignitas…* As has been seen, the right to one's good name and reputation has been interpreted in Germany as forming part of the right to human dignity. Having regard to the venerable ancestry of the right to a good name and reputation, I can see little reason why the same approach should not be adopted in South Africa…" Also see footnotes 163-165 in chapter 4.

human dignity includes the right not only to an individual's *dignitas,* but also to his good name and reputation (*fama),* as a result of a generous interpretation of the *Bill of Rights.*

3.6.2.4.2 Overlapping of the right to dignity with other constitutional rights

3.6.2.4.2.1 Complementary overlapping of an individual's *dignitas,* good name and reputation (*fama*)[540]

Although different aspects of the value of dignity are protected by the various constitutional rights, these aspects are also protected within the ambit of the right to dignity, resulting in a partial and reciprocal overlap between the right to human dignity and other constitutional rights.[541] The scope of the rights in the overlapping area is not affected by the overlapping, and whilst each right remains independent from the other, it is reinforced through the support given by the other right in the overlapping area.[542] All the rights, interpreted independently, are subject to limitation and proportionality analysis, the requirements of which could be different for each right.[543] In instances where a general limitation clause applies to

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540 This is as a result of generous interpretation of the *Bill of Rights.* Common law drew a distinction between the concepts of *dignitas,* which is protected by the *action iniuriarum,* and *fama,* which is protected by the action for defamation. Froneman J in *Gardener v Whitaker* 1995 2 SA 672 (E) recognised that the right to human dignity as envisaged by s 10 of the *Constitution* encompasses the common law right to reputation. He argues at paras 690G-H that: "The right to respect for and protection of human dignity in s 10 of the Constitution is one that also appears in international human rights instruments and seems to encompass something broader than the Roman-Dutch concept of *dignitas…* As has been seen, the right to one's good name and reputation has been interpreted in Germany as forming part of the right to human dignity. Having regard to the venerable ancestry of the right to a good name and reputation, I can see little reason why the same approach should not be adopted in South Africa…" Also see footnotes 163-165 in chapter 4.

541 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 375.

542 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 376.

543 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 376.

all the constitutional rights involved, limitations must be separately analysed from the perspective of each constitutional right.[544]

Barak[545] argues that the reasons for this are twofold: the emphasis on public interest that justifies a limitation on the right to dignity may differ from justifications to limit other constitutional rights.[546] Secondly, the weight given to the protection of a specific constitutional right (where dignity may be limited at the margin) may be different from the weight given to the protection of the right to dignity (where the limitation may be closer to the core of the right.)[547] This situation arose in *Robert James Stransham-Ford v Minister of Justice*[548] when the court had to balance the right to dignity of the Applicant with the State's obligation to guarantee the right to life. More weight was given to the right to dignity than to the right to life. Dignity as the basis of fundamental rights is mutually supportive of the right to life, and not mutually exclusive. In this respect Fabricius J[549] referred to the *dictum* of O'Regan J in *Makwanyane*:[550]

> The right to life, thus understood, incorporates the right to dignity. So the rights to dignity and to life are intertwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.

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544 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 376. In *S v Jordan* 2002 6 SA 642 (CC) the minority judgment of Sachs J and O'Regan J held at paras 52 and 53 that, although the rights to dignity, freedom of the person and privacy intersect and overlap, these rights cannot be seen together as a global right to autonomy, as each right demands a separate consideration with regards to infringement.

545 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 376.

546 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 377.

547 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 377.

548 2015 4 SA 50 (GP).

549 2015 4 SA 50 (GP) para 12.

550 1995 3 SA 391 (CC) para 327.

The Court's approach in instances of complementary overlapping, however, is to apply the specific constitutional right and not the right to dignity.[551] In this respect, Woolman[552] confirms that:

> Dignity is rarely a rule-generating right or (case dispositive right). That is, the right to dignity *alone* is rarely dispositive of a constitutional matter. The first rule of South African dignity jurisprudence is that where a court can identify the infringement of a more specific right, FC s 10 will (ostensibly) not add to the enquiry.

However, Fabricius J relied only on the Applicant's right to dignity in *Robert James Stransham-Ford v Minister of Justice*[553] to find that unbearable suffering as a result of a terminal illness constitutes an infringement upon one's human dignity. Although the court in passing referred to the right to the freedom and security of the person (section 12 of the *Constitution*) in the context of a patient's autonomy to choose or refuse medical treatment, which is endorsed by common law, Fabricius J held that a person's decision on when to end life is a manifestation of that person's own sense of dignity and personal integrity:

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551 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35. In a similar vein, Kriegler J held in *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC) para 43 that: "I propose, also, to treat the right to dignity contained in Section 10 as a right which is intertwined with and helps in the interpretation of the rights of personal freedom and security protected by Section 11, rather than as an independent right violated by the statute in question. In this way I will attempt to locate the issue in what I regard as its proper constitutional framework." In *Jaftha v Schoeman* 2005 2 SA 140 (CC) para 21 the Court stressed that: "this Court has made it clear that any claim based on socio-economic rights must necessarily engage the right to dignity. *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC) at para 83. The lack of adequate food, housing and health care is the unfortunate lot of too many people in this country and is a blight on their dignity. Each time an applicant approaches the courts claiming that his or her socio-economic rights have been infringed the right to dignity is invariably implicated. The appellant's reliance on section 10 as a self-standing right therefore does not add anything to this matter making it unnecessary to consider the attempted amplification of their case in this regard."

552 Woolman "The Architecture of Dignity" 12. Also see Sachs J's *dictum* in *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC) para 43: "I propose, also, to treat the right to dignity contained in Section 10 as a right which is intertwined with and helps in the interpretation of the rights of personal freedom and security protected by Section 11, rather than as an independent right violated by the statute in question. In this way I will attempt to locate the issue in what I regard as its proper constitutional framework."

553 2015 4 SA 50 (GP).

> The author of the Opposing Affidavit of the Third Respondent obviously did not keep in mind that a decision of a person on how to cease life was in many instances a decision very important to their own sense of dignity and personal integrity, and that was consistent with their lifelong values that reflected their life's experience.[554]

Currie and De Waal[555] describe dignity as a right with residual function, stating that:

> It applies where many of the more specific rights that give effect to the value of human dignity, do not. In addition, since the rights in the Bill of Rights stem from dignity and are more detailed elaborations of aspects of the concept, the core rights to dignity has decisive application only relatively infrequently.

Barak[556] argues that each right should be considered separately and that the right to dignity should not be treated as a residual right, as it could detract from its centrality in the *Constitution.*[557] It is submitted that Barak's argument is correct, because fundamentally and methodologically speaking dignity is a ubiquitous right which does not solely provide support for the enforcement of the other constitutional rights – it also constitutes the basis for these rights. Dignity is a free-standing constitutional right that functions in its own exclusive domain in proportionality analysis, on an equal footing with other constitutional rights.[558] In other instances, as dignity overlaps with the range of other constitutional rights, this does not detract from its completeness and independency as a right. That dignity is not a residual right is nowhere more apparent than in the cruel and unusual punishment and equality cases. Regarding equality the Court in *Harksen v Lane*[559] developed a two-stage analysis to establish whether

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554 2015 4 SA 50 (GP) para 18.
555 *The Bill of Rights Handbook* 274. Also see Botha 2009 *SLR* 198.
556 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 376.
557 In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28, Ackermann J referred to several cases which confirmed that "the right to dignity is the cornerstone of our Constitution." Also see fn 353 above. In addition, in *S v Makwanyane* 1995 3 SA 391 para 327, O'Regan J held that the rights to life and dignity are "entwined."
558 Also see the discussion in chapter 5.3.4 as well as footnotes 143-145 in chapter 5 below.
559 1998 1 SA 300 (CC) para 53.

discrimination is unfair resulting from undignified differentiation, pursuant to a negation of inherent dignity based on ascriptive characteristics.[560] The *dictum* of Judge O'Regan in *Makwanyane*[561] confirms that the right to dignity is the mechanism to assess equality:

> The new Constitution stands as a monument to this society's commitment to a future in which all human beings will be accorded equal dignity and respect…

In a similar vein, Ackermann J found in *Ferreira v Levin*[562] that dignity and the freedom of the person as entrenched by section 12 of the *Constitution* are "inseparably linked."[563] The judgment *in casu* relates to a claim of the unconstitutionality of section 417(2)(b) of the *Companies Act,* 68 of 1973, to compel company directors to provide evidence that would incriminate them, after having been summoned by the Master of the High Court to present *viva voce* evidence in an investigation regarding the winding up of a company in liquidation.

In instances of overlapping with other constitutional rights, dignity's main function is to strengthen the claims of constitutional rights. This follows from the premise that dignity is the basis of human rights. Taking into account South Africa's comprehensive *Bill of Rights,* it can be argued that

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560 The Court employed this test in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) to conclude that the exclusion of gays and lesbians from immigration legislation which promotes family unity amounts to unfair discrimination. Ackermann J stated at para 54: "Section 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians."

561 1995 3 SA 392 (CC) para 344. Also see *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41 and *Prinsloo v Van der Linde* 1993 3 SA 101 (CC) para 31.

562 *Ferreira v Levin* 1996 1 SA 984 (CC).

563 Ackermann J held at para 49 that: "Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity."

dignity overlaps with all the constitutional rights and as strengthen these rights. Consequently, dignity has played a role in transforming the legal system *inter alia* in the following areas: 1) "freedom and security of the person" to prohibit punishment in a "cruel, inhuman or degrading way"[564] with regards to capital punishment; corporal punishment and imprisonment and detention; (2) "equality" with regard *inter alia* to the decriminalization of sodomy, the legalising of same-sex marriages, and affirmative action; and (3) socio-economic rights with regard to housing, social security and primary health care.[565]

3.6.2.4.2.2 Conflicting overlapping

One of dignity's most controversial aspects relates to the conflict with other constitutional rights in cases of overlapping. This conflict can occur irrespective of whether dignity is constituted as a relative or an absolute right.[566] Barak[567] reasons that this occurrence is not the result of a constitutional "mistake" or "pathology" but rather

> We do not expect the constitutional right that is overruled by another constitutional right to be wholly or partially withdrawn from the array of constitutional rights. Nor do we proclaim that the special right prevails over the general right. The conflicting overlap demonstrates the richness of the constitutional arrangement and the ongoing clashes among its components.

He goes on to explain that

> A statute that restricts one right in order to protect another is constitutional if it is proportional. Thus, even if the limiting statute is determined to be proportional, this result does not restrict the scope of the right that is limited, nor does it expand the scope of the right that is protected.[568]

Kant in his *The Metaphysics of Morals*[569] argues that a just legal order should accommodate differences in choice and preference. However,

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564 Section 12(1)(e).
565 See the discussion in section 4.3 above as well as the cases listed.
566 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 377.
567 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 377.
568 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 378.
569 Kant *The Metaphysics of Morals* 209.

these rights should be exercised in a way that would be compatible with the choices of others, because these choices "are universalized across the legal system as a whole." As each individual possesses equal dignity, the common purpose of the constitutional rights is to realise the value of human dignity, resulting in a partial and in some instances conflicting overlap, which may result in a contradiction, as the general purpose of human dignity in one right might conflict with the special purpose of another right.[570] This leads to the classic is-ought problem in constitutional law, the Janus-like two sides of a coin, as the value of human dignity may clash with the right to human dignity, or the value may be found on both sides of the coin. Barak[571] proposes that these conflicts be resolved through proportionality, and argues that

> Conflicting overlaps are a natural phenomenon in the realm of constitutional values. They do not reflect a mistake in the constitutional text. They reflect the richness of the humanity of the human being with all of its inherent contradictions. Therefore, these conflicting partial overlaps should be left untouched, without a solution at the constitutional level. Let a thousand flowers of constitutional values (either complementary or contradictory) bloom at the constitutional level.

A clash of the Janus-like aspects of constitutional rights and values came to the fore in *S v Jordan,*[572] in which a number of challenges were made to legislation criminalising prostitution, *inter alia* by invoking the rights to equality, economic freedom and dignity. The challenged legislation results in gender discrimination as it criminalises only the conduct of the prostitute and not of the client. The majority judgment held that the statutory differential distinction was justifiable, irrespective of the fact that the client of a prostitute is as a rule never charged in terms of relevant legislation, whilst the prostitute is in practice at risk of criminal prosecution. However, the minority held that the prostitute willingly diminishes her inherent dignity

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570 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 365.
571 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 365-366.
572 2002 6 SA 642 (CC).

in the eyes of the community pursuant not only to the commodification of her body, but also to the denouncement of the intimate character of the sexual act.[573] Utilising the values of dignity and equality in explaining the Court's role in "establishing and nurturing human relationships",[574] the minority reasoned that prostitution lies at the margin of the right to privacy and therefore does not merit the protection accorded to other forms of sexual intimacy such as the legalisation of same-sex marriages.[575]

3.7 Conclusion

The idea of human dignity as the basis for human rights is a relatively new one in modern constitutionalism, post-World War II. Since dignity's inception as a utilitarian ideal and legal norm in the *Universal Declaration* and *UN Charter*, the judiciary has been confronted with a notion of law fused with morality – a morality that is rooted in the Kantian claim that an individual is autonomous because he has dignity, rather than deriving from his status in society. This development in international law and in the domestic legal systems to follow had profound implications for the recognition, protection and enforcement of human rights; similar to the US Constitution's protection of individual rights and liberties. The *Janus*-like characteristic of human rights, namely the embodiment and protection of values and rights in a constitution, constitutes the "post-war rights-protecting paradigm."

Dignity's appeal lies in its universality. Notwithstanding its divergent theoretical foundations in Stoicism, Christianity, philosophy and law, the invocation of dignity as a legal concept transnationally has come to display three essential elements in the adjudication of human rights: the ontological claim, which entails that all individuals have equal, intrinsic

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573 Also see fn 192 above.
574 *S v Jordan* 2002 6 SA 642 (CC) para 81.
575 *S v Jordan* 2002 6 SA 642 (CC) para 82.

dignity that cannot be waived; the relational claim that all individuals have the right and reciprocal duty to have their dignity recognised and respected by others; from which element, thirdly, follows the "limited-state claim," which holds that states are obliged to endorse the protection of human dignity in their policies and legislation, as well as to realise socio-economic rights. German constitutional law's concretization of the principles set out in the *Universal Declaration* has contributed to the conceptualisation of the three universal elements of human dignity. There is "overlapping consensus"[576] in different jurisdictions that certain types of treatment are inconsistent with human dignity - that man should be treated not as a means to an end - such as the prohibition on cruel and unusual punishment, slavery and discrimination.

The three essential elements of human dignity encompass the value of dignity. The right to dignity protects the value of dignity. As a value, dignity has various functions, such as providing the basis for human rights, assisting in the constitutional interpretation of human rights, playing a role in the balancing and limiting of constitutional rights, and informing the interpretation of the constitutional right to human dignity. Dignity as a value embodies a preconceived, supra-positive attribute of humanity and functions as such in German and South African law. As a result, the value of dignity in these jurisdictions displays a universal character.

Dignity functions as an absolute right in German law and is not subject to limitation and proportionality considerations. Thus dignity as a right displays Dworkinian characteristics to the effect that collective interests cannot under any circumstances trump the right. In South African law dignity functions as a relative right that might be limited in certain circumstances and within the framework of proportionality analysis. This leads to the result that the scope of the value of dignity in German law is

576 See fn 79 above.

wider than the scope of the right to dignity. Hence, the right is detached from the value. In South African law, the scope of the value and the scope of the right are the same. The exclusive area covered by the right to dignity as the "mother-right"[577] is diminished, because the *Bill of Rights* contains most of the recognised human rights as "daughter-rights;"[578] therefore the scope of the right overlaps with the scope of other constitutional rights. However, dignity operates exclusively in the areas of a right to family life and the protection of an individual's reputation (which is not specifically protected in the *Bill of Rights*) as daughter-rights. Thus, against this background it can be said that dignity acts as a rights-generating principle.

Dignity is not textually protected in the US *Constitution.* It is utilised as a value to aid in the interpretation of the protection of autonomy, privacy, personal freedom and liberty, in accordance with the classical liberal governance model, in which protection of the so-called negative liberties is predominant. Conversely, the decisions of the German and South African constitutional courts are characteristically communitarian, based on the presumption that human dignity is rooted in community values and respect. As a result of the differences in governance models, the inherent component of human dignity, which forms the basis of the first generation human rights and acts as a shield against state interference, is integral in US constitutional law, whilst the balance of the essential elements do not form part of the US legal system. In the western concept, the genealogy of human dignity is essentially communitarian.

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577 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 374.
578 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 374.

Chapter 4: The interpretational role of human dignity in human rights and comparative law

> "Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any map of the world. Yet they *are* the world of the individual person: the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere."[1]

4.1 Introduction

What is the theory of human rights? The drafters of the *Charter of the United Nations* (1945) (*UN Charter)* and the *Universal Declaration of Human Rights* (1948) (*Universal Declaration)* negotiated a theoretical basis for human rights in the prevailing global context that would transcend culture, political ideologies and religion, to embody universal values impervious to change but at the same time adaptable to changing ideas about humanity. Not only did the Catholic social doctrine supported by the work of Jacques Maritain[2] influence the incorporation of dignity as a background value in these human rights texts, but the natural law tradition[3] has been instrumental in establishing human dignity as the basis for the protection of human rights.[4] Dignity plays a predominant role in the global

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1 Eleanor Roosevelt "In Your Hands" - speech at the United Nations 27 March 1958, as quoted in Carozza 2003 *AJIL* 1 and Glendon 1999 *NDLR* 1170.

2 For an exposition regarding the influence of Jacques Maritain on the content of the *Universal Declaration, s*ee chapter 2.18 and footnotes 182;183; 193 and 235 in chapter 2 above.

3 Natural law theorists include Pufendorf, Grotius, Wolff and Kant (also see chapter 2.9). Contemporary theorists are Schachter (see 1983 *AJIL* 848-854) and Donnelly (see 2002 doi:10.1111/1468-2346.00001.)

4 Human dignity constitutes a normative claim as it holds that human beings have equal dignity and bearers of human rights by virtue of being human. These rights are inherent and not granted by positive law.

culture of human rights law following its incorporation into law by means of the *UN Charter.* However, this centrality implies a questionable role in the interconnected, multi-layered and heterogeneous systems of human rights protection through supranational, national and international instruments,[5] as dignity is dependent on social, cultural, political and historical factors.[6] It is generally accepted that the "inherent dignity of the human person"[7] constitutes the basis for human rights. In international law, human dignity as the basis of human rights provides at a minimum an indirect supra-positive function, as it serves remote supra-positive values.[8]

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5 The example was set by the *Universal Declaration.* Its preamble states that "all human rights derive from the dignity and worth inherent in the human person." Also see the discussion in chapter 2.13 above regarding the circumstances that prevailed when the *Universal Declaration and the UN Charter* were adopted. Although the *Universal Declaration* is only a declaration and thus not legally binding, it is such a universally accepted instrument of human rights that it has partially become customary international law, binding even states that have not entered into specific treaties on specific aspects of international law: see Steiner, Alston and Goodman *International Law in Context* 367. The preamble of the *Vienna Declaration on Human Rights* 1993, which was adopted at the first United Nations Conference on Human Rights, states that "all human rights derive from the dignity and worth inherent in the human person." Whilst the *European Convention on Human Rights* (hereinafter the *ECHR*) does not refer to human dignity, the European Court of Human Rights has assigned dignity a pivotal role through interpretation in case law. However, dignity is included in an additional protocol, namely Protocol 13 (Abolition of the death penalty). For a further discussion in this regard see Frowein "Human Dignity in International Law" 124-132.

6 Schultziner states in "Human Dignity: Functions and Meanings" 5 that there is a major advantage to this approach "for the abstention from a philosophical decision regarding the source and cause for rights and duties paves the way for a political consent concerning the specific rights and duties that ought to be legislated and enforced in practice without waiving or compromising basic values of belief. Thus, the different parties that take part in a constitutive act can conceive human dignity as representing their particular set of values and worldview. In other words, human dignity is used as a linguistic-symbol that can represent different outlooks, thereby justifying a concrete political agreement on a seemingly shared ground." Pursuing this line of thought, Botha 2009 *SLR* 218 is of the view that dignity's "precise meaning and contours are culturally mediated" and influenced by "contingent historical factors within a particular legal system."

7 Principle VII of the *Helsinki Final Act* (1975) stipulates that participating states will promote human rights and freedoms which "derive from the inherent dignity of the human person." Also see the discussions in chapter 3.4.1 and 3.6.1, as well as footnotes 95; 96 and 494 in chapter 3 above.

8 Neuman 2003 *SLR* 1868.

In this chapter the relationship between human dignity and human rights law will be investigated, as well as dignity's role in comparative law, in purposive interpretation and in the domestic legal systems of Germany, South African and the US. This methodology is necessary in order to establish whether the basic elements of dignity as discussed in Chapter Three above contribute to the application of dignity as a rule or a principle in comparative law, and consequently in domestic law, in the framework of Dworkin's and Alexy's distinction between rules and principles.[9] In addition, the role of dignity as an interpretative tool in purposive interpretation has to be considered in the light of dignity's potential to conform to changing social perceptions, and indeed to act as the lodestar for society to accept constitutional visions of an equal and just existence for human beings.

4.2 The role of human dignity in human rights law

The justification for a normative theory of human rights lies in the recognition of a supra-positive concept of value within a domestic legal system, irrespective of whether human rights were incorporated into domestic positive law or not. Kant's contention that international law and domestic jurisprudence are fundamentally interconnected illustrates this point succinctly.[10] Although all norms embodied in treaties and constitutions claim a consensual aspect that is not rooted in a constitutive political act, the legitimization of positive fundamental rights (as creations

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9 See footnotes 358-362 in chapter 3 above. Also see Choudhry 1998-1999 *ILR* 842.

10 According to Kant, there is no dualistic system of a state's rights and duties in international and domestic law. A state's rights and duties are derived from the individual's rights and interests, in terms of which the people are represented. See Tesón1992 *ColLR* 53. Also see footnotes 346-347 in chapter 3. In a similar vein, Botha states in "Comparative Constitutional Law" at 573 (with regard to dignity's role in post-war constitutionalism) that the "failure to respect dignity cannot be justified by any particular national or religious tradition, or in the name of majoritarian political processes. This idea of dignity recalls Kant's particular idea of 'cosmopolitan right': the idea that violation of a right in one place on earth is felt in all."

of positive law as opposed to unenacted moral human rights) are conceived from a source of pre-existing, supra-positive rights such as human dignity.[11] As such, the three essential elements of dignity are implied in the preambles and article 1 of the *Universal Declaration* and many international human rights documents enacted thereafter.[12]

In international law, human rights are regarded as universal and transcend culture, politics and society. As such they are not affected by the public/private divide, in order to enable individuals to make choices free from government interference.[13] They consequently provide not only a universal standard for adjudication,[14] but are simultaneously contingent on social context, thus culturally relativistic.[15] For example, the *Constitution* of Ireland, 1937 was almost exclusively influenced by the Catholic social

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11 Neuman 2003 *SLR* 1866. The Court's *dictum* in *Ferreira v Levin* 1996 SA 984 (CC) para 72 points to this acceptance of universal human rights' norms: "In construing and applying our Constitution, we are dealing with fundamental legal norms which are steadily becoming more universal in character."

12 For an exposition of the various human rights documents that refer to the three elements, see fn 95 in chapter 3 above.

13 Clapham *Human Rights Obligations of Non-State Actors* 544. The emergence of constitutionalism and the protection of human rights have led to the safeguarding of private persons in private spheres of their lives against, for instance, domestic violence or spousal rape.

14 Universalism is a state-based model of international law and stems from the nineteenth century positivistic perspective of international law as an expression of the will of sovereign states to contract, and not from forcing these governments (by their own consent) to respect their citizen's human rights. Human rights are inherent in each person by virtue of being human, which rights are not granted by the state. Nor can they be taken away by the state. Since most states have ratified international human rights instruments and have agreed to be legally bound by them, human rights standards are universal. See Binder 1999 *BHRLR* 3.

15 As a reaction against universalism, a rival model of international law developed based on the cultural relativist perspective, claiming that states are created by the individual consent of persons, and as a result, international law is grounded upon the authority of these persons. This subordination of political society to the authority of persons implies moral absolutes that transcend society and culture. In consequence hereof, the existence of rights that are independent of society and culture is denied. Rights are regarded as the product of values resourced from social norms and cultural perspectives, which cannot exist separate from humanity. Thus views about rights, irrespective of whether they are sourced from human beings by virtue of their humanity or from their societal relations, are culturally relative. For a further discussion, irrelevant to this chapter, regarding criticisms of both universalism and cultural relativism, see Binder 1999 *BHRLR* 213.

doctrine.[16] Israel's *Declaration of Independence,* 1948 was influenced by historical and political factors,[17] and Catholicism, social democracy, and Kantian views affected the German *Basic Law* of 1949.[18] The *Constitution* of the US is based on the protection of individual rights against state intrusion, and the *Constitution of South Africa*, 1996 was indirectly influenced by the ideas of Kant[19] and also symbolises a reaction against past discrimination and unequal treatment.[20] Essentially, human rights imply not only a contradiction regarding the universality claim, because of differences in culture, history and text of domestic constitutions, but are simultaneously based on a shared commonality rooted in the suprapositive dimensions of these rights. These contradictory aspects represent the fundamental problem of human rights and human dignity as its basis in particular.

The idea that human dignity constitutes the basis of human rights is controversial. However, the idea of human rights is historically older than the phenomenon of human dignity in a legal context. Whilst American constitutional rights originated in the eighteenth century from European ideas and antecedents, human rights since their inception not only drew heavily on American constitutionalism, but in addition assumed a divergent ideology. This ideology ranges from socialism to the commitments of a welfare state (after the establishment of various socialisms and welfare states in Europe) by governments active in intervention and economic social-planning for their societies in order to realise the socio-economic

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16 Moyn "The Secret History of Constitutional Dignity" 97. Also see the discussion in chapter 2.13 above.

17 The preamble states that "survivors of the Nazi holocaust in Europe, as well as Jews from other parts of the world, continued to migrate to Eretz-Israel, undaunted by difficulties, restrictions and dangers, and never ceased to assert their rights to a life of dignity, freedom and honest toil in their national homeland", as quoted by McCrudden 2008 *EJIL* 665.

18 McCrudden 2008 *EJIL* 665.

19 See the discussion in chapter 2.15.6.3 above.

20 See, in general, Ackermann *Human Dignity: Lodestar for Equality in South Africa*.

rights of individuals progressively.[21] Human rights were conceived and developed by representatives of many diverse nationalities, and received in diverse constitutions, and as such were subject to a state's functions of supervision and compliance in these constitutions. Theoretically speaking - although human rights are conceived of as being inherent - international law does not require that human rights have superior, constitutional status, but only that states respect these rights and implement measures for their enjoyment.[22] Equality is a central theme of fundamental human rights based on discrimination against race, colour, sex, language and the like.[23] Characteristically, human rights seek to enforce change – for the better – of political systems, norms and practices[24] and are often associated with a break from the past and new beginnings, in order to bring (legal and political) practice in line with (moral) theory.[25] Human rights, and human dignity as their basis, provide a universal ideal for the protection of these rights.

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21 Henkin argues that most of the provisions of the *Universal Declaration* and *International Covenant of Civil and Political Rights,* 1967 are in essence American constitutional rights: "Human rights began as constitutional rights, and American constitutionalism can proudly claim an important part in their development and in their dissemination to every content and corner of the world. Europe has followed the constitutional lead of the United States; the United States' ancestor in law and in rights, the United Kingdom, and our closest neighbour, Canada, are seriously discussing the desirability of an effective Bill of Rights and judicial review. The American kinds of rights are now in more than 150 constitutions." See "International Human Rights and Rights in the United States" 39; 54.

22 Henkin explains that: "The idea of human rights is a political idea with moral foundations. It is an expression of the political relationship that should prevail between individual and society. It implies that there are limitations on government, including limits on what can be done to that individual even for the welfare of the majority, the public interest, the common good. There are even limitations on law; one may think of human rights as a kind of higher law. The human rights idea implies individual entitlement and corresponding obligations on society; we enjoy them not by the grace of society and not only because it may be good societal policy to respect them. Rather, we are entitled to them." See "The Universality of the Concept of Human Rights" 1989 *AAASPSS* 11.

23 Henkin "International Human Rights and Rights in the United States" 29 - 45.

24 Donnelly *Human Rights in Theory and Practise* 12.

25 Donnelly *Human Rights in Theory and Practise* 16.

4.3 Human dignity in comparative perspective

4.3.1 Introduction

The effects of the post-war rights-protecting paradigm permeated through the jurisprudence of domestic courts with frequent comparative referencing to a common supra-positive body of norms that is grounded in human dignity. Before World War II there were not many decisions in justiciable constitutionalism to refer to – afterwards, with the growth of international human rights law, sources of law beyond the boundaries of the US started to develop.[26] Not only did extensive borrowing from constitution to constitution post-World War II occur, but it has become commonplace for judges to refer to transnational dignity adjudication in their judgments.[27] This transnational[28] dialogue regarding dignity as a common, generic aspect of humanity serves as domestic basis for the justification of what Neuman[29] has termed the "supra-positive aspect" of human rights, irrespective of constraints imposed by positive law or a contingent context.[30] Conversely, the US Constitution does not align with modern human rights texts in this respect, as the constitutional rights in this system do not textually protect abstract constitutional values.[31] The US system favours exceptionalism, in terms of which constitutional analysis is limited to the textual meaning assigned to provisions in their historical, indigenous context to protect the legal character of judicial

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26 Jackson 2005 *HLR* 111.
27 Botha 2009 *SLR* 171, Jackson 2004 *MontLR* 15.
28 Transnational refers to both international and foreign law.
29 2003 *SLR* 1866. Also see the commentary of Jackson in 2005 *HLR* 118: "Such rights, although embedded in particular national constitutions, have "universal" aspects, reflecting the "inescapable ubiquity of human beings as a central concern" for any legal system and widespread (though not universal) aspirations for law to constrain government treatment of individuals."
30 Carozza 2008 *EJIL* 932. The supra-positive aspect refers to the fact that dignity is seen as inherent and exists irrespective of legislative recognition. Also see the discussion in chapter 3.4.1 as well as footnotes 501-502 in chapter 3 above.
31 Jackson 2005 *HLR* 118; Weinrib "The Postwar Paradigm and US Exceptionalism" 99.

review. Comparative engagement is therefore irrelevant, as it departs from the historical understanding of the US Constitution.[32]

Comparative law is not a delineated legal discipline, but rather an activity or method of interpretation, within which the methodological justification for transnational citations might be unclear.[33] Still, although some decision makers may seek a universalistic commonality and others may view different legal systems from a pluralistic perspective to discern cultural and political variations, the central quest is for a commonality such as whether the death penalty can be morally justified.[34] Nevertheless, foreign precedents can act only as persuasive authority in judicial interpretation, as opposed to binding authority (such as international treaties) which a judge has to follow within a framework of hierarchical domestic sources of authority.[35] Persuasive authority refers to other relevant material that exists alongside foreign precedents in addition to binding authority, although it is not binding on domestic law pursuant to the hierarchical structure of local law.[36]

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32 Weinrib "The Postwar Paradigm and US Exceptionalism" 86.

33 Jackson "Comparative Constitutional Law: Methodologies" 54. Also see, in general, McCrudden 2000 *OJLS* 499-532 and Venter 2001(4)1 *PER* 20-41. Venter explains that: "There is no consistency of method to be observed in the practice of legal comparison – no less so in the field of constitutional law. Nor are there defensible grounds for the elevation of comparative law to the level of an autonomous legal discipline. One must simply accept that jurists have a need for comparative forays into foreign territory: some for very limited purposes of gathering information, and others for the generation of more fundamental knowledge. There can, it is therefore submitted, be no such thing as a universal, monolithic science or discipline of comparative law, be it in the field of private or of public law." See 2001(4)1 *PER* 22.

34 In the German-South African context, Kentridge J stated that there are several reasons for the frequent citation of foreign precedents in human rights law: human dignity represents the obvious link between the Constitution and the German Basic Law, and secondly, as the judges of the Constitutional Court dealt for the first time only with a justiciable bill of rights, they had to consult foreign precedents for guidance and comparison. See Rautenbach and Du Plessis 2013 *GLJ* 1573. For a further discussion see Botha "Comparative Constitutional Law and Constitutional Adjudication: A South African Perspective" 571.

35 McCrudden 2000 *OJLS* 502.

36 McCrudden 2000 *OJLS* 502. Jackson argues that the distinction between binding and persuasive authority "bears on objections from democratic legitimacy:

4.3.2 Towards universalism

The *Universal Declaration* claims and prescribes the universality of human rights.[37] Henkin[38] explains that the universal idea of human rights finds its origins in John Locke's theory of natural rights in the seventeenth century. He argues that the universality of human rights is rooted in a moral principle that is shared by humanity:

> The question is whether the moral rights of human rights are universal, whether the specifics in the catalog of rights in the Universal Declaration of Rights respond to that common morality. The important issue, moreover, is not even whether human rights reflect a common morality, but whether the morality it reflects, now universally prescribed, is culturally acceptable or will be rejected as foreign matter.[39]

For Jackson,[40] these rights have "universal" aspects, reflecting "the inescapable ubiquity of human beings as a central concern" for any legal system and widespread (though not universal) aspirations for law to constrain government treatment of individuals.

Cultural receptivity, Henkin[41] argues, does not resist the universality of the right to life and physical integrity, freedom from torture, slavery and arbitrary detention, the right not to suffer cruel punishment, the right to property, and the need for food, housing, health care and the care of children and the aged. Conversely, other rights such as freedom of speech, equality and discrimination on grounds of gender, race or ethnicity are not yet perceived as universal in many countries. However,

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whatever its persuasive value, foreign law is not binding and does not have the same authority as the Court's own precedents." See 2005 *HLR* 122 fn 64.

37 Henkin 1989 *AAASPSS* 11.

38 Henkin 1989 *AAASPSS* 12.

39 Henkin 1989 *AAASPSS* 12. Henkin's view resonates with both Kant's formulation of the categorical imperative that everybody has human dignity which has to be respected and protected, as well as his idea that international law and domestic jurisprudence is fundamentally interconnected. See the discussion in chapter 3.4 above as well as fn 10 above.

40 2005 *HLR* 118.

41 1989 *AAASPSS* 15.

McCrudden[42] suggests that the issue of human rights is highly controversial. In some fields there is profound disagreement regarding the scope of human rights' protections, as well as the ideological differences between jurisdictions pertaining to issues such as freedom of speech, the death penalty and abortion. These issues will as a consequence be present in comparative law too.

The use of comparative jurisprudence in modern constitutionalism led to globalization of the norms of human rights.[43] It follows then that the idea of human dignity as the basis of human rights has also been globalized as a human rights' norm. Carozza[44] conducted a qualitative study regarding the use of the metaphor of a European *ius commune*[45] in the perspective of globalization of human rights norms. He argues that human dignity, in the context of transnational borrowing, and the application of human dignity as a normative principle and specifically in cases of the death penalty has the potential to strengthen the genuine universality of human rights, to respect the principle of subsidiarity, and offer a way of responding to the dual dynamics of globalization and pluralism in contemporary transnational society. A *ius commune* approach to human rights could also have implications for particular national legal systems as well, especially in the United States, that should provoke serious reflection on the role of global norms of human dignity in domestic legal discourse.

Transnational borrowing of the concept of human dignity confirms that human rights recognise and protect values "at the core of personhood,

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42 McCrudden 2000 *OJLS* 500.

43 Klug, stating that "In the late twentieth century there has been a globalization of the notion that individual rights, inscribed in written constitutions, are an essential component of democratic governance. See 1997 *SAJHR* 186.

44 Carozza 2003 *TLR* 1036.

45 Carozza uses the metaphor in reference to a revival of the legal term common to most of Europe in the high Middle Ages and currently applied by scholars regarding the increasing presence of international law and its effect on domestic jurisdictions, which is characterised as giving rise to a *ius commune* in that jurisdiction.

inherent to human dignity."[46] Carozza[47] concludes that the common denominator in the transnational discourse on protection of the rights to life and physical integrity is human dignity, despite differences in historical; political and social context; therefore dignity plays a universal and simultaneously pluralistic role in domestic human rights adjudication. As such, by marrying the "transnational with the universal with the particular" the *ius commune* seeks to protect human dignity in an ever-changing world, not only in the context of the death penalty, but in human rights law in general.[48]

However, although the globalisation of human rights led to a "new comparativism",[49] there is currently no indication that differences in domestic constitutions are diminishing.[50] Slaughter[51] explains that this phenomenon led to

> recognition of a global set of human rights issues to be resolved by courts around the world in colloquy with one another. Such recognition flows from the ideology of universal human rights ... The premise of universalism, however, does not anoint any one tribunal with universal authority to interpret and apply these rights. Collective judicial deliberation, through awareness, acknowledgment, and use of decisions rendered by fellow

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46 Carozza 2003 *TLR* 1042, quoting Cesare Mirabelli, president of the Italian Constitutional Court.

47 2003 *TLR* 1080.

48 Carozza 2003 *TLR* 1086.

49 Slaughter suggests that constitutional comparativism is a "process of constitutional cross-fertilization" which could result in an emerging international legal order (specifically regarding death penalty cases.) See 2003 *HILJ* 193.

50 Botha "Comparative Law" 570. With regards to the different contexts of foreign precedents, and in this instance referring to s 39(1) of the *Constitution,* Chaskalson CJ stated in *S v Makwanyane* 1995 3 SA 392 (CC) para 39: "In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument of some foreign country, and this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it." Incidentally, s 39(1)(a) posits that consideration of international law is mandatory, whilst s 39(1)(b) states that the use of foreign law may be considered. See further discussion in Rautenbach and Du Plessis 2013 *GLJ* 1553 regarding the apparently mistaken use of the terms "foreign" and "international law" by the Court.

51 Slaughter 1994 *URLR* 121-122.

> human rights tribunals, frames a universal process of judicial deliberation and decision.

For example, the Catholic perspective of the right to life in abortion cases should not be transplanted by way of the (universal) value of human dignity into German, US and South African law. In the same line of thinking, Carozza[52] argues that Islamic gender perspectives cannot be imported into US law by using the value of *shari'a* as a justification. Weinrib[53] explains, with regards to the features of the post-war rights-protecting paradigm, that

> While constitutional principles inform the analysis of the scope and strength of rights claims, they do not function as concrete rules that mechanically dictate uniform results for similar questions wherever or whenever they arise. Given the considerable diversity in the historical, cultural, and social contexts in which these principles must flourish, different legal systems will produce different results. The caveat is that this variety must reflect justifiable constructions of the underlying principles.

The status of and emphasis on dignity differs in each jurisdiction, which translates into different conceptions regarding the content and range of the concept.[54] For example, courts would infrequently cite foreign law in instances where other constitutions do not protect similar rights, such as in the socio-economic rights cases, due to their context-specific character. In German law dignity is inviolable and therefore not subject to limitation. Consequently, a foetus is afforded the protection of the dignity-clause

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52 2008 *EJIL* 933.

53 "The Postwar Paradigm and US Exceptionalism" 53.

54 *Omega Spielhallen und Automatenaufstellungs- GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I – 9609, as quoted and discussed by McCrudden 2008 *EJIL* at 710. In this case, the European Court of Justice held that it is legitimate to restrict the market freedom of a Member State on the basis of a specific aspect of national identity. Where concepts of dignity diverge amongst the Member States, prioritising national identity over market freedom is justified. See Kalbheim "The National Identity of the Member States in Europe" 203. Also see the claim of Alexy regarding different concepts of dignity, with reference to "bundles" of conditions under which dignity would be infringed, applied differently by different peoples. He argues that this allows us to speak of a single concept and varying conceptions of human dignity. The different concepts are hard to classify – there are no clear boundaries, only what Wittgenstein called "family resemblances": "a complicated network of similarities, overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail." See *A Theory of Constitutional Rights* 233.

because of its potentiality for life, whilst in South African and US law abortion is permitted under certain circumstances, because more weight is being given to the expectant mother's autonomy and freedom of choice to terminate her pregnancy. Furthermore, it needs to be borne in mind that the theoretical basis of interpretational rules in domestic law might be different from that of the specific jurisdiction compared to, because of theories such as intentionalism, originalism and purposivism.[55] This could necessarily result in different interpretations and applications of the concept of dignity.[56]

From the above it is clear that human dignity displays context-specific characteristics, notwithstanding its claim of universality. Consequently, it is necessary to investigate whether transnational borrowing contributes to dignity's normative traits, being the three essential elements, namely that everybody has inherent human dignity, that everybody is entitled to respect and protection of his inherent dignity, and that the state is obliged to respect and protect dignity by providing minimum existential living conditions. Also, it needs to be established whether reliance on foreign dignity adjudication merely contains references to the generic language of human dignity, or specific borrowing of the normative aspects. In this respect it is important to determine whether the transnational borrowing of human dignity can be described in terms of Dworkin's and Alexy's distinctions between legal principles and rules[57] in order to establish the validity of dignity's claim of universality.

4.3.3 Comparative interpretational methodologies

The effect of globalization on modern constitutionalism raises complex questions regarding the theoretical justifications for comparative

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55 Also see the discussion in section 4.4 below.
56 Also see the discussion of Waldron 2005 *HLR* 140.
57 Also see footnotes 358-362 in chapter 3 above.

jurisprudence.[58] Modern constitutionalism is based on the idea that each nation has a particularistic history and political framework; therefore any reference to or reliance on foreign law may seem contradictory.[59] Theories of particular constitutional interpretation follow the precept of constitutionalism based on the theorist's unique perception of nationalism. However, Choudhry[60] suggests that constitutions display simultaneously a global and a local character, as constitutionalism also incorporates a vision of political morality.[61] He argues that, as law is the source of the coercive power of the state, judges have to justify their decisions not only on the basis of their constitutional mandate but also on their vision of morality, and they have to simultaneously to justify their use of interpretative methodologies:

> As a consequence, the very legitimacy of judicial institutions hinges on interpretative methodology.[62]

With reference to the adjudication of human dignity, it is important to establish which methodology is normatively employed by judges of the three constitutions that form the subject matter of this thesis when they are citing foreign law. This will indicate whether dignity is used as a principle or a rule, and consequently aid in a possible clarification of the concept.

Jackson[63] notes that three models, which are the convergence, resistance and engagement models, might generally describe the relationship between domestic constitutions and the borrowing of law from transnational sources. Choudhry[64] also identifies three models of comparative constitutional interpretation, namely the universalist (which

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58 Choudhry 1999 *ILJ* 822.
59 Choudhry 1999 *ILJ* 822.
60 Choudhry 1999 *ILJ* 824.
61 This argument is akin to Neuman's claim that human rights display a supra-positive character. See fn 10 above.
62 Choudhry 1999 *ILJ* 824.
63 Jackson 2005 *HLR* 112.
64 1999 *ILJ* 824.

refers to Jackson's convergence model), the genealogical model, and the dialogical model (that refers to Jackson's engagement model.) Although these interpretative constitutional models are analytically distinct, they can be conflated by different judges in one judgment, although based on the same legal issues; therefore they are not mutually exclusive.[65] The following discussion is based on the interpretational models formulated by Jackson and Choudhry.

The convergence model views national constitutions as sources for the implementation of international law and for the development of transnational norms. For example, the *Constitution* provides that international law must be taken into account when interpreting fundamental rights and in addition authorises courts to consider foreign law. Also, the *Basic Law* explicitly incorporates international law as a controlling legal norm.[66] In applying this model, countries without a specific constitutional mandate to take international law into consideration when interpreting national law, such as Canada, India and Botswana, may revert to foreign law for guidance. As the norms of human rights in international law are universal and display a supra-positive character, these rights were legitimized in positive law from a source of pre-existing values and rights such as human dignity. Human dignity as the basis of human rights provides at a minimum an indirect supra-positive function in international law as it serves remote supra-positive values,[67] which are transposed into domestic law as a legal norm. As such, human dignity provides justification for the use of comparative law, at least in countries which

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65 Choudhry 1999 *ILJ* 839. For example, the Court employed both the universalist and engagement models in *Makwanyane*, to base their decision to decriminalise the death penalty on the one hand on the universal principle that it constitutes cruel and unusual punishment, and on the other hand that the death penalty constitutes an infringement of human dignity. As Chaskalson CJ stated: "international and foreign authorities are of value because they analyse arguments for and against the death sentence." See *S v Makwanyane* 1995 3 (CC) 391 para 34 (*Makwanyane*.)

66 Jackson 2005 *HLR* 113.

67 See fn 11 above.

share a "genetic relationship",[68] specifically regarding the enactment of dignity as a right and/or a value.

Expounding on the convergence model, Choudhry[69] holds that comparative interpretation in the universalist model is based on the premise that a universal set of supra-positive norms is binding on most domestic courts; thus, courts should be engaged in the identification, interpretation and application of these norms. Whereas Jackson bases her convergence model on obligatory references to international law as required by domestic law, references to normative principles in Choudhry's universalist model are not rooted in legislation but in the principles themselves, which have universal validity. Despite its terminology, universalist interpretation does not claim universality.[70] This claim in itself may be contradictory as universal principles such as the rights to freedom of speech and autonomy do not have universal meaning. In this respect, Dworkin's and Alexy's distinctions between principles and rules can aid to interpret conflicting values and rights in foreign and domestic law.[71]

The resistance model represents opposition to outside influences, of whom the most outspoken proponent in US law was Justice Scalia, who held that

> comparative analysis [is] inappropriate to the task of interpreting a constitution.[72]

The US model holds that constitutional interpretation is limited to local sources to secure the legitimacy of judicial review, also referred to as

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68 This term is used by Henkin, regarding the relationship between two constitutions which influenced the framing of one another, or by a third constitution. See 1993 *Cardozo LR* 533.

69 1999 *ILJ* 825.

70 Choudhry 1999 *ILJ* 851.

71 See the discussion in section 4.3.2. Also see footnotes 358-562 in chapter 3 above.

72 Jackson 2005 *HLR* 114.

"legal particularism."[73] In this model, judges rely on internal sources such as political, legal and cultural history as a product of originalist understanding rather than to acknowledge the universality and validity of a political morality. There are different approaches that "uncomfortably coexist" in the US Constitutional Court: the "nationalist jurisprudence" camp that rejects such references, and the "transnationalist jurisprudence" claim that allows such references.[74]

In the engagement model, citing foreign law is not only understood as a method of engagement between domestic law and international and foreign legal sources (which sources are not binding nor necessarily to be followed) but it also provides an interlocutory way of testing and distinguishing an understanding of one's own traditions and perceptions of law.[75] To illustrate the application of this model Jackson[76] refers to *Roper v Simmons*, in which the majority of the US Supreme Court engaged with foreign law to discuss whether or not the death penalty imposed on juveniles was morally disproportionate in US law. Although the justices engaged with foreign law, they applied state law practices that the death penalty is not disproportionate for juveniles. In applying this model, courts follow a process of interpretative self-reflection by examining legal issues in the mirror of other systems, thereby identifying similar or fundamentally different uses of these issues, followed by distinctive reasoning as to why these applications should either be followed or dismissed.[77] This method,

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73 Choudhry 1999 *ILJ* 824; 830.
74 Barroso 2012 *BCILR* 236.
75 Jackson 2005 *HLR* 114.
76 Jackson 2005 *HLR* 114. She also refers to the foundational case on judicial review, *Marbury v Madison,* in which the Supreme Court invoked British law to differentiate between limited and unlimited government to justify judicial review, at the same time affirmatively referring to British traditions to apply judicial review against the King. She explains that "Notwithstanding "genealogical" or "originalist" accounts, *Marbury*'s invocation of British law — emphasizing the distinction between limited and unlimited government and the availability of judicial relief against the monarch — reads more as an illuminating contemporary comparison."
77 Jackson 2005 *HLR* 115; Choudhry 1999 *ILJ* 825.

although not based on normative methodologies, provides a better understanding of one's own domestic system and accentuates differences in legal systems.[78]

4.3.4 Principles, rules and dignity's essential elements

What do judges mean when they engage in a search for principles (norms, rationales) in foreign jurisprudence, as opposed to a search for rules? The following *dicta* from Sachs and Ackermann JJ respectively illustrate this point, namely that foreign law should be examined:

> with a view to finding principles rather than to extracting rigid formulae, and to look for rationales rather than rules;[79]

and:

> not in order to draw direct analogies, but to identify the underlying reasoning with a view to establishing the norms that apply in the other open and democratic societies.[80]

Dworkin[81] derives the difference between principles and rules from the sources of these two concepts: principles are standards that have not been formally enacted into positive law and which courts notwithstanding regard as law, whilst rules are formally enacted as law. Therefore, when a rule is at stake, the outcome can be predicted whereas a principle can provide guidance as to an outcome, but it cannot predict an outcome.[82] Alexy[83] argues that rules operate in an "all or nothing fashion"; therefore rules cannot be limited. Principles are those ideas that refer to the "ought-to-be" ideal,[84] have as basis an underlying moral meaning, and provide

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78 Jackson 2005 *HLR* 114; Choudhry 1999 *ILJ* 826.
79 *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC) para 662, as quoted by Choudhry 1999 *ILJ* 841.
80 *Ferreira v Levin* 1996 1 SA 984 (CC) para 1025, as quoted by Choudhry 1999 *ILJ* 841.
81 Dworkin *Taking Rights Seriously* 2; 7; 8; 22.
82 See the discussion in Rao 2008 *CJEL* 223.
83 *A Theory of Constitutional Rights* 48.
84 Esteban 1995 *MJECL* 131.

justification for the judicial enforcement of rules. They are framed in vague and general terms, but simultaneously connect constitutional interpretation with a moral understanding of law.[85] Principles are applied through balancing, as a result of which one principle can take preference over another; therefore principles operate concurrently.[86] Against this backdrop one can argue that the inherent dignity paradigm operates as a rule and that the injunction to respect and protect dignity operates as a principle.[87] The identification of principles and rules in foreign law plays an important role in comparative interpretation in order to differentiate between abstraction and the function of the issue compared.[88] This claim is evidenced by the *dictum* of Kriegler J in *Bernstein v Bester*[89] that comparative interpretation, properly applied,

> discern[s] the principles applied by comparable courts in foreign jurisdictions, to establish whether they can be applied here and, if so, to what extent and subject to what modifications.

It is predictable that principles can have universal validity. As such, they connect with Neuman's formulation of the supra-positive dimensions of human rights, with Henkin's claim that the notion of human rights "is a political idea with moral foundations"[90] and with the natural law canon that law precedes the state. The generic concept of human dignity being the basis of human rights and which constitutes a supra-positive dimension of human rights can be claimed as a principle, as Rao[91] confirms:

> Constitutional "values" such as human dignity are really principles that set out general guidelines or possibly aspirations for action by the state and also for the interpretation of rights. Such principles, however, do not have a

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85 Also see the discussion in Choudhry 1999 *ILJ* 843.
86 Alexy *A Theory of Constitutional Rights* 48.
87 Also see the discussion in chapter 5.3.3 below.
88 Venter suggests that: "Comparability not only involves horizontal considerations of the nature of the subject-matter, but is also determined by the balancing of vertical penetration." See *Constitutional Comparison: Japan, Germany, Canada, South-Africa as Constitutional States* 45.
89 1996 4 SA 449 (CC) para 133.
90 Henkin 1989 *AAASPSS* 11. Also see fn 22 above.
91 2008 *CJEL* 223.

specific content, but rather may have different applications depending on the circumstances.

With this in mind, it could be argued that different constitutions have different "root principles" or rules. The inviolable status of dignity in German law elevates it to the position of the most important root rule in German law. In South African law, dignity as a constitutional value is on an equal footing with other values, and could therefore be described as *one* of the root principles. According to Dworkin, the root principle of US law is the egalitarian idea that "government must treat people as equals" or that government must treat all those subject to its dominion as having equal moral and political status.[92]

It follows that the justification for reliance on dignity may differ in domestic jurisdictions, depending on the status of dignity as a principle, notwithstanding the citation of foreign law. In countries that follow a communitarian approach in constitutional adjudication, dignity in favour of one's community would trump a reliance on individual autonomy.[93] It would "smack of paternalism" to do otherwise in jurisdictions that rely on personal autonomy.[94]

Taking the idea that principles have universal meaning a step further, it is conceivable that rules can similarly have universal meaning.[95] In comparing foreign dignity jurisprudence, judges will have to take cognisance of principles and rules in these jurisdictions. If not, this process will result in aimless comparison, which as Venter[96] warns, "tends to result in meaningless and inconclusive juxtaposition." Failing a contextual

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92 Choudhry 1999 *ILJ* 843.
93 See the discussion in chapter 3.4.2 above regarding dignity as recognition.
94 McCrudden 2008 *EJIL* 708.
95 See sections 5.2.4 and 5.3.4 in chapter 5 below for a discussion regarding the functioning of inherent dignity as a rule and its implications for a claim of universal validity.
96 Venter *Constitutional Comparison: Japan, Germany, Canada, South-Africa as Constitutional States* (v).

analysis, the contextualisation of human dignity can lead to conclusions in the "splendid robe of universalism"[97] or give recognition to cultural relativism,[98] and McCrudden[99] states that comparative analysis should recognize these differences in nuances and criticize random uses and application by judges of legal concepts such as human dignity to avoid the so-called "history of errors."[100] In the context of the lack of a comparable, principled basis for adjudicating conflicting rights (such as in cases of the death penalty, freedom of speech and abortion,) this history of errors will be repeating itself in domestic precedents, eventually resulting in a breach of the rule of law, which *inter alia* states that legal decisions are to be made openly, fairly and not arbitrarily.[101]

In a similar vein, Barak[102] warns that

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97 Mahlmann "Human Dignity and Autonomy in Modern Constitutional Orders" 372. Carozza states that there is a common recognition of the fundamental dignity and worth of human beiings, with specific regard to death penalty cases and despite differences in historical and political context. He argues that dignity provides judges with a licence to draw on decisions from other jurisdictions, and that the use of dignity in one case justifies the application of dignity in another jurisdiction. Hence there is a common understanding of the meaning of dignity. See 2003 *TLR* 1081.

98 McCrudden 2008 *EJIL* at 698 observes that: "In the pluralist camp are those that see the function of the comparative method as being the identification of what is different between jurisdictions, stressing the need for an understanding of local context and emphasizing the truth that, even when similar concepts are being used across jurisdictions, that does not mean that the concept plays the same role in each, or that the same conception is in play. These debates in comparative law echoed the approach in human rights that veers towards cultural relativism." Ackermann argues that, in comparing foreign judgments, "one should try, as far as is possible, to avoid these [human] rights being rejected on the basis of cultural relativism, one of its arguments being that these rights are not universal and the entitlement of all humankind, but relative to the cultures and political philosophies of only certain communities." See Ackermann 2005-2006 *TLR* 193.

99 McCrudden 2008 *EJIL* 710; 722.

100 Botha "Comparative Law" 584, quoting AJ van der Walt (at 570 fn 12).

101 2008 *EJIL* 940. The third paragraph of the preamble of the *Universal Declaration* requires that human rights be respected through the rule of law.

102 *Human Dignity The Constitutional Value and the Constitutional Right* 94. In a similar vein, the Court (with regards to the Interim Constitution), cautioned in *Park-Ross v Director, Office for Serious Economic Offences* 1995 2 SA 148 (C) para 160H that "While it is indeed so that section 35(1) of the Constitution provides that in interpreting the provisions of Chapter 3 thereof, the Court may 'have regard to comparable foreign case law', this should be done with circumspection because of the different contexts within which other constitutions were drafted, the different

> Great care should be employed when comparing laws. The historical background, the constitutional architecture and the status of human dignity in one legal system might be unique to it. Such a situation might make it difficult to compare that legal system with another system in which the unique character does not exist.

This warning could have resonated in South African equality jurisprudence during the early 2000's by reason of the Court's "uncritical borrowing" from the individualistic Canadian concept of dignity. Goldstone J cited the minority judgment of L'Heureux-Dubé J in *Egan v Canada*[103] in *President of the Republic of South Africa v Hugo,*[104] the Court's first major equality case under the *Interim Constitution.*[105] Whilst the minority judgment in *Egan v Canada* does not appeal to an individualistic conception of dignity,[106] the Court was criticised not only for having elevated dignity to a prominent position in testing for unfair discrimination (without a textual basis for dignity as a value in the *Interim Constitution*), but for misreading

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social structures and milieu existing in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being." This resonates with the cautionary advice of Mogoeng J in *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) para 243 in the context of human dignity and freedom of expression: "Indeed, human dignity must colour the spectacles through which we view defamatory publications, particularly those which are inextricably linked to our painful past. And so should our rich values, like ubuntu, which are consistent with the Constitution, our shameful history of institutionalised human rights violations, our commitment to make a decisive break with this past as well as our pursuit of the noble objectives of national unity and reconciliation also inform the interpretation and exercise of the rights to dignity, freedom of expression, privacy and property in this country. To this end, we ought to be slow to borrow from comparable jurisdictions which do not necessarily share the same history and experience with us. This ought to be so because very few, if any, of these jurisdictions have made a firm and generous commitment to national unity and reconciliation. In cases of defamation that relate to the amnesty process sensitivity to this national project is called for. The law cannot simply be applied with little regard to the truth and reconciliation process and ubuntu."

103 Davis 1999 *SALJ* 404, referring to *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-105.

104 1997 4 SA 1 (CC).

105 Roux 2008 *AJ* 186.

106 Roux 2008 *AJ* 186 fn 10.

the Canadian concept of the relationship between dignity and equality.[107] According to Roux:[108]

> So here we have a clear instance where the connection between human dignity and comparative constitutional law is alleged to have been an instrumental one, with comparative law being used wrongly to elevate human dignity to a position in the equality analysis it should never have enjoyed.

This was clearly an instance where the principles and rules of one jurisdiction were conflated with those of another jurisdiction. In Canadian law, dignity operates only as a value (principle) whereas dignity was not enacted as a value in the *Interim Constitution*, but only as a right (section 9.)

4.3.5 Towards the principles and application of parallel meanings: convergence, universalism and engagement

Barak[109] argues that the basic approach to the interpretation of comparative law applies equally when comparing the dignity adjudication of different legal systems, especially if the constitutionalising of dignity in one system was influenced by another system with a genetic heritage. He explains that it is meaningful to compare systems in which dignity is enacted as a value with others of the same order, or systems in which dignity operates only as a value (such as Canada and the US,) with systems in which dignity operates both as a value and a right (such as South Africa, Germany and Israel) because, in these systems, the meaning of the value informs the meaning of the right.[110] But in comparing dignity as a right, it should be borne in mind that legal systems have different conceps regarding rights adjudication and its implications for personhood.[111]

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107 Roux 2008 *AJ* 186.
108 2008 *AJ* 186.
109 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 94.
110 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 94.
111 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 94.

Neuman[112] confirms that although rights have supra-positive aspects, their meanings may include specific domestic aspects relating to mechanisms for enforcement in their particular textual frameworks. The distinction between principles and rules as discussed above will aid judges to converge and/or engage with foreign law.

The Court employed both the convergent or universalist and engagement models to interpret international and foreign law in *Makwanyane.*[113] The idea of "cruel and unusual punishment" as envisaged in international human rights instruments and many other constitutions provides a link to infringement of human dignity in death penalty cases. Chaskalson CJ[114] referred to the minority judgment of Brennan J in *Gregg v Georgia* to illustrate this point:[115]

> The weight given to human dignity by Justice Brennan is wholly consistent with the values of our Constitution and the new order established by it. It is also consistent with the approach to extreme punishments followed by courts in other countries.

In casu the Court identified several principles in various legal systems pertaining to the death penalty, the most predominant of which are human dignity and the right to life. References to these principles are in accordance with the universalist mode of interpretation. Thereafter, the Court engaged with several legal systems which still impose the death penalty (mostly as a result of textual authorisation) and provided reasoning why the adjudication in these systems is not to be followed. Although human dignity as a value was not textually included in the *Interim Constitution* (the constitutional dispensation under which *Makwanyane* was adjudicated) Chaskalson J referred to the protection of dignity as a right, which includes Kant's categorical imperative as well as the principle that everyone has the right to respect and the protection of his dignity. The

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112 2003 *SLR* 1876-1877.
113 1995 3 SA 391 (CC).
114 *S v Makwanyane* 1995 3 SA 391 (CC) para 58.
115 [1976] USSC 171.

Court compared the similar principle in German law that cruel and unusual punishment infringes upon human dignity by referring to the *Life Imprisonment* case:[116]

> In Germany, the Federal Constitutional Court has stressed this aspect of punishment. Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.[117]

Acknowledging that dignity is not textually protected in the US Constitution, Chaskalson J referred to the claim that dignity is infringed upon in cases of cruel and unusual punishment under the Eighth and Fourteenth Amendments as held in the dissenting judgment of Brennan J in *Gregg v Georgia*:[118]

> The fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.[119]

The idea that "cruel and unusual punishment" constitutes an invasion of human dignity is not only true in cases of the death penalty. In *S v Williams*[120] Langa J noted a "clear trend" in jurisdictions such as the US and Mozambique regarding the abolition of juvenile whipping, that there is

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116 [1977] 45 BVerfGE 187, 228.

117 *S v Makwanyane* 1995 3 SA 391 (CC) para 59. Mahomed CJ (as he then was and later from 1996 the Deputy President of the South African Constitutional Court) of the Namibian Supreme Court referred extensively to the German application of dignity in cases of life imprisonment in *S v Tcoeib* 1996 (7) BCLR 996 (NmS) para 12: "The threat of life imprisonment is contemplated, as is constitutionally required, by meaningful treatment of the prisoner. The prison institutions also have the duty in the case of prisoners sentenced to life imprisonment, to strive towards their resocialization, to preserve their ability to cope with life and to counteract the negative effects of incarceration and destructive personality changes which go with it. The task which is involved here is based on the constitution and can be deduced from the guarantee of the inviolability of human dignity contained in article 1(1) of the *Grundgesetz.*" Also see fn 14 in chapter 3 above.

118 [1976] USSC 171 at 230.

119 *S v Makwanyane* 1995 3 SA 391 (CC) para 57.

120 1995 3 SA 632 (CC) para 35. See Foster 2010 *USFLR* 95.

a "common thread"[121] in other jurisdictions to protect human dignity. He held that

> There is unmistakably a growing consensus in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity.[122]

The engagement model precipitated in *Roper v Simmons*[123] (decided in 2005, in which it was held that the imposition of the death penalty on offenders less than eighteen years old was unconstitutional under the Eighth Amendment). Both Justices Kennedy (writing for the majority) and O'Connor (dissenting) referred to the relevance of foreign law and the infringement of human dignity in death penalty cases. O'Connor J[124] held that

> …human rights documents] do not lessen our fidelity to the Constitution or our pride in its origin to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage or freedom.

She further held that the US's

> evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement … that a particular form of punishment is inconsistent with fundamental human rights.[125]

Kennedy J held that

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121 "Whether one speaks of 'cruel and unusual punishment' as in the Eighth Amendment of the United States Constitution and in article 12 of the Canadian Charter, or 'inhuman or degrading punishment' as in the European Convention and the Constitution of Zimbabwe, or 'cruel, inhuman or degrading punishment' as in the Universal Declaration of Human Rights, the ICCPR and the Constitution of Namibia, the common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity." See *S v Williams* 1995 3 SA 632 (CC) para 35.

122 *S v Williams* 1995 3 SA 632 (CC) paras 39-40.

123 125 S Ct 1183 (2005). See Jackson 2005 *HLR* 115.

124 125 S Ct 1183 (2005) at 1215-1216.

125 As quoted by McCrudden 2008 *EJIL* 695.

> The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18.[126]

These *dicta* illustrate that the justices first followed a process of analysing state law and the status of cruel and unusual punishment under the Eighth Amendment, where after they engaged with principles of human rights law protecting human dignity against cruel and unusual punishment; although they refrained from applying international and transnational norms.[127]

References to the principle of human dignity through citations of foreign law in either the universalist or engagement mode of interpretative methodology are an expression of the universality of dignity. Such references contribute to the fact that human rights law protects dignity in cases of cruel and unusual punishment. Acceptance of the universal idea that dignity is infringed upon by cruel and unusual punishment is also present in the references of the US justices, although some opinions are reflected in dissenting opinions. In this respect references in foreign law to the principle of human dignity results in a unique relationship between global jurisprudence and local law[128] - it provides the impetus for enacting the principle of dignity into positive law. Therefore the three elements of the value of dignity are the foundation of transnational jurisprudence in cruel and unusual punishment cases and a "paradigmatic example of naturalist foundations at work."[129]

In *Robert James Stransham-Ford v Minister of Justice and Correctional Services (Stransham-Ford),*[130] Fabricius J made use of the engagement model in the context of the rights to dignity and autonomy competing with the rights to life, liberty, security of the person and equal treatment. He

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126 125 S Ct 1183 (2005) at IV.
127 Jackson 2005 *HLR* 115.
128 Carozza 2003 *TLR* 1082.
129 Carozza 2003 *TLR* 1082.
130 2015 4 SA 50 (GP).

referred to the Canadian Supreme Court decision in *Carter v Canada*[131] regarding a request for a medical practitioner to assist with a patient's suicide:

> The Canadian Charter of Rights is very similar to the South African Bill of Rights. I find the reasoning of the Canadian Supreme Court not only enlightening but very persuasive.[132]

In *Stransham-Ford*[133] the Court referred in detail to the use of dignity by the Canadian Court, agreeing with this Court's contention that

> … an individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy.[134]

Fabricius J agreed with the Canadian Supreme Court's interpretation that the right to life does not automatically trump other values and rights, and that a person's decision on how to end his life is a very important component and manifestation of his own "sense of dignity and personal integrity." The citing of the Canadian case provides a "history of examples"[135] and acted as the basis for the Court's decision to grant the applicant's request for assisted suicide.

4.3.6 Deconstruction of applications and meanings

The controversy surrounding dignity as the basis of human rights is mirrored in judicial comparativism, as judges in some instances use the concept either to agree with or to divert from the commonality aspect of dignity. As Carozza[136] explains:

> In both cases [when judges agree or divert from the commonality of dignity], therefore, they reveal a working hypothesis that human dignity justifies reliance on foreign norms and requires a particular justification for departing from foreign models in judicial decision-making. Reliance on the idea of

131 2015 SCC5 on 6 February 2015.
132 2015 4 SA 50 (GP) para 24.
133 2015 4 SA 50 (GP).
134 Quoting from *Carter v Canada* 2015 SCC5 on 6 February 2015 para 66.
135 Term coined by Van der Walt in *Constitutional Property Clauses* 38.
136 2008 *EJIL* 933.

> human dignity as a source of justification in this way simply does not make sense unless it is regarded, at least implicitly, as something the meaning and value of which transcend local context and constitute a commonality across the differences of time and place.

In this respect, McCrudden[137] argues that the essential elements of dignity, although widely referred to and applied by judges transnationally, represent an "empty shell", as a result of the existence of divergent and context-specific judicial norms in different jurisdictions, specifically in similar factual contexts such as abortion, euthanasia, hate speech and socio-economic rights. As a result hereof, McCrudden explains, the normative principle of inherent dignity seems to be false and superficial, subject to malleability and arbitrariness, and so too the whole idea of human rights. Referring to his discussion regarding the universal application of dignity's essential elements, McCrudden[138] observes that

> This part of the article demonstrated that courts have generally confirmed that when judges use the concept of human dignity, they too appear to adopt the minimum core. We can also see that the judiciary in several jurisdictions has attempted to explore, in particular, the second and third elements, and to do so, in part, through a transnational dialogic process. As a result of this judicial activity, we can also identify more clearly than before the contexts in which human dignity seems likely to have most resonance for understanding the relational and limited-state elements in the core concept.

As a solution to this problem, he proposes that a process of specification be followed by using the general principle as a point of departure, and by

> working out practical implications of human dignity in varying concrete contexts.[139]

This leads Carozza[140] to suggest that the principle of subsidiarity and its co-terminous principle of pluralism be employed when international human

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137 2008 *EJIL* 698. He explains furthermore that "when the concept comes to be applied the appearance of commonality disappears, and human dignity (and with it human rights) is exposed as culturally relative, deeply contingent on local politics and values, resulting in significantly diverging, even conflicting, conceptions."

138 2008 *EJIL* 697.

139 2003 *TLR* 1082.

140 2008 *EJIL* 13; Carozza 2003 *AJIL* 38. See also fn 79 in chapter 1 above.

rights norms are being adjudicated.[141] The decision of the European Court of Justice in the *Omega Spielhallen*[142] case points in this direction, in which the Court found that dignity may have significantly varying meanings and scope in the member states, and in essence that Germany's approach and perspective was not necessarily the same as that of other states.

However, it can be argued that the ontological aspect of human dignity in international law and in those jurisdictions that accept the principle is not dependent on "overlapping consensus"[143] – it is inherent in each individual and cannot be diminished or disposed of, and notwithstanding the existence of different conceptions in respect of who the bearers of dignity are. Reliance on this aspect of dignity in foreign law might in fact guide courts to apply the concept correctly. Had regard been given in *S v Jordan*[144] to the essential elements of dignity as endorsed by international law and customary international law,[145] the Court's finding would have

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141 See chapter 1.2.1.3.3 and fn 67 in chapter 1 above. Carozza argues that South African judges' connection of dignity with *ubuntu* is an example of subsidiarity. See 2003 *TLR* 1085.

142 *Omega Spielhallen und Automatenaufstellungs- GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I – 9609, as quoted and discussed by McCrudden 2008 *EJIL* at 710. *In casu* Germany prohibited *Omega,* a commercial enterprise, from operating a laserdrome game which was manufactured by a British company, in which the gamers could try to kill other players by pointing and shooting a laser beam directed at a sensory tag on the other players' jackets. *Omega* argued that the game should also be allowed in Germany as a result of the fact that it was allowed in other member states - on the basis that Community law provides protection of member states to provide services in the Community. Germany in turn, argued that the prohibition was justified on the same grounds that peep shows and dwarf-throwing were disallowed. In rebuttal, *Omega Spielhallen* argued that restrictive measures on the protection of fundamental rights must be based on a common concept of those rights in the Community. However, the Court found that restrictive measures adopted by a member state are not subject to a common concept shared by all the members of the Community, with regards to the specific way in which the fundamental right was to be protected, and consequently that Germany's idea of dignity was not common to the concept of the other member states. Also see the discussion fn 54 above. The unique concept of human dignity in German law is based upon the *Objektformel* – in this regard see footnotes 244-245 below.

143 In reference to the Rawlsian term – also see fn 79 in chapter 3 above.

144 2002 6 SA 642(CC).

145 In terms of s 232 of the *Constitution,* customary law is binding law in South Africa, unless it is inconsistent with the *Constitution* or an act of parliament.

been based on a theoretical principle rooted in the inherent human dignity rule. As prostitutes have equal human dignity that cannot be diminished by their own conduct, notwithstanding the fact that such conduct amounts to a commodification of their bodies (contrary to the Court's finding) any legislation that criminalises such behaviour only in the case of the prostitute and not in the case of the patron is fundamentally discriminatory and unjust and sustains systemic disadvantages in society. Legislation that solely sanctions the patron's conduct reduces the prostitute to an object and not to an end in herself; contrary to the universal paradigm that everybody's dignity must be recognised and respected.[146]

4.3.7 Comparative law in South Africa

Section 39(1)(b) of the *Constitution* posits that international law must be considered when judicial officers interpret the provisions of the *Bill of Rights.* Rautenbach and Du Plessis[147] argue that a court is indeed obliged to follow certain aspects of international law by virtue of sections 231-233 of the *Constitution.* Article 25 of the *Basic Law* (primacy of international law) bears resemblance to the provisions of sections 39(1)(b) and 233 of the *Constitution* to the effect that courts, when interpreting legislation, must give preference to international law.[148] This imperative is evidenced by the *dictum* of Ngcobo J in *Glenister v President of the Republic of South Africa*:[149]

> Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human rights law.

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146 Also see the discussion in chapter 3.4.2 and 3.6.2.2.2.1 above and fn 144 in this chapter.

147 Rautenbach and Du Plessis 2013 *GLJ* 1552.

148 According to Kommers and Miller, the BVerfG infrequently cites foreign law but seldom relies on foreign law. It rather employs comparative law to refer to negative examples of principles to be avoided or as affirmation of conclusions arrived at by way of standard methods of interpretation. See *The Constitutional Jurisprudence of the Federal Republic of Germany* 74-75.

149 2011 3 SA (CC) 347 para 97.

In the framework of the human dignity provisions enacted in international documents, namely that everybody has inherent dignity that has to be respected and protected and which also constitutes the basis of human rights, it follows that courts will have to give regard to the essential elements of dignity in adjudicating human rights claims pursuant to legislation that does not protect these elements of dignity. The US Constitution on the other hand cannot be seen as "simply a site for implementing transnational norms."[150] Although US law has a comparable application of the aforementioned provisions that international law has to be taken into account as a tool for constitutional interpretation, based on the presumption that statutory law must be interpreted congruently with international law, (the US Constitution was drafted to some degree to facilitate compliance with the US's international obligations,) the ambit of constitutional purposes and existing interpretative practices do not point towards a general presumption of convergence with non-binding foreign and international law. [151]

The universality of international law endorses the essential elements of human dignity. This principle was applied in *Makwanyane*[152] when the Court unanimously outlawed the death penalty. In adjudicating whether the death penalty constitutes an infringement of human dignity, the Court took into consideration the provisions of public international law, which includes customary international law, treaties and the decisions of tribunals dealing with human rights instruments.

4.3.8 The influence of German dignatarian law on South African law

The uniqueness of the architectural structure of dignity as a value and as a right in the *Basic Law* limits comparison in domestic law. A further factor is

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150 Jackson 2005 *HLR* 123.
151 Jackson 2005 *HLR* 123.
152 *S v Makwanyane* 1995 3 SA 391 (CC).

that the right to dignity in German law is narrowly viewed and its scope is therefore limited to the effect that its area of application is ruled to an extent by the wide and encompassing right to the development of personality.[153] On the other hand, although the value of dignity is supreme over a hierarchy of other constitutional values - as opposed to the situation in other constitutions which do not differentiate between values - comparing values is less restrictive, because societies have a shared sense of these values.[154] This is the idea that was proposed by Ackermann J in his concurring judgment in *Du Plessis v De Klerk*:[155]

> I do believe that the German Basic Law (GBL) was conceived in dire circumstances bearing sufficient resemblance to our own to make critical study and cautious application of its lessons to our situation and Constitution warranted. The GBL was no less powerful a response to totalitarianism, the degradation of human dignity and the denial of freedom and equality than our Constitution.

Further, in a South African constitutional context Botha[156] states that, notwithstanding the fact that its dignity-based jurisprudence is dynamic and led to lively debates on dignity's relationship with other values such as equality and its capacity to constrain constitutional decision-making:

> What is missing from the South African literature on dignity is a sustained engagement with comparative constitutional law. So far, South African constitutional scholars have largely failed to situate their analyses and critiques of the Court's dignity-based jurisprudence within the broader context of a transnational constitutional discourse on human dignity.

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153 Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 241. With regard to the right to the development of one's personality, see fn 238 in chapter 3 above.

154 Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 242. With regard to dignity as an absolute value in German Law, Botha refers to Isensee, who holds that dignity is the only absolute value in a world of relative values. See 2009 *SLR* 171.

155 1996 3 SA 850 (CC) para 92. Compare also the same exact same dictum of Ackermann J in *S v Mhlungu* 1995 3 SA 867 (CC) para 92. Reference to the German system regarding shared values was also made by Ackermann and Goldstone JJ in *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 54: "Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system."

156 Botha 2009 *SLR* 172.

However, Rautenbach and Du Plessis[157] have found that up until the end of 2011 the Court referred to approximately thirty-four foreign court cases (collectively via the judgments of individual judges) with reference to the right to dignity in approximately sixteen constitutional cases.[158] Reference was made to only one German constitutional case in the context of section 10 of the Constitution, namely Federal Constitutional CourtE 45,187 – the *Life Imprisonment* case and with specific reference to the death penalty as cruel and unusual punishment (Chaskalson CJ.):[159]

> In Germany, the Federal Constitutional Court has stressed this aspect of punishment. Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.

This is significant as one would expect that, as a result of the Court's reliance on Kantian dogmatics,[160] dependence on German constitutional dignity adjudication would have been substantially more significant in the light of the parallel provisions of article 1(1) of the *Basic Law* and section 10 of the *Constitution.*[161] In addition, the historical circumstances leading to the enactment of the *Basic Law* and the *Constitution* are comparable, as was confirmed by Ackermann J:[162]

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157 Rautenbach and Du Plessis point out that South African Constitutional Court judges refer more frequently to foreign judgments than any other domestic court worldwide. In an empirical survey conducted from cases handed down between 1995 to 2011 they have shown that Ackermann J for instance, referred to German Law in 68 constitutional cases. Interestingly, in *Makwanyane* reference was made to 220 foreign cases from 11 countries and 3 international courts. See 2013 *GLJ* 1540; 1572 and 1574.

158 Information compiled from the research of Rautenbach and Du Plessis. See Rautenbach 2014 http://4-win2.p.nwu.ac.za/dbtw-wpd/exec/dbtwpub.dll.

159 In *S v Makwanyane* 1995 3 SA 391 para 59, with specific reference to the translation by Kommers of the *Life Imprisonment* case in fn 89.

160 Also see the discussion in chapter 2.15.6.5 and fn 103 in chapter 3 above.

161 Kentridge 2005 *TLR* 246.

162 *Human Dignity: Lodestar for Equality in South Africa* 116. This view is shared by Barak: "It is thus only natural that the German judicial history and legal culture regarding human dignity serve as interpretational inspiration for understanding human dignity in other democratic legal systems." See *Human Dignity: The Constitutional Value and the Constitutional Right* 94. Du Plessis concurs: "The

> Why the German Basic Law, particularly with regard to dignity, is of such significance to South Africa is because both Constitutions are deliberate reactions to recent and serious historical failures, indeed tragedies, with regards to human dignity.

Another reference to German law was made by Froneman J of the Eastern Cape Division of the High Court in *Gardener v Whitaker*[163] with regard to the ambit of section 10 in the *Interim Constitution,* which encompasses the common law's protection of a person's *dignitas* in South African law. This reference was made in the context of article 5(1) in the *Basic Law,* which posits the right of a person to freely "express and disseminate… opinion by speech, writing and pictures." As part of the comparative overview he conducted, Froneman J discussed the German principle of dignity as protected by article 1(1), which in addition constitutes the basis of fundamental rights:

> The guarantee of human dignity is stated to be the guiding principle of the German Constitution in article 1(1), which provides that the “dignity of man” shall be inviolable. The Constitutional Court has held that a person's reputation is included in his right to human dignity, as well as in the right to the free development of personality (art 1.)[164]

In justification for his decision that the constitutional right to human dignity is wide enough to include all personality rights as well as the right to reputation, Froneman J concluded that:

> As has been seen, the right to one's good name and reputation has been interpreted in Germany as forming part of the right to human dignity. Having regard to the venerable ancestry of the right to good name and reputation, I can see little reason why the same approach should not be adopted in South Africa.[165]

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occurrence of the triumvirate of human dignity, equality and freedom in several places in the 1996 Bill of Rights tells us where we in South Africa were coming from when we first tried to establish our fledging constitutional democracy – exactly what article 1 of the Basic Law does with reference to Germany's unique (and sad) holocaust history." See 2005 *PER* (8)1 at 92. Also see the discussion in chapter 2.15.6.3 above.

163 1995 2 SA 672 (EC).

164 *Gardener v Whitaker* 1995 2 SA 672 (EC) para 689D.

165 *Gardener v Whitaker* 1995 2 SA 672 (EC) para 690H. Also see the discussions in chapter 2.15.4 and fn 411 in chapter 2 above.

Rautenbach and Du Plessis's finding regarding the Court's minimal references to dignity adjudication in German law is supported by Roux's statement[166] in 2008 in an article analysing Judge Ackermann's masterful demonstration of the usefulness and relevance of comparative constitutional law,[167] connected with his concern for human dignity and against the perspective of the judge's well-known interest in German law:

> As I read the cases, therefore, foreign law has not exerted very much influence on the development of the distinctly South African conception of human dignity that we are exploring in this conference. The foreign influence, if there is one, is Immanuel Kant, whose conception of human dignity lies behind much of the Court's jurisprudence, and certainly behind Laurie's share of that jurisprudence. But Kant's influence on the South African understanding of human dignity is not mediated through foreign law, but through the relevance of his thought to the Court's understanding of the apartheid evil, and also through its connection to indigenous notions of *ubuntu*, with its quintessentially relational understanding of human dignity.

Roux[168] furthermore observes that

> While it is safe to assume that the dignity-based jurisprudence of South Africa's Constitutional Court has, at least in part, been inspired and influenced by German constitutional jurisprudence, it is not clear from the Court's judgments exactly what it takes the relevant textual, contextual, cultural and historical similarities and differences between Germany and South Africa to be. It is also not immediately apparent to what extent the Court understands its dignity-based interpretation of specific rights such as the right to equality, or its use of dignity in assessments based on balancing and proportionality to have been modelled on German constitutional law, or as a new departure. It is only through careful textual exegesis and a juxtaposition of the German and South African literature that the comparativist can arrive at some tentative conclusions.

The reason for the Court's non-reliance on German law could be the fact that, contrary to the situation in South Africa, human dignity as a value and a right is not amendable and not subject to proportionality – in Germany, the right to dignity is absolute and unamendable,[169] in South Africa, relative and amendable.[170] In the premises, it can be deduced that the

166 Roux 2008 *AJ* 185.
167 Roux 2008 *AJ* 185.
168 2008 *AJ* 185.
169 Article 79(3) of the *Basic Law.* Also see fn 523 in chapter 3 above.
170 Also see fn 522 in chapter 3 above.

findings of Rautenbach and Du Plessis regarding the Court's limited references to German law in the context of human dignity indirectly coincide with Barak's[171] observation that there is no similarity between the value of human dignity in the Constitution of South Africa and human dignity in the German Constitution.

This view is shared by Foster,[172] who argues that

> When the text reflects a value that is shared with a foreign country, the Constitutional Court is likely to find foreign law persuasive. However, when the constitutional value differs as a result of text, history, or culture, the Constitutional Court is likely to cite foreign law solely to illustrate a contrasting approach.

However, it is contended that the basis of the value of human dignity is the same in German and South African law, notwithstanding the fact that the scope of application differs. In both jurisdictions, the value of dignity refers to the humanity of each individual, which is underpinned by Kant's categorical imperative that everybody has inherent dignity, as posited by article 1 of the *Basic Law* and section 10 of the *Constitution.* Although the status of dignity as a value differs in the two jurisdictions, it functions as a rule in them as a result of the universality of dignity's three essential elements. The Court indeed referred to this common aspect of dignity as a value, albeit in a footnote in *Mohamed v President of the Republic of South Africa,*[173] by citing a *dictum* from the German Administrative Court in the *Peep Show*[174] decision to the effect that dignity is an

> objective, indisposible value, the respect of which the individual cannot waive validly.

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171 *Human Dignity The Constitutional Value and the Constitutional Right* 248.
172 Foster 2010 *USFLR* 94.
173 2002 3 SA 893 (CC) para 62 fn 55.
174 BVerfGE 64, 274, quoted by the Court from the English translation by Michalowski and Woods *German Constitutional Law – The Protection of Civil Liberties* (Ashgate/Dartmouth, Aldershot, 1999) at 105.

Had the Court in *S v Jordan*[175] referred to German law regarding the *Objektformel*[176] as formulated in the *Life Imprisonment*[177] case or to the "dwarf tossing case"[178] in French law, it would have found that a prostitute's dignity cannot be diminished and that legislation which criminalises only the prostitute's actions and not that of the patron is discriminatory.

It would thus appear that South African comparative dignity jurisprudence with reference to German law falls outside the ambit of McCrudden's and Carozza's criticisms that the widespread transnational use of dignity, in the absence of a universal concept of dignity, causes domestic case law and human rights norms to become

> indistinguishable from the arbitrary or idiosyncratic preference of a judge for some norm over another.[179]

Indeed, the Court in *Makwanyane*[180] refrained from employing the negative example of the US Supreme Court to institutionalise the death penalty, resulting from the arbitrariness and the subjective nature of judicial sentencing.[181] In comparing foreign law, the Court still has to give

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175 2002 6 SA 642(CC).

176 Also see the discussion in chapter 3.4.1 above.

177 BVerfGE 62, 274.

178 *Wackenheim v France* Conseil d'État Assemblee [CE Ass.] [Administrative Court Assembly] decision No. 136727, Oct 27, 1995, Rec.Lebon (Fr.), *available at* http:/www.juricaf.org/arret/FRANCE-CONSEILDETAT-19951027-136727.

179 Carozza states that this practice frequently happens in jurisdictions which lack an implicit constitutional guarantee of the protection of human dignity and/or an explicit textual endorsement for the use of foreign or comparative law (in contrast to South Africa). See 2008 *EJIL* 940.

180 1995 3 SA 391 at 456. Ackermann J quoted (with the Court's Approval) from the dissenting judgment of Blackburn J in *Callins v Collins* 114 S Ct 1127, 127 L Ed 435 (1994) at 1129: "Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, see *Furman v Georgia supra,* can never be achieved without compromising an equally essential component of fundamental fairness – individualised sentencing."

181 Chaskalson J held in *S v Makwanyane* 1995 3 SA 391 para 56 that: "The United States jurisprudence has not resolved the dilemma arising from the fact that the Constitution prohibits cruel and unusual punishments, but also permits, and contemplates that there will be capital punishment. The acceptance by the majority of the United States Supreme Court of the proposition that capital punishment is

effect to its constitutional mandate, bearing in mind the advice of Chaskalson[182] regarding the debate about dignity's "vacuous" meaning in constitutional law in the South African context:

> This is not a debate for South African lawyers and judges. Respect for human dignity as a foundational value is entrenched in specific terms in our Constitution, and lawyers and judges cannot dismiss that as a vacuous concept; they have to give effect to the Constitutional mandate, and give meaning to its language.

Whereas the *Basic Law* served as a model for many states in the post-war period, the comprehensive German corpus of dignitarian law has contributed to an understanding of the concept of dignity in many domestic jurisdictions. Botha[183] emphasises that

> The scope and sophistication of the dignity jurisprudence of German courts – in particular the Federal Constitutional Court – and the depth of academic comment by German constitutional law scholars on the concept and uses of dignity are unparalleled in any other country.

In a similar vein, Barak[184] contends that

> It is thus only natural that the German judicial history and legal literature regarding human dignity serve as interpretational inspiration for understanding human dignity in other democratic legal systems.

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not per se unconstitutional, but that in certain circumstances it may be arbitrary, and thus unconstitutional, has led to endless litigation. Considerable expense and interminable delays result from the exceptionally-high standard of procedural fairness set by the United States courts in attempting to avoid arbitrary decisions. The difficulties that have been experienced in following this path, to which Justice Blackburn and Justice Scalia have both referred, but from which they have drawn different conclusions, persuade me that we should not follow this route." However, Chaskalson CJ did refer to the minority judgment of Brennan J in *Gregg v Georgia* 428 US 153 (1976) at 230 regarding the infringement of human dignity in death penalty cases (para 57.)

182 Chaskalson 2011 *AUILR* 1382.

183 2009 *SLR* 173.

184 *Human Dignity:The Constitutional Value and the Constitutional Right* 94.

4.4 Purposive constitutional interpretation

4.4.1 Introduction

Human dignity as a constitutional value provides a yardstick for purposive constitutional interpretation, an interpretational process in which conclusive weight is given to the underlying purpose (*telos*) of the constitution at the time of interpretation.[185] This method is applied in accordance with the post-war rights-protecting paradigm in terms of which the recognition and protection of inherent human dignity provide a regulative framework for protection against state authority.[186] Purposive interpretation, which has widely come to be used in the European continent,[187] South Africa,[188] Canada[189] comparative law[190] and international law,[191] forms one part of the quartet of Von Savigny's interpretational methods, the others (slightly adapted) being grammatical, systematic and historic or original interpretation.[192] The accepted

185 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 69; 70.
186 Weinrib "The Post-War Paradigm and US Exceptionalism" 93.
187 Du Plessis 2005 *PER* (8)1 at 86.
188 This is in terms of the instruction of s 39(2) of the *Constitution*, being the interpretation clause.
189 Currie and De Waal *The Bill of Rights Handbook* 148; Barak *Human Dignity The Constitutional Value and the Constitutional Right* 72; 73.
190 Scheppele 2013 *YJLH* 38, Weinrib "The Post-War Paradigm and US Exceptionalism" 85.
191 Swart 2010 *ZaöRV* 775; 782; 783.
192 Eberle "Human dignity; Privacy and Personality in German and American Law" 1997 *ULR* 970 fn 20; Du Plessis 2005 *PER* (8)1 at 86; 87. Von Savigny did not include comparative law as one of his methods of legal interpretation, but it has widely come to be used as an additional method. See Du Plessis *Re-Interpretation of Statutes* 271.

approach in South Africa[193] and Germany is purposive interpretation.[194] US constitutionalism favours the originalist approach in terms of which a constitution is understood according to the original intent of its framers or the public understanding of the language of the constitution when it was developed.[195] As the Court held in *Dred Scot v Sandford*:[196]

> No one, we presume supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favour than they were intended to bear when the instrument was framed and adopted…If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.

Purposive interpretation is supplemented by a value-based approach sustained by supra-positive and positive law constitutional values. In the South African context human dignity, along with equality and freedom as constitutional values, plays a purposive and integrative role in the interpretational process.[197] The value of human dignity, which comprises the three essential elements of dignity, will always have to be taken into

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193 Foster 2010 *USFLR* 94; Ackermann 2005-2006 *TLR* 176; In *Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) the Court held that the Constitutional Principles should be interpreted "purposively and teleologically" (para 34) and "read holistically with an integrated approach" (para 37). Also see *S v Zuma* 1995 2 SA 642 paras 650H-653B; *S v Mhlungu* 1995 2 SA 277 (CC) para 295; *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 123; *Soobramoney v Minister of Health* 1998 1 SA 765 (CC) paras 16, 17 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA (CC) 490 para 91.

194 Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 73. Kommers and Miller suggest that the judges of the Federal Constitutional Court draw on different interpretational methods – from a linguistic analysis to teleological to historical, and there is no order of priority in their application. In cases of conflicting values or if the application of these methods leads to different results, the Court will often resort to *ad hoc* analysis. See *The Constitutional Jurisprudence of the Federal Republic of Germany* 62-66.

195 Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 69; Post 1990 *YLSFS* 21. The originalist approach is critised by Ackermann, holding that: "… the meanings of values, rights, and norms cannot be fossilized in the form they may have had … Foundational constitutional concepts such as dignity, equality, and freedom are not self-defining." See 2005-2006 *TLR* 178.

196 60 US 393 (1857) at 426, as quoted by Weinrib "The Post-war Paradigm and American Exceptionalism" 100.

197 Section 39(2) of the *Constitution.*

account during the interpretational process of all statutes and common law principles.[198] As such, dignity as a value functions as an interpretative principle, a so-called ultimate purpose as an end in itself, radiating through the entire legal system.[199] The values-based approach is in congruence with the transformative character of the *Constitution*.[200] The scope of constitutional rights is determined by dignity's interpretational role as a value, as it is regarded as the basis of these rights.[201] When constitutional rights such as socio-economic rights are being considered, however, the interpreter will have to weigh the reasonableness of placing burdens on the state, given its resources, against the impossibility of giving effect to the right being interpreted. Because human dignity is multi-faceted, the capacity of interpreters to generate unenumerated rights from the right to dignity is derived from purposive interpretation within the parameters of the purpose of the right.[202]

Now it is necessary to discuss the general features of purposive interpretation, to ascertain how it manifests in dignity adjudication in the three jurisdictions under review.

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198 *Daniels v Campbell* 2004 5 SA 331 (CC) para 56.

199 Langa JP held in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 22 that: "The purport and objects of the Constitution find expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve."

200 Langa JP held further in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 21 that: "The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."

201 See the discussion in chapter 3.6.2.1 above as well as *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35 per O'Regan J: "It is a value of human dignity that informs the interpretation of many, possibly all, other rights."

202 See the discussion in chapter 3.6.2.4.1.3.

4.4.2 Features of purposive interpretation

Purposive interpretation seeks to apply constitutional values that support rights-protection by taking into account both the subjective purposes of the constitution's framers and the objective purposes of the text itself.[203] Subjective purposes comprise of the goals, values, objectives and policies of the framers' intent in the constitution's historical context, which is stated at a high level of generality as an undisputable, empirical fact of constitutionalism, a so-called "grand narrative"[204] interpretative mode.[205] It is ascertained from the pre- and post-constitutional development.[206] Objective purposes are the "intent of the system", which is based on the democratic goals, values, objectives and policies of the constitution. It includes external sources such as pre- and post-constitutional history, past decisions, constitutional values and comparative law.[207]

Contrary to originalist interpretation, the holistic approach of purposive interpretation considers all the elements of the constitution as a unified whole rather than focusing on separate parts.[208] The meaning of a text in a

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203 Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 62.

204 The term was coined by Jean Francois Lyotard and applied by De Vos with regard to extra-textual references by the Court to aid in interpretation of the *Constitution*, such as the historical and political context of South Africa. See De Vos 2001 *SAJHR* 8.

205 Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 82. In applying the "mischief rule" as discussed below in fn 266, it could be argued that the apartheid system was the defect to be remedied, comprising the framers' intent of the *Constitution* to effect a "ringing and decisive break with the past" as per Mahomed J in *S v Mhlungu* 1995 2 SA 277 (CC) para 8. Also see Du Plessis *Re-Interpretation of Statutes* 117.

206 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 84.

207 Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 72. In *S v Makwanyane* 1995 3 SA 392 (CC) para 10 Chaskalson CJ held that rights should not be construed in isolation, "but in [their] context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of [the bill of rights] of which [they are] part."

208 Weinrib "The Post-War Paradigm and US Exceptionalism" 93. Currie and De Waal refer to this approach as "contextual reading." See *The Bill of Rights Handbook* 156.

present-day context is therefore decisive, as opposed to an analysis limited to the ideas and intentions of the framers as the interpretative authority.[209] Purposive interpretation enables a unique synthesis of the subjective and objective purposes of the text. It establishes the purposes of a constitutional right within a normative framework of legitimacy and scope.

The objective purpose of a text manifests through the express and implied meaning of the constitutional text.[210] Express meaning is limited by the literal meaning of the constitutional language as well as the structure of the constitution, which consists of its words, paragraphs, articles and chapters. However, more weight is given to a generous meaning by drawing the boundaries of rights as wide as possible within the provision's language and context.[211]

Against this backdrop Devenish[212] argues that

> … despite its important pedigree, it is submitted that "purposivism" or the purposive approach in a narrow sense, should not be accepted as a general theory of interpretation in South Africa, because it can neglect certain critically important values.

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209 Weinrib "The Post-War Paradigm and US Exceptionalism" 93.

210 Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 74. Du Plessis explains that purpose is established by way of the mischief/defect rule in the common law tradition of purposivism. Four questions have to be asked during the interpretational process: what was the common law before the enactment, what was the mischief/defect in the common law, what was the remedy that parliament resolved and what was the true reason for the remedy. When legislative intent is identified to rectify the remedy, the "purpose of an act and the intention of the legislature can hardly be at odds." See *Re-Interpretation of Statutes* 97.

211 Currie and De Waal *The Bill of Rights Handbook* 150. However, generous interpretation could be limited in certain cases such as socio-economic rights, as evidenced by the *dictum* of Chaskalson J in *Soobramoney v Minster of Health* 1998 1 SA 765 (CC) para 17: "The purposive approach will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the bill of rights, but this is not always the case, and the context may indicate that in order to give effect to the purpose of a particular provision a narrower or specific meaning should be given to it." Also see *S v Makwanyane* 1995 3 SA 391 para 324; Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 100-101.

212 Devenish 2006 *THRHR* 240.

Therefore human dignity as a value and a right should instead be interpreted as widely as possible, based on the three essential elements, and not be limited to the prevention of degrading and humiliating conduct. The result of purposive interpretation is inevitably the product of a value-judgment by a judge,

> …but it is a value judgment which requires objectively to be formulated, having regard to the ordinary meaning of the words used…[213]

In the postwar American paradigm, a two-stage analysis has to be followed to determine whether a right has been infringed.[214] In the first stage, the claimant has to prove that his constitutional right has been *prima facie* infringed; in the second stage the respondent has to prove that this violation is justified.[215] If so, the respondent will have to justify the reasonableness of infringement by application of the principles that regulate limitations on constitutional rights.[216] A purposive approach is of particular importance for the justification of the limitation of constitutional rights, as the current meaning of the values ascribed to the constitution is to be employed as the basis for the limitation of these rights.

Implied meaning is expressed through general and open-ended concepts such as human dignity, freedom and equality.[217] The implied meaning is derived from the background of the relevant provision as well as the structure of the entire constitution, in order to extract norms and rights that are not expressly enacted – in the form of assumptions or postulates based on the constitution's foundational principles.[218] Purposive

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213 Chaskalson J in *S v Makwanyane* 1995 3 SA 391 para 2.
214 Weinrib "The Postwar Paradigm and American Exceptionalism" 94.
215 *S v Makwanyane* 1995 2 SA 391 (CC) para 100; *S v Williams* 1995 3 SA 632 (CC) para 54.
216 In common law, proof of the infringement of a person's *dignitas* comprises only a subjective and objective element.
217 Barak Human Dignity: *The Constitutional Value and the Constitutional Right* 74-75.
218 Barak Human Dignity: *The Constitutional Value and the Constitutional Right* 77; 81.

interpretation allows for a deviation from the literal meaning of a text, based on the idea that historically, purpose precedes literalism.[219]

Purposive interpretation grants priority to the objective purposes of a constitution.[220] The background and structure of the constitution provide limitations for interpretation and a direct *nexus* between the implied meaning and the extracted norm.[221] For example, human dignity as a constitutional value was read into the US Constitution and Canadian *Charter of Rights and Freedoms* via this methodology.[222] The express and implied meanings should provide the same interpretational result. In *S v Zuma*[223] Kentridge J discussed six guidelines to give effect to purposive interpretation during the interpretational process, namely to ascertain the meaning of a provision by analysing its purpose, to have regard to the context of a provision with reference to its historical origins, to discern a provision's meaning taking into account the totality of a statute's subject matter, broad objectives and values, to have regard to the immediate context of the section analysed and its interrelated provisions, to take into account the precise wording of the provision interpreted and to interpret constitutional rights generously rather than legalistically, and to grant to individuals the full benefit of and widest possible protection of constitutional rights.[224]

This approach enables the interpreter to take social changes into account before establishing the modern meaning of old provisions. Therefore,

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219 Du Plessis *Re-Interpretation of Statutes* 97.
220 Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 84; Du Plessis *Re-Interpretation of Statutes* 96.
221 Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 78.
222 Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 79.
223 1995 2 SA 642 para 15. These guidelines are based on a *dictum* from the Canadian Supreme Court in *R v Big M Drug Mart Ltd* 1985 18 DLR (4th) 321 395-6. Also see *S v Makwanyane* 1995 3 SA 392 (CC) para 9 and *Minister of Land Affairs v Slamdien* LCC 107/98 (1999) para 14.
224 Also see the criteria listed by Mahomed J in *S v Makwanyane* 1995 3 SA 391 (CC) para 266.

interpretation is not limited to the intention of the framers but will reflect changes pertaining to society's fundamental views of constitutional values. Although history plays an important role in the interpretational process, social values develop and cannot be fossilised into the intent of the drafters of a constitution, as Barak[225] explains:

> the purpose of a constitution is not to realize the intent of the founders. The purpose of a constitution is to provide a foundation for the social structure and its fundamental values.

The modern meaning of a constitution is developed from the constitution's historical framework. Although the original understanding of the protection of individual rights may not necessarily be sustained by the wishes of the current majority, purposive interpretation reflects not only a constitution's bedrock values, but also a society's evolving values.[226] This feature of purposive interpretation is often conveyed through the metaphor of a "living constitution" and a constitution as a "living tree."[227] It is through this constitutional mechanism that future infringements of dignity will be protected on a case by case basis. As Justice Brennan Jnr[228] explained in a speech given at Georgetown University: "the demands of human dignity will never cease to evolve."

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225 Barak *Purposive Interpretation* 111.

226 Ngcobo J, in finding that the word "spouse" for the purposes of the recognition of Muslim marriages falls under the ambit of the *Marriage Act* 25 of 1961, held in *Daniels v Campbell* 2004 5 SA 331 (CC) para 54 that: "These founding values have introduced new values in our society. The process of interpreting legislation must recognise the context in which we find ourselves and the constitutional goal of establishing a society based on democratic values, social justice and fundamental human rights." Further in this respect he held at para 56 that: "In my view the word spouse in the statutes under consideration must be construed to reflect this change."

227 Jackson 2006 FLR 926; *Barak Human Dignity: The Constitutional Value and the Constitutional Right* 99.

228 Brennan (Jnr) "Text and Teaching."

4.4.3 Purposive interpretation in the German Aviation Security case

In 2006 the Federal Constitutional Court had to adjudicate whether a provision in the so-called *Aviation Security Act*[229] was constitutional in the context of the violation of the rights to dignity (article 1(1)) and life (article 2(1)) of the *Basic Law.*[230] Section 14(3) of the abovementioned act empowered the air force to shoot down a hijacked aeroplane containing innocent passengers as a counter measure, if it was evident that the aircraft would be used to place the lives of these passengers in danger and that the only means to avert harm for the public would be to shoot down the plane, with the inevitable consequence that the passengers would die in the process.[231] The Court held that the impugned provision violated the guarantee of the human dignity clause to the extent that it allowed armed forces to shoot down aircraft with innocent human beings on board who had become the victims of a terrorist attack. Read in conjunction with the right to life as guaranteed by article 2(2), the Court held further that the state was not empowered to violate human dignity whilst endeavouring to protect human life in terms of its obligation under article 2(2).[232]

In applying purposive interpretation, the following *dictum* provides a concrete example of how the Court construes the ultimate purpose of article 1(1) of the *Basic Law*:

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229 *Luftsicherheitsgesetz,* enacted by the Bundestag in June 2004.

230 115 BVerfGE 118. (English translation provided by the Court.) *In casu* the second question under deliberation was whether the federal legislature had the legislative power to enact such a law, which the Court found in the negative, because powers involving the police fall within the powers of the *Länder.*

231 Section 14(3) provided that: "The direct use of armed force is permitted only if, considering the circumstances, it appears that the aircraft is intended to be used for the killing of human beings, and if that use of armed force is the only available means to avert that present danger." English translation by Naske and Nolte – see 2007 *AJIL* 466.

232 115 BVerfGE 118 paras 118-120.

> Taking as a starting point the idea of the constitution-creating legislature that it is part of the nature of human beings to exercise self-determination in freedom and to freely develop themselves, and that the individual can claim, in principle, to be recognised in society as a member with equal rights and with a value of his or her own (see Federal Constitutional CourtE 45, 187 (227-228)), the obligation to respect and protect human dignity generally precludes making a human being a mere object of the state (see Federal Constitutional CourtE 27, 1 (6)); 45, 187 (228); 96, 375 (399)).[233]

The reference to self-determination in the framing of the *Basic Law* by the "constitution-creating legislature" as the "starting point" for interpretation is rooted in the foundational premise that inherent human dignity is inviolable, enacted as a counter-measure against National Socialism - a so-called "never again"[234] (*Nicht wieder!*) constitutional guarantee for future generations. Enders[235] argues that

> The meaning of human dignity cannot be disclosed by a strictly *textual approach.* The precise meaning of this clause in the context of the German Basic Law emerges from the clause's origin and the constitutional text's system.

The Court expressly confirmed this approach in the *First Abortion* case:[236]

> The Basic Law contains principles… which can only be explained by the historical experience and by the moral-ethical recollection of the past system of National Socialism.

This empirical fact or "grand narrative" is a consistent premise in German law and affects the interpretation of all legal provisions, although it does not function as the sole guideline to establish the purpose of a provision.[237] As the Federal Constitutional Court held in the *Life Imprisonment*- case:[238]

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233 115 BVerfGE 118 para 119.

234 The so-called "never again" narrative was picked up by Nelson Mandela in his inaugural speech to the nation on 10 May 1994. See fn 389 in chapter 3 above as well as fn 287 in chapter 2 above.

235 Enders 2010 *RECHTD* 2.

236 39 BVerfGE 1 para 67.

237 Eberle 1997 *ULR* 970.

238 45 BVerfGE 187 (1977). See Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 364. The Court made a similar comment in the *Homosexuality* case: "The original history of a particular provision

> Neither original history nor the ideas and intentions of the framers are of decisive importance to interpreting particular provisions of the Basic Law. Since the adoption of the Basic Law, our understanding of the content, function, and effect of basic rights has deepened. Additionally, the medical, psychological, and sociological effects of life imprisonment have become better known. Current attitudes are important in assessing the constitutionality of life imprisonment. New insights can influence and even change the evaluation of this punishment in terms of human dignity and the principles of the constitutional state.

The Court, at the same time, acknowledged that:

> We must never lose sight of the fact that human dignity is indispensable. We cannot separate our recognition of the duty to respect human dignity from its historical development.[239]

The Court confirmed that the underlying purpose of the *Basic Law* as formulated by historical experience manifests as such in the *Aviation Security* case, traversing that:

> What is thus absolutely prohibited is any treatment of a human being by public authority which fundamentally calls into question his or her quality of a subject, his or her status as a legal entity (see Federal Constitutional CourtE 30, 1 (26); 87, 209 (228); 96, 375 (399)) by its lack of the respect of the value which is due to every human being for his or her own sake, by virtue of his or her being a person (see Federal Constitutional CourtE 30, 1 (26); 109, 279 (312-313)).[240]

The core principle of the *Basic Law* as described above represents its objective purpose, which is portrayed through the portal of the express and implied meaning of the constitution. Article 1(1) proclaims the express meaning as "the obligation to respect and protect human dignity" in terms of the Court's formulation in the case under discussion above. As has been discussed in Chapter Three above, the concept of human dignity comprises three basic elements, namely the inherent dignity paradigm, the obligation of recognition and respect for dignity, and the claim that the state has to realise each human being's dignity.[241] These elements are

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of the Basic Law has no decisive importance in constitutional interpretation." See BVerfGE 389, 431 (1957), as quoted by Eberle 1997 *ULR* 970 fn 23.

239 45 BVerfGE 187 (1977). See Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 364.

240 115 BVerfGE 118 para 119.

241 See the discussion in chapter 3.4 – 3.4.3 above.

embodied by article 1(1) as the express purpose of the *Basic Law.* In addition, the injunction that human dignity is inviolable provides absolute protection and as such conveys the *Basic Law's* express meaning. Inherent dignity is constituted as an *a priori* constitutional value[242] and comprises one dimension of the constitution's express meaning. Hence, the objective purpose of the *Basic Law* is rooted in the three basic elements of human dignity.

The implied meaning of the *Basic Law,* namely that a human being is not to be treated as "a mere object of the state," augments the express meaning and translates into the well-known *Objektformel* in German law. In the *Aviation Security* case the Court held that the state, in its efforts to prevent severe danger for the public, trades the lives of innocent passengers in lieu of the purpose of prevention, and therefore treats the passengers as mere objects to be used to realise its objective of saving lives. Consequently the passengers are objectified, which delegalises them. In so doing, section 14(3) of the *Aviation Security Act* denies the passengers the very value that the *Basic Law* confers on each human being.[243] As has been discussed in Chapter Three,[244] the *Objektformel* is based on Kant's categorical imperative to the effect that, as every human being has inherent dignity, he is not to be treated as a means to an end, because this result is objectification, which causes infringement of human dignity. The Court expressed its finding of the prohibition of such objectification as follows:

> Neither can the right to life of the passengers be relativized on the basis that they should be seen as forming part of the aircraft weapon. This sort of

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242 See the discussion regarding the inherent dignity paradigm as an *a priori* constitutional value in chapter 3.4.1 above.

243 115 BVerfGE 118 paras 119 and 122. For a summary of criticisms against the Court's application of the *Objektformel* in the *Aviation Security* case, see Ackermann *Human Dignity: Lodestar to Equality in South Africa* 121-123.

244 See chapter 3.4.1 above.

> operation renders them mere objects of state action and robs them of their human quality and worth.[245]

The application of the *Objektformel* causes the right to dignity (which cannot be limited) to be interpreted narrowly. The scope of the value of dignity is broader and the *Objektformel* is only one of the aspects taken into account by the Federal Constitutional Court in interpreting and limiting the balance of the constitutional rights.[246] In the framework of the *Aviation Security* case, it is evident that constitutional provisions are not to be interpreted in isolation but have to be synthesised to produce a purposive result. The *Objektformel,* independent of the express meaning of the constitution, cannot produce a purposive result as it would not give the court enough guidance when there is a conflict of constitutional rights and duties. *In casu* the Court was faced with the dilemma of whether the duty to respect dignity takes precedence over the duty to protect the dignity of the passengers by saving their lives.[247] In acknowledging this double function of the dignity guarantee, the Court held that the obligation to respect dignity trumps the obligation of protection, which demonstrates that dignity is inviolable.[248] The protection of dignity is facilitated through the mechanism of the *Objektformel.*

Purposive interpretation is dynamic and can cause variations in the interpretation of the implied meaning of a constitutional provision and the extracted norm. Lepsius[249] remarks that the Federal Constitutional Court deviated in the *Aviation Security* case from its *Objektformel* decisions in

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245 115 BVerfGE 118 par 127.
246 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 118.
247 The BVerG Court was faced with a similar dilemma in the abortion cases. In addition, the Court acknowledged in the *Aviation Security* case that the right to life is relative; otherwise the state would not be able to justify states of war or emergency, pursuant to the provisions of articles 65a and 87a of the *Basic Law.*
248 Lepsius 2006 *GLJ* 773. Regarding the preference of the duty to respect over the duty to protect, the Editorial Committee who drafted article 1 of the *Basic Law* also intended the preference of the duty to respect over the duty to protect. Also see fn 284 in chapter 2 above.
249 2006 *GLJ* 771.

the seventies (with reference to the *First Abortion* case) when it connected the right to dignity with the right to life, which created interpretational difficulties as these two rights are textually disconnected. The Court referred to the "older" formulation during the 1950's that interpreted human dignity independently without reference to the right to life, and applied this contextualisation *in casu.* Lepsius[250] argues that

> If the Court keeps on separating both constitutional provisions from each other, the interpretation of the Basic Law will benefit from both an increased flexibility with regard to life issues and a stricter standard concerning challenges of human dignity.

Scheppele[251] illustrates that the flexibility of purposive interpretation allows for a deviation of the objective purpose of a constitution, when more information comes to light regarding the intent of the framers of the constitution, subsequent to its enactment. The "starting point" of interpretation to establish the purpose of a constitution may change over time as history is seen in a new perspective. She argues that the "never again" canon of the *Basic Law* became the prevailing principle only in the early 1950's when formerly unknown facts emerged regarding the atrocities committed by the Nazis.[252] Initially, when the *Basic Law* was constituted, the German public was generally apolitical and mostly concerned with the effect of the war on themselves.[253] The pressing issues at the time were the composition of parliament and the divisions of power, not the interpretation of constitutional values. Only after the Holocaust emerged as the narrative of World War II and Germany's role in the elimination of the Jews was acknowledged did the Federal Constitutional Court follow suit in their interpretation of rights and constitutional values:

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250 2006 *GLJ* 776.
251 2013 *YJLH* 29.
252 She claims that: "It was then projected backwards into the history of the text as its core purpose, reflecting a changing social view of that history." 2013 *YJLH* 30; 31.
253 2013 *YJLH* 32.

> As this process happened, the point of the constitutional order became the respect for human dignity, the protection of the core elements of rights from any political restriction, and the binding of all public authority to a constitution of values.[254]

This reconfiguration of the objective purpose of the *Basic Law* as an application of purposive interpretation radiated through the use of comparative law so that the history of the Holocaust has become the history of the world.[255] The "never again" canon of the *Basic Law* draws frequent references from jurisdictions that differ from the German example, with judges drawing parallels with their own constitutional history and that of the *Basic Law*.[256]

4.4.4 Purposive interpretation in the South African Stransham-Ford case[257]

Robert James Stransham-Ford (Robert), who suffered from phase four prostate cancer and was left with but a few weeks to live, approached the High Court in Pretoria for an urgent order to direct a medical practitioner to lawfully end his life through the administration of a lethal agent. Robert relied *inter alia* on section 39 of the *Constitution* (the "interpretation clause"), section 10 (human dignity), section 12 (freedom and security of the person), and the provisions of a living will that he had executed previously. The four Respondents, being the Minister of Justice and Correctional Services, the Minister of Health, the Health Professionals Council of South Africa and the National Director of Public Prosecution collectively argued that Robert's human dignity was not compromised as a result of his illness, that his experience of pain was not only subjective but a natural process of life, and that the state's duty to uphold life trumps any

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254 2013 *YJLH* 35. She argues that the Court's interpretation of the *Basic Law* based on constitutional rights and values emanated from this period, with the first case being the well-known *Lűth* case in 1958, in which the Court found that the objective values of the *Basic Law* radiate through the entire legal system.

255 Scheppele 2013 *YJLH* 39.

256 Scheppele 2013 *YJLH* 39. Also see section 4.3.5 above.

257 *Robert Stransham-Ford v Minister of Justice* 2015 5 SA 50 (GP).

purported undignified suffering and resulting death.[258] Fabricius J granted Robert's request without knowing that he had died some two hours earlier, holding that a state of constant, unbearable pain as a result of a terminal illness infringes the right to dignity. The judgment pertained only to Robert, however, and the Court made it clear that the common law prohibition against assisted suicide was not thereby legalised. In this section, the manifestation of the features of purposive interpretation in the Court's decision under review will be analysed.

In *Stransham-Ford* Fabricius J held that the common law sanction against assisted suicide was established in a pre-constitutional era, whilst the post-constitutional dispensation required law to give effect to a person's constitutional rights, thereby placing the adjudication of Robert's request for acknowledgement of his inherent human dignity during his last living days within the context of the *Constitution's* subjective intent. This intent, relating to the goals, values, objectives and policies of the framers' intent, was portrayed through the "grand narrative" of South African constitutionalism, to constitute the idea that the *Constitution* acts as the meta-narrative of a transformative "bridge"[259] between the apartheid past and the new system based on values and human rights. To interpret constitutional provisions and to ascertain the *Constitution's* objective purpose, the grand narrative was utilised by judges as an interpretative tool based on extra-textual factors such as the country's historical and political context. De Vos[260] argued that

> The creation, maintenance and deployment of this grand narrative constitutes an ambitious attempt to situate (almost) any understanding of the constitutional text within the context of a universally accepted structuring, meaning-giving story about the origins and purpose of the interim and 1996 Constitutions.

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258 *Robert James Stransham-Ford v Minister of Justice* 2015 5 SA 50 (GP) para 21.

259 The metaphor of the *Constitution* as a bridge between the past and present originates from the *Interim Constitution* and was elaborated on by Etienne Mureinik and subsequently by several other academics. See De Vos 2001 *SAJHR* 10 fn 29.

260 De Vos 2001 *SAJHR* 9.

Dignity was of particular importance to the ideas of the grand narrative and the *Constitution* as a bridge, as had been articulated by O'Regan J in *Dawood v Minister of Home Affairs:*[261]

> The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied.

However, the idea of the recognition and protection of dignity as *inherent* human dignity was more far-reaching and consequential and went beyond the mere application of dignity as the basis of establishing the purpose of "transformative"[262] or "reactive"[263] constitutionalism. In *Stransham-Ford,*[264] the Court was faced with adjudicating the principled basis of Kant's categorical imperative, outside the realm of the grand narrative as the uncontested justification of constitutional interpretation. Rather, the judgment constituted a move towards values-based interpretation to face the difficult is-ought problem in law pertaining to the death penalty, euthanasia and abortion.[265] The "mischief" to be rectified was not related to discrimination or unequal treatment, but was one that went to the heart of what it means to be a human being, to be treated with dignity, to have one's dignity respected and protected. Utilising constitutional values in order to rectify a "mischief", which includes universal moral and ethical values in order to ascertain the *Constitution's* ultimate purpose, resulted in a generous interpretation of the *Constitution* as a liberal constitution.[266]

The value of human dignity comprises one of the objective purposes of the *Constitution,* as enacted by section 1 and portrayed by the express and

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261 2000 3 SA 936 (CC) para 35. Also see further examples listed by De Vos in 2001 *SAJHR* 7-8 fn 26 and 10 fn 30z.
262 See fn 200 above.
263 Ackermann refers to the *Constitution* as "reactive." See 2004 *NZLR* 643.
264 Devenish 2006 *THRHR* 241-242.
265 Rights pertaining to these issues are unqualified in the *Constitution.* The political parties taking part in the process of negotiating the *Interim* and *Final Constitutions* left these issues for deliberation by the Constitutional Court. See Corder 1994 *MLR* 513.
266 Devenish 2006 *THRHR* 241-242.

implied meaning of the textual provisions. It is expressly encapsulated by the first component of section 10 to the effect that "everyone has inherent human dignity", which the Court utilised as the basis for its decision in *Stransham-Ford:*[267]

> The principle of human dignity as a central value of the "objective, normative value system" established by the Constitution has in my view a pre-eminent value… In the context of s. 10 read with s. 1 and 7(2), Ackermann says that human dignity, besides being a value and a right, is also a categorical imperative. I have approached this application on this basis.

Kant's categorical imperative represents the implied meaning of section 10 by giving effect to the supra-positive and *a priori* aspect of human dignity as a postulation of the *Constitution's* foundational principles. As the Court held *in casu:*

> … the concept of "human dignity" has a wide meaning which covers a number of different values. Dignity is a human worth and an "inherent" human worth.[268]

There is a direct *nexus* between the implied meaning and the extracted norm that everyone has inherent dignity as a constitutional imperative, which results in the claim that the first component of section 10 is not subject to limitation as opposed to constitutional rights which are subject to limitation.[269]

In casu Fabricius J determined the purpose of section 10 holistically, taking into account the interrelationship of the right to dignity with the rights to privacy, life and autonomy, stressing the close interaction with the right to a meaningful life by quoting the *dictum* of O'Regan J in *Makwanyane:*[270]

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267 *Robert James Stransham-Ford v Minister of Justice* 2015 5 SA 50 (GP) para 12.
268 *Robert James Stransham-Ford v Minister of Justice* 2015 5 SA 50 (GP) para 12.
269 See the discussion in chapter 3.6.1.5 and footnotes 405-413 in chapter 3 above, as well as discussion in chapter 5.3.3.3 below.
270 *Robert James Stransham-Ford v Minister of Justice* 2015 5 SA 50 (GP) para 12.

> The right to life is more than existence, it is a right to be treated as a human being with dignity; without dignity, human life is substantially diminished. Without life, there cannot be dignity.[271]

The court did not specifically deal with the conflict between the rights to dignity and the state's duty to protect life, but held that the current constitutional framework with its emphasis on the value of human dignity (among others) supports euthanasia.[272] As the Court took into account Kant's claim that inherent human dignity is rooted in autonomy, it is not surprising that the Court granted the broadest protection possible to the right to have one's dignity respected and protected. Although the Court did not formulate a daughter "right to die" as a derivative of the "mother-right" to human dignity (in the absence of legislation that regulates euthanasia), Fabricius J gave effect to a "once-off" development of the common law in accordance with the injunction of section 39(2) that courts must develop the common law to reflect the principles and values of the *Constitution*. Froneman J[273] describes this obligation succinctly:

> In terms of the Constitution the courts bear the responsibility of giving specific content to those values and principles in any given situation. In doing so judges will invariably "create law."

This decision truly resonates with the ideas of a "living constitution" and a liberal constitution in reflecting the dynamism and far-sightedness of purposive interpretation based on the value of human dignity, as Devenish[274] informs us:

> This means that the Constitution must be interpreted in the social and economic context and setting existing at that time when the matter is being adjudicated on, and not when it was adopted, in order for the subsequent changes in society to be taken into account.

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271 *S v Makwanyane* 1995 3 SA 392 (CC) para 327.
272 *Robert James Stransham-Ford v Minister of Justice* 2015 5 SA 50 (GP) paras 14, 23.
273 *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 3 BCLR 80 (SE) 87E.
274 2006 *THRHR* 250.

4.4.5 Purposive interpretation in the American Obergefell case[275]

In *Obergefell v Hodges* (*Obergefell*), a consolidated case of fourteen same-sex couples and two men, who appealed the decision of the US Court of Appeals Sixth Circuit to the effect that bans on same-sex marriage by states do not violate the petitioners' Fourteenth Amendment rights to equal protection and due process, Justice Kennedy on behalf of the majority (five/four split) delivered the Supreme Court's decision on 26 June 2015 that the right to marriage included same-sex marriages. The Court's decision was based upon a person's fundamental liberty as guaranteed by the Fourteenth Amendment, to be able to freely choose one's most intimate personal relationships, which is rooted in the concept of individual autonomy. Therefore, the Equal Protection Clause of the Fourteenth Amendment guarantees the right to same-sex couples to marry, based on the fundamental principle of liberty. Human dignity, which operates in US law only as a value as distinguished from a normative principle in the interpretation of rights claims, was employed by the Court in support of the finding that the "equal dignity"[276] of same-sex couples wishing to marry equates to fundamental liberties protected by the Fourteenth Amendment.

The Court applied a purposive approach to reach its decision that original intent regarding the meaning of the Fourteenth Amendment was not dispositive. It held that the changing social context of modern America should provide guidance as to whether a union of two persons of the same sex could be included in the definition of marriage.[277] *In casu* the relevant

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275 135 S. Ct. 1039 (2015).

276 The Court connected the equal dignity of same-sex couple's marriages with past practices in terms whereof women were denied equal dignity in relation to men: "These classifications denied the equal dignity of men and women**.**" See 135 S. Ct. 1039 (2015) 21.

277 The Court held at p 4 that "Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that

social context regarding the equal protection of same sex marriages is society's changing perceptions of family relationships, which also includes a unit consisting of same-sex couples with children. The Court connected the Due Process Clause with choices which define personal identity and beliefs "central to individual dignity and autonomy", and held that

> Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[278]

Recognition of a right to marriage, purposively derived, is in congruence with the post-war rights-protecting paradigm within which an objective value-order of inherent dignity and equality provides a normative yardstick for adjudication, as opposed to restrictive (unrelated) textual elements of a constitution as a "grand narrative" which grants rights absolute protection. Weinrib[279] argues that purposive interpretation is a move away from

> the controlling authority of traditional values, historical authority, original intent, and natural – i.e., God-given – social hierarchies.

Rather, phrases such as "identifying interests of the person so fundamental" are a move towards purposive interpretation[280] to delineate state power from interference in the personal choices of individuals. This is a matter not only of dignity-as-recognition[281] but of the purposeful acknowledgement of the postwar concept of a human being's "personhood" which, in the Kantian sense, holds that the development of an individual's personality and talents are a moral right that must be

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once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage…"

278 *Obergefell v Hodges* 135 S. Ct. 1039 (2015) at 2 para (b)(1).

279 "The Postwar Paradigm and American Exceptionalism" 101.

280 See further examples of phrases pointing to purposive interpretation listed by Weinrib in "The Postwar Paradigm and American Exceptionalism" 101.

281 See the discussion in chapter 3.4.2 above.

recognised and respected by the state.[282] In discussing the particular pejorative history of homosexuality the Court recognised the non-recognition of dignity in this context in the following *dictum:*

> For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity.[283]

Although the Supreme Court did not connect "equal dignity" with inherent dignity and the simultaneous obligation to respect and protect dignity, a purposive analysis points towards the recognition of the Kantian canon that fuses morality with law. For Kant, human dignity is rooted in the individual autonomy of each human being and in turn individual autonomy is rooted in an individual's rationality and autonomy to self-govern.[284]

Kant argued that individual freedom is the same as autonomy. Thus, freedom also has its roots in rationality.[285] As Kennedy J held in *Obergefell*:[286]

> There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.

Contrary to the opinion of the minority, which still relies on the counter-majoritarian dilemma,[287] the decision of the majority truly coincides with the purposive notion of a "living constitution" that adapts with time to reflect a constitutive reality at the time of interpretation.

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282 Also see fn 238 in chapter 3 above.
283 *Obergefell v Hodges* 135 S. Ct. 1039 (2015) 7.
284 See the discussion in chapters 2.10 and 3.3 above.
285 Meyer "Introduction" 7.
286 *Obergefell v Hodges* 135 S. Ct. 1039 (2015) 13.
287 The minority collectively argued that, although same-sex marriage might be a good and fair policy, this was not a constitutional right; therefore its recognition lay at the level of state legislatures based on the will of their electorates to institutionalise such a right.

4.5 Conclusion

Human rights have universal validity. This idea finds its origins in John Locke's theory of natural rights, formulated in the seventeenth century, that human rights are derived from a moral principle that is shared by humanity. Kant similarly argued that international law and domestic law are interconnected. Human rights transcend politics and culture, but they are simultaneously contingent on social context and therefore also culturally relativistic. Herein lies the fundamental paradox of these rights – while cultural heritage contributes to a specific understanding of rights adjudication, there is a shared global commonality regarding the supra-positive dimension of these rights. The same is true for the role of human dignity in international law, and the consequential usage of dignity in domestic law as a result of extensive borrowing from constitution to constitution and because of the citing of foreign judgments. In this context, human dignity as the basis for human rights provides a universal ideal for the protection of these rights.

As a result of the globalization of the norms of human rights, human dignity functions normatively to protect these rights – as in comparative law. However, in line with the paradoxical feature of human rights, there are profound ideological differences between jurisdictions regarding the scope of the protection of human rights. These issues will therefore occur in comparative law too. Judges make use of different models of interpretation in comparing foreign precedents. During such analysis, judges should be aware of differences in nuance between jurisdictions, specifically in the context of adjudicating conflicting rights, in order to avoid the repetition of a "history of errors", which could eventually lead to a breach of the rule of law. To circumvent the incorrect transnational application of dignity, it will have to be established whether dignity functioned as a rule or as a principle in the jurisdiction being used for the purpose of comparison. During this process, the three essential elements

of dignity will have to be identified and applied in terms of Dworkin's and Alexy's theories pertaining to rules and principles. The first essential element of the concept of dignity, being inherent dignity, functions as a rule in terms of Kant's categorical imperative. The second and third elements of dignity, being the injunction to respect and protect dignity, function as a principle. In a comparative context a rule cannot be conflated with a principle, because rules have absolute validity and are not subject to proportionality, whereas principles can be limited in favour of other competing principles. The transnational borrowing of dignity as a rule in the cruel and unusual punishment cases *inter alia* to declare the death penalty unconstitutional has resulted in a *ius commune* of human rights, despite the differences in the historical, political and social contexts of the jurisdictions of the nations of the world.

In accordance with the postwar rights-protecting paradigm, dignity as a value also plays a role in purposive constitutional interpretation, a process during which conclusive weight is given to the underlying purpose of the constitution at the time of interpretation. Purposive interpretation implies a holistic approach to enable a unique synthesis of both the subjective purposes of the constitution's framers and the objective purposes of the text itself. While purposive interpretation has to take into account the ultimate purpose of the constitutional guarantee to respect and protect human dignity, it also has to confer on individuals the full benefit and widest possible protection of constitutional rights as envisaged by the objective purposes of the text. Through this approach the interpreter can synthesise social changes with the subjective and objective purposes of the constitution, by protecting against future infringements of dignity on a case by case basis.

Chapter 5: Human dignity: forms and functions in German and South African law

> "In the empire of the law, nobody touches the worth of human beings. In the constitutional text inviolability stands as truth. Yet it is not something empirical, but a matter of belief and a truth to be believed, and yet as an ought."[1]

5.1 Introduction

In Germany, complainants alleged that their dignity would have been infringed if titles for civil servants or judges were to be changed, or if a name was spelled "oe" instead of "ö", or by addressing a woman as "Frau" Meier instead of "Dame" Meier.[2] In South Africa, a co-accused charged with certain criminal offences objected to the lawfulness of a letter of request issued on application by a judge to the National Director of Public Prosecutions to the Attorney-General of Mauritius requesting them to forward fourteen documents in their possession. He alleged that the issuing of the said letter infringed his right to human dignity.[3] Further, he averred that the mere act of issuing such a letter of request had the effect of the judge endorsing the allegations therein, thereby violating his rights

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1 Isensee "Human worth: Secular society in search of the absolute" as quoted and translated by Ackermann *Human Dignity: Lodestar for Equality in South Africa* 76.

2 On a similar note, the Federal Constitttional Court held that the requirement to bury the ashes of the dead in a cemetery and the obligation to attend traffic school did not infringe dignity. Examples listed by Klein "Human Dignity in German Law" 151.

3 *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 1 SA 1 (CC). A comparable case presented in *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC), in which the sixty-nine applicants and South African citizens were detained in Zimbabwe on a variety of charges. The applicants initially instituted action in the High Court in Pretoria seeking orders compelling the government to make certain representations on their behalf to the governments of Zimbabwe and Equatorial Guinea, where they were to stand trial, and to take steps to ensure that their rights to dignity, freedom and security of the person, and fair conditions of detention and trial were at all times respected and protected in Zimbabwe and Equatorial Guinea. The application was dismissed because the Court held that the government was in compliance with their international and national obligations. Also see fn 187 below.

to dignity and a fair trial.[4] In another matter, the appellants alleged that their rights to dignity and equality were infringed if a duty to support emanating from permanent life partnerships is not recognised, as opposed to such a duty recognised in formal marriages.[5] Lastly, a High Court judge *mero motu* invoked dignity's being violated by the crime of bestiality, because it is so "so repugnant to and in conflict with human dignity."[6]

In current law, dignity's greatest danger is trivialisation, over-use and usage out of context. Applying a constitutional model or theory of interpretation that incorporates the three essential elements of dignity[7] as criteria or standards for establishing circumstances under which dignity could be infringed would preclude decisions by judges based on their personal value-judgments and/or derived from a general rule of dignity. The model of interpretation proposed here is rooted in Alexys' theory of constitutional rights, which proposes that constitutional norms consist of a set of rules and principles. The distinction between rules and principles is of significance here, because rules cannot be limited, whilst principles can be limited in terms of proportionality analysis. In dignitarian terms, it has to be ascertained which of dignity's essential elements function in the category of rules or principles, or both, in order to establish 1) whether dignity has been infringed and 2) the circumstances under which dignity can be limited. The end-result of this process will prevent the incorrect application of inherent dignity as a legal concept. To this end, the forms and functions of dignity in German and South African law will be investigated.

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4 *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 1 SA 1 (CC) para 53.

5 *Paixão v Road Accident Fund* 2012 1 SCA 130 para 17.

6 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 6 BCLR 726 (W) 751B-D.

7 These elements are the inherent dignity paradigm and the injunctions that the state and third persons must respect and protect inherent dignity. Also see the discussion in chapter 3.4 above.

It is compelling to note that the first element of dignity functions as a rule in German law, because article 1(1) of the *Basic Law* specifically posits that dignity is inviolable. Section 10 of the South African *Constitution,* however, provides that "everybody has inherent dignity." It needs to be considered whether this component functions as a rule, like its German counterpart and based on Kant's ethical theory that dignity has no price, notwithstanding the South African judiciary's treating it as a constitutional right, which is consequently capable of limitation. The second and third components of these constitutions, being the second and third elements of dignity, are both treated as principles that can be limited under proportionality analysis.

5.2 The role of human dignity in German law

5.2.1 Background

The three essential elements of dignity, which manifest in the unique two-fold formulation by article 1(1) of the *Basic Law* that man has simultaneous and inviolable dignity *per se*,[8] acted as the impetus for the post-war rights-protecting paradigm that the state exists for the benefit of humanity and not *vice versa.* The categorical imperative enacted in the phrase "human dignity shall be inviolable"[9] is based upon Kant's moral philosophy that human worth has no price and cannot be traded off against anything in the

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8 See the discussion of the manifestation of dignity's three elements in German law in chapter 3.4.1 - 3.4.3 above. Unger advises us that, in relation to many other post-war constitutions, only the Finnish and Polish constitutions and to a certain extent the Hungarian constitution (para 1 of article 54) contain a similar provision that human dignity is inviolable. In addition, the German concept of the inviolability as envisioned in article 1(1) of the *Basic Law* is enacted as such in article 1 of the *Charter of Fundamental Rights of the European Union* ("Human dignity is inviolable. It must be respected and protected.") See "'Human Dignity Shall Be Inviolable' - Dealing with a Constitutional Taboo" 191. In addition, section 8(1) of the *Constitution of the Republic of Namibia*, 1990 stipulates that: "The dignity of all persons shall be inviolable."

9 Translation of the *Basic Law* provided by Professors Christian Tomuschat and David P Currie, available at www.gesetze-im-internet.de/englisch_gg/.

world.[10] This claim holds that dignity cannot be waived or diminished under any circumstances.[11] It functions as the highest objective constitutional value,[12] a so-called *dignitas absoluta,* which cannot be encroached upon and is adjudicated by the Federal Constitutional Court as a subjective legal right, because it imposes duties on the state.[13] The second component of article 1(1), namely

> To respect and protect the dignity of man shall be the duty of all state authority

fuses law with morality as a result of its connection to state duties. Dignity's inviolable and eternal status is also evidenced by the embargo against the amendment of article 1(1) in the *Basic Law*.[14] Such an amendment can be effected only by the enactment of a new constitution in the case of a revolution.[15]

Human dignity functions as both the highest constitutional value[16] and a right[17] in German law. As such, it displays a positive and a negative dimension, which manifests in the duty to respect and the duty to protect

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10 See discussion in chapter 3.4.1 above.
11 Klein "Human Dignity in German Law" 148. Also see the discussion regarding the *Peep Show* and *Dwarf Tossing* judgments in chapter 3.4.1 as well as footnotes 150 and 152 in chapter 3 above.
12 See the discussion and footnotes 372 and 376-377 in chapter 3.6.1.
13 Klein "Human Dignity in German Law" 147; Benda "The Protection of Human Dignity (Article 1 of the Basic Law)" 36. Also see section 4.4.2 above regarding the Federal Constitutional Court's decision in the *Aviation Security Case* by applying the *Objektformel* as an example of the Kantian model of the imperative not to treat human beings as objects for the purposes of state functioning. Notwithstanding the Court's application of article 1(1) as a fundamental right, academics such as Dreier and Dűrig view dignity as a constitutional value only and not as a subjective right, based on the textual provisions of article 1(3) of the *Basic Law,* which posits that "the following basic rights shall bind the legislature, the executive and the judiciary." See Barak *Human Dignity The Constitutional Value and the Constitutional Right* 233; Klein "Human Dignity in German Law" 147; Benda "The Protection of Human Dignity (Article 1 of the Basic Law)" 35; 36; Botha 2009 *SLR* 180.
14 Articles 19(2) and 79(3) of the *Basic Law.*
15 Benda "The Protection of Human Dignity (Article 1 of the Basic Law)" 36.
16 See the discussion in chapter 3.6.1 and fn 372 above.
17 See the discussion in chapter 3.6.2.3 above.

respectively.[18] This classification corresponds with the idea of objective (positive) and subjective (negative) rights. The objective dimension of rights requires that the state creates conditions so that the exercising of rights can be realised, and centres upon respect for and protection of human dignity.[19] It embodies the value-ordered nature of the German legal system.[20] In terms of the subjective ordering of values, the exercising of individual rights is defensive, as the scope of personal freedoms is delimited, beyond governmental control.[21] In the context of human dignity, the subjective dimension of rights requires corresponding duties in the Kantian sense - in order to claim dignity, other human beings' dignity must be respected.[22]

The imperative in article 1(2) to respect and protect applies solely to dignity and not to the balance of the constitutional rights listed in the *Basic Law.*[23] The Federal Constitutional Court established the positive dimension of dignity through the process of interpretation,[24] whilst the negative dimension is expressed via the state's duty to protect dignity as well as the fundamental rights in general through civil and criminal law,[25] which is equally applicable to the state and third parties.[26] The scope of dignity as a right is narrower than dignity as a value. As a right it refers to the *Objektformel,* which is rooted in the first essential element of dignity, whilst the value comprises all aspects of dignity, inclusive of the three essential elements.[27] Dignity displays a certain fixed content in German

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18 Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 372; Barak *Human Dignity The Constitutional Value and the Constitutional Right* 237. Also see fn 226 in chapter 3 above.
19 Eberle 1997 *ULR* 968.
20 Eberle 1997 *ULR* 968.
21 Eberle 1997 *ULR* 969.
22 See the discussion in chapter 3.4.2.
23 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 238.
24 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 239.
25 For example, the legalisation of abortion under certain circumstances, and the prohibition of corporeal punishment.
26 Also see fn 383 in chapter 3 above.
27 See the discussion in chapter 3.6.2.3 as well as fn 515 in chapter 3 above.

law, which manifests in the three essential elements, namely the inherent dignity paradigm, the instruction to protect and respect dignity, and the state's duty to realise dignity. The value of dignity refers to specific recognition of the equality of mankind as guaranteed by article 3 of the *Basic Law,*[28] which is encapsulated in the first essential element, through the protection of article 1(1). By applying the three essential elements of dignity as the basis, the features and functions of dignity will next be discussed in the following categories:

5.2.2 Human dignity as the basis of constitutional rights

The Parliamentary Council, drafters of the *Basic Law* in 1949, intended to make the classical human rights directly applicable and binding in German law; therefore the constitutional commitment to human rights follows textually after the *a priori* guarantee that dignity is not subject to legal regulation.[29] Article 1(2) of the *Basic Law* connects human dignity with human rights:

> The German people *therefore* acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (own emphasis)

The value of human dignity is regarded as the basis of the enumerated human rights in articles 2 – 19 of the *Basic Law,* to the extent that each constitutional right contains an inviolable dignity core.[30] For example, the Federal Constitutional Court underlined the "absolutely protected core area of private autonomy"[31] as the protection of human dignity:

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28 Eberle 1997 *ULR* 975.

29 Enders 2010 *RECHTD* 2; Eberle 1997 *ULR* 971. Also see the discussion in chapter 2.14.4 above.

30 Unger "'Human Dignity Shall Be Inviolable' - Dealing with a Constitutional Taboo" 194 fn 33.

31 BVerfGE 34, 238 at 245; as quoted by Teifke "Human Dignity as an 'Absolute Principle'?" 99. On a similar topic, the Federal Constitutional Court held in BVerfGE 109, 279 at 313 that the acoustic surveillance of private homes, even if it could be justified by its leading to a possible successful criminal prosecution, interferes with

> Even outweighing principles of general interest cannot justify an infringement of the absolutely protected core area of private self-determination; balancing in accordance with the principle of proportionality does not take place.[32]

The basic rights serve to respect and protect dignity as the second and third essential elements. As Klein[33] states: "all basic rights are in the service of human dignity." In Federal Constitutional CourtE 7, 198 the Federal Constitutional Court explained dignity's connection with the catalogue of constitutional rights, which expresses a system of values, as follows:

> this has its centrepoint in the freely developing human personality and its dignity in the social community. [34]

Therefore dignity as a value functions in an auxiliary way to aid in the interpretation of these rights, helping to formulate their meaning, scope and restrictions.[35]

In terms of article 1(2), the constitutional value of human dignity confers rights and duties on the individual, as Enders[36] claims, including the "right to have rights:"

> The individual as such – irrespective of governmental organisation – is subject of rights and duties, and precisely this constitutes his or her dignity. So, the constitutional principle of human dignity recognises the individual as a moral person and postulates his or her original *right to have rights.* Hence, if the individual was not subject of specific rights that he or she owned without presuppositions, he or she would be a mere object of the arbitrariness of others.

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private autonomy and therefore violates dignity. Thus a process of the balancing of conflicting interests (the right to privacy, which is rooted in human dignity, against the efficiency of criminal prosecution) was not employed by the Court. See Unger "'Human Dignity Shall Be Inviolable' - Dealing with a Constitutional Taboo" 194.

32 BVerfGE 34, 238 at 245, as quoted by Teifke "Human Dignity as an 'Absolute Principle'?" 99.

33 Klein "Human Dignity in German Law" 152.

34 At 205, as quoted by Alexy *A Theory of Constitutional Rights* 339.

35 Klein "Human Dignity in German Law" 152.

36 Enders 2010 *RECHTD* 3.

As a right to have rights, dignity connects with the right to the free development of the personality, which operates as an all-encompassing right in German law, as enshrined in article 2(1) of the *Basic Law*:

> Every person shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

The Court developed the right to personality to include a guarantee of privacy as an independent right in tandem with article 1(1).[37] This right likewise functions in a unique way in German law, because it serves to protect all rights, inclusive of unenumerated constitutional rights, which are central to the development of an individual's personality.[38] It can be argued that the scope of the right to personality is wide enough to cover all areas of protection; therefore it should not be necessary to rely on the right to dignity. For example, Unger[39] suggests that the Federal Constitutional Court could have adjudicated the case regarding preventative detention for a dangerous criminal to secure public safety under the second component of article 2(2),[40] rather than to rely on an additional so-called binary aspect as to whether the criminal is made an object of the state or not. In addition, he argues that the Federal Constitutional Court could have resorted to the first component of article 2(2)[41] in the *Aviation Security*

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37 Klein "Human Dignity in German Law" 155.

38 The Court held in the *Census Act case* (BVerfGE 65,1 (1903) at 41) that "The focal point of order established by the Basic Law is the value and dignity of the individual, who functions as a member of a free society with free self-determination. The general personality right, as laid down in art 2(1) in tandem with art 1(1) serves to protect these values – along with other, more specific guarantees of freedom." See Klein "Human Dignity in German Law" 153. The right to personality functions as a "basket right" in German law to encompass unenumerated constitutional rights – also see the discussion in chapter 3.6.2.3 and fn 516 in chapter 3 above.

39 "'Human Dignity Shall Be Inviolable' - Dealing with a Constitutional Taboo" 198, referring to BVerfGE 109, 133 at 151 and BVerfGE 117, 17 at 89.

40 "Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law."

41 "Every person shall have the right to life and physical integrity."

case.[42] In doing so, the scope of dignity is narrowed to a minimum set of cases in accordance with its understanding of inviolability as an answer to the violations of dignity under National-Socialism.[43]

However, the connection between dignity and the right to personality is rooted in the subjective and objective dimensions of dignity, which radiate through the entire legal system. As the Court held in Federal Constitutional CourtE 34, 238:

> in determining the content and extent of the constitutional right found in article 2(1) Basic Law, one must have regard to the fact that according to the constitutional rights norm of article 1(1) Basic Law, human dignity is inviolable, and demands respect and protection from all state power.[44]

Although the Federal Constitutional Court characterises dignity as a constitutional right (contrary to the original intent of the framers,)[45] it has done so only in *obiter* remarks and always in instances where dignity overlaps with other constitutional rights.[46] Dignity overlaps with the constitutional rights as relative rights enumerated in articles 2 – 17 of the *Basic Law,* functioning as an "absolute barrier"[47] against interference, to prevent reducing the individual to an object. Dignity as the basis of constitutional rights, outside the narrow scope and independent application of the right, does not consist of its own "normative zone" and

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42 Unger "'Human Dignity Shall Be Inviolable' - Dealing with a Constitutional Taboo" 199.

43 Unger "'Human Dignity Shall Be Inviolable' - Dealing with a Constitutional Taboo" 199.

44 At 245, as quoted by Alexy *A Theory of Constitutional Rights* 232.

45 See the discussion in chapter 2.14 above.

46 Enders 2010 *RECHTD* 3; Barak *Human Dignity The Constitutional Value and the Constitutional Right* 233; McCrudden 2008 *EJIL* 681. Benda explains that the reasoning behind the Federal Constitutional Court's application of dignity as a right rests on a very practical application: although the Parliamentary Council, drafters of the *Basic Law,* referred to the dignity clauses in the *Universal Declaration,* it also recognised the differences between an international law declaration and a constitutional provision. The first is at most a general principle, or an abstract moral idea, whereas the human dignity provision in the *Basic Law* functions as a legal guarantee, a so-called "supreme constitutional principle" and a fundamental right, dealing with human beings concretively and not in the abstract. See "The Protection of Human Dignity (Article 1 of the Basic Law)" 36.

47 Enders 2010 *RECHTD* 5.

exclusive area, because it always connects with the other constitutional rights.[48] However, the unique character of dignity causes unconstitutional limitations on constitutional rights in so far as a violation of dignity is effected by such a limitation.[49] This means that if any of the relative rights are exercised to such an extent that this infringes upon dignity, the subsequent limitation of the relative right, although proportional, would be unconstitutional pursuant to article 1. Even if dignity features on both sides of a dispute (such as in the abortion cases,) beyond the common core, so to speak, no balancing is carried out as the absolute character of dignity has to be preserved.[50]

5.2.3 Human dignity as an absolute and supreme value and right

Article 1(1) of the *Basic Law* concretises human dignity as an absolute constitutional value and right, ranking the highest in the hierarchy of constitutional rights that is neither subject to balancing nor to amendment.[51] However, the duty to respect and protect dignity as the second and third elements of the concept of dignity has not been developed as a self-standing subjective right (subjective rights refer to

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48 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 235.

49 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 235; Unger "'Human Dignity Shall Be Inviolable' - Dealing with a Constitutional Taboo" 194.

50 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 229. Botha, however, holds the opposite view: "In cases where dignity conflicts with dignity, a court has no choice but to engage in balancing." He states that in the abortion cases the Court weighed the life and dignity of the foetus against the rights to self-determination and dignity of the mother. See 2009 *SLR* 194. It can be argued that Botha's understanding in this respect is debatable, as the Court held that a pregnant mother who must take part in an obligatory counselling process is not placed in the position of an object because she is treated as a partner, thereby recognizing her autonomy and responsibility. See BVerfGE 88, 203 at 281 (1993.)

51 Article 1(1) of the *Basic Law* does not establish a hierarchy of fundamental rights, each with an impenetrable core of dignity that would preclude balancing against other interests or prevent these rights from constitutional amendment. According to Klein, the conceptual relationship of fundamental rights and article 1 does not provide a sufficient basis for a conclusion to the contrary. See "Human Dignity in German Law" 153.

both rules of law and the rights created by these.)[52] Therefore the claim for respect, which results from the first element of dignity, is voidable.[53] Any legislation that infringes the first element of human dignity is *prima facie* unconstitutional regardless of the interest or right protected by such infringement. In cases of infringement of the first element, dignity is not weighed against any other right and subsequently the second stage of enquiry is not applied, contrary to the dogma of proportionality in other legal systems, which characterizes human rights adjudication:

> human dignity as the basis of human rights cannot be weighed against any single fundamental right.[54]

In this respect Enders suggests that the absolute nature of dignity renders it "unmanageable" as a constitutional right.[55] This is because the relationship between dignity and other constitutional rights causes interpretational difficulties as a result of the structure of dignity in the *Basic Law*.[56] The "operating mode of human dignity" fundamentally differs from that of constitutional rights, as these rights are subject to balancing.[57] In order to lend flexibility of interpretation to the balance of the constitutional rights, it is necessary to interpret dignity narrowly and restrict its

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52 45 BVerfGE 187 (1977) - the *Life Imprisonment* case; 39 BVerfGE 1 (1975) – the *Abortion I* case; 88BVerfGE 203 (1993) – the *Abortion II* case and Lembcke "Human Dignity – A Constituent and Constitutional Principle" 228.

53 Lembcke "Human Dignity – A Constituent and Constitutional Principle" 228. This is apparently what the Editorial Committee had in mind when they drafted Article 1 of the *Basic Law.* See Ackermann *Human Dignity: Lodestar for Equality in South Africa* 124.

54 BVerfGE 107, 275 at 284, as quoted by Unger '"Human Dignity Shall Be Inviolable' - Dealing with a Constitutional Taboo" 194 fn 37.

55 Enders 2010 *RECHTD* 3. According to Enders, human dignity is not to be regarded as a basic right, but serves a "foundational function" by endowing legal subjectivity to human beings by means of a "right to have rights."

56 The absoluteness of any principle in law is challenged as circumstances may arise in which an absolute principle may be defeated. See Habermas 2010 *Metaphilosophy* 475.

57 Unger '"Human Dignity Shall Be Inviolable' - Dealing with a Constitutional Taboo" 193.

applicability to the most essential features of human flourishing, such as life[58] and life imprisonment.[59]

The additional feature of dignity, functioning simultaneously as the basis of constitutional rights, concretely results in a narrow core of these rights, which is immune from limitation. Dürig, the well-known German academic, first developed the idea of this double function of dignity, which derives from articles 1(1) and 2(1) and causes dignity not to be balanced against other rights.[60] Regarding dignity as an absolute right, Teifke[61] explains that "there is a relationship of exclusiveness between absoluteness and balancing." From the perspective of its absolute guarantee as a constitutional value and right, it has to be ascertained whether dignity functions as a constitutional rule or principle or both in German law, in the light of the theoretical premise that rules cannot be balanced but are applied through the subsumption of other constitutional rights, and principles are applied through a process of balancing.[62]

5.2.4 Dignity: a rule or a principle?

At this point the distinction between principles and rules as constitutional norms becomes relevant, as developed by Dworkin and further expounded and applied to the dignity guarantee in German law by Alexy.[63] Alexy[64] argues that principles feature as "optimization requirements" and lack the means to self-execute in the light of competing principles and factual

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58 Also see fn 223 in chapter 3 above.
59 Also see the discussion in chapter 3.6.2.3 and fn 223 in chapter 3 above. For further examples where dignity functions independently of other constitutional rights, see Klein "Human Dignity in German Law" 157.
60 Ackermann *Human Dignity: Lodestar for Equality in South Africa* 122.
61 Teifke "Human Dignity as an 'Absolute Principle'?" 94.
62 See the discussion in chapter 3.6.1 above.
63 Also see Ackermann *Human Dignity: Lodestar for Equality in South Africa* 122-123 and Teifke "Human Dignity as an 'Absolute Principle'?" 93-103.
64 Alexy *A Theory of Constitutional Rights* 47.

impossibilities, whilst rules are "definitive requirements" that can either be fulfilled or not within the perspective of its legal and factual possibilities:[65]

> This means that the distinction between rules and principles is a qualitative one and not one of degree.[66]

As rules have absolute validity, they do not assume a balancing relationship and can be infringed directly, as a result of which no balancing between principles is applied.[67] According to Alexy,[68] one could argue that the *Basic Law* contains at least one principle which portrays the character of absoluteness as enacted by the first component of article 1(1) of the *Basic Law* ("human dignity is inviolable.") However, he explains that this impression of absoluteness is derived not from the premise of the principle itself as being absolute, but because dignity here is treated partly as a rule and partly as a principle,[69] coupled with the fact that the realisation of dignity is dependent on a very large set of conditions, as well as the certainty that the claim of dignity, when satisfied, will prevail over other principles.[70] The realisation of dignity as an "optimizing requirement" indicates a relationship of preference, and the eventual balancing of dignity against other interests.[71] Alexy[72] explains that

> The area defined by such conditions, that is, the area protected by the rules corresponding to these conditions, is what the Federal Constitutional Court calls, the absolutely protected area of private autonomy.'

To determine the scope of the rule of dignity, the principle of dignity is to be balanced against other principles.[73] Alexy[74] argues that the preference

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65 Alexy *A Theory of Constitutional Rights* 57.
66 Alexy *A Theory of Constitutional Rights* 47.
67 Alexy *A Theory of Constitutional Rights* 47.
68 Alexy *A Theory of Constitutional Rights* 67.
69 Teifke explains that constitutional rights provisions can issue a principle and a rule, resulting in a general double-aspect of these provisions, when it results in a decision based on the relative outcome of competing principles. See "Human Dignity as an 'Absolute Principle'?" 95.
70 Alexy *A Theory of Constitutional Rights* 63.
71 Alexy *A Theory of Constitutional Rights* 63.
72 Alexy *A Theory of Constitutional Rights* 63.
73 Teifke "Human Dignity as an 'Absolute Principle'?" 96.

relationship between the principle of dignity and other principles competing with it will establish the parameters of the rule of human dignity. He refers to the *Life Imprisonment*[75] case in which the Court weighed the state's duty to protect society upon the release of a convicted murderer against the right to dignity of the prisoner.[76] In this instance, the protection of society prevailed over the principle of human dignity. In effect, the Court acknowledged that the "claim for respect" of dignity is voidable in the perspective of the inviolable rule of dignity:

> human dignity is also not infringed if the completion of the sentence is rendered necessary by the continued danger represented by the prisoner, and if on this basis early release is inappropriate.[77]

As a result, one can argue that Alexy's distinction between the rule of dignity and the principle of dignity accords with the Federal Constitutional Court's application of the first element of dignity as an absolute rule and the second and third elements as voidable principles. It follows that, when the Court applies a severance of the three elements of dignity, as in the *Life Imprisonment* and in the *Abortion* cases,[78] the principle of proportionality could be implemented to balance the different interests against each other.

Alexy[79] concludes that the principle of dignity is thus not absolute, as dignity can in concrete cases be realised to a certain extent only, *ex post facto,* by identifying instances of degradation and infringement. He quotes from the *Telephone Tapping*[80] case to illustrate this point:

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74 Alexy *A Theory of Constitutional Rights* 64; Teifke "Human Dignity as an 'Absolute Principle'?" 96.
75 BVerfGE 45, 187 at 242.
76 Alexy *A Theory of Constitutional Rights* 64.
77 Alexy *A Theory of Constitutional Rights* 64, quoting from BVerfGE 45, 187 (242).
78 See fn 247 in chapter 4 above.
79 Alexy *A Theory of Constitutional Rights* 64.
80 This case involved a constitutional complaint against the interception of private communications through the tapping of telephones, resulting from a constitutional amendment regarding restrictions on the privacy of correspondence, post and

> as regards the principle of the inviolability of human dignity laid down in article 1 Basic Law… it all depends on establishing the circumstances under which human dignity might be violated. Clearly this cannot be stated in general terms, but only in light of the concrete case.[81]

However, the rule of dignity is absolute, because dignity, as a result of its semantic and open-ended nature, will always be infringed when dignity as a principle (after balancing) takes precedence.[82] Alexy[83] explains that

> if human dignity takes *precedence* at the level of the principle, then it has been *breached* at the level of the rule.

Möller[84] suggests that Alexy's methodology in establishing human dignity as a principle is inconsistent, because only rules display an absolute character and are not to be subjected to proportionality; therefore dignity cannot be a principle in the Alexian sense. According to Möller, this methodology implies that a court has to engage in an initial process of balancing to ascertain whether an infringement upon the rule of dignity is caused, because of its open-ended formulation in the *Basic Law.* He further argues that developments pertaining to the Court's jurisprudence since Alexy's analysis of the *Telephone Tapping* case, which was adjudicated in 1985, indicate limitations in his approach.[85] However, Möller's criticism is to be rejected because Alexy's claim is premised on the idea that the rule of dignity can be infringed directly, in which instance a process of the balancing of principles is unnecessary. The Court's decision in the *Aviation Security*[86] case points affirmatively in this direction,

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telecommunications. Legislation authorising such restrictions provides that the person so affected need not to be informed of the restriction. See BVerfGE 30, 1 (1975.) The Court applied the object formulation to establish that the complainant's dignity was not infringed because state security demands that burdens can be imposed on citizens pursuant to the obligation to protect the survival of the democratic order. Also see fn 104 below.

81 Alexy *A Theory of Constitutional Rights* 63.

82 Alexy *A Theory of Constitutional Rights* 64. For criticism of this approach, see Ackermann *Human Dignity: Lodestar to Equality in South Africa* 123.

83 *A Theory of Constitutional Rights* 64.

84 Möller 2007 *IJCL* 465.

85 Möller 2007 *IJCL* 466.

86 115 BVerfGE 118.

as no balancing was applied because the Court found that the impugned provision in the *Aviation Security Act*[87] *prima facie* infringed the inherent and inviolable dignity of the passengers. Therefore it was not necessary to balance the dignity of the passengers with the right to life of innocent victims under a possible terrorist attack.[88] Alexy's approach explains why dignity can compete with dignity at the level of principle, and can take preference in one instance over another. Möller[89] criticises this application, because in these instances the Court instead applies balancing of the other constitutional rights at stake.

5.2.5 The Objektformel

The formulation of dignity as a concept that counterbalances the objectification and degradation of a human being for state or third party purposes in an effort to define dignity in a negative way is attributed to Dűrig almost sixty-three years ago.[90] Dűrig defined dignity in the perspective of the prohibition of the degradation and treatment of a person as an object, without having subjective identity, thus negating inherent dignity as the first essential element:

> naturally one should not claim to interpret the principle of human dignity as positively binding; one can only say what infringes it.[91]

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87 *Luftsicherheitsgesetz,* enacted by the Bundestag in June 2004.
88 Also see Möller 2007 *IJCL* 466.
89 Möller 2007 *IJCL* 466.
90 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 235; Benda "The Protection of Human Dignity (Article 1 of the Basic Law)" 35; Botha 2009 *SLR* 183; Mahlman "Human Dignity and Autonomy in Modern Constitutional Orders" 379 fn 54. Mahlman refers to Dűrig in *Die Menschenauffassung des Grundgezets* (1952) at 259 as the one who saw that the *Basic Law* does not conceptualise a human being as the mere object of state power. Interestingly, Dűrig denied the subjective right character of human dignity ascribed to by the Federal Constitutional Court. See Benda "The Protection of Human Dignity (Article 1 of the Basic Law)" 35; Barak *Human Dignity The Constitutional Value and the Constitutional Right* 233.
91 As quoted by Kirste "A Legal Concept of Human Dignity as a Foundation of Law" 69.

To illustrate this point, Botha[92] quotes from Dürig with regards to the *Objektformel*:

> Human dignity as such is affected when a concrete human being is reduced to an object, to a mere means, to a dispensable quantity. [Violations of dignity involve] the degradation of the person to a thing, which can, in its entirety, be grasped, disposed of, registered, brainwashed, replaced, used and expelled.

In addition to the examples already discussed,[93] a further example of the application of the *Objektformel* in German law, specifically by the Berlin Land Court, is to be found in the *Honecker* case.[94] Eric Honecker, former head of Communist East Germany, was gravely ill with cancer when he was arrested and held in custody in a hospital prison, pending trial for the killings committed between the East and West German borders. He challenged his prosecution by reason of his illness, claiming that his right to dignity was being infringed upon by any continuation of the trial and detention. The lower courts ruled against him. The Constitutional Court of

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92 Botha 2009 *SLR* 183, quoting from Dürig "Der Grundrechtssatz von der Menschenwűrde" 1956 *AöR 125.* Also see Mathis "Human Dignity as a Two-edged Sword" 138.

93 The *Aviation Security* case in chapter 4.4.3 above and 45 BVerfGE 187 (1977) - the *Life Imprisonment* case, in chapter 3 fn 145. In another matter, the Federal Administrative Court held in the *Laserdrome* case regarding a mock battle game in which "playful killing" was exercised that human dignity was infringed because a player became a fungible object of his co-players. This case was eventually referred to the European Court of Justice to make a finding on the justification of safeguarding public policy by a restriction on the freedom to provide a service, in the framework of the protection of specific fundamental rights guaranteed by Community law. Also see the discussion in chapter 4 fn 142 above regarding the findings of the European Court of Justice pertaining to the different conceptions of dignity of the member states.

94 VerfGH 55/92, as quoted, summarised and discussed by Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 372. This case is comparable to the South African *Stanfield v Minister of Correctional Services* 2004 4 SA 43 (C), in which it was held that terminally ill prisoners have a right to a humane and dignified death outside of prison: Also see fn 116 and 443 in chapter 3 above, as well as the discussion in section 3.3.3 and footnotes 212 and 218-220 below. For further examples of the application of the object formulation, see Bendor and Sachs "Human Dignity as a Constitutional Concept in Germany and Israel" 2009 *IsraelLR* 23 footnotes 74-76 and Klein "Human Dignity in German Law" 150 – 151.

Berlin held on appeal that Honecker's right to respect for his dignity would be infringed by the furtherance of his trial and detention, holding that

> the continued detention in custody of a man suffering from a serious and incurable illness and close to death is incompatible with the requirement that human dignity be respected.

The Court concluded that

> It is contrary to the dignity of a person to make him the mere object of criminal proceedings and of detention in custody.

The object formulation does not provide a comprehensive definition and guarantee of dignity, because every case will still have to be judged on its own merits. As a general formula, it commands a high level of consensus, which can be ambiguous as there are different concepts of the nature of dignity.[95]

Botha[96] argues that the application of the *Objektformel*, despite its intuitive and justifiable appeal, is subject to criticism, especially in instances where dignity collides with autonomy, such as in the abortion[97] and first *Peep Show*[98] judgments. According to Klein,[99] the Court in the second *Peep Show* judgment in 1990 based its reasoning not on human dignity but on a purported moral verdict of the public, as a result of criticisms from the

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95 See footnotes 53 and 54 in chapter 4 above. See also discussion of the *Omega Spielhallen* case in chapter 4 fn 142, in which case the European Court of Justice found that, although the guarantee of dignity is absolute, the conception of human dignity within the member states of the European Union differs.

96 2009 *SLR* 185. With reference to the *Life Imprisonment* case, Botha relates that the object formulation could be inconclusive as the convicted person is reduced to an object of the criminal system in any event, and that it could be argued that the death penalty itself treats a person as an autonomous being who has to take responsibility for his criminal actions. See 2009 *SLR* 185.

97 The Court held in the *Second Abortion* case (BVerfGE 88,203 (1993)) that the expectant mother is not placed in the position of a mere object as the law treats her as a partner, requiring her to take part in a counselling process, to avoid abortion in the first trimester of the pregnancy; therefore the legislation does not denounce her autonomy.

98 BVerfGE 64, 274. Also see discussion in chapter 3 footnotes 147-149 above.

99 "Human Dignity in German Law" 158.

academy against the first judgment (of the Federal Administrative Court), which rooted its reasoning in public morals infused by human dignity:

> Needless to say that in this case, there is no clear judgment from the public. One can only assume that the decision of the Court is based on the moral judgment of the judges themselves.

Botha states that the mere object formula in this instance is inconclusive, as it is utilised to curtail the autonomy of a woman who does not share the same sense of morality as the court holds in order to protect her sphere of personal autonomy based on the court's communitarian concept of duty and personhood.[100] This criticism is not necessarily valid, taking into account the content of the legal idea of personhood in the European post-war rights-protecting paradigm. As has been explained in chapter three, the idea of dignity as "recognition" is relational, because the dignity of the human person is constituted by his relationship to society.[101] Dignity in this respect is socially constructed and can often conflict with inherent dignity. The recognition and protection of dignity here are adjudicated from the perspective of the community or groups and not from that of the individual, which is the reverse of the situation in adjudicating inherent dignity. It may be necessary to protect a person from his own actions to guard against the person's humiliation and degradation, and in doing so relativizing autonomy. In this perspective, dignity limits the value of liberty, expressing the interrelatedness of these concepts.

However, the Federal Constitutional Court's legalisation of Dürig's object formulation underscores the momentousness of Kant's claim that everything in the universe either has a price or is priceless. Something that cannot be replaced by an equivalent item is priceless and has dignity, which has to be respected and protected.[102] Benda[103] observes that Dürig's

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100 Botha 2009 *SLR* 185.
101 Also see discussion in chapter 3.4.2 above.
102 See fn 104 in chapter 3 above.
103 Benda "The Protection of Human Dignity (Article 1 of the Basic Law)" 35.

definition has already been expanded to include the protection of the dignity of mankind as such and not only that of human beings, in order to guard against new threats to human dignity, specifically in the fields of privacy in the electronic age,[104] biotechnology and human genetics.

5.2.6 Human personhood

In German dignitarian law, the nature and content of being a human being is rooted in Kantian moral ethics, which claims that a person is endowed with rationality and self-determination, and that people are morally bound by duties towards one another.[105] The Federal Constitutional Court described man as a "spiritual-moral" being who is entitled to act freely whilst respecting the rights of his fellow man:

> The state in all its forms is obliged to respect and defend it [human dignity]. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself.[106]

This conceptualisation represents three different strands of thought in post-war Germany: Christian natural law, Kantianism, and social democratic thought, which permeates the entire constitutional text.[107] The Court connected its concept of personhood to man's relationship with his

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104 Botha observes that the Federal Constitutional Court diluted the object formulation in the *Telephone Tapping* case: BVerfGE 30,1 (1970). *In* casu, the Court questioned the capacity of the object formulation to determine whether a violation of dignity occurred in a concrete case, holding that a human being is more often than not placed in the position of an object through his relationship to society, whereby his dignity is not *per se* infringed. As an additional criterion, the Court held that only treatment amounting to serious disparagement would be seen as an affront to dignity, which results in undermining a person's subjectivity. See Botha 2009 *SLR* 185-186 and also Alexy's discussion of the dignity rule and principle in section 2.4 and footnotes 77-79 above. Also see Klein "Human Dignity in German Law" 150 and Mathis "Human Dignity as a Two-edged Sword" 139.

105 Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 362; Eberle 1997 *ULR* 973; Fletcher "Human Dignity as a Constitutional Value" 1984 *UWOLR* 179. Also see fn 60 in chapter 3 above.

106 45 BVerfGE 187 at 277 - the *Life Imprisonment* case, as quoted by Eberle 1997 *ULR* 973.

107 Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 361-362. Also see the discussion regarding the history of the enactment of the human dignity clause in chapter 2.14 above.

social community,[108] which also roots in Kantian moral ethics, to the effect that man's focus is now not only on himself but "on the vindication of the dignity of all humankind."[109] As everybody is interconnected with everybody else, individual self-determination is reached through familial relationships, communal participation, communication and civility.[110] According to Eberle, the Court first advanced the concept of the human being as a community-bound person in the *Investment Aid* case:[111]

> The image of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favour of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value.

Restrictions on personal freedoms in favour of one's community do not cause the infringement of dignity, as the person is not seen to be made an object of the state through these actions.[112] Alexy[113] explains that the Court's connection of dignity with the concept of freedom plays a central role in the legal personhood formula, because if freedom were not relevant, the concept of dignity would not come into play. Freedom, as associated with dignity, does not operate without limits, but connects with an "individual related and bound to society."[114] In this way, freedom

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108 Eberle 1997 *ULR* 974; Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 362; Botha 2009 *SLR* 187. Also see the discussion in chapter 3.4.2 and specifically footnotes 232-235 above.

109 Fletcher 1984 *UWOLR* 176. Also see fn 56 in chapter 3 above.

110 Eberle 1997 ULR 974; Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 362.

111 4 BVerfGE 7, 15-16 (1954), as quoted by Eberle 1997 *ULR* 974; Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 362; Botha 2009 *SLR* 187.

112 Klein "Human Dignity in German Law" 150.

113 *A Theory of Constitutional Rights* 234. Alexy quotes from the *Life Imprisonment* case at 227 to explain the existence of limitations on freedom as embodied in the notion of legal personhood: "The individual must submit himself to those limits on his freedom of action which the legislature sets in order to maintain and support social so-existence within the limits of what is generally acceptable according to the relevant subject-matter, and so long as the independence of the person remains guaranteed."

114 *Alexy A Theory of Constitutional Rights* 234.

contributes to the legalisation of human dignity because it represents one aspect of this inclusive principle.[115]

On a similar topic, the Court held in the *Mephisto* case[116] that a human being is "an autonomous person who develops freely within the social community," finding that personal freedom is dependent also on communitarian values; therefore the protection of dignity extends to the dead. *In casu* the adopted son of the deceased Gustaf Grűndgens, a former actor who attained fame and fortune during World War II by winning the favour of Nazi leaders, lodged a constitutional complaint against the re-publishing of Mann's book, claiming that it infringed upon the good name and memory of the actor. Although Mann had used a pseudonym for the main character, the drama was clearly based on the life of Grűndgens. The Federal Constitutional Court found that the deceased actor's dignity, extending to his posthumous reputation, trumped the right to freedom of art and science, reasoning that as time goes by, the obligation to protect diminishes as the memory of the deceased person fades.

In *Mephisto* the Federal Constitutional Court applied article 1 in two stages of analysis. Firstly, it emphasised the connection between dignity and the freedom of art.[117] Secondly, it balanced the deceased's right to dignity (if Grűndgens had been alive his right to personality would have been relevant) against the publisher's right to freedom of art. The Federal Constitutional Court found that Grűndgens' dignity had prevailed in the circumstances, which had been violated.[118] Klein[119] criticises the Court's balancing of dignity with freedom of art and the right to personality, stating

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115 Alexy *A Theory of Constitutional Rights* 234; 246.
116 30 BVerfGE 173, as quoted by Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 358-361.
117 Klein "Human Dignity in German Law"156.
118 Klein "Human Dignity in German Law" 156.
119 "Human Dignity in German Law" 156.

that it should not have applied any balancing, as dignity has absolute effect. However, one can argue that the Court balanced the dignity principle in line with Alexy's model of constitutional rights, because, if dignity takes precedence at the level of the principle, it is always infringed at the level of the rule.[120]

5.2.7 Human dignity and equality

Article 3, being the equality clause in the *Basic Law,* has as underlying theme that dignity lies at the heart of the right to equality, because article 1(1) indirectly posits that human beings are entitled to equal dignity.[121] Dűrig in 1956 developed the idea that the value of dignity is to be utilised as an external (third) referencing point or *tertium comparationis* to establish grounds for unequal treatment:[122]

> The human worth of all human beings is the absolute (and final) *tertium comparationis* of all legal equality assessments, indicating what must be regarded as essentially equal and consequently treated absolutely equally.[123]

The Federal Constitutional Court adopted Dürig's formulation in Federal Constitutional CourtE 82, 60, finding that the state has to guarantee "minimal conditions for a dignified existence" pursuant to its obligations under articles 1(1) and 20(1) – the social state principle.[124] In addition, article 3(3) contains a *numerus clausus* of classifications under which discrimination is prohibited. Ackermann[125] explains that an infringement upon any of the listed grounds would violate dignity; therefore any limitation on dignity would be unconstitutional, based on Dűrig's

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120 Also see fn 83 above.
121 Ackermann *Human Dignity: Lodestar for Equality in South Africa* 215; 231.
122 Ackermann *Human Dignity: Lodestar for Equality in South Africa* 215.
123 "Der Grundrechtssatz von der Menschenwűrde" 1965 *AöR* (81) 117, as quoted and translated by Ackermann *Human Dignity: Lodestar for Equality in South Africa* 216.
124 Ackermann *Human Dignity: Lodestar for Equality in South Africa* 216 - 217.
125 *Human Dignity: Lodestar for Equality in South Africa* 228.

explanation regarding the connection between the prohibitions in article 3(3) and human dignity.

Dürig[126] furthermore argued that articles 1, 2(1) and 3 cannot be separated from one another as they demonstrate a symbiotic relationship of interrelatedness and reciprocity, to constitutionalise a free person's equal dignity in German law, thereby underscoring the principle that the provisions of the *Basic Law* are not to be interpreted in isolation.[127] As such, the values of human dignity, liberty and equality inform the meaning of other constitutional values in the same way that they contribute to the scope and limits of constitutional rights, which are guaranteed by these three values.[128]

5.3 The role of human dignity in South African law

5.3.1 Background

Human dignity displays a dual functionality on multiple sub-levels in South African law. As a value, dignity operates as a universal moral justification for both the *Constitution*[129] and human rights.[130] As a right, dignity displays an operative but relative meaning that is enforceable by the bearers of this right. This distinction is significant because it influences the pragmatic process of balancing dignity as a value with rights and political interests.

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126 Ackermann *Human Dignity: Lodestar for Equality in South Africa* 215.

127 Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 355.

128 Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 355.

129 Section 1(1) of the *Constitution.* In *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) para 143 Ngcobo J held that: "For this reason [rejection of the apartheid past], the Constitution holds human dignity up as not only a human right that is given constitutional recognition, as with freedom of expression, but also as a fundamental value upon which the legitimacy of the sovereign state is based. The Republic was "founded on" the value of human dignity, and failure to uphold that value is both a violation of a constitutional right and a threat to a bedrock principle that underpins the legitimacy of the state." Also see *ANC v Sparrow* (01/16) [2016] ZAEQC 1 (10 June 2016) p 40 para 20.

130 See fn 96 in chapter 3 above. Also see *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions* 2009 1 SA 147 (CC) para 75.

Against this backdrop, the dual nature of constitutional dignity poses both a "challenge and a threat"[131] to jurisprudence, because of the perpetual incongruence between inherent and inalienable dignity and finite rights. The ambiguity of dignity in adjudication presents through redressing injustices of the past, as well as to prevent future violations, so much so that it might obfuscate the boundaries of the principle of the separation of powers[132] or cause a breach of the rule of law.[133]

To ascertain whether the concept of dignity has been adequately developed in South African law it would be prudent to compare the application of the concept with shared values, or ultimately absolutes, in German law. During this process it needs to be established whether dignity operates as a rule or as a principle, based on the premise that section 10 of the *Constitution* is derived from Kant's categorical imperative.

5.3.2 Forms and functions of human dignity

5.3.2.1 Dignity as a value

As was shown in chapter 3.4, the content of dignity as a value is rooted in Kant's categorical imperative, meaning that everybody has inherent dignity, which has to be respected and protected by the state as well as individuals. Dignity's three essential elements constitute its content as a value.[134] In this context it can be argued that dignity as a value functions on three sub-levels in South African law, the first and second functions being ascribed to by the *Constitution*:[135]

(a) a court has to interpret the application of all the rights in the *Bill of Rights*, as well as the principles of positive law, in order to further

131 Weisstub "Honor, Dignity and the Framing of Multiculturalist Values" 263.
132 This situation might present itself in the socio-economic cases.
133 Carozza 2008 *EJIL* 940.
134 Also see the discussion in chapter 3.4 above.
135 Also see the discussion in chapter 3.6.1 above.

human dignity[136] - as such; it acts as the moral basis for and reinforces constitutional rights;[137]

136 Section 39(1) of the *Constitution* (the "interpretation clause.") The value of human dignity is specifically used to reinforce socio-economic rights. See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 10 and Liebenberg 2005 *SAJHR* 1-31. Also see *Minister of Health v Treatment Action Campaign* 2001 1 SA 46 (CC) para 34; *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 76; *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) para 62 and Ackermann *Human Dignity: Lodestar to Equality in South Africa* 98 fn 32. In a private law context Cameron J held in *Brisley v Drotsky* 2004 4 SCA 1 para 7 that: "contractual autonomy informs also the constitutional value of dignity." As a value that informs the interpretation of constitutional rights, the inherent dignity paradigm is utilised to establish if the right to equality has been infringed or not, as the test for unfair discrimination will indicate whether discrimination has the potential to infringe upon inherent human dignity, whether the grounds for discrimination are specified or not. See *Harksen v Lane* 1998 1 SA 300 (CC); *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC); *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC); *City Council of Pretoria v Walker* 1998 2 SA 363 (CC); *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) para 50; *MEC for Education v Pillay* 2008 1 SA 474 (CC) para 150; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 15. Ngcobo J in *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) para 153 held that "… the law of defamation therefore protects the legitimate interests that an individual has in his or her reputation and thereby furthers the value of human dignity…" In *South African Broadcasting Corp v National Director of Public Prosecutions* 2007 1 SA 523 (CC) para 120 the Court stated that: "In an open democracy based on the values of equality, freedom and human dignity, the right of the public to be informed is one of the rights underpinned by the value of human dignity." In *Barnard obo Cakwe v Road Accident Fund* (ZAECPEHC) (unreported) case number 2916/2013 71 of 25 October 2016 para 29 the high court held that: "The provision of an undertaking [in terms of section 17(4)(a) of the *Road Accident Fund Act* 56 of 1996] serves not only to avoid the difficulties of quantification of such claims, it serves also to provide a claimant who will require future treatment or the rendering of services with a measure of security of access to such services that payment of a lump sum award cannot provide. This, in my view, serves to protect the dignity of claimants. That the statutory scheme of compensation for victims of road accidents serves as a form of social security is well recognised. An interpretation of s 17(4) (a) which is consonant with the values of human dignity and equality must be favoured if there is any ambiguity in the proper construction to be placed on the section."

137 *Dawood v Minister of Home Affairs* 2000 3 SA 939 (CC) para 35; *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 36; *MEC for Education v Pillay* 2008 1 SA 474 (CC) para 150. In *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) para 147 Ngcobo J held that: "It [human dignity] permeates every right. The demand for equality and freedom is a demand to be treated with dignity. It is indeed difficult to think of any right in the Bill of Rights which is not informed by human dignity."

(b) any "reasonable and justifiable" limitation of a constitutional right has to be considered within the realm of dignity;[138] and

(c) the courts have ascribed a third function to the value of dignity in matters in which the *Bill of Rights* has no direct application, namely it is to be applied, independent from the rights in the *Bill of Rights,* in the interpretation of a statute or in developing the common and customary law, to promote the spirit, purpose and object of the *Bill of Rights.*[139]

5.3.2.2 Dignity as a right

The content of dignity as a right coincides with the content of the value of dignity.[140] Section 10 of the *Constitution* legalises the three essential elements of dignity as its minimum content.[141] As a right, dignity functions on four sub-levels in South African law:[142]

(a) the "normative zone"[143] of dignity serves as a free-standing right, independent from other constitutional rights and where no specific rights could be identified to protect the value of dignity, such as the right to legal representation[144] and the right to be detained in

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138 Sections 36(1) (the "limitation clause") and 8(3)(b) of the *Constitution.* Also see *De Reuck v Director of Public Prosecutions* 2004 1 SA (CC) 406 paras 62-63; *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 41; *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) para 50.

139 *Daniels v Campbell* 2004 5 SA 331 (CC) para 43; *NK v Minister of Safety and Security* 2005 6 SA 419 (CC) para 17 and *Carmichele v Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 4 SA 938 (CC) para 44; *Fourie v Minister of Home Affairs* 2005 3 SA 429 SCA paras 4; 41; *Metrorail Rail Commuters Action Group v Transnet* 2005 2 SA 359 (CC) para 62; *Du Plessis v Road Accident Fund* 2004 1 SA 359 (CC) para 27. Also see footnotes 425-428 in chapter 3 above.

140 Barak "Human Dignity: The Constitutional Value and the Constitutional Right" 367. Also see fn 521 in chapter 3 above.

141 Also see the discussion in chapter 3.6.2.4.1 above.

142 As mandated by s 10 of the *Constitution.*

143 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 256.

144 In *Advance Mining Hydraulics v Botes* 2000 1 SA 851 (T) para 16.4 E-F Fabricius AJ held that a violation of the common law duty to inform a party to liquidation interrogations of his right to legal representation amounts to "a blatant affront to

conditions consistent with human dignity in terms of section 35(2)(e) of the *Constitution;*[145]

(b) dignity operates as a rights-generating mechanism to derive from the primary dignitary "mother right" certain "daughter rights"[146] not enumerated in the *Constitution*, such as the right to family life,[147] the right to a good name and reputation[148] and the right to mental integrity;[149]

(c) the area in which dignity as a right does most of its work is in the overlapping zone with other constitutional rights, either to[150]

    a. fortify these rights in the complementary overlapping zone,[151] such as the right to life,[152] to protection against cruel and

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such person's right to dignity and this particular right ought to be respected, protected and promoted, certainly within the present context." In *S v Pienaar* 2000 2 SACR 143 (NC) para 10 a magistrate's omission to inform an accused of his right to legal representation in his mother language or that he is entitled to communicate with his legal representative through the medium of a translator resulted in the accused not being represented at trial, as he requested his legal representative, who was only English-speaking, to withdraw from the case. Buys J, on appeal, held that the magistrate's omission constituted an affront to human dignity. In *Robert James Stransham-Ford v Minister of Justice* 2015 4 SA 50 (GP) the Court relied on the right to dignity to found a once-off right to die.

145 *Lee v Minister of Correctional Services* 2013 2 SA 144 para 110; *Stanfield v Minister of Correctional Services* 2004 4 SA 43 (C) para 89.

146 Barak *Human Dignity The Constitutional Value and the Constitutional Right* 259.

147 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 36; *Dladla v City of Johannesburg* 2014 4 SA 51 (GJ) paras 33-38.

148 *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 27; *Le Roux v Dey* 2011 3 SA 274 (CC) para 138.

149 *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC). Also see the discussion in chapter 3.6.2.2.2.1.1 above.

150 Also see the discussion in chapter 3.6.2.2.1 above.

151 Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 271 and cases listed in fn 136. Also see the *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23, where the Court acknowledged the role of human dignity in the context of socio-economic rights: "Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting."

152 *S v Makwanyane* 1995 3 SA 391 (CC); *Mohamed v President of the Republic of South Africa* 2002 3 SA 893 (CC) para 38.

unusual punishment,[153] to equality,[154] to freedom of speech,[155] to freedom and security of the person,[156] to bodily integrity,[157] to privacy,[158] to freedom of religion, belief and opinion,[159] and the socio-economic rights,[160] or

b. it aids in the limitation analysis in cases of conflict or overlap with different aspects of the right to dignity[161] or with other

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153 *Dodo v The State* 2001 3 SA 382 (CC) 423 para 35; *S v Williams* 1995 3 SA 632 (CC) para 55; *Mohamed v President of the Republic of South Africa* 2002 3 SA 893 (CC) para 38; *Minister of Home Affairs v Tsebe* 2012 5 SA 467 (CC) para 76.

154 Such as in cases to protect the equal interests of spouses, life partners or family associations in *Daniels v Campbell* 2004 5 SA 331 (CC); *Du Toit v Minister of Welfare Development* 2003 2 SA 198 (CC) and *Petersen v The Maintenance Officer, Simon's Town* 2004 2 SA 56 (C) or in case of administration of intestate estates in *Moseneke v The Master* 2001 2 SA18 (CC) para 22 and intestate succession in *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC) para 187. In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 30 the Court held that the common law prohibition against sodomy infringes the rights to dignity, equality and privacy and that: "the rights to dignity and equality are closely related, as are the rights of dignity and privacy." The Court in *Gory v Kolver* 2007 4 SA 97 (CC) para 19 held that s 1(1) of the *Intestate Succession Act* 81 of 1987 infringes on the rights to dignity and equality of a partner in a same-sex relationship, because at the time, these partners were not legally entitled to marry by excluding the surviving partners from intestate succession. In the context of affirmative action and restorative equality, Van der Westhuizen J held in *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 176 that "dignity is connected to equality."

155 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) para 24.

156 *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC) para 43; *Mohamed v President of the Republic of South Africa* 2002 3 SA 893 (CC) para 55; *NM v Smith* 2007 5 SA 250 (CC) para 54; *Lawyers for Human Rights v Minister of Home Affairs* 2004 2 SA 125 (CC) para 20; *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 18.

157 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA).

158 *Khumalo v Holomisa* 2002 5 SA 401 (CC) paras 27 and 28; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 30; *S v Jordan* 2002 6 SA 642 (CC) para 81*; NM v Smith* 2007 5 SA 250 (CC) paras 139 and 145.

159 *Christian Education SA v Minister of Education* 2000 4 SA 757 (CC) para 36; *MEC for Education: KZN v Pillay* 2008 1 SA 474 (CC) paras 63-64.

160 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83; *Khosa* v Minister of Social Development 2004 6 SA 505 (CC); *Jaftha v Schoeman* 2005 2 SA 140 (CC) para 21.

161 For example, the dignity of parents in exercising their parental rights might clash with the right to dignity of children in corporal punishment matters, as in *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC). See Barak

constitutional rights;[162] and

c. dignity as a right is employed as a yardstick to rule legislation[163]

Human Dignity: The Constitutional Value and the Constitutional Right 272. In *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC), dignity competed with dignity in an action brought by Barnard against the affirmative action policies of the SAPS, which adversely led to her not being able to receive promotion. Therefore while her dignity was infringed, the policy upheld the restorative and equal dignity injunction in s 9(2) of the *Constitution.* As Van der Westhuizen J held at para 169: "The rights to – and values of – equality and dignity are of course interdependent and complementary. But they may sometimes compete, as far as the scope of their implementation or enforcement is concerned. Aspects of a person's right to dignity may sometimes have to yield to the importance of promoting the full equality our Constitution envisages. Other times, the impact of equality-driven measures with laudable aims may not be justifiable in view of severe damage to human dignity." In the perspective of freedom of speech, the elements of dignity on both sides of the dispute may conflict with each other, as in *NM v Smith* 2007 5 SA 250 (CC) para 145.

162 For example, the right to reputation might conflict with the right to freedom of expression as in *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 27 and the rights to dignity and privacy might clash with the right to freedom of expression and children's rights as in *Le Roux v Dey* 2011 3 SA 274 (CC) paras 31 and 72. The right to artistic freedom collided with children's dignity in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC). Also see Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 272. In *S v Jordan* 2002 6 SA 642 (CC) the right to dignity collided with the rights to privacy and autonomy. Also see the discussion in chapter 3.6.2.2.2.2 above.

163 For example, ss 277 and 294 of the *Criminal Procedure Act* 51 of 1977, pertaining to the death penalty and corporal punishment, was found to be unconstitutional (*S v Williams* 1995 3 SA 632 (CC). In *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) the Court declared s 25(5)(9) of the *Aliens Control Act*, 96 of 1991 invalid, as it discriminated against foreign spouses of SA citizens, who were required to be in possession of temporary residence permits, before they could apply for immigration permits from within SA. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) s 25(5) of the *Aliens Control Act* 96 of 1991 was declared invalid in so far as it denied equal benefits to same-sex spouses, but permitted these benefits to heterosexual spouses. S 23(7)(a) of the *Black Administration Act* 38 of 1927 was declared invalid in *Moseneke v The Master* 2001 2 SA18 (CC) as it stipulated that intestate estates of black persons were to be administered only by magistrates' courts, whereas intestate estates of white persons were solely administered through offices of Masters of the Supreme Court; ss 17(a); 17(c) and 20(1) of the *Child Care Act* 74 of 1983 and s 1(2) of the *Guardianship Act* 192 of 1993 were declared unconstitutional as it precluded long-standing same-sex partners from adopting children and being joint guardians of the minors in *Du Toit v Minister of Welfare Development* 2003 2 SA 198 (CC); s 18(b) of the *Matrimonial Property Act* 88 of 1984, which prohibited spouses married in community of property from claiming patrimonial damages from each other, was declared unconstitutional. In *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC); the words "or spouse" were held to be included in s 30(1) of the *Marriage Act* 25 of 1961, to validate same-sex

and the common[164] and customary law[165] invalid in instances of inconsistency with the *Constitution.*

5.3.2.3 Anomalies in the application of dignity as a value and a right

The concept of dignity is most frequently invoked by the Court as a value, as a result of the injunction in the interpretation clause (dignity's first function as a value.)[166] This relates to dignity's universal and inclusive feature, which stems from Kant's categorical imperative. However, dignity's most controversial aspect lies at the intersection between dignity as a value and dignity as a right (dignity's second function as a value), for it is paradoxical to rely on inherent dignity, which is absolute in the Kantian sense, yet to balance this feature with the relative right to dignity that encompasses inherent dignity, or with any of the other constitutional rights in terms of the limitation clause.[167] One can argue that, notwithstanding the

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marriage in *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC). In *Gory v Kolver* 2007 4 SA 97 (CC) the Court held (on appeal from the high court) that s 1(1) of the *Intestate Succession Act* 81 of 1987 was unconstitutional, as it conferred intestate succession rights only to "spouses." The Court confirmed that the exclusion of same-sex partners was discriminatory and violated the right to dignity, and amende the wording of section 1(1) to include the words "or partner in a permanent same-sex partnership in which the partners have undertaken reciprocial duties of support." Ss 15 and 16 of the *Sexual Offences and Related Matters Amendment Act*, 32 of 2007 were declared invalid in *Teddy Bear Clinic for Abused Children v Minister of Constitutional Development* 2014 2 SA 168 (CC), because it held certain physical contacts between adolescents criminally liable and other conduct not.

164 The common law crime of sodomy was decriminalised in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 SA 1517 (CC) – and so too the prohibition against sodomy s 20A of the *Sexual Offences Act*, 23 of 1957 as well as an item included in Schedule 1 of the *Criminal Procedure Act*, 1977. The common law definition of marriage was amended so as to include a spouse of the same sex in *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC). In *Petersen v The Maintenance Officer, Simon's Town* 2004 2 SA 56 (C) the High Court ruled that the common law rule which differentiates between children born in and out of wedlock to the effect that grandparents have a duty of care to support only children born in wedlock infringes upon the rights to dignity and equality.

165 The rule of male primogeniture in the context of intestate succession was declared invalid in *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC).

166 *Advance Mining Hydraulics (Pty) Ltd v Botes* 2000 1 SA 815 (T).

167 The Court balanced the value of dignity against the right to freedom of expression in *Khumalo v Holomisa* 2002 SA 401 (CC).

establishment of dignity's theoretical underpinnings in *Makwanyane*,[168] the Court's application of the inherent dignity component of section 10 in some cases is inconsistent with true Kantian ethics, which holds that dignity is irreplaceable and priceless.

This paradox came to the fore in *S v Jordan*[169] in which the minority held that the dignity of prostitutes is diminished as a result of their own conduct, contrary to the German application of the mere object formula, which holds that human dignity cannot be waived. Dignity's inclusivity renders potentially inconclusive results when the injunction of the duty to respect and protect dignity as a relative right has to be balanced against inherent dignity.[170] Notwithstanding this paradox, Fabricius J correctly applied dignity's second function as a value in *Robert James Stransham-Ford v Minister of Justice*[171] (hereinafter *Stransham*-Ford) when he found that Kant's categorical imperative implies that a patient's pain and suffering, resulting from the unbearable consequences of a debilitating illness, impair the patient's right to dignity; therefore a (once-off) right to die with dignity coincides with living a dignified life.

In order to resolve the intermittent conflict in balancing dignity as a value with the inherent element of dignity as a right, it needs to be established whether dignity operates as a rule or as a principle or both, along the lines of Alexy's theoretical classification to this effect. These aspects will be discussed in the next section.

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168 1995 3 SA 392 (CC). Also see the discussion in chapter 2.15.6.5 above.
169 2002 6 SA 642 (CC).
170 This anomaly might have been the reason why the Technical Committee which drafted the *Final Constitution* suggested that the right to dignity should be divided into two components, with the first component being inviolable. See footnotes 524-526 in chapter 2.
171 2015 4 SA 50 (GP).

5.3.3 The right to dignity: a rule or a principle?

5.3.3.1 Introduction

As has been discussed in Chapter Three above, section 10 of the *Constitution* comprises of two components: the inherent dignity paradigm and the injunction to respect and protect dignity. Inherent dignity is constituted *a priori* and *ex lege*; a so-to-speak self-executing and absolute constitutional guarantee, which in this sense should be immune to limitation and proportionality in terms of section 36 of the *Constitution.*[172] As the Court held in *The Citizen 1978 (Pty) Ltd v McBride*:[173]

> Thus human dignity is one of the defining features of our constitutional democracy. It underscores the proposition that in us inheres *the inalienable right to be treated with dignity* regardless of our position in society, and to have that right respected and protected.

The inherent feature of dignity resonates with the double function of dignity in German law, being the aspect of absoluteness that constitutes the inner core of constitutional rights and cannot be balanced against other rights in instances of infringement.[174] The second component of section 10 functions as a constitutional right on the same level as the other rights in the *Bill of Rights*, capable of balancing and limitation and regulated by the general limitations clause.

In South African jurisprudence the severability of the inherent dignity paradigm (dignity's first essential element) from the second component of section 10 (dignity's second and third essential elements) and the consequences hereof in the balancing process have not been adequately developed. The inadequate development between dignity's first and

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172 This is contrary to the view of Barak, who argues that "All aspects of the right to human dignity can be limited, and the conditions set out in the limitations clause apply to all of them." See *Human Dignity The Constitutional Value and the Constitutional Right* 247. Also see footnotes 113 and 405-411 in chapter 3 above.

173 2011 4 SA 191 (CC) para 147 (own emphasis.)

174 See fn 51 above.

second and third elements is most probably as a result of the structure of section 10, which leaves the impression that the general limitations clause applies to this section in its totality.[175] It is significant, however, that the Technical Committee mandated with the drafting of the *Final Constitution* initially proposed that the first component of section 10 should be inviolable and illimitable, although the Constitutional Assembly subsequently did not consent to this formulation.[176] One could only speculate as to whether the Technical Committee foresaw that the application of the so-called violable first element of dignity, which in fact is inviolable, would pose interpretational problems. The courts conflate the two components in some instances, which results in interpretational difficulties when dignity as a value intersects with dignity as a right: on the one hand the Court acknowledges inherent dignity,[177] but on the other hand it has held that it is not absolute and can be limited:

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175 In states of emergency, the totality of s 10 of the *Constitution* is non-derogable in terms of s 37 of the *Constitution.*

176 See footnotes 524-526 in chapter 2 above.

177 See the discussion in chapter 5.3.2 above. Also see *S v Makwanyane* 1995 3 SA 391 (CC) para 326: "Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern"; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 54: "The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity"; *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 31: "In our view unfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity"; *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 50: "It [discrimination] denied to gays and lesbians that which was foundational to our Constitution and the concepts of equality and dignity, which at that point was closely intertwined, namely that all persons have the same inherent worth and dignity, whatever their other differences may be." Compare also the Court's *dictum* in *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 43: "In that regard, there can be no doubt that persons in public office have a diminished right to privacy, though of course their right to dignity persists. It will also have regard to the crucial role played by the press in fostering a transparent and open democracy. The defence of reasonable publication avoids therefore a winner-takes-all result and establishes a proper balance between freedom of expression and the value of human dignity. Moreover, the defence of

> The rights entrenched in the Bill of Rights include equality, dignity and various other human rights and freedoms. These rights give effect to the founding values and must be construed consistently with them. They are, however, not absolute and in principle are subject to limitation in terms of section 36(1) of the Constitution…[178]

5.3.3.2 Features of constitutional rules and principles

Against this backdrop, one can argue that the structure of section 10 incorporates two human dignity norms, namely dignity-as-a-rule ("everyone has inherent human dignity" as the first essential element) and dignity-as-a-principle ("the right to have their dignity respected and protected" as the second and third elements.) As described in chapter 4.3.4 and section 5.2.4 above, Alexy[179] explains that rules have absolute validity (save when limited by an exception clause) and are mutually exclusive, whereas principles are norms that can be classified as "optimizing requirements" (as opposed to "maximization requirements")[180] whose realisation is restricted by neutralising rules and principles; thus they function concurrently. The main purpose of rules is to constitute and organize legislation, adjudication and administration, and their central theme is empowerment.[181] Principles are realised to the greatest extent possible, with varying degrees and within factual and legal possibilities; whereas rules can be realised or not, containing "fixed points" within their factual and legal possibilities.[182] As Alexy[183] argues: "what separates them is the way the conflict is resolved." Conflicts between rules are resolved

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reasonable publication will encourage editors and journalists to act with due care and respect for the individual interest in human dignity prior to publishing defamatory material, without precluding them from publishing such material when it is reasonable to do so."

178 *Minister of Home Affairs v NICRO* 2005 3 SA 280 (CC) para 23. Also see *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 57: "There is a clear limitation of the right to dignity caused by section 25(9)(b) read with sections 26(3) and (6). Like all constitutional rights, that right is not absolute and may be limited in appropriate cases in terms of section 36(1) of the Constitution."

179 Alexy *A Theory of Constitutional Rights* 47.

180 Alexy *A Theory of Constitutional Rights* 51.

181 Alexy 2003 *RJ* 131.

182 Alexy *A Theory of Constitutional Rights* 48.

183 Alexy *A Theory of Constitutional Rights* 49.

through a process of the subsumption (incorporation) of principles, whilst conflicts between principles are applied through balancing; as a result of which one principle can take preference over another principle that assumes lesser importance.[184]

Alexy[185] argues that principles are accorded equal status in the abstract as a starting point in the balancing process. During this process it will have to be determined which principle, having equal status in the abstract, has the greater weight in the concrete.[186] Preferences between principles as a result of balancing indicate the legal parameters of the principle's scope in a specific factual setting. In dignitarian terms, this means that the second and third elements, which comprise the dignity principle, would not in all instances take preference over competing principles. The state's obligation to respect, promote and fulfil the rights in the *Bill of Rights* in terms of section 7(2) of the *Constitution,* which obligation is intrinsic in every constitutional right, functions as a principle, because this instruction can be obeyed only as far as possible, given its legal and factual possibilities.[187] Therefore the right to have one's dignity respected and protected as guaranteed by section 10 of the *Constitution* will not automatically assume preference in a case of balancing. Another principle

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184 Alexy *A Theory of Constitutional Rights* 48.
185 Alexy *A Theory of Constitutional Rights* 51.
186 Alexy *A Theory of Constitutional Rights* 51.
187 Also see discussion in section 3.4 below regarding non-infringement of dignity when the dignity principle assumes lesser importance during balancing. In *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC), the applicants relied the state's obligation in terms of s 7(2) of the *Constitution* to ensure that their rights entrenched in ss 10;11;12 and 35 are not being infringed, as a result of their detainment in Zimbabwe and having to stand trial in Zimbabwe and Equatorial-Guinee for a variety of offences. The applicants' application was dismissed on the grounds that the government complied with their obligations under international and national law. Also see fn 3 above. Also see the *dictum* of Mogoeng CJ in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* (CC) (unreported) case number CCT 19/16 of 8 November 2016 para 39: "In particular, SARS argues that it is, as an organ of State, obliged by section 7 of the Constitution to protect and promote the rights in the Bill of Rights. Those rights include, in this context, its workers' right to equality or human dignity that racism violates."

could outweigh the dignity principle in terms of its legal and factual possibilities. In this instance, the realisation of one principle limits the legal possibility of satisfying the other. [188]

Theoretically speaking, it would be quite pointless to balance a rule that is absolute, such as inherent dignity, against principles capable of limitations, such as the injunction to respect and protect dignity. Treating inherent dignity as a rule and the duty to respect and protect as a principle could provide a fundamental model for interpretation and principled application of section 10. It would prevent the concept from trivialisation, over-use and usage out of context. In addition, it would satisfy the requirements of the rule of law, which holds that legal decisions are not to be made arbitrarily and must be decided according to substantive, known and general principles of law.

5.3.3.3 Inherent dignity-as-a-rule

In applying Alexy's classification of norms to section 10, it becomes evident that the first essential element of dignity as a legal norm displays the feature of a rule ("everyone has inherent dignity") that cannot be limited, as any limitation would cause a violation. Treating the inherent component of section 10 as a rule coincides with Kant's categorical imperative to the effect that human worth has no price and cannot be traded off against anything in the world.[189] Any limitation and proportionality would offend the categorical imperative. The open-ended semantic structure of the first component of section 10 causes inherent dignity not to be in a relationship of preferences in the case of principles, and thus not subject to limitation. Inherent dignity-as-a-rule applies in an

188 Alexy *A Theory of Constitutional Rights* 51. See also discussion in section 3.3.4 as well as fn 261 below.
189 Also see fn 104 in chapter 3 above.

"all or nothing fashion"[190] and its outcome can always be predicted. It constitutes *the* fixed point within the principle's factual and legal possibilities, for it is theoretically unsound to accord inherent dignity the status of a principle, as it is somewhat of a contradiction to acknowledge and to limit dignity at the same time. This application results in the untenable conclusion of the minority judgment in *S v Jordan*[191] that prostitutes' dignity is diminished as a result of their own conduct, whereas the Court in *Mohamed v President of the Republic of South Africa*[192] cited the *dictum* of the German Administrative Court that

> Human dignity is an objective, indisposible value, the respect of which the individual cannot waive validly.

In addition, Ngcobo CJ referred to the illimitable element of dignity in *The Citizen 1978 (Pty) Ltd v McBride*[193] as an:

> inalienable right to be treated with dignity regardless of our position in society, and to have that right respected and protected.

The above *dicta* are in contradistinction to the *dictum* of Langa DCJ in *Islamic Unity Convention v The Independent Broadcasting Authority*:[194]

> The right [dignity] is accordingly not absolute; it is, like other rights, subject to limitation under section 36(1) of the Constitution.

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190 Term coined by Dworkin in *Taking Rights Seriously* 22. Also see fn 358 in chapter 3 above.

191 2002 6 SA 642 (CC). The minority held at para 74 that: "Our Constitution values human dignity which inheres in various aspects to what it means to be a human being. One of these aspects is the fundamental dignity of the human body, which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body."

192 2002 3 SA 893 (CC) para 62 fn 55.

193 2011 4 SA 191 (CC) para 147. Also see fn 173 above.

194 2002 4 SA 294 (CC) para 28.

Inherent dignity cannot be subject to limitation, because it functions in an "all-or nothing fashion." As Alexy[195] argues:

> Legally speaking, a rule is valid or not. The fact that a rule is valid and applicable to a certain set of facts means that the legal consequence is valid. However one justifies it, the possibility that two mutually incompatible ought-judgments might apply has to be excluded. If the application of two rules result in mutually incompatible outcomes on the facts of any given case, and if an exception cannot be read into one of them, then at least one must be declared invalid.

The distinct feature of dignity-as-a-rule is displayed in matters where preference over other norms is not considered; where the only relevant factor is whether inherent dignity was violated or not.[196] In other words, during proportionality analysis, inherent dignity functions independently from the injunction to respect and to protect dignity. To establish circumstances under which inherent dignity might be infringed, the open-ended semantic nature of dignity-as-a-rule dictates that dignity assumes a negative definition, in accordance with Dűrig's assertion that dignity can be defined only with regard to past violations.[197] It is in this area that the inclusive feature of dignity-as-a-rule can potentially diverge between jurisdictions as a result of differences in their historical context, which lends impetus to the desire to a break away from a destructive past. As Kommers and Miller[198] suggest, a right to die is not likely to be legalised in Germany because of the Nazi killings of thousands of incurably ill people, whereas a once-off right to die was allowed in the South African case of *Stransham-Ford,*[199] based on the judgment that denying it would infringe upon dignity-as-a-rule. In a similar vein, the right to life pertaining to abortion, rooted in the inviolable core of human dignity, ranks higher than the expectant mother's rights to autonomy and bodily integrity in German law than in South African law. In the South African context, one can argue

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195 Alexy *A Theory of Constitutional Rights* 49.
196 Alexy *A Theory of Constitutional Rights* 63.
197 See fn 91 above.
198 *The Constitutional Jurisprudence of the Federal Republic of Germany* 398.
199 2015 4 SA 50 (GP).

that the inherent dignity of a foetus is limited by an exception clause that a foetus is accorded legal personality only from the date of birth and not from the date of conception.[200]

The features of dignity-as-a-rule as described above manifest in the cruel and unusual punishment cases. In *Makwanyane* [201] Chaskalson JP held that the death penalty

> is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.

In a similar vein and with regards to juvenile whipping, Sachs J stated in *S v Lawrence*[202] that:

> Indeed, there is a core to the individual conscience so intrinsic to the dignity of the human personality that it is difficult to imagine any factors whatsoever that could justify it being penetrated by the state.

Fannin J confirmed in *S v Khumalo*[203] that

> I am of the opinion that a whipping is a punishment of a particularly severe kind. It is brutal in its nature and constitutes a severe assault upon not only the person of the recipient but upon his dignity as a human being.

Ackermann J declared in *S v Dodo*[204] that mandatory life sentencing in cases of murder convictions, which inflict disproportional punishment on the convicted, treats the convicted as an object:

> To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they

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200 Section 11 of the *Choice on Termination of Pregnancy Act,* 92 of 1996 stipulates that the word "everyone", which describes the bearers of the right to life, does not include a foetus.
201 1995 3 SA 391 (CC) para 26.
202 1997 4 SA 1176 para 168. Also see fn 83 in chapter 3 above.
203 1990(2) SACR 88 (Tk) para 547E-H.
204 2001 3 SA 382 (CC) para 35. Also see fn 103 in chapter 3 above.

> are creatures with inherent and infinite worth; they ought to be treated as an end in themselves, never merely as means to an end.[205]

With regards to punishment in general, Langa J explained in *S v Williams*[206] that:

> It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that "… even the vilest criminal remains a human being possessed of common human dignity."

Here inherent dignity operates in an "all or nothing fashion" relating to the question whether cruel and unusual punishment infringes inherent dignity. Any purported limitation by principles such as the state's duty to protect society and life causes an infringement upon inherent dignity; therefore the outcome of the rule is always predicted and no balancing against other rights is necessary. The first element of dignity, being inherent dignity, functions as a fixed point between the factual and legal possibilities of realising dignity. In other words, a person's rights can be restricted, but inherent dignity cannot be limited; and at the same time, restrictions on rights that lead to infringements upon inherent dignity are unjustified. Here dignity-as-a-rule is self-executing and functions determinatively – its legality not dependent on supplementary rules and principles. Such an application of inherent dignity coincides with its true meaning in Kantian terms.

Another strand of dignity-as-a-rule came to the fore in *Stransham-Ford,*[207] in which Fabricious J allowed a once-off right to die as a result of the direct infringement of inherent dignity. Fabricius J did not balance the rights to dignity, life, and freedom and security of the person with the state's duty to protect life, as he held that the debilitating *sequelae* of a life-threatening

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205 *S v Dodo* 2001 3 SA 382 (CC) para 35. Also see footnotes 112 and 417 in chapter 3 above.

206 1995 3 SA 632 (CC) para 58, quoting from *Furman v Georgia* 408 US 328 (1972) 273.

207 *Robert James Stransham-Ford v Minister of Justice* 2015 4 SA 50 (GP).

illness *per se* cause a prohibited infringement of inherent human dignity. Here dignity has absolute validity and functions in an "all or nothing fashion," not concurrently with other rules, and its outcome can be predicted in applying the relevant set of facts and law. The injunction to respect and protect dignity has no bearing on the independent functioning of dignity-as-a-rule, because any purported limitation on inherent dignity would violate Kant's categorical imperative. As Fabricius J emphasised:

> Ackermann says that human dignity, besides being a value and a right, is also a categorical imperative. I have approached this application on that basis.[208]

Another strand of dignity-as-a-rule manifests in equality jurisprudence. The dignity-rule is directly infringed as a result of unfair discrimination. This aspect is discussed in section 5.3.5 below. In substantive and procedural criminal law, the infringement of equal dignity and the denial of a right to a fair trial cause other instances of direct infringement of the rule of dignity. These manifestations in criminal law are discussed in section 5.3.7 below.

5.3.3.4 The duty to respect and protect: dignity-as-a-principle

As has been shown in section 5.3.2 above, dignity's most significant role as a right occurs at the intersection with other rights, either to fortify these rights or to resolve matters of conflicting overlap.[209] This function relates to the theory of constitutional rights, which stipulates that these rights can be limited in appropriate circumstances, subject to proportionality analysis. Consequently, it is necessary to establish whether the second and third components of section 10 function as a principle, because conflicts between principles are resolved through a process of balancing, resulting in one or more principles taking preference over the others. It can be

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208 *Robert James Stransham-Ford v Minister of Justice* 2015 4 SA 50 (GP) para 12. Compare also Ackerman J's *dictum* in *S v Dodo* 2001 3 SA 382 (CC) para 35: "The human dignity of all persons is independently recognized as both an attribute and a right in section 10 of the Constitution."

209 See footnotes 151-162 above.

argued that the sub-components contained in section 10 undoubtedly function as a principle, because "the right to have one's dignity respected" (a negative right) and "protected" (a positive right) can in concrete cases be realised only to a greater or lesser degree, irrespective of whether or not a conflict occurs between the two sub-components or other principles. Taking this claim one step further, one can additionally argue that the "right to respect" can be severed from the "right to protect" and that these two sub-components as the second and third essential elements of dignity can separately be balanced against each other, and against other constitutional rights that function as principles. In this state of affairs one principle could outweigh another principle, which effect would not lead to the invalidity of the principle whose scope was being diminished, or to an infringement upon it.

In German law the duty to respect takes priority over the duty to protect, as in *Aviation Security*[210] and in the abortion cases. As a general rule, the state's duty to refrain from interfering with dignity is rooted in the direct infringement of dignity, whereas the obligation to protect dignity emanates from infringement by a third person. When dignity is violated by a third person and not the state, the state assumes a relationship with the victim as well as the offender, through its obligation to protect dignity. In this instance, the state can at most be guilty of an indirect infringement upon dignity, as the violation of dignity does not emanate from state action or inaction.[211] This is not necessarily the case in South Africa, as either of the two components can be accorded more importance than the other or both can play an equally significant role. A situation can even arise where one of the two sub-components is not violated, whilst the other is infringed

210 115 BVerfGE 118. Also see the discussion in chapter 4.4.3 as well as fn 284 in chapter 2 above.

211 Ackermann *Human Dignity: Lodestar to Equality in South Africa* 124. Also see fn 284 in chapter 2 above.

upon in the same set of circumstances.[212] Consequently, as a result of balancing, one of the two sub-components can supersede the other or any other principle, whereby the scope of the lesser principle would be limited. The scope of what is legally possible in realising dignity-as-a-principle is determined by opposing principles and rules. For dignity-as-a-principle (of either one of the two components) to take preference over other principles there should be

> a very large set of conditions of precedence for the principle of human dignity together with a strong degree of certainty that when they are satisfied it takes precedence over other competing principles.[213]

To date, South African jurisprudence does not differentiate between the two sub-components of section 10, nor do the courts engage in balancing between these components as principles, most probably as a result of the injunction in section 7(2) of the *Constitution*, which stipulates that

> the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

Prioritising one of the sub-components of the dignity principle during balancing would allow a judge to establish whether duties imposed on the state to respect basic rights (and to refrain from interference) have preference over the obligation of a third party (as an offender) to uphold dignity, which has to be protected by state measures to a greater or lesser degree. It would also establish a basis upon which to determine whether or not the rule of dignity had been directly infringed.

A comparable situation to the *Aviation Security*[214] case presented itself in *Carmichele v Minister of Safety and Security*[215] (hereinafter *Carmichele*), where the elements to respect and to protect did not function

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212 See the discussion below of *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC); *Stanfield v Minister of Correctional Services* 2004 4 SA 43 (C).
213 Alexy *A Theory of Constitutional Rights* 63.
214 115 BVerfGE 118.
215 2001 4 SA 938 (CC).

simultaneously, but independently from each other. This case rested on Carmichele's struggle against the judicial system to hold the state liable for delictual damages resulting from a failure to protect her after she was assaulted by one Coetzee, despite numerous requests by her friend to the investigating officer and the prosecutor not to release Coetzee on bail, pending his trial. During the bail application the investigating officer neglected to inform the presiding magistrate that Coetzee had previous convictions for housebreaking and indecent assault, and was also at the time facing a charge of rape, for which he was released on bail without conditions. Shortly after his release on bail on this charge, Coetzee forced entry into the house where Carmichele was staying and assaulted her by breaking her arm and stabbing her in the chest. As a result of the state's refusals to incarcerate Coetzee, Carmichele sued the Minister of Safety and Security for delictual damages emanating from the negligence of both the investigating officer and the prosecutor, who had failed to perform their legal duty to prevent Coetzee from causing her further harm. Carmichele appealed the matter to the Constitutional Court after her action was set aside in the Cape High Court and her appeal was dismissed by the Appellate Court.

The legal question before the Court was whether the common law should be developed so as to include delictual damages payable by the state, resulting from an omission in not upholding the rights to human dignity and freedom and security of the person.[216] Here the duty to respect was realised to a lesser degree, whilst the duty to protect was violated. The state had already adhered to the duty to respect dignity, as a negative right, by having legislation and criminal procedures in place to bring the accused before court. At the same time, the state had failed to comply with its duty to protect Carmichele's dignity, as a positive right. In balancing the right to protect Carmichele's dignity against the accused's right to a fair

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216 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) paras 35-36.

trial, it is evident that the right to protect dignity takes preference at the level of principle, because the preferential result points in the direction of a very large set of conditions that will be fulfilled, as well as the confidence that it will take precedence over other competing principles, when these will be satisfied.[217] *In casu* the duty to protect took preference over the duty to respect, contrary to the general application in German law.

In *Stanfield v Minister of Correctional Services*[218] a reverse situation to that of *Carmichele* arose, which concerned a violation of the duty to respect, whereas the state had already complied with its duty to protect dignity. Stanfield, a terminally ill prisoner, having been diagnosed with ischemic heart disease and an incurable and inoperable, fast-spreading lung cancer, applied to the prison authorities for medical parole following this diagnosis. His projected median life expectancy (with treatment) was one year. As at the time of the application for medical parole Stanfield had already received two sessions of chemotherapy, the rest of which was to be spread over a period of six months. A serious side-effect of this treatment was the patient's being highly susceptible to chest infections such as tuberculosis, which could shorten his life in this immune-depressed condition. The prison environment was not appropriate in this state of affairs. Stanfield's application was rejected by the respondents, who claimed that his right to dignity was not compromised, because the state's duty to deter the prisoner to commit any further offences during the period of parole, took precedence. Furthermore, the prisoner had served only one third of his six-year sentence, and medical parole would have a negative effect on penal administration in South Africa.

Here the two sub-components of the dignity principle operate concurrently as optimising requirements in order to give effect to the injunction to

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217 This process is mandated by s 36(1) of the *Constitution.*
218 2004 4 SA 43 (C).

respect and protect dignity. The state had already complied with its duty to protect dignity by supplying medical treatment for Stanfield's conditions and was also willing to provide hospitalisation at an institution in accordance with the specialist's instructions, to prevent the contraction of infections. As such, the principle of dignity had been realised to a certain extent, within its factual[219] and legal[220] possibilities. Only one of the two sub-components had been violated, and this resulted in forcing a process of balancing the violated principle to respect dignity against the other principles at stake. In balancing the duty to respect Stanfield's dignity by granting him medical parole against the state's duty to prevent crime, dignity at the level of principle took preference because, in Alexy's[221] words,

> a very large set of conditions of precedence for the principle of human dignity

exist, along with a strong indication that this preference will take precedence over other competing principles when the dignity principle is satisfied.

5.3.3.5 Infringement of dignity-as-a-rule as a result of balancing between the dignity principles

As has been discussed in section 3.3.3 above, the first aspect in which dignity-as-a-rule can be infringed occurs when a limitation is applied against the rule, which causes prohibited violation. The second aspect that causes infringement of dignity-as-a-rule takes place whenever balancing is applied between dignity-as-a-principle and other principles, after which process the dignity principle takes preference. This is normally the case when both components of the dignity principle play an equally important

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219 The factual possibilities point in the direction of medical parole as a result of collaborating reports from medical experts.

220 The legal possibilities refer to the provisions of parole on medical grounds in terms of section 69 of the *Correctional Services Act* 8 of 1959.

221 Alexy *A Theory of Constitutional Rights* 63.

role. In terms of Alexy's theory of constitutional rights, an immediate balancing relationship between principles indicates limitation as a result, whereas no limitation is applied when a rule is at stake. According to his construction of the relationship between dignity-the-rule and dignity-the-principle, dignity at the level of a rule is always infringed when dignity at the level of a principle (or one of the sub-components) is violated, and therefore takes precedence over the competing principle:[222]

> if human dignity takes *precedence* at the level of principle, then it has been *breached* at the level of rule.[223]

This claim can be illustrated by the Court's application of proportionality in *Khosa v Minister of Social Development.*[224] The Court had to consider whether unfair discrimination amounted to an infringement of the right to dignity, as a specific class of persons had been denied the right to receive socio-economic rights, as provided by section 27 of the *Constitution*.[225] The applicant was a Mozambican citizen and permanent resident of South Africa; therefore he did not qualify to receive the benefit of an old age grant from the government. The Court held that the impact of the exclusion of permanent residents from receiving grants led to an impairment of their rights to life and dignity, which outweighed the alleged financial and immigration responsibilities of the state.[226] Although this case differs from the socio-economic cases in which the reasonableness-requirement of state action has to be assessed to protect the value of human dignity, the Court found that the rights to dignity, equality and life take precedence over any other purported obligations of the state. It is evident that the Court's balancing of the different interests at stake resulted in dignity's taking precedence at the level of principle; therefore the applicant's dignity had been violated by the state at the level of a rule.

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222 Emphasis in original text.
223 Alexy *A Theory of Constitutional Rights* 64.
224 2004 6 SA 505 (CC).
225 Also see the discussion regarding dignity and equality in section 3.5 below.
226 *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 82.

Another strand of Alexy's claim that dignity would be breached at the level of a rule when it takes precedence at the level of principle as a result of balancing can be illustrated by the defamation and freedom of expression cases. In these cases, dignity functions in the overlapping zone with the rights to privacy and freedom of expression to strengthen privacy and to limit the scope of the conflicting right to freedom of expression. Here dignity takes priority at the level of principle, therefore dignity-as-a-rule is simultaneously violated. As the Court held in *NM v Smith*[227]

> it [the balancing process] involves a nuanced and sensitive approach to balancing the interests of the media, in advocating the freedom of expression, privacy and dignity of the applicants irrespective of whether it is based on the constitutional law or the common law.

In a similar vein, the Court held in *Islamic Broadcasting Convention v Independent Broadcasting Authority*[228] that:

> There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other State interests, such as the pursuit of national unity and reconciliation.

Likewise, the Court stated in *The Citizen 1978 (Pty) Ltd v McBride*[229] that:

> When considering a claim based on defamation, the proper approach is to strive to achieve an appropriate balance between the protection of the right of freedom of expression, on the one hand, and the right to human dignity, on the other.

In *S v Mamabolo*[230] the Court emphasised the importance of applying the right to dignity during the balancing process, as opposed to the right to freedom of expression:

> With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression.

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227 2007 5 SA 250 (CC) para 31.
228 2002 4 SA 294 (CC) para 28.
229 2011 4 SA 191 (CC) para 150.
230 2001 3 SA 409 (CC) para 41. Also see *ANC v Sparrow* (01/16) [2016] ZAEQC 1 (10 June 2016) p 40 para 10.

And further in *The Citizen 1978 (Pty) Ltd v McBride*:[231]

> … the right to human dignity must always be allowed to assume its rightful place even when the right to freedom of expression enters the equation.

In *Le Roux v Dey*[232] an adult's dignitarian and privacy rights collided with the right to artistic freedom and children's rights of the applicants (who at the time were teenagers) as a result of the distribution of a manipulated photo of the respondent (at the time one of the deputy head-masters) at the school the applicants attended, depicting the respondent in a sexually compromising position. Yacoob J emphasised that the applicants' right to dignity was as important as that of the respondent:

> The rights to dignity and privacy are likewise to be balanced in relation to the right to freedom of expression and children's rights in assessment of wrongfulness in the dignity claim.

The Court held in *The Citizen 1978 (Pty) Ltd v McBride*[233] that the *Constitution* requires a proper balance to be struck between dignity and "fair comment" as a justifiable ground for an intrusion upon dignity:

> In my view, the requirement of fair comment is consistent with the need to respect and protect dignity. It maintains a delicate balance between the need to protect the right of everyone, including the press, to freedom of expression and the need to respect human dignity. This is the balance that the Constitution requires be struck.

In *NM v Smith,*[234] a biography of a prominent South African politician was authored by the respondent, in which the HIV-positive status of three women was disclosed without their knowledge or authorisation. Here the sub-components of the dignity-principle played an equally important role in

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231 2011 4 SA 191 (CC) para 222.

232 2011 3 SA 274 (CC). The Court held at para 31 that: "When a court assesses whether a publication is defamatory through the prism of the Constitution, it is concerned with the interpretation, protection and enforcement of the Constitution. In this case the process involves the balancing of the rights to dignity and privacy on the one hand, with freedom of expression, and the rights of children on the other."

233 2011 4 SA 191 (CC) para 222.

234 2007 5 SA 250 (CC).

the balancing process as both were simultaneously violated, but they took preference over the competing right to freedom of expression:

> I therefore conclude that by the disclosure of the applicants' HIV status the respondents violated the dignity and the psychological integrity of the applicants and that nowhere can it be shown that the disclosure was in the public interest.[235]

The high probability that the dignity principle will take preference over the competing principles will result in infringement of the dignity rule, as held in *NM v Smith*:[236]

> It is, however, an affront to the infected person's dignity for another person to disclose details about that other person's HIV status or any other private medical information without his or her consent.

And further in *The Citizen 1978 (Pty) Ltd v McBride*:[237]

> The campaign waged by the Citizen in a long chain of articles and editorial comments vilified Mr McBride and severely undermined his reputation and right to dignity.

The validity of Alexy's argument regarding competing principles and resulting violation at the level of a rule can further be illustrated by contrasting the issues pertaining to the previous cases where the infringement of the dignity principle caused an infringement of the rule of dignity, against matters where the state had indeed complied with its duties in terms of section 10 to ascertain whether dignity-as-a-rule has in actual fact not been infringed. In *De Reuck v Director of Public Prosecutions*[238] the applicant contended that the prohibition against child pornography in section 27(1) of the *Films and Publications Act* 65 of 1996 unconstitutionally infringed on his rights to equality, freedom of expression and privacy (on appeal from the Magistrate's and High Courts.)[239] The

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235 *NM v Smith* 2007 5 SA 250 (CC) para 54.
236 2007 5 SA 250 (CC) para 48.
237 2011 4 SA 191 (CC) para 293.
238 2004 1 SA 406 (CC).
239 Incidentally, the facts in this matter constitute a reversal of the facts in *Le Roux v Dey* 2011 3 SA 274 (CC), where the applicants infringed upon the dignity of the

Court held that preference is to be accorded to children's dignity over the competing principles of the applicant's aforementioned rights; therefore the limitation in the Act was not unconstitutional. Here dignity has not been violated at the level of principle, because the state complied with its duty to respect and protect children's dignity through the prohibition of pornography. This conclusion coincides with the injunction that children's dignity should be protected because section 28

> protects the dignity of the child and advances the child's equal worth and freedom.[240]

5.3.3.6 Infringement of dignity-as-a-rule as a result of infringement of dignity as a principle

One can take one step further Alexy's claim that dignity-as-a-rule is always violated when balancing between principles is applied and dignity-as-a-principle takes preference by arguing that dignity-as-a-rule is always infringed when dignity-as-a-principle is simultaneously infringed on the level of both sub-components. This mode of establishing that dignity-as-a-rule was infringed does not necessitate balancing, because the mere fact of the violation of the sub-components is determinative for this purpose. In *Moatshe v Legend Golf and Safari Resort Operations (Pty) Ltd*[241] Snyman AJ *mero motu* invoked section 10 as a result of the grave injustice suffered by the applicant, not only because of the rape and attempted murder by her perpetrator, but also because of a magistrate's shockingly inappropriate and lenient sentencing of the accused. As rape is already an affront to a person's dignity,[242] an extremely lenient sentence of the

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respondent as a result of a defamatory publication on social media. Also see fn 232 above.

240 *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) para 72.

241 (2014) 23 LC 6.12.1.

242 In *F v Minister of Safety and Security* (2012) 33 ILJ 93 (LC) para 54 the Labour Court held that: "She also has the constitutional right to have her inherent dignity respected and protected. This, and the right to freedom and security of the person, are implicated by the assault and rape which were perpetrated against her person."

accused contributes to the infringement of dignity. *In casu* Snyman AJ argued that the sentence imposed on the accused was an affront to the applicant's human dignity emanating from the outcome of the criminal proceedings. The state's failure to simultaneously respect and protect the applicant's dignity was caused by the magistrate's incorrect sentencing of the accused, which violation occurred at the level of principle, resulting in the infringement of inherent dignity-as-a-rule.

A similar situation arose in *K v Minister of Safety and Security,*[243] in which case the Court had to decide (on appeals from the High Court as well as the Supreme Court of Appeals) whether the common law should be developed to hold the state vicariously liable as a result of the conduct of three on-duty policemen having raped the applicant. The policemen offered the applicant a lift home when she was left stranded in the early hours of the morning after an altercation with her boyfriend, where after they abducted her, gagged her, raped her and left her in a street near her home. The Court ruled that the principles of vicarious liability needed to be developed as there was a sufficient nexus between the obligations of the three policemen to ensure everybody's safety and to prevent crime, and their conduct against the applicant, to hold the state liable for infringement of her rights to dignity and security of the person:

> When the policemen – on duty and in uniform – raped the applicant, they were simultaneously failing to perform their duties to protect the applicant. In committing the crime, the policemen not only did not protect the applicant, they infringed her rights to dignity and security of the person.[244]

Here it is evident that the policemen simultaneously violated the sub-components of the dignity-principle, therefore dignity at the level of rule was directly infringed, and no process of balancing needed to be applied.

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243 2005 6 SA 419 (CC).
244 *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 56.

The modes of infringement of dignity-as-a-rule are not specifically restricted to the examples of infringement as discussed in the preceding two sections: as time evolves, and more types of violation of inherent dignity occur, modes of infringement will be expanded. These new modes of infringement will still have to be tested in terms of Alexy's distinction between rules and principles.

5.3.4 Non-infringement of dignity

The human dignity principle is not a weak principle. Its overarching purpose is to limit and direct the exercise of state powers and to protect individual rights. Although the dignity principle in section 10 portrays an absolute character (everybody has inherent dignity) because it displays the features of Kant's categorical imperative and constitutes part and parcel of the *Constitution's* objective value order, the rule of dignity must be detached from the principle to respect and protect, in terms of the model of interpretation proposed above. The principle of dignity, detached from the rule, can however not be absolute, as these principles would then in all instances outweigh other principles, thereby defeating the theory of competing principles and proportionality.[245] As Alexy[246] argues, neither rules nor principles can be realised in pure form. Human dignity as a principle *per se* would therefore not trump other principles in every concrete case.[247] Principles display different weightiness in different matters and the principle that receives preference, based on the specific set of facts, would outweigh the other principle.[248] Alexy[249] concurs that:

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245 Alexy *A Theory of Constitutional Rights* 62.

246 Alexy 2003 *RJ* 131.

247 As the Court held in *Minister of Home Affairs v NICRO* 2000 3 SA 936 (CC) para 57: "there can be no doubt that there will be circumstances when the constitutional right to dignity that protects the rights of spouses to cohabit may justifiably be limited by refusing the spouses the right to cohabit in South Africa even pending the decision upon an application for an immigration permit."

248 Alexy *A Theory of Constitutional Rights* 50. Any limitation on a constitutional principle has to be justifiable in terms of s 36(1) of the *Constitution.*

> The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.

This claim explains why dignity can compete with dignity on both sides of a conflict, with the one dignity principle outweighing the opposing dignity principle in one set of facts, as "two norms lead to mutually incompatible results."[250] A preferential result has to be rooted within the parameters of conditions of preference that were established in the ruling and in the context of the case.[251] In balancing competing interests against each other, proportionality does not cause the invalidity of one principle or of a sub-component of the specific principle. Therefore dignity has not been infringed if another principle outweighs the dignity principle – it merely assumes lesser importance in this process. Alexy[252] explains that:

> This means that neither the outweighed principle is invalid nor that it has to have an exception built into it. On the contrary, the outweighed principle may itself outweigh the other principle in certain circumstances. In other circumstances the question of precedence may have to be reversed.

In a similar vein, the Supreme Court of Appeal confirmed in *Independent Newspapers Holdings Ltd v Suliman*[253] that

> there is obviously a potential clash between constitutionally entrenched rights: the rights to dignity and privacy on the one hand and, on the other, the right of freedom of the press, of expression, and of receiving or imparting information. None of these rights should be regarded as permanently trumping the others in the sense that there is a preordained and never shifting order of priority to be assigned to each of them. The weight to be assigned to each of them in a given situation will vary according to the circumstances attending the situation.

The relative status of the dignity principle results in a detachment from the inherent dignity paradigm, which claim explains why the dignity principle can be limited in appropriate circumstances without infringing on dignity-

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249 Alexy 2003 *RJ* 136.
250 Alexy *A Theory of Constitutional Rights* 55.
251 Alexy *A Theory of Constitutional Rights* 52.
252 Alexy *A Theory of Constitutional Rights* 50.
253 2005 7 BCLR 641 (SCA) para 44.

as-a-rule. As Innes JA held in *Whittaker v Roos and Bateman*[254] regarding the deprivation of prisoners' rights to legal representation and encroachment of their liberty as a result of incarceration, where the manner of detention may cause a violation of the rights to bodily integrity and mental and intellectual wellbeing:

> [they retain] those absolute natural rights relating to personality, to which every man is entitled. True, [their] freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect for what remained. The fact that their liberty had been legally curtailed could afford no excuse for a further legal encroachment upon it. [It was] contended that the [prisoners], once in prison, could claim only such rights as the Ordinance and the regulations conferred. But the directly opposite view is surely the correct one. They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed.

To balance conflicting interests, the point of departure would be to accord equal status (in the abstract) to the competing principles.[255] As principles are "optimization requirements" that can be realised to the greatest extent possible, with varying degrees and within their factual and legal possibilities, it follows that not all principles can reach this threshold in the

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254 1912 AD 92 paras 122-123, as quoted in *S v Makwanyane* 1995 3 SA 391 (CC) para 142. *In casu* Innes J awarded damages as a result of the infringement of individual dignity rooting in the denial of the rights to legal representation and because they were confined to "punishment cells" rather than to awaiting-trial cells. Innes J's *dictum* resonates with the Court's reasoning in *S v Makwanyane* 1995 3 SA 391 (CC) para 142: "Dignity is inevitably impaired by imprisonment or any other punishment, and the undoubted power of the state to impose punishment as part of the criminal justice system, necessarily involves the power to encroach upon a prisoner's dignity. But a prisoner does not lose all his or her rights on entering prison." In *August v Electoral Commission* 1999 3 SA 1 (CC) para 18 the Court held that: "It is a well-established principle of our common law, predating the era of constitutionalism, that prisoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they have been placed."

255 Alexy *A Theory of Constitutional Rights* 50. This claim explains why the right to dignity cannot be seen as a residual right (in certain circumstances), but as an individual right on an equal footing with the balance of the constitutional rights. The right to dignity merely assumes a residual function to strengthen constitutional rights, if dignity does not enter into a relationship of opposition with these rights, which would then result in proportionality analysis. This claim coincides with the finding of O'Regan J in *Dawood v Minister of Home Affairs* 2000 3 SA 939 (CC) that if human dignity is violated, the primary constitutional breach may be of a more specific right, for which the *Constitution* already affords protection and a remedy. Also see footnotes 551-552 in chapter 3.

process of balancing conflicting interests. This claim presented itself in *Prince v Law Society of the Cape of Good Hope,*[256] that concerned a case in which the applicant (on appeal from both the High Court and Supreme Court of Appeal) sought to set aside the Law Society's decision not to register his contract for the prescribed community service for the purposes of his admission as an attorney. In his application for admission the applicant disclosed that not only was he an active Rastafarian using cannabis for religious purposes, but that he had been convicted on two previous counts for the possession of cannabis. Prince's appeal to the Court also included challenges to section 4(b) of the *Drugs and Drug Trafficking Act* 140 of 1992 and section 22A (10) of the *Medicines and Related Substances Control Act* 101 of 1965. The minority (four judges) held that a religious exemption should be granted, because the impact of the current law was an infringement on the dignity of the Rastafari religion:

> There can be no doubt that the existence of the law which effectively punishes the practice of the Rastafari religion degrades and devalues the followers of the Rastafari religion in our society. It is a palpable invasion of their dignity. It strikes at the very core of their human dignity. It says that their religion is not worthy of protection. The impact of the limitation is profound indeed.[257]

In balancing this limitation on dignity with the state's duty to prevent social harm as a result of drug-use and the suppression of trafficking in those drugs, the minority held further that:

> Yet, there can be little doubt about the importance of the limitation in the war on drugs. That war serves an important pressing social purpose: the prevention of harm caused by the abuse of dependence-producing drugs and the suppression of trafficking in those drugs. The abuse of drugs is harmful to those who abuse them and therefore to society. The government thus has a clear interest in prohibiting the abuse of harmful drugs.[258]

Contrary to the result of the minority's assertion that the dignity principle should take preference, the majority held that

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256 2002 2 SA 794 (CC).
257 *Prince v Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) para 51.
258 *Prince v Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) para 52.

> The granting of a limited exemption interferes materially with the ability of the state to enforce its legislation, yet, if the use of cannabis were limited to the purpose of the exemption, it would fail to meet the needs of the Rastafari religion.[259]

Here the circumstances of the case resulted in the dignity principle's not trumping the state's duty on the war on drugs, as there were not "a very large set of conditions of precedence for the principle of human dignity"[260] present, together with a strong possibility that this state of affairs would not cause preference over other competing principles. In the process of balancing, the opposing principles are accorded equal status in the abstract, but one principle will outweigh the other, taking its legal and factual possibilities into account as optimising requirements. The Court exercised balancing by establishing the conditions of preference over the dignity principle, in laying out the gravity of the state's duty to prevent harm resulting from the use of drugs. The preference of the state's duty over individual dignity does not result in a violation of dignity-as-a-principle – it merely results in non-infringement of the dignity principle, because the principle can be realised to only a certain extent (depending on the circumstances, as discussed above) in terms of Alexy's theory of constitutional rights. As he argues: "this means that each limits the legal possibility of satisfying the other."[261] The second and third essential elements of dignity, which operate as principles, would not in all instances of balancing take greater weight over competing principles.

5.3.5 Dignity and equality

The values of human dignity and equality are inseparably linked as a result of the Court's ruling in *President of the Republic of South Africa v Hugo*[262] that the test for unfair discrimination is based on the question

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259 *Prince v Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) para 141.
260 Alexy *A Theory of Constitutional Rights* 63.
261 Alexy *A Theory of Constitutional Rights* 51. See also fn 188 above.
262 1997 4 SA 1 (CC). Also see *MEC for Education v Pillay* 2008 1 SA 474 (CC) para 167.

whether inherent dignity has been infringed upon as a result of any applied discriminatory measures:

> At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.[263]

Ackermann[264] explains that the Court employs dignity as the "*criterion of attribution* for human equality"[265] to satisfy the purposes of sections 9(2) and 9(3) of the *Constitution,* which stipulate that everybody must be treated equally and that unfair discrimination is prohibited. This function of dignity as a value[266] in equality jurisprudence coincides with Kant's claim that everybody has equal human dignity that cannot be violated.[267] As O'Regan J held in *Makwanyane*:[268]

> The new Constitution rejects this [apartheid] past and affirms the equal worth of all South Africans.

The Court expounded as follows on the equal inherent dignity paradigm in *MEC for Education v Pillay*:[269]

> The rights, like all others in our Constitution, must be interpreted in light of the founding value of human dignity which asserts the equal moral worth of human beings and the right of each and every person to choose to live the life that is meaningful to them.

And further in *South African Police Services v Solidarity obo Barnard*:[270]

> We care about equality – both formal and substantive – because we recognise the equal and inherent worth of all human beings.

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263 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41.
264 *Human Dignity: Lodestar for Equality in South Africa* 182. Also see the cases listed by Ackermann at 186 fn 22.
265 Emphasis in original text.
266 Dignity's first function as a value, as discussed in section 3.2.1 above.
267 Also see Ackermann *Human Dignity: Lodestar for Equality in South Africa* 182 and the discussion in chapter 3.4.1 above; *Hoffman v South African Airways* 2001 1 SA 1 (CC) para 27.
268 *S v Makwanyane* 1995 3 SA 391 (CC) para 329. Also see *National Coalition for Gay and Lesbian Equality v Minister* 1999 1 SA 6 (CC) para 120.
269 2008 1 SA 474 (CC) para 150.
270 2014 6 SA 123 (CC) para 176.

Therefore one can deduce that the first essential element of the dignity-concept ("everyone has inherent dignity") functions on the level of dignity-as-a-rule in equality jurisprudence, similar to its operation in the cruel and unusual punishment cases.[271] Here dignity applies in an all-or-nothing fashion and it does not assume a relationship of preference with principles, as any limitation would cause an infringement of the rule. Preference over other norms is not taken into account, since the only relevant factor would be whether the measures resulting in unfair discrimination have violated inherent dignity or not. The principles pertaining to the rule of dignity as discussed in section 3.3.3 above will determine whether unfair discrimination as envisaged in sections 9(2); 9(3) and 9(4) of the *Constitution* will have infringed directly upon inherent dignity in any given case.

In this respect, the Court developed two applications of the dignity-rule to establish whether or not discrimination leads to unfairness (as opposed to fair discrimination) which will violate the rule of dignity.[272] The purpose of these applications is to establish a benchmark to justify constitutional or unconstitutional limitations on formal equality. Firstly, dignity is utilised to determine whether discrimination based on an unspecified ground as envisaged in section 9(3) of the *Constitution* impairs inherent dignity.[273] In the second instance, dignity is employed as a criterion to establish

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271 See the discussion in section 3.3.3 above.

272 Dignity also manifests in a third function to establish unfair discrimination, but this functions flows from the general limitations clause in the *Constitution.* Together with the constitutional values of freedom and equality, dignity is employed to establish whether a limitation is justifiable under the general limitations clause in the *Constitution.*

273 *Prinsloo v Van der Linde* 1997 3 SA 101 (CC) para 31. Also see the Court's *dictum* in para 33: "Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2)." In a similar vein, the Court related in *Harksen v Lane* 1998 1 SA 300 (CC) para 46 that: "There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner." Also see *Van der Merwe v Road Accident Fund* 2006 4 SA 230 para 42; *Weare v Ndebele* 2009 4 SA 370 (CC) paras 72-73.

whether specified[274] or unspecified discrimination amounts to unfair discrimination.[275] This process involves a holistic examination (in the perspective of substantive equality)[276] of various factors to establish the extent and impact of unfair discrimination, such as the plaintiff's position in society and past patterns of disadvantages.[277] Thus, the circumstances under which violations of the dignity-rule in equality jurisprudence can occur are determined by the factors described above, as developed by the Court.

The right to dignity intersects with the right to equality in the overlapping zone between these two rights;[278] therefore it strengthens equality or it can play a competing role to aid in proportionality analysis when these rights oppose each other. However, the circumstances in which the right to dignity can be violated in the perspective of equality involve a much wider set of situations than the two-stage enquiry developed by the Court to

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274 Differentiation on specified grounds leads to a presumption of unfair discrimination. See *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) para 35.

275 The Court held in *Harksen v Lane* 1998 1 SA 300 (CC) para 49 that: "The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner." In a similar vein, the Court held in *National Coalition for Gay and Lesbian Equality v Minister of Justice*: "The discrimination has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity. In *Hoffman v South African Airways* 2001 1 SA 1 (CC) para 27 the Court related that: "… dignity is impaired when a person is unfairly discriminated against." Also see *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) para 34.

276 See for example *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 126; *Hoffman v South African Airways* 2001 1 SA 1 (CC) para 52.

277 *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) paras 22-41; *Harksen v Lane* 1998 1 SA 300 (CC) paras 49-50; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) paras 26(a) and 126; *Hoffman v South African Airways* 2001 1 SA 1 (CC) para 27; *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) para 113.

278 Also see fn 154 above.

establish unfair discrimination. As the Court held in *National Coalition for Gay and Lesbian Equality v Minister of Justice*:[279]

> The violation of dignity under section 10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It also could be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.

In this context, the two sub-components of the dignity principle can either operate individually or concurrently as optimising requirements to realise the principle within its factual and legal possibilities.[280] The same rules applicable to proportionality analysis between the dignity principle and other principles apply to establish whether dignity takes preference at the level of principle, when the rights to dignity and equality compete.[281] Therefore, as the Court held in *National Coalition for Gay and Lesbian Equality v Minister of Justice*:[282] "the rights of equality and dignity are closely related."[283] The features of the dignity principle manifested in *Bhe v Magistrate Khayelitsha*,[284] in which the customary rule of male primogeniture was declared invalid because it treated women as perpetual minors, resulting in a violation of the rights to dignity and equality. Here both components of the dignity principle played an equally important role, which took precedence in the balancing process together with the right to

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279 1999 1 SA 6 (CC) para 124. With regard to infringement of the dignity rule, the Court explained that: "The violation of dignity and self-worth under the equality provisions can be distinguished from a violation of dignity under section 10 of the Bill of Rights. The former is based on the impact that the measure has on a person because of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members; it is the inequality of treatment that leads to and is proved by the indignity."

280 See the discussion in section 3.3.4 above.

281 See the discussion in sections 3.3.2 and 3.3.5 above.

282 1999 1 SA 6 (CC) para 30.

283 Also see fn 154 above.

284 2005 1 SA 580 (CC).

equality and which caused an infringement of dignity at the level of a rule.[285]

When dignity and equality compete, the dignity principle can be trumped in certain circumstances, which would not result in a violation of the dignity-rule. Thus a detachment occurs between the dignity-rule and the dignity-principle. In *Volks v Robinson*[286] a tension occurred between the equality claims of married spouses and the equal dignity of the surviving partners of permanent life partnerships. This claim was rooted in the fact that the survivor of a marriage relationship is entitled to receive maintenance from the deceased's estate in terms of the *Maintenance of Surviving Spouses Act* 27 of 1990. Unequal treatment purportedly resulted in an infringement of the dignity of the survivors of permanent life partnerships, if the consequences of these are not placed on an equal footing with married couples with regard to maintenance after death. Mrs Robinson alleged that the differentiation in this act unfairly discriminated against her as a survivor of the life partnership, by disallowing her to lodge a claim for maintenance against the estate of the deceased. The High Court found in favour of Mrs Robinson, contending that the differentiation infringed upon her rights to equality and dignity, as:

> To ignore the arrangement and impose a particular religious view on their world is to undermine the dignity of difference and to render the guarantee of equality somewhat illusory insofar as a significant percentage of the population is concerned.[287]

However, on appeal to the Court it was held that the differentiation in the *Maintenance of Surviving Spouses Act* 27 of 1990 to exclude survivors of

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285 This is the second manner in which the dignity rule can be infringed. Also see the discussion of the comparable case *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) in section 3.3.5 above. Also compare the Court's *dictum* in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 32: "The offence which lies at the heart of the discrimination in this case constitutes at the same time and independently a breach of the rights of privacy and dignity which, without doubt, strengthens the conclusion that the discrimination is unfair."

286 2005 5 BCLR 446 (CC).

287 *Robinson v Volks* 2004 6 SA 288 (C) para 299 I.

life partnerships from claiming maintenance was fair and therefore did not infringe upon Mrs Robinson's (and similar classes of persons') dignity.

> I do not agree that the right to dignity has been infringed. Mrs Robinson is not being told that her dignity is worth less than that of someone who is married. She is simply told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance.[288]

Here equality in the perspective of fair discrimination takes precedence at the level of principle as a result of balancing; therefore dignity was not violated at the level of a rule.[289]

In *South African Police Services v Solidarity obo Barnard*[290] the Court found that the applicant's implementation of restitutionary measures pertaining to its employment policies in terms of sections 9(2) of the *Constitution* and 6 of the *Employment Equity Act* 55 of 1998 amounted to fair discrimination, which trumped the respondent's rights to equality and dignity.[291] In balancing the applicant's discretion not to promote Ms Barnard to the position of superintendent on the grounds of her race, Moseneke on behalf of the majority held that

> Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned.

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288 *Volks v Robinson* 2005 5 BCLR 446 (CC) para 62.

289 A comparable case presented in *Prinsloo v Van der Linde* 1997 3 SA 101 (CC). *In casu* the Court found that a differentiation of land owners in protected and unprotected areas to control fires does not impair dignity and therefore does not result in unfair discrimination.

290 2014 6 SA 123 (CC).

291 A comparable case presented in *City Council of Pretoria v Walker* 1998 2 SA 363 (CC). On appeal from the High Court, the Constitutional Court held that the Council's selective enforcement policy to charge "flat rates" in respect of former black townships and a consumption rate in respect of formerly white areas. Although the differentiation was based on geographic areas: "I am satisfied that the operation of the flat rate and its continued application on properties where meters had been installed in Mamelodi and Atteridgeville, as well as the cross-subsidisation which may have resulted from any delay in implementing a metered tariff, did not impact adversely on the respondent in any material way. There was no invasion of the respondent's dignity nor was he affected in a manner comparably serious to an invasion of his dignity" (para 68.)

> We must remain vigilant that remedial measures under the Constitution are not an end in themselves.[292]

In a similar vein, Cameron, Froneman JJ and Majiedt AJ (in assent) held that

> We agree with the main judgment that, to exercise this vigilance, remedial measures "must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society." But we differ from the main judgment's assessment of a standard to determine whether the implementation of a remedial measure has adequately balanced substantive equality with the dignity of the person negatively affected by the measure.[293]

The main judgment established the conditions of preference of fair discrimination in favour of the respondent's dignity by concluding that the implementation of remedial measures should be rationally connected to the terms and objects of the measure.[294] Here the classic feature of principles as optimization requirements presented itself in the facts of the case, because there was not a very large set of conditions of precedence in existence for the principle of human dignity to take preference, together with a strong possibility that this state of affairs will not cause preference over other competing principles. Van der Westhuizen J (in assent) elaborated as follows on the impact on the respondent's dignity as a result of the implemented remedial measures:

> This is not to say that dignity will always be affected by the implementation of the measure. The rights to – and values of – equality and dignity are of course interdependent and complementary. But they may sometimes compete, as far as the scope of their implementation or enforcement is concerned. Aspects of a person's right to dignity may sometimes have to yield to the importance of promoting the full equality our Constitution envisages. Other times, the impact of equality-driven measures with

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292 *South African Police Services v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 30.

293 *South African Police Services v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 94.

294 Cameron, Froneman JJ and Majiedt AJ concurred at para 94: "We agree that rationality is the "bare minimum" requirement. It can hardly be otherwise. In our law all exercises of public power must at least be rational."

> laudable aims may not be justifiable in view of severe damage to human dignity.[295]

The claim that the equality principle limited the legal possibility of satisfying the dignity principle resulted in dignity not taking preference in the balancing process, resulted in the non-violation of Ms Barnard's dignity in terms of proportionality analysis:

> In summary, the impact on her dignity is not excessively restrictive and indeed reasonably and justifiably outweighed by the goal of the affirmative measure.[296]

5.3.6 Dignity and the common law

One of the objectives of the *Constitution* is to harmonise the principles of the common law with the constitutional values of human dignity, equality and freedom.[297] This tenet also manifests in the adjudication of claims for damages resulting from the infringement of common law *dignitas*, for which compensation can be claimed under the *actio iniuriarum.* As has been shown in Chapter 2.15.5, constitutional dignity is somewhat broader than common law *dignitas,* because it differentiates between subjective and objective feelings of injury and equalises the subjective element of *dignitas*. Contrary to the common law perception of *dignitas*, constitutional dignity is fundamentally rooted in the three essential elements of dignity. *Dignitas* is competitive and linked to rank and honour; thus judged subjectively, based on a claimant's injured emotional experience pertaining to his feelings of, for example, chastity, reverence, privacy, self-respect and reputation. A claim for common law *dignitas* still has to further the constitutional value of dignity[298] and a balance will have to be struck

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295 *South African Police Services v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 171.

296 *South African Police Services v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 183.

297 Sections 39(1)(a) and 39(2) of the *Constitution; Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 39. Also see fn 299 in chapter 2 above.

298 As Madala J held in *NM v Smith* 2007 5 SA 250 (CC) para 28: "While the claim falls to be dealt with under the *actio iniuriarum* the precepts of the Constitution

between the injunction to respect the rule of dignity and any grounds for the justification of a violation of *dignitas*, such as freedom of speech.

One can argue that there is a considerable overlap between dignity and *dignitas* pertaining to *fama, corpus* and *dignitas,*[299] and *crimen iniuria.*[300] In so far as a claimant's subjective feelings of dignity and *dignitas* coincide, he cannot institute an action for recovery of damages under both the common law and section 10 of the *Constitution*.[301] When the infringement of fundamental rights falls within the ambit of the requirements of delictual liability, the aggrieved party should follow this route and not claim damages resulting from a breach of fundamental rights.[302] As Kriegler J

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must inform the application of the common law." Burchell describes the role of delictual law in the protection of human rights and freedoms as "peripheral", but suggests that "there is a vast, as yet virtually unexploited, potential within the law of delict for the protection of these rights and freedoms." See 1988 *SAJHR* 1.

299 *Khumalo v Holomisa* 2002 5 SA 401 (CC) paras 27; 148; *Wiese v Moolman* 2009 3 SA 122 (T). In *NM v Smith* 2007 5 SA 250 (CC) para 27 Madala J explained that: "In this Court the applicants complained that the High Court had failed to protect their rights to privacy, dignity and psychological integrity. While these rights are claimed by the applicants under the *actio iniuriarum*, they are also protected under the Constitution."

300 For a discussion in this regard, see Burchell 2014 *SAJCJ* 250-271.

301 In *Dendy v University of the Witwatersrand* 2005 5 SA 357 (W) para 2.15 the plaintiff erroneously instituted action (based on an alternative claim) for damages rooted in both the infringement of *dignitas* as well as dignity protection under s 10 of the *Constitution.*

302 The rationality behind the different causes of action was explained as follows by the Court in *Fose v The Minister of Safety and Security* 1997 3 SA 786 (CC) para 17, referencing the arguments of the respective parties' counsels: "Section 7(4)(a) of the interim Constitution establishes a separate cause of action, a public law action directed against the state, based on the infringement of a fundamental right entrenched in Chapter 3. The objectives of the law of delict differ fundamentally from those of constitutional law. The primary purpose of the former is to regulate relationships between private parties whereas the latter, to a large extent, aims at protecting the Chapter 3 rights of individuals from state intrusion. Similarly the purpose of a delictual remedy differs fundamentally from that of a constitutional remedy. The former seeks to provide compensation for harm caused to one private party by the wrongful action of another private party whereas the latter has as its objective (a) the vindication of the fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights; (b) the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of state at all levels of government; (c) the punishment of those organs of state whose officials have infringed fundamental rights in a particularly egregious fashion; and (d) compensation for harm caused to the plaintiff in consequence of the infringement

held in *Fose v The Minister of Safety and Security*:[303]

> Nevertheless, common law remedies - particularly delictual remedies - have been designed to protect personality interests such as dignity which are central to chapter three. In cases where the harm arising from a rights violation is highly localised, a common law remedy may well be appropriate, that is, it may effectively vindicate the Constitution and deter further violations of it.

This is not to say that the plaintiff cannot in his summons aver that his right to dignity, protected by section 10 of the *Constitution,* has been infringed. It merely means that the plaintiff should recover damages for the infringement of *dignitas*, in so far as it overlaps with dignity, under the *actio iniuriarum.*

The question therefore arises whether the common law should be developed to make provision for infringements of fundamental rights that do not fall within the body of the law of delict, to protect the value of dignity. Burchell[304] argued as far back as 1988 that an objective requirement to prove delictual liability in cases of the infringement of dignity needed to be established to keep the *actio iniuriarum* within manageable proportions and to comply with the minimum legal standards to protect dignity.[305] This piece of legal foresight came to fruition in the Appellate Court's decision in *De Lange v Costa*[306] (*De Lange*), in which the court established a composite test to place objective limits on the *actio iniuriarum* to recover damages for the impairment of *dignitas*.[307] The court

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of one or more of the plaintiff's rights entrenched in Chapter 3. The common law remedies are not directed to the achievement of the first three of these objectives and the common law should not be distorted by requiring it to perform these functions and fulfil the purposes of constitutional law." Also see *NM v Smith* 2007 5 SA 250 (CC) para 27 and *Dendy v University of the Witwatersrand* 2005 5 SA 357 (W) para 23. Also see fn 290 in chapter 3 above.

303 1997 3 SA 786 (CC) para 98.

304 1988 *SAJHR* 3.

305 These standards are reflected in the common law and international declarations and conventions. See Burchell 1988 *SAJHR* 3.

306 1989 2 SA 857 (A) paras 860I – 861A.

307 To succeed in a claim for damages under the *actio iniuriarum,* a plaintiff has to prove a wrongful act, and if proven, *animus injuriandi* is presumed, which could be rebutted by one of the grounds for justification to impairment. If intent is not

reasoned that the objective threshold would place limits on actions by hypersensitive persons, because a subjective test on its own has the potential to "lead to the courts being inundated with a multiplicity of trivial actions."[308] The objective test as formulated in *De Lange*[309] complies with the interpretation clause in the *Constitution.* As the court held in *Dendy v University of the Witwatersrand*:[310]

> The test enunciated in *De Lange* is, in my view, consistent with the Constitution. The objective test of wrongfulness (the criterion of reasonableness) provides a natural point of entry for giving expression to the "*spirit, purport and objects*" of the Constitution which reflect, as it were, the new *boni mores*. (Court's emphasis.)

One can take Burchell's claim and the formulation of the court in *De Lange*[311] regarding the objective requirement in delictual liability one step further to argue that this dimension protects human dignity against trivialisation, over-use and use out of context. Human dignity does not provide a remedy for damages in all situations where a person feels aggrieved by the actions of another. Furthermore, society evolves and conceptions regarding delictual liability have changed over time. As the Court held in *DE v RH*:[312]

> I am led to the conclusion that the act of adultery by a third party lacks wrongfulness for purposes of a delictual claim of *contumelia* and loss of

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rebutted, the plaintiff will have to prove that he suffered actual impairment of his dignity, based on the subjective feelings of the individual. See *Whittaker v Roos and Bateman* 1912 AD 92. The court in *De Lange v Costa* 1989 2 SA 857 (SCA) para 16 held that an objective test has to be applied to determine whether or not the act complained of is wrongful, in the form of the criterion of reasonableness: "It requires the conduct complained of to be tested against the prevailing norms of society (i e the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address words to another which might wound his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for injuria."

308 *De Lange v Costa* 1989 2 SA 857 (A) para 15.

309 1989 2 SA 857 (A) paras 860I – 861A.

310 2005 5 SA 357 (W) para 29; *Wiese v Moolman* 2009 3 SA 122 (T) para 27. In *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) the court held at para 39 that: "public policy and the *boni mores* are now deeply rooted in the Constitution and its underlying values."

311 *De Lange v Costa* 1989 2 SA 857 (A).

312 2015 5 SA 83 (CC) para 63.

consortium; it is not reasonable to attach delictual liability to it. That is what public policy dictates. At this day and age it just seems mistaken to assess marital fidelity in terms of money.

5.3.7 Dignity and criminal law

The rule and principle of dignity influence both substantive and procedural criminal law on a normative level. Kant's object formula constitutes the constitutional basis for criminal culpability,[313] judicial sentencing and detainee conditions. It delineates the boundaries of criminal law and gives effect to the presumption of innocence, as the individual is regarded as morally autonomous and an end in himself, not to be treated as a means to an end. In substantive criminal law, equal dignity implies that an accused's fundamental rights be respected, his liability proven (*nulla poena sine culpa*) and punishment imposed having regard to the principles of equality,[314] *mens rea*[315] and *nulla poena sine lege.* Infringement of these principles as well as torture and cruel, inhuman and degrading punishment directly violate the rule of dignity. To establish whether the dignity-rule was violated under these circumstances, the principles as set out in section

313 In *S v Mbatha* 2012 2 SACR 551 (KZP) para 63 Madondo J held that: "The principle not to imprison a mentally innocent person stems from acute awareness that to imprison a 'mentally innocent' person is to inflict a grave injury on that person's dignity and sense of worth. There must be a correlation between the moral blame and punishment."

314 In the current constitutional dispensation, certain common law crimes, such as sodomy, were abolished because they directly violated the equal dignity claim. See *National Coalition for Gay and Lesbian Equality v Minister* 1999 1 SA 6 (CC); fn 157 above as well as the discussion in section 3.5 above.

315 In *S v Mbatha* 2012 2 SACR 551 (KZP) para 39 Madondo J quoted from the case by the Canadian Supreme Court *Re B.C. Motor Vehicle Act* [1985] 2 SCR 486 at 513, in which Lamer J, writing for the majority, stated: "It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin *Action non facit reum nisi mens sit rea*."

3.3.3 above will have to be applied to each set of facts.[316] In this perspective, dignity-as-a-rule requires that

> even the vilest criminal remains a human being possessed of common human dignity.[317]

Human dignity as a value furthermore influences substantive criminal law in the perspective of victims of crimes, to the effect that the impact of the crime on the victim's dignity is highlighted in order to emphasise the severity of the crime. This application marks the evolution of the concept of dignity in the post-World War II era from its status-based legal perception, in terms of which the dignity of victims such as women and children ranked lower than that of men as perpetrators. Rape and crimes against children are a particular manifestation of humiliation and degrading treatment against victims. The Court held in *Masiya v Director of Public Prosecutions, Pretoria*[318] that rape is:

> the most reprehensible form of sexual assault ... a humiliating, degrading and brutal invasion of the dignity and the person of the survivor.

In the context of procedural criminal law, the all-encompassing right to a fair trial[319] is to be exercised within the parameters of the proclaimed constitutional values. In its very first case in *S v Zuma,*[320] the Court ruled that the reverse onus rule, which was regulated by section 217(1)(b)(ii) of the *Criminal Procedure Act* 51 of 1977, is inconsistent with the basic

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316 This implies a process to establish whether dignity assumes a role of preference with other principles when proportionality analysis is applied. If not, the rule of dignity applies in an all or nothing fashion and dignity functions independently from the injunction to respect and protect.

317 *S v Williams* 1995 3 SA 632 (CC) para 58, quoting from *Furman v Georgia* 408 US 328 (1972) 273. See also fn 193 above. Also compare the *dictum* of Lewis J in *S v Dzukuda* 2000 3 SA 229 (W): "Even a convicted person is entitled to be treated humanely, and in such a way that his dignity is not unduly impaired."

318 2007 5 SA 30 (CC) para 36. Also see *S v Chapman* 1997 2 SACR 3 (SCA) para 5b-f; *S v Ferreira* 2004 2 SACR 454 (SCA) para 40.

319 Also see *S v Manamela* 2000 3 SA 1 (CC); *SA Broadcasting Corporation v National Director of Public Prosecutions* 2007 1 SA 523 (CC) para 22; *S v Basson* 2004 6 BCLR 620 para 128. The rights of arrested, detained and accused persons are regulated by s 35 of the *Constitution.* Also see fn 145 above.

320 1995 2 SA 642 (CC).

principle of the presumption of innocence. The Court based its finding on a *dictum* of the Canadian constitutional court in *R v Oakes*[321] to the effect that this rule negates the presumption of innocence and therefore infringes upon human dignity:

> The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct.[322]

In *S v Dzukuda*[323] the Court summarised dignity's role in procedural criminal law as follows:

> There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arose primarily from considerations of dignity and equality.

A violation of any of the elements of a right to a fair trial will result in a direct violation of dignity-as-a-rule; therefore no balancing needs to be applied between dignity-as-a-principle and other principles.[324] Here the first component of section 10 of the *Constitution,* being inherent dignity, functions independently from principles, because no preference over other norms is considered and any limitation would cause a violation.[325] For example, Fabricius AJ held in *Advance Mining Hydraulics v Botes*[326] that a failure to inform a party to liquidation interrogations of his right to legal representation amounts to

> a blatant affront to such person's right to dignity and this particular right ought to be respected, protected and promoted, certainly within the present context.[327]

And further:

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321 (1986) 26 DLR (4th) 200.
322 *S v Zuma* 1995 2 SA 642 (CC) para 22.
323 2000 4 SA 1078 (CC) para 11.
324 Also see the discussion in section 3.3.3 above.
325 Also see the discussion in section 3.3.3 above.
326 2000 1 SA 851 (T). Also see footnotes 138 and 144 above.
327 2000 1 SA 851 (T) para 16.4 E-F.

> Human dignity is violated when persons are subjected to conduct that is degrading and humiliating. This is a core right, but in its very nature there is no precisely defined content. I agree that it is deceptively illusive, but the concept does require that persons be treated as recipients of rights and not as objects subjected to statutory mechanisms without a say in the matter. The State exists for the people, not the other way round.[328]

Lawful conviction does not infringe the rule of dignity.[329] However, if dignity is not respected and protected during this process, the rule of dignity will have been infringed after dignity-as-a-principle assumed a role of preference over competing principles.[330]

5.3.8 Dignity and ubuntu

The African principle of *ubuntu* underlies a notion of respect for humanity, which is expressed through a person's social conduct in relation to the community. On a deeper level, *ubuntu* circumscribes the values of group solidarity, compassion, respect,[331] human dignity, conformity to basic norms, collective unity and reconciliation.[332] Fundamentally speaking, *ubuntu* means that an individual's existence is relativized through his relationship to his community, which is

> manifested in anti-individualistic conduct towards the survival of the group if the individual is to survive. It is a basically humanistic orientation towards fellow beings.[333]

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328 *Advance Hydraulics v Botes* 2000 1 SA 851 (T) para 16.4 F-G.

329 Also see fn 254 above.

330 For example, in *Lee v Minister of Correctional Services* 2013 2 SA 144 the Court confirmed the High Court's finding that the respondent was liable for delictual damages, suffered by the applicant as a result of contracting tuberculosis while in detention. The respondent failed to take preventative and precautionary measures to prevent the risk of inmates contracting tuberculosis, because of overcrowding in the prison; thereby infringing of the principle of dignity. Also see the discussion of *Stanfield v Minister of Correctional Services* 2004 4 SA 43 (C) in section 3.3.4 above.

331 Langa J held in *S v Makwanyane* 1995 3 SA 392 para 225 that: "An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept." Also see *Afri-Forum v Malema* [2011] 3 All SA 293 (EqC) para 18.

332 Per Mokgoro J in *S v Makwanyane* 1995 3 SA 392 para 307.

333 Mokgoro "Ubuntu and the Law in South Africa" 2.

Therefore the individual and his community are interdependent on each other for mutual survival.[334] Narratives of the interrelatedness of dignity as a value and *ubuntu* have been expressed in judicial discourse. In *Hoffman v South African Airways*[335] Ngcobo J described *ubuntu as* "the recognition of human worth and respect for the human dignity of every person."[336] Although the two concepts seem to correlate at first blush, there are theoretical differences that exclude conceptual similarities. Constitutional dignity developed from the Stoic concept of *dignitas humana* into the concept of individual dignity as applied in current law, in terms of which the individual is the bearer of equal and inalienable fundamental rights. He has rights because he has dignity. In law, inherent dignity as dignity-as-a-rule is autonomous and self-executing. In *ubuntu,* certain rights of the individual are constituted because of his relationship with his community; therefore both act as an extension of the other.[337] Dignity in *ubuntu* can be seen as a bridge between the individual and his community. One cannot exist without the other as both have a reciprocal duty to respect the rights of the other.[338]

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334 Mokgoro J held in *S v Makwanyane* 1995 3 SA 392 para 307 that: "In my view, life and dignity are like two sides of the same coin. The concept of *ubuntu* embodies them both."

335 2001 1 SA 1 (CC) para 38.

336 Also compare the *dictum* of Mokgoro J in *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 63: "In our constitutional democracy the basic constitutional value of human dignity relates closely to *ubuntu* or *botho*, an idea based on deep respect for the humanity of another."

337 As Langa CJ explained in *MEC for Education v Pillay* 2008 1 SA 474 (CC) para 53: "The notion that we are not islands unto ourselves is central to the understanding of the individual in African thought. It is often expressed in the phrase *umuntu ngumuntu ngabantu,* which emphasises the communality and the inter-dependence of the members of a community and that every individual is an extension of others."

338 In *S v Makwanyane* 1995 3 SA 392 para 224 Langa held that *ubuntu* "recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."

Perhaps the drafters of the *Universal Declaration* had an ideal similar to that of *ubuntu* in mind when they declared in article 1 that humanity should "act towards one another in a spirit of brotherhood." Dignity as recognition implies that dignity-as-a-principle can compete on both sides and therefore limit individualism, in order to give way to communitarian and/or cultural interests.[339] As a result, dignity's inclusive feature correlates with *ubuntu* to the extent that individual freedom can be limited in favour of communitarian needs.

5.3.9 Collective dignity and hate speech

The first concept of constitutional dignity that developed in South-Africa was collective dignity, as a reaction against unequal treatment and discrimination during the apartheid era.[340] Whereas collective dignity was ascribed only to the black population during apartheid, in the post-constitutional dispensation it attaches to all population groups, including whites, coloureds and Indians. Collective dignity represents an aspect of "dignity as recognition",[341] which constitutes a pluralistic sub-category of dignity-as-a-rule. Dignity as recognition is relational because it is viewed from the perspective of society and not from the individual, and individual dignity could be limited in favour of the dignity of society. In these matters dignity-as-a-rule would be infringed upon when dignity-as-a-principle takes precedence in proportionality analysis.[342] The dignity-principle then clashes on both sides of the dispute: the dignity of collective groups as well as that of the individual. In this process there is a constant shift between an eventual balancing of the conflicting interests of the individual and collective groups. This paradox in the relational aspect of dignity is caused

339 See the discussion of *MEC for Education v Pillay* 2008 1 SA 474 (CC) in chapter 3.4.2 (footnotes 190-191.)
340 See the discussion in chapter 2.15.2.
341 Also see fn 203 in chapter 3 above.
342 Also see the discussion in section 3.3.5 above.

by limitations on individualism, resulting in the collective taking precedence over individual autonomy.[343]

Ironically, in the post-constitutional era collective dignity is still being infringed upon, and the infringement emanates not from inequality or discrimination but from hate speech.[344] As the Equality Court held in *Afri-Forum v Malema*:[345]

> Hate speech at a personal level as experienced by individuals comprising the group affected by the speech ("the target group") is a direct invasion of dignity and infringement on the rights of association of an individual.

And further in *ANC v Sparrow*:[346]

> The memories of humiliation, suffering and indignity endured by black people for so long would have come flooding back, given our history described above.

And finally, as the Court held in *South African Revenue Service v Commission for Reconciliation, Mediation and Arbitration*:[347]

> Without disregarding the fact that Mr Kruger's utterances [the k-word] amount to one of the worst violations of human dignity that according to our jurisprudence amounts to hate-speech and must be rooted out, all of the above factors point to compensation as the just and equitable remedy that is appropriate in this matter.

One can only hope that the principles of the concept of dignity, over time, would establish "social harmony and national dignity" in South Africa.[348]

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343 Botha 2009 *SLR* 219. Also see fn 187 in chapter 3.

344 [2011] 3 All SA 293 (EqC) para 30. In a similar vein, the Court held in *ANC v Sparrow* (01/16) [2016] ZAEQC 1 (10 June 2016) p 52 para 20 that: "The words posted constituted a serious affront to the human dignity of members of the complainant and black people in general, namely Africans, coloured and Indian."

345 2011] 3 All SA 293 (EqC) para 30.

346 (01/16) [2016] ZAEQC 1 (10 June 2016) p 48 para 10.

347 (CC) (unreported) case number CCT 19/16 of 8 November 2016 para 58.

348 Per Sachs J in *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 145, albeit in the context of equality.

5.4 Conclusion

Alexy, the renowned German academic, developed a model for the interpretation of constitutional rights as a result of the Federal Constitutional Court's application of balancing and proportionality. In terms of this model, constitutional norms consist of rules and principles. Rules have absolute validity and limitations on rules therefore constitute a *contradictio in terminis*. Principles, on the other hand, function as optimising requirements within their legal and factual possibilities and can thus be limited without losing their character, when a situation of conflict with other principles arises. As a feature of proportionality analysis, one principle can assume more weight than a competing principle because the weightier principle could be realised to the greatest extent possible. Alexy's take is that the inviolability aspect of dignity functions as a rule and that the component to respect and protect dignity functions as a principle. To establish whether the inviolability aspect of dignity is being infringed upon, dignity as a rule would always be violated if dignity as a principle takes precedence. Dignity-jurisprudence in Germany follows this path. In South African jurisprudence, the inherent aspect of dignity has not yet been accorded the status of a rule.

In German law, article 1(1) of the *Basic Law* provides that "*Die Würde des Menschen ist unantastbar.*"[349] (Human dignity is inviolable.) Dignity's first essential element as the only constitutional right that has absolute validity cannot be limited. The content of this right coincides with Kant's claim that dignity has no price and cannot be traded off against anything in the world. The second component of article 1(1), which requires that all state authority must respect and protect human dignity, functions as a relative right in conjunction with the balance of the constitutional rights. *Dignitas absoluta* has been developed as a subjective right, whereas the

349 Article 1(1) of the *Basic Law.*

component to respect and protect dignity does not function as a subjective right. This leads to the inevitable result that the second component can be limited in terms of proportionality analysis if conflicts arise between this component and other rights. However, if a purported limitation of the second component of article 1(1) or of any other constitutional rights leads to the infringement of the first component of article 1(1), such a limitation would be unconstitutional because it would violate human dignity.

In South African law the first component of section 10 of the *Constitution* provides that everyone has inherent dignity. By applying Alexy's model of interpretation to section 10, one can deduce that "[e]veryone has inherent dignity" assumes the status of a rule that cannot be limited and that has absolute validity. The second component, consisting of the subcomponents to respect and protect dignity, functions as a principle that can be limited, or the subcomponents can be severed from each other, to be balanced against other principles. Alexy's theory of rules and principles holds that dignity-as-a-rule can be infringed upon in two possible manners: firstly, inherent dignity is directly infringed upon as a result of certain actions, such as in the cruel and unusual punishment cases, when unfair discrimination leads to unequal treatment, and when an accused is denied the right to a fair trial. In these cases no balancing needs to be done between principles, because rules have absolute validity and any infringement would result in a violation. The second mode in which dignity-as-a-rule can be infringed upon occurs when inherent dignity has not been directly infringed upon, but where principles have been balanced and dignity-as-a-principle took precedence over competing principles, resulting in the infringement of the dignity rule.

Alexy's model is particularly useful to establish when dignity has not been infringed upon, to prevent the trivialisation of the concept. As the principle of dignity is not absolute, the injunction to respect and protect dignity can in some instances be limited in favour of other principles, without infringing

on dignity-as-a-rule. Principles have relative status; therefore during the interpretational process the second component of section 10 of the *Constitution* is detached from the inherent dignity paradigm and the limitation of this component does not cause a violation of the dignity rule. The principle of dignity merely assumes lesser importance in relation to the principle taking priority as a result of proportionality. Non-violation of dignity-as-a-rule coincides with Kant's claim that inherent dignity is priceless and inviolable.

Chapter 6: Conclusion

> In our continued quest towards a society that is just and defensible, human dignity in its various manifestations lies at the heart of all that we yearn for and aspire to as a nation in transition.[1]

6.1 Background

Dignitas humana has a rich and pervasive history, perhaps more so than any other legal concept. In Antiquity, the Stoics were the first to ascribe a universal meaning to human dignity as justifying man's dominion in the cosmos. They derived moral laws strictly from man's ability to reason and argued that obedience to these laws follows from reason. In Modernity dignity is invoked as the source of legal rights and it also functions as an independent right that demands the respect and protection of inherent dignity.

Dignity has a dual function in South African law: as one of the triad of constitutional values, it aids in the interpretation of all legal provisions, and as a right dignity functions on many sub-levels, *inter alia* to strengthen constitutional rights claims, to act as a rights-generating principle, as well as to aid in proportionality analysis. During proportionality analysis, conflicting rights are balanced against each other, in order to add lesser or greater weight to whichever right takes preference in the limitation process. The content of the right to dignity in section 10 of the *Constitution* has been traced to Kant's moral ethics, which claims that everybody has equal inherent dignity that has to be respected and protected. Section 10 consists of two elements that correspond with Kant's justification of dignity. As a constitutional right, dignity is subject to proportionality analysis and limitation when conflicting interests are to be adjudicated. It is in this area where dignity's most controversial aspect lies, because the first element,

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1 *ANC v Sparrow* (01/16) [2016] ZAEQC 1 (10 June 2016) p 32 para 10.

being the inherent dignity paradigm, cannot be subjected to limitation, as inherent dignity cannot be limited. Neither can the value of dignity be applied in proportionality analysis, as values cannot be limited. These anomalies in dignity adjudication have not been properly developed in South African law.

Consequently, the main purpose of this thesis is to conceptualise the idea of dignity, in order to establish and distinguish the content of both the value and the right to dignity. To this end, dignity's evolution was traced from its identification by the Stoics, through religion, the Enlightenment and the nineteenth century, to the current legal recognition of equal and inherent dignity.

Dignity constitutes *the* central value of the *Basic Law* and it functions as an absolute and inviolable constitutional right. Therefore it is fruitful to conclude a possible conceptualisation of dignity in South African law by comparing it in the framework of dignity's three universal elements with the position in Germany. In German law, dignity's first element is absolute and not subject to limitation, whereas the corresponding first element of section 10 of the *Constitution* is indeed subject to limitation. Although the two dignity clauses in the *Basic Law* and the *Constitution* bear similarities, the differences between the two go to the heart of the idea of dignity: in Kantian terms inherent dignity is absolute, whereas in South African law, inherent dignity can be limited. In this respect, dignity's universality renders inconclusive results. German law severs the second and third elements of dignity from the first element; consequently these two elements can be limited, as in South African law. The distinction between the inviolable and violable elements of the dignity clauses is paramount for a principled interpretation of the dignity clauses, because it indicates when dignity has been directly violated, without having to apply proportionality analysis. Furthermore, in this thesis the application of dignity in Germany and South Africa is contrasted against the application of dignity in US law,

where dignity does not display a fixed content, but instead functions as a second-order value to strengthen rights claims.

Expanding on dignity's three essential elements, a further purpose of this thesis is to apply the elements to Dworkin's and Alexy's distinction of constitutional norms as rules and principles. In terms of this classification, rules have absolute validity whereas principles can be limited, because they function as optimization requirements. The purpose of this exercise is to identify which of the elements functions as a rule or a principle, to ascertain which element can be limited in terms of proportionality analysis. It was therefore necessary to establish whether dignity functions as a rule or as a principle, or both, in South African law. Taking into account dignity's Kantian roots, it is conceivable that inherent dignity functions as a rule, and the injunction to respect and protect dignity functions as a principle. Such a classification would provide a principled basis upon which to establish whether the rule of dignity has been infringed in the perspective of both Kant's categorical imperative as well as dignity's essential elements. Treating inherent dignity as a rule would prevent it from being trivialised, over-used and used out of context.

6.2 Main findings

6.2.1 Development of the idea of human dignity

The idea of egalitarian *dignitas* in law took shape only with the Enlightenment, when Pufendorf classified human beings as persons with innate rights and concluded that they are therefore equal by nature. He incorporated the concept of human dignity (or *dignatio*) into his secularized doctrine of natural law. Before this progression on the idea of innate rights, the protection of strictly inegalitarian *dignitas* was legally enforceable. *Dignitas* was seen as an attribute that was acquired solely within the hierarchical framework of birth; gender; public services or status, notwithstanding the prevailing universal view of *dignitas humana* in

Stoicism and Christianity. Pufendorf subsequently expounded on the Stoic conception of human dignity in distinguishing between hierarchical *dignitas* and *dignatio* and argued that man is equal because of his common rational nature. He derived the claim that man has a social character from the idea that man has a common rational nature that constitutes the basis of human nature and which in turn could only be developed and realised within a social context. Whereas man's common features denote the origin of rights, human dignity in turn emanates from man's social relations. Consequently, traditional distinctions of *dignitas* as manifestations of private law limited to aristocratic societies were losing their substance, because there were no longer people with or without *dignitas.*[2] Pufendorf's differentiating idea is normative and constitutes the founding formulation for human rights, as it distinguishes between public and private law *dignitas*.

The Stoic claim regarding *dignitas humana* thus formed the basis for the Enlightenment's universalistic interpretation of man's dignity and justification for innate rights. The American and French declarations of human rights reflected this development, which in turn impacted on the moral ethical theories of Kant. Indeed, Kant acknowledged the influence of Stoicism on his own ideas pertaining to dignity. His explanation that humanity itself is dignity, and that this dignity is to be respected by protagonists and antagonists alike, is regarded as the basis of modern-day inherent human dignity. Kant's ideas provide the basis for legitimising the concept of the "inherent dignity of man" in the international documents enacted after World War II, which fuses metaphysics with secularism.[3] The insight of the Enlightenment was the *causa* for the establishing of a new world order in which humanity has universal dignity and equal rights, independent of any hierarchy. This progression culminated in the

2 Barrett 2005 *SAJHR* 531.
3 Arieli "The Emergence of the Doctrine" 7.

codification of human rights in the *Universal Declaration.* Now human beings, human dignity and human rights are interconnected, which development is rooted in Kant's moral concept of dignity (man's obedience to his self-imposed laws) and the *a priori* acknowledgement that everybody has inherent dignity.

In a different strand of development, Catholicism incorporated human dignity into its teachings in the years preceding World War II, based on the *imago Dei* canon. The incorporation of dignity in the Irish *Constitution* of 1937 indicates a reassignment of the concept of *dignitas* to an individualised and equal idea of dignity. This reference to dignity was designed to counterbalance the "depersonalized individual" depicted by secular liberalism,[4] which process resulted in a fusion of the principles of religion and Christian Democracy. From the 1942's onwards, Catholic thinking linked the "dignity of the human person" with "human rights." The ideas of Christian Democracy were also incorporated in the international documents enacted post World War II and many domestic constitutions thereafter. As a result, individual dignity entered constitutionalism as part of world history and is a legacy of both Christian Democracy and the ideas of the Enlightenment, which manifested itself in a global religious-secular constitutionalism.

The framework within which dignity was judicialised presented in the enactment of the *Basic Law* and the *Constitution* as well. The *Basic Law* unreservedly abides by the idea propounded in Stoic philosophy and religion, that man has inherent dignity which cannot, by definition, be violated or limited. Human dignity as a normative instruction functions as the legitimising basis for the state and as the foundation of the *Basic Law.* By contrast, and although the dignity clauses in the *Constitution* share a family semblance with article 1(1) of the *Basic Law,* dignity functions as

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4 Moyn 2014 *YHRDJ* 56.

one of the constitutional values and as a relative right. By further contrast, dignity displays no fixed content in US law and functions as a second order rule.

The all-embracing element that links humanity with each other is dignity. Stoicism initially recognised this universality, where after it was harmonised by religion and metaphysics and eventually became legitimised in current law.

6.2.2 Towards a conceptualisation of human dignity

Kant's categorical imperative was legalised in the international documents enacted post World War II as well as in the *Basic Law* and several domestic constitutions to follow. This anti-positivistic legal development embraces a fusion of moral principles with the seemingly objective theory of law. The multiple meanings ascribed to dignity in Stoicism, religion and philosophy culminated in the *a priori* postulation that dignity is inherent in humanity, which has to be respected and protected. Because the human species is connected, man's focus is now not only on himself, but "on the vindication of the dignity of all humankind."[5] As a result, human dignity is universally accepted as the basis of and justification for human rights. The protection of dignity is an essential feature of the post-war rights-protecting paradigm, in which state authority is limited and delineated in order to protect human dignity.[6] In Kantian terms, the state exists for the benefit of the individual and not *vice versa*.

Dignity's universality encompasses three essential elements in the adjudication of individual rights claims in international and domestic systems. The three elements coincide with Kant's categorical imperative that inherent dignity has to be respected and protected. The first element

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5 Fletcher 1984 *UWOLR* 176.
6 Weinrib 2005 *NJCL* 333.

refers to the ontological claim that each individual has inalienable, intrinsic and inherent worth. Inherent dignity is by definition the very antithesis of the hierarchical *dignitas* as status and the differential claim of private law *dignitas.* Inherent dignity resonates with the Ciceronian Stoic claim of man's elevation in nature and with the Judeo-Christian tradition that emphasises man's nature as a creation in the image of God. Inherent dignity cannot be gained or lost. Article 1(1) of the *Basic Law* coincides with the claim that inherent dignity is inviolable. Section 10 of the *Constitution* refers to the *a priori* postulation that everybody has inherent dignity. The second element, which demands respect and protection of dignity, comports with Kant's instruction that dignity has to be mutually respected and protected. The dignity clauses in both the *Basic Law* and the *Constitution* contain similar postulations. Dignity's third element, which holds that the state has to realise dignity by implementing socio-economic rights, is an expansion of the second element. In US law, however, dignity adjudication does not display the same normative content, because this legal system protects autonomy and individual rights and prohibits interference with individual rights by the state, without requiring that the state must respect and protect constitutional rights.

Article 1(1) of the *Basic Law* and section 10 of the *Constitution* postulates an *a priori* claim that everybody has inherent dignity. In German law, inherent dignity functions to trump autonomy as a result of dignity's inviolability. As an additional mechanism to protect inherent dignity, German law devised the object formula (*Objektformel*), which is based on Kant's categorical imperative and holds that the individual is not to be treated as a means to an end, even in extreme circumstances. In South African law the inherent dignity paradigm is employed to realise substantive equality as required by section 9 of the *Constitution,* in the context of unfair discrimination and differential treatment and specifically to redress the *sequelae* of the apartheid policies. In addition, the Court applies the prohibition against the violation of inherent dignity in the cruel

and unusual punishment cases to prevent the convicted person from being dealt with as a mere means to an end when punishment is inflicted.

As the second and third elements of dignity, being the injunction to respect and protect dignity in the *Basic Law* and the *Constitution* relates to Kant's formulation that to act in accordance with reason is to act solely out of a self-imposed but reciprocal duty to uphold one's own moral law. Here duty is connected to respect for the human dignity of ourselves and others. Such dignity is ultimately the supreme value to be respected as an end-in-itself, so that humanity should never be treated as a means only (the categorical imperative.) This notion of dignity is essentially communitarian in character, because dignity is indissolubly constituted through the individual's relationship to his society. In this respect, dignity does not function absolutely, because individual freedom can be limited in favour of one's community, resulting in a constant shift of and eventual balancing between the sometimes conflicting interests of the individual and his society. Consequently, the second and third essential elements of dignity display relative features, as opposed to inherent dignity, which is absolute.

In German law the second component of article 1(1) that requires the state to respect and protect dignity functions independently from the first component, which is inherent dignity. The injunction to respect and protect dignity is adjudicated as a relative right that can be limited during proportionality analysis, whereas any limitation on inherent dignity is unconstitutional. The second component is applied as a relative right only if a purported limitation does not result in an infringement upon inherent dignity. In South African law, the first and second elements of dignity, as encapsulated in section 10 of the *Constitution*, are in some instances adjudicated as a complete unit and in other instances not (such as in the cruel and unusual punishment cases and when inherent dignity protects substantive equality.) In instances when inherent dignity is not severed from the injunction to respect and protect dignity, the complete unit of

section 10 functions as a relative right that can be limited during proportionality analysis.

Dignity functions as a value and as a right in both Germany and South Africa, but in US law only as a value. In the first-mentioned jurisdictions, the content of the value of dignity consists of the three essential elements. However, the right to dignity in German law functions in a unique way because of its inviolable status, which regulates that dignity is not subject to limitation. Its scope is narrower than the scope of the value of dignity, which encompasses all the elements of dignity.[7] This is because the right includes only the first element of dignity as inherent dignity, to protect the individual in terms of the object formula from being treated as a means only. As a result, a detachment occurs between the scope of the value and the right to dignity. In South African law, Barak[8] argues that the "accepted view" is that section 10 of the *Constitution* is interpreted as a complete unit, thereby adding to the status of dignity as a relative right to which general rules of limitations apply during proportionality analysis. However, if section 10 is treated as a complete unit, the scope of the right and the value would overlap, which could lead to inconsistency and interpretational problems, because inherent dignity cannot be limited in one instance and be absolute in another instance.

Human dignity has multiple legal functions on two primary levels: as a value and as a right. The juridical grounding for dignity is to be found in its three essential elements. Inherent dignity as the first element should function as a categorical imperative that cannot be limited. The second and third elements of dignity function independently from the first element, to protect violation of inherent dignity. Inherent dignity is what distinguishes German law from South African law: the *Basic Law's*

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7 "Human Dignity: The Constitutional Value and the Constitutional Right" 370.
8 *Human Dignity The Constitutional Value and the Constitutional Right* 247.

injunction that inherent dignity is inviolable coincides with Kant's categorical imperative, whereas inherent dignity does not enjoy the same status in the *Constitution*.

6.2.3 The interpretational role of human dignity in human rights and comparative law

Human dignity plays a predominant role in the multi-layered systems of protection of human rights, following expression into law by means of the *Charter of the United Nations,* 1945 (*UN Charter*) and the *Universal Declaration of Human Rights,* 1948 (*Universal Declaration*.) The "inherent dignity of the human person"[9] functions as the basis of human rights. Human rights have universal validity and transcend culture, politics and society, but are simultaneously contingent on social context. Thus they are culturally relative. However, dignity's three essential elements are implied in the preamble and article 1 of the *Universal Declaration* and many international human rights documents adopted thereafter. Not only have the *UN Charter* and the *Universal Declaration* influenced subsequent national constitutions, but courts frequently refer to transnational dignity adjudication in their judgments. This notwithstanding, there is profound disagreement in domestic jurisdictions regarding the scope of human rights' protections as well as ideological differences regarding rights adjudication. Notwithstanding its universal claim, dignity displays context-specific features in different jurisdictions and different peoples may come to different conclusions. The European Court of Justice endorsed the differences in nuances in the meaning of dignity in the *Omega Spielhallen*[10] case, in which the Court found that dignity may have significantly varying meanings and scope in the member states, and in

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9 Principle VII of the *Helsinki Final Act,* 1975.

10 *Omega Spielhallen und Automatenaufstellungs- GmbH v. Oberbürgermeisterin der BundesstadtBonn* [2004] ECR I – 9609, as quoted and discussed by McCrudden 2008 *EJIL* at 710.

essence that Germany's approach and perspective was not necessarily the same as that of other states.

Dignity's multiple meanings present in comparative analysis of foreign law too. McCrudden, the renowned human rights scholar, argues that the essential elements of dignity represent an "empty shell" as a result of the widespread transnational references to dignity.[11] He suggests that inherent dignity seems to be false and superficial, subject to malleability and arbitrariness, and so too the idea of human rights, as a result of divergent applications across jurisdictions regarding similar factual contexts such as abortion, hate speech and socio-economic rights. In order to prevent inconsistent and incorrect application of dignity when foreign law is cited, it is submitted that dignity's three elements need to be applied in the framework of the distinction between constitutional norms as rules and principles, as explained by Dworkin and Alexy. Furthermore, the identification of principles and rules in foreign law plays an important role in comparative interpretation in order to differentiate between the abstraction of a concept and the function of the issue compared, thereby helping to identify differences and similarities. During the comparative process, it needs to be established what role dignity plays in a specific jurisdiction, and specifically whether dignity is employed as a value or a right, and if so, whether dignity functioned as a relative or an absolute right. Identifying dignity's three essential elements when foreign law is examined would indicate what role dignity assumes.

Applying the rule/principle distinction against the conceptualisation of dignity that roots in Kant's categorical imperative and its three essential elements, it is evident that inherent dignity as the first element functions as a rule and the injunction to respect and protect as the second and third elements operate as principles. In the perspective of human rights, rules

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11 2008 *EJIL* 698.

and principles can have universal validity. However, to prevent incorrect citation of dignity as a rule or as a principle, and a consequent violation of the rule of law, judges will have to discern dignity's role in a specific jurisdiction to prevent a so-called "history of errors."[12] It is in the application of inherent dignity as a rule that a so-called *ius commune* originated in the perspective of cruel and unusual punishment, resulting from judges' agreement that this punishment violates inherent dignity.

Rautenbach and Du Plessis[13] found that the South African Constitutional Court cited only one German case in the context of section 10 of the *Constitution* in the period between 1995 and 2011*,* which citation refers to the death penalty as being cruel and unusual punishment. The paucity of the references by the Court to German human dignity cases result from the unique function of dignity in German law as a right with a narrow scope, not subject to limitation under any circumstances. In *S v Makwanyane*[14] the Court referred to the German application of the *Objektformel* in the *Life Imprisonment*[15] case, which is based on Kant's categorical imperative. Furthermore, the High Court referred to the Canadian application of competing rights such as life and liberty, which do not automatically trump the right to dignity, in the context of assisted suicide in *Robert James Stransham-Ford v Minister of Justice and Correctional Services.*[16] *In casu,* Fabricius J applied the distinction between rules and principles in both jurisdictions to conclude that inherent dignity is infringed by the *sequelae* of a debilitating illness. The references to these foreign cases rather provide a "history of examples."[17] Therefore South African comparative dignity jurisprudence, with reference to German law and Canadian law, falls outside the ambit of McCrudden's criticisms

12 Botha "Comparative Law" 584, quoting AJ van der Walt (at 570 fn 12).
13 2013 *GLJ* 1540, 1572 and 1574.
14 1995 3 SA 392 (CC) para 89.
15 BVerfGE 62,274.
16 2015 4 SA 50 (GP).
17 Term coined by Van der Walt in *Constitutional Property Clauses* 38.

that the widespread transnational use of dignity (in the absence of a so-called universal concept of dignity,) causes domestic case law and human rights norms to become indistinguishable from judges' arbitrary citation and application of foreign law. Conversely, US law maintains an originalist viewpoint as a consequence of which references to foreign law are (currently) limited to the cruel and unusual punishment cases.

The interpretative role of human dignity in purposive interpretation contributes to dignity's potential to conform to changing social perceptions on the one hand and on the other hand to act as the lodestar for society to accept constitutional visions of an equal and just existence for human beings. Dignity as a value, which encompasses the three essential elements, is employed as a yardstick to provide a regulative framework for protection against state authority and as a basis for the limitation of rights. The historical significance of a constitution as a "grand narrative" or underlying purpose for interpretation plays a significant role in establishing a constitution's objective meaning. In German law, inherent dignity is constituted as an *a priori* value; therefore the objective purpose of the *Basic Law* is rooted in dignity's three essential elements and translates into the application of the *Objektformel,* to protect against violations of dignity. In South African law, dignity is employed as a value in purposive interpretation to give effect to the "grand narrative" of the *Constitution,* namely to protect human rights in the post-constitutional era. The postulation of inherent dignity as the first essential element in section 10 should function as the *Constitution's* foundational principle and objective purpose; therefore it needs to be interpreted as a rule that cannot be limited, similar to the application in German law. The US Supreme Court applied the concept of dignity purposefully in *Obergefell v Hodges*[18] to find that the equal dignity of same-sex couples wishing to marry emanates from the fundamental liberties protected by the Fourteenth Amendment.

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18 135 S. Ct. 1039 (2015).

Dignity's three essential elements materialise in the distinction between constitutional rules and principles, in terms whereof inherent dignity operates as a rule and the injunction to respect and protect dignity functions as a principle. Notwithstanding claims of dignity's universality, judges will have to take cognisance of dignity's functions in a specific constitution in terms of the distinction between rules and principles when they cite foreign dignity adjudication, to avoid inconsistent and arbitrary applications of dignity in domestic law.

6.2.4 Forms and functions of human dignity in German and South African law

6.2.4.1 German law

6.2.4.1.1 Dignity as a value

Human dignity functions as the highest constitutional value in Germany and as such embodies Kant's imperative that dignity is inviolable. The scope of the value includes the three essential elements and operates as the basis of the constitutional rights. These rights serve to respect and protect dignity as the second and third elements. As such, dignity also aids in the interpretation of the constitutional rights, helping to formulate their meaning, scope and restrictions.

6.2.4.1.2 Dignity as a right

In German law, only the first element of dignity operates as a right that is illimitable. Inherent dignity is implicit in the balance of the constitutional rights and functions as an "absolute barrier"[19] against interference, to prevent having the individual being reduced to an object. Any limitation on a constitutional right that results in a violation of inherent dignity is unconstitutional. The narrow scope of dignity causes it to be used in a

19 Enders 2010 *RECHTD* 5.

minimum set of cases and in accordance with its understanding of inviolability as a reaction to the transgressions of dignity under National-Socialism. Although the Federal Constitutional Court characterises dignity as a constitutional right, it has applied dignity as such only in *obiter* remarks as well as in instances where dignity overlaps with other constitutional rights. However, the duty to respect and protect dignity (dignity's second and third elements) has not been developed as a self-standing subjective right; therefore these elements can be limited during proportional analysis.

In applying Dworkin's and Alexy's distinction of constitutional norms into rules and principles to article 1 (1) of the *Basic Law,* it becomes evident that inherent dignity, being the first element, operates as a rule that is absolute and cannot be limited. Here dignity functions in an "all-or-nothing fashion" and any limitation results in a violation. The application of inherent dignity as a rule corresponds with Kant's categorical imperative as well as with the *Objektformel.* The duty to respect and protect dignity functions as a principle, because it can be realised only to a certain extent and can be limited in certain circumstances, which limitation would not result in an infringement of inherent dignity – it merely means that greater weight is given to a competing principle than to the principle of dignity. Treating the second and third elements of dignity as a principle coincides with Kant's moral ethics that people should respect each other's dignity. In German law, the duty to respect dignity is severed from the duty to protect dignity, and priority is given to the duty to respect dignity in proportionality analysis.

The strict content of the right to dignity causes it to be applied in a very narrow set of circumstances, in order to protect the essence of inherent dignity and to prevent the trivialised and inconsistent use of dignity.

6.2.4.2 South African law

Dignity operates as a universal and moral justification for both the *Constitution* and for human rights. It has a dual function as a value and a right in South African law, but dignity does not enjoy the same inviolable status as in German law. Dignity's three essential elements are implicit in both the value and the right to dignity, whereas in Germany the right to dignity includes only the first element. In South African law section 10 of the *Constitution* is adjudicated as a complete unit, although semantically it consists of two units, namely the claim that everybody has inherent dignity on the one hand and the injunction to respect and protect dignity on the other hand. Although section 10 encompasses dignity's three essential elements and is therefore rooted in Kant's categorical imperative, it does not reflect true Kantian ethics, because inherent dignity is not severed from the second component of section 10, and consequently it does not function as an absolute right.

In the adjudication of dignity, it has to be identified whether dignity functions as a value or as a right, or as both, in order to firstly establish whether dignity has been infringed, or secondly, if dignity has not been infringed, to correctly apply dignity's multiple functions.

6.2.4.3 Dignity as a value

Dignity functions on three sub-levels as a value:

(a) dignity informs the interpretation of all positive law;

(b) any "reasonable and justifiable" limitation of a constitutional right has to be considered within the realm of dignity; and

(c) dignity is applied in the interpretation of a statute or when the common and customary law is developed, to promote the spirit, purport and objects of the *Bill of Rights.*

6.2.4.3.1 Dignity as a right

As a right, dignity functions on four sub-levels:

(a) where no specific right could be identified to protect the value of dignity, dignity functions as a free-standing right, for example to protect the right to legal representation and the right to be detained in conditions consistent with human dignity in terms of section 35(2)(e) of the *Constitution;*

(b) dignity operates as a rights-generating mechanism to derive from the right to dignity, rights not enumerated in the *Constitution;*

(c) dignity overlaps with other constitutional rights as the basis of these rights. This relationship causes the following functions of dignity:

    a. dignity fortifies constitutional rights in the overlapping zone;

    b. it aids in limitation analysis when dignity conflicts with dignity on both sides of the conflict, or with other (conflicting) rights; and

(d) dignity is employed as a yardstick in the adjudication of the validity of legislation and the common and customary law within the framework of the *Constitution.*

6.2.4.4 Anomalies in the application of dignity as a value and a right

Dignity's most controversial aspect lies at the intersection between dignity as a right and as a value. It is paradoxical to rely on inherent dignity, which is absolute in the Kantian sense, but to balance this feature with the relative right to dignity, which encompasses inherent dignity. Although the Court established dignity's theoretical underpinnings in *S v Makwanyane,*[20]

20 1995 3 SA 391 (CC).

it applies the inherent component inconsistently, which results in the non-protection of inherent dignity in some instances. Dignity adjudication in this respect has not been properly developed in South African law.

6.2.4.5 Recommendations

In view of the aforementioned anomalies pertaining to adjudicating dignity as a value and a right, it is recommended that the following model of constitutional interpretation be applied to provide a principled basis for the adjudication of dignity and to avoid the inconsistent application of dignity:

6.2.4.5.1 Section 10 of the *Constitution* consists of two components

To address the anomalies that arise when the adjudication of inherent dignity is at stake, section 10 of the *Constitution* should be interpreted as two components that function independently from each other. Each of these components has different legal meanings and each may be violated in distinct ways. The idea that each component functions independently coincides with dignity's three essential elements. A severance of these components has significant importance for proportionality analysis, because an infringement upon the duty to respect and protect dignity does not necessarily result in a violation of inherent dignity.

6.2.4.5.2 Dignity-as-a-rule and dignity-as-a-right

Taking the idea that section 10 has two independent components further, one can argue that the *a priori* postulation of inherent dignity as the first component functions as a rule, and the second component, to respect and protect dignity, functions as a principle, in terms of the classification of constitutional norms by Dworkin and Alexy. Inherent dignity displays the features of a rule, because it is absolute and cannot be limited. The duty to respect and protect dignity manifests in the features of a principle, because it can be realised only to a certain extent; therefore it functions as a relative right. As in German law, the second component can be divided

into two sub-components: the duty to respect can function independently from the duty to protect, depending on the facts of each case.

The distinction between dignity-as-a-rule and dignity-as-a-principle becomes relevant during proportionality analysis. The principle of dignity cannot be weighed against the rule of dignity, because the rule is absolute and cannot be limited. However, dignity-as-a-principle (severed from dignity-as-a-rule) can be weighed against competing principles during proportionality analysis, in terms whereof dignity-as-a-principle can either take preference over the competing principle, or the competing principle can take preference over the dignity principle. In this respect, the distinction between the rule and the principle of dignity will indicate when dignity-as-a-rule has been infringed.

6.2.4.5.3 Infringement upon dignity-as-a-rule

There are two instances in which the rule of dignity can be infringed:

(a) Direct infringement

As in German law, dignity is directly infringed when a human being is used as an object and where preference over other norms is not considered. In this instance, no balancing of competing principles is applied, because inherent dignity is illimitable. Direct infringement of dignity manifested in the cruel and unusual punishment cases; when unfair discrimination occurs and when the right to a fair trial is denied. A further manifestation of direct infringement of the rule of dignity occurs when both the sub-components of the dignity-principle have simultaneously been violated, in which event no balancing between principles is applied because any limitation would lead to a violation of inherent dignity, such as in rape cases. In another strand it was found that inherent dignity was violated as

a result of the debilitating *sequelae* of a terminal illness.[21] Protecting inherent dignity by applying it as a rule would protect against future violations of dignity, specifically in the field of bio-ethics.

(b) Indirect infringement

Dignity-as-a-rule is infringed when dignity-as-a-principle engaged with competing principles and has taken preference in proportionality analysis against the principle, which has been accorded less weight in this process. In these instances, the duty to respect and to protect can function as sub-components of the principle and can take preference on their own during proportionality analysis. For example, indirect infringement of dignity-as-a-rule can occur in instances when the rights to dignity, equality and life take precedence over the state's financial responsibilities, such as in the socio-economic rights' cases. A further manisfestation of indirect infringement of the rule of dignity can occur in the rights to privacy and freedom of expression matters, when the right to dignity takes preference over the conflicting rights, resulting in a violation of inherent dignity.

The types of infringement of dignity-as-a-rule is not exhaustive and restricted to only the examples discussed above regarding direct and indirect infringement: as time evolves, more examples of infringement of the rule of dignity will come to the fore, however; infringement of dignity will always have to be judged in terms of Alexy's distinction between rules and principles.

6.2.4.5.4 Non-infringement of dignity-as-a-rule

Dignity-as-a-rule cannot be infringed when dignity-as-a-principle does not take preference in proportionality analysis. According to Alexy's theory of constitutional rights, the fact that one principle takes preference over

21 *Robert James Stransham-Ford v Minister of Justice* 2015 4 SA 50 (GP).

another during proportionality analysis does not result in the invalidity of the principle, having been accorded less weight during this process.[22] The second and third essential elements of dignity, which operate as principles, would not in all instances of balancing take greater weight over competing principles. Applying dignity-as-a-principle would prevent the trivialisation of inherent dignity.

6.3 Conclusion

The legal significance of human dignity lies in its potential to protect humanity against denigration. As such, dignity is inseparably linked to human personhood. The universal claim of dignity constitutes a powerful idea, operating in a multitude of contexts, demanding respect and protection of the dignity of vulnerable members of society. As a universal right it protects humanity not only against past transgressions, but also against future and undefined transgressions. Notwithstanding dignity's status as universal and absolute, its meaning remains elusive. However, dignity's appeal lies in the malleability of the concept rather than in a fixed definition - it has the potential to adapt to social needs and cultural understandings.

The need for the legal protection of human dignity arose as a result of past transgressions of dignity. Now the burden of proof that a person has not been treated as a mere object lies against the state. Dignity's *a priori* postulation means not only that dignity cannot be waived, but also that no balancing of individual or communitarian interests can be applied against inherent dignity. In US law, however, dignity has no similar independent function – the idea of equal dignity operates to strengthen rights' claims such as equality, liberty and autonomy.

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22 Alexy *A Theory of Constitutional Rights* 84.

The three essential elements of dignity run like a golden thread through the adjudication of this value and right. It constitutes the basis for distinguishing between dignity-as-a-rule and dignity-as-a-right as a model for constitutional interpretation. The proposed model provides a principled basis for the interpretation of dignity in the perspective of Kant's categorical imperative and should result in legal consistency. The rule/principle distinction should resolve the constant conflict when competing principles have to be balanced. In addition, it should provide guidance to judges when they are called upon to determine the legal significance of human dignity.

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