Human dignity and fundamental rights in South Africa and Ireland

Anne Hughes
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Acknowledgment

THE ARTHUR COX FOUNDATION

Arthur Cox, solicitor, classical scholar and former president of the Incorporated Law Society of Ireland, was associated with the setting up of many Irish companies, not least the Electricity Supply Company (ESB). He was a specialist in company law and was a member of the Company Law Reform Committee which sat from 1951 and reported to the Government in 1958, ultimately giving rise to the Companies Act 1963. When he decided to retire from practice as a solicitor in 1961 a number of his clients, professional colleagues and other friends, in recognition of his outstanding contribution to Ireland and his profession, thought that a fund should be established as a tribute to him which fund would be used to encourage the writing and publication of legal text books. There was a generous response to this appeal.

After his retirement Arthur Cox studied for the priesthood and was ordained in 1963. He went to Zambia to do missionary work. He died there in 1965 as a result of a car accident.

The Foundation was established to honour Arthur Cox and was for many years administered by Mr. Justice John Kenny in conjunction with the Law Society. John Kenny was the encouraging force behind the publication of a number of Irish legal textbooks. Without his quiet drive and enthusiasm there would have been no Foundation. To both Arthur Cox and John Kenny we pay tribute.

The Foundation’s funds have been used to assist the writing and publication of Irish legal textbooks and the development of electronic databases of Irish legal materials. The Foundation has recently inaugurated an annual prize for the best overall results in the business and corporate law modules of the Law Society’s Professional Practice Courses.

The Law Society, as the continuing trustee of the Foundation, is pleased to have been able to assist in the publication of this book.

John P. Shaw
President – Law Society of Ireland
December 2013
Preface

Since the post-apartheid constitutional era commenced almost two decades ago, there have been many progressive judicial decisions on fundamental rights in South Africa. By contrast over the same period, the longer-established Irish legal system has gone through a phase of deference to the separation of powers resulting in a more restricted interpretation of human rights. As no comprehensive analysis of the comparison between fundamental rights in South Africa and Ireland has hitherto been undertaken, this book aims to address that subject. I have carried out substantial doctrinal research and a literature review focusing primarily on fundamental rights in South Africa, Ireland and internationally, but extending to other countries and regional systems. The research goes beyond the South African and Irish constitutions to various European and African countries and to places with similar legal backgrounds to them or that have a particular emphasis on dignity. Within its ambit are Germany, Canada, India, Israel, the US, Australia and New Zealand. Case-law and legislation are noted, and new developments tracked. The conclusions result from deductive and inductive reasoning, refined by critical evaluations.

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

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

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

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

This book extends to an examination of remedies and the scope of fundamental rights. As suggested in the South African jurisprudence, a more coherent values-driven structure could be created for ascertaining the appropriate level of damages for defamation and catastrophic injuries. Alternative reconciliatory remedies for defamation might also be considered. Mediation of disputes is arguably more compatible than adversarial litigation with the establishment of enduring human relationships that enhance human dignity. The horizontal application of rights and the extent of the state’s positive human rights obligations are probed. There is a constitutional base for mandating the courts to enforce rights where the state is not a direct protagonist. It is argued that the limitation rules that apply to actions concerning fundamental rights should not be the same as those that govern other claims in tort. A broad interpretation, as in South Africa, can give effect to the spirit of a constitution and its underlying values. Accountability is essential in a democracy to ensure that those in positions of power exercise the authority entrusted to them in a responsible manner.
Because of the similarities in the normative constitutional framework in both countries, some useful guidelines can be extracted from the South African experience to reinvigorate Irish jurisprudence. Illustrations from various jurisdictions demonstrate that the South African approach is not idiosyncratic on account of the apartheid legacy, but is suitable for adoption in other countries. Fundamental Irish constitutional values have the capacity to produce a more rigorous prohibition on parental corporal punishment, to progress the delivery of substantive equality and the reduction of overcrowding in prisons, and to lead to recognition of the ethnic identity of Travellers. The law of torts could be refashioned, and contract law might be developed to provide further protection for consumers and others in an unequal bargaining position. The Irish judiciary could give a deeper meaning to human dignity by seeing it in a relational context, rather than adopting a restricted individualistic view of it. A mutually supportive and respectful relationship could develop between the judiciary and the executive.
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Human Rights Act 1998
Rent Act 1977
Statute of Westminster 1931

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Civil Rights Act 1964

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Constitution of the German Reich 1919
Basic Law for the Federal Republic of Germany 1949
Constitution of the Republic of Ghana 1992
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Interim Constitution of the Republic of South Africa 1993
Constitution of the Republic of South Africa 1996
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Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 59 Stat 1031, UNTS 993, 3 Bevans 1153


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Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research (2005) CETS No 195


First Protocol to the European Convention on Human Rights

Fourth Protocol to the European Convention on Human Rights


European Social Charter (revised) ETS No 163

Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135


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

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


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UNSC Res 311 (4 February 1972) UN Doc S/Res/311(1972)


## Abbreviations

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<tr>
<th>Abbreviation</th>
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<td>AC</td>
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<td>ACHPR</td>
<td>African Commission on Human and Peoples’ Rights</td>
</tr>
<tr>
<td>AD</td>
<td>Appellate Division Reports (South Africa)</td>
</tr>
<tr>
<td>AHRLR</td>
<td>African Human Rights Law Reports</td>
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<tr>
<td>AIR</td>
<td>All India Reporter</td>
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<td>All ER</td>
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<td>Butterworths Constitutional Law Reports (Namibia; South Africa)</td>
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<td>CC</td>
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<td>Constitutional Court (Germany; South Africa)</td>
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<td>Cases on Human Rights</td>
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<td>CLR</td>
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<td>CPD</td>
<td>Cape Provincial Division (South Africa)</td>
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DLR  Dominion Law Reports (Canada)
DLT  Delhi Law Times (India)
ECHR  European Convention on Human Rights
Reports of Judgments and Decisions of the European Court
of Human Rights
ECJ  European Court of Justice
ECOWAS  Community Court of Justice of the Economic Community
of West African States
EDL  Eastern Districts Local Division (South Africa)
EHRR  European Human Rights Reports
eKLR  Kenya Law Reports
ER  English Reports (England and Wales)
EWCA Civ  Court of Appeal (Civil Division) (England and Wales)
EWHC  England and Wales High Court (England and Wales)
Foro It  Italian Forum
F.Supp  Federal Supplement (United States)
F.Supp 2d  Federal Supplement, Second Series (United States)
F.2d  Federal Reporter, Second Series (United States)
F.3d  Federal Reporter, Third Series (United States)
HC  High Court
HCA  High Court of Australia
HL  House of Lords
HRLRA  Human Rights Law Reports of Africa
IACHR  Inter-American Court of Human Rights
ICJ  International Court of Justice
ICR  Industrial Court Reports (England and Wales)
ICTR  International Criminal Tribunal for Rwanda
IECCA  Court of Criminal Appeal, Ireland
IEHC  High Court, Ireland
IESC  Supreme Court, Ireland
ILRM  Irish Law Reports Monthly
ILTR  Irish Law Times Reports
INSC  Supreme Court of India
IR  Irish Reports
Ir Jur Rep  Irish Jurist Reports
JIC  Justis Irish Cases
JT  Judgements Today (India)
JZ  Juristen-Zeitung (Lawyers Newspaper, Germany)
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Human dignity and fundamental rights in South Africa and Ireland

SA South African Law Reports
SACR South African Criminal Law Reports (Namibia)
SALR South African Law Reports
SAR South African Republic High Court Reports
SC Session Cases (Scotland)
Supreme Court
SCA Supreme Court of Appeal (South Africa)
SCC Supreme Court of Canada
Supreme Court Cases, India
SCCC Constitutional Court of Seychelles
SCGLR Supreme Court of Ghana Law Reports
SCNJ Supreme Court of Nigeria Judgments
SCR Supreme Court Reports, Canada
Supreme Court Reports, India
SW 2d South Western Reporter, Second Series (United States)
SZSC Supreme Court, Swaziland
SC Supreme Court Reporter (United States)

TPD Transvaal Pro vincial Division (South Africa)
TS Transvaal Supreme Court (South Africa)

UGCC Constitutional Court of Uganda
UgHC High Court, Uganda
UGSC Supreme Court, Uganda
UKHL United Kingdom House of Lords
UKPC United Kingdom Privy Council
US United States Supreme Court Reports

WLD Witwatersrand Local Division (South Africa)

ZACC Constitutional Court of South Africa
ZAGPHC Gauteng High Courts, South Africa
ZAGPPHC North Gauteng High Court, Pretoria, South Africa
ZaHC High Court, Zambia
ZASCA Supreme Court of Appeal, South Africa
ZAWCHC Western Cape High Court, South Africa
ZLR Zimbabwe Law Reports
ZMSC Supreme Court, Zambia
ZR Zambia Law Reports
ZWHHC Harare High Court, Zimbabwe
ZWSC Supreme Court, Zimbabwe
Chapter 1

Introduction

1.1 Introduction

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

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

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3. As above.
5. Binchy (n 2 above) 318 - 319; G Hogan & G Whyte JM Kelly: *The Irish Constitution* (2004) [2.1.32]-[2.1.34], [7.3.222]-[7.3.223].
Why should there be such a profound difference in the jurisprudence of the two countries? The book points out the following answers. The South African Constitution⁶ is manifestly transformative in character, replacing the harsh positivism and lack of respect for the equal and inherent worth of the person which characterised the apartheid regime.⁷ This Constitution, in embracing the values of equal respect and inherent dignity, has transformed the judicial resolution, not merely of issues relating to race and ethnicity, but of matters completely removed from that context. The new constitutional understanding of the individual and society, and so the place of dignity in the constitutional order, has resulted in the refashioning of the law in areas of social justice, such as housing, health provision and education, but also in relation to personal conduct and personal relationships. It is, in retrospect, no surprise that a dignity-based new constitutional order should have led the courts to the conclusion that same-sex marriage is a constitutional necessity.

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

10 W Binchy ‘The Supreme Court of Ireland’ in B Dickson (ed) Judicial activism in common law supreme courts (2007) 171; Hogan & Whyte (n 5 above) [1.1.55], [7.1.08]-[7.1.18], [7.1.22] fn 42; Keane (n 8 above) 10, 13 - 14, fn 17; Whyte (n 1 above) 46 - 51.
11 The common law’s theory of personal liberty was based on the principle that no legal sanction could be imposed for what was not expressly forbidden by law: AV Dicey Introduction to the study of the law of the constitution (1915) xxxvii, 203 - 204.
Moreover, the strong tradition of deference to parliamentary sovereignty\textsuperscript{12} was slow to fade. It is true that for a period of a couple of decades, from the mid-1960s to the mid-1980s, the Irish constitutional jurisprudence on fundamental rights developed exponentially, under the inspiration of Ó Dálaigh CJ and more particularly Walsh J.\textsuperscript{13} These two judges can now be seen as faithful exponents of the philosophy of the Constitution, who grasped its radically transformative effects on the traditional common law model, based on deference to parliamentary sovereignty, and the strongly positivist philosophy which had been in the ascendancy. Walsh and Ó Dálaigh opened up the possibility of a judicial understanding of constitutional rights as being based on a human rights philosophy.\textsuperscript{14} The implications for the doctrine of the separation of powers were equally radical. Yet, other judges, while acquiescing in the Walsh/Ó Dálaigh approach, had no great enthusiasm for it. Their training and background generally gave them no particular expertise in philosophical reflection. With the departure of Ó Dálaigh CJ and, later, Walsh J, and perhaps more importantly, with changes in Irish society in which the standing of the Catholic Church and, consequently, respect for its social philosophy, has weakened greatly, the present disposition of Irish judges to uphold and develop a natural law understanding of human dignity has become almost imperceptible.\textsuperscript{15}

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

With human dignity as their constant lodestar, the South African courts play their constitutionally-mandated part in the national mission to transform relationships in society by moving them from their morally indefensible apartheid roots of inequality, humiliation and enforced vulnerability on the


\textsuperscript{13} Binchy (n 10 above) 169, 171 - 172; Keane (n 8 above) 9 - 10; JM Kelly A short history of Western legal theory (1992) 425.


\textsuperscript{15} Binchy (n 10 above) 214 - 215.
particularly odious ground of race to a foundation of reciprocity in a humane community exhibiting respect for the inherent dignity, equality and freedom of each of its members. The person is positioned in society, where human rights – linked with correlative duties – are harmonised to the greatest extent possible. This well-developed communitarian understanding of dignity supported by constitutional norms clearly reasoned and articulated by the judiciary contrasts with the Irish courts’ sporadic acknowledgment of the dignity of the atomised individual without taking into account the emphasis in the Constitution on social justice which also requires human dignity to be located in a group setting. Because of the dramatic switch from the exclusivity embedded in the previous regime to a polity committed to embracing all citizens, it is not surprising that the transformative process was based on the value of human dignity, which recognises the inherent worth of each person. What is startling is that the Irish judges (unlike their South African counterparts) have shown great reluctance to examine the foundational norms and value systems of the Constitution. Their failure, combined with an unnecessarily stringent application of the separation of powers, has inhibited the development of a jurisprudence laying strong emphasis on human dignity.

As South Africa has shown, a communitarian application of human dignity can be the foundation of a humanist philosophy that promotes equality in many spheres and combats discrimination on the grounds of, inter alia, race, gender, civil status and cultural background, as well as extending the ambit of the right to life from mere survival to the leading of a dignified healthy meaningful life with sufficient nourishment and shelter to enable the development of fulfilling relationships and participation in society with the enjoyment of civil and political rights. Its ethos requires that prisoners, children, nomadic people, the disabled and other marginalised or vulnerable groups be treated with equal respect. It protects against degradation and humiliation in the punishment meted out for crimes and in the sanctions for civil law breaches. The all-pervasive influence of human dignity is evident in these examples of the diverse areas where it has been successfully invoked: bodily and mental integrity, fair procedures in the justice system, freedom to express oneself and to form publically-recognised relationships, upholding of reputation, and preservation of a private sphere with the autonomy to take an informed decision on how best to lead one’s life and to decide on what private information to reveal. Its reciprocal nature is evident in its curtailment of self-degradation and its limiting effect on the exercise of rights to accommodate the rights of others or the common good.
Why has a comparison between the Irish and South African case-law revealed such a marked divergence between the reliance on and understanding of human dignity in each jurisdiction? One explanation is that the South African Constitution has unequivocally espoused human dignity as a foundational value and contains multiple textual references to it. Its Bill of Rights also includes a non-derogable individual right to respect for human dignity. When interpreting or developing the law, the courts are explicitly directed to promote the Bill of Rights’ underlying values, spirit, purport and objects. Contrast the Irish Constitution, containing just one reference to dignity – and that is not embodied in it, but in the Preamble. At first glance on a literal reading of the Constitution, it might be thought that the Preamble is superfluous to its interpretation. But a deeper study reveals that the Irish Constitution is also values-based and I propose that, in the absence of an interpretation clause, reliance should be placed on the reference to dignity in the Preamble as a factor when interpreting the document. The Preamble refers to the common good and social order, which is evidence of a communitarian understanding of dignity with its emphasis on mutual interdependence.¹⁶ The values of human dignity and social inclusion could mandate judicial enforcement of socio-economic rights.¹⁷

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

¹⁷ McHugh (n 16 above) 118, 126, 128.
1.2 Framework of study and relevance to proposition

The purpose of this chapter is to outline the proposition, sketch the main lessons which the Irish courts may learn from South Africa, defend the interpretative method proposed for the Irish Constitution and describe the research methodology.

Chapter II examines the role of dignity in contemporary jurisprudence, its meaning in philosophy, and its history, sources, roles and impact. Rationales from the human being’s nature, spirituality, reasoning capacity and status in the community have amalgamated to provide a coherent perception of human dignity, which merits mutual love in relationships and a common commitment to respect for each other in order to experience the full breadth of humanity in social solidarity – a modern appreciation of human dignity that supports a communitarian understanding of the concept in law. Noted in the jurisprudence are dignity’s association with other rights, its close relationship with equality, its relevance to groups, its pivotal place in human rights and its implications for democracy.

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

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

Chapter V shows the association of the value of dignity with other rights, in particular freedom and security, fair trial, privacy and autonomy, freedom of expression and equality.

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

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

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

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

1.3 Purposive interpretation

Courts have adopted two opposing interpretative approaches in relation to constitutions, namely the literal and the purposive. Each one has its rightful place provided it is applied in the context to which it is suited. Gerard Hogan and Gerry Whyte pointed out that the literal approach focusing on the language in the text is most appropriate in relation to technical provisions. 20 But its shortcomings are evident when there is an apparent conflict within the document. 21 The broad purposeful method is a better tool to discover the meaning of fundamental rights and public policy, because it discerns the people's intentions as embodied in the Constitution and identifies the purpose and objective in protecting human rights while using the textual language as a guide. 22 The literal theory is a product of parliamentary supremacy and, as George Devenish put it, is associated in South Africa with ‘primitive legal positivism of the by-gone era, of imperialism,
colonialism and white minority rule’. He rejects a mere technical exercise in constitutional interpretation and notes that a purposive approach involving values is required. Constitutions are now regarded as *sui generis* and require a generous purposive construction, so the ordinary rules of statutory construction are not applied rigidly. Etienne Mureinik argues for an interpretation where text, purpose and values are weighed to produce a value-coherent interpretation by which ‘the judge is charged with the duty of finding the construction most consonant with the morality that affords the best explanation of the legal system.’

A canon of interpretation first expressed in Ireland in 1980 was that of harmonious interpretation, which regards the Constitution as having a single scale of values that should be read without internal discord. It may require a literal interpretation to yield to a purposive one. Similarities can be seen


24 Devenish (n 23 above) 117. On values-based interpretation, see Devenish (n 19 above) 606 - 608.


27 Hogan & Whyte (n 5 above) [1.1.12]-[1.1.13], citing *Dillane v AG* [1980] ILRM 167 (SC).

28 Hogan & Whyte (n 5 above) [1.1.16]. This did not happen in *People (DPP) v O’Shea*, where the majority diverged from Henchy J’s vision of the Constitution as ‘an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation’: [1982] IR 384 (SC) 426. Henchy J noted that in a constitution ‘the letter killeth, but the spirit giveth life’: as above. In 1985 a differently composed Supreme Court effectively repudiated the majority reasoning in *O’Shea*, and adopted Henchy J’s harmonious approach in which the scheme of the entire constitution is regarded to prevent a literal construction defeating the Constitution’s fundamental purpose, thus resolving conflicts between two provisions: *Tormey v Ireland* [1985] IR 289. Henchy J rejected a hierarchy of rights, *Tormey* above, 295 - 296. The rule of literal interpretation, which is generally applied in the absence of ambiguity or absurdity in the text, must here give way to the more fundamental rule of constitutional interpretation that the Constitution must be read as a whole and that its several provisions must not be looked at in isolation, but be treated as interlocking parts of the general constitutional scheme. This means that where two constructions of a provision are open in the light of the Constitution as a whole, despite the apparent unambiguity of the provision itself, the court should adopt the construction which will achieve the smooth and harmonious operation of the Constitution. A judicial attitude of strict construction should be avoided
in the South African jurisprudence where the harmonious reading of the Constitution as a whole is favoured, as exemplified by Sachs J in *Prince II*,\(^{29}\) *Van Heerden*\(^{30}\) and *NM v Smith*.\(^{31}\) Harmony is useful when it results in the constitutional purposes being achieved. As Rory O’Connell stated, ‘courts must not simply harmonise those provisions, they must aim to realise their purpose, and more particularly the central purposes of the Constitution.’\(^{32}\)

When values are being considered, the question arises as to whether they are to be ascertained by gauging what they meant in 1937 when the people adopted the Constitution or whether they have a current meaning.\(^{33}\) Although the historical approach sometimes has a role to play, John Kelly thought it was not the correct viewpoint here and proposed that the ‘present-tense’ approach was appropriate for standards and values, such as ‘personal rights’, ‘common good’, ‘social justice’, ‘equality’ and – in the context of private property guarantees – for concepts like ‘injustice’.\(^{34}\) This accords with Walsh J’s dictum in *McGee* that as ‘the prevailing ideas’ of the virtues in the Preamble ‘may be conditioned by the passage of time’, the Constitution is interpreted ‘in the light of prevailing ideas and concepts.’\(^{35}\)

It has to be recognised that applying a purposive interpretation to a constitutional text whose values are capable of assuming a different content or scope over a period of time can present formidable intellectual challenges.\(^{36}\) A purposive interpretation based on an originalist perspective is a far simpler endeavour. Here the task is to identify the original purpose of those who

\(^{29}\) *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) [155].

\(^{30}\) *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) [136].

\(^{31}\) 2007 5 SA 250 (CC) [204].


\(^{33}\) Whyte (n 1 above) 24, 27.

\(^{34}\) Kelly (n 28 above) 215.


\(^{36}\) See Binchy (n 2 above) 312 - 313.
created the Constitution and construe the language of the text accordingly. But if key concepts can change their meaning over time in the light of ‘prevailing ideas’, then the historical purpose loses its centrality and the courts must construct an artificial purpose based on the changed corpus and shape of the new values. In describing this as an artificial purpose, the intent is not to stigmatise the process as involving falsity or disingenuousness, but rather to identify the fact that the courts are no longer engaging exclusively in a process of historical detection of actual purpose – instead they are involved in a more complex process of seeking to draw from an identified cluster of values (including newly developed or reshaped values) a coherent normative philosophy. Undoubtedly there is purpose in the interpretative process, but it relates more to the purpose of achieving philosophical coherence rather than to identifying the purpose of those who created the Constitution.

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

37 John Locke’s understanding of dignity was that its actualisation is vulnerable, dependent on wilful actions of society and is to be safeguarded by political and social institutions grounded on a social contract: D Ritschl ‘Can ethical maxims be derived from theological concepts of human dignity?’ in Kretzmer & Klein (n 7 above) 96.
It must be acknowledged that two decisions of the Supreme Court – *Re a Ward of Court (withholding medical treatment) (No 2)*[^39] and *Roche v Roche*[^40] – are difficult to reconcile with a natural law understanding of dignity; yet neither decision sought to invoke changing ‘prevailing ideas’ on dignity as a reason for adopting a different interpretation of the concept and both professed broad loyalty to the interlinked constitutional understanding of human rights.

Frank Michelman’s suggestion for interpretation captures the multi-faceted holistic nature of the task which must give effect to the underlying values.[^41]

On the constitutional level, legal interpretation succeeds by construing legal words, intentions, and purposes, yes, but by construing them decidedly in the light of consequences, and by appraising consequences decidedly in the light of an emergent national sense of justice to which the interpretations are themselves, recursively, contributing.

### 1.3.1 Review of interpretative methods in the case-law

A review of the Irish case-law shows judicial support for the purposive values-focused interpretation. In *AG v Paperlink* in 1983 Costello J noted that the Constitution was ‘a political instrument as well as a legal document’ and that a purposive, rather than a strictly literal, approach to its interpretation was appropriate.[^42] He expanded on this view in *Murray v Ireland*[^43]:

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

Hardiman J in *Sinnott v Minister for Education* viewed the terms ‘historical’, ‘harmonious’ and ‘purposive’ as disparate aspects of interpretation which


[^40]: [2009] IESC 82, [2010] 2 IR 321. Murray CJ expressly linked the moral status of embryos with human dignity, but he declined ‘to pronounce on the truth of when human life begins’ on the grounds that when a broad consensus did not exist on such a complex multi-faceted issue, it was a policy choice to be exercised by the legislature: *Roche v Roche* above, [44]-[45], [49]-[50]. See R Byrne & W Binchy *Annual review of Irish law 2009* (2010) 246 - 251, 469 - 480.


[^43]: [1985] IR 532 (HC) 539.
form part of every constitutional construction. 44 The established interpretative approach of the Supreme Court was described by Murray CJ in *A v Governor of Arbour Hill Prison* as ‘the teleological approach – a universally recognised method of interpreting constitutional and other legal norms’, which meant that (even though the Constitution did not expressly say so) the ambit and effect of a particular constitutional provision fell to be considered ‘within the rubric and scheme of the Constitution as a whole’ and involved taking into account the Constitution’s ‘objectives, principles and provisions’ as a whole.45

As MacMenamin J indicated in *Health Service Executive v X*, it is beyond doubt that statutes for the protection of vulnerable people are to be construed in a broad purposive manner reflecting constitutional values and compatible with the Constitution itself.46

The purposive approach infused with constitutional values can be seen in operation in South Africa. All the judges in *S v Mhlungu* agreed that a purposive interpretation was appropriate,47 but there was a difference of opinion between them on how it applied to the particular provisions under scrutiny. Devenish described the majority judgment of Mahomed J as ‘[t]he high water mark of a values-based interpretation’.48 Kriegler J, dissenting in *Du Plessis v De Klerk* because he would have applied the interim Constitution horizontally, stated, ‘[i]t is … trite that the Constitution is to be interpreted purposively and as a whole, bearing in mind its manifest objectives.’50

Chaskalson P in *Makwanyane* approved of the purposive interpretation of fundamental rights taking into account the context, including the history and background to the adoption of the Constitution, aimed at securing for ‘individuals the full measure’ of its protection.51 O’Regan J agreed that the

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44 [2001] 2 IR 545 (SC) 688. In *Sinnott*, he used the purposive approach as outlined by Costello J in *AG v Paperlink*: as above.
46 [2011] IEHC 326 [63]-[64], [67].
48 Devenish (n 23 above) 97.
50 1996 3 SA 850 (CC) [123].
courts’ responsibility was to develop fully constitutional rights and in that quest to seek the purpose for which a right was included in the Constitution.52 She clarified that the purposive or teleological approach did not invariably result in a generous meaning — at times it required a narrower or specific definition.53 In delving for the purpose, the common South African values could form a basis on which to develop a South African human rights jurisprudence and Mokgoro J, relying on the reference to it in the epilogue to the Constitution54 and ‘the underlying idea and its accompanying values … expressed in the preamble’, identified the value of ubuntu (humaneness) as the unifying thread.55 She equated its spirit with the internationally recognised human dignity from which human rights derive.56

Guided by ‘the broad and ample style’ of the chapter in the Constitution of Bermuda providing for the protection of fundamental rights and freedoms57 as well as by the influence on the drafters of the European Convention on Human Rights58 and the Universal Declaration, Lord Wilberforce in Minister of Home Affairs v Fisher backed a ‘generous interpretation avoiding what has been called “the austerity of tabulated legalism,” suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.’59 The Privy Council rejected simply interpreting the Constitution ‘with less rigidity, and greater generosity, than other Acts’ and chose a broader perspective where it was treated as a sui generis instrument with its own principles of interpretation that recognised its character and origin.60

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52 n 51 above, [325].
53 As above.
54 n 49 above, Epilogue, 3rd para.
55 n 51 above, [307 - 308].
56 n 51 above, [309].
57 Constitution of Bermuda 1968, Ch I.
60 Fisher (n 59 above) 329. Lord Wilberforce explained, as above: Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.
Chapter 1 – Introduction

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

1.3.2 A preamble as an indicator of values

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

A constitutional preamble is therefore an important source whenever a provision of the constitution is interpreted by applying the principles that the history and origin of the provision, the constitution as a whole, and the purpose of the provision must be taken into account.

The South African Constitution differs from the Irish one in that specific values on which the democratic State is founded are listed in Section 1. Human dignity, equality, human rights and freedom are mentioned first.

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61 Canadian Charter of Rights and Freedoms 1982, Sec 2(a).
64 Rautenbach (n 63 above) 74.
65 Rautenbach (n 63 above) 75.
66 n 63 above, 75.
these values are repeated in other provisions of the Constitution.\textsuperscript{69} Constitutional supremacy is also a founding value\textsuperscript{70} and, as recited in the Preamble, the Constitution was adopted by the people as the supreme law. A perusal of the preambular text shows that the first goal is to establish a society with democratic values and social justice.\textsuperscript{71} Another aim is an improved quality of life and personal freedom to achieve one’s full potential. All the values are designed to ensure human dignity and freedom in an accountable, responsive and open political system.\textsuperscript{72} The Preamble indicates that the Constitution gives a central place to the dignity of the individual and also endeavours to restore the collective dignity of the state and of the people.\textsuperscript{73} These universal values are expressed in \textit{ubuntu}.\textsuperscript{74}

The values in the Preamble to the Irish Constitution are prudence, justice and charity. The aims relevant to human rights are to assure the dignity and freedom of the members of an orderly society while promoting the common good. The Constitution was adopted by the people, who are sovereign and the source of all State powers.\textsuperscript{75} It is remarkable that, despite the different circumstances and eras in which they were adopted, there are such striking similarities between the values and aspirations in the South African and Irish documents – the South African Constitution echoes the common commitment to a just society where human dignity and individual liberty are respected. Furthermore, both documents with supremacy in law were adopted by the people.

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

\textsuperscript{68} Sec 1(a).
\textsuperscript{69} Secs 7(1) (rights), 36(1) (limitation of rights), 39(1)(a) (interpretation of Bill of Rights).
\textsuperscript{70} Sec 1(c).
\textsuperscript{71} C Roederer ‘Founding provisions’ in Woolman \textit{et al} (n 67 above) [13-4]. See also H Klug \textit{The Constitution of South Africa: A contextual analysis} (2010) 110.
\textsuperscript{72} Devenish (n 19 above) 11 - 12.
\textsuperscript{74} Devenish (n 19 above) 12.
\textsuperscript{75} Constitution of Ireland 1937, Art 6.1.
1.3.3 The preamble in the courts

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

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

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

> Text to n 55 above.
> n 51 above, [130] fn 159.
> n 51 above, [155]-[156].
> n 51 above, [262].
> n 51 above, [362]-[363].
> 1996 1 SA 984 (CC) [255].
> n 47 above, [112] (footnote omitted).
> Rautenbach (n 63 above) 75.
> n 63 above, 75 (footnote omitted).
[P]rovisions of the Constitution must therefore always be interpreted and applied within the context of the preamble and not only in the case of vague and ambiguous concepts. In a particular case, this could mean that the literal, clear meaning of a constitutional provision will not be followed, because it must be interpreted and applied as qualified by the values and goals set out in the preamble and in other provisions of the Constitution.

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

87 n 86 above, 724.
88 See Hogan & Whyte (n 5 above) [2.1.07]-[2.1.18]; text to n 33-n 35, n 38-n 41 in Ch VII.
89 [1950] IR 67 at 80 - 81 (O’Byrne J):
  In the enacting portion of the Constitution, contained in the Preamble, the people of Ireland, seeking, amongst other things, ‘to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured … adopt, enact and give’ to themselves the Constitution. These most laudable objects seem to us to inform the various Articles of the Constitution, and we are of opinion that, so far as possible, the Constitution should be so construed as to give to them life and reality.
90 [1940] IR 136 (HC) 143, 155.
91 Burke v Lennon (n 90 above) 178.
Since the people’s purpose in adopting the Constitution could be discerned from it, thereby helping to determine ‘the meaning of and the effect to be given to particular provisions’, the Supreme Court endorsed the use of the Preamble as an interpretative aid in *AG v Southern Industrial Trust Ltd.* In *McGee* Walsh J adopted the same stance as O’Byrne J in *Buckley* and placed the onus on the judiciary to apply the values in the Preamble to interpret the Constitution. Budd J followed suit. Citing Walsh J’s dictum, O’Higgins CJ in *State (Healy) v Donoghue* found that justice in the courts must import regard to the individual’s dignity (not only fairness and fair procedures). He agreed with the judge at first instance (Gannon J) that fair procedures apply in criminal trials; however, in serious cases justice also required the provision of legal assistance and means-related aid. Gannon J had highlighted the judiciary’s primary role in protection from injustice, its part in furthering the constitutional aims articulated in the Preamble being equal to that of the other arms of state:

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

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

Following Henchy J’s view in O’Shea,100 O’Flaherty J in AG v X agreed that the Constitution should be read harmoniously – the spirit could prevail over the letter.101 He held that an injunction restraining a woman from travelling abroad to have an abortion would interfere to an unwarranted degree with her freedom of movement, the authority of the family and the aspiration in the Preamble to assure the dignity and freedom of the individual.102 Finlay CJ also adopted a harmonious values-based interpretation of the right to life in accordance with the concepts of prudence, justice and charity in the Preamble, as explained by Walsh J in McGee.103

In 2011 Hogan J in Aslam v Minister for Justice and Equality granted a pregnant asylum seeker an injunction restraining her transfer out of the country by air or sea, because the State had constitutional obligations to protect her and her unborn child’s life and health.104 Guided by the Preamble, he was required to interpret these obligations in a fashion that assured her dignity.105 When considering an asylum seeker’s application for judicial review of a decision denying her claim in E v Minister for Justice Equality and Law Reform, he continued the same theme and, echoing Henchy J’s comments in Garvey, he pointed out that the obligation to respect fair procedures assured the dignity of the individual as set out in the Preamble – it was not ‘an

98 [1981] IR 75 (SC) 99. The Supreme Court held that the guarantee of fair procedures in Article 40.3 of the Constitution applied to the Government’s exercise of its power of removal from office of the Garda Commissioner.
[I]t does seem to me that the teleological and schematic approach has for many years been adopted in this country – though not necessarily under that description – in the interpretation of the Constitution. The innumerable occasions in which the preamble to the Constitution has been invoked and in particular the desire therein expressed ‘to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored and concord established with other nations’ in seeking to ‘fill the gaps’ in the Constitution is itself an obvious example of the teleological approach.
100 See n 28 above.
102 n 101 above, 88.
103 n 101 above, 52 - 53, citing n 35 above, 318 - 319.
104 [2011] IEHC 512 [33], [36].
105 n 104 above, [34].
exercise in pure formalism, but … rather an opportunity to enable the person affected to fairly put his or her case.\footnote{106}

Denham CJ in \textit{MD v Ireland} associated the equal treatment of all human persons with ‘the principles of freedom, justice and human dignity, which, \textit{inter alia}, the preamble of the Constitution aims to safeguard.’\footnote{107} Finnegan J recognised human dignity as a key constitutional objective protected by the Preamble in \textit{People (DPP) v Murray}.\footnote{108}

Murphy J (partially dissenting) in \textit{DPP v Best} construed the right and duty of parents to educate their children in Articles 42 teleologically in the light of the purpose for adopting the Constitution as explained in the Preamble:\footnote{109}

\begin{quote}
Article 42.1 and 42.2 recognise that it is for parents to educate their children. This provision is not based on any proprietary right of the parents or functional analysis of the educational process. It is grounded on the acceptance of the belief that it is the moral right and duty of parents to educate children and that by exercising that and the other fundamental rights referred to in the Constitution the goals identified in the Preamble may be achieved.
\end{quote}

This review of Irish case-law from the earliest days of the Constitution up to 2012 has shown that the courts have consistently returned to the Preamble as an indicator of constitutional values to be used to discern the people’s purpose in enacting the Constitution and the meaning of specific provisions. The Preamble with its reference to human dignity has been invoked in diverse areas such as fair criminal trial, punishment for crime, equality, privacy, autonomy, expression, education, admission of refugees and freedom of movement. It can be a guide to the unenumerated rights springing from specific provisions in the Constitution to cope with changing circumstances.\footnote{110}

There are other examples of national courts enlightening the meaning of their constitutions by reference to the preamble. When it considered a

\begin{footnotes}
\item[106] [2012] IEHC 3 [13].
\item[107] [2012] IESC 10 [38].
\item[108] [2012] IECCA 60.
\item[109] [1999] IESC 90, [2000] 2 IR 17 at 65 - 66.
\end{footnotes}
challenge to the procedure for ratification of the Lisbon Treaty,\textsuperscript{111} the German Federal Constitutional Court relied, \textit{inter alia}, on the resolution contained in the Preamble to the Basic Law\textsuperscript{112} to serve world peace as an equal partner in a united Europe in order to show that the principle of openness towards European law applied.\textsuperscript{113} Hence, there was a constitutional mandate to realise a united Europe.\textsuperscript{114} The French Constitutional Council gave binding legal force to the Preamble to the 1946 Constitution\textsuperscript{115} as an independent source of human rights in 1971, when it struck down a law for breaching freedom of association.\textsuperscript{116} The Preamble has also supported socio-economic rights in France.\textsuperscript{117}

The Indian Supreme Court decisions are littered with references to the constitutional preamble and its association with human dignity.\textsuperscript{118} The Preamble and human dignity have underpinned rights in various spheres including the right to travel as part of personal liberty,\textsuperscript{119} health and safety at work imposing obligations on the employer and on the state to protect current and retired employees;\textsuperscript{120} and equality, where social justice is aimed at achieving substantial social, economic and political equality,\textsuperscript{121} and the reservation of government jobs for the historically deprived has been upheld.\textsuperscript{122} Construing fundamental rights in the light of the Preamble, the Court in \textit{Randhir Singh} deduced that the principle of ‘equal pay for equal work’ could be applied to employees receiving different scales of pay based on no classification or irrational classification for identical work under the

\textsuperscript{112} Basic Law for the Federal Republic of Germany 1949.
\textsuperscript{113} Treaty of Lisbon case, BVerfG, 2 BvE 2/08, Absatz-Nr (1-421) (30 June 2009) 222, 225. See Orgad (n 86 above) 725.
\textsuperscript{114} n 113 above, 225.
\textsuperscript{115} Constitution of the French Republic 1946.
\textsuperscript{116} Decision No 71-44 (16 July 1971). See Orgad (n 86 above) 726 - 727.
\textsuperscript{117} See text to n 69-n72 in Ch VI.
\textsuperscript{118} See text to n 250 -n 254, n 275 -n 285 and n 289 -n 295 in Ch III; Orgad (n 86 above) 727 - 728.
\textsuperscript{119} Maneka Gandhi \textit{v} Union of India [1978] INSC 16, 1978 SCR (2) 621.
\textsuperscript{120} Consumer Education \& Research Centre \textit{v} Union of India [1995] INSC 91, JT 1995 (1) 636. See text to n445 in Ch V.
\textsuperscript{121} Air India Statutory Corp \textit{v} United Labour Union [1996] INSC 1400.
\textsuperscript{122} Indra Sawhney \textit{v} Union of India 1992 Supp (3) SCC 217.
same employer. Referring to the Preamble as an aid to interpretation in *Minerva Mills*, Chandrachud CJ captured the far-reaching nature of democracy embodied in the Constitution as securing the dignity of the individual in the community:

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

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

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

The majority in the Canadian Supreme Court decision on the *Provincial Judges’ Salaries* case adjudged that although the Preamble to the Canadian Constitution Act was not a source of positive law, it had important legal

123 Randhir Singh *v* Union of India [1982] INSC 24, 1982 (3) SCR 298. See text to n 442-443 in Ch V.
126 *Leeth* (n 125 above) [9].
127 Constitution Act 1867.
effects – it recognised and affirmed judicial independence as an unwritten norm. 128 It went further than ordinary statutory preambles, which could identify the purpose of a statute and aid in the construction of ambiguous statutory language, as the Preamble to the Act embodying the Constitution articulated political theory by recognising and affirming the basic principles at the source of its substantive provisions. 129 The Court saw that the Preamble was more than the key to construing express provisions of the Act, but also invited the use of those principles to fill out gaps in the constitutional scheme. 130 Lamer CJ, delivering the majority judgment, eloquently portrayed the Preamble as ‘the grand entrance hall to the castle of the Constitution’. 131

The United States Supreme Court has used the Preamble as a tool of constitutional interpretation. 132 Justice Brennan in Goldberg v Kelly observed that the purpose of public assistance was to promote welfare and liberty – aims listed in the Preamble. 133 Although the issue of whether and in what manner it should be used has been debated, 134 the judicial references to it still

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129 n128 above, [95].

130 As above.

131 n128 above, [109].


133 397 US 254 (1970) 265. See text to n414-n415 in Ch V.

134 For arguments in favour of the Preamble having a role in discerning the values supporting unenumerated rights, see GP Carrasco & PW Rodino, Jr ““Unalienable rights,” the Preamble, and the Ninth Amendment: The spirit of the Constitution” (1990) 20 Seton Hall Law Review 498.

135 Orgad (n 86 above) 720.
provide the Preamble with some constitutional weight.\textsuperscript{135}

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

1.3.4 Philosophies supporting a values-based interpretation

A values-based interpretation requires articulation of a cogent moral foundation for decisions in compliance with the constitutional role assigned to the judges.\textsuperscript{136} Invoked should be those shared principles explicitly or implicitly encompassed within the constitution and applied as mandated by the constitution interpreted in a purposive manner.

Fortunately since World War II there are many international and regional human rights instruments expressing universally agreed norms across diverse cultures available to support the judiciary in divining the meaning of values in national constitutions. In modern multi-cultural societies there is no need to resort to personal or widely-held (but not universally-shared) moral, religious or political convictions – nor, indeed, could this potentially-partisan view be justified.\textsuperscript{137} The task is to adhere to the common values enshrined in the constitution and to apply those principles in cases arising for adjudication.

A review of the South African case-law shows that overall the judges have adhered to the universal constitutional values without imposing their own personal morality or the morality of any section of society in the adjudication process. They have not avoided grappling with difficult moral issues as can be seen in the litigation concerning sexual orientation\textsuperscript{138} and

\textsuperscript{136} Devenish (n 19 above) 608.

\textsuperscript{137} Although there is a view that the idea of human rights is ineliminably religious, this does not deny that those who are not religious can take human rights seriously: MJ Perry ‘Is the idea of human rights ineliminably religious?’ in A Sarat & TR Kearns (eds) Legal rights: Historical and philosophical perspectives (1997) 252. See text to n 30 -n 33 in Ch II.

\textsuperscript{138} See Ch V, 5.5.3.
Human dignity and fundamental rights in South Africa and Ireland

Despite their usual objectivity, on occasion the influence of their personal moral and religious beliefs has become apparent. The South African Preamble refers to God and the Irish Preamble has an even more conspicuous religious ethos resonant of its time. The jurisprudence of Roman-Dutch law was natural law, but the judiciary has not relied on it to interpret the Constitution – there have been occasional references to ubuntu. The judgments reflect constitutional values from a secular universally accepted perspective. This is as it should be, since the Constitution recognises the right to freedom of conscience and religion.

In addition to guaranteeing similar freedoms, the Irish Constitution guarantees not to endow any religion. Therefore, as in South Africa, a secular approach to interpreting the Constitution and the common values it encompasses is appropriate. However, this does not mean that natural law cannot be an aid to interpretation. ‘Natural law’ has been equated with

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139 Eg, S v Lawrence 1997 4 SA 1176 (CC), Christian Education South Africa v Minister of Education 2000 4 SA 757 (CC), Prince II (n 29 above), MEC for Education: KwaZulu-Natal v Filay 2008 1 SA 474 (CC).
140 Eg, Le Roux v Dey where Mogoeng J did not agree with his nine colleagues that the choice to lead a heterosexual lifestyle, and to be known as heterosexual, should not be protected by legal action: [2011] ZACC 4, 2011 3 SA 274 (CC) [9].
141 ‘May God protect our people.’ See Levinson (n 76 above) 168.
142 ‘In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the People of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial…’ See Levinson (n 76 above) 170, 171; MJ Perry ‘What do the free exercise and nonestablishment norms forbid? Reflections on the constitutional law of religious freedom’ (2003) 1 University of St Thomas Law Journal 549 at fn 66; MJ Perry ‘A right to religious freedom? The universality of human rights, the relativity of culture’ (2005) 10 Roger Williams University Law Review 385 at fn 36.
143 Devenish (n 19 above) 630.
144 See Devenish (n 19 above) 639.
145 Sec 15(1).
146 Art 44.2.1°.
147 Art 44.2.2°.
148 On secular and religious approaches to constitutional interpretation, see Whyte ‘Some reflections on the role of religion in the constitutional order’ (n 9 above) 54 - 59.
149 On natural law, see n204 and text thereto in Ch VIII. See also Hogan & Whyte (n 5 above) [7.1.08]-[7.1.20], [7.8.14]; MJ Horwitz ‘Natural law and natural rights’ in Sarat & Kearns (n 137 above) 39 - 51; G Whyte ‘Religion and the Irish Constitution’ (1997) 30 John Marshall Law Review 725 at 739 - 744; Whyte (n 1 above) 27 fn 76.
the neutral term ‘justice’.\textsuperscript{150} Walsh J made the connection in \textit{McGeer}.\textsuperscript{151} Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection.

Explicit reliance on natural law has waned in recent decades – Murphy J’s acknowledgment of the influence of Thomist natural law in \textit{DPP v Best}\textsuperscript{152} is an exception.\textsuperscript{153} In \textit{Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995}, the Supreme Court held that the Constitution was the fundamental supreme law of the State representing the will of the people – hence, it ruled out natural law as being superior to specific provisions in the Constitution and it could not be called on to invalidate an amendment passed by the people in a referendum.\textsuperscript{154} When Hamilton CJ, who delivered the judgment, went on to consider the right to life of the unborn he made a sweeping statement that the Court had already rejected the argument ‘that the natural law was superior to the Constitution and that no provision of the Constitution or of any Act enacted by the Oireachtas or any judicial interpretation thereof can be contrary to natural law’.\textsuperscript{155} Although a plausible reasoned defence might be made of his conclusion insofar as it concerns the Constitution, his immunisation of statutes and judicial decisions was undoubtedly too broad – he went further than was necessary to decide the issues in the case and ignored the wording of the Constitution itself, which refers to ‘inalienable’ rights and rights ‘antecedent to positive law’.\textsuperscript{156} The Supreme Court’s reasoning has been described as

\textsuperscript{150} O’Connell (n 32 above) 54, 60, 61.
\textsuperscript{151} n 35 above, 310; see also n 35 above, 317 - 318.
\textsuperscript{152} n 109 above, 65.
\textsuperscript{153} Hogan & Whyte (n 5 above) [1.1.55].
\textsuperscript{155} n 154 above, 50.
\textsuperscript{156} See text to n 205 -n 207 in Ch VIII.
‘somewhat simplistic and lacking in sophistication’\(^\text{157}\) and ‘instructively deficient’.\(^\text{158}\) No attempt was made to resolve the conflict between two provisions in the Constitution – both of which were the result of amendments to the Constitution. Indeed, the conflict was not even acknowledged. Neither was the issue of natural law addressed thoroughly.

That Hamilton CJ himself did not intend to wipe out natural law entirely from constitutional jurisprudence is evident in his judgment in the \textit{Ward of Court} case less than three months later, where he referred to unenumerated natural rights ancillary to the right to life.\(^\text{159}\) Indeed, when he was a High Court judge in \textit{Northampton County Council v ABF} he had enthusiastically accepted the legal legitimacy of natural law and stated, ‘[t]he natural law is of universal application and applies to all human persons’.\(^\text{160}\) He asserted that natural law rights were ‘recognised by Bunreacht na hÉireann and the courts created under it as antecedent and superior to all positive law’.\(^\text{161}\)

Since it is of universal application, it can be deduced that natural law is not confined to the religious tradition – as Roderick O’Hanlon said, it is ‘in essence immutable’ and ‘is not contingent on contemporary mores or any particular culture, because it resides in the innermost common denominator of all humankind through all generations, that is, human reason.’\(^\text{162}\) The origins of natural law can be traced back to the pre-Christian days of Aristotle, whose philosophical ideas influenced the adoption of the doctrine by scholars of various religions centuries later.\(^\text{163}\) It formed a strong vein in the jurisprudence of the courts of the United States of America.\(^\text{164}\)

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157 Whyte ‘Natural Law and the Constitution’ (n 9 above) 11. See also, as above, (footnote omitted):

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

158 Jacobsohn (n 154 above) 469.

159 n 39 above, 123 - 124. See Byrne & McCutcheon (n 21 above) [15.187]-[15.194].

160 [1982] ILRM 164 (HC) 166.

161 As above.


163 See Kelly (n 13 above) 57 - 58; T Murphy ‘The cat amongst the pigeons: Garrett Barden and Irish natural law jurisprudence’ in Doyle & Carolan (n 2 above) 128, 133 - 134.

164 Devenish (n 19 above) 630.
man recognised in natural law was the unifying theme behind adoption of the Universal Declaration – it was universally acceptable to all cultures and to those of all religions and of none.165 Its appeal is secular (as well as undoubtedly religious). A non-sectarian view of human dignity was taken by Henchy J in *McGee*166 and *Norris*,167 where his application of respect for dignity would require the State to preserve as great a range of authentic moral choice based on the personal make-up of the individual as is consistent with the common good168 – it did not mean that the law could impose a particular institutional religious view on the conscientious individual.

The common good (a prime constitutional aim), like human dignity, is rooted in natural law philosophy.169 As William Binchy said, ‘it envisages a social scaffolding capable of supporting the individual fulfilment of human potential.’170

### 1.3.5 Judicial practice

Unlike the South African judiciary, Irish judges in recent decades have avoided engagement with the philosophical and moral dimensions to contentious disputes.171 They have not leveraged the strong value system in the Constitution. The result has been a failure to vindicate personal rights, to assure the human dignity of the individual in the community and to promote the constitutional aim of social justice. Reliance on the other arms of government to comply with the State’s constitutional duties has been misplaced. The power structure in Ireland has continued with very little challenge. By failing to intervene to redress social exclusion in the socio-economic sphere, the judges are not fulfilling their constitutional duty to

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165 See 2.2.1.1 in Ch II.
166 n 35 above.
167 *Norris v AG* [1984] IR 36 (SC).
169 Binchy (n 2 above) 315 - 316; Kelly (n 13 above) 423 - 424.
170 Binchy (n 2 above) 316.
171 *Eg, Roche v Roche* [2006] IEHC 359, [2009] IESC 82, [2010] 2 IR 321 (see text to n 387 -n 389 in Ch VII). See 7.2 in Ch VII. The European Court of Human Rights allows the states a margin of appreciation when there is not a European consensus on the moral issue arising and when the appropriate legal protection has not been resolved in the majority of states: *Vo v France* (App no 53924/00) (2005) 40 EHRR 12 [82]. However, a dissenting view was that there could be no margin of appreciation in application of an absolute right: as above, [O-III8] (Ress J).
uphold the Constitution, and are not defending and vindicating personal rights.\textsuperscript{172} Accordingly, Irish democracy is falling short of realising the constitutional value of a just social order, in which the freedom and dignity of the individual is assured.\textsuperscript{173}

The trend in recent years to revert to the positivist view of the Constitution is regrettable, as it runs contrary to its spirit and purpose garnered from a reading of the document as a whole – the Preamble in addition to the fundamental rights and other substantive provisions contained within it. It runs contrary to Seamus Henchy’s conviction that the Constitution broke ‘with the positivist character of the common law’, a conclusion which he attributed to the fact that the Preamble ‘makes clear that the Constitution and the laws which owe their force to the Constitution derive, under God, from the people and are directed to the promotion of the common good’.\textsuperscript{174}

The Irish Preamble approved by the people in 1937 was prophetic in anticipating the Universal Declaration with its emphasis on human dignity by more than a decade.\textsuperscript{175} It was the first national constitution to specifically refer to dignity in the sense of being inherent in all people. Although Christopher McCrudden has named four countries (Mexico, Germany, Finland and Portugal) as incorporating the concept of dignity in their constitutions before Ireland in 1937,\textsuperscript{176} a closer examination of those constitutions shows that this is not correct – the references to dignity were either to dignity as status,\textsuperscript{177} adopted by subsequent amendment\textsuperscript{178} or implied by the use of an analogous term.\textsuperscript{179}

The Supreme Court’s virtual closing off of identifying more unenumerated rights (in the socio-economic area at least)\textsuperscript{180} has inhibited the

\textsuperscript{172} McHugh (n 16 above) 126, 129.
\textsuperscript{173} McHugh (n 16 above) 129.
\textsuperscript{174} Henchy (n 168 above) 550.
\textsuperscript{175} Walsh (n 12 above) 92.
\textsuperscript{176} C McCrudden ‘Human dignity and judicial interpretation of human rights’ (2008) 19 European Journal of International Law 655 at 664. See text to n 104 - n 108 in Ch II.
\textsuperscript{177} The original constitution adopted by Finland in 1919 mentioned ‘hereditary dignity’.
\textsuperscript{178} The original constitutions adopted by Mexico in 1917 and by Portugal in 1933 contained no reference to dignity.
\textsuperscript{179} The German Reich Constitution of 1919 stated that the principles of justice were aimed at the attainment of ‘humane conditions of existence’ for all.
courts from keeping pace with the legal problems presented by the changes in modern life and advancing technology.\textsuperscript{181} The judges need to overcome their reluctance to grasp the philosophies underlying the Constitution. Instead they could expose its values, interpret its provisions in accordance with those values and apply them to cases coming before them for adjudication. Novel legal issues arising in the increasing complexity of modern life where people are more mobile than in the past and there is much diversity in Irish society will ensure a continuing demand for the judiciary to take this step. As Brian Walsh expressed it, the Constitution has given the judiciary a position of special responsibility as ‘the ultimate interpreters of the law and of the Constitution itself’, and this requires that the fundamental human rights of minorities be guaranteed so that they can ‘permanently withstand the assaults tolerated or even initiated by occasional despotic majorities.’\textsuperscript{182}

One area where the values will have an impact is in enforcement of the Hague Convention on Child Abduction, which allows a state to refuse to return a child to the requesting jurisdiction if it would not be permitted by the ‘fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.’\textsuperscript{183} The correct application of this provision requires clarity on the content and boundaries of the fundamental human rights principles in the Irish Constitution. So far there has been a dearth of considered judicial analysis of these principles – the

\textsuperscript{181} TD v Minister for Education [2001] IESC 101, [2001] 4 IR 259. Keane CJ pointed out that the Supreme Court had not specifically endorsed the view that unenumerated rights flowed from the Christian and democratic nature of the State and neither had it decided whether the declaration of unenumerated rights should be the courts’ function rather than that of the Oireachtas: above, 281. He had first expressed these doubts three years earlier: IOT v B [1998] 2 IR 321 (SC) 369 - 370. See Byrne & McCutcheon (n 21 above) 15.60. In IOT v B Keane J relied (wrongly in my view) on remarks of Walsh J in McGee and on the judgment in Regulation of Information Bill to deduce that ‘no identifiable and superior corpus of law’ existed to which judges might have recourse: above, 372.


courts have preferred to take the easier option of deciding the cases before them on narrow points of law or fact.\textsuperscript{184}

If a conflict emerged between rights under European law and the fundamental rights protected by the Irish Constitution, a thorough analysis of the values enshrined in the Constitution would strengthen the judicial evaluation.\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{184} Eg, \textit{Nottinghamshire County Council v B} where the parents of two children challenged an application by the English local authority to have them returned to England: [2011] IESC 48. The parents claimed that they and their children constituted a family under Articles 41 and 42 of the Constitution and that return of the children would be in breach of those rights because the law of the United Kingdom permitted adoption of the children of married couples in circumstances where it would not be permitted in Ireland: above, [4]. The Supreme Court upheld the decision of Finlay Geoghegan J to return the children because their adoption was no more than a ‘possibility’; furthermore, O’Donnell J, who delivered the Court’s judgment, considered that the UK adoption regime was ‘not so fundamentally at odds’ with the forms of adoption permitted under the Irish Constitution: above, [67], [89]. He did not explore the human rights norms underlying the Irish Constitution, but concentrated more on the value of international co-operation: above, [60], [64]-[65], citing Constitution of Ireland 1937, Art 29. His terminology dismissed resistance to international co-operation on human rights grounds as ‘isolationism’ and ‘fundamentalist’: above, [45], [63]. He raised (but did not decide) the question of the level of constitutional protection afforded to non-citizens travelling to Ireland and suggested that Article 40.1 of the Constitution (the equality provision) could be relevant: above, [84]. By focusing on the Irish court’s order of return of the children rather than on what might happen to them (eg, adoption) if they were returned to England, O’Donnell J narrowed the level of protection under the Convention: above, [54], [61]. The test he applied was not whether there was a constitutional difference between the two regimes, but whether what was proposed or contemplated in the requesting state departed ‘so markedly from the essential scheme and order envisaged by the Constitution’ and was such a direct consequence of the court’s order that return was not permitted by the Constitution: above, [54]. A difference in the law relating to the care of children between the jurisdictions (even if the foreign law would be unconstitutional if enacted in Ireland) was not the issue – that difference could be ignored if the laws in both jurisdictions were ‘recognisably part of the same spectrum’ of views; to justify a refusal to return it was necessary to show that the manner in which the children would be dealt with by the courts on their return ‘must necessarily offend against the provisions of the Irish Constitution if administered in an Irish court’: above, [52]. O’Donnell J focused on the compatibility of the legal systems rather than compliance of the requesting jurisdiction with the constitutional standards of the requested state: above, [45], [63]-[64], [66]. Although he referred to case-law concerning natural law, he did not deliberate on this aspect: above, [30], citing \textit{Northampton County Council v ABF} (Hamilton J, relying on Walsh J in \textit{McGee}). See R Byrne & W Binchy \textit{Annual review of Irish law 2011} (2012) 153 - 154, 223 - 229.

\item \textsuperscript{185} See M Cahill ‘Constitutional exclusion clauses, Article 29.4.6° and the constitutional reception of European law’ (2011) 34 \textit{Dublin University Law Journal} 74 at 96.
\end{itemize}
1.4 Research methodology

As this is a comparative study, I engaged in substantial doctrinal research. My literature review started with fundamental rights concentrating on the South African and Irish Constitutions and international human rights. It broadened out to other African and European countries (particularly Germany), and to Canada, India, Israel, the US, Australia, and New Zealand. Some of these countries were chosen for comparison because they are in geographical proximity to South Africa or Ireland, being in the continents of Africa or Europe, or have similar legal backgrounds to them. The review of the literature and case-law had revealed that the fundamental rights jurisprudence in Germany, Canada, India and Israel had a particular emphasis on dignity. The South African Constitutional Court has mainly referred to Canada, Germany, India and the US in its judgments.\(^{186}\) The regional systems in Europe, Africa and America had interesting comparisons.

Relevant case-law and legislation were noted. Tracking of new developments was necessary. The content and impact of various human rights instruments and systems were taken into account. The conclusions were drawn from engaging in deductive and inductive reasoning. The application of sub-conscious reasoning to the doctrine elicited preliminary findings, which were refined by critical evaluations. The study culminated in the writing of a report that combined an understanding of the relevant theory and its practical application with the results of comparative research.

1.5 Summary of major lessons

The examination of constitutional interpretation has substantiated the proposition that the Irish courts should adopt a purposive values-based approach taking the reference to human dignity in the Preamble as a serious factor. Apart from reliance on the Preamble, human dignity is germane to the debate on human rights because of its universal acceptance in international

\(^{186}\) Church \textit{et al} (n 47 above) 80.
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instruments. The Universal Declaration, with its several references to human dignity regarded as inherent, has grown in importance since it was first signed and is now widely considered to be part of customary international law.

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

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


189 See text to n 46-n50 in Ch VII.

190 See text to n 14 in Ch VII.

191 See text to n 232 -n 241 in Ch VII. Hardiman J identified values based on respect for human rights and dignity as underlying the necessity to treat prisoners properly: see text to n 55 in Ch VII.

192 Healy v Donoghue (n95) 348. McGuinness J relied on the same principles to constrain the DPP from reversing a decision not to prosecute after that decision had been communicated to a suspect without any caveat: Evison v DPP [2002] IESC 62, [2002] 3 IR 260 at 318 - 319. The entitlement of unconvicted prisoners not to be made to stand trial in prison garb (based on the presumption of innocence) is in order to avoid stigmatisation and to maintain the dignity of the individual: People (DPP) v Davis [2001] 1 IR 146 (CCA) 152, citing Estelle v Williams 425 US 501 (1976) 518 (Justice Brennan dissenting).


194 See text to n 23 in Ch VII. There is statutory immunity from criminal and civil liability for injury or damage caused by the use of reasonable force in defending one's dwelling: Criminal Law (Defence and the Dwelling) Act 2011 secs 2 & 5.
The part played by human dignity in the Preamble as a fundamental constitutional value, its role as the basis of international human rights instruments, the fact that it has been recognised as an unenumerated right, and the connections between dignity and constitutional rights merit the Irish judges giving it greater prominence in their decisions. There is no convincing argument in favour of ignoring or overlooking it. On the contrary, if it were analysed in depth and applied by the judiciary, it could lead to a coherent articulation of the impact of the Constitution on individuals in a shared society in the context of their everyday lives. People would then have a clearer picture of the implications for them of the Constitution in practice and would have confidence that they could rely on the judiciary to uphold constitutional values and rights.

The main messages are in the areas of equality, socio-economic rights, the legal status of unmarried fathers, punishment of children, prison conditions, the extent of state responsibility to protect human rights, and civil liability for failures of the police and state-endorsed agents. There are helpful pointers relating to publication of private information, the parameters of informed consent, regulation of research and aids to human reproduction, prohibition of hate speech, development of the laws of defamation and contract, quantum of damages and effective remedies.195

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

195 The damage to a defamed person’s dignity and standing in the community could be repaired by a public apology, a judicial finding of defamation and a modest sum in compensation. Similarly where a severely impaired person is unaware of the impact of the injuries received, their human dignity could be reconciled with society’s values by a smaller award than that merited by a fully-conscious plaintiff.
Chapter 2
The role of dignity in contemporary jurisprudence

2.1 The philosophical dimension

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

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


³ In the philosophy of the Stoics and in Roman humanism, there was a collective notion of dignitas humana that did not have the modern egalitarian meaning: J Habermas ‘The concept of human dignity and the realistic utopia of human rights’ (2010) 41 Metaphilosophy 464 at 473. Humans were of superior rank to ‘lower’ forms of life because of faculties such as reason and reflection: as above.

Yair Lorberbaum remarked that the concept of human dignity and the sanctity of human life are historically bound up (at least in Jewish tradition and to a great extent in early Christianity, which draws from it) with the biblical notion of humankind created in the divine image. The idea of *Imago Dei* is to be found in Mesopotamia and perhaps in ancient Egypt as well. Lorberbaum acknowledges it is arguable that the modern content of human dignity has nothing in common with these ancient thought structures, but has its origins in modern anthropology, metaphysics and the ethics of Immanuel Kant and other Enlightenment thinkers. He has recourse to Paul Ricoeur’s view that ‘the symbol gives rise to thought’ as a counter-argument. In ancient times, dignity was more often a symbol of social status and therefore of superiority rather than of equality. But Cicero and some other classical Roman writers also used the concept of *dignitas hominis* to refer to the dignity of human beings as such without being dependent on any additional status.

In philosophical terms, ‘human dignity’ has been recognised since ancient times. It and the term ‘human being’ are synonymous. Each person is unique. Humanity has always been regarded as superior to animals and other species.


6 Lorberbaum (n 5 above) 55.

7 n 5 above, 84.

8 n 5 above, 84, citing P Ricoeur *Symbolism of evil* trans E Buchanan (1967) 348.

Cicero contrasted man with animals. Philosophers saw that the capacity for rational thought and free will distinguished human beings. According to Christian Starck, classical and Christian concepts of human dignity and freedom recognised an important social aspect, where human beings were interdependent, as evidenced by the enshrinement of fraternity and solidarity in the early political structures. In sub-Saharan Africa, the mutually supportive relationship between human dignity and equality has spawned the social concept of ubuntu. Langa CJ of South Africa, having translated it from Zulu as ‘a person is a person through another person’, said it described the essence of humanity and what it means to be a human being.

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

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

An individual’s inner worth is at the core of their being. Their personality is unique to them and they are entitled to forge their own identity. Identity

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10 He focused on the difference in mental capacities, as in this extract, ‘[i]t is vitally necessary for us to remember always how vastly superior is man’s nature to that of cattle and other animals; their only thought is for bodily satisfactions…. Man’s mind, on the contrary, is developed by study and reflection’: McCrudden (n 9 above) 657, citing Cicero, *De officiis I* at 30. On Cicero’s idea of human dignity, see K Saastamoinen ‘Pufendorf on natural equality, human dignity, and self-esteem’ (2010) 71 Journal of the History of Ideas 39 at 49 - 51.

11 C Starck ‘The religious and philosophical background of human dignity and its place in modern constitutions’ in Kretzmer & Klein (n 2 above) 180.

12 As above.

13 On ubuntu, see Ackermann (n 5 above) 77 - 81; T Metz ‘Human dignity, capital punishment, and an African moral theory: Toward a new philosophy of human rights’ (2010) 9 Journal of Human Rights 81 at 82 - 85.


15 Starck (n 11 above) 181.

16 As above.
and personality are deeply significant for each individual in the passage through life.\textsuperscript{17} The assurance of the scope to all people in society to achieve their full potential to lead meaningful lives in accordance with their unique identity and to express their own personality requires respect for each other from all members of society.

Dignity is the opposite of shame.\textsuperscript{18} It is equated with honour, particularly with the aim of redressing a humiliating assault on dignity, and is the entitlement of all human beings irrespective of status.\textsuperscript{19}

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

Mette Lebech professes four distinct rationales that have developed and amalgamated to provide a more coherent understanding of human dignity.\textsuperscript{20} The first rationale to gain credence was in the time of Cicero and antiquity when the physical superiority of humans gave them the right to dominion over animals and other creatures. The second rationale emerged in the Middle Ages when Thomas Aquinas identified the discerning feature of humans as being their likeness to God. Each individual was deserving of respect because of their spirituality. In modern times after the Reformation, the spiritual dimension was thought wanting and Kant developed a third rationale which

\textsuperscript{17} Cardinal Manning viewed dignity as the achievement of the individual's potential in life. Each life has value in its own right irrespective of comparisons with others. In 1874 Cardinal Manning described the dignity in physical labour aimed at helping others as well as oneself, HE Manning \textit{The dignity and rights of labour, and other writings on social questions} (1934) 6:

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

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

\textsuperscript{18} C Safrai ‘Human dignity in a rabbinical perspective’ in Kretzmer & Klein (n 2 above) 105.

\textsuperscript{19} On the generalisation of the concept of dignity, see Habermas (n 3 above) 472 - 475. See also M Dan-Cohen ‘A concept of dignity’ (2011) 44 \textit{Israel Law Review} 9.

\textsuperscript{20} M Lebech ‘What is human dignity?’ (2004) 2 \textit{Maynooth Philosophical Papers} 59 at 60.
imputed superiority to human beings by virtue of their reasoning capacity and free will. Mary Wollstonecraft saw that politics significantly affected the lives of people in society and the fourth rationale attributed to her was based on the status of each individual in the community.

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

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

As the ideal religious base of love does not have universal appeal, Stith settles for the secularly-acceptable respect for others as a more widely

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21 n20 above, 67.
22 n20 above, 68.
23 Lebech concludes, ‘we learn to respond out of our own depth to the equally fundamental value of the other. Hence, as an expression, “human dignity”, refers beyond criteria to the fundamental value of the existence of individual human beings.’ as above. See also M Lebech ‘On the problem of human dignity’ (2010) 21(4) Bioethics Outlook 3 at 5, 8.
24 Stith quoted Finnis, ‘[h]uman beings are not just “values” … rather, they are persons each incommunicably, non-fungibly individual in [a] peculiar, deep way, and so entitled, one by one, to be respected.’ R Stith ‘The priority of respect: How our common hu-manity can ground our individual dignity’ (2004) 44 International Philosophical Quarterly 165 at 169, citing J Finnis ‘Public reason, abortion and cloning’ (1998) 32 Valparaiso University Law Review 361 at 377.
25 n24 above, 174.
embraced starting point. He sees human beings as beginnings, not ends.\textsuperscript{26} They should be given the opportunity to develop their personality in order to achieve their full potential. Respond to others, but be prepared to release them rather than holding them.\textsuperscript{27} Eschew control.\textsuperscript{28} Acknowledge their wishes and defer to them. A retreat, not a charge, is often required.

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

Michael J Perry is an adherent of the ‘love’ doctrine.\textsuperscript{30} God loves us; therefore, we must all love each other. In the absence of love, Perry paints the gloomy spectre of Nietzsche’s nihilism.\textsuperscript{31} He is convinced that morality founded on the claim that every human being has inherent dignity and is therefore inviolable has solely a religious basis. This is the cornerstone of human rights.\textsuperscript{32} Having analysed the works of various philosophers (including Ronald Dworkin, Martha Nussbaum, Richard Rorty, Leo Tolstoy, Richard Posner, Raimond Gaita and Finnis), he discounts a non-religious footing for the morality of human rights.\textsuperscript{33}

Dworkin perceives that human beings can be sacred or inviolable from a secular perspective as well as from a religious point of view.\textsuperscript{34} The secular proponent sees each individual as ‘a creative masterpiece’ attributable to a combination of natural and human intervention.\textsuperscript{35} Sacredness or inviolability arises through history or association.\textsuperscript{36} A person is the highest product of

\begin{itemize}
\item \textsuperscript{26} n 24 above, 166.
\item \textsuperscript{27} n 24 above, 178.
\item \textsuperscript{28} n 24 above, 180.
\item \textsuperscript{29} Stith sums up, ‘[w]e can find solidarity more safely in a common respect than in a common goal.’: n 24 above, 184.
\item \textsuperscript{30} MJ Perry Toward a theory of human rights: Religion, law, courts (2007).
\item \textsuperscript{31} n 30 above, 29.
\item \textsuperscript{32} On Perry and the religious basis for human rights, see Butler (n 5 above) 1263 - 1267.
\item \textsuperscript{33} MJ Perry ‘The morality of human rights: A nonreligious ground?’ (2005) 54 Emory Law Journal 97 at 150.
\item \textsuperscript{34} R Dworkin Life’s dominion: An argument about abortion and euthanasia (1993) 25, 82. See SC Rockefeller ‘Comment’ in C Taylor et al, Multiculturalism: Examining the politics of recognition (1994) 95.
\item \textsuperscript{35} n 34 above, 82 - 83.
\item \textsuperscript{36} n 34 above, 74.
\end{itemize}
natural creation and of deliberative human creative force.\textsuperscript{37} Because of the intrinsic importance of these two elements, no-one should violate anyone else and everyone commands respect and protection from everyone else.\textsuperscript{38} Human life can have instrumental and subjective value as well as intrinsic value.\textsuperscript{39}

Autonomy is necessary in order to develop one’s personality. Adults have the right to make decisions defining their own lives. Dworkin explains the importance of respect for autonomy thus:\textsuperscript{40}

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

Democracy provides an environment where people have the freedom to make rational choices for themselves. Dworkin links dignity to freedom,\textsuperscript{41} and makes a further link from dignity through freedom to democracy: \textsuperscript{42}

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

Each individual has experiential and critical interests in life.\textsuperscript{43} It is essential for individuals and for their integrity that their lives as a whole make sense

\textsuperscript{37} n 34 above, 82.
\textsuperscript{38} n 34 above, 84.
\textsuperscript{40} n 34 above, 224.
\textsuperscript{41} The connection is evident in the following passage, n34 above, 239:

… a true appreciation of dignity argues … for individual freedom, not coercion, for a régime of law and attitude that encourages each of us to make mortal decisions for himself. Freedom is the cardinal, absolute requirement of self-respect: no one treats his life as having any intrinsic, objective importance unless he insists on leading that life himself, not being ushered along it by others, no matter how much he loves or respects or fears them. Law regards self-application as important and looks wherever possible to voluntary compliance: J Waldron Dignity, rank, and rights (2012) 52, 63. It only resorts to coercion as a last resort and – when coercion is necessary – dignity is respected in the manner of enforcement: Waldron above, 63 - 64 (footnotes omitted).
\textsuperscript{42} n 34 above, 239.
\textsuperscript{43} n 34 above, 201.
and that they have lived a good life according to their own convictions. Integrity is closely connected to dignity and is important in people having the freedom to live their lives in a responsible fashion as they see fit. Selfrespect is a necessary ingredient in acting with integrity and in nurturing one’s own dignity. Dworkin alludes to our antipathy towards the attempted waiver of dignity when he highlights the lack of self-respect in a person acting without integrity. As bad, or even worse, are those who do not recognise that they have compromised their own dignity.

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

Irrespective of their conduct, everyone should be treated with respect, or at least, should not be treated with disrespect or suffer indignity. The community disapproves of those who do not have self-esteem and do not appreciate their own dignity. However, there is not necessarily a duty on others to advance an individual’s critical interests. Rather, the obligation is to recognise and respect those interests no matter what the circumstances. Dworkin endorses Kant’s principle that people should be treated as ends, not means. Only the individuals themselves are entitled to define what is important to them in the passage through life.

Another secular supporter is Nussbaum, who considers that the good of other human beings is worth pursuing in its own right. She attributes this caring characteristic to the basic social emotion of compassion.

44 n 34 above, 205.
45 ‘[W]e think that someone who acts out of character, for gain or to avoid trouble, has insufficient respect for himself.’ as above.
46 n 34 above, 235.
47 n 34 above, 236.
48 Dworkin explains that principle as not requiring ‘that people never be put at a disadvantage for the advantage of others, but rather that people never be treated in a way that denies the distinct importance of their own lives’: as above.
50 n 49 above, 719.
Human dignity and fundamental rights in South Africa and Ireland

disturbed when bad things happen to others. Pity or compassion arises because of the seriousness of the disturbing situation, which is not attributable to any fault on the sufferer’s part, and an empathy with the other’s dilemma because it could happen to oneself. Compassion can co-exist with human dignity.

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

Kant’s philosophy of life is premised on the absolute inner worth of the individual, which gives rise not only to duties to others but also to a ‘necessary

52 n 51 above, 45.
54 n 53 above, 85.
55 n 53 above, 91.
56 n 53 above, 87.
57 According to L’Heureux-Dubé J in the Supreme Court of Canada, while some mentally ill patients may have ‘a low level of awareness of their environment because of their mental condition’, which may influence their own conception of dignity, ‘an objective appreciation of dignity’ prevailed and there could be ‘interference with the safeguard of their dignity’ despite the fact that the patients might have ‘no sense of modesty’: Quebec (Public Curator) v Syndicat national des employés de l’hôpital St-Ferdinand [1996] 3 SCR 211 [108]. In another Canadian case, Robins JA highlighted the equal dignity of the mentally ill and the importance of their autonomy: Fleming v Reid (1991) 82 DLR (4th) 298 (Ont CA) 311.
Jeremy Waldron suggests that the issue of how human dignity applies to infants and to the profoundly disabled can be addressed by applying the rank of equality to all humans by virtue of their unrealised potential rationality (albeit that the subject’s rationality is evolving or may even be impossible to achieve by virtue of his or her condition): n 41 above, 29.
58 Réaume puts it thus, ‘[a]s human beings we are called upon to treat others “as fellow members of a common association,” to be honoured not particularly for our accomplishments but simply because of our membership in the human race’: n 53 above, 85, citing TE Hill, Jr ‘Social snobbery and human dignity’ in Autonomy and self-respect (1991) 170.
Chapter 2 – The role of dignity in contemporary jurisprudence

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60 TE Hill, Jr. Dignity and practical reason in Kant’s moral theory (1992) 166 - 167.

61 n 60 above, 47, citing Kant (n 59 above) 115, 120.

62 n 60 above, 36 - 37.

63 The precise version is: ‘Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means but always at the same time as an end’: Kant (n 59 above) 106 - 107.

inner worth’.59 Inner worth is different from moral worth. Thomas E Hill, Jr, explains:60

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

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

According to Hill, Kant saw that the capacity to be rational and self-governing set us apart from the lower animals and gave us dignity. Moral conduct is the practical exercise of this ‘noble capacity’.62 Because all individuals have the ability to rationalise, all are equal and should be treated as equals. People are ends in themselves and must not be used solely as a means to an end. They are not to be regarded as objects. Each human being has inherent dignity and an unparalleled personality. Kant’s practical imperative in simplistic terms was: act so that you treat humanity (whether yourself or another) always as an end (not as a means).63 Hill points out the distinction between ‘humanity in a person’ and the entire person, leading to the deduction that Kant recognised that human beings have characteristics,
such as animal instincts and talents, apart from their humanity. The dignity of humanity arises from man's rational nature, which should direct his will. The element of duty is apparent here. While Kant conceded that people are imperfect and do not always act rationally or fulfil their duties to themselves or to others, he steadfastly adhered to the precept that even the most heinous individual should not be abused. Irrespective of his situation, he retains the capacity to act rationally, although he may not be disposed to do so. Kant had faith in humanity and the inextinguishable spark of goodness in each of us because of our capacity to rationalise.

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

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

Our relationships with others should be moulded to accord with the requirements of dignity. Clearly we have a primary duty not to destroy the other person or ourselves by degradation or suicide; this duty arises, not because a person is irreplaceable, but because it degrades humanity. Each

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64 n 60 above, 39. Kant considered that the basis of human worth commands respect; Waldron pointed out that this is not exactly respect for persons – what commands respect is the capacity for morality; this involves respecting something within a person, not a person him- or herself: n 41 above, 24 - 25.

65 n 60 above, 39 - 40.

66 n 60 above, 41.

67 As above.

68 As above. See also P Capps Human dignity and the foundations of international law (2009) 108.

69 n 60 above, 43 fn 2.

70 n 60 above, 10.

71 n 60 above, 47, citing Kant (n 59 above) 115.

72 n 60 above, 48.

73 As above.

74 n 60 above, 51.
one has a duty to develop his rational capacities and to strive to exercise reason in moral contexts. Try to reason with others, not to manipulate them, and do not treat anyone as worthless. Allow individuals the freedom to form and pursue their own life plans, subject to the constraint that others be allowed a similar freedom. Individual liberty is limited by a concern for the liberty and rational development of all. Help others to set their own ends and to pursue them rationally. Honour human rationality in ourselves and in others in our words, symbols and deeds.

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

Human dignity is the foundation of society and civilisation in Islam and originated in the creation of man, when, according to the Koran, God ‘bestowed dignity on the progeny of Adam’ by breathing His Own Spirit into him. Stressing our interdependence, Abdullah al-Ahsan has defined human dignity as ‘the recognition and respect of human need, desire and expectation one individual by another’. Since all human beings are descended from Adam and his spouse, every person possesses dignity. It is not earned by meritorious conduct and is the right of everyone regardless of colour, race and religion. There is a prohibition on violating the personal dignity of all, whether a Muslim or non-Muslim, pious or of ill-repute, law-
abiding or a criminal. Human dignity in Islamic texts is affirmed in a variety of contexts, including the unity and equality of mankind. According to Linda Hogan and John D’Arcy May, dignity is an absolute value in Islam (an Abrahamic faith based on the doctrine of creation), but it is in danger of being eclipsed by the overwhelming presence of the utterly transcendent God. The primary responsibility of the Muslim is submission to God and the practice of religious duties rather than insisting on one’s entitlements because of one’s dignity as a human being, which in any case is a gift from God.

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

Hindu society is founded on the ideas of duty (dharma) and deeds (karma), which determine our existence and rebirths. The Bhagavadgîta (the Hindu equivalent of the New Testament) regards caste duty and disinterested action as the highest moral ideal. This socially structured inequality is compounded by gender inequality. Hierarchy is the natural norm in India. The traditional caste system is a blatant denial of human dignity. But,

85 Kamali (n 84 above) 2.
86 Kamali (n 84 above) 3.
88 As above.
89 Hogan & D’Arcy May (n87) 80.
90 As above.
93 Hogan & D’Arcy May (n 87 above) 82.
94 Hogan & D’Arcy May (n 87 above) 84.
95 As above.
96 Hogan & D’Arcy May (n 87 above) 83.
97 As above.
98 Hogan & D’Arcy May (n 87 above) 82.
within the boundaries of each caste, there is egalitarianism. Gandhi believed that the caste method could remain as a means of ordering society, if it rid itself of the pattern of defining lower castes as morally and spiritually inferior.

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

2.2 Law

2.2.1 History

Dignity is not endowed by states or by the international order. It is innate in each human being. The role of dignity in law developed during the course of the twentieth century. It began appearing as a concept in constitutions in the first half of the century, including those adopted in Mexico, Weimar Germany, Finland, Portugal, Ireland, Cuba, Spain and Costa Rica.

99 Hogan & D’Arcy May (n 87 above) 84.
100 As above.
101 Hogan & D’Arcy May (n 87 above) 85.
102 Hogan & D’Arcy May (n 87 above) 86.
103 As above.
104 McCrudden (n 9 above) 664. See also C Dupré ‘Human dignity in Europe: A foundational constitutional principle’ (2013) 19 European Public Law 319 at 319 - 325.
105 Political Constitution of the United Mexican States 1917 (amended 1946), Art 3(II)(c).
106 Constitution of the German Reich 1919, Art 151. See Habermas (n 3 above) 468.
107 The initial reference was to ‘hereditary dignity’: Constitution of Finland 1919, Art 15. It was amended in 1995 to guarantee the ‘inviolability of human dignity’ (Sec 1) and to refer to ‘the security required for a dignified life’ (Sec 15a).
108 Political Constitution of the Portuguese Republic 1933, Art 45.
109 Constitution of Ireland 1937, Preamble, 5th para: And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations.
111 Charter of the Spanish People 1945, Arts 1 & 25.
This can be attributed to a variety of influences such as the emphasis on dignity in the Catholic religion, the Enlightenment and socialism.

2.2.1.1 UN Charter and Universal Declaration

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

113 Catholic Church Catechism of the Catholic Church (1999) [27], [225], [306], [308], [356]-[357], [364], [369], [872], [1004], [1468], [1487], [1645], [1691]-[1692], [1698], [1700]-[1876], [1934]-[1935], [1938], [1956], [2203], [2261], [2275], [2284]-[2301], [2324], [2334]-[2335], [2418], [2424], [2436], [2524]. See McCrudden (n 9 above) 658.
114 On the Enlightenment and human rights, see Butler (n 5 above) 1262, 1267, 1269, 1305.
115 McCrudden (n 9 above) 664. The Catholic influence was evident in Portugal, Ireland and Spain, the socialist in Finland, and both Catholic and social democratic/socialist in Central and South American countries: as above.
118 n 116 above, Preamble, 1st para, 2nd point.
120 The foundation of the concept of inalienable rights that pertain to the individual had crystallised by the end of the 17th century: G Peirce Dispatches from the dark side: On torture and the death of justice (2010) vii.
121 n 117 above, Preamble, 1st para.
dignity, equality and social progress mentioned in the UN Charter.\textsuperscript{122} 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.

Article 1 Universal Declaration declares:

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

Here the Kantian influence is evident. It embraces the individual and community aspects, as well as engaging the intellect and moral conscience of the person. In the course of the drafting of the Universal Declaration, the South African representative CT Te Water objected to the inclusion of the words ‘dignity and rights’.\textsuperscript{123} His initial objection was because he did not agree to the extension of equality to all rights, personal, social, economic and political, irrespective of whether or not they were fundamental.\textsuperscript{124} He also insisted there was no universal standard of dignity.\textsuperscript{125} He backtracked subsequently and supported a Guatemalan proposal to move draft article 1 to the Preamble on the basis that it was a statement of fact, not a right.\textsuperscript{126} In the South African delegation’s view, the dignity of the individual was a broader and deeper concept than a right.\textsuperscript{127} If fundamental human rights were respected, the dignity of the individual person would be automatically recognised.\textsuperscript{128} Eleanor Roosevelt (Chairperson of the Human Rights Commission and of the Drafting Committee established by it) said that the word ‘dignity’ had been considered at great length and the Human Rights

\textsuperscript{122} n 117 above, 5th para.
\textsuperscript{123} MA Glendon \textit{A world made new: Eleanor Roosevelt and the Universal Declaration of Human Rights} (2001) 144.
\textsuperscript{124} UNGA 3rd Session Third Committee 95th Meeting (6 October 1948) UN Doc A/C.3/SR.95 at 91 - 92.
\textsuperscript{125} UNGA 3rd Session Third Committee 95th Meeting (n 124 above) 92.
\textsuperscript{126} UNGA 3rd Session Third Committee 96th Meeting (7 October 1948) UN Doc A/C.3/SR.96 at 96.
\textsuperscript{127} As above.
\textsuperscript{128} As above.
Commission had decided to include it to emphasise the inherent dignity of all mankind.  

Economic and social rights were incorporated in the Universal Declaration at Articles 22 to 27 at the insistence of Latin American and Communist countries, who battled with the North Atlantic countries and their allies over the emphasis to be accorded to them as compared with the hitherto more important civil and political rights. Eleanor Roosevelt was committed to Franklin D Roosevelt’s ‘four freedoms’, which included freedom from want and this, according to Mary Ann Glendon, ensured that they ‘would be a constant touchstone for all members of the Commission.’ The right to work in Article 23 also mentions dignity. These international texts were concluded after much deliberation and with a lot of effort to obtain a common platform between various nations with widely different cultures and backgrounds. The agreed basis for human rights in the Universal Declaration is secular humanist. Reference to a divine origin or a basis in nature was avoided. Jacques Maritain has noted that in the course of negotiations on the text of the Universal Declaration there was a divergence of views between those who accepted and those who rejected natural law as the cornerstone of human rights. The drafters adopted a practical approach and contented themselves with a statement and


131 n 123 above, 42.

132 It reads:

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

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

134 Morsink., (n 130 above) 334.

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

Glendon rightly said that the Universal Declaration ‘heralded a new moment in the history of human rights.’ It emphasised dignity and insisted on the link between freedom and solidarity. Her overview neatly captures the interdependence between the individual and society, and the intermingling of rights:

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

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

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

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

\begin{itemize}
\item \textsuperscript{143} ‘The grounds of an international declaration of human rights’ in UNESCO (n135) Appendix II at 259.
\item \textsuperscript{144} ‘The United Nations cannot succeed in the great purposes to which it is committed unless it so acts that this dignity is given increasing recognition, and unless steps are taken to create the conditions under which this dignity may be achieved more fully and at constantly higher levels.’: as above.
\item \textsuperscript{145} In UNESCO (n 135 above) 18.
\item \textsuperscript{146} As above.
\item \textsuperscript{147} As above.
\item \textsuperscript{148} S Waltz ‘Universalising human rights: The role of small states in the construction of the Universal Declaration of Human Rights’ (2001) 23 Human Rights Quarterly 44 at 70.
\item \textsuperscript{149} n148 above, 71.
\item \textsuperscript{150} n148 above, 70.
\item \textsuperscript{151} n148 above, 69 - 70.
\item \textsuperscript{152} n148 above, 69.
\end{itemize}
individual.\footnote{Morsink (n 130 above) 329.} This can be seen from the insertion of the word ‘alone’ in Article 29(1), which locates people necessarily in the community for development of their full potential.\footnote{Morsink (n 130 above) 334. Art 29(1) reads: ‘Everyone has duties to the community in which alone the free and full development of his personality is possible.’}

The value of dignity had universal appeal, but for a variety of reasons.\footnote{The Kenyan High Court explained that the universality of the Universal Declaration was based on ‘a common heritage of humankind which is the oneness of the human family and the essential dignity of the individual’: \textit{RM v AG} [2006] AHRLR 256 (KeHC 2006) \[69\]. For legal reasons in support of the claim that human dignity is the moral source from which all of the basic rights derive their meaning, see Habermas (n 3 above) 466 - 470.} It was not simply a Western ideal, but was attractive to South American, Latin American, African and Eastern countries. The basis of the appeal was not solely Christianity, but those with the Kantian view and followers of Eastern philosophy were equally sympathetic to the concept.

In a look back more than 50 years after adoption of the Universal Declaration, William Joseph Wagner indicated that interest groups and states have used human rights for their own political purposes.\footnote{Wagner (n 5 above) 199. See W Osiatynski ‘On the universality of the Universal Declaration of Human Rights’ in A Sajó (ed) \textit{Human rights with modesty: The problem of universalism} (2004) 33 - 50.} As a result, some are sceptical of Western human rights.\footnote{n 5 above, 223, 225.} However, Wagner considers that human rights can be moulded by adding social content and that the Universal Declaration was a worthwhile endeavour, as it tried to replace force with human dignity.\footnote{Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (ECHR).}

\subsection*{2.2.1.2 ECHR and EU Charter}

The term dignity is not used explicitly in the European Convention on Human Rights (ECHR).\footnote{G Moon & R Allen ‘Dignity discourse in discrimination law: a better route to equality?’ [2006] \textit{European Human Rights Law Review} 610 at 621.} As it is expressly based on the Universal Declaration, it is implicitly based on the latter’s assertion of human dignity.\footnote{Morsink (n 130 above) 334. Art 29(1) reads: ‘Everyone has duties to the community in which alone the free and full development of his personality is possible.’}
In any event, the European Court of Human Rights has made it clear in its jurisprudence that dignity is a foundation value of democracy.161

The European Union Charter of Fundamental Rights signed in Nice in 2000 placed the individual at the heart of the Union’s activities and declared human dignity, freedom, equality and solidarity its foundational values.162

The entire of Chapter I is devoted to dignity rights directed towards the physical and mental aspects of personal security.163 There is an unequivocal demand that dignity be protected in Article 1, which reads: ‘Human dignity is inviolable. It must be respected and protected.’ Unsurprisingly, the right to life is proclaimed164 and torture, inhuman or degrading treatment or punishment,165 slavery166 and forced labour167 are proscribed.

Article 2 (dealing with the right to life) contains an explicit prohibition on the death penalty.168 The right to integrity is set out in Article 3. Modern scientific developments have necessitated the inclusion of a ban on eugenics, the sale of body parts and cloning, and informed consent is required for participation in scientific experiments and medical treatment.169 In another sign of the times and increased mobility, human trafficking is forbidden.170

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

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


163 n 162 above, Arts 1 - 5. See P Craig & G de Búrca EU law: Text, cases, and materials (2011) 395 - 396.

164 n 162 above, Art 2.1.

165 n 162 above, Art 4.

166 n 162 above, Art 5.1.

167 n 162 above, Art 5.2.

168 n 162 above, Art 2.2.

169 n 162 above, Art 3.2.

170 n 162 above, Art 5.3.

171 n 162 above, Art 31.1.
Chapter 2 – The role of dignity in contemporary jurisprudence

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

2.2.1.4 International humanitarian texts
The initial stimulus for the inclusion of dignity in humanitarian texts was war. In 1863 the US required that prisoners be treated with dignity. After the Second World War the International Committee of the Red Cross proposed that the Geneva Conventions protecting prisoners of war should include preambles incorporating: ‘[r]espect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking.’ The Conventions, as adopted, included Common Article 3 prohibiting, \textit{inter alia}, ‘outrages upon personal dignity, in particular humiliating and degrading treatment.’ The statutes of international criminal tribunals and the Rome Statute establishing the International Criminal Court have referred to ‘outrages upon personal dignity’.

Dignity played a role in abolitionist policies, so it is not surprising that the Slavery Convention 1956 echoes back to the UN Charter in affirming

\begin{itemize}
  \item \textbf{172} McCrudden (n 9 above) 667, fn 82, citing ‘Instructions for the Government of Armies of the United States in the Field’ (Lieber Code), 24 Apr 1863, Art 75.
  \item \textbf{173} McCrudden (n 9 above) 667, fn 84, citing ‘Remarks and Proposals submitted by the International Committee of the Red Cross’, Document for the consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference of Geneva (21 Apr 1949) (Feb 1949) 8.
  \item \textbf{174} McCrudden (n 9 above) 668, fn 85, citing Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Art 3.
\end{itemize}

‘faith in the dignity and worth of the human person’. Likewise, given the prominence of the principle of the ‘dignity of labour’ in the growth of the trade union movement, there is an emphasis on dignity in International Labour Organisation Conventions.

2.2.1.5 UN human rights instruments since the 1960s
Following up on the aspirations in the Universal Declaration, in 1966 the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (CESCR), which comprise the International Bill of Rights, fleshed out states’ obligations. They highlight the importance of dignity and acknowledge it as the foundational value.

The Preambles to ICCPR and CESCR set the scene in identical terms:

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

Recognizing that these rights derive from the inherent dignity of the human person …

176 McCrudden (n 9 above) 668; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 226 UNTS 3, Preamble.


180 John McGinnis has criticised international human rights treaties and customary law as inadequate protectors of human dignity. JO McGinnis ‘The limits of international law in protecting dignity’ (2003) 27 Harvard Journal of Law and Public Policy 137 at 137. He considers that the dignity of the poor would be better served by focusing on the tangible benefits and increased standards of living and education obtained by World Trade Agreements: above, 138. Vested interests stand to gain by implementation of rights.
Dignity is mentioned in Article 10 of ICCPR: ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’

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

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

Conventions banning discrimination on the grounds of race and gender are among the many that have referred to dignity. The Convention on the Elimination of Racial Discrimination refers three times to dignity in its Preamble. It takes into consideration that the UN Charter ‘is based on the principles of the dignity and equality inherent in all human beings’, that the Universal Declaration ‘proclaims that all human beings are born free and equal in dignity and rights’ and that the 1963 UN Declaration on the Elimination of All Forms of Racial Discrimination:

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

The Preamble to the Convention on Discrimination against Women in 1979 also mentions dignity three times. Having noted the focus on dignity in the UN Charter and in the Universal Declaration, it goes on:

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181 n 178 above, art 10.1. This right is violated by the enforced disappearance of people (ie, their arrest, detention or abduction with the authorisation, support or acquiescence of a state or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on their fate or whereabouts, with the intention of removing them from the protection of the law for a prolonged period of time): Bousroual (Saker) v Algeria UNHR Committee (24 April 2006) 86th Session UN Doc CCPR/C/86/992/2001 [9.2]. See also Mulezi v Democratic Republic of the Congo UNHR Committee (23 July 2004) 81st Session UN Doc CCPR/C/81/D/962/2001 [5.3].

182 n 179 above, art 13.1.


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

In 1986 the UN gave formal recognition to the central importance of dignity in standards it adopted for new human rights instruments which should be ‘of fundamental character and derive from the inherent dignity and worth of the human person’.186 International instruments since then have referred to dignity in mainstream human rights areas and also in topics not traditional human rights territory. In the mainstream category are conventions on the Rights of Children in 1989,187 Migrant Workers in 1990188 and the Disabled in 2007.189 An example in the non-traditional class is an agreement on funding for agricultural development adopted at a conference in Rome in 1976, in which the first paragraph of the Preamble recognised that a continuing world food problem was afflicting many people in the developing countries and was jeopardising ‘the most fundamental principles and values associated with the right to life and human dignity’.190

Dignity was the central organising principle of the Vienna World Conference on Human Rights in 1993.191 The Declaration and Programme of Action adopted dignity as foundational to human rights generally192 and in particular areas like the prohibition of gender-based violence and

191 McCrudden (n 9 above) 670. This Second World Conference on Human Rights was attended by over 170 governments.
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harassment,\textsuperscript{193} the abolition of extreme poverty\textsuperscript{194} and biomedical ethics.\textsuperscript{195} Conventions since then have contained specific provisions protecting dignity in relation to diverse matters such as the criminal justice process in relation to children,\textsuperscript{196} minimum welfare of migrant workers and their families,\textsuperscript{197} health of the disabled\textsuperscript{198} and their treatment as autonomous individuals,\textsuperscript{199} reintegration of abused children and disabled people,\textsuperscript{200} reputation,\textsuperscript{201} and control of personal data.\textsuperscript{202} UNESCO gave a central role to dignity in the Universal Declaration on the Human Genome and Human Rights in 1997.\textsuperscript{203}

\textbf{2.2.1.6 Regional treaties}

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

\begin{footnotesize}
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  \item[193] See note 182 above, para 18.
  \item[194] See note 182 above, para 25.
  \item[195] See note 182 above, para 11.
  \item[196] Convention on the Rights of the Child (n 187 above) arts 37 & 40. These provisions were reference points for the Supreme Court of Appeal when it upheld an appeal against the leniency of a sentence on a girl for the murder of her grandmother and theft, as the trial judge failed to give sufficient weight to the gravity of the offence and the interests of society: \textit{DPP Kwazulu-Natal v P} [2006] 1 All SA 446 (SCA) [15], [22], [26].
  \item[197] Convention on the Rights of Migrant Workers (n 188 above) art 70.
  \item[198] Convention on the Rights of Persons with Disabilities (n 189 above) art 25.
  \item[199] Convention on the Rights of Persons with Disabilities (n 189 above) art 3.
  \item[200] Convention on the Rights of the Child (n187) art 39; Convention on the Rights of Persons with Disabilities (n 189 above) art 16.
  \item[202] Convention for Protection from Enforced Disappearance (n 201 above) art 19.
  \item[203] McCrudden (n 9 above) 671 fn 120; UNESCO ‘Universal Declaration on the Human Genome and Human Rights’ (11 November 1997) Gen Conf 29 C/Res 16, Preamble, arts 1, 2, 6, 10 - 12, 15, 21 & 24.
\end{itemize}
\end{footnotesize}
dignity of basic needs such as a home. The American Convention on Human Rights mentions dignity in relation to humane treatment and the prohibition on forced labour. It provides a privacy right to have one's honour respected and dignity recognised. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women refers to dignity several times.

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

All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another. The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty. See VB Monsalve & JA Román ‘Tensions of human dignity: Conceptualization and application to international human rights law’ (2009) 11 SUR - International Journal on Human Rights 39 at 44 - 45.

205 American Declaration of the Rights and Duties of Man (n 204 above) Art XXIII: ‘Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.’


207 n 206 above, Art 6.2.

208 n 206 above, Art 11.1.


210 The African Commission found that the government of Sudan was responsible for torture, because – even though it had punished some torturers – it had not taken preventive measures such as halting of incommunicado detention, effective remedies, and ongoing investigations into allegations: Amnesty International v Sudan [2000] AHRLR 297 (ACHPR 1999) [56]-[57]. It also stated that holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family if and where the individual was being held, was inhuman treatment of both the detainee and the family concerned: above, [54]. The security forces in Cameroon tortured a journalist and human rights activist physically and mentally in violation of ICCPR: Njou v Cameroon UNHR Committee (14 May 2007) 89th Session UN Doc CCPR/C/89/D/1353/2005 [6.1].

personality.\textsuperscript{212} The Protocol upholds the right of elderly,\textsuperscript{213} disabled\textsuperscript{214} and imprisoned pregnant or nursing women\textsuperscript{215} to be treated with dignity.

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

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


(1) Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights;

(2) Every woman shall have the right to respect as a person and to the free development of her personality.

\textsuperscript{213} n 212 above, Art 22(b).

\textsuperscript{214} n 212 above, Art 23(b).

\textsuperscript{215} n 212 above, Art 24(b).


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

\textsuperscript{217} n 216 above, Art 3.3: ‘Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments.’


\textsuperscript{218} n 216 above, Art 33.3.

\textsuperscript{219} n 216 above, Art 20.1.

2.2.1.7 National constitutions

It is interesting to note that countries where there has been wholesale abuse of people have protected human dignity in post-atrocity laws. These include Germany and South Africa. Germany’s Basic Law adopted in 1949 gave dignity the most predominant place. Article 1 is devoted to the protection of human dignity, which is the foundation for directly enforceable human rights. The foundational values in the South African Constitution are dignity, equality and freedom; it also recognises dignity as a self-standing right. Israel is another country that has highlighted human dignity in its basic laws.

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

There are significant differences in the use of dignity in the various texts reflecting cultural relativism and pluralism.

According to McCrudden, some countries, particularly those with Catholic or Islamic outlooks, ‘use dignity as the basis for (or another way of expressing) a comprehensive moral viewpoint, “a whole moral world view”’,

222 McCrudden (n 9 above) 665; Basic Law for the Federal Republic of Germany 1949.
223 On dignity in German constitutional law, see Botha (n 221 above) 178 - 196; J Church et al, Human rights from a comparative and international law perspective (2007) 100 - 102.
224 It reads:
(1) The dignity of man inviolable. To respect and protect it is the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
(3) The following basic rights bind the legislature, the executive and the judiciary as directly enforceable law.
226 Sec 10.
227 n 9 above, 673.
228 As above.
229 As above.
which seems distinctly different from region to region. He instances Ireland’s 1937 Constitution and Arab human rights texts as examples of this trend.

2.2.2 Sources

Dignity was a right of personality and status in legal systems based on Roman law. Many European jurisdictions have had a long-standing right to personality, which has a community aspect and is not solely concerned with autonomy and the right to self-determination. It acknowledges the person as a social being, who communicates and interacts with other members of society. The moral integrity of the individual is recognised, as is the need of security for each person’s own ethical standards. The dignity of everyone in the community is protected. The aim is harmony between society and the individual’s expression of his or her unique personality in accordance with their own priorities without the imposition of uniform standards in deeply personal issues.

In Germany and France, rights of personality are protected. James Whitman has tracked their origin in Germany to the Roman law concept of insult, which in ancient Rome protected certain damage to possessions, and evolved to protect against public insult. It was based on honour and matured to safeguard non-economic interests and various kinds of disrespect. Whitman points out that the dignity of the ‘ancien régime’ was not human dignity, but was ‘intended to guarantee that high-status persons would be treated better than low-status persons’. In twentieth century Continental Europe, ‘human dignity’ in a reaction against the status quo was extended by a pattern of levelling up to all sectors of the population.

230 n 9 above, 675. Dignity does not provide an agreed content to human rights. McCrudden considers that it has a more limited institutional benefit in ‘providing a language in which judges can appear to justify how they deal with issues such as the weight of rights, the domestication and contextualization of rights, and the generation of new or more extensive rights’: n 9 above, 724.
231 McCrudden (n 9 above) 657.
232 On personality rights in Germany, see Church et al (n 222 above) 108 - 109.
234 Whitman (n 233 above) 1184.
236 Whitman (n 235 above) 18.
South Africa, with a Roman-Dutch basis for its law, recognised a tort of injury to dignity. Infringement of a person’s dignitas constituted a delict and compensation could be claimed with the *actio iniuriarum*, which applied between private individuals and did not lie against the state. Mokgoro J explained it in *Dikoko v Mokhatla*:

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

The South African constitutional concept of dignity is much broader than the pre-existing personality right. Nelson Mandela in his speech in Trafalgar Square in 2005 viewed overcoming poverty as an act of justice rather than charity; it protected fundamental human rights, the right to dignity and a decent life.

Many states worldwide with different value systems, cultures and legal backgrounds have given prominence to dignity in their constitutions or case-law. Its ambit stretches across continents to countries such as India, where dignity is mentioned in the Preamble to its Constitution (similar to Ireland), Japan, Hong Kong and Malaysia in Asia, to Peru and Argentina.


238 2006 6 SA 235 (CC) [62].

239 McCrudden (n 9 above) 663.

240 Constitution of India 1950.

241 Constitution of Japan 1946.

242 Hong Kong Bill of Rights Ordinance 1991.

243 The High Court of Malaysia has held ‘it is the fundamental right of every person within the shores of Malaysia to live with common human dignity’: E Daly ‘Constitutional dignity: Lessons from home and abroad’ Widener Law School Legal Studies Research Paper Series no 08-07 http://ssrn.com/abstract=991608 (accessed 16 January 2009), citing *Kanawagi A/l Seperumaniam v Dato’ Abdul Hamid Bin Mohamad* [2004] 5 MLJ 495, 506 (High Court Malaysia - Kuala Lumpur) (Fiaza Tamby Chik J).

244 Constitution of Peru 1993.

245 The Argentine Supreme Court has held that ‘the right of reply is a natural fundamental right that is essential to the legitimate defense of one’s dignity, honor and privacy’.
in South America, to Poland, Macedonia and Hungary in Eastern Europe, and to Belgium and Portugal in Western Europe.

### 2.2.3 Roles and impact

Dignity is not merely an ethical cornerstone of the international legal order, but its use in multiple international instruments has led to it becoming a substantive guarantee in its own right to-day assuring respect for each individual and giving protection against humiliating and degrading treatment. Human dignity has a variety of roles in law. It can be a value, a principle or a right. Gay Moon and Robin Allen explain:

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

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

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Some commentators have been enthusiastic supporters of the use of dignity in law, while others have been less enamoured with it or have criticised it as a vague concept which has detracted from other legal principles or values.\textsuperscript{254} It has played a growingly significant role in Canadian jurisprudence, particularly in the area of equality law; however, it has drawn adverse reaction from some quarters.\textsuperscript{255}

There is no reference to dignity in the US Constitution, but it has related concepts including a ban on cruel and unusual punishment and a due process clause.\textsuperscript{256} The US Supreme Court has invoked the concept of dignity sporadically. Vicki Jackson sees scope for its development:\textsuperscript{257}

Although some members of the U.S. Supreme Court in the postwar period have embraced dignity as a motivating principle for the U.S. Bill of Rights, the role of the concept of ‘human dignity’ in the Court’s jurisprudence is episodic and underdeveloped.

She explains that the difference between the European notion of human dignity and that prevailing in much of the US is due partly to ‘the interactions among newer and older legal ideas and the varying capacities of existing legal systems to assimilate newer legal norms to existing traditions.’\textsuperscript{258}

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

US jurisprudence has primarily emphasised the importance of privacy. This is compatible with the ethos in a nation where the liberty of the individual is supreme and there is abhorrence of government interference. Individual states have references to dignity in their constitutions. Montana is unique among the states in the US in having an explicit and wide guarantee of individual dignity in its 1972 Constitution. Section 4 in its Declaration of Rights is devoted to individual dignity. Montana was inspired to focus on dignity in its Constitution by the Puerto Rican Constitution adopted in 1951 and which, in turn, had been influenced by the Universal Declaration.

The Constitutions of Illinois and Louisiana, adopted in 1970 and 1974...
respectively, refer to dignity, but not as comprehensively as that of Montana.265

The dignity clause may have played a role in the occasional assertions by the Montana Supreme Court that the state constitution provides different more expansive rights than in the federal Constitution.266 In Armstrong v State the court held that a legislative ban on certified physician assistants from performing abortions violated the right to privacy and invoked the dignity clause to support its conclusions.267 As Jackson says, the court appeared to attribute both some independent value to the ‘dignity’ clause and a coherent connectedness between the right to dignity and other rights.268

The dignity clause in the Puerto Rican Constitution has been significant in the case-law of its Supreme Court, which has asserted that the inviolability of human dignity is the foundational concept at the base of the Commonwealth’s commitments to democracy and human rights.269 In contrast to other states where the legislature led the way in introducing no-fault divorce, the abandonment of the fault system came through the Supreme Court in Puerto Rico in Figueroa Ferrer v Commonwealth where it held that the requirement for fault to obtain a divorce violated Puerto Rico’s constitution;

266 Jackson (n 256 above) 29.
267 1999 MT 261, 296 Mont 361, 989 P2d 364; Jackson (n 256 above) 30. The European Court of Human Rights found that Ireland had a positive obligation to secure to a pregnant woman whose life was at risk effective respect for her private life by legislation or the provision of a regulatory regime giving an accessible and effective procedure by which she could establish whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3° of the Constitution: A v Ireland (App no 25579/05) (2011) 53 EHRR 13 [267]. For reviews of the A case, see S Krishnan ‘What’s the consensus? The Grand Chamber’s decision on abortion in A, B and C v Ireland’ [2011] 105(2) Gazette of the Law Society of Ireland 16; E Wicks ‘A, B, C v Ireland: Abortion law under the European Convention on Human Rights’ (2011) 11 Human Rights Law Review 556.

268 n 256 above, 30, citing Armstrong (n 267 above) [72]: Respect for the dignity of each individual – a fundamental right, protected by Article II Section 4 of the Montana Constitution – demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic value of life in general, answering to their own consciences and convictions. Equal protection … requires that people have an equal right to form and to follow their own values in profoundly spiritual matters … Finally the right of individual privacy … requires the government to leave us alone in all these most personal and private matters.
269 Jackson (n 256 above) 33.
the court criticised the fault regime in divorce for requiring married couples either to mislead the court or to surrender aspects of their private lives to public scrutiny. The constitutional principles of dignity and privacy ‘are based on principles which aspire to universality,’ and ‘protect … dignity and private life in divorce proceedings through the expression of the mutual decision to obtain a divorce.’

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

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

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270 107 PR Dec (1978); Jackson (n 256 above) 34, fn 71. Most couples obtained divorce by mutual consent, but through a judicial charade: Jackson (n 256 above) 34.
271 Jackson (n 256 above) 34, citing Figueroa Ferrer (n 270 above) 301.
273 n 272 above, 85.
274 Glendon (n 272 above) 171.
276 n 275 above, 221 - 222, 255.
277 n 275 above, 255.
278 As above.
279 n 275 above, 256.
for argument about individual rights. She advocates a new take on dignity based on the American Constitution and legal traditions, which would emphasise individual liberty and self-determination rather than the newer communitarian view found elsewhere.

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

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

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

Dignity played a primary role in the South African case *Makwanyane* where the death penalty was held to be unconstitutional. Langa J

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280 As above.
281 As above.
283 As above.
284 Universal Declaration of Human Responsibilities (adopted 1 September 1997) InterAction Council, Preamble.
285 Declaration of Human Responsibilities (n 284 above) art 2.
286 *S v Makwanyane* 1995 6 BCLR 665 (CC); McCrudden (n 9 above) 688.
considered that *ubuntu* was relevant and brought out its community aspect with mutual duties in addition to respect for the individual's dignity. The element of reciprocal love in *ubuntu* was significant for Mahomed J. Mokgoro J linked dignity with *ubuntu* while highlighting group co-existence in harmony.

Other African countries also place a value in their constitutions and jurisprudence on the dignity of the individual. Zimbabwe invoked the concept of dignity when it too declared the death penalty unconstitutional.

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287 n 286 above, [224]:
The concept [*ubuntu*] is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

For a critique of the explanations the Constitutional Court gave for thinking that an *ubuntu* ethic entailed that the death penalty was an unconstitutional violation of human dignity, see Metz (n 13 above) 85 - 91.

288 n 286 above, [263]:
'The need for *ubuntu*’ [in the postamble to the Constitution] expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.

289 n 286 above, [308]:
Generally, *ubuntu* translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it enwraps the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

See Church et al (n 222 above) 207 - 208.

In *Jumbe v AG* the High Court of Malawi struck down legislation reversing the onus of proof in corruption charges, as it breached the constitutional right to a fair trial, which included the presumption of innocence and the right to silence, and was not justified under the limitation clause in the Constitution; Katsala J invoked democratic principles when he stressed that the accused should be treated with dignity as fellow human beings, notwithstanding the odious and contemptible nature of corruption.291

While accepting that there are different philosophies of life and various cultures throughout the world, it is worthwhile striving to find common ground for co-existence, where the interests of the community, states and international world order will be protected while respecting the dignity of the individual. Chandra Muzaffar asks that our rights and responsibilities be guided by universal moral and spiritual values.292 He sees human dignity as the common starting point.293

Jack Donnelly pointed out the historical difference between the Western alliance of human dignity and human rights, on the one hand, and the traditional place of human dignity in non-Western societies, on the other.294

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291 [2005] MWHC 15 at 47: 
Admittedly corruption is bad. It is evil and it has to be rooted out of our society. It is counter productive and it seriously retards development. Those that engage in corruption in a way violate the citizens’ right to development as enshrined in section 30 of the Constitution. They, among other things, divert for their own use public resources thereby depriving the general public the benefit from such resources. Such people are selfish and greedy at the expense of everyone else. Surely, if caught, they must be dealt with firmly.

However, inasmuch as we may harbour hatred for such people, we can only show and prove to the whole world and indeed to ourselves that we are an open and democratic society and that we cherish and promote the values that underlie such a society if we treat those we suspect of committing heinous crimes with dignity as fellow human beings and afford them all the protection that accused persons enjoy under the Constitution. I do not see any justification for limiting their right to be presumed innocent bearing in mind that they are mere suspects and have not been convicted of the alleged crimes.


293 As above: ‘The great challenge before us is to develop this vision of human dignity culled from our religious and spiritual philosophies into a comprehensive charter of values and principles, responsibilities and rights, and roles and relationships acceptable to human beings everywhere.’ See also C Muzaffar *Rights, religion and reform: Enhancing human dignity through spiritual and moral transformation* (2002) 34 - 35.

Islamic, African, Chinese and Indian societies have valued dignity, but have not historically embraced universal human rights. Instead these societies have given precedence to the common good. He considers that in an era when there is a focus on the individual, universal human rights are appropriate for all societies. Independent evidence for this trend can be gauged from the fact that international gatherings have endorsed human rights and, indeed, have selected human dignity as a, if not the, foundational value grounding human rights.295

In contrast to Donnelly’s focus on individual rights at the expense of social justice, Guy Haarscher looks at the relationships between each individual and society.296 The dignity of each member should be considered and the norm should be respect for the other.297

In the final debate in the UN General Assembly on the Universal Declaration in 1949, the Indian delegate’s view was that the basis of rights is neither the state nor the individual human being, but the human person participating in social life and working towards national and international co-operation.298 The emphasis is on the individual in society rather than on the individual *per se* or the state.

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

### 2.2.4 Association with other rights

#### 2.2.4.1 Equality

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

297 As above.
family and is inextricably linked to the dignity of the individual. The Court explained that the principle of non-discrimination cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.

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

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

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

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300 As above.

301 1998 12 BCLR 1517 (CC) [126].

302 n301 above, [129]:

At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. The indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream; they may also be derived from the location of difference as a problematic form of deviance in the disadvantaged group itself, as happens in the case of the disabled. In the case of gays it comes from compulsion to deny a closely held personal characteristic. To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality.
Moon and Allen promote dignity as an element that can help achieve substantive equality. They consider that the Aristotelian concept of equality is insufficient to address historical disadvantage. Dignity attacks discrimination based on class or social status. The use of dignity by the judiciary as an aid to achieve equality can entrench social solidarity.

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

2.2.4.2 Freedom and security

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

The imprisonment of judgment debtors in South Africa without a criminal trial was found to be an infringement of their constitutional rights to freedom and security. The court invoked the constitutional right to dignity as an interpretative aid. While the goal of the legislation to provide a mechanism

303 n 160 above, 645:

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

304 n 160 above, 643.

305 As above.

306 Moon & Allen (n 160 above) 649.

307 Andrew Foster analysed the focus on dignity to define equality in Canada and South Africa and concluded, ‘the use of dignity as a normative standard for determining violations of equality has itself reinforced the formalism it was intended to overcome’;

Foster (n 254 above) 74.

308 1999 3 SA 1 (CC) [17].

for the enforcement of judgment debts was a legitimate and reasonable
government objective, the means were not justified since it resulted in the
unjustifiable imprisonment of those who were impecunious and could not
pay, as well as those who had sufficient resources but refused to discharge
their legal obligations.

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

2.2.4.3 Fair trial
The right to a fair trial is based on the dignity of the person. The elements of
rationality and free will in dignity have led to a ban on serious criminal
responsibility without mens rea. It offends the inner worth of the individual
to impose guilt in the absence of intention to commit a crime or knowledge
of the transgression. Hardiman J quoted from Canadian jurisprudence in CC
v Ireland, when the Supreme Court found unconstitutional legislation
criminalising sexual relations with a girl under 15 years because it exposed
a person without mental guilt to a maximum sentence of life imprisonment
and failed to respect the accused's liberty and dignity.310

Respect for dignity, in particular the freedom and security of the person,
has resulted in an amelioration of harsh or precipitative civil procedures for
collection of debts. The defaulting debtor is entitled to a fair hearing with
advance notice of the possibility of punitive measures being imposed.311 As
support for her decision to this effect in McCann v Judge of Monaghan District
Court, Laffoy J referred to Coetzee as finding:

… the sanction of imprisonment is ostensibly aimed at the debtor who
will not pay, but it also strikes at those who cannot pay and simply fail to

Wilson J [in R v Hess; R v Nguyen [1990] 2 SCR 906] went on to review the
academic authorities. She concluded:
‘Our commitment to the principle that those who did not intend to commit harm
and who took all reasonable precautions to ensure that they did not commit an
offence should not be imprisoned stems from an acute awareness that to imprison a
mentally innocent person is to inflict a grave injury on that person’s dignity and
sense of worth. Where that person’s beliefs and his actions leading up to the
commission of the prohibited act are treated as completely irrelevant in the face of
the state’s pronouncement that he must automatically be incarcerated for having
done the prohibited act, that person is treated as little more than a means to an end.’
311 McCann v Judge of Monaghan District Court [2009] IEHC 276.
prove this at the hearing due to negative circumstances created by the provisions themselves.\textsuperscript{312}

The dignity of those accused of war crimes must be respected, as Sachs J made clear in \textit{S v Basson}.\textsuperscript{313}

2.2.4.4 Privacy and autonomy

Dignity has been inextricably linked with the rights to privacy and autonomy. The Victorian Law Reform Commission in Australia’s research into workplace privacy revealed a social aspect to the intermingling of these three elements.\textsuperscript{314} Privacy can have connotations of territory, confidentiality or the freedom to make intimate personal decisions. The inherent worth of the individual demands that each person be allowed to exercise free will responsibly; every individual must be given the space to choose the course of action which makes life meaningful for him or her. This may not coincide with what the majority considers correct behaviour. Respect for dignity usually requires that society support them in their decision. Tolerance is not enough, but a more active level of endorsement is required.

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

\textsuperscript{312} n 311 above, citing n 309 above, [13].

\textsuperscript{313} 2005 I SA 171 (CC) [126]:

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


Privacy always includes and refers to autonomy and dignity. This means that the protection of privacy will always encompass the following rights:

- not to be turned into an object or thing, that is, not to be treated as anything other than an autonomous human being; and
- not to be deprived of the capacity to form and develop relationships.

This right of privacy is aimed not just at the protection of the individual’s privacy, but at protecting privacy as a social value.

On privacy as a social value, see H Delany \textit{et al}, \textit{The right to privacy: A doctrinal and comparative analysis} (2008) 18 - 20.
had authority to ban dwarf-throwing to prevent public disorder. The claimant’s right to self-determination did not prevail.\textsuperscript{315}

In common law systems privacy first became established as a central legal value in the US and had its origins in 1880 when Thomas Cooley argued that there was a ‘right to be let alone’.\textsuperscript{316} The earliest manifestation of dignity in the autonomy context was in allowing the fulfilment of decisions about procreation and in allowing access to contraceptives. A constitutional right to privacy was established by the US Supreme Court in \textit{Griswold v Connecticut} when it struck down a state statute which made it an offence for married couples to use contraceptives.\textsuperscript{317} Famously, in \textit{Roe v Wade} the right to privacy protected women’s autonomy in respect of their bodies.\textsuperscript{318} The majority of the Supreme Court held that the right was not absolute, so the grounds on which the state was entitled to prevent abortions were restricted.\textsuperscript{319}

The dignity of the person has been intertwined with the autonomy of adults in obtaining legal recognition for the right of homosexuals to have sexual relations in private without fear of prosecution and is prominent in their quest to obtain the right to marry same-sex partners. The US Supreme Court resiled from its earlier enthusiasm to protect privacy in \textit{Bowers v Hardwick} when a narrow majority refused to uphold the right of adult homosexuals to engage in consensual sexual relationships.\textsuperscript{320} This contrasts with the European Court of Human Rights’ decision in \textit{Dudgeon v UK}, where the states were found to have a restricted margin of appreciation in view of the degree of personal intimacy.\textsuperscript{321}


France, South Africa and Germany are inclined to separate dignity from autonomy to give the legal conception of dignity an expanded more positive, community-based meaning: Rao (n 39 above) 220.


\textsuperscript{317} 381 US 479 (1965).

\textsuperscript{318} 410 US 113 (1973).

\textsuperscript{319} Feldman (n 316 above) 519.

\textsuperscript{320} 478 US 186 (1986).

\textsuperscript{321} (App no 7525/76) (1982) 4 EHRR 149 [52]:

\[N\]ot only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8 (2).
The limits to the bounds of privacy when one enters into relationships were explained by Ackermann J in *Bernstein v Bester*.\(^\text{322}\)

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

O’Regan J amplified this conception of privacy in referring to our interdependence in society and the supportive role to be played by each other and by the state.\(^\text{323}\)

Transsexuals also base their claims to legal recognition on privacy and autonomy. In *Goodwin v UK* the European Court of Human Rights found that the UK breached the right to private life by refusing to record Ms Goodwin’s altered gender and considered that the margin of appreciation diminished as social attitudes changed over time.\(^\text{324}\) Society must be tolerant

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322 1996 2 SA 751 (CC) [77].

323 *Bernstein* (n 322 above) [150]:

In my view, the democratic society contemplated by the Constitution is not one in which freedom would be interpreted as licence, in the sense that any invasion of the capacity of an individual to act is necessarily and inevitably a breach of that person’s constitutionally entrenched freedom. Such a conception of freedom fails to recognise that human beings live within a society and are dependent upon one another. The conception of freedom underlying the Constitution must embrace that interdependence without denying the value of individual autonomy. It must recognise the important role that the state, and others, will play in seeking to enhance individual autonomy and dignity and the enjoyment of rights and freedoms.

324 (App no 28957/95) (2002) 35 EHRR 18 [90]:

[The very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings. In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.](#)
Dignity is central in decisions on medical treatment and its continuation or withdrawal. The controversial areas of abortion and the right to die raise issues of dignity, privacy and autonomy. Re Quinlan in the US established the right to refuse medical treatment. The common law right to informed consent and constitutional privacy right are relevant. Cruzan v Director, Missouri Department of Health upheld the state's right to insist on clear evidence of the person's wishes before agreeing to the withdrawal of medical treatment. Justice Brennan, dissenting, prioritised dignity in death.

Jeremy Miller, having reviewed US case-law, considered that dignity should replace privacy as the prime constitutional value. The liberty to determine one's path without intrusion by the state creates individuality and promotes dignity in the form of self-respect, self-worth and value. According to Miller, 'privacy can promote crime, but dignity promotes only goodness.'

2.2.4.5 Freedom of expression
Communication is an aspect of dignity. Because of this, freedom of expression is an important right. Dickson CJ of the Canadian Supreme Court in R v Keegstra, a prosecution for hate speech, considered that freedom of expression was essential in a participative democratic society based on dignity.
and equality.\textsuperscript{333} It often comes into conflict with other values. In\textit{ Keegstra} Dickson CJ found that the dignity of the targets of the speech took precedence over free speech.\textsuperscript{334}

Guy Carmi has pointed out the difference between the values underlying free speech in the US and other Western democracies. In the US the guiding value is liberty, whereas in Germany and many other Western democracies the value of human dignity is supreme.\textsuperscript{335} The characteristics of dignity ‘include a communitarian approach to human rights, the promotion of positive rights, paternalism, and the protection of audience rights.’\textsuperscript{336} The use of the proportionality analysis by European courts is another distinguishing feature leading to speech restrictive results when free speech is balanced with other rights – predominantly human dignity.\textsuperscript{337}

Notwithstanding the emphasis on freedom of expression in the US, even there hate speech has been curtailed.\textsuperscript{338} Alexander Tsesis has called for extension of the protection against hate speech to prohibit speech that is not intimidating but which incites an audience to commit discrimination at work or in public places.\textsuperscript{339} Tsesis sums up the benefits of this step, ‘[s]uch an extension of current American jurisprudence would indicate a greater respect

\textsuperscript{333} [1990] 3 SCR 697 at 70:
Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.
See Hogg (n 310 above) 61, 276, 294 - 295.

\textsuperscript{334} n 333 above, 72:
[\textit{G}]iven the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal …

\textsuperscript{335} GE Carmi ‘Dignity versus liberty: The two western cultures of free speech’ (2008) 26\textit{ Boston University International Law Journal} 277 at 323.

\textsuperscript{336} n 335 above, 371.

\textsuperscript{337} n 335 above, 374.

\textsuperscript{338} In\textit{ Virginia v Black} the Supreme Court held that a state may ban cross burning carried out with the intent to intimidate: 538 US 343 (2003).

\textsuperscript{339} A Tsesis ‘Dignity and speech: The regulation of hate speech in a democracy’ (2009)\textit{ 44 Wake Forest Law Review} 497 at 532.
for human dignity than for degrading expression. He instances France as a country which has banned hate speech while holding freedom of expression in high regard. There the emphasis is on the promotion of democracy rather than on ‘the naive libertarian belief’ common in the US that ‘truth will emerge even when inflammatory statements are made about vulnerable groups. Another example is Sweden where the free expression of ideas is regarded as central to a democracy, but the Swedish Supreme Court has restricted free speech on occasion including incitement to hatred against a protected group.

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

2.2.4.6 Social, economic and cultural rights

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

There is a minimum core of subsistence needed for the realisation of human dignity. There has been criticism from some quarters of this proposition for not going beyond the minimum necessary for survival. McCrudden sees three elements in the minimum core of human dignity:

340 As above.
341 n 339 above, 525.
342 n 339 above, 531. According to Tsesis, ‘[t]he Court thereby acknowledged that hate speech stifles victims from participating in democracy while it increases bigoted individuals’ right to self-determination.’ as above.
343 Eg, Independent Newspapers (Pty) Ltd v Minister for Intelligence Services [2008] ZACC 6, 2008 5 SA 31 (CC).
first, the ontological aspect focused inward on the individual; second, the
relational perspective looking outwards towards society; and third, the
limited-state claim, which is the principle that the state exists for the
individual and not vice versa.345 His analysis has not detected any norm in law
requiring the provision of more than the minimum needed to preserve dignity.

Oscar Schachter as far back as 1983 evoked Kant in finding that the
dignity of the person required at least the recognition of a minimal concept
of distributive justice to satisfy the essential needs of everyone.346 A person
cannot foster dignity if in abject poverty. Schachter concedes that the
minimum may not be enough.347

The right to life has been interpreted as meaning more than simply
existence.348 The Indian Supreme Court has held that the constitutional right
to life and personal liberty includes

the right to live with human dignity and all that goes along with it,

namely, the bare necessities of life such as adequate nutrition, clothing
and shelter over the head and facilities for reading, writing and expressing
oneself in diverse forms, freely moving about and mixing and commingling
with fellow human beings.349

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

The Inter-American Court of Human Rights has stated that the
fundamental right to life is broader than freedom from the arbitrary
deposition of life.350 It includes the right to live a ‘vida digna’ or a dignified

345 n 9 above, 679.
346 O Schachter ‘Human dignity as a normative concept’ (1983) 77 American Journal of
International Law 848 at 851. As the idea of a just society is connected with the
promise of emancipation and human dignity, the norm underlying distributive justice
is autonomy: J Habermas Between facts and norms: Contributions to a discourse theory
347 ‘Some would probably go beyond this and contend that substantial equality is a necessary
condition of respect for the intrinsic worth of the human person. “Each person is as
good as every other” may be inferred as a plausible maxim.’: n 346 above, 851.
348 The African Commission stated that the inviolability of human beings and respect for
the life and dignity of the person give a broad interpretation of the right to life, which
was not protected by living in a state of constant fear and/or threats: Amina v Nigeria
[2000] AHRLR 258 (ACHPR 2000) [18].
349 McCrudden (n 9 above) 693, citing Mullin v Administrator, Union Territory of Delhi,
AIR 1981 SCR (2) 516 at 518.
See Pasqualucci (n 299 above) 310.
The Inter-American Court held that the state, pursuant to its duty to guarantee life, has the obligation to generate living conditions that are at least ‘minimally compatible with the dignity of the human person’. The state ‘has the duty to adopt positive concrete measures oriented to satisfy the right to a “vida digna,” especially when dealing with persons in a situation of vulnerability and risk’, including indigenous communities.

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

The interaction of constitutional rights and foundational values such as dignity can form the basis of socio-economic and cultural rights. The tension between the judiciary and the other arms of government in an effort to

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351 *Yakye Axa* (n 350 above) [161]-[162], citing *Children's Rehabilitation v Paraguay* Series C 112 [2004] IACHR 8 [156].
352 *Yakye Axa* (n350) [162]. See Pasqualucci (n 299 above) 310.
353 *Yakye Axa* (n350) [162]. See Pasqualucci (n 299 above) 310.
354 2001 1 SA 46.
355 *Grootboom* (n354) [29].
356 n 354 above, [33].
357 n 354 above, [42]-[43].
358 n 354 above, [43].
359 n 354 above, [83]:

The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity.
preserve the separation of powers is evident worldwide. 360 Yacoob J in *Grootboom* said the question of how to enforce socio-economic rights was ‘a very difficult issue which must be carefully explored on a case-by-case basis.’ 361 Bearing this in mind, Chaskalson CJ (now retired) described the challenge: 362

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

### 2.2.5 Groups

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

David Feldman identified three levels on which human dignity operates: ‘the dignity attaching to the whole human species; the dignity of groups within the human species; and the dignity of individuals.’ 363 He commented that the second level ...

360 On the legitimacy of court adjudication, see Habermas (n 346 above) 279.
361 n 354 above, [20].
363 n 316 above, 125.
discrimination on grounds which are morally irrelevant, providing a link between the values of dignity and equality.364

There are subjective and objective aspects to human dignity. Feldman explains how those who lack individual capacity, such as young children or patients in a persistent vegetative state, can have intrinsic human dignity in an objective sense.365

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

Iacobucci J of the Canadian Supreme Court in *Law v Canada* described human dignity of individuals and groups and how it is harmed by marginalisation.366

South Africa goes beyond the mere prohibition of discrimination against members of disadvantaged groups to a more positive recognition of the value of all in society, as expressed by Goldstone J in *President of the Republic of South Africa v Hugo*:367

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

364 n 316 above, 126.
365 n 316 above, 127.
366 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 [53]: Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.
367 1997 4 SA 1 (CC) [41].
German constitutional law firmly places the individual in the community. Grant’s study led to her to the following conclusion:\footnote{368}

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

The Federal Constitutional Court envisaged the individual encircled by the community in the \textit{Life Imprisonment} case.\footnote{369}

\subsection*{2.3 Horizontal application}

There is much academic debate over whether human rights can be enforced horizontally between private parties or whether the onus is solely on the state to respect and protect human rights. Andrew Clapham considers that it is not possible to confine protection to the public sphere.\footnote{370} An individual’s dignity should not be violated from any source, whether public or private. Clapham concludes:\footnote{371}

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

\footnotetext[368]{n 254 above, 309.}

\footnotetext[369]{Grant (n 254 above) 309, citing 45 BVerfGE 187 (1977) (Fed CC of Germany) translated in Kommers, \textit{The Constitutional Jurisprudence of the Federal Republic of Germany} (2nd edn Duke University Press, London 1997) 307 - 308: The free human person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself. This freedom within the meaning of the Basic Law is not that of an isolated and selfregarding individual, but rather [that] of a person relating to and bound by the community. In the light of this community-boundedness it cannot ‘in principle be unlimited’. The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community’s social life; yet the autonomy of the individual has to be protected. This means that [the state] must regard every individual within society with equal worth.}

\footnotetext[370]{n 77 above, 553.}

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

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

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

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

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372 n 77 above, 558:

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

373 n 77 above, 554, fn 74, citing *Rodgers v ITGWU* [1978] ILRM 51, which held that a trade union cannot deny a right to disassociate and must comply with fair procedures.

374 n 77 above, 555 - 558, citing *Christian Education South Africa v Minister for Education 2000 10 BCLR 1051 (CC)*, where the issue was essentially the human rights of children versus the human rights of parents.

375 1996 3 SA 850 (CC) [135].


377 n 376 above, 434 - 435 (footnote omitted).


379 n 375 above, [135]:

> Unless and until there is a resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms
Hunt favours the Irish *sui generis* constitutional tort over the restrictive American approach.\(^{380}\)

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

William Wade also supports the Irish approach.\(^{381}\)

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

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

As society evolves, so does the ambit of human dignity. The accepted wisdom changes in each generation. There are mind-boggling scientific developments that require ethical and legal standards to be applied to ensure they continue for the benefit of society as a whole while respecting the individual’s integrity, equality and autonomy. Human dignity is an excellent yardstick for assessing what is acceptable to the individual and what is best for the community at large.

More often than not, there is a mélange of values, principles and rights involved in assessing human rights. Frequently equality, dignity, freedom, privacy and the common good are issues in contention. It is usually not possible to isolate one value on which to base a decision. A multi-faceted

\(^{380}\) n 376 above, 429.

approach is required. It can be a balancing exercise by the legislature and, in
default, by the judiciary, to decide what the right answer is at the present
time. The principle of proportionality has assumed importance in recent
decades in adjudication of personal rights.

2.4 Democracy

Respect for dignity is not enough. Democracy requires active protection,
and even promotion, of dignity. Participation by individuals in the
democratic process enhances the dignity of all in society. It also is an overt
manifestation of the equality of all individuals. In Doctors for Life International
v Speaker of the National Assembly Sachs J highlighted the benefit of
participation in democracy for marginalised groups.382 He returned to the
theme of the importance of being heard for dignity and self-respect, when he
dissented in Merafong Demarcation Forum v President of the Republic of South
Africa.383

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

Susan Marks considers that democracy invokes social and economic rights
in addition to the commonly accepted civil and political rights.384 She sees
risks to democracy by ignoring some categories of human rights and points
out the
tension between the proclaimed indivisibility of civil, political, economic,
social, and cultural rights and the priority accorded to some of those

382 2006 12 BCLR 1399 (CC) [234];
Minority groups should feel that even if their concerns are not strongly represented,
they continue to be part of the body politic with the full civic dignity that goes with
citizenship in a constitutional democracy. Public involvement will also be of particular
significance for members of groups that have been the victims of processes of
historical silencing. It is constitutive of their dignity as citizens today that they not
only have a chance to speak, but also enjoy the assurance they will be listened to.
383 2008 5 SA 171 (CC) 298.
384 S Marks The riddle of all constitutions: International law, democracy and the critique of
rights. This affects the prospects for deepening democracy within nation-states, for, if equality is to be secured in the opportunities for political participation, all categories of human rights need protection.\textsuperscript{385}

Humane governance, as defined by Richard Falk is ‘the effective realization of human rights, including economic and social rights, and the extension of participatory mechanisms and accountability procedures’.\textsuperscript{386}

Political marginalisation reinforces subordinate socio-economic status. Clapham points out that the protection of dignity can have an impact on other values such as freedom.\textsuperscript{387} The equality necessary to protect an individual’s dignity may curtail another’s freedom. Participation in democracy by acceptance of the democratic will\textsuperscript{388} in the common interest might dilute an individual’s autonomy. He advocates resolving conflicts, not by establishing a hierarchy of rights, but by examining the context in each case.

2.5 Assessment

Feldman warned against relying on dignity as a right or value because it was ‘culturally dependent and eminently malleable’.\textsuperscript{389} Using dignity as a yardstick could give rise to complications on account of the lack of clarity on its central core because of disagreement on what makes life good for individuals and societies.\textsuperscript{390} The various ways in which dignity operates can give rise to confusion. He also feared that the indeterminate nature of dignity gives too much scope to the judiciary and could weaken the legislature in a democracy.\textsuperscript{391} Protection of dignity can be paternalistic and undermine respect for autonomy.\textsuperscript{392} This could arise when the individual does not

\begin{itemize}
  \item[385] As above.
  \item[387] n 77 above, 533.
  \item[388] The source of the legitimacy of democratic will-formation includes, on the one hand, the communicative presuppositions that allow the better arguments to come into play in various forms of deliberation and, on the other, procedures that secure fair bargaining conditions: Habermas (n 346 above) 278 - 279.
  \item[389] ‘Human Dignity as a Legal Value’ Part I (n 254 above) 698.
  \item[389] Feldman ‘Human Dignity as a Legal Value’ Part II (n 254 above) 75.
  \item[390] ‘Human Dignity as a Legal Value’ Part II (n 254 above) 76.
  \item[392] As above.
\end{itemize}
recognise their own dignity and is prohibited from exercising their free will to attempt to destroy it. The autonomy of another member of society might also be inhibited in the interests of protecting an individual’s dignity. Feldman noted that dignity has been used in some jurisdictions to advance social rights.393 Because of the importance of dignity in the case-law of the European Court of Human Rights, he considered that the value was likely to become increasingly significant in the UK with the enforcement of the Human Rights Act 1998.394 Feldman’s prediction proved correct. According to Moon and Allen the dignity discourse has pervaded equality jurisprudence in the UK and has also been included in legislation.395

Susie Cowen acknowledges the multi-factorial nature of the dignity concept.396 However, she considers it useful because of its concern with the collective as well as the individual: ‘It makes little sense to speak of the worth of human beings in isolation. Human beings are social creatures. This idea is found in the concept ubuntu.’397 The value of equality is insufficient on its own to give meaning to the equality right, but supported by dignity it can deliver substantive equality and can serve transformative and distributive justice roles.398

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

Joan Small and Evadné Grant support the use of dignity by the South African and Canadian courts to further substantive equality.399 In South Africa, the courts define dignity by looking at the individual in association

393 ‘Human Dignity as a Legal Value’ Part II (n 254 above) 61.
394 ‘Human Dignity as a Legal Value’ Part II (n 254 above) 75.
395 n 160 above, 625 - 626.
397 n 396 above, 50.
398 n 396 above, 55.
399 n 290 above, 54.
with group membership. The contextual enquiry in Canada and South Africa leads to flexible jurisprudence adapted to each case, but backed by a structure and not reliant on the judiciary’s own unilateral opinion.

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

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400 n 290 above, 42.
401 n 290 above, 51.
402 McCrudden (n 9 above) 682 - 685.
Chapter 3
Dignity in the South African Constitution

3.1 Historical background

3.1.1 Politics
Following the abolition of apartheid\(^1\) and the formation of a democratic

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\(^1\) The apartheid era had commenced in 1948 when the National Party formed the first
government consisting of Afrikaners only: TRH Davenport & C Saunders *South
Africa: A modern history* (2000) 377. The concept originated in the mid-1930s, among
Afrikaner intellectuals, who wanted some ‘vertical’ separation of the races: Davenport
& Saunders above, 373. The government applied apartheid in a plethora of laws and
executive actions with four ideas at heart of the system; first, the population comprised
four racial groups – white, coloured, Indian and African – each with its own inherent
culture; second, whites, as the civilised race, were entitled to have absolute control
over the state; third, white interests should prevail over black interests and the state
was not obliged to provide equal facilities for the subordinate races; fourth, the white
racial group formed a single nation, with Afrikaans- and English-speaking components,
while Africans belonged to several (eventually ten) distinct nations or potential nations
– a formula that made the white nation the largest in the country: L Thompson *A

Apartheid is an Afrikaans term meaning ‘apartness’ or ‘segregation’: LW Potts ‘Law
as a tool of social engineering: The case of the Republic of South Africa’ (1982) 5
*Boston College International and Comparative Law Review* 1 at fn 2. Racial segregation
and white domination of South African social, political and economic life were firmly
established prior to 1948: Potts above, 1 - 2. Longstanding official governmental
policy had been to confine Africans to special locations in the urban areas; one of the
first projects undertaken at the Cape settlement of 1652 was to plant a hedge of bitter
almonds to separate the Dutch garrison from the coloured population: Potts above,
24. In the Orange Free State, whites excluded Asians from residence and real property
ownership: Potts above, 24 - 25. Using the Natives Land Act 1913 and the Native
Trust and Land Act 1936, the Union Parliament set aside 14% of the land in South
Africa for exclusive ownership by Africans: Potts above, 25.

Preceded by the prohibition of sexual intercourse between white women and African
government, a new constitution was adopted in South Africa in 1996. The drafting process absorbed much time, lots of effort and the talents of a multitude of legal intellectuals. Emerging from a background of a racially divided, unequal society based on an inhumane premise of white supremacy entrenched in a plethora of complicated petty laws, the framers of the men, the Immorality Act 1927 made it illegal between unmarried Europeans and Africans: Potts above, 34.

Almost without interruption from 1809, South African law required African males to have passes from their home jurisdictions while in white areas: Potts above, 37.

Following the first non-racial election held in April 1994, Nelson Mandela was elected president and formed the Government of National Unity consisting of the African National Congress (ANC), the National Party and the Inkatha Freedom Party: Davenport & Saunders (n 1 above) 568 - 569; Thompson (n 1 above) 263 - 264. On democratisation in South Africa, see IM Rautenbach Rautenbach-Malherbe constitutional law (2012) 16 - 18.


The process was initiated at the Convention for a Democratic South Africa (CODESA) held on 20 and 21 December 1991, where one of the working groups established was tasked with drafting a constitution for a democratic non-racial South Africa; CODESA was opened by Chief Justice Corbett and presided over by Judges Mahomed and Schabort; CODESA subsequently broke down; following violence, the government and the ANC signed a Record of Understanding on 26 September 1992; negotiations resumed and the negotiators agreed a draft interim constitution in November 1993 providing for the new parliament to act as a constitutional assembly to draw up the first fully democratic constitution: Davenport & Saunders (n 1 above) 560, 563 - 566, 571. See also I Currie & J de Waal The Bill of Rights handbook (2005) 4 - 6; Thompson (n 1 above) 252 - 258.

Cyril Ramaphosa (ANC) chaired the Constitutional Assembly and the Constitutional Committee, which was the main negotiating and co-ordinating structure reporting directly to the Constitutional Assembly; Kader Asmal was a member of the Constitutional Committee: H Ebrahim The soul of a nation: Constitution-making in South Africa (1998) 180, 198, 334 fn 17. The Theme Committee dealing with fundamental rights (of which Asmal was also a member) was supported by a Technical Committee of specialists and experts, namely, Prof H Cheadle, Prof J Dugard, Ms S Liebenberg, and Prof I Rautenbach: Ebrahim above, 182 - 183, 184, 339 fn 29. A workshop on human rights and international law was held in April 1995, organised jointly by the Constitutional Assembly, Parliament, and the Raoul Wallenberg Institute from Sweden: Ebrahim above, 184 - 185.

The population in 1996 was almost 44 million comprising 77% Africans, 12% whites, 8.5% coloureds and 2.5% Asians: Davenport & Saunders (n 1 above) 428.

The United Nations General Assembly (UNGA) declared that the practice of apartheid constituted ‘a crime against humanity’: UNGA Res 3151 (XXVIII) (14 December 1973) UN Doc A/RES/3151(XXVIII) G, Preamble.

Legislation covered a broad sweep of segregationist policies to keep state control on a racist basis over people covering (with examples in brackets) where they lived (Bantu Land Act 1913, Asiatic Land Tenure and Indian Representation Act 1946, Group Areas Acts 1950, 1957 and 1966), their education (Bantu Education Act 1953), work (Apprenticeship Act 1922 making skilled trades more accessible to white youths), marriage and sexual relations (Prohibition of Mixed Marriages Act
Constitution aimed to build a legal model for an inclusive democratic nation. The new regime recognised that to achieve meaningful change it was not enough simply to give all citizens the franchise, but it was necessary to remove the inequities that had characterised South African society and to improve the living conditions of the majority who had struggled in poverty for generations. Another crucial factor was the polarised and diverse 1949, Immorality Act 1957), facilities (Reservation of Separate Amenities Act 1953), movement (Bantu (Abolition of Passes and Coordination of Documents) Act 1952 – a misleading title, as this legislation coordinated the pass laws rather than repealing them), and culture (State-Aided Institutions Act 1957 enforcing segregation in public libraries and places of entertainment); J Dugard Human rights and the South African legal order (1978) 65, 68 - 70, 75, 78 - 82; Davenport & Saunders (n 1 above) 271, 389, 390 - 391, 397. See also Potts (n 1 above) 20 - 41.

The Group Areas Act was the core of apartheid, having as its aim the segregation of the different races into their own groupings and limitation of their land rights in South Africa to the bare minimum; DP Malan, the Prime Minister when it was first introduced, described the Bill as ‘the essence of the apartheid policy’: F Meer The ghetto people: a study of the effects of uprooting the Indian people of South Africa (1975) 4.

HF Verwoerd replaced the static term of apartheid with separate development in government parlance; he saw the total separation of white and black as the ideal aim; he viewed apartheid as more than territorial separation of the races; it comprised religion and the political, social, economic and every other sphere of life; maintenance of the colour bar was the most important issue: Davenport & Saunders (n 1 above) 391 - 392.

Although whites, coloureds and Indians had voting rights to elect representatives to three uniracial chambers based on separate ethnic rolls under the Tricameral Constitution (Constitution of the Republic of South Africa 1983), African leaders had rejected a proposal for a Council for Blacks: Davenport & Saunders (n 1 above) 502; Thompson (n 1 above) 225 - 226. The government had transformed the administration of Africans by abolishing the Natives Representative Council in 1951 and grouping the reserves into territories destined to become homelands administered under white tutelage by a set of Bantu authorities, consisting mainly of hereditary chiefs; in 1971 the Bantu Homelands Constitution Act empowered the government to grant the homelands independence and the Transkei became the first to become independent in South Africa’s terms in 1976, having been made self-governing in 1963: Thompson (n 1 above) 191. Verwoerd’s government commencing in 1959 had given the first firm commitment to some kind of independence for the African areas: Davenport & Saunders (n 1 above) 407. See Mabaso v Law Society of the Northern Province [2004] ZACC 8, 2005 2 SA 117 (CC) [38]; Mashavha v President of the Republic of South Africa [2004] ZACC 6, 2005 2 SA 476 (CC) [51].

Historically, there were divergent franchise policies with the vote being enjoyed by all races in the Cape from 1853, but denied to Africans and Indians in Natal from 1865 and 1896 respectively: Davenport & Saunders (n 1 above) 123. As had happened in the Transvaal in 1885, the Franchise Act 1896 in Natal meant effective disenfranchisement of Indians without the appearance of discrimination on racial grounds; the vote was denied to those whose countries of origin did not have representative institutions founded on the Parliamentary franchise: Davenport & Saunders (n 1 above) 121. Jan Smuts’ token enfranchisement of Indians in 1946 – rejected as inadequate by the Indians themselves – was reversed by the new government in 1948: Davenport & Saunders (n 1 above) 379. Hertzog’s legislation in 1936 giving Africans three white representatives in the Assembly was opposed by a small number of white parliamentarians with conflicting liberal and segregationist attitudes: Davenport & Saunders (n 1 above) 328 - 329. After a skirmish between the courts and the other
backgrounds of people in South Africa. They ranged from the various indigenous tribes with the oldest heritage in the country, through the Indians whose ancestors were brought to South Africa as slave-like indentured labourers or came as traders starting in the nineteenth century, to the descendents of the settlers of European origin and the ‘coloureds’, being two branches of government, legislation was eventually passed in dubious circumstances in 1956 removing coloured voters from the common electoral roll: Thompson (n 1 above) 190 - 191.

10 The Africans were descendants of the San hunter-gatherers, the Khoikhoi pastoralists and the Bantu-speaking mixed farmers, who formed various tribal chiefdoms such as the Zulu and Xhosa: Thompson (n 1 above) 10, 16. On the Khoisan peoples and the emergence of Bantu-speaking chiefdoms, see Davenport & Saunders (n 1 above) 6 - 13.

11 Other forms of servitude could resemble slavery in substance, although different in legal form; the House of Commons in Britain recognised this in 1828 when it passed a unanimous resolution securing to all natives of South Africa the same freedom as enjoyed by other free people there; this arose following denunciation by missionaries of the holding by the Afrikaners of their Cape Coloured servants in a semi-service status under a system akin to indenture recognised by Roman-Dutch law: H Tinker A new system of slavery: The export of Indian labour overseas 1830 - 1920 (1993) 15. The British government banned the slave trade throughout the Empire in 1807; the British parliament emancipated slaves in the Empire to take effect after a four-year apprenticeship in 1838: Davenport & Saunders (n 1 above) 47. Fatima Meer deduced that the indentured workers’ state of unfreedom was little different from that of the slaves; they were on the lowest rung of the hierarchy: Meer (n 8 above) 2.

12 The first batch of 340 indentured Indian labourers arrived in Durban aboard the Truro ship on 16 November 1860: JB Brain Christian Indians in Natal 1860 - 1911: An historical and statistical study (1983) 246; Tinker (n 11 above) 97. The indentured labourer system was introduced to South Africa to meet the demand of white settlers for workers in the sugar and cotton industries, as the required interests and skills were not present in traditional African society; laws were passed by the Natal Legislative Council in 1859 and by the Indian Government in 1860 extending to Natal the existing system for emigration of Indian workers to tropical and subtropical British and French colonies; colonists who wanted to employ indentured Indians applied to the Natal Government, which would arrange and pay for the recruitment, transport and assignment of the Indians, the employers being liable to repay these costs in instalments: L Thompson ‘Co-operation and conflict: The Zulu Kingdom and Natal’ in M Wilson & L Thompson (eds) The Oxford history of South Africa (1969) 387 - 388. The indentured labour system in South Africa came to an end when India banned emigration to South Africa from 1 July 1911: Tinker (n 11 above) 313. For further information on Indian indentured labourers in South Africa, see RA Huttenbach Gandhi in South Africa: British imperialism and the Indian question, 1860 - 1914 (1971) 2 - 26; Tinker (n 11 above) 96 - 97, 272 - 273, 283 - 285, 287 - 289, 291 - 293, 306, 312 - 314. There were also indentured Chinese labourers in South Africa; they were introduced from 1904 to meet a labour shortage in the gold mines: Davenport & Saunders (n 1 above) 237.

13 From the late 1870s, Gujarati traders (commonly Muslims) came to South Africa under their own initiative and set up shops in competition with whites in Natal, the Transvaal and the Orange Free State: Davenport & Saunders (n 1 above) 121.

14 Two English captains annexed the Cape without authority on behalf of King James I in 1620: Davenport & Saunders (n 1 above) 8. The Dutch East India Company established a base in Table Bay in 1652 and subsequently brought in European
the mixed race mainly the progeny of whites and other races.15 Within these groupings there was also divisiveness with a history of tensions among the native tribes16 and a well-publicised antipathy between the Europeans of English and Dutch origin against the backdrop of the Boer War almost 100 years earlier.17 Deaths and detentions during the apartheid era left their scars.

settlers, including Huguenot refugees fleeing from France in 1689 and many German-speakers during the 18th century: Davenport & Saunders (n 1 above) 21 - 22. Having seized the Cape in 1806, Britain legally acquired it under a treaty with the Netherlands in 1815: Davenport & Saunders (n 1 above) 42 - 43. British emigrants settled in the new district of Albany in the eastern Cape in 1820: Davenport & Saunders (n 1 above) 44. A small settlement of British traders and hunters established itself at Port Natal in 1824: Davenport & Saunders (n 1 above) 113. The Voortrekkers migrated from the Cape in the Great Trek in the 1830s and formed the Republic of Natalia (the first Boer state) in 1839: Davenport & Saund-ers (n 1 above) 80. It was short-lived, as it submitted to British control in 1842: Davenport & Saunders (n 1 above) 113. A new Voortrekker republic was established north of the Vaal in 1844: Davenport & Saunders (n 1 above) 81. The Orange Free State Republic of 1854 adopted a constitution based on Cape Dutch and Voortrekker experience and also on American and European precedents: Davenport & Saunders (n 1 above) 84.

15 The coloureds were concentrated mainly in the western part of South Africa, particularly in the Cape; their ancestors included indigenous Khoisan people and slaves from Indonesia, Madagascar and tropical Africa: Thompson (n 1 above) 113. See also Davenport & Saunders (n 1 above) 33; A Hepple South Africa: A political and economic history (1966) 11 - 12.

16 Tribal conflict was particularly marked during the Mfecane wars from about 1817 until the murder of the Zulu chief, Shaka, in 1828: Davenport & Saunders (n 1 above) 113. Violence among black South Africans was prevalent from the mid-1980s, particularly between Inkatha gangs and Zulu-supporters of the United Democratic Front in what is now KwaZulu-Natal: Davenport & Saunders (n 1 above) 486 - 487; Thompson (n 1 above) 229 - 230.

17 The South African War (the Boer War to the British, the Second War of Freedom to Afrikaners) was from 1899 to 1902: Thompson (n 1 above) 141 - 143. Against a background of the discovery of gold and a perceived threat of Africans uniting to throw off white rule, the British had annexed the Transvaal in 1877: Hepple (n 15 above) 85. The First Boer War (called the First Freedom War by the Boers) started when the Transvaal Boers rose up against the British in December 1880 and ended a few months later with the Transvaal regaining its independence; there was an agreement on self-government, subject to British suzerainty: Hepple (n 15 above) 86. The realisation that the gold mines were extensive attracted many foreigners (mainly British) to Johannesburg: Hepple (n 15 above) 89. They campaigned unsuccessfully for full citizenship rights and ultimately petitioned the British government for protection: Hepple (n 15 above) 89. Following unproductive negotiations between the British and President Kruger of the Transvaal, the (Second) Boer War broke out between Britain and the Transvaal in October 1899; because of its defensive alliance with the Transvaal, the Orange Free State was also at war with Britain: Hepple (n 15 above) 91. At the end of the war during which many were interned and died in concentration camps established by the British, the Boers surrendered, and the Transvaal and the Orange Free State became British colonies: Hepple (n 15 above) 91 - 92. On the Boer War 1899 - 1902, see also Davenport & Saunders (n 1 above) 223 - 232.
Many in the previously privileged class resented the change. Reconciliation between the various strata in society and redress of the injustices suffered were primary aims in the new South Africa.

The first step was to draft an interim Constitution, which was adopted in 1993 and came into effect on 27 April 1994. It was the result of protracted negotiations between the representatives of the apartheid state and its opponents. While not procedurally a revolt because it was adopted by a statute of the old constitutional order, Laurie Ackermann has categorised the change as ‘a substantive constitutional revolution’ which ‘imploded the apartheid constitution and structures’. The interim Constitution established a formula for drafting another constitutional document and for its adoption by the Constitutional Assembly in a democratic fashion to ensure public ownership and acceptance. Following an initial rejection of some provisions, the new Constitution was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997.

18 The resentment manifested itself in drastic action resulting in death and destruction on some occasions. On 10 April 1993, Chris Hani (a communist and previously the leader of MK, the militant ANC wing *Umkhonto we Sizwe*), was murdered allegedly with the encouragement of white political leaders: Davenport & Saunders (n 1 above) 565. On 25 June 1993 the Afrikaner Weerstands Beweging (AWB), led by Eugene Terre'blanche, drove an armoured vehicle through the doors of the World Trade Centre near Johannesburg and trashed the chamber where the negotiations on the draft constitution were taking place: Davenport & Saunders (n 1 above) 566.

19 Interim Constitution of the Republic of South Africa 1993. It was a liberal democratic constitution, including ideas borrowed from western Europe and the US, modified by South African experience; it contained an elaborate Bill of Rights with economic rights as well as the classic civil and political rights; several sections (including those dealing with human rights) were ambiguous and would need to be fleshed out by political action or resolved by the Constitutional Court: Thompson (n 1 above) 257 - 258.

20 Currie & de Waal (n 4 above) 4.


22 The National Assembly doubled as a Constitutional Assembly, which set up its own structures; submissions from the public were encouraged and all meetings of the Constitutional Assembly and its committees were open to the public: Davenport & Saunders (n 1 above) 571 - 572.


25 President Mandela signed the definitive text at Sharpeville on 10 December 1996: Davenport & Saunders (n 1 above) 572.
3.1.2 Legal system

The local legal backdrop was Roman-Dutch law.26 It became the common law as a result of Dutch and British colonisation from 1652 to the end of the nineteenth century.27 Indigenous African law was applied in certain circumstances.28 Pius Langa has described indigenous systems of law and custom as having been ‘tolerated to the extent that their principles were not repugnant to the dominant system of law.’29 English law had considerable influence, particularly on procedure, and reached its high point at the creation of the Union of South Africa in 1910.30 This can be attributed partly to the fact that English was the official language of the courts for a substantial period.31 The right of appeal to the Privy Council was abolished in 1950.32 South Africa left the Commonwealth in 1961,33 the year in which it became a republic,34 and did not rejoin it until 1 June 1994 after the abolition of

28 De Vos (n 27 above) 74. On the features of the indigenous system, see Church et al (n 26 above) 63 - 65.
30 n 29 above, 83.
31 n 29 above, 81.
32 n 29 above, 78.
33 The government had intended to follow the precedent whereby India remained a member of the British Commonwealth when it became a republic; however, at a conference of Commonwealth countries, the African members, supported by Canada and India, sharply criticised apartheid, and South Africa then withdrew from that loose association: Thompson (n 1 above) 188.
34 Prime Minister Smuts’ efforts to douse the republican propaganda of the opposition during the election campaign in 1948 had failed: Davenport & Saunders (n 1 above) 370. The National Party had earnestly wanted a republic since forming a government after that election; there was an initial disagreement between Malan and JG Strijdom’s wing of the National Party which advocated separatist republicanism until they were persuaded in 1951 that the issues of republican status and Commonwealth membership were separable: Davenport & Saunders (n 1 above) 378. With Verwoerd’s succession as Prime Minister in 1958, the government made a major change in the political orientation of South Africa by deciding to go for a republic: Davenport & Saunders (n 1 above) 407. The National Party achieved a major Afrikaner ethnic objective in 1961 when, after obtaining a narrow majority in a referendum of the white electorate,
apartheid. From the 1960s the South African courts tended to apply pure Roman-Dutch law. Despite the infiltration of English law, Roman-Dutch law was the substantive private common law.

### 3.1.3 International isolation

On the international front South Africa had isolated itself from the human rights treaties originating from the United Nations and had not participated in the formation of the African Charter in 1981. Its representatives had taken an active part in the drafting of the United Nations Charter and the Universal Declaration of Human Rights. However, South Africa fell foul of the UN in 1946 when the General Assembly criticised the treatment of people of Indian origin and passed a resolution saying that Indians in South Africa should be treated in conformity with agreements.
between the two countries and the UN Charter. As a result of the elections by whites in 1948 the National Party came to power and set about institutionalising apartheid, which was based on the false assumption that blacks were an inferior race. It passed a plethora of statutes and regulations based on racial discrimination, which favoured the already powerful and dominant whites at the expense of the black majority. Ackermann described it thus:

The state did its best to deny to blacks that which is definitional to being human, namely the ability to understand or at least define oneself through one’s own powers and to act freely as a moral agent pursuant to such understanding or self-definition. Blacks were treated as means to an end and hardly ever as an end in themselves; an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.

Mainly at the instigation of Asian and African states, the question of apartheid was raised in the General Assembly in 1952 and on many occasions before the General Assembly and the Security Council in subsequent years. A group of experts appointed by the Secretary-General of the UN recommended in 1964 that South Africa should incorporate into its constitution a

40 JP Humphrey Human rights and the United Nations: A great adventure (1984) 15; UNGA Res 44(I) (8 December 1946) UN Doc A/RES/44(I). In December 1946, Mrs Pandit of India made a scorching attack on South Africa’s Indian policy at the second session of the GA, while Dr AB Xuma (ANC) lobbied Assembly delegates in New York: Davenport & Saunders (n 1 above) 517. The Indian government’s support for South African Indians in the international arena goes back to 1917 when it first gave a clear warning that it intended to press for fair treatment for Indians in Commonwealth countries: Davenport & Saunders (n 1 above) 279. When Malan introduced legislation in 1925 to make repatriation of Indians easier to effect, the South African government agreed to receive a fact-finding commission from India; a round-table conference eventually took place between the South African and Indian governments over four weeks from 17 December 1926: Davenport & Saunders (n 1 above) 306 - 307.


43 Ackermann ‘Equality and the South African Constitution: The role of dignity’ (n 21 above) 540 (footnote omitted).

44 SD Bailey ‘The Security Council’ in P Alston (ed) The United Nations and human rights: A critical appraisal (1992) 312 - 313. The League of Nations had never subjected South Africa to the intensity of moral pressure which bore down it at the UN, apparently because the political values of the League were intrinsically European and harboured colonialist assumptions: Davenport & Saunders (n 1 above) 341. See also Thompson (n 1 above) 214.
bill of rights based on the Universal Declaration.45 The Security Council had described apartheid as incompatible with the Universal Declaration in 1963,46 and went on in 1976 to reaffirm it as ‘a crime against the conscience and dignity of mankind’.47 In 1972 it endorsed the struggle of the oppressed people in South Africa as being in compliance with the Universal Declaration.48 It reaffirmed in a resolution in 1980 that apartheid was a severe violation of dignity, ‘… the policy of apartheid is a crime against the conscience and dignity of mankind and is incompatible with the rights and dignity of man…’49

In 1955 the ANC adopted the Freedom Charter.50 Many of its principles were incorporated in the South African Constitution when it was drafted by the ANC-led government 40 years later.51

45 Bailey (n 44 above) 312.
50 The Freedom Charter was an expression of collective human dignity in its promise and claim for the recognition of specific human rights in a future South Africa: H Klug ‘The dignity clause of the Montana Constitution: May foreign jurisprudence lead the way to an expanded interpretation?’ (2003) 64 Montana Law Review 133 at 144. At a Congress of the People attended by 3 000 people of all races at Kliptown, south of Johannesburg, on 26 and 27 June 1955, sections of the Charter were voted on by show of hands; it demanded a non-racial, democratic system of government, and equal protection for all before the law; it urged nationalisation of the banks, mines and heavy industry, as well as land redistribution; it sought equal work and educational opportunities, and the removal of restrictions on family life: Davenport & Saunders (n 1 above) 404. See also Thompson (n 1 above) 208 - 209.
3.1.4 Apartheid jurisprudence

The judiciary faced a dilemma during the apartheid era. Parliament was supreme\(^{52}\) and judicial review of the validity of legislation was

\(^{52}\) Following the Statute of Westminster 1931, the supremacy of Parliament was confirmed by the Appellate Division of the South African Supreme Court in 1937 when in *Ndlwana v Hofmeyr NO* 1937 AD 229 it dismissed a challenge by a disenfranchised African to the Representation of Natives Act 1936 on the grounds that the wrong procedure had been used to enact it. The Court ruled that the Union Parliament, being fully sovereign, could adopt any legislative procedure it thought fit: Davenport & Saunders (n 1 above) 331; Dugard (n 8 above) 29.

The supremacy issue caused a constitutional crisis in the 1950s stemming from the government’s attempt to remove the coloured voters from the common electoral rolls, which was an entrenched provision in the Constitution adopted on formation of the Union in 1910 (Constitution of the Union of South Africa 1909) and was only amendable by special procedure. The Separate Representation of Voters Act 1951 purported to place coloured voters on a separate roll with power to elect four members to the Assembly, one to the Senate and two to the Cape Provincial Council (whites only to the Assembly and Senate, but not explicitly so to the Council). It was passed by ordinary legislation and not by the special procedure for entrenched provisions. In *Harris v Minister of the Interior* (the *Vote* case) 1952 2 SA 428 (AD), the Appellate Division declared the Act invalid because the special procedure had not been used. Parliament then passed the High Court of Parliament Act 1952 purporting to transform Parliament into a High Court with power to review all cases in which the Appellate Division declared legislation invalid. The Appellate Division ruled in *Minister of the Interior v Harris* (the *High Court of Parliament* case) 1952 4 SA 769 (AD) that this legislation was also invalid on the ground that the ‘High Court of Parliament’ was Parliament under another name: Davenport & Saunders (n 1 above) 379 - 380; Dugard (n 8 above) 30 - 31; Thompson (n 1 above) 190 - 191.

In 1955 two acts were passed by ordinary procedure – the Senate Act 1955 enlarging the Senate and altering the method of election of senators to give the government the majority required under the entrenched clause amendment procedure, and the Appellate Division Quorum Act 1955 increasing the number of appellate judges to 11. The South Africa Act Amendment Act 1956 (revalidating the Separate Representation of Voters Act 1951 and removing the coloured voters from the common electoral rolls) received the required majority under the entrenched clause amendment procedure (thanks to a packed Senate): Dugard (n 8 above) 31; Thompson (n 1 above) 191. The enlarged Appellate Division in *Collins v Minister of the Interior* 1957 1 SA 552 (AD) agreed by a majority of 10 to one that the South Africa Act Amendment Act was valid; Schreiner J (the sole dissentient) considered it was not correct to view the two statutes separately and that the new Senate, created for purpose of circumventing the entrenched clauses, was not the type of Senate contemplated by the South Africa Act in the entrenched provisions: Dugard (n 8 above) 32. Schreiner J was the senior judge of appeal, but – contrary to tradition – was overlooked for the role of Chief Justice in 1957; the government was unable to forgive his persistent opposition to their legislative scheme to remove coloured voters from the common role and his steadfast dedication to the notion of equality before the law: Dugard (n 8 above) 286.

prohibited. There was a conflict between the positive law and moral right. Apartheid was a denial of common humanity. The establishment’s view was that it was the judges’ role to enforce apartheid laws based on an immoral system. The judiciary itself showed deference to the legislature and the executive as far back as 1934 when it accepted that if the Minister had an unfettered discretion by statute, it was not the court’s function ‘to curtail its scope in the least degree’; it adopted the principle that Parliament ‘may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway’ and it was ‘the function of courts of law to enforce its will’.

The same attitude was apparent in 1960 when a court held that the condition for the exercise of emergency powers of arrest and detention was not the factual state of danger to public order or safety, but the opinion of the Minister, magistrate or commissioned officer; it stated, ‘[t]he Court cannot substitute its own opinion’.

Although the British notion of parliamentary sovereignty was originally designed and actually served to protect the basic freedoms of the citizenry against abridgement by the executive, the South African adaptation of the concept differed in that the restraints on the British parliament (representative government and faithful adherence to the historical objectives of equal protection of citizens’ rights) were absent: JD van der Vyver ‘Depriving Westminster of its moral constraints: A survey of constitutional development in South Africa’ (1985) 20 Harvard Civil Rights-Civil Liberties Law Review 291 at 291 - 292, 306 - 307. On the development of parliamentary supremacy in South Africa prior to the Union, see Dugard (n 8 above) 16 - 24.


Judicial review was not unknown in the Dutch colonies of South Africa; the Orange Free State Constitution of 1854 enshrined it; but judges used it sparingly and often met with opposition when they did: Davidson (n 52 above) 688. On judicial review in the Orange Free State and Transvaal colonies, see Davidson (n 52 above) 691 - 697.


Dugard (n 8 above) 327, citing Sachs v Minister of Justice 1934 AD 11 at 36 - 37.

Dugard (n 8 above) 111, citing Stanton v Minister of Justice 1960 3 SA 354 (T).
However, as John Dugard pointed out, the Roman-Dutch legal heritage embodied principles advancing equality and liberty, which judges could

57 South African common law is colour-blind: n 8 above, 71. In 1882 Kotzé CJ declared that the court was bound to do equal justice to every individual without regard to colour or degree except where the law expressly provided to the contrary: n 8 above, 72 fn 97, citing Re Marchane [1882] 1 SAR 27 at 31. In R v Plaatjies 1910 EDL 63 it was held that a municipality might not set aside a separate part of a stream for exclusive white swimming even though it provided for a separate (and apparently equal) part for black swimming, and in Williams v Johannesburg Municipality 1915 TPD 106 the decision was that a municipality authorised to work trams for public use might not set aside certain trams for the use of coloured persons: n 8 above, 312. Although some lower court decisions had inclined to the view that separate facilities for different racial groups could never be reasonable, in 1934 the Appellate Division of the Supreme Court in a majority decision upheld the validity of regulations establishing separate post office counters for white and black on the ground that discrimination coupled with equality was not unreasonable: n 8 above, 64, citing Minister of Posts and Telegraphs v Rasool 1934 AD 167. Gardiner AJA (in dissent), invoking the ‘fundamental principle that in the eyes of the law all men are equal’, viewed the relegation of Indians to a non-European counter as humiliating treatment impairing the dignitas of the person affected: n 8 above, 315 - 316, citing Rasool at 185, 187, 190 - 191. After Rasool the courts struck down discriminatory subordinate legislation where there were unequal facilities, but refused to regard ‘mere technical inequality of treatment’ as sufficient to set aside subordinate legislation and insisted on substantial inequality: n 8 above, 64, citing R v Carelse 1943 CPD 242 at 253; R v Abdurahman 1950 3 SA 136 (AD) 145.

Lee Potts pointed out that the South African version of European law rejected the concept of equity and significantly limited the concept of equality before the law by confining it to white South Africans only: n 1 above, 17. In addition to the courts not sitting as courts of equity, other principles of the South African legal culture that facilitated the implementation of apartheid were, first, the courts would not interfere in discriminatory practices sanctioned by Parliament; second, the courts would decide ultra vires questions on the side of the executive; third, white popular opinion on race questions would inform judicial interpretations of ambiguous race legislation: n 1 above, 49.

58 In 1912 the Appellate Division ordered the government to pay damages to strikers for their illegal treatment as awaiting trial prisoners and castigated the authorities for their conduct: n 8 above, 326, citing Whittley v Ross 1912 AD 92. In 1916 when the Transvaal Provincial Division overturned the conviction of a socialist politician under wartime legislation for ‘exciting public feeling’ in what was – as recounted by John Dugard – ‘a vicious attack on the war effort’, Wessels J warned that if liberty were to be suppressed, it was to be suppressed by the legislature and not by the court: n 8 above, 326 - 327, citing R v Bunting 1916 TPD 578 at 583 - 584. 30 years later Price J pronounced that the right to personal liberty was ‘always guarded by courts of law as one of the most cherished possessions of our society’: n 8 above, 108, citing Mpanza v Minister of Native Affairs 1946 WLD 225 at 229.
choose in resolving conflicts in laws affecting race and security. In 1954 the Appellate Division interpreted a provision allowing banning orders restricting freedoms of movement and expression in the Suppression of Communism Act 1950 as obliging the Minister to comply with the *audi alteram partem* rule, but the Act was amended after the adverse court decision. A similar decision in 1956 relating to the banishment provision of the Black Administration Act 1927 upheld the right of a banished person to be heard in his defence before the issue of a banishment order; it received like treatment, as amending legislation was introduced to exclude its operation. The Appellate Division widened the scope of the writ of *habeas corpus* in 1975 when it held that individuals concerned about corporal punishment being inflicted on suspected members of political organisations in South West Africa had *locus standi* to institute proceedings on their behalf; Rumpff CJ considered that there should be a wide construction because illegal deprivation of liberty was ‘a threat to the very foundation of a society based on law & order’.

Sir James Rose Innes (Chief Justice 1914 – 1927) was a notable defender of individual rights and expressed critical views of the other branches of government when he found himself opposed to legislation. His philosophy of strict construction of statutes denying equality of treatment prevailed in

59 The Appellate Division of the Supreme Court overruled the decision of a transport board withholding a taxi-cab licence from an Asian on the grounds of his race: n 8 above, 318, citing *Tayob v Ermelo Local Road Transportation Board* 1951 (4) AD 440. It also promoted equality and liberty in *R v Lusu* 1953 2 SA 484 (AD), when it set aside a conviction imposed on a black man during the defiance campaign of the early 1950s for entering a ‘European waiting room’ in a railway station on the ground that the administration had failed to provide substantially equal facilities for blacks: n 8 above, 318; however, the government retorted by enacting the Reservation of Separate Amenities Act 1953, which invalidated this construction: n 8 above, 65; Davenport & Saunders (n 1 above) 387. On the interpretation of race legislation, see Davidson (n 52 above) 728 - 734.


On the interpretation of security legislation, see Davidson (n 52 above) 734 - 741.

61 Dugard (n 8 above) 138 - 139, citing *R v Ngwevela* 1954 1 SA 123 (AD).

62 Dugard (n 8 above) 331, citing *Saliwa v Minister of Native Affairs* 1956 2 SA 310 (AD).

63 Dugard (n 8 above) 351 - 352, citing *Wood v Ondangwa Tribal Authority* 1975 2 SA 294 (AD) 310 - 311.

64 Dugard (n 8 above) 287, 385.
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_Dadoo Ltd v Krugersdorp Municipal Council_ (upholding acquisition of land by Asians through a company)\(^{65}\) and in _R v Detody_ (preventing the pass laws from being extended to African women).\(^{66}\) He and Kotzé JA dissented in _R v Padsha_ where the majority upheld the validity of regulations prohibiting non-white Asian immigrants, but the dissentients refused to accept the popular meaning of ‘Asiatic’ in South Africa and insisted that if the regulations were valid they must extend to all Asians, whether white or coloured in appearance.\(^{67}\)

Although English common law and the Roman-Dutch law provided the procedural and substantive bases for the South African legal system, the spirit of these laws had not penetrated deeply enough into basic values of the South African society to prevent the establishment of the apartheid legal system.\(^{68}\) The South African common law strives, in accordance with Roman-Dutch principles, to maintain a stable equilibrium between all rights of legal subjects.\(^{69}\) The judiciary had scope to make moral decisions in some circumstances.\(^{70}\) There were some notable decisions upholding freedom of association, but frequently the legislature amended the law in their aftermath to support the oppressive regime. For instance, following a decision restraining the police from attending a political meeting on private premises, the Criminal Procedure Act was amended to permit _any_ policeman to enter _any_ premises at _any_ time without a warrant where he suspected on reasonable grounds that _any_ crime had been or was likely to be committed or that preparations for the commission of _any_ offence were likely to be made on the premises.\(^{71}\) Another example was the amendment of the Suppression of Communism Act in 1962 after the Appellate Division had ruled that a ministerial prohibition under the Act on any gathering of any number of persons having a common lawful or unlawful purpose could not apply to social gatherings.\(^{72}\) Van Zijl J of the Cape Provincial Division in a case arising out of a student protest emphasised the important role of public protest in a democracy and

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\(^{65}\) 1920 AD 530.
\(^{66}\) 1926 AD 198. Dugard (n 8 above) 310 - 311.
\(^{67}\) 1923 AD 281. Dugard (n 8 above) 308 - 310.
\(^{68}\) Potts (n 1 above) 11 - 12.
\(^{69}\) Van der Vyver (n 52 above) 325.
\(^{70}\) Chaskalson (n 53 above) 594.
\(^{71}\) Dugard (n 8 above) 144 - 145, citing _Wolpe v Officer Commanding SA Police, Johannesburg 1955_ 2 SA 87 (W).
\(^{72}\) Dugard (n 8 above) 162 - 163, citing _R v Kahn 1955_ 3 SA 177 (AD).
stated that freedom of speech and freedom of assembly were ‘part of the
democratic right of every citizen’.73

According to Arthur Chaskalson, the common law requirement to
interpret statutes in accordance with the principles of liberty and equality
gave

... room for moral decisions in the development and application of the
common law, in the interpretation and application of statutes not directly
affected by apartheid, and even, though to a limited extent, in the
interpretation and application of apartheid laws.74

Didcott J described a chasm between laws as passed by parliament and
justice:75

Parliament has the powers to pass the statutes it likes and there is nothing
the Courts can do about that. The result is law. But it is not always the
same as justice.

Faced with a plethora of racially discriminatory laws, although some
members of the judiciary did not show independence of spirit in politically-
charged conflicts, Dugard’s view is that in this they behaved no differently
from judges in the United States and Britain in times of crisis.76 The best
traditions of South African law compared favourably with those of Anglo-
American and Western European legal systems and those traditions were
upheld on a daily basis by South African judges in less divisive cases.77 An
exceptional political case was where the Appellate Division rejected an
allegation that the Dean of Johannesburg had committed an offence under
the Terrorism Act, _inter alia_, by paying money to dependants of political

73 Dugard (n 8 above) 186, citing _S v Turrell_ 1973 1 SA 248 (C) 256.
74 n 53 above, 594.
75 Chaskalson (n 53 above) 593, citing _Re Dube_ 1979 (3) SALR 820 (N) 821. In 1976
Didcott J (then of the Natal court) departed from restrictive decisions in _Rossouw v
Sachs_ 1964 2 SA 551 (AD) and _Schermbrucker v Klindt NO_ 1965 4 SA 606 (AD)
when he approved an interpretation of the Terrorism Act which provided some
minimal relief and comfort to the family of a detainee: Dugard (n 8 above) 359, citing
_Nxasana v Minister of Justice_ 1976 3 SA 745 (DCLD).
76 n 8 above, 387.
77 As above. The Innes tradition of critical judicial comment was followed by South
African judges in respect of legislation which judges considered politically colourless;
some of these acts of judicial censure resulted in benevolent reforms by the legislature,
including the abolition of compulsory whipping for certain offences and modification
of mandatory minimum sentences for recidivists: Dugard (n 8 above) 385.
prisoners; Ogilvie Thompson CJ interpreted the Act with strict regard to the context to which it related, namely, participation in terrorist activities.

The assessment of Rodney Davenport and Christopher Saunders is that the Supreme Court had not generally disgraced itself except, frequently, in political cases. They cite high profile cases in defence of the courts: a very sharp interdict on the use of third-degree methods by the security police against a political detainee in Gosschalk v Rossouw (March 1966); a ten-year prison sentence imposed on a security policeman for carelessly shooting and killing a detainee, whom he was merely attempting to intimidate, in S v Van As (1984); the setting aside of a conviction by the Supreme Court of Bophuthatswana under the South African Terrorism Act by the Appeal Court, because the Act, though it extended to the Territory, was repugnant to Bophuthatswana’s Declaration of Fundamental Rights, which placed the onus of proof on the State (May 1982); the finding by the Cape Supreme Court that it was unreasonable to expect ordinary readers of books to be aware in every case of whether a book was on the banned list (1981); and the judgment of the Supreme Court of South West Africa laying down that South West African People’s Organisation (SWAPO) infiltrators captured while bearing arms were entitled to be tried as prisoners of war (1983).

While recognising that there were some exceptions, the Truth and Reconciliation Commission (TRC) condemned the judiciary in general for its willingness to uphold unjust laws without comment and for readily accepting police evidence over that of the accused. Leaders of the judiciary had made a written submission to the TRC acknowledging the failure of the judiciary as an institution to protect basic rights during the apartheid era.

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78 Dugard (n 8 above) 348 - 349, citing S v ffrench-Beytagh 1972 3 SA 430 (AD) 457.
79 Dugard has a less benign view of Gosschalk v Rossouw 1966 2 SA 476 (C): n 8 above, 132, 135.
80 n 1 above, 582.
81 Chaskalson (n 53 above) 597.
82 A Sachs The strange alchemy of life and law (2009) 76. The submission was made in October 1997 by the five senior judges who presided over the courts after 1994 (Chief Justices Corbett and Mohamed, Deputy Chief Justice van Heerden, and Constitutional Court President Chaskalson and Deputy President Langa); they acknowledged the role of the courts in upholding apartheid, and the effect of apartheid in causing poverty and suffering on a massive scale, and dragging down the morale of law-enforcement agencies; they recognised the prevalence of torture and the cruelty of detention without trial; they criticised the overwhelming whiteness of judicial appointees, and the positivist attitudes of some judges who accepted that a law properly enacted was by definition just, regardless of its content; on the favourable side, they attached importance to the rearguard action of some judges in standing up for the rule of law: Davenport & Saunders (n 1 above) 582 - 583.
Chapter 3 – Dignity in the South African Constitution

The TRC was an attempt to make South Africans come to terms with their past by addressing the crimes of apartheid. It had power to grant amnesties to individuals, on condition that they revealed the truth and could prove their actions were politically motivated. After looking at precedents in eastern European and Latin American states that had recently rejected authoritarian regimes, parliament created the TRC with a mandate to deal with gross human rights violations since 1 March 1960. It was comprised of 17 commissioners of balanced gender and diverse racial backgrounds, and was chaired by Archbishop Desmond Tutu. The TRC was divided into three committees dealing with gross human rights violations, amnesty, and reparations for victim. It had a large budget, much of it from foreign donors, and set up an elaborate organisation with regional offices and a large number of employees who took more than 20,000 statements from victims of political violence. Starting in December 1995, it worked for more than two years and held over 50 public hearings around the country. More than 7,000 individuals applied for amnesty. The TRC was criticised by both sides of the divide, and its report was the subject of court challenges by former President FW de Klerk and the ANC. It revealed information about the heinous behaviour of agents of the apartheid regime and showed that some ANC operatives had committed serious crimes. Leonard Thompson regards the TRC as neither advancing the cause of racial reconciliation nor of bringing justice to the victims of political violence. Tutu and Judges Goldstone and Sachs argued that the truth was a necessary part of the healing process. Strengthened by the testimony of victims and the often corroborative evidence of amnesty applicants, some people felt that justice should be allowed to run its full course.

83 n 1 above, 274 - 278.
84 Davenport & Saunders (n 1 above) 701.
85 Davenport & Saunders (n 1 above) 702. For a detailed review and assessment of the TRC, see Davenport & Saunders (n 1 above) 690 - 703.
In South African law there has been a long-standing remedy for violation of dignity and reputation under the umbrella of protection of a personality right. Mokgoro J described it in *Dikoko v Mokhatla*:

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

Jonathan Burchell distinguished between the historical divisions of impairments of reputation, dignity and person in the *actio iniurarum*. The Roman-Dutch legal tradition in South Africa prevailed over the English stream of law to give a higher protection to reputation. Impairments of dignity included invasions of privacy, unlawful arrest and malicious prosecution. The significance of the remedy for infringement of dignity is evident from Burchell’s assessment:

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86 Steven Heyman segregated personality rights in the US into three categories (with the corresponding wrongs in brackets): first, the right to personality, which is subdivided into the substantive right to mental and emotional well-being (intentional infliction of emotional distress) and the formal right to ‘an inviolate personality’ comprising privacy (unreasonable intrusion or exposure) and personal dignity (insulting words); second, the right to self-expression through speech and conduct (improper regulation); and third, the right to image or reputation (defamation and related torts). SJ Heyman *Free speech and human dignity* (2008) 55. On the development of the tort of intentional infliction of emotional distress, see DP Duffy ‘Intentional infliction of emotional distress and employment at will: The case against tortification of labor and employment law’ (1994) 74 Boston University Law Review 387 at 392 - 395; D Givelber ‘The right to minimum social decency and the limits of evenhandedness: Intentional infliction of emotional distress by outrageous conduct’ (1982) 82 Columbia Law Review 42 at 43 - 45; H Harrington ‘Alabama Supreme Court recognizes intentional infliction of severe emotional distress as an independent cause of action: American Road Service Co v Inmon, 394 So. 2d 361 (Ala. 1980)’ (1982) 12 Cumberland Law Review 525. For a definition of the tort and its interpretation in practice, see Givelber above, 45 - 75.

87 2006 6 SA 235 (CC) [62] (footnotes omitted).


89 Truth *per se* is not a defence to a defamation action – it is only a defence when publication of the truth is for the public benefit: Burchell (n 88 above) 644.

90 Burchell (n 88 above) 640.

The protection of human dignity under the *actio iniuriarum* is undoubtedly one of the most impressive and enduring legacies of Roman law, and a feature which places the South African law of delict in the forefront of the protection of what is arguably the most fundamental of all human rights.

As well as the more usual usages to defend privacy and to prevent unwarranted arrest and prosecution, the remedy came to be used to safeguard an individual from insulting words or conduct, interference with parental authority, breach of promise to marry, and adultery.\(^92\) The *actio iniurarum* is not confined to insult, even though insulting behaviour and the expression of arrogance played a formative function in the development of the idea of *animus iniurandi*.\(^93\) The case-law up to the middle of the twentieth century did not give any substance to the concept of privacy, but from the 1950s a right to be free from encroachments into one’s private realm began to develop in South Africa and gave protection against unreasonable intrusions into the private sphere, public disclosure of private facts, appropriation of name or likeness, and portrayal in a false light.\(^94\)

### 3.2 Fundamental rights in the South African Constitution

#### 3.2.1 Transitional phase

The interim Constitution marked the boundary between the old regime based on discrimination with a privileged white minority and the new democracy where all are equal and the human dignity of each individual is respected.\(^95\)


\(^93\) n 88 above, 651 - 652. Burchell interpreted the Supreme Court’s decision in 1993 extending a remedy for invasion of privacy to an artificial or juristic person – which obviously cannot experience insult in the strict sense – as a rejection of a limiting requirement of insult: n 88 above, 652, citing Corbett CJ in *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (AD) 460-3, esp 462A-E.

\(^94\) n 88 above, 652.

\(^95\) Respect for dignity is an affirmation of fundamental human equality; by resisting the temptation to humiliate the white minority, Mandela and the other black African leaders gave all groups the chance to escape the cycle of revenge: J Glover *Humanity: A moral history of the twentieth century* (2012) 150.

Langa described the fact that agreement was reached at all on an interim Constitution as ‘a remarkable feat’ and ‘one of the miracles of the century’: n 29 above, 109.
It took two years to negotiate its terms between a myriad of different political
groups with diverse interests. New structures to support democracy included
the Constitutional Court\(^{96}\) and the Human Rights Commission.\(^{97}\) An elected
Constitutional Assembly, modelled on the Indian experience,\(^{98}\) comprising
the National Assembly and the Senate was established to draft a new
Constitution based on 34 Constitutional Principles.\(^{99}\) The agreed draft was
to be proofed by the Constitutional Court and certified by it as complying
with the Principles before becoming operative.\(^{100}\)

The Preamble set the scene for a complete break with the old order by
signalling the need to create a state where there would be ‘equality between
men and women of all races so that all citizens shall be able to enjoy and
exercise their fundamental rights and freedoms’.\(^{101}\) The Principles crystallised
that theme by stating clearly that the new democratic government’s aim was
to achieve a society where there was gender and racial equality.\(^{102}\) This was
an acknowledgment that the starting point was inequality in a society
deliberately divided along racial lines and therefore there were many
inequities to be gradually removed. Not only was past discrimination to be
eliminated, but there was an edict to take positive steps to promote equality
and national unity.\(^{103}\) The new document should provide for entrenched
justiciable ‘universal fundamental rights, freedoms and civil liberties’ drafted
after considering, \textit{inter alia}, the fundamental rights listed in Chapter 3 of the
interim Constitution.\(^{104}\) The justiciability of rights broke with the past
supremacy of positive law and parliament’s complete autonomy to enact
binding laws supporting an immoral apartheid system. The recognition that
equality could not be achieved without the improvement of living conditions
and the existence of socio-economic rights was evident from the edict in
Principle V that the legal system should ensure an equitable legal process

\(^{96}\) n 19 above, Sec 98.
\(^{97}\) n 19 above, Sec 115. CESCR plays a significant role in the Commission’s special
mandate to monitor socio-economic rights: CH Heyns & F Viljoen ‘Overview of
study results’ in Heyns & Viljoen (n 38 above) 19.
\(^{98}\) Sachs (n 82 above) 69.
\(^{99}\) n 19 above, Secs 68, 71(1) & Sch 4.
\(^{100}\) n 19 above, Sec 71(2).
\(^{101}\) n 19 above, Preamble, 1st para.
\(^{102}\) n 19 above, Sch 4, Principles I, III & V.
\(^{103}\) n 19 above, Principle III.
\(^{104}\) n 19 above, Principle II.
and equality before the law to include programmes to relieve the plight of the disadvantaged – particularly those disadvantaged on the grounds of race, colour or gender. While the separation of powers was expressed in Principle VI, the judiciary was specifically singled out as the organ of state with power ‘to safeguard and enforce the Constitution and all fundamental rights.’ 105

The interim Constitution was not merely a transitional measure, but was supreme, binding and justiciable. 106 Section 7(4) provided for the courts to adjudicate on alleged breaches of the fundamental rights in Chapter 3 and for relief to be sought in a representative capacity. 108

The first enumerated fundamental right was equality in Section 8. It gave protection against direct and indirect 109 unfair discrimination in general and particularly singled out discrimination on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, 110 age, disability, religion, conscience, belief, culture or language. 111 Measures to redress past discrimination, 112 whether against individuals or groups, 113 were allowed. 114

105 n 19 above, Principle VII.
106 Pharmaceutical Manufacturers Association of South Africa, ex p President of the Republic of South Africa [2000] ZACC 1, 2000 2 SA 674 [19]-[20], [44]-[45], [49].
107 Currie & de Waal (n 4 above) 5; n 19 above, Sec 4.
108 Class actions and public interest litigation were allowed: n 19 above, Sec 7(4)(b)(iv) & (v) respectively.
109 The explicit prohibition on indirect discrimination was inserted because the South Africans wanted to avoid the American interpretation of the Fourteenth Amendment only to forbid intentional discrimination: AK Wing ‘The South African Constitution as a role model for the United States’ (2008) 24 Harvard BlackLetter Law Journal 73 at 76.
110 The South African Constitution was the first one to include sexual orientation in its protections: Wing (n 109 above) 75.
111 n 19 above, Sec 8(2).
112 Aware of the American debate on reverse discrimination and wanting to avoid a rash of reverse discrimination cases, the drafters made it clear that affirmative action is part of the notion of equality, rather than an exception to it: Wing (n 109 above) 76.
113 In embracing group-based remedies, even though they may disadvantage individuals from a privileged group, the South Africans go beyond the individualistic approach of US jurisprudence: Wing (n 109 above) 76. It is naïve to think that prejudices can be combated without an insistent affirmative emphasis on the equal worth and dignity of groups; if a dignitary slur on an individual is based wholly or partly on contempt for the group to which that individual belongs as a collective entity, then assertion of the equal dignity of the group as an entity may be necessary to rebut prejudice: J Waldron ‘The dignity of groups’ (2008) New York University School of Law Public Law Research Paper No 08-53 http://ssrn.com/abstract=1287174 (accessed 26 September 2013) 19.
114 n 19 above, Sec 8(3)(a).
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Restoration of land rights where people had been dispossessed on a discriminatory basis during the apartheid regime was an entitlement. Prima facie evidence of unfair discrimination was sufficient, subject to rebuttal by the defence.

The right to life was set out in Section 9. There was a specific right to dignity in Section 10, ‘[e]very person shall have the right to respect for and protection of his or her dignity.’ Broadly accepted civil and political rights were incorporated based on physical security, justice and democratic norms. Interestingly, there was a specific right to privacy concentrating on the physical aspect, possessions and communications.

Freedom of religion, belief and opinion in Section 14 extended beyond established religions to conscience. Freedom of expression, association and peaceful assembly were guaranteed. Personal property rights were subject to expropriation for public purposes on payment of compensation. There was a right to basic education and equal access to educational institutions. Again, taking account of pluralism, the right to be educated in the language of one’s choice within reason was granted, private segregated schools could be established on cultural, language or religious grounds provided there was no racial discrimination, and there was a general right

115 n 19 above, Sec 8(3)(b).
116 n 19 above, Sec 8(4).
117 n 19 above, Secs 11, 12, 18 - 22, 24 & 25.
118 ‘Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications’: n 19 above, Sec 13.
119 State-endowed religious observances were allowed provided they were equitable, free and voluntary: n 19 above, Sec 14(2). Taking cognisance of the multi-cultural nature of South African society, personal, family and marriage laws could be tailored to different religions: n 19 above, Sec 14(3).
120 The Supreme Court of Ghana found that the prohibition on holding a public rally without a police permit constituted a serious abridgment of responsible human and civil rights inherent in a democracy and intended to secure the freedom and dignity of man: New Patriotic Party v Inspector-General of Police [2001] AHRLR 138 (GhSC 1993) [53], [55]. See also Inspector-General of Police v All Nigeria Peoples Party [2007] AHRLR 179 (NgCA 2007).
121 n 19 above, Secs 15, 17 & 16 respectively.
122 n 19 above, Sec 28(3).
123 n 19 above, Sec 32(a).
124 n 19 above, Sec 32(b).
125 n 19 above, Sec 32(c).
to choose one's language and culture.126

Free enterprise was the basis of the economy, but intervention was allowed to protect workers, foster human development and to improve the quality of life and working conditions, provided the measures were compatible with a democracy based on equality and freedom.127 Workers' rights were given constitutional status.128

Unusually in comparison with traditional constitutions and with a nod to posterity from solidarity rights, which had the potential to endow societal benefits in the future as well as in the present, protection extended beyond the purely personal to the environment.129 Another modern feature was Section 30 relating to children's rights, which was an acceptance of the temporal changes in people's enjoyment of rights. The justiciability of socio-economic rights was recognition of the need to make human rights a reality for people deprived by state action of physical and monetary benefits. Certain standards of living were necessary to enjoy fully civil and political rights.

None of the fundamental rights was absolute. The entrenched rights in Chapter 3 were subject to limitation by law to the extent that it was reasonable and compatible with a free and equal democracy.130 The essential content of the right could not be negated and the limit on certain entrenched rights (including the right to human dignity) must also have been necessary.131 Fundamental rights were all-pervasive. Courts were obliged to have regard to them, their spirit and aims when interpreting laws, and in applying and developing the common and customary law.132

127 n 19 above, Sec 26.
128 n 19 above, Sec 27.
129 'Every person shall have the right to an environment which is not detrimental to his or her health or well-being': n 19 above, Sec 29.
130 n 19 above, Sec 33(1)(a).
131 n 19 above, Sec 33(1)(b). Its role in the limitation of rights is the key, in practice, to the idea of human dignity serving as a foundational principle: Klug (n 50 above) 148.
132 n 19 above, Sec 35(3).
3.2.2 Constitution of 1996

3.2.2.1 Drafting and adoption
The new Constitution drafted by the Constitutional Assembly did not differ markedly from the interim document. Most judicial decisions under the interim Constitution remain authoritative. The Constitutional Assembly adopted a constitutional text on 8 May 1996. The Constitutional Court approved many of its provisions, but rejected, *inter alia*, the failure to entrench the right of individual employers to bargain collectively. Judicial scrutiny of a constitution before becoming effective was unique. Iain Currie and Johan de Waal describe it as ‘an unprecedented and extraordinary exercise of judicial review.’ Despite the fact that the Constitutional Assembly was the pinnacle of the country’s democratic institutions, the certification process empowered an unelected Constitutional Court to pronounce on its efforts with reference to a set of principles formulated by unelected negotiators.

There was an objection to the inclusion of socio-economic rights on the basis that they were not universal, and should not be justiciable because of the separation of powers and budgetary implications arising from their enforcement. The Court overruled the first objection, since the Constitutional Assembly was not confined to including only universal rights, but was entitled to add additional rights. The second objection was dismissed, as it considered that these rights are justiciable at least to some extent; the Court pointed out that upholding civil and political rights also has budgetary implications at times.

Objection was taken to the omission of family rights and the right to marry. The Court found that the values of dignity, equality and freedom as well as the right to dignity in Section 10 would protect the right to marry and freedom of choice in relation to one’s spouse. They also provide negative

133 It received 86% support – well in excess of the two-thirds majority required: Currie & de Waal (n 4 above) 6, fn 21; n 19 above, Sec 73(2).
134 Currie & de Waal (n 4 above) 6.
135 The draft text was adopted with only two negative votes and a small number of abstentions: Davenport & Saunders (n 1 above) 572.
136 First Certification case (n 23 above) [69].
137 n 4 above, 6.
138 As above.
139 First Certification case (n 23 above) [76]:[78].
140 First Certification case (n 23 above) [96].
141 n 23 above, [100].
protection for family life. The drafters of the Constitution steered a middle course in relation to the family in order to cater for a multi-cultural society with varying views on these issues and also to take account of different individual lifestyle choices. Many of the constitutional provisions provided direct and indirect support for marriage and the family. The Court did not enter into the abortion debate raised in the context of the rights to bodily integrity.

The phrase ‘fundamental rights, freedoms and civil liberties’ in Constitutional Principle II of the interim Constitution should not be broken down into separate words and examined in isolation. The Court said that as a whole it conveyed a composite idea firmly established in human rights jurisprudence. These rights vary from country to country.

With regard to the limitation of rights, the new text omitted the reference to the limitation being ‘necessary’ and required it only to be reasonable and justifiable. The Court said that the qualification ‘necessary’ was not universally accepted in national constitutions as the norm for limiting rights. Section 36 of the new Constitution dealing with the limitation of rights embodied the requirement of proportionality and was in conformity with the interpretation given to that term in *Makwanyane*, where the death sentence was held to be unconstitutional. There Chaskalson P had found that the task of adjudicating on the validity of limitations on rights involved weighing up competing values and an assessment based on proportionality, and continued:

The fact that different rights have different implications for democracy, and in the case of our Constitution, for ‘an open and democratic society based on freedom and equality’, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing

142 n 23 above, [103].
143 n 23 above, [59]-[60].
144 n 23 above, [50].
145 n 23 above, [90].
147 n 146 above, [104].
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.

He alluded to the different roles of the organs of state and the delicate balance to be struck by the judiciary in respecting the separation of powers. Writing extrajudicially, Albie Sachs described *Makwanyane* as having treated proportionality as ‘the vertebral support of the whole legal analysis’. Jeremy Waldron considers it more compatible with dignity to have standards such as ‘reasonable care’ in order to facilitate thoughtfulness about situations than to lay down a rule; this permits ordinary people to recognise a norm, apply it to their conduct, make a determination and act on it. The South African courts have unequivocally adopted proportionality as a central principle.

Among other objections dismissed in the *First Certification* case were to provisions relating to horizontality of rights, and access to information.

The Indian freedom struggle and the processes used to accommodate diversity in a democratic national framework influenced Nelson Mandela’s generation and are reflected in the Constitution, which owes much to the spirit of Gandhi with his focus on compassion and self-denial as well as to

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148 He quoted Lamer J of the Supreme Court of Canada who had said in the *Prostitution Reference*, ‘the role of the Court is not to second-guess the wisdom of policy choices made by legislators.’: n 146 above, [104], citing *Reference re ss 193 and 195(1)(c) of the Criminal Code of Manitoba* (1990) 48 CRR 1 at 62.

149 n 82 above, 206.


151 n 23 above, [53]-[56], [200]-[202].

152 n 23 above, [82]-[87].

153 Gandhi (like Martin Luther King) exemplified the virtue of dignity by claiming his rights publically, forcefully and without exaggerating or underestimating how his rights should be seen by others: MJ Meyer ‘Dignity as a (modern) virtue’ in Kretzmer & Klein (n 42 above) 198, 205 - 207. For an account of Gandhi in South Africa, see B Chandra *India’s struggle for independence 1857 - 1947* (1989) 170 - 176; Davenport & Saunders (n 1 above) 121 - 122, 244 - 245, 276 - 278; Huttenback (n 12 above) 46 - 331; S Mehra *Human rights: A Gandhian perspective* (2006) 14, 21 - 25; Tinker (n 11 above) 283 - 284, 288 - 289, 300, 314.
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3.2.2.2 Supremacy and values

The Preamble leaves no doubt that the Constitution is supreme and transformative. The purposes in adopting it as ‘the supreme law of the Republic’ recognise that socio-economic benefits are necessary to achieve social justice and for full personal development. The Constitution aims to change the unjust ethos of the past to a society where all are cherished equally.

The founding values in Section 1 include human dignity and the achievement of equality irrespective of race or sex. It is more difficult to amend Section 1 than other parts of the Constitution. Chapter 2 contains a

154 Sachs (n 82 above) 91 - 92. India’s nationalist leaders (including Nehru and Gandhi) viewed human rights as indivisible and interconnected; they were imbued with socialist philosophy: V Sripati ‘Constitutionalism in India and South Africa: A comparative study from a human rights perspective’ (2007) 16 Tulane Journal of International and Comparative Law 49 at 66.

155 Sachs (n 82 above) 92.

156 As above.


158 Preamble, 5th para, points 1 - 3: The Constitution was adopted, inter alia, to

• Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
• Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
• Improve the quality of life of all citizens and free the potential of each person.

159 Sec 1(a), (b).

160 A Bill amending it has to receive the support of three-quarters of the National Assembly instead of the two-thirds majority required to change other provisions (except for the amending provision itself, which is subject to the higher threshold): Sec 74(1). The entrenchment of founding values seems partly attributable to the influence of the German Basic Law: Ackermann ‘Equality and the South African Constitution: The role of dignity’ (n 21 above) 543.

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Bill of Rights. Dignity has been given a more prominent and recognised place than in the interim Constitution. As well as including it in the founding values, the definition of the right to dignity in Section 10 has been extended to read, ‘[e]veryone has inherent dignity and the right to have their dignity respected and protected.’ The additional text underscores the recognition that human dignity is not merely a protected and entrenched right, but that the concept of human dignity is definitional to what it means to be a human – that all humans have inherent dignity as an attribute independent of and antecedent to any constitutional protection thereof; Ackermann argues that human dignity has been accepted as a categorical constitutional imperative. An understanding of what it means to be human involves a belief that human beings are self-aware in ways that add dimensions to matters such as experiencing abuse or facing death; our understandings of human capacity and human desire are relevant. Chaskalson described the affirmation of human dignity as one of the founding values of the Constitution as significant, because although human dignity was immanent in the values and rights of democracy, freedom and equality emphasised in the interim Constitution, it was not recognised as a foundational value. ‘The right to dignity in Section 10 is stronger, as it refers to ‘the “inherent dignity” of all people, thus asserting that respect for human dignity, and all that flows from it, is an attribute of life itself, and not a privilege granted by the state’.

In *Hyundai Langa* DP pointed out the focus on the dignity of all in the new transformative Constitution:

The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic

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161 Secs 7 - 39.
164 Kriegler J also stated, ‘the right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution’: *Ex p Minister of Safety and Security: Re S v Walters* 2002 4 SA 613 (CC) [28].
166 n 165 above, 196 (footnote omitted).
167 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 1 SA 545 (CC) [21].
process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

Writing extrajudicially, Langa suggested that the Epilogue to the interim Constitution, which identified the need to change by healing the wounds caused by the divisions of the past and embracing a future founded on ‘human rights, democracy and peaceful co-existence and development opportunities for all’, provided a basis for understanding transformative constitutionalism.168 Peggy Cooper Davis considers that the South African Constitutional Court’s decisions concerning issues such as the death penalty, procedural due process, consensual sodomy and gay marriage show that responsive constitutionalism can yield a respect for human dignity that commits one to much more than saying ‘never again’ to apartheid.169 Dikgang Moseneke (also writing extrajudicially) indicated that in order to achieve substantive equality (the primary purpose of the Constitution), transformative adjudication must aim for social redistributive justice by looking at violations of human rights in the context of the socio-economic conditions of groups and by having regard to the historical context.170 He pointed out that as the Constitution’s transformative mission is altruistic rather than individualistic, the change being sought was not only freedom, but also the achievement of equal worth and social justice, which was allied, inter alia, to substantive equality.171 Ngcobo J in Daniels also pinpointed dignity as the focal point.172

The central position given to dignity as a value brought the South African legal order in line with post-World War II constitutionalism and closer in

169 n 163 above, 1375.
172 ‘The new constitutional order … affirms the equal worth and equality of all South Africans. The recognition and protection of human dignity is the touchstone of this new constitutional order.’: Daniels v Campbell 2004 5 SA 331 (CC) [54].
language to the Charter of the Organisation of African Unity173 and the African Charter,174 both of which record ‘the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples’.175 It is in accord with the foundational role attributed to dignity in the UN Charter and human rights instruments.

The Constitution marks a radical shift to democracy and is not just a tweaking of the old constitutional order.176 The South African Constitution (like the German one) embodies a normative value system.177 The Constitutional Court drew an analogy between the South African and the German Constitutions, and cited the German Federal Constitutional Court as saying:178

The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.

The Court in Carmichele contrasted the South African Constitution with the US Constitution, which distinguishes between government action and in-

174 n 37 above, Preamble.
175 Chaskalson (n 165 above) 196.
176 The Constitution has a transformative role ‘from a grossly unequal society’ to one based on equality between all: Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 4 SA 490 (CC) [74] (Ngcobo J). Ngcobo J differentiated it from other constitutions where it is assumed that all are equal, and mentioned the US as an example where the equal protection clause in its Constitution has limited application to the government’s programme to remedy race discrimination: above, [74], fn 10, citing Fulilove v Klutznick 448 US 448 (1980), City of Richmond v JA Croson Co 488 US 469 (1989).
178 Carmichele v Minister of Safety and Security 2001 4 SA 938 (CC) [54], and Du Plessis v De Klerk 1996 3 SA 850 (CC) [94], citing First Abortion case, BVerfGE 39, 1 (1975) [41].

action resulting in the state not being liable for not preventing harm. Similar to the European Convention on Human Rights (ECHR), positive obligations are imposed by the South African Constitution. As Chaskalson said, ‘[t]he Constitution demands a moral reading of its provisions’. The common law must be developed to conform with the Constitution’s value system.

3.2.3 The Bill of Rights

3.2.3.1 Scope

The Bill of Rights is the cornerstone of democracy in South Africa. Section 7 reaffirms ‘the democratic values of human dignity, equality and freedom.’ Rights are not absolute, but can be limited as in Section 36 or elsewhere in the Bill. Section 36 denotes carefully the boundaries of the limitation by reference to the underlying values. Balancing of individual rights against community interests is necessary at times, but Chaskalson pointed out that rights can be interpreted in ways that avoid conflict.

179 n 178 above [45], citing *DeShaney v Winnebago County Department of Social Services* 489 US 189 (1989).
181 *Carmichele* (n 178 above) [45]. Pierre de Vos observed that the obligation on the state in Section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights entailed a combination of negative and positive duties, and applied to all rights whether classified as civil and political or social and economic: P de Vos ‘Pious wishes or directly enforceable human rights? Social and economic rights in South Africa’s 1996 Constitution’ (1997) 13 *South African Journal on Human Rights* 67 at 78 - 79.
182 n 53 above, 608 (footnote omitted).
183 Constitution of the Republic of South Africa 1996, Sec 7(1).
184 As above.
185 Sec 7(3).
186 Sec 36(1):

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

See Rautenbach (n 2 above) 306 - 314.
187 n 165 above, 201.
There is a broad approach to *locus standi* in constitutional issues in contrast with the restrictive common law requirements.\(^{188}\) In addition to those directly affected, access to the court is granted to their representatives when they are unable to act themselves.\(^{189}\) Class actions,\(^{190}\) public interest litigation\(^{191}\) and proceedings by associations\(^{192}\) are permitted. Section 39 of the Constitution obliges the courts to ‘promote the spirit, purport and objects of the Bill of Rights’\(^{193}\) and makes it clear that other common or customary law or statutory rights only exist to the extent that they are consistent with the Bill.\(^{194}\) When interpreting the Bill, a court, tribunal or forum must ‘promote the values that underlie an open and democratic society based on human dignity, equality and freedom’.\(^{195}\) The spirit of the foundational values is to be observed.

The supremacy of the Bill of Rights is evident. But it is not simply a domestic measure. There is a clear instruction to courts to consider international law when interpreting the Bill of Rights.\(^{196}\) They may also consider foreign law.\(^{197}\) South African courts have used foreign decisions in order to fill

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188 Currie & de Waal (n 4 above) 80.
189 Sec 38(b).
190 Sec 38(c).
191 Sec 38(d).
192 Sec 38(e).
193 Sec 39(2). See Rautenbach (n 2 above) 260 - 264.
194 Sec 39(3).
195 Sec 39(1)(a).
196 Sec 39(1)(b). South Africa has the first Constitution setting out an explicit mandate for the courts to use comparative and international law in their human rights reasoning: E Örücü ‘Comparative law in practice: The courts and the legislator’ in E Örücü & D Nelken (eds) *Comparative law: A handbook* (2007) 427. Having reviewed cases from many jurisdictions, Paolo Carozza concluded that the centre of gravity of the global jurisprudence he observed regarding the death penalty was in the affirmation of the dignity of the human person and the principle that human rights law exists to protect that dignity; some weight was also given to foreign sources by the transnational character of the dialogue: PG Carozza ‘My friend is a stranger: The death penalty and the global *ius commune* of human rights’ (2003) 81 *Texas Law Review* 1031 at 1079. He discerned an emerging global *ius commune* of human rights in which the concept of human dignity, with its universal appeal, served as a common currency of transnational judicial dialogue and borrowing in matters of human rights: PG Carozza ‘Human dignity and judicial interpretation of human rights: A reply’ (2008) 19 *European Journal of International Law* 931 at 932. The new *ius commune* embodied the value of subsidiarity, with its attendant pluralism, rather than uniformity: above, 934.

On the courts’ use of international law, see Church et al (n 26 above) 194 - 196; D Moseweke ‘The role of comparative and public international law in domestic legal systems: A South African perspective’ (2010) 23(3) *Advocate (South Africa)* 63 at 65 - 66; Okeke (n 26 above) 36 - 37.
197 Sec 39(1)(c).
a vacuum left by the temporary absence of indigenous jurisprudence. When the national jurisprudence is sufficiently plentiful and sophisticated, the use of foreign law could be expected to decline significantly. Where there is a transformative constitution, it is more likely that foreign experience will be drawn on to exemplify how transformation is possible on particular issues.\textsuperscript{198} The Constitutional Court’s use of foreign law shifted from embracing it initially for guidance, then to regarding it with circumspection, and most recently to dialogue by taking account of foreign jurisprudence without apology.\textsuperscript{199}

Most of the rights are conferred on persons as such, but citizens’ and political rights can be invoked by citizens, and children’s rights are granted to minors.\textsuperscript{200} Workers and employers have rights,\textsuperscript{201} and juristic persons may have rights in certain circumstances.\textsuperscript{202}

3.2.3.2 Horizontal application

The fundamental rights in the interim Constitution were held in \textit{Du Plessis v De Klerk}\textsuperscript{203} not to bind individuals directly so as to have horizontal application in disputes between private individuals.\textsuperscript{204} This was principally on account of the omission of the judiciary from Section 7(1), which read, ‘[t]his Chapter shall bind all legislative and executive organs of state at all levels of government.’ The Constitutional Assembly was concerned not to tolerate private violations of rights and created a different application scheme in the 1996 Constitution.\textsuperscript{205} It included the judiciary in the application provision

\begin{itemize}
\item\textsuperscript{198} C McCrudden ‘Human rights and judicial use of comparative law’ in E Örücü (ed) \textit{Judicial comparativism in human rights cases} (2003) 14 - 15.
\item\textsuperscript{200} G Devenish \textit{A commentary on the South African Bill of Rights} (1999) 20.
\item\textsuperscript{201} Sec 23.
\item\textsuperscript{202} Devenish (n 200 above) 20, 22 - 24.
\item\textsuperscript{204} Currie & de Waal (n 4 above) 33.
\item\textsuperscript{205} Currie & de Waal (n 4 above) 34. Sections 8 and 9(4) of the 1996 South African Constitution have effectively reversed the holdings in \textit{Du Plessis} that the interim Constitution did not apply directly in relations between private persons, nor did it directly apply to private common-law litigation: AS Butler ‘Private litigation and
in Section 8(1), ‘[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.’ It also imposed an obligation on individuals to uphold the rights of other individuals in certain circumstances.206

According to Currie and de Waal, questions concerning the horizontal application of the Bill of Rights cannot be determined in the abstract, but require a contextual enquiry – provided that the circumstances of a particular case should not be used to frustrate the clear intention of the drafters to extend the direct operation of the provisions of the Bill of Rights to private conduct.207 The purpose of a provision and the nature of the duty imposed by the right are important considerations.208 The same duties may not be imposed on an individual as on the state where financial outlay is required. Currie and de Waal give an example of a privately-funded hospital, which would not be subject to the same obligations under the Bill of Rights as a public hospital.

3.2.3.3 Socio-economic rights

In contrast with earlier constitutions which tentatively recognised socio-economic rights209 or contained a single, all-encompassing guarantee,210 the South African Constitution includes specific guarantees relating to housing,211 healthcare,212 welfare,213 and other socio-economic rights recognised as constitutional rights under sections 8 and 9 of the 1996 Constitution – Assistance from Ireland’ (1999) 116 South African Law Journal 77 at 77. Very few countries have similar constitutional provisions; those that do include Brazil, Malawi, Namibia and Zambia: Butler above, 78, fn 8.

206 ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’: Sec 8(2). See Rautenbach (n 2 above) 295 - 298.

207 n 4 above, 53. More often than not, the Constitutional Court has avoided the direct application of a provision in the Bill of Rights to a common law rule, but has resorted to indirect horizontality facilitated by Section 39(2) of the Constitution, which obliges courts to promote the spirit, purport and objects of the Bill of Rights when developing the common law; although legal academics have criticised or praised this method of adjudication, a third group has argued that indirect horizontality is better suited to produce an incremental and cohesive body of constitutionalised common law: Mose-neke ‘Transformative constitutionalism: Its implications for the law of contract’ (n 171 above) 8.

208 n 4 above, 54.


210 Beatty (n 209 above) 120, citing Constitution of Japan, Art 25.

211 Sec 26.

212 Sec 27.

213 As above.
separate justiciable rights. Although from a different background, after the fall of the Berlin Wall in 1989 countries of central and eastern Europe also favoured this approach. In Hungary the Constitutional Court has drawn on dignity in its decisions on socio-economic rights. The Basic Law in Israel has been interpreted as generating a right to the minimal material conditions necessary to exist. Other examples of constitutions with justiciable socio-economic rights are those of Lithuania, Finland, and Portugal.

While socio-economic rights are not explicitly recognised in the United Kingdom, they have been implicated through the right not to be subjected to inhuman or degrading treatment. The House of Lords in *Limbuela* held that there had been a breach of Article 3 ECHR when asylum seekers denied support were faced with starvation and homelessness. Baroness Hale stated

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214 See Rautenbach (n 2 above) 413 - 418. On the different generations of rights and the options concerning socio-economic rights considered when the Bill of Rights was being drafted, see Sachs (n 82 above) 166 - 168. Human dignity is foundational to all types of rights, drawing them together and acting as a reminder of their principled indivisibility: C Dupré ‘Unlocking human dignity: towards a theory for the 21st century’ [2009] European Human Rights Law Review 190 at 202. Dupré explains that human dignity’s historical focus on autonomy makes it the queen of civil and political rights; its fundamental material and humane dimension also makes it the queen of economic and social rights; it may be the archetype of the third generation solidarity rights (the right to peace or to a healthy environment): above, 199, 202.

215 Beatty (n 209 above) 120, citing Constitution of Hungary.

216 C McCrudden ‘Human dignity and judicial interpretation of human rights’ (2008) 19 European Journal of International Law 655 at 693. Combined with the right to life, the framework of social institutions supporting the right to social security has been interpreted as requiring the minimum necessary to guarantee the right to human dignity, thus imposing an obligation on the state to provide shelter for the homeless in dire circumstances: above, 693, fns 271 - 273, citing Decision 42/2000 (XI 8) AB, Constitutional Court file number: 5/G/1998, published in the Official Gazette (Magyar Közlöny) MK 2000/109.

217 McCrudden (n 216 above) 701.


219 Constitution of Finland 1999.


221 ‘No one shall be subjected to torture or to inhuman or degrading treatment or punish-
ment.’

222 *R (Limbuela) v Secretary of State for the Home Dept* [2005] UKHL 66, [2006] 1 AC 396. The state was culpable for inaction in the face of unacceptable conditions, which the claimants alleged required ‘a person to sleep rough, thus exposing him to risks to health and safety and depriving him of dignity’; above, 400. The fact that the primary intention was not to degrade or humiliate was not an exculpatory factor.

*Limbuela* was significant, first, for finding that ‘inhuman and degrading’ covered denial of the most basic needs to a seriously detrimental extent and, second, for
that Article 3, along with the right to life, was the most important of the ECHR rights and reflected ‘the fundamental values of a decent society, which respects the dignity of each individual human being, no matter how unpopular or unworthy she may be.’

The right to respect for private and family life, and for a person’s home in Article 8 ECHR also has socio-economic implications. In Connors v UK, where Article 8 was the basis for the right not to be evicted summarily, the European Court of Human Rights recognised that it imposed a positive obligation on states to facilitate the lifestyle of vulnerable minorities – in this case, the nomadic traditions of gypsies.

The Inter-American Court of Human Rights has adopted a broad approach to the right to life and considers its exercise as essential for the exercise of all other human rights. In the Street Children case against Guatemala it held that a person’s right to life included ‘the right that he will not be prevented from having access to the conditions that guarantee a dignified existence’. The Court upheld the complaints against the state, which had violated the children’s rights by breaching the negative obligation not to deprive them of their lives arbitrarily and also the positive obligation to protect street children by investigating, prosecuting and punishing crimes against them. In its examination of the rights of the child to protection by society and the state, recognising that the state was responsible for the destitution because the legal structure rendered the individuals destitute by prohibiting them from obtaining paid work while simultaneously withdrawing social support: S Fredman Human rights transformed: Positive rights and positive duties (2008) 236 - 237.

223 n 222 above, [76].
224 (App no 66746/01) (2005) 40 EHRR 9 [84].
225 Villagrán Morales case (the ‘Street Children’ case) Series C 63 [1999] IACHR 17 [144].
227 n 225 above, [144]. The case concerned the torture and murder of street children by the police, who were attempting to deal with juvenile delinquency and vagrancy. The state’s lax attitude meant that the crimes against street children continued in the knowledge that the authorities at the very least condoned the extreme actions of the security forces.

228 The Court expanded the conception of the right to life to meet basic needs: McCrudden (n 216 above) 693.
it reiterated its view of the dual nature of the state’s default. It criticised the violation of the children’s physical, mental and moral integrity and their lives, and also the failure to prevent at-risk children from living in misery, thus depriving them of the minimum conditions for a dignified life and preventing them from the ‘full and harmonious development of their personality’, even though every child has the right to harbor a project of life that should be tended and encouraged by the public authorities so that it may develop this project for its personal benefit and that of the society to which it belongs.230

The protection afforded to prisoners has evolved from the prohibition of intentional torture and physical maltreatment through its extension to precluding impairment of their mental and intellectual well-being to a requirement to provide reasonable living conditions for them.231 The intermingling of civil and political rights with socio-economic rights is consonant with the ethos of the Vienna Declaration, which placed them on the same platform and demanded that they be promoted equally.232

It is noteworthy that the Vienna Declaration pre-dated agreement on the interim Constitution in South Africa. The international human rights model was one of the influences on the drafters.233 Although they sought precedent constitutions mentioning socio-economic rights, the only ones the drafters could find incorporated them merely as non-justiciable directives of state policy.234 They adverted to the Irish and the Indian235 Constitutions, both of which were in this category.236

230 n 225 above, [191].
231 In Canada and the US two distinct bases – residual liberty and intolerable conditions – have justified intervention when an otherwise proper detention has been rendered unlawful because the custodial conditions are excessive or interfere with the fundamental rights of prisoners: A Hoel ‘What rights do you take to prison? Habeas corpus and prison conditions’ (2009) 83 Australian Law Journal 395 at 397.
All human rights are universal, indivisible and interdependent and interrelated. … While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.
233 Sripati (n 154 above) 108.
234 Sachs (n 82 above) 168.
235 Constitution of India 1950.
236 Sachs (n 82 above) 168.
In view of the crucial influence of Indian constitutional jurisprudence on the formation and development of the Bill of Rights in South Africa, it is worth examining some central aspects of that jurisprudence. Unlike its Irish counterpart, the Indian Supreme Court construed the fundamental rights combined with the directives to give practical effect to social and economic rights. For over a quarter of a century after gaining independence in 1947, the Indian judiciary had a somewhat fraught relationship with the other two branches of government. Initially there were skirmishes over the power of the government to amend the Constitution to pare back property rights in order to achieve social justice and a more equal society. Vijayashri Sripati described the battle between the Parliament and the Court during the first two decades as being over land reform, compensation for expropriation of private property and the abolition of the privy purses (compensation payable to former princes); her view was that the Court aligned itself with the propertied classes and repeatedly blocked Parliament’s attempts to water down the right to property through constitutional amendments to implement the directive principles.237 Venkat Iyer has a different perspective and regards the Court’s actions up to 1973 as constitution-reinforcing entirely consistent with the role of the courts in a liberal democracy; the Court saw the naked power of an encroaching state as the biggest threat to freedom and the rule of law.238

The integrity of the judiciary was tested – and some would say, found wanting – by the declaration of an emergency in 1971 and the abrogation of safeguards on detention with the suspension of habeas corpus applications to enforce fundamental rights to equality, life and liberty in 1975. Indira Gandhi, as Prime Minister after the 1971 elections, enacted a series of constitutional amendments that made any law implementing any or all of the directive principles immune from judicial review; Sripati described as ‘historic’ the constitutional bench’s judgment in Keshavananda conceding that although Parliament had unlimited powers to amend any part of the Constitution (including the right to property), such sweeping away of judicial review was destructive to the ‘basic features’ or ‘basic structure’ of the Con-

237 n 154 above, fn 298.
stitution and therefore unconstitutional. Sripati was critical of the Supreme Court’s deference to the government during the emergency. Keshavananda is seen as the high-water mark of judicial activism in the entire history of independent India; the Supreme Court did not list the elements of the ‘basic structure’ of the Constitution, leaving them to be decided on a case-by-case basis. The ‘basic structure’ doctrine was imported to India from the West and reinterpreted there.

Tensions between the judiciary and the government boiled over because of Keshavananda; within a day of the judgment, the government announced it was passing over three senior judges, who were in the majority in that case, for the office of Chief Justice and appointed Ray J, who had supported the government’s position; the three judges and the incumbent Chief Justice, who had only one day left in office, tendered their resignation amidst strong protests from the public, media and legal community over their treatment.

Iyer described the period 1973 - 1977 as ‘easily the least glorious in the annals of the Supreme Court’, when it became highly politicised and significantly marginalised. In the Habeas Corpus case the Supreme Court in a majority decision upheld the government’s actions. Iyer labelled the majority judgments ‘remarkable’ for their summary rejection of arguments based on natural law and on the importance of judicial scrutiny of executive action where basic freedoms were involved, and for the enthusiasm with which the judges endorsed the positions advocated by the emergency regime; remarks by Beg J and Ray CJ were seen by many as insulting to detainees; in view of credible reports about widespread abuse and torture of detainees, this raised serious questions about the objectivity and impartiality of the Court; Ray CJ even

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240 n 154 above, 97, fn 300.

241 Iyer (n 238 above) 130.


243 Iyer (n 238 above) 133.

244 n 238 above, 137 - 138.

questioned the patriotism of the detainees’ counsel by suggesting they had wilfully and grossly exaggerated the emergency regime’s actions. The judges’ observations and the Court’s visible determination to shut out any possibility of judicial review for human rights infringements represented an unmistakable capitulation by the Court in the face of executive pressure. Khanna J dissenting (finding that the rule of law did not permit the revocation of fundamental rights) based his decision on natural law pre-dating the Constitution and was adamant that procedural and substantive safeguards could not be extinguished. Prime Minister Indira Gandhi passed over Khanna J for the position of Chief Justice in 1977 in favour of Beg J (one of the majority judges in the Habeas Corpus case); Iyer described her move as ‘a further display of contempt for judicial independence’.

Sachs described the Indian Court’s interpretation as ‘creative’, by using the directives ‘to give texture and substance to fundamental civil and political rights that were directly enforceable in the courts.’ A more detailed look at the Indian case-law at this juncture will be instructive.

Having survived onslaughts as an institution (albeit with a rather tarnished reputation as a defender of fundamental rights), the Supreme Court redeemed itself in 1978 in Maneka Gandhi and held that the Constitution should be read as an integrated document encompassing due process. The Court gave an integrated reading to the rights to personal liberty and life in Article 21, the various freedoms in Article 19 (including freedom of expression and of movement) and equality in Article 14. The goal of fundamental rights, as identified by Beg CJ, was to secure political and social justice in a free and

246 n 238 above, 135.
247 Iyer (n 238 above) 136.
248 n 238 above, 137.
249 n 82 above, 168.
250 Maneka Gandhi v Union of India [1978] INSC 16, 1978 SCR (2) 621. It overruled its earlier decision in Gopalan v State of Madras [1950] INSC 14, 1950 SCR 88. The government had impounded Maneka Gandhi’s passport ostensibly in the public interest without prior notice. As she had not been given the opportunity to contest its cancellation or to put forward her reasons for going abroad for consideration, she had been denied a fair hearing and the government’s arbitrary action infringed her right to equality before the law. Bhagwati J categorised equality as ‘a dynamic concept with many aspects and dimensions’ and it could not ‘be imprisoned within traditional and doctrinaire limits.’: above, 674.
See Church et al (n 26 above) 126 - 128.
equal society thereby assuring the dignity of the individual. The right to personal liberty included the unenumerated right to travel as a method of self-expression and freedom as a moral agent, which Bhagwati J based in human dignity. A restrictive constitutional interpretation was eschewed by Krishna Iyer J, who recognised the dynamic nature of a state’s fundamental law:

To look at the little letters of the text of Part III de hors the Discovery of India and the Destiny of Bharat or the divinity of the soul and the dignity of the person highlighted in the Preamble unduly obsessed with individual aberrations of yesteryears or vague hunches leading to current fears, is a parsimonious exercise in constitutional perception.

An expansive interpretation has continued to be the hallmark of Indian jurisprudence. It can be seen in Mullin, where Bhagwati J was influenced by the ‘luminous guideline’ of the US Supreme Court to follow a wide liberal approach flexible enough to deal with changes in society and various circumstances. Applying this method, the right to life was not confined to ‘mere animal existence’ and meant ‘something much more than just physical

252 n 250 above, 648:
Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. … Their waters must mix to constitute that grand flow of unimpeded and impartial Justice (social, economic and political), Freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vacation or occupation as well as of acquisition and possession of reasonable property), of Equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of Fraternity (assuring dignity of the individual and the unity of the nation), which our Constitution visualises.

253 ‘It cannot be disputed that there must exist a basically free sphere for man, resulting from the nature and dignity of the human being as the bearer of the highest spiritual and moral values.’: n 250 above, 695.
Freedom of movement does not exist in all circumstances, but depends on the context. Bhagwati J outlined the test to be applied based on the nature and depth of integration of the claimed right with an enumerated right (n 250 above, 697):
What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right.

254 n 250 above, 718.
255 Mullin v Administrator, Union Territory of Delhi [1981] INSC 12, 1981 SCR (2) 516 at 527. In Mullin the Court upheld the right of a detainee to receive family visits and to consult with her lawyer.
survival’. It should be dignity-supporting. Remarks by Bhagwati J on the extent of the right to life combined with other fundamental rights, including equality, opened the door to the practical enforcement of socio-economic rights in future cases.

In Bandhua Mukti Morcha Bhagwati J declared that the right to live with human dignity enshrined in Article 21 of the Constitution derived its ‘life breath’ from the directive principles. In this case brought on behalf of bonded labourers working in stone quarries, the state was required to invest ‘their right to live with basic human dignity, with concrete reality and content’ by ensuring observance of social welfare and labour laws enacted to protect workers. Bhagwati J stated that ‘inaction’ on the part of the state in securing implementation of the legislation would amount to ‘denial of the right to live with human dignity’.

The right to live with human dignity was a central theme in the Supreme Court’s judgment in 1982 in People’s Union for Democratic Rights, where it

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256 n 255 above, 528.

257 As above: The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

258 The Indian Supreme Court’s interpretation of the right to life is at the forefront of an approach which infuses the values of positive freedom, solidarity, and equality into fundamental rights, thereby opening up the possibility of recognising positive duties even in relation to civil and political rights; the positive duties flow directly from the Court’s affirmation of the central values for which the right to life stands; Sandra Fredman mentions in particular the value of positive freedom: Fredman (n 222 above) 206.

259 n 255 above, 529: [T]he magnitude and content of the components of this right [to live with human dignity] would depend upon the extent of the economic development of the country, but it must … include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self.

260 Bandhua Mukti Morcha v Union of India [1983] INSC 206, 1984 (2) SCR 67 at 103. He acknowledged that the terms of the Constitution meant that the directive principles were not enforceable in court, but where legislation already existed the state could be obliged by the courts to enforce it: as above.

261 The bonded labour system had been abolished by the Bonded Labour System (Abolition) Act 1976.

262 n 260 above, 103 - 104.

263 n 260 above, 103. The state’s duty extended to rehabilitation of the released individuals with support to avoid them living a free life in penury. As Bhagwati J discerned, ‘[t]he bonded labourer who is released would prefer slavery to hunger, a world of “bondage and (illusory) security” as against a world of freedom and starvation.’: n 260 above, 133.
held that the state had a constitutional obligation to enforce the rights of workers, who were weak and had been treated unequally, against private entities. The Court transformed the policy directive to secure equal pay for equal work in Article 39(d) of the Constitution into a fundamental right by using this directive principle to enhance the rights to equality before the law in Article 14 and to equality of opportunity in public employment in Article 16 in Randhir Singh. Reddy J interpreted equality rights as directed to all in society, including the majority who were workers, and he pointed out that the ‘equality clauses of the Constitution must mean something to everyone.’

The right to life includes the right to a livelihood in the sense of a means of living, but does not entail a right to carry on a trade or business of one’s choice. The livelihood right was established in Olga Tellis through the medium of the right to life. Sandra Fredman pointed out that the Court, although using the vocabulary of a right to livelihood, only imposed a duty to consult those facing eviction and did not insist that alternative pitches with proper infrastructure be provided as a condition precedent to removals. There was a negative obligation on the state not to deprive people of their livelihood without giving them the opportunity to be heard.


This was a significant decision and, according to JN Pandey ‘heralded a new legal revolution’; his assessment is that it ‘clothed millions of workers in factories, fields, mines and projects sites with human dignity’ giving them rights to wages, sustenance, shelter, medical aid and safety: JN Pandey The constitutional law of India (2008) 231.

265 Randhir Singh v Union of India [1982] INSC 24, 1982 (3) SCR 298 (SC). The Court held that the same pay scales should apply to drivers in the police force as to drivers of heavy vehicles in other departments.

266 n 265 above, 305.


269 n 222 above, 143.
in a fair, just and reasonable procedure. The Court did not impose an
affirmative duty on the state to provide work, so the pavement dwellers
could be evicted in the public interest, provided that they had been allowed
a fair hearing. It acknowledged that to evict them from their homes on the
pavement was equivalent to depriving them of their right to work, since they
were unable to survive in their rural villages and needed to live near their
workplaces in the cities where work was available. Chandrachud CJ drew
on the US experience of due process to prevent arbitrary action by the public
authorities.\textsuperscript{270} He found that there were two purposes to the right to be heard:
first, an instrumental one to try to change the outcome and, second, an
intrinsic value consisting of

the opportunity which it gives to individuals or groups, against whom
decisions taken by public authorities operate, to participate in the processes
by which those decisions are made, an opportunity that expresses their
dignity as persons.\textsuperscript{271}

Participation was evidenced by dialogue comprising the giving and receiving
of explanations, articulating and listening to reasons for and against the
measure, thereby expressing and respecting dignity as persons irrespective
of the outcome.

In contrast to \textit{Olga Tellis}, Gauntlett JA held that the right to life in the
Constitution of Lesotho did not encompass a right to a livelihood, as the
Constitution imposed limitations on the right to life.\textsuperscript{272} Furthermore, Lesotho
dealt with socio-economic rights (including the opportunity to secure a
livelihood) as principles of state policy and not as fundamental rights.\textsuperscript{273}
Also in contrast was Ghana, when Ofari Atta J held that the right to life of
those who had built houses in a flood plain could be justifiably interfered
with by being evicted in the public interest to allow the construction of

\textsuperscript{270} The outcome appeared puzzling to some commentators in view of the ringing rhetoric
in earlier passages of the judgment and critics suggested that the Court failed to
invalidate the enabling legislation because it did not have the courage to take such a
politically risky step; Pierre de Vos has countered critics with his explanation that the
Court insisted that the pavement dwellers could only be removed on certain stringent
conditions: n 181 above, 82.

\textsuperscript{271} n 268 above, 91.

\textsuperscript{272} \textit{Baitsokoli v Maseno City Council} [2005] LSCA 13 (CA of Lesotho) [17], [28].

\textsuperscript{273} \textit{Baitsokoli} (n 272 above) [18]-[19].
drains to prevent flooding in future, thus protecting the right to life of others.274

In *Consumer Education and Research Centre*, the Indian Supreme Court found that the right to live with dignity imposed obligations on the employer and on the state to safeguard the health of workers during work and in retirement.275 The Court integrated the right to life in Article 21 of the Constitution with the Preamble and directive principles,276 which amplify that right. The ethos of social justice was imbued in the Preamble and in the directive principles.277 The Constitution envisioned social justice as ‘its arch to ensure life to be meaningful and liveable with human dignity.’278

Ramaswamy J gave a comprehensive exposé of social justice in *Air India* describing it as ‘a dynamic device to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person.’279

The Supreme Court was consistent in its approach in *LIC of India*, a case concerning the right to life insurance on reasonable conditions, when it reiterated that the Preamble, the fundamental rights and the directive principles combined to give a right to livelihood as a meaningful life, which required the provision of social security and benefits on equal terms.280

With resonances of previous *dicta* concerning employers and employees in

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274 *Asare v Ga West District Assembly* (Suit No 36/2007) (Ghana High Court) 2 May 2008.

275 *Consumer Education & Research Centre v Union of India* [1995] INSC 91, JT 1995 (1) 636. This case concerned those employed in the asbestos industry. See Raju (n 268 above) 74 - 75.

276 The novel feature of including directive principles in the Constitution was borrowed from the Irish Constitution: Pandey (n 264 above) 385; Jacobsohn (n 239 above) 471.

277 Particularly those in Article 38, which enjoins the state to strive to secure a social order to promote the welfare of the people, and in Article 39(e) requiring state policy to prevent abuse of the health of workers.

278 n 275 above, 657 [20]. The manifestation of the goal of social justice was the opportunity for self-expression and enjoyment of life supported by a basic level of healthcare and income in a communal setting. See as above:

Social security, just and humane conditions of work and leisure to workman are part of his meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity, the State should provide facilities and opportunities to them to reach at least minimum standard of health, economic security and civilised living while sharing according to the capacity, social and cultural heritage. Social justice uses the rule of law to achieve equality in results: n 275 above, 658 [21].

279 *Air India Statutory Corp v United Labour Union* [1996] INSC 1400 (SC). He positioned the rule of law as ‘a potent instrument of social justice to bring about equality in results.’

280 *LIC of India v Consumer Education & Research Centre* [1995] INSC 272, 1995 SCC (5) 482.
People’s Union for Democratic Rights,281 Ramaswamy J was prepared to dismantle unequal negotiation terms. The right to life in a welfare state obliged the state and doctors employed in state hospitals to provide timely medical assistance in the case of emergencies and, in default, the Supreme Court held that the injured person was entitled to compensation.282

The Constitution of India in not merely a legal document, but also a social document providing for a social contract, whose goals are achieved through the fundamental rights and directive principles; the essence of the social contract, as a political theory (in its most common form as proposed by Jean-Jacques Rousseau) is that in order to live in society, human beings agree to an implicit social contract, which gives them certain rights in return for giving up certain freedoms they would have in a state of nature.283

The range of fundamental rights has been expanded in many areas by an interpretation taking a broad inclusive view of the Constitution and invoking the Preamble and directive principles to enrich the interpretation of equality and the right to life. By interpreting the right to life in Article 21 of the Constitution in the light of the directive principles, the majority of the Supreme Court in *Unni Krishnan* held that every child has a right to free education up to the age of 14 years.284 Reddy J for the majority was clear that the Constitution was an integrated document, the fundamental rights in Part III being fleshed out by the directive principles in Part IV.285 The Constitution was amended in 2002 to add a new fundamental right in Article 21A requiring the state to provide free compulsory education to children from six to 14 years old. The fact that as a result of *Unni Krishnan* a child denied education could approach the courts for an order compelling the government to provide facilities was used as a strategic tool by activists seeking improvements in primary education.286 The Supreme Court played a crucial role in bringing education to the forefront of the national agenda.287

281 n 264 above.
285 n 284 above, 649.
287 Sripati & Thiruvengadam (n 286 above) 157.
The affirmative action provisions in the Constitution have been given an expansive interpretation by the Supreme Court. In *Sawhney*, the Court upheld reservation by the government of jobs in the public sector for the dalits (formerly called the ‘untouchables’ and formally referred to as the ‘Scheduled Castes’), Scheduled Tribes and other socially and educationally backward classes. However, in relation to the other backward classes, it ordered the government to exclude the creamy layer. Sawant J emphasised the importance of socio-economic benefits to enable an individual to be fulfilled as a person, to participate in society and to enjoy civil and political rights to the full. Reddy J (delivering a separate judgment in

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288 The affirmative action provisions have been enhanced by constitutional amendments to equip them to address social and economic deprivation – particularly in the areas of education and public employment.


289 The reservation was made in accordance with the provision in the Constitution allowing affirmative action in favour of backward classes inadequately represented in employment in the public sector: Art 16(4).

290 The socio-economic condition of dalits, see A Anderson ‘On dignity and whether the Universal Declaration of Human Rights remains a place of refuge after 60 years’ (2009) 25 *American University International Law Review* 115 at 139.

291 Scheduled Tribes are tribal communities who live in isolated pockets of India: Nagarajan (n 289 above) 487. They are specified by the President and may be altered by Parliament: Constitution of India 1950, Art 342.

292 n 289 above, [810], [882]. The ‘creamy layer’ is the term applied to the privileged section of the other backward classes: Nagarajan (n 289 above) 504. The Supreme Court’s determination of ‘Scheduled Caste’ status recognises that membership of a dalit caste per se subjects individuals to a particularly egregious form of discrimination (‘untouchability’) regardless of socio-economic status, and merits positive action; in contrast, the determination of ‘other backward classes’ takes into account the socio-economic gains achieved by many members of backward castes in India – who are not subject to untouchability practices – and confines constitutional protections more strictly to those in greatest need by using empirical evidence of economic status: S Narula ‘Equal by law, unequal by caste: The “untouchable” condition in critical race perspective’ (2008) 26 *Wisconsin International Law Journal* 255 at 325. The definition of the creamy layer to be excluded should not necessarily be determined solely on income or economic grounds, but social capacity (which could include educational achievements) was relevant also: n 289 above, [809].

293 The social and political justice pledged by the Preamble of the Constitution to be secured to all citizens, will remain a myth unless first economic justice is guaranteed to all. The liberty of thought and expression also will remain on paper in the face of economic deprivations. A remunerative occupation is a means not only of economic upliftment but also of instilling in the individual self-assurance, self-esteem and self-
Sawhney) pointed out the modern addition of social justice in the economic and political spheres to the original revolutionary demands of liberty, equality and fraternity, and, as he stated, ‘[f]raternity assuring the dignity of the individual has a special relevance in the Indian context.’

In Thakur the Supreme Court confirmed the ratio decidendi in Sawhney when it upheld legislation reserving educational places in public institutions for members of castes, tribes and other backward classes. The legislation had been enacted to progress the directive principle in Article 46 of the Constitution promoting the educational and economic interests of the weaker sections of society. The Constitution permits special provision to be made for admission of members of castes, tribes and other backward classes to educational institutions. Balakrishnan CJ regarded the directive principles and the fundamental rights as equally important and significant, since the rationale for categorising directive principles as non-justiciable was simply a desire not to make an infant state accountable immediately for not fulfilling the obligations arising under them. He found that the application of the creamy layer principle to identification of the socially and educationally backward class was necessary, because one of the main criteria for determining that class was poverty.

The identification of those communities that constitute the socially and educationally backward classes, and the extension of quotas to them, has caused much controversy and violence in India – unlike the reservation worthiness. It also accords him a status and a dignity as an independent and useful member of the society. It enables him to participate in the affairs of the society without dependence on, or domination by, others, and on an equal plane … The employment under the State, by itself, may, many times help achieve the triple goal of social, economic and political justice.

Equality required that affirmative action be confined to those who were actually socially and economically backward, as its object was ‘not to uplift a few individuals and families in the backward classes but to ensure the advancement of the backward classes as a whole.’; the aim was to develop the social capacities of individuals until they were able to compete with others on equal terms: n 289 above, [521].

295 n 289 above, [637].
297 Thakur (n 296 above) [22], citing the Statement of Objects and Reasons for Central Educational Institutions (Reservation in Admission) Act 2006 (Act 5 of 2007).
298 Art 15(5).
299 n 296 above, [173].
300 n 296 above, [150].
system for dalits and Scheduled Tribes, which has aroused less controversy.\textsuperscript{301} In implementing the reservation policy, the state has to strike a balance between the competing claims of the individual under Article 16(1) guaranteeing equality of opportunity in relation to employment and the reserved categories falling within Article 16(4).\textsuperscript{302}

The Supreme Court of India’s broadening of the \textit{locus standi} rules and other innovations to facilitate public interest litigation\textsuperscript{303} have enhanced greatly the practical implementation of socio-economic rights.\textsuperscript{304} The initial impetus was to deal with grievances by prisoners and gross human rights abuses. It started in the late 1970s when the Court relaxed the formalism of traditional litigation to allow disadvantaged groups increased access to justice.\textsuperscript{305} As a result, the Supreme Court has obtained a highly controversial transformative role in the protection and promotion of the actual enjoyment of human rights.\textsuperscript{306} Public interest litigation has covered a wide range of issues such as vulnerable children, environmental protection, public health, consumer protection, maintenance of state-run hospitals, distribution of

\textsuperscript{301} Nagarajan (n 289 above) 487.

\textsuperscript{302} Jitendra Kumar Singh v State of Uttar Pradesh [2010] INSC 20 [33].

\textsuperscript{303} Bhagwati and Sen JJ both pointed out that adversary litigation differs from public interest litigation and exhorted the state to embrace it instead of resisting petitions brought on behalf of the poor and vulnerable: Bandhua Mukti Morcha (n 260 above) 102, 174. Bhagwati J stated that public interest litigation was rather ‘a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice’: n 260 above, 102. See Church et al (n 26 above) 122, 129 - 131.

\textsuperscript{304} Iyer (n 238 above) 143.

\textsuperscript{305} Iyer (n 238 above) 141. There were hints that the Supreme Court was on the verge of a new era in 1976: Neuborne (n 239 above) fn 111. Iyer has outlined the procedural and substantive innovations comprised in the process as including: first, widening of the rules of \textit{locus standi} to permit someone else to approach the court on behalf of a victim too poor or otherwise unable to do so personally; second, a greater investigative role for the court with the court perhaps appointing commissioners or committees to gather facts and materials; third, closer collaboration between the parties and the judges – and occasionally even third parties; fourth, creative moulding of reliefs; and, fifth, post-litigation monitoring by the court of its orders: n 238 above, 141 - 142. See also Fredman (n 222 above) 124; Neuborne (n 239 above) at 502 - 503.

\textsuperscript{306} Fredman (n 222 above) 124. This raises questions about the proper function of the courts in a democracy, but Fredman considers that courts can act as a catalyst for democratic pressures which ultimately make recalcitrant or incompetent governments act; according to her, the ideal behind public interest litigation is to construct the court as a vehicle for social conversation between co-equal citizens; instead of interest-bargaining, where success depends on economic or political power, judicial process requires decision making based on a dynamic interplay between the different perspectives brought together in the social conversation; the courts can enhance accountability, facilitate deliberative democracy, and promote equality: n 222 above, 125.
government largesse, investigation of corruption by state agencies, maintenance of standards in public education, and affirmative action in favour of backward classes. By a combination of finding unenumerated constitutional rights from an expansive reading of the fundamental rights (particularly the rights to life, equality and the various freedoms) invigorated by the directive principles and the use of public interest litigation to allow friends of the vulnerable access to the courts, the Indian Supreme Court has given concrete recognition to socio-economic rights with practical benefits for the marginalised.

Iyer considers that public interest litigation has not always succeeded in making distributive justice a reality for the weak and oppressed because of the inability of the courts to enforce its orders on the massive scale required and lack of resources and/or will on the part of the politicians and bureaucrats to carry out the necessary reforms. He also criticised public interest litigation, first, for allowing scope for 'judge-shopping' particularly in the early years by having an unstructured manner of dealing with individual petitions to named judges; second, by creating a two-tier system discriminating against ordinary litigants; third, for being misused by those with private axes to grind or opportunistic publicity-seekers; fourth, for needlessly

307 Iyer (n 238 above) 143. In a case dealing with child prostitution, the Court correctly categorised prostitution as not only a social ill but also a socio-economic problem and, therefore, considered that preventive rather than punitive measures should be taken to combat it: Vishal Jeet v Union of India [1990] INSC 176, 1990 (2) SCR 861. A public health issue was taken up as public interest litigation after receipt by the Chief Justice of a letter indicating that insecticides, colour additives and food additives banned as carcinogenic elsewhere were in widespread use in India: Ashok v Union of India [1997] INSC 491.

Common Cause (a registered society dedicated to public causes) has been successful in promoting practical solutions and holding people accountable by resorting to the courts. In one case initiated by it, the Supreme Court issued detailed directions with time lines requiring the authorities to put properly structured arrangements in place for hearing consumer complaints in lieu of the ad hoc solutions devised by the courts: Common Cause v Union of India [1993] INSC 7, 1993 (1) SCR 10. In its challenge to a government minister, who had been biased in the allotment of petrol pumps and retail dealerships and had favoured relations of staff, government colleagues and business contacts, the Court took a decisive stance and as well as ordering the quashing of ministerial orders, cancellation of allotments, and the sale by public auction of petrol pumps re-possessed by the authorities, it gave the minister two weeks to show to the Court why he should not be prosecuted and pay damages: Common Cause v Union of India [1996] INSC 1199.

308 India understands that there is no contradiction between economic and social rights and political and civil rights, knowing that economic and social rights make access to rights of citizenship meaningful; it realises that equality and freedom are not opposed but work together: MacKinnon (n 264 above) 202.

309 n 238 above, 150 - 151.
delaying developmental projects. Pathak J redressed abuses of public interest litigation by requiring in future verification of the allegations in a petition save in exceptional circumstances such as habeas corpus applications; he also stipulated that petitions should be addressed to the entire Court and not to a particular judge.

India is not alone in using directive principles to bring about socio-economic improvements. The Supreme Court of Ghana, using the modern interpretative approach of treating a constitution as a living organism rather than adhering to the original intent, held in Ghana Lotto Operators that there was a rebuttable presumption that all constitutional provisions (including the directive principles) were justiciable and that any ambiguity concerning the legal enforceability of the directive principles should be decided in favour of fundamental rights. The Court found that it had jurisdiction to strike down legislation incompatible with a sound healthy economy, whose underlying objectives – as set out in the directive principles – included affording ample opportunity for individual initiative and creativity, and fostering an enabling environment for a pronounced role for the private sector. The economic objectives in the directive principles were legally binding and not simply a matter of conscience for government.

In an action brought in Ghana in 2008 by a lawyer, respect for dignity was the foundation for gaining acceptance for improvement in living and working conditions. There was a successful outcome to the litigation after the Supreme Court found that he had locus standi. Prior to taking proceedings, he had sought on numerous occasions to have the government change the practice of employing workers to carry human faeces in pans on their heads from residences in Accra. He claimed it was an affront to their dignity and to the dignity of Ghanaians as a whole contrary to Article 15(1) of the Constitution, which provides that the dignity of all shall be inviolable. He also maintained it contravened Article 15(2)(a) as it was cruel, inhuman and degrading, and Article 15(2)(b) because it detracted from their dignity and worth as human beings. An amicable settlement was reached and it was

310 n 238 above, 151 - 152.
311 Bandhua Mukti Morcha (n 260 above) 158.
314 Adjei-Ampofo (No 1) v Accra Metropolitan Assembly [2007-2008] SCGLR 611.
315 n 314 above, 612.
agreed that the practice would be phased out. They under the terms of settlement, Accra Metropolitan Assembly committed itself to construct public toilet facilities, to ensure that planning and development permits were only granted for plans that made adequate provision for proper facilities and to prosecute those who failed to comply with the ban on pan latrines.

From the comparative analysis I have undertaken, it is clear that there has been a shift in favour of the justiciability of socio-economic rights. The rift between civil and political rights and socio-economic rights has been sealed internationally and domestically in many countries either by specific constitutional recognition or by a dynamic judicial interpretation of stated fundamental rights – sometimes enlivened by directive principles – to develop unenumerated rights. There has also been a change in outlook in academic circles. Two legal scholars mentioned by David Beatty as having moved from a position of favouring the omission of socio-economic rights from constitutions to embracing the idea wholeheartedly were Cass Sunstein, one of America’s most prolific scholars, and Dennis Davis, ‘a legal giant in South Africa’, who became a judge. They were both inspired by the South African Constitutional Court’s decision in *Grootboom* ruling that national, provincial and municipal governments had a collective responsibility to develop programmes that would provide emergency shelter and relief for squatters living in ‘crisis conditions’. Sunstein was impressed by the decision’s carving out a middle ground between making social and economic rights fully enforceable individual entitlements and denying them any recognition in law. Davis was the judge in the court at first instance to whom Irene Grootboom and her co-squatters prayed for relief; he saw things in a new light when confronted with the squalor and deprivation of those before his court. While the Court recognised that foundational values of human dignity, freedom and equality are denied those without food, clothes or shelter, it was sensitive to the fact that government could respond in many ways that would meet the requirements of the Constitution.

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316 *Adjei-Ampofo (No 2) v Accra Metropolitan Assembly* [2007-2008] SCGLR 663 at 663.
317 n 316 above, 663 - 664.
318 n 209 above, 126 - 127.
320 n 209 above, 128.
321 n 209 above, 128.
322 n 209 above, 128 - 129.
The rigid political and economic rule bordering on dictatorship during the apartheid era did not regard all people as human beings and rode roughshod over their dignity, not just by deprivation of the majority of civil and political rights to vote, freedom of movement and free speech, but also by favouring economically the minority – but politically dominant – whites at the expense of the black population regarded as servile, cheap labour and dispensable. This led to an enormous gulf between the two sectors, with most blacks being left with inferior education and housing. Sachs perceived that there was a link amounting to interdependence between the absence of civil and political rights and the lack of socio-economic benefits, so that restoration of dignity in South Africa necessitated both ‘the development of increased respect for the personality rights and freedom’ of every individual and ‘the creation of material conditions for a dignified life for all.’

Without education, the poor were ill-equipped to demand political rights. Without the vote, they lacked the democratic clout to canvass for improved social conditions. The interrelatedness of civil and political rights and socio-economic rights helps resolve the tensions that inevitably arise in the enforcement of the latter because of lack of adequate resources to completely satisfy the needs of all. There can be reconciliation between the libertarian whose emphasis is on the individual, autonomy and choice, and the communitarian, who sees our social setting as dictating choices. Sachs labels the reconciliation of the liberty and community views in the South African Constitution the ‘dignitarian’ approach, which ‘united the right to be autonomous with the need to recognise that we all live in communities.’

He summarised this development, ‘[i]t was the fundamental right of all human beings to have their basic human dignity respected, that linked the right to


324 For an assessment of the link between the foundational values and material circumstances in South African jurisprudence and in human rights literature, see S Cowen ‘Can “dignity” guide South Africa’s equality jurisprudence?’ (2001) 17 South African Journal on Human Rights 34 at 52 - 54.

freedom with the right to bread.'326 It was not only the poor whose dignity was undermined by apartheid, but the dignity of the privileged whites and of society in general was assailed by the intentional institutionalised non-recognition of the humanity of all, irrespective of race or colour.327

The ANC’s constitutional guidelines published in 1988 mentioned socio-economic rights.328 In 1992 the ANC produced a draft Bill of Rights that encompassed rights for workers and in the social, welfare, health and educational areas.329 There was political opposition from the apartheid government represented by the National Party, which viewed the social welfare rights as a threat to the system of white and Afrikaner privilege that existed under apartheid.330 The strength of the ruling party’s position prior to elections in 1994 explains why the interim Constitution contained fewer provisions for social justice than the final Constitution which was drafted in 1996.

326 n 82 above, 173.
327 Ackermann ‘Equality and the South African Constitution: The role of dignity’ (n 21 above) 540. Gandhi realised that the supposed benefactors in a traditional hierarchy are themselves humiliated by the belittling of fellow human beings: Meyer (n 153 above) 199 - 200.

The first significant comprehensive contribution dealing with the broader considerations of constitutional rights was authored by Sachs who, during the second half of the 1980s, published a number of papers arguing for redistribution of wealth through a transformative constitution: DM Davis ‘Socioeconomic rights: Do they deliver the goods?’ (2008) 6 International Journal of Constitutional Law 687 at 687 - 688. Sachs proposed that an orderly and fair redistribution of wealth be achieved by establishing a minimum floor of rights to a series of carefully defined social and economic goods: above, 688. See also MS Kende Constitutional rights in two worlds: South Africa and the United States (2009) 29.

In keeping with the universal principle of the interrelatedness of all human rights, Moseneke has also supported the substantive fulfilment of socio-economic rights through transformative adjudication: ‘Transformative adjudication’ (n 170 above) 318.

329 Davis (n 328 above) 688. Ideologically opposed to this proposal were first, neoliberals, who regarded the market as the effective agent for the distribution of social capital; they were wary of increasing the state’s power of interference in the private sphere, thereby minimising individual liberty and hindering the operation of the market: above, 688 - 689. Second, social democrats opposed it as a threat to democracy by giving the unelected judiciary broad capacity for judicial review and scope for interfering with legislation passed by a democratically elected parliament and with implementation of the executive’s policies; they also feared the creation of a new judicial elite: above, 689.

330 Christiansen (n 328 above) 379.
socio-economic rights than the final Constitution negotiated after the ANC had received overwhelming electoral support.331

The range of protection that the Constitution affords to basic needs is wide. The housing and healthcare, food, water and social security rights in Sections 26332 and 27333 of the 1996 Constitution were completely new with no parallel rights in the interim Constitution.334 Starting from the negative obligation perspective, first, there is at the very least a prohibition on the State and others from preventing or interfering with the individual’s right of access to housing.335 Second, there is a positive obligation on the State to provide housing on a progressive basis. The extent of the State’s duties differs according to the economic resources available to different sectors of the population.336 Some may be able to rent or buy their own accommodation. The State’s resources can be concentrated on those without means or access.337 Third, framed in negative terms, arbitrary evictions are banned, and there is the protection of court scrutiny before eviction from a home or before a home is demolished.338

331 Christiansen (n 328 above) 379 - 380. In the Constitutional Assembly debates ANC negotiator Asmal stressed the need for material benefits and security in order to be liberated: Christiansen (n 328 above) 378, fn 66, citing Rep of South Africa, Debates of the Constitutional Assembly 24 Jan to 20 Feb 1995 at 122 - 23 (1994-96) and 3 Debates of the Constitutional Assembly, 122 - 23 (1996).

332 It reads:
(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

333 The text is:
(1) Everyone has the right to have access to
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3) No one may be refused emergency medical treatment.

334 Devenish (n 200 above) 357.
335 L Chenwi ‘Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions’ (2008) 8 Human Rights Law Review 105 at 116, citing Grootboom (n 319 above) [34].
336 Currie & de Waal (n 4 above) 586.
337 Currie & de Waal (n 4 above) 587.
338 Chenwi (n 335 above) 116.
Mirroring the nature of the rights relating to housing, the right to healthcare, nutrition and welfare may not be directly infringed by retrogressive provisions, while reasonable legislative and implementation measures to achieve progressive realisation of the right are required. The right to emergency medical treatment is a negative one not to be arbitrarily excluded from that which already exists, in that no-one requiring medical assistance urgently can be turned away from a hospital which is able and available to provide the service. It does not extend to routine medical treatment and is not necessarily free. Under Section 35(2)(e) detained people have an unqualified right to adequate medical treatment, as well as to adequate accommodation, nutrition and reading material.

Children have an unconstrained right in Section 28(1)(c) to ‘basic nutrition, shelter, basic health care services and social services’. Basic education is the right of children and adults. The State’s obligation in relation to further education is to make it progressively available and accessible through reasonable measures.

As we have already seen, when the Constitution was being drafted, there was considerable debate over whether socio-economic rights should be justiciable. Sachs, who was involved in drafting the Constitution, thought that the equal protection clause and affirmative action, although they would have helped the black middle classes, were not enough to lift the standards of living of the desperately poor. The problem was not just to prevent

339 Currie & de Waal (n 4 above) 591.
340 The difference between the welfare provisions is that social security refers to insurance schemes to which workers and employers contribute for the purposes of financial old-age pensions, medical and unemployment insurance, whereas social assistance financed from public funds is based on need, entitlement to it and the extent of that entitlement being assessed on a case-by-case basis: Currie & de Waal (n 4 above) 591 - 592. The availability of social security and social assistance depends on schemes having been established by the State or privately based on legislation requiring their establishment: Currie & de Waal (n 4 above) 592.
341 Currie & de Waal (n 4 above) 591.
342 Currie & de Waal (n 4 above) 592.
343 Currie & de Waal (n 4 above) 593.
344 As above.
345 Sec 29(1)(a).
346 Sec 29(1)(b).
348 n 82 above, 169.
continuing or new discrimination, but to ensure that everyone was entitled to at least the minimum decencies of life.\textsuperscript{349} Davis described the Constitution that emerged as representing an alternative vision to the neoliberal framework with its focus on globalisation.\textsuperscript{350} It moved beyond the conception of rights as a shield against a sovereign espoused by Hobbes to rights involving significant claims on state and community resources.\textsuperscript{351}

3.2.3.4 Environmental rights

The environmental rights were strengthened in the 1996 Constitution in Section 24.\textsuperscript{352} The word ‘harmful’ replaced ‘detrimental’ in the interim Constitution, which was a considerable improvement in the standard of protection. However, it is still enshrined in negative terms and is not a positive right to a healthy environment.\textsuperscript{353} Protection was improved by extending the duty (albeit a negative one) from the State to the private sector; this is done by reading Section 24(a) in conjunction with Section 8 allowing for direct horizontal application of the 1996 Constitution against privately-owned enterprises, which often cause massive environment degradation.\textsuperscript{354}

\textsuperscript{349} As above.


\textsuperscript{351} Davis (n 328 above) 690 - 691. It is of the social democratic genre: Davis (n 328 above) 690.

\textsuperscript{352} It provides:
Everyone has the right
(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.


\textsuperscript{353} Currie & de Waal (n 4 above) 525.

\textsuperscript{354} Currie & de Waal (n 4 above) 524.
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Protection of the environment for posterity in Section 24(b) is a positive obligation on the State to take the initiative to achieve this by reasonable legislative and other measures.355 It is unlikely to have direct horizontal application.356

3.2.4 Dignity

Dignity and equality are inextricably linked in the Constitution. They are the foundational values mentioned in Section 1357 and, together with freedom, are the basic democratic values which restrict the limitation of rights358 and govern the interpretation of the Bill of Rights.359 In times of emergency, the rights to equality and dignity are non-derogable – equality to the extent that unfair discrimination is based solely on the grounds of race, colour, ethnic or social origin, sex, religion or language, and dignity in its entirety.360

355 Currie & de Waal (n 4 above) 527. See BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs [2004] ZAGPHC 18 (High Court, Witwatersrand Local Division). The elevation of environmental rights to a fundamental justiciable human right sets the goal of attaining a protected environment ‘by an integrated approach, which takes into consideration inter alia socio-economic concerns and principles’: above, 25 (Claassen J). The Constitution ‘envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development’: Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province [2007] ZACC 13, 2007 6 SA 4 (CC) [45]. See also MEC. Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd [2007] ZACC 25, 2008 2 SA 319 (CC) [60]-[61]. Environmental considerations have to be accorded appropriate recognition and respect in administrative processes: Director: Mineral Development, Gauteng Region v Save the Vaal Environment [1999] ZASCA 9, [1999] 2 All SA 381 (A) [20]. The courts must ensure that adequate and effective mechanisms are provided to the State for the proper enforcement of environmental obligations: Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd [2006] ZAGPHC 47 (High Court, Witwatersrand Local Division) [17.3].


356 Currie & de Waal (n 4 above) 524 - 525.

357 Sec 1(a).

358 Sec 36(1).

359 Sec 39(1)(a).

360 Sec 37(5)(c).
Equality rights are set out in some detail in Section 9.\textsuperscript{361} Section 9(1) embodies two concepts: first, the right to equality before the law, which is inherent in the rule of law, and, second, equal protection and benefit of the law.\textsuperscript{362} ‘Equal protection’ comes from the American idea of constitutional equality and ‘equal benefit’, taken from the Canadian Charter of Rights, broadens the equality guarantee from procedure to the substance of the law.\textsuperscript{363}

The commitment to substantive equality is endorsed again in Section 9(2) by the reference to ‘full and equal enjoyment of all rights and freedoms’.\textsuperscript{364} Legislative and other measures may safeguard or assist previously disadvantaged individuals or groups in the interests of achieving substantive equality. Affirmative action was explicitly allowed to avoid disputes as in the US and to avoid merely formal equality.\textsuperscript{365} In Lesotho there was an unsuccessful challenge by a man who was unable to stand as a local government election candidate in his home electoral division because that division had been reserved for women.\textsuperscript{366} The Court of Appeal rejected his argument that the court \textit{a quo} had been unduly deferential to the legislature and found that the measures (designed to achieve important objectives) were not arbitrary, unfair or irrational; they impaired rights as little as possible; and there was a proportionality between the effects of the measures and the objective.\textsuperscript{367}

\textsuperscript{361} It reads:

\begin{quote}
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.
\end{quote}

\textsuperscript{362} Devenish (n 200 above) 40, fn 40.

\textsuperscript{363} Devenish (n 200 above) 40, citing H Cheadle & D Davis ‘Equality’ in D Davis \textit{et al} (eds) \textit{Fundamental rights in the Constitution} (1997) 61. On equal protection, see Church \textit{et al} (n 26 above) 148 - 149.

\textsuperscript{364} Devenish (n 200 above) 41; \textit{National Coalition for Gay and Lesbian Equality v Minister of Justice} 1998 12 BCLR 1517 (CC) (\textit{Sodomy case}) [62].

\textsuperscript{365} Chaskalson (n 41 above) 36. On affirmative action, see Rautenbach (n 2 above) 326 - 327.


\textsuperscript{367} n 366 above, [38]-[40].
Unfair discrimination, whether direct or indirect, by the State is prohibited by Section 9(3). Grounds additional to those particularised in the interim Constitution are pregnancy, marital status and birth. Protection from discrimination on the grounds of birth promotes personal dignity (a key aspect of which is individual autonomy) by ensuring that each person can create her own identity, free from the constraints of ascriptive status, and is treated on the basis of individual merit. A corollary of autonomy-linked personal dignity is that an individual achieves and fulfils this dignity through her own capabilities and conduct; this is an illustration of the transition from status-based dignity to conduct-based dignity.

Section 9(4) was another innovation, which gave the anti-discrimination provision horizontal effect backed by legislation to be introduced within three years. Subsections 9(2)-(4) make it clear that discriminatory or disparate impact as well as intent is actionable under the Constitution. It can be deduced from other parts of Constitution that the right in Section 9(4) is not dependent on legislation. Section 9(5) carries forward a presumption that discrimination on one of the listed grounds is unfair unless it is proven to be fair.

In contrast, the right to dignity is succinct.

3.2.4.1 The values dimension in South African jurisprudence

The case-law from South Africa exudes a values perspective. Recognising that dignity is the inviolable central essential gravity at the soul and heart of each individual, Sachs J articulated an inviolable core beyond the realm of the state:

… there is a core to the individual conscience so intrinsic to the dignity of the human personality that it is difficult to imagine any factors whatsoever that could justify its being penetrated by the state.

369 Shadowen (n 368 above) 44.
370 Sch 6, Sec 23(1).
371 Wing (n 109 above) 76.
372 Devenish (n 200 above) 41.
373 Sec 10.
375 S v Lawrence 1997 4 SA 1176 (CC) [168]. On Lawrence, see Kende (n 328 above) 223 - 226.
The inviolability of the private sphere from unreasonable searches and seizures was mentioned by van der Westhuizen J, quoting Jackson J (dissenting) in a US case: 376

[O]ne need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

While these remarks are valid insofar as they protect the privacy of the person’s physical presence and tangible environment, they do not give any recognition to the inviolable nature of dignity, which cannot ‘disappear’ or be lost or waived by its holder. Richard Stith has said, ‘[w]e cannot forfeit or waive our humanity nor change its status as a principle’ nor can we ‘legally consent to be enslaved (to be reduced from person to property) nor to be killed’.377 In German law, a waiver of dignity is not acceptable; it has absolute effect and cannot be balanced against other legal interests.378 The Daschner case held that because of the absolute ban on torture, which infringes dignity, the pleas of self-defence (of oneself or of another) or necessity were unreasonable and did not apply.379

The German Constitutional Court held that a statute passed in the wake of the 9/11 terrorist attacks, permitting the German air force to shoot down airliners that had been taken over by terrorists was not compatible with the protection of dignity in Article 1 of the Basic Law; the Court stated it was ‘absolutely inconceivable’ to intentionally kill the crew and the passengers of a hijacked plane, even when they were ‘doomed anyway’; human dignity

376 Magajane v Chairperson, North West Gambling Board 2006 5 SA 250 (CC) [64], citing Brinegar v US 338 US 160 (1949) 180 - 81.
378 E Klein ‘Human dignity in German law’ in Kretzmer & Klein (n 42 above) 148 - 149, 157 - 159.
enjoys ‘the same constitutional protection regardless of the duration of the physical existence of the individual human being.’

Naming dignity as an absolute value may have a useful symbolic effect in a society such as Germany with its traumatic history of human rights violations, but David Weisstub suggests that proportionality may be more appropriate for balancing collective and individual interests in liberal democratic societies without such a history. There is a distinction between autonomy, which can be waived, and dignity, which is inviolable; therefore consent may not be a defence to criminal physical harm.

In Mohamed the Court – casting doubt on whether a suspected criminal could validly consent to his removal to the US to face a criminal charge involving the death penalty thereby endangering his life – noted the statement in the German Peep Show decision that ‘[h]uman dignity is an objective, indisposable value, the respect of which the individual cannot waive validly.’

Ackermann J linked dignity and freedom with respect for the individual’s unique humanity:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their ‘humanness’ to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual’s human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible.
These views on the freedom to develop one’s unique potential are correct, but Ackermann J erred in saying that self-awareness is necessary for human dignity.385

385 The concept of dignity does not reflect the subjective state of mind of the perpetrator or the victim, but instead has an ‘objective,’ normative meaning; Vera Bergelson gave as an example voluntary cannibalism which by its very terms denies people equal moral worth and, thus, assaults the victim’s dignity – even that of a willing participant; she described what was at stake as people’s moral dignity, or dignity of personhood, as opposed to social dignity, or dignity of rank: n 382 above, 730 - 731.

In a different context, Denise Réaume has proposed replacing the tort of intentional infliction of nervous shock with a dignity-based tort of intentional outrage to dignity, which would substitute the legally protected interest of dignity for the weak concept of emotional tranquillity as a foundation for expansion of tort law; her rationale is that it is the desire to inflict distress or humiliation that constitutes the assault on dignity rather than the causing of that precise effect; to treat a person as worthless as a moral personality offends dignity irrespective of whether one succeeds in making that person feel worthless: DG Réaume ‘Indignities: Making a place for dignity in modern legal thought’ (2002) 28 Queen’s Law Journal 61 at 86, 90 - 91.

There are various views on whether awareness on the part of the victim is a necessary element in the tort of false imprisonment. Fawsitt J of the Irish Circuit Court considered it was not and stated, ‘[t]he fact that a person is not actually aware that he is being imprisoned does not amount to evidence that he is not imprisoned, it being possible for a person to be imprisoned in law, without his being conscious of the fact and appreciating the position in which he is placed’: Dullaghan v Hillen [1957] Ir Jur Rep 10 (CC) 15. In the UK, the House of Lords ruled in Murray v Ministry of Defence [1988] 2 All ER 521 that false imprisonment was actionable without proof of special damage, and it was not necessary for a person unlawfully detained to prove knowledge of the detention or harm. Because the law attached ‘supreme importance to the liberty of the individual’, Lord Griffiths refused to follow the US route, which required that the person confined be conscious of the confinement or be harmed by it: above, 529, citing Restatement of the Law, Second, Torts 2d (1965) § 35, p 52. He doubted Herring v Boyle (1834) 1 Cr M & R 377, 149 ER 1126, and approved instead the dictum in Meering v Grahame-White Aviation Co Ltd of Aitkin LJ, who thought ‘a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic’ or while unknowingly being confined in a locked room, or while being restrained (without being locked in) within defined bounds, although damages would be affected by whether the imprisoned person was conscious of it or not: above, 528 - 529, citing (1919) 122 LT (CA) 53 - 54. In the US, since the interest protected is regarded as a mental one, resembling apprehension of contact in the assault cases, the Restatement of Torts has taken the position that there can be no imprisonment unless the plaintiff is aware of it at the time – the mere dignitary interest in freedom from unconscious confinement is not worthy of redress; this position is opposed by three American decisions in cases of children and an incompetent: WP Keeton (ed) & WL Prosser Prosser and Keeton on the law of torts (1984) 47 - 48, citing Robalina v Armstrong NY 1852, 15 Barb 247; Commonwealth v Nickerson 1861, 87 Mass (5 Allen) 518; Barker v Washburn 1911, 200 NY 280, 93 NE 958. For criticism of the requirement of consciousness of confinement, see S Reed ‘Is knowledge of the fact of imprisonment by the plaintiff a necessary element in false imprisonment?’ (1944) 32 Kentucky Law Journal 212; WL Prosser ‘False imprisonment: Consciousness of confinement’ (1955) 55 Columbia Law Review 847; DS Cohen ‘False imprisonment: A reexamination of the necessity for awareness of confinement’ (1975) 43 Tennessee Law Review 109; SH Nahmod ‘Awareness of confinement for false imprisonment: A brief critical comment’ (1976)
Sachs J in the Sodomy case pinpointed dignity as the underlying value in the Bill of Rights and related it to self-worth and equality:386

It will be noted that the motif which links and unites equality and privacy, and which, indeed, runs right through the protections offered by the Bill of Rights, is dignity. This Court has on a number of occasions emphasised the centrality of the concept of dignity and self-worth to the idea of equality.

In Soobramoney v Minister of Health (Kwazulu-Natal) the same judge endorsed Ronald Dworkin’s view of the composition of the sanctity of life and stressed the importance of the law in supporting the freedom of society to make choices.387 Sachs J explained the religious-based philosophy of life in Minister of Home Affairs v Fourie:388

For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their environment.


In an action for battery, it is not essential that the plaintiff should be conscious of the contact at the time it occurs; interest in personal integrity is still entitled to protection, although the plaintiff is asleep or otherwise unaware of what is going on; a technical infringement attracts nominal damages; more serious events can confer an entitlement to compensation for the resulting mental disturbance, eg. fright, revulsion or humiliation: Keeton & Prosser above, 40.

Assault is essentially a mental rather than a physical invasion; since the interest involved is the mental one of apprehension of contact, the plaintiff must be aware of the threat of contact: Keeton & Prosser above, 43 - 44. See also Vold above, 177 - 178.

386 n 364 above, [120] (footnotes omitted).

387 1998 1 SA 765 (CC) [55], citing Dworkin Life’s dominion: An argument about abortion and euthanasia (1993) 240, 241:

[The present case] does point to the need to establish what Dworkin has in his book Life’s Dominion, called the ‘relative importance of the natural and human contributions to the sanctity of life’. He concludes his study with the eloquent reminder that if people are to ‘retain the self consciousness and self respect that is the greatest achievement of our species, they will let neither science nor nature simply take its course, but will struggle to express, in the laws they make as citizens and the choices they make as people, the best understanding they can reach of why human life is sacred, and of the proper place of freedom in its dominion.’

Whatever the moral and ethical arguments, the courts are clear that the principle of sanctity of life in the medical context is not absolute: D McQuoid-Mason ‘Pacemakers and “living wills”: Does turning down a pacemaker to allow death with dignity constitute murder?’ (2005) 18 South African Journal of Criminal Justice 24 at 26.

388 2006 1 SA 524 (CC) [89] (footnote omitted).
their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. Such belief affects the believer’s view of society and founds a distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries. For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation.

When describing the death penalty in *Makwanyane*, Chaskalson P used Kantian terminology:\(^{389}\)

> [Death] is ... an inhuman punishment for it ‘... involves, by its very nature, a denial of the executed person's humanity', and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.

Although they came to opposite conclusions in a dispute over the validity of a limitation clause in an insurance contract, two judges in *Barkhuizen v Napier* connected freedom and autonomy with dignity.\(^{390}\) Undoubtedly, the freedom of the competent to regulate their affairs unhindered is critical. However, the converse is not true, as even the incompetent retain their objective dignity, which is deserving of respect.\(^{391}\) Sachs J (dissenting) in *Barkhuizen v Napier*

\(^{389}\) n 146 above, [26], citing *Furman v Georgia* 408 US 238 (1972) 290 (Brennan J, concurring).

\(^{390}\) 2007 5 SA 323 (CC). For Ngcobo J in the majority, '[s]elf-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity.': above, [57]. Jonathan Lewis criticised the Constitutional Court in this case for not awarding costs against the losing party because an important constitutional issue was in dispute; the state was not involved, as it concerned a contractual dispute between two private parties: J Lewis 'The Constitutional Court of South Africa' (2009) 125 Law Quarterly Review 440 at 446 - 447.

\(^{391}\) The concept of dignity can be developed to require respect for all sentient beings with the capacity to flourish; the theory recognises the variable nature of the good for diverse beings, requiring that their fundamental interests be protected through fundamental rights: D Bilchitz 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' (2009) 25 South African Journal on Human Rights 38 at 40. David Bilchitz expanded a theory of value known as the capabilities approach expounded by Amartya Sen and Martha Nussbaum; value in an individual
saw strict contract rules as impeding free will. He cited Davis J, who raised the issue of reciprocal respect for each other:

‘... Parties to a contract must adhere to a minimum threshold of mutual respect in which the “unreasonable and one-sided promotion of one’s own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts”.

As Sachs J expounded in Harksen v Lane, even in marriage each partner preserves their own identity and personal dignity. O’Regan J advocated harmonious interaction between the individual and society in Bernstein v Bester. General assumptions about people’s roles in society deny the life to be understood in terms of functionings and capabilities: above, 62. It requires respect for those without full autonomy, such as children, the senile and the mentally incompetent, the value of particular functionings and capabilities being determined according to what enables each individual to flourish as the kind of being that it is: above, 63. Bilchitz examines and dismisses as inadequate theories based on personhood, or on human dignity viewed from the perspective of category or the capacity for rational thought and autonomy promoted by Kant: above, 41 - 43, 52 - 56. He rejects rationales from marginal cases such as general capacity, partial autonomy, or social obligation: above, 58 - 60.

On Sen and Nussbaum’s capabilities approach, see Ackermann Human dignity: Lodestar for equality in South Africa (n 21 above) 70 - 74.

‘Freedom of contract has been said to lie at the heart of constitutionally prized values of dignity and autonomy. Yet the evolution of contract law suggests that the notion of sanctity of contract has been used to undermine rather than reinforce true volition.’: n 390 above, [150] (footnote omitted).

Lewis criticised Sachs J for encroaching on the separation of powers by, in effect, drafting legislation without sufficient evidence on which to assess the facts and develop the law: n 390 above, 451, 458.

n 390 above, [140], citing Mort NO v Henry Shields-Chiat 2001 1 SA 464 (C) 474J - 475F (references omitted).

1998 1 SA 300 (CC) [124]:

Being trapped in a stereotyped and outdated view of marriage inhibits the capacity for self-realisation of the spouses, affects the quality of their relationship with each other as free and equal persons within the union, and encourages society to look at them not as ‘a couple’ made up of two persons with independent personalities and shared lives, but as ‘a couple’ in which each loses his or her individual existence. If this is not a direct invasion of fundamental dignity it is clearly of comparable impact and seriousness. Dignity can be opened up inwards (relating to the inner mental and emotional world of the person) and outwards (relating to the person’s social and relational identity and being): Dupré (n 214 above) 194.

1996 2 SA 751 (CC) [150]:

[H]uman beings live within a society and are dependent upon one another. The conception of freedom underlying the Constitution must embrace that inter-dependence without denying the value of individual autonomy. It must recognise the important role that the state, and others, will play in seeking to enhance individual autonomy and dignity and the enjoyment of rights and freedoms.
individual’s identity. Kriegler J (dissenting) warned about assuming that
women are closer than men to their children.\footnote{396}

Langa J in \textit{Makwanyane} saw the dual constituents of rights and duties
arising out of living in a community:\footnote{397}

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

Ackermann J quoted from Kant to illustrate the primacy accorded to
freedom, but even Kant accepted that it is limited by the freedom of others.\footnote{398}

\footnote{396 \textit{President of the Republic of South Africa v Hugo} 1997 4 SA 1 (CC) 80 (footnote omitted):
One of the ways in which one accords equal dignity and respect to persons is by
seeking to protect the basic choices they make about their own identities. Reliance
on the generalisation that women are the primary care givers is harmful in its
tendency to cramp and stunt the efforts of both men and women to form their
identities freely.}

\footnote{397 \textit{n 146 above}, [224]. The Confucian conception of ‘human dignity’ centres on in-
dividual consciousness and respect for every person; with its egalitarian content and
recognition of common humanity, it – like \textit{ubuntu} – also gives rise to a corresponding
duty to show respect for others: MYK Lee ‘Universal human dignity: Some reflections
Non-Western philosophies – African, Asian and indigenous traditions – lay great
emphasis on the obligations/responsibilities of an individual as compared with his or
her rights: NMI Goolam ‘Human dignity – Our supreme constitutional value’ (2001)
4 Potchefstroom Electronic Law Journal 1 at 5. Nazeem Goolam considers that since
every human being has a responsibility to treat every other human being in a dignified
and humane manner, human dignity is a universal human duty: above, 4.

\footnote{398 \textit{Ferreira} (n 384 above) 52, citing \textit{Kant The metaphysical elements of justice} trans J
Ladd (1985) 43:
Kant conceptualises freedom as the ‘only one innate right’ in the following terms:
‘Freedom (independence from the constraint of another’s will), insofar as it is
compatible with the freedom of everyone else in accordance with a universal law,
is the one sole and original right that belongs to every human being by virtue of his
humanity.’
On the Constitutional Court’s understanding of dignity in Kantian terms, see Ackerm-
mann \textit{Human dignity: Lodestar for equality in South Africa} (n 21 above) 99 - 102.}
As Mahomed J expressed eloquently in *Makwanyane*, reciprocal love for each other enriches not just the lover and the beloved, but wider society as well:399

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

Mokgoro J encapsulated the multi-factorial nature of communication and its importance for dignity:400

… freedom of speech is a *sine qua non* for every person's right to realise her or his full potential as a human being, free of the imposition of heteronomous power. Viewed in that light, the right to receive others’ expressions has more than merely instrumental utility, as a predicate for the addressee’s meaningful exercise of her or his own rights of free expression. It is also foundational to each individual’s empowerment to autonomous self-development.

O’Regan J illustrated a broad embrace of cultural diversity:401

With human dignity as the lodestar, it becomes clear that treating people as worthy of equal respect in relation to their cultural practices requires more than mere tolerance of sincerely held beliefs with regard to cultural practices.

She understood that ‘an approach to cultural rights in our Constitution must be based on the value of human dignity which means that we value cultural

399 n 146 above, [263]. Tabaro J of the Ugandan Constitutional Court stated that *ubuntu* is a concept embraced by all the communities of Uganda; he agreed with Madala J’s view of it in *Makwanyane* as being associated with humaneness, social justice and fairness, and permeating fundamental human rights; he also referred with approval to Langa J’s conclusion in *Makwanyane* that the concept carries with it the idea of human dignity and true humanity: *Abuki v AG* [1997] UGCC 5 at 9.
400 *Case v Minister of Safety and Security* 1996 3 SA 617 (CC) [26] (footnote omitted).
401 *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) [156].
practices because they afford individuals the possibility and choice to live a meaningful life.”

One’s religion is a central aspect of dignity, according to Ngcobo J in dissent in *Prince II*:

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.

Therefore respect for the beliefs of others and facilitation of the practice of their beliefs is necessary. The majority in *Prince II* approved of Sachs J’s contextual approach in *Christian Education* instead of the use of different levels of scrutiny. All the judges in *Prince II* applied the balancing test, but ended up giving different weights to the relevant factors. They all accepted that freedom of religion was infringed, but there was disagreement over whether a workable exception could be framed and policed. Sachs J (dissenting) expanded on the meaning of a contextual balancing exercise and focused on the effect on people:

The balancing has always to be done in the context of a lived and experienced historical, sociological and imaginative reality. Even if for purposes of making its judgment the Court is obliged to classify issues in

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402 Pillay (n 401 above) [157]. Steven Rockefeller advocated expanding the politics and ethics of equal dignity so that respect for the individual was understood to involve not only respect for the universal human potential in every person, but also respect for the intrinsic value of the different cultural forms in and through which individuals actualise their humanity and express their unique personalities: SC Rockefeller ‘Comment’ in C Taylor et al, *Multiculturalism: Examining the politics of recognition* (1994) 87.


405 n 403 above, [128], citing *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) [30].

406 Sachs (n 82 above) 209.

407 n 403 above, [151].
conceptual terms and abstract itself from such reality, it functions with materials drawn from that reality and has to take account of the impact of its judgments on persons living within that reality. Moreover, the Court itself is part of that reality and must engage in a complex process of simultaneously detaching itself from and engaging with it. I believe that in the present matter, history, imagination and mind-set play a particularly significant role, especially with regard to the weight to be given to the various factors in the scales.

The balancing of freedom of religion against the public interest in curbing drug use was a particularly difficult task in *Prince II*, where the majority held that the banning of cannabis was justified even though Rastafarians wished to use it for religious purposes. The dilemma for society where religion collides with other community goals is evident in another passage from Sachs J’s minority judgment in which he strived to show how reconciliation between apparently conflicting interests could satisfy religious beliefs while benefiting all living in a receptive tolerant community:

> [N]o amount of formal constitutional analysis can in itself resolve the problem of balancing matters of faith against matters of public interest. Yet faith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a constitutional principle. Religious tolerance is accordingly not only important to those individuals who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.

There can also be a dilemma for the judiciary to ensure respect for the separation of powers while upholding constitutional values, as mentioned by Sachs J after he distinguished the South African accommodation of minority religions from the position in the US:

> [L]imitations analysis under section 36 is antithetical to extreme positions which end up setting the irresistible force of democracy and general law enforcement, against the immovable object of constitutionalism and protection of fundamental rights. What it requires is the maximum

408 n 403 above, [170]
409 n 403 above, [155]
harmonisation of all the competing considerations, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet guided by international experience, articulated with appropriate candour and accomplished without losing sight of the ultimate values highlighted by our Constitution. In achieving this balance, this Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the legislature and the executive, and what falls squarely to be determined by the judiciary.

The Court used less restrictive means arguments in its reasoning. The UN Human Rights Committee found that there was no breach of the International Covenant on Civil and Political Rights. Understanding that dignity can be infringed by dehumanising behaviour, treating people as objects or instruments, stigmatising them and stereotyping individuals, Chaskalson P invoked US case-law on the dehumanising effect of capital punishment:

It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process.

Excessive punishment as a deterrent offends dignity, according to Sachs J in Mohunram v National DPP. Kentridge AJ, quoting Dickson CJC, upheld the presumption of innocence as essential to dignity in order to avoid the stigma of being prematurely branded a criminal.

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412 Makwanyane (n 146 above) above, [91], citing People v Anderson, 493 P2d 880 (Cal 1972) 899.
413 2007 4 SA 222 (CC) [146]: Deterrence as a law enforcement objective is constrained by the principle that individuals may not be used in an instrumental manner as examples to others if the deterrence is set at levels beyond what is fair and just to those individuals. To do otherwise would be to breach the constitutional principle of dignity.
414 S v Zuma 1995 2 SA 642 (CC) [22], citing R v Oakes (1986) 26 DLR (4th) 200 at 212-213 (Supreme Court of Canada): ‘The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual
The traditional South African concept of *ubuntu* promotes the goal of harmonious communal living, while at the same time recognising each participant’s right to respect. The intrinsic worth of an individual, and the freedom to develop and maintain an identity, lead to a person having an interest in their reputation. O’Regan J captured the dual interest in reputation:

The value of human dignity in our Constitution is not only concerned with an individual’s sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. …'

415 *Ubuntu* has resonances of Confucianism, where harmony involves physical and psychological balance, and also a balanced, mutual connectedness among all things in the cosmos; harmony is not uniformity, but means recognising an organic interconnectedness based in our complementary differences rather than seeing all as equivalent in value: SC Angle ‘Human rights and harmony’ (2008) 30 Human Rights Quarterly 76 at 79. On the concept of *ubuntu*, see Ackermann *Human dignity: Lodestar for equality in South Africa* (n 21 above) 111 - 115; JD Bessler ‘In the spirit of ubuntu: Enforcing the rights of orphans and vulnerable children affected by HIV/AIDS in South Africa’ (2008) 31 Hastings International and Comparative Law Review 33 at 41 - 46; Botha (n 178 above) 204 - 205.

416 As Langa CJ amplified in Pillay (n 401 above) [53] (footnotes omitted):

The notion that ‘we are not islands unto ourselves’ is central to the understanding of the individual in African thought. It is often expressed in the phrase *umuntu ngumuntu ngabantu* which emphasises ‘communality and the inter-dependence of the members of a community’ and that every individual is an extension of others. According to Gyekye, ‘an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons’. This thinking emphasises the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one’s sense of self-worth is defined by one’s identity. Cultural identity is one of the most important parts of a person’s identity precisely because it flows from belonging to a community and not from personal choice or achievement.

A similar situation exists in Germany where the individual is not seen as a lone rights-bearer, but is a free person in a social federal state in which people are inter-dependent without encroaching on each other’s intrinsic value: LAA Pagán ‘Human dignity, privacy and personality rights in the constitutional jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico’ (1998) 67 Revista Jurídica de la Universidad de Puerto Rico 343 at 348.

417 See *Masetlha v President of the Republic of South Africa* [2007] ZACC 20, 2008 1 SA 566 (CC) [98].

418 *Khumalo v Holomisa* 2002 5 SA 401 (CC) [27].
value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public’s estimation of the worth or value of an individual.

According to Sachs J, the apartheid system itself clearly debased the oppressed, but it also infringed the dignity of the oppressors. O’Regan J pointed out that tolerance is inexorably associated with free speech, thus allowing room for dissenters as society develops an associative culture.

These examples from South African jurisprudence illustrate the abundance of philosophical analysis underpinning decisions. The judges consistently display an acute awareness of the constitutional values that have a transformative aim rooted in an abhorrence of the previous inhumane apartheid system. They know it is their duty to analyse and translate the Constitution into legally enforceable concepts, and base their judgments on normatively sound rationalised principles.

3.2.4.2 Human dignity and substantive rights
As well as being a unique right in Section 10, dignity has a pre-eminent place in the Bill of Rights, as one of the three democratic values affirmed by the Bill, the other two being equality and freedom. These same values govern the limitation of rights and must be promoted in the interpretation of the

419 Minister of Finance v Van Heerden 2004 6 SA 121 (CC) [145]:
[T]he system of state-sponsored racial domination not only imposed injustice and indignity on those oppressed by it, it tainted the whole of society and dishonoured those who benefited from it. Correcting the resultant injustices, though potentially disconcerting for those who might be dislodged from the established expectations and relative comfort of built-in advantage, is integral to restoring dignity to our country as a whole.

420 South African National Defence Union v Minister of Defence 1999 4 SA 469 (CC) (SANDU) [8]:
[Freedom of expression] is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views.

421 Sec 7(1).
422 Sec 36(1).
Bill. By Section 35(2)(e) every detained person has the right to conditions compatible with dignity while in custody.

The right of everyone to have their inherent dignity respected and protected in Section 10 is broadly framed and, as George Devenish says, covers a wide range of circumstances which could constitute a violation of dignity involving not just the liberal democratic rights, but conceivably 'freedom from poverty and disease and a clean and healthy environment in which life is tolerable.' Accordingly it has a significant socio-economic aspect. It may be limited, although in a circuitous fashion – in common with all other rights – the extent of the limitation is itself restricted by the foundational values including human dignity. The rights to dignity and to life are the only rights that are completely immune from derogation in times of emergency. Chaskalson P described their pre-eminent position in *Makwanyane*.

423 Sec 39(1).

424 n 200 above, 83. According to the Kenyan High Court, which interpreted the right to life as including the activity of living in some environment, '[t]he right to a clean environment is primary to all creatures including man, it is inherent from the act of creation': *Waweru v Republic* [2006] eKLR (High Court of Kenya, 2 March 2006) 7. The Court referred to the link in the UN Stockholm Declaration between freedom, equality, and a life of dignity and well-being: above, 11, citing UN Conference on the Human Environment 'Stockholm Declaration' (16 June 1972) UN Doc A/Conf.48/14/Rev 1 (1973), Principle 1. It took into account the rights of all in society to a clean environment, thus evoking the issue of environmental justice, and, even though the state authorities had failed to provide safe sewerage treatment works, the Court emphasised the continuous need for traders to accept responsibility and not to commit environmental crimes, which ought to be severely punished: *Waweru v Republic* [2006] eKLR (High Court of Kenya, 2 March 2006) 7, 11 - 12, 14. Sustainable development had a cost element to be met by the developers: above, 6.

In a later majority judgment, the Court confirmed the derivation from the right to life of 'a right to a clean and healthy environment free from pollution of any kind that is detrimental to human health, wealth and/or socio-economic well being and ultimately the human life': *Nabori v AG* [2007] eKLR (High Court of Kenya, 11 December 2007) 126. Having stated that the right to life included the right to live with human dignity, Rawal J continued, '[t]aking any lesser interpretation will be an affront to the dignity of human life and any hindrance or limitation to enjoy the right to live would be derogation of the most fundamental right of any human being': above, 114.

425 n 200 above, 83. The Nigerian High Court held that gas flaring in the course of oil extraction was a gross violation of the fundamental right to life (including healthy environment) and dignity, and that legislation allowing it was unconstitutional: *Gbemre v Shell Petroleum Development Co Nigeria Ltd* [2005] AHRLR 151 (NgHC 2005) 5, citing Constitution of the Federal Republic of Nigeria 1999, Secs 33(1) & 34(1).

426 Sec 36(1). See Rautenbach (n 2 above) 338 - 340.

427 Sec 11.

428 Sec 37(5)(c).

429 n 146 above, [144].
The rights to life and dignity are the most important of all human rights, and the source of all other personal rights…. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.

The reference to ‘inherent dignity’ in Section 10 acknowledges that it is an innate quality in everyone not dependent on being endowed by the state. The content of human dignity is not set out in the Constitution. Its essence is wider than the more technical meaning in Roman-Dutch law, where it was equated with the conceptually limited term of ‘self-esteem’ and its infraction invariably involved insult. In any event the tort action for breach of dignitas was recognised only in the private law sphere and did not affect the state.

Ackermann J set out the minimum import of dignity in the Sodomy case:

Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.

Currie and de Waal describe it as ‘the source of a person’s innate rights to freedom and to physical integrity, from which a number of other rights flow. As a value, it ‘provides the basis for the right to equality – inasmuch as every person possesses human dignity in equal measure everyone must be treated as equally worthy of respect.’ Currie and de Waal explain its place as a right thus:

As a fundamental right, it has a residual function. It applies where many of the more specific rights that give effect to the value of human dignity, do not. In addition, since the rights in the Bill of Rights stem from dignity and are more detailed elaborations of aspects of the concept, the core right to dignity has decisive application only relatively infrequently.

430 Devenish (n 200 above) 84.
432 n 364 above, [28] (footnote omitted).
433 n 4 above, 273 (footnote omitted).
434 As above.
435 n 4 above, 275 (footnotes omitted).
Dignity is referred to in the Constitution in other contexts apart from as an underlying value and in connection with substantive rights.436

436 Organs of state are obliged to assist and protect the dignity, first, of the courts: Sec 165(4); second, of the institutions of Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, the Electoral Commission: Sec 181(3); and, third, the Public Service Commission: Sec 196(3).

Ministers, Deputy Ministers, Premiers, Acting Premiers and members of provincial Executive Councils swear or affirm to uphold their office with honour and dignity: Sch 2, Secs 3 & 5.
Chapter 4
The right to dignity

As the value of human dignity supports many constitutional rights,¹ the Constitutional Court frequently bases its decisions on a right other than that to dignity in Section 10. In those circumstances, there is no need to consider the right to dignity as the ratio decidendi. O’Regan J in Dawood revealed the multiple significant roles of dignity resulting in the right to dignity itself often playing a secondary part.²

Even though constitutional rights overlap to a great extent, each right is considered individually. In a minority judgment in S v Jordan, Sachs and O’Regan JJ refused to recognise a right to autonomy not specifically mentioned in the Constitution, remarked that it was not useful to amalgamate

¹ See Alexander v Minister of Justice [2010] NASC 2 (SC of Namibia) [99]-[101].
² Dawood v Minister of Home Affairs 2000 3 SA 936 (CC) [35] (footnotes omitted):

The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.

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rights to create a new right and went on to consider in turn each right allegedly breached.\(^3\) The right to dignity has a pre-eminent place on a par with the right to life. O'Regan J in *Makwanyane* noted their interlinked nature.\(^4\) She founded the right to dignity and to be treated with respect on the intrinsic worth of the individual.\(^5\)

The Constitutional Court made it clear in *Mohamed v President of the Republic of South Africa* that the right to dignity is one of three rights not subject to being curtailed even when there are weighty countervailing demands.\(^6\) While the Court did not decide on the issue, it raised the notion of non-waiver of the right to dignity.\(^7\)

\(^3\) 2002 6 SA 642 [53]:

While we accept that there is manifest overlap between the rights to dignity, freedom and privacy, and each reinforces the other, we do not believe that it is useful for the purposes of constitutional analysis to posit an independent right to autonomy.

There can be no doubt that the ambit of each of the protected rights is to be determined in part by the underlying purport and values of the Bill of Rights as a whole and that the rights intersect and overlap one another. It does not follow from this however that it is appropriate to base our constitutional analysis on a right not expressly included within the Constitution.

\(^4\) *S v Makwanyane* 1995 6 BCLR 665 (CC) [326]-[327]:

[T]he right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.

The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.


\(^5\) ‘Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.’: n 4 above, [328] (footnote omitted). See IM Rautenbach *Rautenbach-Malherbe constitutional law* (2012) 333 - 337.

\(^6\) ‘[O]ur Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice.’: 2001 3 SA 893 (CC) [53].

\(^7\) *Mohamed* (n 6 above) fn 55. Erasmus J in the Western Cape High Court, Cape Town, found that a collective agreement cannot amount to a waiver of individual fundamental
Chapter 4 – The right to dignity

4.1 Equal respect

The idea of equal respect was the basis of the decision in the Sodomy case, where the Constitutional Court found that the criminalisation of sodomy violated the right to dignity. Having identified the offence as punishment of a form of sexual conduct associated with homosexuals, Ackermann J focused on the law’s degradation and devaluation of gay men. Sachs J distinguished breach of the right to dignity from violation of dignity and self-worth under the equality provisions. The right to dignity has a broader brush than rights to dignity and privacy: Beja v Premier of the Western Cape [2011] ZAWCHC 97 [101]. He held that the City of Cape Town in providing unenclosed toilets violated Sections 10 (human dignity), 12 (bodily and psychological integrity), 14 (privacy), 24 (environment), 26 (housing) and 27 (healthcare) of the Constitution: above, [150]. He ordered that the toilets be enclosed: above, [192].

8 I Currie & J de Waal The Bill of Rights handbook (2005) 274. The idea of equal respect could be said to have originated with Rousseau, who deemed it indispensible for freedom; he considered that the balanced reciprocity that underpins equality is the ideal in a republic; thus the age of dignity was born: C Taylor ‘The politics of recognition’ in C Taylor et al, Multiculturalism: Examining the politics of recognition (1994) 45 - 49. On human dignity and equal respect, see J Habermas ‘The concept of human dignity and the realistic utopia of human rights’ (2010) 41 Meta philosophy 464 at 469 - 470, 472.

9 National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 12 BCLR 1517 (Sodomy case) [28]: Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity…. 

10 n 9 above, [124]: The violation of dignity under section 10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It also could be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.
equality and protects individuals in circumstances where they are not respected.\textsuperscript{11} Equal respect was also lacking in \textit{Nyathi} and led to a finding of infringement of the equality and dignity guarantees.\textsuperscript{12} Mr Nyathi had been awarded compensation against the State for medical negligence, but the State failed to pay the amount due. He was precluded by statute from enforcing the debt against the State and, unfortunately, he died before his challenge to the constitutionality of the legislation could be heard. In a majority decision, the Constitutional Court held that his rights to equal protection of the law in Section 9(1) of the Constitution, to protection of dignity under Section 10, and to access to courts in Section 34 had been breached. Madala J considered that his worth as a person had not been recognised.\textsuperscript{13} The State had a particular duty to respect people and there was added insult because of its involvement.\textsuperscript{14}

4.2 Punishment

In \textit{S v Williams} juvenile whipping was held to be a contravention of the right to dignity in Section 10 and of the prohibition on cruel, inhuman or degrading
treatment or punishment in Section 11(2) of the interim Constitution. Apart from the physical aspect, the treatment of an individual – no matter how despicable – as an object violated dignity. Lang J invoked foreign case-law to this effect:

In *Furman v Georgia*, Brennan J postulated criteria in the assessment of what amounts to cruel and unusual punishment. He pointed out that punishment does not become ‘cruel and unusual’ merely because of the pain inflicted. The true significance lay in the fact that members of the human race are treated:

15 Over the previous 30 years at least, South African jurisprudence had experienced a growing unanimity in judicial condemnation of corporal punishment for adults, with consistent and emphatic criticism of the practice, it being characterised as ‘punishment of a particularly severe kind … brutal in its nature … a severe assault upon not only the person of the recipient but upon his dignity as a human being’: above, [11], citing Fannin J in *S v Kumalo* 1965 4 SA 565 (N) 574F. It was also called ‘a very severe and humiliating form of punishment’: above, [11], citing De Wet CJ in *S v Myute* 1985 2 SA 61 (Ck) 62H.

16 As Richard Stith said ‘[w]e do not entirely lose our active potential for virtue even by habituation to vice’: R Stith ‘The priority of respect: How our common humanity can ground our individual dignity’ (2004) 44 International Philosophical Quarterly 165 at 182.

17 He mentioned a case from Lesotho, where the court imposed restrictions on the whipping of people aged over 30 years: n 15 above, [40], citing *R v Tsehlana Rev Case 157/77 (HC)*, cited in SC Neff ‘Human rights in Africa: Thoughts on the African Charter on Human and Peoples’ Rights in the light of case law from Botswana, Lesotho and Swaziland’ (1984) 33 International and Comparative Law Quarterly 331 at 339. Aguda JA in Botswana had recognised that certain types of punishment or treatment were ‘by their very nature cruel, inhuman or degrading’ and also that a punishment not inherently inhuman or degrading might become so ‘by the very nature or mode of execution’ notwithstanding the fact that popular demand might favour it: *Williams* (n 15 above) [40], citing *S v Petrus* [1985] LRC (Const) 699 at 725G - 726A. See W Binchy ‘Dignity as a core constitutional concept’ in E Quansah & W Binchy (eds) *The judicial protection of human rights in Botswana* (2009) 181 - 183. On Petrus, see: Hon Justice K Dingake *Expanding the frontiers of fundamental human rights: Judicial protection of human rights in Botswana* in Quansah & Binchy above, 47 - 50; Hon Justice O Tshosa ‘Judicial protection of human rights in Botswana and the role of international human rights law’ in Quansah & Binchy above, 84 - 85.

Stephen Neff’s research showed that the Swaziland courts had been particularly active in imposing restrictions on the use of corporal punishment; in 1978 the High Court there had noted the prevailing opinion among criminologists around the world that the punishment of whipping very rarely, if ever, had any beneficial result and that consequently it should be used only in very exceptional circumstances: Neff above, 339, citing *Kumene v R CRI Case No 112/78 (HC)*. In another case it was held that the number of strokes given for an offence should not ordinarily exceed six: Neff above, 339, citing *R v Zwane CRI Case No 8/73 (HC)*. A third case held that strokes are never an appropriate punishment for a minor traffic offence: Neff above, 339, citing *R v Mthembe CRI Case No 21/81 (HC)*.

18 n 15 above, [28], citing 408 US 238 (1972) 273. The latter case held that capital punishment in Georgia was unconstitutional.
'[... as nonhumans, as objects to be toyed with and discarded ... [and that this is] ... thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.]

'The dignity of man' is the basic concept underlying the prohibition in the United States on cruel and unusual punishment. In *Trop v Dulles*, Chief Justice Warren pointed out that the policy underlying the prohibition was firmly based in the Anglo-American tradition as far back as the Magna Carta and the phraseology was taken from the English Declaration of Rights 1688. The purpose of the prohibition was to ensure that the State exercised its power to punish within the limits of civilised standards. As identified by Justice Brennan in *Furman v Georgia*, the four fundamental principles to be applied cumulatively to assess whether a sanction is precluded as uncivilised and inhuman, are primarily that the punishment is severe enough to be degrading to dignity, and that it is arbitrary, unacceptable to contemporary society and excessive. When referring to the struggle in the US to balance the desire for retribution against the belief in the equal value of individuals, Justice Brennan described 'the dignity of the individual' as society's 'supreme value'.

The disagreement in US society over whether retribution is an acceptable objective in imposing punishment was reflected by the judges in *Gregg v*...
Georgia,25 where the Supreme Court in a majority decision upheld the constitutionality of death penalty legislation introduced in Georgia containing safeguards on the lines outlined in Furman v Georgia.26 Justice Stewart accepted that retribution was no longer the dominant objective in punishment, but neither was it forbidden nor inconsistent with dignity.27 His endorsement of retention of the death penalty brought into the equation the dignity of the victim and society’s interest in deterrence, which could prevail in extenuating circumstances over the dignity of the offender.28 Justice Brennan in dissent adhered to his stance against the death penalty per se and emphasised that foremost among the ‘moral concepts’ recognised in the US was ‘the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings – a punishment must not be so severe as to be degrading to human dignity.’29

Retribution as a punitive objective was held by the majority of the US Supreme Court to be inappropriate for the mentally retarded in Atkins v Virginia and it held that executions of mentally retarded criminals was a

25 n 19 above. See Kende (n 22 above) 77 - 78.
26 While in the US the death penalty is under dispute but is not considered per se to be an offence against human dignity, in Germany the Basic Law abolished it in the light of the Nazi experience; Ernst Benda noted that historical developments, cultural diversity and a society’s principal values help to define the content and borderlines of human dignity; this applies even to societies which share a common cultural and religious heritage, as in the US and Germany: E Benda ‘The protection of human dignity (Article 1 of the Basic Law)’ (2000) 53 Southern Methodist University Law Review 443 at 448 - 449.
27 n 19 above, 183. Helen Knowles identified three main categories of dignity in US Supreme Court death penalty opinions, viz, human dignity requiring abolition of the death penalty (dignity without death), human dignity coexisting with a heavily regulated death penalty (dignified coexistence), and state dignity emphasising respect for the dignity of the institutional apparatuses of the state that employs the death penalty (institutionalised dignity): HJ Knowles ‘A dialogue on death penalty dignity’ (2011) 11 Criminology and Criminal Justice 115 at 116 - 117.
28 ‘[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.’: n 19 above, 184.
cruel and unusual punishment. Its focus was on the excessiveness of the punishment which should be graduated and proportionate to the offence judged by the prevailing standards of decency informed by objective factors as far as possible.

Similar to South Africa, the prohibition in the European Convention on Human Rights (ECHR) on degrading punishment is designed to protect dignity and physical and psychological integrity, as enunciated in *Tyrer v UK*, where the European Court of Human Rights condemned judicially-authorised birching of a minor. The majority considered that the absence of publicity was not the central issue, as the victim could be ‘humiliated in his own eyes, even if not in the eyes of others’. Fitzmaurice J (dissenting

30 536 US 304 (2002). Justice Stevens cited Chief Justice Warren’s explanation in *Trop* of the basic concept underlying the Eighth Amendment’s ban on cruel and unusual punishments as being ‘nothing less than the dignity of man’: above, 311, citing n 19 above, 100. Steven Heyman pointed out that notwithstanding the contrast between the crucial importance accorded to the value of dignity in international human rights law and the tendency to conceive of rights in terms of liberty in American law, dignity is an important theme in US Supreme Court jurisprudence: SJ Heyman *Free speech and human dignity* (2008) 40.

31 Lori Church has criticised the decision on the grounds that the Court ‘disregarded precedent, dramatically lowered the bar in determining what constitutes a national consensus, misapplied the objective standards used to determine a national consensus, and caused further non-uniformity in an already complex area of the law’: LM Church ‘Mandating dignity: The United States Supreme Court’s extreme departure from precedent regarding the Eighth Amendment and the death penalty [*Atkins v. Virginia*, 122 S. Court. 2242 (2002)]’ (2003) 42 Washburn Law Journal 305 at 306.


33 (App no 5856/72) (1979-80) 2 EHRR 1 at 11 [33]:— although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which is the main purpose of Article 3 to protect, namely a person’s dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.

The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.


34 n 33 above, 10 [32].
on the main issue) distinguished punishment of a juvenile from that of an adult.\footnote{35}{n 33 above, 16 [2]. He thought that most punishment involves a loss of dignity, so an effect on dignity was not coterminous with a finding of degrading punishment: n 33 above, 19 [8]. He disagreed with the majority’s reasoning in many respects, including the distinction between institutionalised violence and non-institutionalised violence, the differentiation between being beaten by a stranger and by a person known to the offender, and the attribution of a possible psychological consequence to degrading punishment: n 33 above, 20 - 21 [9]. In his view, a distasteful, undesirable, or morally wrong practice did not necessarily amount to a breach of the prohibition on degrading punishment: n 33 above, 24 [14].}

The Supreme Court of Zimbabwe held in \textit{Juvenile v S} that a sentence of corporal punishment on a juvenile was an inhuman and degrading punishment contrary to Section 15(1) of the Constitution.\footnote{36}{[1989] LRC (Const) 774; Constitution of the Republic of Zimbabwe 1979.} The judges disagreed on the constitutional issue and had various views on whether juvenile corporal punishment was equivalent to adult whipping, whether corporal punishment was inherently degrading, and whether corporal punishment in schools or by parents was degrading. Dumbutshena CJ held that the same considerations should apply to physical chastisement of children by schoolteachers and that even a parent’s common law right to spank a child was limited; he cited South African cases where judges showed their abhorrence towards judicial corporal punishment – in \textit{S v V en ‘n Ander}\footnote{37}{1989 1 SA 532 (A).} the Appellate Division had highlighted the increasingly popular view ‘that it was undesirable and even ill-advised to couple corporal punishment to a long term of imprisonment because it served no acceptable end’ and in \textit{S v November en ‘n Ander},\footnote{38}{1988 1 SA 661 (O) 664 C-D.} Terbutt J had described corporal punishment as ‘a drastic punishment’, which was also ‘humiliating and demoralising.’\footnote{39}{n 36 above, 784.} Gubbay JA disagreed with Fitzmaurice J’s dissenting view in \textit{Tyrer}\footnote{40}{n 33 above.} that there was no difference between ‘the caning of errant schoolboys and a judicial caning’ and considered instead that the concern was ‘not with the gradation of the number of cuts’, but ‘with the essential nature of the punishment itself’\footnote{41}{n 36 above, 794 - 795.}. He went further than the European Court of Human Rights and held that ‘judicial whipping, no matter the nature of the instrument used and the manner of execution,’ was ‘inherently brutal and cruel’; furthermore, it was subject to abuse by those
administering it and was ‘antiquated’ and ‘counter-productive’. McNally JA (dissenting on the constitutional issue) thought there was ‘a very clear distinction between the corporal punishment of adults and the corporal punishment of juveniles’ and associated himself with the minority judgment of Fitzmaurice J in Tyrer, being of the view that all punishment, including imprisonment, involves an element of degradation.

Corporal punishment infringes the dignity of the perpetrator as well as that of the offender. State-sanctioned degrading punishment is particularly odious and is likely to lead to a general disregard for dignity.

4.2.1 Corporal punishment of children

Corporal punishment in schools is a contentious issue with different attitudes being taken to it in – and frequently within – various countries. In adjudicating on it, judges have given varying weight to dignity, some regarding it as an absolute value and others being prepared to balance it against other interests.

In Namibia the Supreme Court in Ex p AG, Re Corporal Punishment by Organs of State unanimously held that the infliction of corporal punishment in government schools pursuant to a ministerial code or state direction

42 n 36 above, 796.
43 n 36 above, 798, 800.
44 ‘There is no dignity in the act itself; the recipient might struggle against himself to maintain a semblance of dignified suffering or even unconcern; there is no dignity even in the person delivering the punishment. It is a practice which debases everyone involved in it.’: Williams (n 15 above) [89].
45 Williams (n 15 above) [47]:
If the State, as role model par excellence, treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished.
46 [1991] NASC 2; 1991 3 SA 76 (NmS). The Court in the same case also struck down a sentence of corporal punishment by any judicial or quasi-judicial authority.

Mahomed AJA assessed whether a punishment was inhuman or degrading by looking at domestic and international values. He explained that in exercising an objective value judgment, regard should be had ‘to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution and … to the emerging consensus of values in the civilised international community’: above, 20. His use of national institutions as sources of identification of norms and values added another dimension to judicial interpretation: SK Amoo ‘The constitutional jurisprudential development in Namibia since 1985’ in N Horn & A Bösl (eds) Human rights and the rule of law in Namibia (2008) 50.

This ruling established the liberal credentials of the Namibian Supreme Court and its adherence to international human rights norms: GJ Naldi Constitutional rights in Namibia: A comparative analysis with international human rights (1995) 50.
infringed the prohibition on inhuman or degrading treatment or punishment in Article 8(2)(b) of the Namibian Constitution, which falls under the umbrella of respect for human dignity. Mahomed AJA in his lead judgment gave pre-eminence to dignity, which he stated was inherent in juveniles as well as in adults. Therefore the physical pain or the speedy recovery from the punishment was not determinative.

Sachs J referred to this Namibian case in his judgment for a unanimous Constitutional Court in the challenge by Christian Education of South Africa (representing independent Christian schools) to the prohibition by the South African Schools Act of 1996 of corporal punishment in schools. It was alleged that the prohibition interfered with the right of the parents of the pupils to religious freedom, as they had consented to corporal punishment in school since it was part of their religious convictions. The Minister for Education in defence relied, inter alia, on the children’s constitutional rights

48 ‘Juveniles also have an inherent dignity by virtue of their status as human beings and that dignity is also violated by corporal punishment inflicted in consequence of judicial or quasi-judicial authority.’: n 46 above, 29.
49 The very fact of state-sanctioned punishment was inherently demeaning, n 46 above, 34:
A deliberate and systematic assault with a cane on the buttocks of an individual inflicted by a stranger as a form of punishment authorised by a judicial or quasi-judicial tribunal, is inherently a demeaning invasion on the dignity of the person punished. It must, in these circumstances be degrading or inhuman. It does not become less so because a juvenile might conceivably recover from such a basic infliction on his dignity sooner than an adult might in comparable circumstances. Berker CJ (concurring) took the same view and could be taken as favouring the condemnation of all corporal punishment from whatever source no matter how moderate or controlled, n 46 above, 4:
It seems to me that once one has arrived at the conclusion that corporal punishment per se is impairing the dignity of the recipient or subjects him to degrading treatment or even to, cruel or inhuman treatment or punishment, it does not on principle matter to what extent such corporal punishment is made subject to restrictions and limiting parameters, even of a substantial kind – even if very moderately applied and subject to very strict controls, the fact remains that any type of corporal punishment results in some impairment of dignity and degrading treatment.
Mahomed AJA left open whether punishment inflicted by a teacher pursuant to a parent’s actual delegation of the powers of chastisement would be a violation: n 46 above, 38.

to equality,\textsuperscript{51} dignity,\textsuperscript{52} personal freedom and security,\textsuperscript{53} and to be protected from maltreatment, neglect, abuse or degradation.\textsuperscript{54} The Constitutional Court dismissed the appeal against the finding of the High Court that the ban on corporal punishment in schools did not interfere unduly with the parents’ right to religious freedom. The High Court judge had concluded that the legislative prohibition did not constitute a substantial burden on religious freedom and that corporal punishment in schools infringed the children's right to dignity and security of the person. Sachs J did not rule on the constitutionality of parental correction by physical punishment, but assumed that the legislation infringed the parents’ rights.\textsuperscript{55} The approach in the Constitutional Court was not to portray the problem as the right to bodily integrity versus the right to freedom of conscience, but, as Sachs J described it, to deliver a judgment giving ‘a carefully thought-through balancing of the way these two rights inter-connected in the concrete circumstances of the case.’\textsuperscript{56} The ruling was that, subject to common law principles governing reasonable chastisement, the Christian Education community could maintain the integrity of their faith at home but not impose corporal correction in the more public environ of the schools.\textsuperscript{57} Religious belief is one of the key ingredients in a person's dignity.\textsuperscript{58} But it is not the only aspect of dignity that was relevant, as the trend in Southern Africa had been strongly in favour of regarding corporal punishment in schools as in itself violatory of the dignity of the child.\textsuperscript{59}

\begin{thebibliography}{9}
\item[51] Constitution of the Republic of South Africa 1996, Sec 9(1).
\item[52] Sec 10.
\item[53] Sec 12(1)(c), (d) & (e).
\item[54] Sec 28(1)(d).
\item[55] n 50 above, [27].
\item[56] A Sachs \textit{The strange alchemy of life and law} (2009) 272. As Sachs J stated in \textit{Christian Education} ‘[o]ur Bill of Rights, through its limitations clause, expressly contemplates the use of a nuanced and context-sensitive form of balancing’; n 50 above, [30].
\item[57] Sachs \textit{The strange alchemy of life and law} (n 56 above) 272.
\item[58] \textit{Christian Education} (n 50 above) [36].
\item[59] \textit{Christian Education} (n 50 above) [47]. See Grant (n 11 above) 313 - 314. Cf \textit{Canadian Foundation for Children, Youth and the Law v Canada (AG) 2004 SCC 4, [2004] 1 SCR 76}, where the Supreme Court of Canada in a majority decision upheld the constitutionality of the use of reasonable corrective force by parents and teachers. Binnie J (dissenting in part in \textit{Canadian Foundation}) found a violation of the equality provision, but it could be justified in relation to parents. He criticised the Chief Justice for concluding that children’s equality rights were not infringed because their dignity was not offended by depriving them of the protection of their physical integrity against the use of unlawful force: above, [72]. He agreed with the conclusion in a report that the child’s dignity was breached by the humiliation of corporal punishment, but
\end{thebibliography}
The South African Constitutional Court has hesitated to condemn corporal punishment unambiguously and has clearly not found that it violates children’s rights in all circumstances, leaving scope for tipping the balance in favour of the parents’ rights to exert control by physical means. Langa J in *S v Williams*, which did not deal with corporal punishment in schools, mentioned that it was a controversial topic\(^{60}\) and stated, ‘[i]t is not necessary to comment on the suggestion that judicial corporal punishment is in reality no worse than cuts imposed at school’.\(^{61}\) He referred to the requirement of the European Court of Human Rights that for punishment to be degrading, it had to reach a minimum level of severity, attaching importance to ‘the difference between strokes inflicted by a policeman as a result of a court order’ and ‘corporal punishment administered by a headmaster in terms of disciplinary rules’ in a boarding school.\(^{62}\) The attitudes to the significance of punishment in the school environment differed – the European Court of Human Rights ‘seemed to attach some importance to the difference between strokes inflicted by a policeman as a result of a court order … and corporal punishment administered by a headmaster in terms of disciplinary rules in force within the school in which the youth was a boarder’, whereas Justice White in a dissenting opinion in the US Supreme Court considered that when corporal punishment became so severe as to be unacceptable in a civilised society the fact that it was inflicted in public schools did not make it any more acceptable.\(^{63}\)

mainly by the inherent lack of respect: above, [107], citing C Bernard ‘Corporal Punishment as a Means of Correcting Children’ Quebec Commission des droits de la personne et des droits de la jeunesse (November 1998) 8. Deschamps J (dissenting) considered that the equality breach was not justified, as the legislation did not meet the proportionality test. Arbour J (also dissenting) thought the legislation infringed the child’s security interest, and the deprivation was not in accordance with the principles of fundamental justice, since its wording was vague. For reviews of Canadian Foundation, see: PW Hogg *Constitutional law of Canada* Vol 2 (2007) 196 - 197, 376, 392, 420, 427 - 428, 632, 669 - 670; G Shannon *Child law* (2010) [2-31], [11-191]; B Shmueli ‘Corporal punishment in the educational system versus corporal punishment by parents: A comparative view’ (2010) 73(2) *Law and Contemporary Problems* 281 at 285 - 286, 314 - 315.

60 n 15 above, [48].
61 n 15 above, [49].
63 n 15 above, [49], citing Costello-Roberts (n 62 above) and *Ingraham v Wright* 430 US 651 (1977) 692.
In *Christian Education*, Sachs J avoided ruling on the extent of children’s rights by dealing with the issue of punishment in schools by a proportionality analysis under the limitations clause. He concluded that the legislation prohibiting corporal punishment in all schools – private as well as public – was reasonable and was justified in restricting the parents’ rights to religious freedom on the assumption that this freedom included a right to chastise their children. He made a clear distinction between the school and the home, when he stated, ‘corporal punishment administered by a teacher in the institutional environment of a school is quite different from corporal punishment in the home environment.

The Namibian Supreme Court’s decision on corporal punishment is wider in scope than that of the South African Constitutional Court, the Namibian Court finding that state-sanctioned corporal punishment in schools infringed children’s inherent dignity. Unlike the South African Constitutional Court, it was less open to arguments attempting to justify corporal punishment of young people in a learning environment. In contrast to the Namibian and South African courts, the European Court of Human Rights in a narrow majority of five votes to four found in *Costello-Roberts v UK* that the use of reasonable corporal punishment in schools did not breach the prohibition on inhuman or degrading treatment or punishment in Article 3 ECHR. By requiring a minimum level of severity, the Court accepted that human dignity is not absolute. The US Supreme Court held by a narrow majority in *Ingraham v Wright* that the prohibition against cruel and unusual punishment

64 n 50 above, [32].
65 n 50 above, [50]-[52].
66 n 50 above, [49]. He distinguished conduct in ‘the intimate and spontaneous atmosphere of the home’ from ‘the detached and institutional environment of the school’: n 50 above, [49].
67 n 62 above. The Court took into account the context in which the punishment was imposed and its nature, duration, and physical and mental effects on the pupil, whose age, sex and state of health were relevant in certain circumstances: n 62 above, [30]. The approach of the European Court of Human Rights was quite different from that of the Supreme Court of Namibia which emphasised the inherently demeaning character of such punishment rather than its relative nature: Naldi (n 46 above) 51.
68 The seven-year old boy in a private school had shown no evidence of ‘any severe or long-lasting effects as a result of the treatment complained of’, but even if such effects were not shown, the Court indicated that there could be particular circumstances where it could be said that the punishment reached the minimum threshold of severity required; the Court made it clear that it was not endorsing corporal punishment and it had ‘certain misgivings about the automatic nature of the punishment and the three-day wait before its imposition’: n 62 above, [32].
in the Eighth Amendment was designed to protect those convicted of crime and did not apply to disciplinary corporal punishment in public schools.69

At the international level, the United Nations has progressively narrowed any scope for corporal punishment of children by the state, in school and at home. The Convention on the Rights of the Child (CRC) adopted in 1989 has a strong emphasis on the equal dignity of all – children as well as adults.70 It contains several provisions impacting on corporal punishment of children. There is an obligation on states to legislate and educate to defend children from violence or ill-treatment in article 19(1),71 which embraces control over all those in charge of children, whether at home, in school or elsewhere. Article 37(a) contains a general ban on torture or other cruel, inhuman or

The four judges dissenting on the Art 3 issue were struck by ‘the ritualised character of the corporal punishment’ and also mentioned the three-day gap before the headmaster of the school “‘whacked” a lonely and insecure seven-year-old boy’: n 62 above, 137. They considered that a spanking on the spur of the moment might have been permissible, but viewed as degrading ‘the official and formalised nature of the punishment meted out, without adequate consent of the mother’: n 62 above, 137 - 138. They adverted to the trend in Europe (and in the UK since the corporal punishment the subject of the complaint) to render unlawful corporal punishment in state and certain independent schools, and felt that the discrepancy caused by the progressive outlawing elsewhere must have added to the degradation of the remaining pupils in independent schools whose disciplinary regimes persisted in corporal punishment: n 62 above, 138.

69 n 63 above. This finding has given the states wide latitude regarding the treatment of the parental privilege to use physical force to discipline children: KL Willis ‘Willis v State: Condoning child abuse as discipline’ (2010) 14 University of California Davis Journal of Juvenile Law and Policy 59 at 73. In 2008 the Indiana Supreme Court overturned the conviction of a single mother for battery of her son, as parents had a fundamental liberty interest to direct the upbringing of children, which included using ‘reasonable or moderate physical force’ to control behaviour: Willis above, 89, citing Willis v State 888 NE.2d 177 (Ind 2008) 180. Indiana’s interest in protecting the welfare of children lost out in the balance against the mother’s liberty, and her plea of the parental privilege defence succeeded: Willis above, 89 - 90.

70 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. Although the US and Somalia are the only countries which have not ratified the CRC, the US courts have already begun using it as persuasive authority under the doctrine of ‘customary international law’: JM Fuller ‘The science and statistics behind spanking suggest that laws allowing corporal punishment are in the best interests of the child’ (2009) 42 Akron Law Review 243 at 256, 258 - 259. On CRC, see S Coetzee ‘Discipline in Nigerian schools within a human rights framework’ (2010) 10 African Human Rights Law Journal 478 at 484 - 487.

71 It reads:
State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
degrading treatment or punishment of children, but there is no explicit
prohibition of corporal punishment. Included in the educational provisions
is a duty on states to take measures to ensure that school discipline is
administered in a manner ‘consistent with the child’s human dignity’ and in
conformity with the CRC.\footnote{CRC (n 70 above) art 28(2).}

Recognising the development of norms in society across the globe over
time, the UN Committee on the Rights of the Child through its general
comments has essentially outlawed all corporal punishment of children in
all environments.\footnote{There is disagreement among scholars on whether the CRC bans the use of light,
educational corporal punishment: Shmueli (n 59 above) 306 - 307. Benjamin Shmueli
proposes a reading of the CRC which would interpret it as not barring educational
corporal punishment but only violence committed for extraneous purposes: n 59
above, 312 - 313.} Its General Comment No 8 dealing with corporal
punishment contains reminders of the significance of the dignity of children\footnote{UN Committee on the Rights of the Child ‘General Comment No 8’ (2 March 2007)
UN Doc CRC/C/GC/8 [2], [5], [7], [16], [17].} as a precursor to an adamant statement that the CRC bans all corporal
punishment with a consequent obligation on states to enforce the ban.\footnote{n 74 above, [18]:
There is no ambiguity: ‘all forms of physical or mental violence’ does not leave
room for any level of legalized violence against children. Corporal punishment and
other cruel or degrading forms of punishment are forms of violence and States must
take all appropriate legislative, administrative, social and educational measures to
eliminate them.
Courts in many countries have issued decisions, usually quoting the CRC ‘condemning
corporal punishment of children in some or all settings’: n 74 above, [25].}

In 1996 Italy’s highest Court, the Supreme Court of Cassation, invoking the
CRC, effectively prohibited all parental use of corporal punishment, basing
its decision, first, on the dignity of the individual – meaning that children
were not the objects of their parents – and, second, on the fostering of the
child’s personality.\footnote{UN Committee on the Rights of the Child ‘General Comment No 8’ (n 74 above) fn
15, citing Cambria, Cass, sez VI, 18 Marzo 1996 [Supreme Court of Cassation, 6th
Penal Section, 18 March 1996], Foro It II 1996, 407 (Italy). The Italian Court’s own
description as cited was:
The use of violence for educational purposes can no longer be considered lawful.
There are two reasons for this: the first is the overriding importance which the
[Italian] legal system attributes to protecting the dignity of the individual. This includes
‘minors’ who now hold rights and are no longer simply objects to be protected by
their parents or, worse still, objects at the disposal of their parents. The second reason
is that, as an educational aim, the harmonious development of a child’s personality,
which ensures that he/she embraces the values of peace, tolerance and co-existence,
cannot be achieved by using violent means which contradict these goals.}
The General Comment requires that states take action against corporal punishment even in the traditional sanctity of the home. The state has a multiple role in upholding children's rights to be free from corporal punishment. In addition to the requirement to make it 'explicitly clear that the criminal law provisions on assault also cover all corporal punishment, including in the family', it may be possible to have civil and family law measures 'prohibiting the use of all forms of violence, including all corporal punishment.'

4.2.2 Punishment of adults

African countries have varied in their attitude to corporal punishment of adults and in the rate of progress in banning it. In 1987 the Supreme Court of Zimbabwe had held unanimously in Ncube v S that adult whipping was unconstitutional, being inhuman or degrading punishments contrary to Section 15(1) of the Constitution. The Ugandan Supreme Court considered...
corporal punishment in *Oryem v Uganda* and confirmed the Constitutional Court’s finding in *Kyamanywa* that corporal punishment – in that case six strokes of the cane – contravened the prohibition in Article 24 of the Constitution on torture, cruel, inhuman or degrading treatment or punishment.81

In *A v UK*, where the European Court of Human Rights held that the state had a duty to protect individuals against injury from private parties, the stepfather of a child had beaten him severely with a garden cane on more than one occasion, but a jury acquitted him of assault occasioning actual bodily harm and accepted his defence of ‘reasonable chastisement’.82

The rights to dignity, life and not to be subject to cruel, inhuman or degrading punishment were all breached when South African immigration officers handed over to the FBI a Tanzanian national suspected of having been involved in the bombing of the US embassy in Dar es Salaam.83 He was put on trial for conspiracy in New York. The Constitutional Court held that the South Africans should have obtained a prior undertaking from the US that the death penalty would not be executed if he were found guilty. In

He was of the opinion that whipping in its very nature was ‘both inhuman and degrading’ and relied on four adverse features inherent in the infliction of whipping, namely, first, the manner in which it was administered, which rendered it ‘not only inherently brutal and cruel, … but which stripped the recipient of all dignity and self-respect’; second, by its very nature, it treated ‘members of the human race as non-humans’; third, it was easily subject to abuse; and fourth, it was degrading to both the punished and the punisher, it caused the executioner and society to stoop to the level of the criminal, and it was likely to generate hatred against the prison regime and the system of justice: above, 466.


81 [2003] UGSC 30 at 10 - 12 confirming *Kyamanywa v Uganda* (No 10/2000) (Uganda Constitutional Court) 14 December 2001. In Zambia, Chulu J had held in the High Court in 1999 that corporal punishment was ‘inhuman, degrading and barbaric’ and breached the absolute prohibition on torture, inhuman and degrading punishment in the Constitution: *Banda v The People* [2002] AHRLR 260 (ZaHC 1999) [12], [22].

82 (App no 25599/94) (1999) 27 EHRR 611. The Court approved of the approach in *Costello-Roberts* requiring ill-treatment to attain a minimum level of severity if it is to fall within the scope of Art 3 and confirmed that the assessment of this minimum was relative: above, [20]. The obligation on states under Art 1 ECHR to secure to everyone within their jurisdiction the rights and freedoms defined in the ECHR, taken together with Art 3, required states to take measures designed to ensure that individuals were not subjected to ill-treatment by private individuals; there was a particular obligation to provide effective deterrence to protect children and other vulnerable individuals against serious breaches of personal integrity: above, [22].

In *Z v UK* the European Court of Human Rights found that the local authority had failed to take adequate measures to protect children known to be suffering abuse and neglect at the hands of their parents: (App no 29392/95) (2002) 34 EHRR 3. See L Hoyano & C Keenan *Child abuse: Law and policy across boundaries* (2010) 185 - 186; Shannon (n 59 above) [2-30], [11-191], [14-05].

83 *Mohamed* (n 6 above).
Soering v UK the European Court of Human Rights had taken a similar view when a West German national alleged that the decision by the United Kingdom Secretary of State for the Home Department to extradite him to the US to face trial in Virginia on a charge of capital murder would, if implemented, breach Article 3 ECHR. Changing views on capital punishment were central to the Canadian decision in US v Burns, where extradition to the US without assurances concerning the death penalty or life imprisonment without parole was held to violate the right not to be deprived of life, liberty or security other than in accordance with the principles of fundamental justice in Section 7 of the Canadian Charter and was not justified under the limitations clause.

While all eleven judges in Makwanyane agreed that the death penalty was unconstitutional, they based their decisions on varying provisions in the interim Constitution including the right to dignity. Mahomed J referred to

84 (App no 14038/88) (1989) 11 EHRR 439. Although the death sentence per se was not contrary to the ECHR, the Court held that extradition to the US with the risk of a death sentence being imposed and exposure to ‘death row phenomenon’ would violate the prohibition on inhuman or degrading treatment or punishment in Art 3. The Court considered that the manner of imposition and execution of the sentence, the offender’s personal circumstances, the proportionality of the sentence to the crime and the conditions of detention could amount to unacceptable punishment: above, [104]. Society’s changing views were a factor for the Court, which stated, ‘Present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.’ as above.

See RKM Smith Textbook on international human rights (2012) [14.3.2].


87 Sec I. This was contrary to the majority view in Kindler 10 years earlier: Kindler v Canada (Minister of Justice) [1991] 2 SCR 779 (SC of Canada). But Cory J in dissent then had categorised capital punishment as ‘the annihilation of the very essence of human dignity’ and explained, ‘[t]he death penalty not only deprives the prisoner of all vestiges of human dignity, it is the ultimate desecration of the individual as a human being.’: above, 53.


On international and comparative sources referenced in Makwanyane and the way they were linked to the local context, see PG Carozza ‘My friend is a stranger: The death penalty and the global jus commune of human rights’ (2003) 81 Texas Law Review 1031 at 1056 - 1061.
the effect of the death penalty on the dignity of society as a whole. Ackermann J considered that the individual’s right not be put to death gave rise to a corresponding state obligation to defend society from dangerous criminals.

He referred to the German Life Imprisonment case upholding the constitutionality of life imprisonment provided it gave some hope to the offender, whose right to dignity was not abrogated while in prison.

The German Federal Constitutional Court upheld the law on the basis that it was not shown that the serving of a sentence of life imprisonment leads to irreparable physical or psychological damage to the prisoner’s health. The Court did however find that the right to human dignity demands a humane execution of the sentence. This meant that the existing law, which made provision for executive pardon, had to be replaced by a law laying down objective criteria for the release of prisoners serving life sentences. In the course of its judgment, the Court made clear that there is nothing constitutionally objectionable to executing a life sentence in full in cases where the prisoner does not meet the criteria ... 'Human dignity is not infringed when the execution of the sentence remains necessary due to the continuing danger posed by the prisoner and clemency is for this reason precluded. The state is not prevented from protecting the community from dangerous criminals by keeping them incarcerated'.

The German Federal Constitutional Court would not countenance crime deterrence as the sole objective of the criminal justice system, so in Kantian style it required the state to retain respect for the inmate’s dignity and to uphold social justice by not turning the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.

89 n 4 above, [272]: It is not necessarily only the dignity of the person to be executed which is invaded. Very arguably the dignity of all of us, in a caring civilization, must be compromised, by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the conduct of the offender in the first place (see Furman v Georgia 408 US 238 at 273 (1972) (Brennan J, concurring).

90 '[T]here is a correlative obligation on the state, through the criminal justice system, to protect society from once again being harmed by the unreformed recidivist killer or rapist.': n 4 above, [171].


Chapter 4 – The right to dignity

In S v Dodo the Constitutional Court dealt with the constitutionality of the Criminal Law Amendment Act 1997 imposing a mandatory life sentence and was satisfied that the statutory provisions were neither disproportionate nor did they interfere unduly with the court’s role in sentencing.93 The court retained the capacity to consider the circumstances and to decline to impose a life sentence should there be substantial and compelling reasons to impose a more lenient punishment. The Constitutional Court reviewed the impact of dignity in its many guises in the South African Constitution. 94 It noted its place as a foundational value as well as a distinct right and that dignity underpins the Bill of Rights. Dignity’s association with freedom was significant. Ackermann J invoked the Kantian principle of individuals being deserving of respect because of their inherent worth which required that their dignity be not attacked by treating them as objects on account of the imposition of a disproportionate punishment, whether that be merely disproportionate or disproportionate with a deterrent or reformative purpose.95

Comparable sentiments and rationales can be seen in Tcoelb when the Namibian Supreme Court dealt with a similar challenge and held that life

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93 2001 3 SA 382 (CC). Cf Niemand v S [2001] ZACC 11, 2002 1 SA 21 (CC), where legislation imposing an indeterminate sentence on a habitual criminal was found unconstitutional.
94 Dodo (n 93 above) [35].
95 Dodo (n 93 above) [38], citing Prinsloo v Van der Linde 1997 3 SA 1012 (CC) [31]: To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ... the offender is being used essentially as a means to another end and the offender’s dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender’s humanity.

See R O’Connell ‘The role of dignity in equality law: Lessons from Canada and South Africa’ (2008) 6 International Journal of Constitutional Law 267 at 273, fn 50. As is evident from the following passage from his judgment in Dodo (n 93 above) [37], Ackermann J placed proportionality at the centre of the investigation into whether life imprisonment was constitutional:

The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost
imprisonment was not unconstitutional, regard being had to the fact that the relevant legislation permitted release on parole in appropriate circumstances.\textsuperscript{96} Mahomed CJ was mindful of the possibility that, even if the sentence of life imprisonment was not \textit{per se} unconstitutional, its imposition in a particular case might be unconstitutional 'if the circumstances of that case justify the conclusion that it is so grossly disproportionate to the severity of the crime committed that it constitutes cruel, inhuman or degrading punishment in the circumstances or impermissibly invades the dignity of the accused'; he found resonances of this approach in US jurisprudence where grossly excessive sentences had been held to be contrary to the prohibition on cruel and unusual punishment in the Eighth Amendment.\textsuperscript{97} He distinguished between unacceptable infringements of dignity and the unavoidable effect on the individual of guilt and sentence.\textsuperscript{98}

The obligation to undergo imprisonment would undoubtedly have some impact on the appellant’s dignity but some impact on the dignity of a prisoner is inherent in all imprisonment. What the Constitution seeks to protect are impermissible invasions of dignity not inherent in the very fact of imprisonment or indeed in the conviction of a person \textit{per se}.

He also cited the German \textit{Life Imprisonment} case\textsuperscript{99} and used Kantian language to describe the requirement to treat everyone (even convicted criminals) decently.\textsuperscript{100}

It seems to me that the sentence of life imprisonment in Namibia can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner’s natural life as if he was a ‘thing’ instead of a person without any continuing duty to respect his dignity (which would include his right not to live in ex-clusively the length of time for which an offender is sentenced that is in issue. … In order to justify the deprivation of an offender’s freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence. The sentences imposed for criminal offences must be proportionate to the crime and show respect for the dignity of the offender, irrespective of the public interest in curbing crime by making an example of the individual as a deterrent to others.

\begin{itemize}
  \item \textsuperscript{96} \textit{S v Twedd} [1996] NASC 1; 1996 (1) SACR 390 (NmS).
  \item \textsuperscript{97} n 96 above, 19.
  \item \textsuperscript{98} n 96 above, 20.
  \item \textsuperscript{99} n 91 above.
  \item \textsuperscript{100} n 96 above, 13.
\end{itemize}
despair and helplessness and without any hope of release, regardless of
the circumstances).

Rehabilitation with the aim of restoring a sense of humanity in those
incarcerated was worthy of support, as constitutional values mandated
society 'continuously and consistently to care for the condition of its
prisoners, to seek to manifest concern for, to reform and rehabilitate those
prisoners during incarceration and concomitantly to induce in them a
consciousness of their dignity, a belief in their worthiness and hope in their
future.'

There was a divergence of views among the judges of the Canadian
Supreme Court in *R v Smith* when a majority found that legislation imposing
a minimum sentence for importing narcotics breached the ban on cruel and
unusual punishment in Section 12 of the Canadian Charter. In Tanzania
the Court of Appeal found that capital punishment was an inherently cruel,
inhuman and degrading punishment and infringed the right to dignity, but
that the death penalty was saved under the limitations clause. It disagreed
with the High Court’s view that the legislation imposing the death penalty
for murder failed the limitations test as it was arbitrary and disproportionate.
On the question of whether the death penalty was reasonably necessary to
protect the right to life, Ramadhani JA (delivering the Court of Appeal’s
judgment) considered this was for society to decide and the trial judge had
acknowledged that society at that time had so deemed it. The Tanzanian
Constitution contains a prohibition on inhuman or degrading punishment or

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101 n 96 above, 12.
102 [1987] 1 SCR 1045. McIntyre J (dissenting) set out three characteristics of punishment
– any one of which would suffice to render the punishment cruel and unusual – first,
itself character or duration might outrage the public conscience or be degrading to human
dignity; second, it could go beyond what was necessary to achieve a valid social aim,
bearing in mind the legitimate purposes of punishment and adequate alternatives;
and third, it might be arbitrarily imposed by not being applied rationally in accordance
with ascertained or ascertainable standards: above, [94]. As there was a possibility of
parole in this case, he adjudged the minimum sentence for importing narcotics not to
be outrageous or degrading to dignity: above, [96]. See Hogg (n 59 above) 579 - 581.
103 *Mbushu v R* [1995] 1 LRC 216. On the death penalty debate in Tanzania, see A
Gaitan & B Kuschnik ‘Tanzania’s death penalty debate: An epilogue on *Republic v
104 n 103 above, 232.
treatment.\textsuperscript{105} It also protects human dignity in the criminal process and in
the execution of a sentence.\textsuperscript{106} Basic rights may be limited in the public
interest.\textsuperscript{107} The Nigerian Supreme Court held that the death penalty is not
inconsistent with the constitutional guarantee of the right to life.\textsuperscript{108}

The Privy Council in \textit{Reyes v R} was not convinced that the possibility of
a pardon was sufficient to save the mandatory death penalty in Belize.\textsuperscript{109}
Notwithstanding the fact that the right to life was not absolute\textsuperscript{110} since the
Belize Constitution allowed capital punishment,\textsuperscript{111} Lord Bingham found that
the mandatory nature of the death penalty infringed the prohibition on
inhuman and degrading punishment and treatment.\textsuperscript{112}

By a narrow majority in \textit{Kigula v AG} the Ugandan Constitutional Court in
2005 also found that mandatory capital punishment was unconstitutional,
as was an inordinate delay in executing the death penalty.\textsuperscript{113} Like in Belize,

\begin{itemize}
\item[105] Constitution of the United Republic of Tanzania 1977, Art 13(6)(e).
\item[106] Art 13(6)(d).
\item[107] Art 30(2).
\item[108] \textit{Kalu v S} (1998) 3 NWLR (Pt 509) 531, \textit{Okoro v S} (1998) 2 SCNJ 84, both cited in
Nigerian Bar Association, \textit{Training Manual on African Regional Mechanisms for the
\item[109] \textit{Reyes v R (Belize)} [2002] UKPC 11, [2002] 2 AC 235. Lord Bingham pointed out that
mercy came too late in the process after the judicial decision and was distinct from
justice: above, [44]. International bodies interpreting human rights instruments had
generally accepted the need for ‘proportionality and individualised sentencing’: above,
[40]. Lord Bingham effectively framed the issue in transnational terms and relied on
much foreign jurisprudence: Carozza (n 88 above) 1075 - 1077.
\item[110] International instruments (like many national legal systems) do not accord any formal
primacy to the right to life itself, as they contain qualifications rendering it less than
absolute; in contrast, other rights such as freedom from torture and other ill-treatment,
and freedom from slavery and servitude are absolute, and subject to no exceptions of
any kind; therefore international human rights law assigns a higher value to the
quality of living as a process, than to the existence of life as a state; from the viewpoint
of the person concerned, the law tends to regard acute or prolonged suffering (at all
events where it is inflicted by others, and so potentially avoidable) as a greater evil
than death (ultimately unavoidable for everyone): \textit{P Sieghart The international law of

The prohibition on torture, and inhuman or degrading treatment and punishment
in Art 3 ECHR is absolute: \textit{Gülffen v Germany} (App no 22978/05) (2011) 52 EHRR
1 [87], [107], [120], [176].
\item[111] Constitution of Belize 1981, Sec 4(1).
\item[112] Sec 7.
\item[113] [2005] UGCC 8. Okello JA associated the rights to a fair hearing and to equality
before the law in his condemnation of the obligatory death penalty; he found that the
intrusion on the judicial discretion to determine an appropriate sanction violated the
separation of powers, as the legislature had prescribed ‘the only sentence which the
court must impose on conviction’: above, 28.
the right to life is not absolute in Uganda,\(^\text{114}\) so the Court upheld the death penalty \textit{per se}. Death by hanging passed constitutional muster. Twinomujuni JA stated that one of the general principles of constitutional construction is that fundamental rights and freedoms are to be interpreted having general regard to evolving standards of human dignity.\(^\text{115}\) He referred to the minority decision in the US case of \textit{Campbell v Wood}, which concluded:\(^\text{116}\)

\begin{quote}
Even aside from the risks of decapitation and lingering painful death, hanging is simply inconsistent with ‘the dignity of man’ … Hanging is without the slightest doubt, ‘cruel and unusual’ – in layman’s terms and in the constitutional sense.
\end{quote}

However, he distinguished the situation in Uganda from this and other international comparisons because of the terms of its Constitution, which expressly authorised the death penalty ‘clearly in the knowledge that it would be carried out by hanging’, as the practice of hanging criminals in serious crimes had been in vogue for almost 60 years prior to adoption of the Constitution and the people’s opinion that it was a suitable method of carrying out the death sentence was a relevant consideration.\(^\text{117}\)

Another issue on which Twinomujini JA expressed a view was the fettering of judicial discretion by legislation decreeing that life imprisonment meant a maximum of 20 years, which he interpreted as prohibiting a sentence longer than that period. He considered that the judiciary should be able to tailor the sanction to the circumstances of each case, that the entire sentence should be served (subject to remission for good behaviour or other just cause), and that when a ‘life imprisonment’ sentence is pronounced, the convict should serve imprisonment for life, describing the legislation as ‘another attempt by the legislature to pre-determined sentences without hearing the parties in order to determine an appropriate sentence’.\(^\text{118}\) Jamil Mujuzi criticised the wish for life imprisonment to mean the whole of a person’s life,

\begin{flushright}
For a review of this Constitutional Court decision, see A Novak ‘The decline of the mandatory death penalty in common law Africa: Constitutional challenges and comparative jurisprudence in Malawi and Uganda’ (2009) 11 \textit{Loyola Journal of Public Interest Law} 19 at 70 - 74.
\end{flushright}


\(^{115}\) n 113 above, 55.

\(^{116}\) n 113 above, 84 - 85, citing \textit{Campbell v Wood} 18 F.3d 662 (1994) (US Court of Appeals 9th Circuit).

\(^{117}\) n 113 above, 86 - 87.

\(^{118}\) n 113 above, 105.
which – as observed by courts in South Africa and Namibia – would be an infringement of the right to human dignity at the time of sentencing, since it deprived the prisoner of any real hope of release from prison.\(^\text{119}\)

On appeal in 2009, the Supreme Court unanimously upheld the findings that the mandatory death penalty and a delay of more than three years in carrying it out were unconstitutional.\(^\text{120}\) As Okello JA had done in the court below, the Supreme Court highlighted the inequality in the legislation refusing a person convicted of a serious crime an opportunity to plead in mitigation and to have the judge assess their character:\(^\text{121}\)

\[\text{[A]} \text{ a person accused of stealing a chicken may not only be heard in mitigation, but may actually request the court to inquire into his character and antecedents for purposes of assessing appropriate sentence for him, while on the other hand, a person accused of murder and whose very life is at stake, may not do likewise. We think this is inconsistent with the principle of equality before and under the law.}\]

The Court reiterated that the separation of powers had to be respected and unhindered by removal of its discretion in sentencing:\(^\text{122}\)

\[\text{The Court has power to confirm both conviction and sentence. This implies a power NOT to confirm, implying that court has been given discretion in the matter. Any law that fetters that discretion is inconsistent with this clear provision of the Constitution.}\]

On the issue of delay, it evoked the inherent dignity of all when it described the legal status of a convict, ‘[a] condemned person does not lose all his other rights as a human being’ and continued, ‘[h]e is still entitled to his dignity within the confines of the law until his sentence is carried out’.\(^\text{123}\)


121 n 120 above, 43.

122 n 120 above, 45.

123 n 120 above, 47. On condemned persons retaining the right to be treated with dignity, see also Peter Nemi v AG Lagos State (1996) 6 NWLR 587, cited in Nigerian Bar Association (n 108 above) 23.
was confirmed as constitutional by the majority, the sole dissentient being Egonda-Ntende Ag JSC, who considered hanging as a method of execution as carried out in Uganda to be ‘a process that is cruel, inhuman and degrading treatment and punishment’, which failed to meet the test of ‘the least possible physical and mental suffering’ set by the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR). Unlike the majority, he read all the provisions of the Constitution together ‘to provide a harmonious interpretation that does not do violence to the meaning of any one provision’. He found that hanging as practised in Uganda was ‘definitely beyond the pain, suffering or humiliation that should be associated with the death penalty’ and that unnecessary continual reminders by a prison warder in the three days beforehand of the impending violent death must cause ‘the same amount of mental suffering as that experienced under the death row phenomenon’.

The psychological impact of contradictory notifications about the outcome of an appeal leading to a belief that the death sentence had been commuted, when it was not, and of inexplicably being returned to death row after two years in a different section breached the prohibition on cruel and inhuman treatment in ICCPR.

The High Court in Malawi had a wider range of support for its decision than the Ugandan courts when it unanimously struck down the mandatory death penalty for murder in Kafantayeni in 2007. The Court held that the mandatory death sentence infringed the prohibition on inhuman or degrading treatment or punishment and the right to dignity in Section 19 of the

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124 n 120 above, 78 - 80, 90, 96 - 97, citing UN Human Rights Committee, Chitat Ng v Canada ‘Communication No 469 of 1991’ (7 January 1994) [16.2], [16.4], and International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). On Ng v Canada, see Smith (n 84 above) [14.3.2].

125 n 120 above, 85.

126 n 120 above, 96 - 97.

127 Chisanga v Zambia UNHR Committee (18 November 2005) 85th Session UN Doc CCPR/C/85/D/1132/2002 [7.3].

128 Kafantayeni v AG [2007] MWHC 1, [2007] 5 LRC 353. It was a more focused attack, as the death penalty per se, hanging or delay in execution were not raised in the challenge.

This case was not appealed to the Supreme Court of Appeal, but it affirmed the High Court’s decision several months later in Jacob: Novak (n 113 above) 62, citing Jacob v Republic (MSCA Crim App No 16/2006) 19 July 2007 (Malawi Sup Ct App). For reviews of Kafantayeni and Jacob, see Novak (n 113 above) 63 - 70.
Constitution. It linked the protection against inhuman or degrading treatment in Section 19(3) of the Constitution with the guarantee of respect for human dignity in judicial proceedings contained in Section 19(2), and commented that the latter was ‘often overlooked even in the case authorities that we have examined from comparable jurisdictions’. The death penalty itself, expressly preserved by Section 16 of the Constitution, remained available as the maximum punishment for murder. The Court did not deal with the allegations of arbitrary deprivation of the right to life or of breach of the separation of powers, which had been relied on by the accused. It invoked foreign precedents to support its decision, including Makwanyane and Reyes. Because the mandatory death penalty required a sentence of death to be passed without any opportunity for the defendant to show factors in mitigation, sentencing was not individualised and a sentence could be disproportionate to the defendant’s criminal culpability. The Court also found that the mandatory death penalty breached the right to a fair trial, which required fairness of the trial at all stages including sentencing. Although it was not relied on by the accused, the Court of its own motion raised the right of access to justice, and held that it too had been breached, as sentencing was a legal issue for judicial determination within the purview of Section 41(2) of the Constitution effectively granting the right of appeal.

The African Commission accepted that the right to respect for dignity required that the death sentence should not be a disproportionate penalty and explained that it should only be imposed after consideration of whether there were any extenuating circumstances (facts bearing on the commission of the crime, which reduce the accused’s moral blameworthiness taking into account the state of mind of the offender at the time of the commission of the offence).

By the time the Kenyan Court of Appeal considered the constitutionality of the mandatory death penalty for murder in Mutiso in 2010, the opposition to it had dissipated and the State – obviously recognising the growing trend in Africa and the Commonwealth to strike it down – conceded that it was

130 n 128 above, 358.
131 n 4 above.
132 n 109 above.
133 Interights (Bosch) v Botswana [2003] AHRLR 55 (ACHPR 2003) [31]-[33].
unconstitutional and that the trial judge should retain a discretion not to impose the death sentence. The law should evolve in tandem with a civilised society.

This review of challenges to the death penalty in various jurisdictions shows that its complete abolition was easier to achieve in South Africa because of its comprehensive constitutional ban on cruel, inhuman and degrading punishment, the unrestricted articulation of the right to life, the specific right to dignity and the foundational value of human dignity. Unsurprisingly the challenge in countries where the death penalty was specifically permitted by the terms of the constitution failed. However, even there the mandatory death penalty did not withstand scrutiny, as it failed to allow an assessment of individual culpability and responsibility for one’s actions.

135 Godfrey Ngotho Mutiso v Republic [2010] eKLR [10], [31]. The Court was critical of the State for not taking action earlier to abolish the mandatory death penalty – particularly as only a handful of the those condemned to death in Kenya had been executed leaving the prisons inundated with a huge number of death row inmates: above, [13]-[14]. Notwithstanding the State’s concession, the Court considered the case on its merits: above, [12]. It took cognisance of the array of offenders with a wide range of culpability that could be found guilty of murder, and the fact that the mandatory death penalty had been declared to constitute inhuman treatment or punishment in other countries in violation of constitutional provisions similar to those in Kenya: above, [32]-[34]. The judge should consider any mitigating factors relating to the offence and the offender before imposing the death sentence: above, [34]. The Court in Mutiso referred to many Commonwealth decisions with approval including Reyes and cited extensively from Kigula in Uganda, where the death row syndrome was highlighted because of the long delay in carrying out the sentence: above, [23], [29], [32]-[34] (Reyes) and [17]-[18], [24]-[25], [35] (Kigula).

136 ‘A law that is caught up in a time warp would soon find itself irrelevant and would be swept into the dustbins of history.’: Mutiso (n 135 above) [14]. The individual must have a chance to mitigate – otherwise the dignity of humanity would be ignored: n 135 above, [34]. Similar to the challenge in Malawi, Mutiso was confined to the narrow issue of the mandatory death penalty and raised neither the constitutionality of the death penalty per se (specifically permitted by Constitution of the Republic of Kenya 1963, Sec 71(1)) nor the prescription by law of the death penalty for murder, both of which were within the realm of parliament or the people in a referendum: n 135 above, [22]. The Court found that the mandatory death sentence for murder contained in the Penal Code (sec 204) violated the constitutional protection against inhuman or degrading punishment or treatment (Sec 74(1)) and also breached the right to a fair trial (Sec 77): n 135 above, [36].

A new Constitution approved in Kenya in 2010 recognises everyone’s inherent dignity and ‘the right to have that dignity respected and protected’: Constitution of the Republic of Kenya 2010, Art 28. The Bill of Rights contained in it at Ch Four has been described by Ouko J as ‘arguably the most progressive and probably the most liberal in the region and perhaps beyond’: Mbiyu v Commissioner of Police [2011] eKLR (High Court of Kenya, 5 January 2011).

On the ‘civilised standards’ rationale, see W Binchy ‘The role of comparative and public international law in domestic legal systems’ (2010) 23(3) Advocate (South Africa) 58 at 61.
The conditions of detention by placing a prisoner in leg-irons or chains were found to be degrading treatment in Namibia in *Namunjepo*. Strydom CJ regarded the degrading treatment as disrespecting dignity.

4.3 Family

Unlike many other constitutions and international human rights instruments, there is no specific provision in the South African Constitution protecting family life. Its absence was challenged unsuccessfully in the *First Certification* case, where the Court held that the foundational values and the

137 *Namunjepo v Commanding Officer, Windhoek Prison* [1999] NASC 3; 2000 6 BCLR 671 (NmS) (SC of Namibia). It was ‘a humiliating experience which reduces the person placed in irons to the level of a hobbled animal whose mobility is limited so that it cannot stray’: above, 23.

Respect for dignity and the prohibition on cruel, inhuman or degrading treatment in the African Charter precludes not only actions which cause serious physical or psychological suffering, but also those which humiliate the individual or force him or her to act against his will or conscience: *International Pen (Saro-Wiwa) v Nigeria* [2000] AHRLR 212 (ACHPR 1998) [79]. The deplorable conditions in which women, children and aged detainees were held in Rwanda violated their physical and psychological integrity: *Organisation Mondiale Contre la Torture v Rwanda* [2000] AHRLR 282 (ACHPR 1996) [26]. The African Commission held that the denial to detainees of medical attention under health-threatening conditions and access to the outside world does not respect their dignity: *Huri-Laws v Nigeria* [2000] AHRLR 273 (ACHPR 2000) [41]. It noted that the term ‘cruel, inhuman or degrading treatment or punishment’ is to be interpreted so as to extend to ‘the widest possible protection against abuses, whether physical or mental’: *Media Rights Agenda v Nigeria* [2000] AHRLR 262 (ACHPR 2000) [71]. See also *M’Boissona (Bozize) v Central African Republic UNHR Committee* (26 April 1994) 50th Session UN Doc CCPR/C/50/D/428/1990 [5.2]; *Civil Liberties Organisation v Nigeria* [2000] AHRLR 243 (ACHPR 1999) [26]-[27]; *Article 19 v Eritrea* [2007] AHRLR 73 (ACHPR 2007) [102]; *Titiahonjo v Cameroon UNHR Committee* (13 November 2007) 91st Session UN Doc CCPR/C/91/D/1186/2003) [6.3]-[6.4].

138 ‘To be continuously in chains or leg-irons and not to be able to properly clean oneself and the clothes one is wearing sets one apart from other fellow beings and is in itself a humiliating and undignified experience.’: n 137 above, 23.

Cf *Engelbrechts v Minister of Prisons and Correctional Services* 2000 NR 230 (High Court of Namibia).

139 *Dawood* (n 2 above) [36].
right to dignity safeguarded the right to marry the person of one’s choice, to bring up a family and to live together.\(^{140}\)

When the non-South African spouses of South African citizens complained that their family life could be disrupted because they had no guarantee that they would be allowed to stay in South Africa while their application for immigration was being processed, the right to dignity was key.\(^ {141}\) The Constitutional Court in *Dawood* held that the legislation was invalid because it breached their right to family life, which covered the right to marry and to sustain a married relationship by living together.\(^ {142}\) Other provisions in the Aliens Control Act governing the issue of work permits to foreign spouses of South African citizens or permanent residents were declared unconstitutional in *Booysen*.\(^ {143}\) Sachs J in the Constitutional Court agreed with the High Court judge’s finding that the restrictions could infringe the right to dignity of the South African spouse as well as the foreign one, as alleged by the applicants.\(^ {144}\)

140 *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) [100]:

[T]he provisions of the NT [new constitutional text] would clearly prohibit any arbitrary State interference with the right to marry or to establish and raise a family. NT 7(1) enshrines the values of human dignity, equality and freedom, while NT 10 states that everyone has the right to have their dignity respected and protected. However these words may come to be interpreted in future, it is evident that laws or executive action resulting in enforced marriages, or oppressive prohibitions on marriage or the choice of spouses, would not survive constitutional challenge.

141 *Dawood* (n 2 above). The Aliens Control Act 1991 required applicants for immigration permits to be outside South Africa when their permits were granted but exempted spouses and children, who could remain in the country pending the outcome of their applications provided they had valid temporary residence permits: above, [2]-[3].

142 The UN Human Rights Committee found that legislation under which foreign husbands of Mauritian women lost their residence status constituted discrimination on the grounds of sex under ICCPR: *Aumeeruddy-Cziffra v Mauritius* UNHR Committee (9 April 1981) 12th Session UN Doc CCPR/C/12/D/35/1978. In Botswana legislation denying citizenship to children with a Botswanan mother and a foreign father (but not where the father was a citizen of Botswana and the mother was not) was unconstitutional because it breached the Botswanan mother’s freedom of movement and constituted sex-discrimination: *AG v Dow* [2001] AHRLR 99 (BwCA 1992) 663 (Amissah JP), 678 (Aguda JA), 683 (Bizos JA).

143 *Booysen v Minister of Home Affairs* 2001 4 SA 485 (CC). The legislation required the foreign spouse to make the application for a work permit from outside the country and not to enter South Africa until the permit had been issued. Furthermore work permits would only be issued to foreign spouses if there were not enough people of their occupation in South Africa.

144 ‘In many cases the foreign spouse was the sole or main provider for the family and this highly restrictive provision prevented them from fulfilling their duty to support, thereby violating the right to human dignity of both spouses.’: n 143 above, [7].
O’Regan J in *Dawood* saw marriage as the pinnacle of carving one’s identity and self-fulfilment essential to dignity for a lot of people.\(^{145}\) She highlighted the social importance of marriage with its associative, community and public elements in addition to the individual and relationship aspects.\(^{146}\) Family life is not confined to the traditionally recognised unit and other arrangements also deserve respect.\(^{147}\) Marriage encompasses duties and responsibilities as well as rights, as illustrated in various marriage regimes.\(^{148}\) O’Regan J viewed marriage with its public and private nature as connoting rights and obligations in inter-personal relationships.

\(^{145}\) n 2 above, [37] (footnotes omitted):
The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity. Cf comments by the Court of Appeal for Ontario on marriage in *Halpern v Canada (AG)* (2003) 225 DLR (4th) 529 [5], [107].

\(^{146}\) n 2 above, [30] (footnotes omitted):
Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.

\(^{147}\) ‘[F]amilies come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.’: *Dawood* (n 2 above) [31] (footnote omitted).

\(^{148}\) *Dawood* (n 2 above) [33] (footnotes omitted):
In terms of common law, marriage creates a physical, moral and spiritual community of life. This community of life includes reciprocal obligations of cohabitation, fidelity and sexual intercourse, though these obligations are for the most part not enforceable between the spouses. Importantly, the community of life establishes a reciprocal and enforceable duty of financial support between the spouses and a joint responsibility for the guardianship and custody of children born of the marriage. An obligation of support flows from marriage under African customary law as well. In terms of Muslim personal law, the husband bears an enforceable duty of support of the wife during the subsistence of the marriage.
The idea that dignity is sustained by fulfilling the duties that arise from the commitment to an intimate relationship with another entered into autonomously as a core expression of one’s autonomy brings a moral dimension to the exercise of choice. The question of whether a person should be entitled to resile from a commitment because of a subsequent change of mind is a further moral dimension with legal implications for consideration. Is one obliged to accept the consequences of choices made? It has resonances of the idea that punishment is required because of respect for the dignity of the offender. This was relied on unsuccessfully in the challenge to the ban on corporal punishment in schools, when those seeking freedom to punish pleaded that for believers, including the children involved ‘the indignity and degradation lay not in the punishment, but in the defiance of the scriptures represented by leaving the misdeeds unpunished’ and that subjectively, for those who shared that religious outlook, no indignity was involved in the punishment.\(^{149}\) The retributive justice view of punishment is that respect for the humanity of offenders demands that they accept the consequences of their actions in choosing to break the law.\(^{150}\) Patrick Smith presses for restorative justice, which regards the offender as an essential part of the repairing process for the victim and at the same time aids the offender in his own healing, thus recognising the dignity of both parties.\(^{151}\) Stephen Garvey has argued for a secular penance in the interests of the offender as part of the process of atonement after a finding and acceptance of guilt.\(^{152}\) William Binchy made a case for the option to marry without the choice of divorce in order to recognise in law people’s mutual lifelong commitments if they so choose as an aspect of their human dignity and in the autonomous exercise of their free will.\(^{153}\)

O’Regan J’s views in *Dawood* were cited by all judges with varying interpretations of the scope of the maintenance rights of a surviving spouse in *Volks v Robinson*, where a woman in a permanent life partnership claimed an entitlement from the estate of her deceased partner on the same basis as a

149 *Christian Education* (n 50 above) [43].


151 Smith (n 150 above) above, 453 - 454.


Sachs J’s dissenting judgment in *Volks* has extensive philosophical analysis of the nature of marriage, which is deserving of societal support in law based on respect for autonomy and the common good. This does not mean that the law should disregard the choice made – voluntarily or because of circumstances – by lifetime partners not to marry. The substantive relationship between the parties was the central issue, showing ‘the serious content of the mutual commitment’ and not ‘the particular form’ in which it was expressed. He resisted viewing the issue ‘exclusively as one of the sanctity of marriage, or simply of the important social purpose that marriage serves,’ but saw it in terms of ‘the integrity of the family relationship.’ Sachs J recognised the societal importance of marriage, describing also its benefits of self-esteem, equality and freedom for members of the family. But also to be borne in mind were the rights of life partners without the benefit of having formalised their relationship and perhaps with a more enduring quality than a formal, but empty, marriage.

154 2005 5 BCLR 446 (CC) [52], [81], [93], [106], [206], [210]. See OC Okafor *The African human rights system, activist forces and international institutions* (2007) 165 - 166, 207.

155 n 154 above, [156] (Sachs J):
Respecting autonomy means giving legal credence not only to a decision to marry but to choices that people make about alternative lifestyles. Such choices may be freely undertaken, either expressly or tacitly. Alternatively, they might be imposed by the unwillingness of one of the parties to marry the other. Yet if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not be astute to penalise or ignore them because they are unconventional.

156 n 154 above, [215].

157 n 154 above, [217].

158 n 154 above, [223]:
There is a great social need to promote marriage as an institution which provides stability, security and predictability for intimate family relations. By so doing our society stresses the importance of people taking responsibility for their lives, and showing respect for the fact that they are members of a law-governed and interdependent community. It encourages self-reliance and self-empowerment; helps people escape from a world made up of victimisers and victims into one consisting of free and equal people; and induces the previously disadvantaged and subordinated to advance in life by calling on their inner strengths rather than allowing themselves to fall into dependence on external support.

159 n 154 above, [230]:
It needs to be remembered, however, that the claim for maintenance stems from the social regard to be given to commitment, intimacy, interdependency and stability in the family. In the case of a married survivor these will be presumed to have existed as a matter of law. However brief, unstable and non-intimate the marriage might have been, the certificate alone would suffice to grant a claim. In the case of the unmarried survivor, on the other hand, the partnership relationship would have to be proved as a matter of fact.
disagreement between Skweyiya J (for the majority) and Sachs J on the nature of marriage. He criticised Sachs J for having over-simplified the matter by saying that the only difference between the surviving life partner and a spouse was a marriage certificate.\textsuperscript{160} Ngcobo J (concurring with the majority) regarded the formal aspect and choice of marriage as decisive.\textsuperscript{161} Mokgoro and O’Regan JJ in a joint dissenting judgment saw that commitment to a relationship was not the preserve of married couples.\textsuperscript{162}

In \textit{Daniels} the Constitutional Court held that ‘spouse’ for the purpose of intestacy included those married according to the Muslim rites, who, as Moseneke J stated, had been denied recognition in the past because of prejudice (including judicial bigotry) based on a one-sided view of people judged worthy of respect.\textsuperscript{163}

The need for change in the definition of the family in accordance with societal advances is clear.

\textsuperscript{160} n 154 above, [58], [220].

\textsuperscript{161} n 154 above, [92]:

The law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify their acceptance of those consequences by entering into a marriage relationship. Those who do not wish such consequences to flow from their relationship remain free to enter into some other form of relationship and decide what consequences should flow from their relationships.

\textsuperscript{162} n 154 above, [106]:

The celebration of a marriage thus confers extensive legal duties and rights upon the parties to the marriage as a matter of law. As a matter of social relations, it often results in the founding of a family which provides essential human companionship, mutual support and security to the members of that family. However, not every family is founded on a marriage recognised as such in law. Yet members of such families often play the same roles as in families which are founded on marriage and provide companionship, support and security to one another.

\textsuperscript{163} \textit{Daniels v Campbell} 2004 5 SA 331 (CC) [74]-[75]:

[The] ‘persisting invalidity of Muslim marriages’ is, of course, a constitutional anachronism. It belongs to our dim past. It originates from deep-rooted prejudice on matters of race, religion and culture. True to their worldview, Judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different. They exalted their own and demeaned and excluded everything else. Inherent in this disposition, says Mahomed CJ, is ‘inequality, arbitrariness, intolerance and inequity’.

These stereotypical and stunted notions of marriage and family must now succumb to the newfound and restored values of our society, its institutions and diverse people. They must yield to societal and constitutional recognition of expanding frontiers of family life and intimate relationships. Our Constitution guarantees not only dignity and equality, but also freedom of religion and belief.
4.4 Defamation

The right to a good name and reputation form part of the right to human dignity. Hefer JA’s view in the Supreme Court of Appeal in *National Media Ltd v Bogoshi* was that the recognition of the right to respect for and protection of dignity in Section 10 of the Constitution ‘must encompass … the right to a good name and reputation.’ In balancing the right to protect one’s reputation against the freedom of the press, he re-interpreted the common law by holding that strict liability of the media was incompatible with the benefit of public debate. The reasonable publication defence in *Bogoshi* was approved by the Constitutional Court in *Khumalo v Holomisa*, where O’Regan J balanced the dignity in reputation against freedom of expression, which are frequently in conflict in defamation actions.

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164 Currie & de Waal (n 8 above) 392.
165 1998 4 SA 1196 (SCA) 41, citing *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 607E-G.
166 n 165 above, 25:
   If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended… Much has been written about the ‘chilling’ effect of defamation actions, but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error.
   The decision was correct, but the SCA had been criticised, *inter alia*, for not acknowledging that its development of the common law principles of defamation was required by the new constitutional values or provisions. Instead, it attributed it to the ordinary dynamic development of the common law: Currie & de Waal (n 8 above) 388 (foot-note omitted). See also HL MacQueen ‘Delict, contract, and the Bill of Rights: A perspective from the United Kingdom’ (2004) 121 South African Law Journal 359 at 373 - 374.
167 2002 5 SA 401 (CC) [43]:
   Were the Supreme Court of Appeal not to have developed the defence of reasonable publication in Bogoshi’s case, a proper application of constitutional principle would have indeed required the development of our common law to avoid this result. … In determining whether publication was reasonable, a court will have regard to the individual’s interest in protecting his or her reputation in the context of the constitutional commitment to human dignity. It will also have regard to the individual’s interest in privacy. In that regard, there can be no doubt that persons in public office have a diminished right to privacy, though of course their right to dignity persists. See analyses by Klug (n 88 above) 153 - 154; C Roederer ‘The transformation of South African private law after ten years of democracy: The role of torts (delict) in the consolidation of democracy’ (2006) 37 Columbia Human Rights Law Review 447 at 502 - 504, 512 - 513. Cf *Grant v Torstar Corp* 2009 SCC 61 (SC of Canada), which modified the Canadian law of defamation by recognising a defence of responsible communication on matters of public interest; this would require the media to act proportionately and reasonably when deciding whether or not to publish.
The test for defamation of politicians varies depending on whether the contentious comments relate to their political activities or to their private lives. They are given equal protection in non-political activities, but frank critiques can be lawful in the public arena. Free speech is vital to democracy, so that people are informed, open to debate and can be motivated to participate in society’s governing structures. In Mthembi-Mahanyele the Supreme Court of Appeal accepted that in some circumstances defamatory political information could be justified under the reasonable publication defence.\(^\text{168}\) Lewis JA indicated that there were boundaries:\(^\text{169}\)

That does not mean that there should be a licence to publish untrue statements about politicians. They too have the right to protect their dignity and their reputations. As Burchell puts it:

‘There are limits to freedom of political comment, especially in regard to aspects of the private lives of politicians that do not impinge on political competence. Politicians or public figures do not simply have to endure every infringement of their personality rights as a price for entering the political or public arena, although they do have to be more resilient to slings and arrows than non-political, private mortals.’

She indicated that the circumstances to be considered in assessing whether a publication about politicians is justifiable included:

… the interest of the public in being informed; the manner of publication; the tone of the material published; the extent of public concern in the information; the reliability of the source; the steps taken to verify the truth of the information …; and whether the person defamed has been given the opportunity to comment on the statement before publication.\(^\text{170}\)

In her view, in the case of urgent information crucial to the public, the absence of the opportunity to comment might not be decisive.\(^\text{171}\) Mthiyane JA (dissenting) did not agree that there should be a separate or nuanced

\(^{168}\) Mthembi-Mahanyele v Mail & Guardian Ltd [2004] 3 All SA 511 (SCA) [64].

\(^{169}\) n 168 above, [67] citing J Burchell Personality rights and freedom of expression: The modern actio injuriarum (1998) 229. Jonathan Burchell also said (n 168 above, fn 61, citing Burchell above, 229): ‘It has for many years been accepted that greater latitude must be given to freedom of expression on political matters. However, although politicians may, in one sense, be fair game for criticism, it is not completely open season in the political veld.’

\(^{170}\) n 168 above, [68].

\(^{171}\) As above.
reasonable publication defence in relation to politicians.\textsuperscript{172} He would prefer harmonisation of the right to freedom of expression with the right to dignity, giving both equal protection, and therefore took the view that barring cabinet ministers from suing ‘would undermine the protection of an individual’s right to dignity, which includes reputation, and elevate the right to freedom of expression above the right to reputation.’\textsuperscript{173}

According to George Devenish, ‘[t]he operation of the law of defamation has a wider ambit than the mere protection of dignity’ as evidenced by the fact that juristic persons can sue for defamation to vindicate their reputations, but the courts have not determined that corporations are the recipients of dignity.\textsuperscript{174}

Mayor Dikoko defamed Thupi Mokhatla (the Chief Executive Officer of a municipal authority) when he blamed Mokhatla for deliberately giving his political opponents a basis for an attack on his integrity by changing accounting procedures thereby causing him to run up a debt to the Council for his mobile phone. Dikoko appealed to the Constitutional Court against the successful High Court defamation action brought by Mokhatla.\textsuperscript{175} His appeal failed and the Constitutional Court did not interfere with the quantum. A minority would have reduced the quantum including Mokgoro J who felt that the Court should have ordered an apology, as restoration of the plaintiff’s dignity would benefit both parties.\textsuperscript{176}

Sachs J favoured reparatory remedies and considered it undesirable to have high awards in defamation cases because the main outcome that should
be sought was an apology to restore dignity and worth in society. A reparatory remedy is more compatible with the public interest than a high award, as it fosters accountability and debate. The defamation in *Dikoko v Mokhatla* had occurred in the course of the mayor being called to account by a governmental committee. In those circumstances, it is important that fear of a high award would not stifle comment, since the chilling effect would be felt by those motivated to speak out in the public interest as well as by those defending their own actions. The remedy advocated by the minority would strike a reasonable balance by encouraging freedom of expression, while ensuring that the dignity of the offended be respected should the boundaries of defamation be crossed. Sachs J captured the adverse effect of high awards well:

Witnesses before such investigative committees should feel free to speak their mind. As a matter of general principle they should not be made to fear heavy damages suits if they either overstep the mark in the telling, or do not have iron-clad proof to substantiate their testimony. The chilling effect of punitive awards would not only be felt by officials caught with their metaphorical pants down, but by honest whistleblowers and by newspapers simply carrying testimonial exposures.

The constitutional value of *ubuntu-botlo* with its solidarity element was ‘highly consonant with rapidly evolving international notions of restorative justice.’

The question must be asked whether, and if so to what extent, the constitutional value of dignity is driving the analysis and development of defamation law in South Africa. The trend in common law and civil law jurisdictions had been to promote the free dissemination of information in the public interest by abolishing strict liability for publishing false state-

177 n 175 above, [109]:

There is a ... problem with damages awards in defamation cases. They measure something so intrinsic to human dignity as a person's reputation and honour as if these were market-place commodities. Unlike businesses, honour is not quoted on the Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur.

178 n 175 above, [108].

179 n 175 above, [114]. It recognises that to rehabilitate a sentenced offender is ‘to recognise the inherent human dignity of the individual offender’: *Van Vuuren v Minister of Correctional Services* [2010] ZACC 17, 2010 12 BCLR 1233 (CC) [51].
ments. These judgments were not necessarily rooted in protection of dignity, but may have had a different rationale. Indeed, Bogoshi itself had developed the common law without overtly relying on the constitutional value of dignity. In his judgment in the Supreme Court of Appeal, Hefer JA referred to the reasonable publication defence enunciated with various local variations in the US, Germany, the European Court of Human Rights, the Netherlands, England, Australia and New Zealand.\(^\text{180}\) In balancing the right to freedom of expression with the individual’s interest in reputation, the social utility of strict liability in prohibiting the dissemination of false information of no benefit to the public was not as worthy as the good effects in society of encouraging the free flow of useful information.\(^\text{181}\) He acknowledged that the Constitution ‘rated personal dignity much higher than before’, but he did not need to resort to the Constitution to impose the reasonableness requirement.\(^\text{182}\)

The constitutional value of human dignity extends beyond the common law notion of self-worth to incorporate the individual’s value in the eyes of others, as O’Regan J stated in the Constitutional Court in *Khumalo*:\(^\text{183}\)

*Dignitas* concerns the individual’s own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual’s sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public’s estimation of the worth or value of an individual.

It must be remembered that freedom of expression itself also invokes dignity and autonomy.

I now propose to undertake a comparative review of the rationale underlying the protection of reputation and the solutions adopted for infringements in other jurisdictions in order to assist in ascertaining whether

\(^{180}\) n 165 above, 26.

\(^{181}\) n 165 above, 22.

\(^{182}\) n 165 above, 43.

\(^{183}\) n 167 above, [27].
respect for dignity is widespread as a guide in defamation actions and whether it is in fact the basis of South African jurisprudence in this area.

In the US, freedom of speech and liberty are prime constitutional values, and there is much tolerance and encouragement of debate and expression of views – particularly of politically-motivated speech. But even there, in the bastion of free speech, Justice Stewart in *Rosenblatt v Baer* – emphasising society’s interest in protecting and providing redress for attacks on reputation – based it on human dignity, which he placed at the foundation of a free civilisation.

When Justice Powell in *Gertz* restricted the *New York Times* standard of knowledge or reckless falsity to criticism of public figures in the public or general interest, he reiterated Justice Stewart’s focus on the dignity of the individual. The Supreme Court in its majority decision in *Gertz* based its additional protection for private individuals on the fact that, as they had less opportunity for rebuttal, they were more vulnerable and therefore were entitled to recover damages more readily – they had not voluntarily exposed themselves to increased risk of injury from defamatory falsehoods. The Court allowed the states scope for defining for themselves the appropriate standard for defamation of private individuals who were in substantial danger of damage to reputation by the substance of the publication of broadcast, subject only to not imposing liability without fault. Damages were restricted to compensation for actual injury when liability was imposed under a less demanding standard than the *New York Times* test.

184 In recent years, many nations have expanded the protection afforded to defamatory speech on public matters, but few go so far as the US: Heyman (n 30 above) 245 fn 24. See N Rao ‘Three concepts of dignity in constitutional law’ (2011) 86 *Notre Dame Law Review* 183 at 212 - 214.

185 ‘The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty.’: 383 US 75 (1966) 92.


188 n 187 above, 344 - 345.

189 n 187 above, 347. Steven Heyman agrees with the analysis in *Gertz*, since reputation, being the social aspect of personality, is central to individual dignity and self-realisation: n 30 above, 75. Because free speech confers no general right to violate private reputation, and as these rights are of the same order and value, Heyman concludes that it was appropriate for the Court in *Gertz* to impose liability for injury to reputation based on fault – failure to use reasonable care to determine whether the defamatory statements were actually true: n 30 above, 77.

190 n 187 above, 348 - 349.
Even though reputation is more highly valued on this side of the Atlantic, the European Court of Human Rights allowed more leeway in the expression of opinions on political matters. In *Lingens v Austria* it understood the charged atmosphere that can prevail in the aftermath of elections, when articles were written using the expressions ‘basest opportunism’, ‘immoral’ and ‘undignified’ about the Austrian Chancellor.\(^{191}\) The magazine publisher, who had been found guilty of criminal libel for accusing the Austrian Chancellor of protecting former Nazis for political reasons and of facilitating their participation in politics, succeeded in his action for violation of his freedom of expression. The Court accepted that the words used appeared likely to harm the politician’s reputation, but it had regard to the political background against which the offensive articles had been written and held unanimously that the interference with the freedom of expression in Article 10 ECHR was not necessary in a democratic society and was disproportionate to the legitimate aim pursued.\(^{192}\)

In Canada considerably more analysis was done of the nature of reputation in *Hill* – an action brought by the Crown attorney – where the Supreme Court found that the common law struck an appropriate balance between the twin values of reputation and freedom of expression.\(^{193}\) Although not specifically mentioned in the Canadian Charter, Cory J stated that a good reputation was closely related to ‘the innate worthiness and dignity of the individual.’\(^{194}\) The concept of ‘[t]he innate dignity of the individual’ underlay all the Charter rights.\(^{195}\) Furthermore, reputation was intimately related to the

\(^{191}\) (App no 9815/82) (1986) 8 EHRR 407 at 419 [43].

\(^{192}\) There was disagreement among the judges on whether the right to respect for private life in Art 8 ECHR was engaged, the majority finding that it was not since the comments were made in the context of a public debate in the political arena: n 191 above, 417 [38]. Thór Vilhjálmsson J disagreed, as the comments were made about the Chancellor both as a political leader and as a private individual; therefore he was of opinion that the right to respect for private life in Art 8 was one of the factors relevant to the question whether or not in this case the freedom of expression was subjected to restrictions and penalties that were necessary in a democratic society for the protection of the reputation of others: n 191 above, 423. However, he concluded that this right had in fact been taken into account by the majority when weighing the relevant considerations: n 191 above, 423 - 424.


\(^{194}\) n 193 above, [107].

\(^{195}\) n 193 above, [120].

\(^{196}\) n 193 above, [121].
Chapter 4 – The right to dignity

Cory J extolled the benefits to individuals of their reputation in society and regarded its protection as mutually beneficial to all in a democracy. He declined to adopt the New York Times standard and was satisfied that the defences of fair comment and qualified privilege were sufficient protection for freedom of expression, saying, ‘[s]urely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish’ and continuing, ‘[t]hose who publish statements should assume a reasonable level of responsibility.’

Strict liability of the media in England was removed in Reynolds, when the English courts broadened the classical test of the duty to impart information the public has an interest in receiving to require a contemporaneous close look at the context and circumstances of publication with a list of factors to be taken into consideration as guidelines in order to establish the reasonableness of the publication. Lord Nicholls gave precedence to reputation founded on the individual’s dignity, the preservation of which had societal benefits as well as being of importance to the individual. He

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197 n 193 above, [108]:

Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual’s sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

198 n 193 above, [137].


In Ireland in the absence of legislative reform, Ó Caoimh J endorsed the flexible approach in Reynolds as the best way of protecting constitutional rights when reputation and freedom of expression collide, and favoured expansion of the law on qualified privilege to something close to a public interest defence: Hunter v Gerald Duckworth & Co Ltd [2003] IEHC 81. Subsequently legislation provided for a defence of fair and reasonable publication on a matter of public interest: Defamation Act 2009 sec 26.

There was a reformulation of Reynolds in Jameel v Wall Street Journal Europe Sprl [2006] UKHL 44, [2007] 1 AC 359 with clarity emerging that the Reynolds defence did not rely on the traditional duty and interest privilege, but was a new public interest defence: K Beattie ‘New life for the Reynolds “public interest defence”? Jameel v Wall Street Journal Europe’ [2007] European Human Rights Law Review 81 at 83 - 84. The practical message for journalists from Jameel was the importance of editorial judgment and contextual accuracy rather than the meaning of words in isolation: Beattie above, 86.

200 n 199 above, 201:

Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to
was keen to conform with international human rights norms to arrive at the right balance between freedom of expression and reputation.\textsuperscript{201} This was a theme that Lord Steyn also adopted when he referred to the European Court of Human Rights for guidance in drawing the line between permissible and impermissible political speech.\textsuperscript{202}

In Australia the High Court held in a majority decision in \textit{Theophanous} that there was implied in the Constitution a freedom to publish material discussing government and political matters, or concerning the performance and suitability for office of politicians.\textsuperscript{203} However, the defence of qualified privilege applied if the defendant was unaware of the falsity of the material, which was not published recklessly, and the publication was reasonable in the circumstances. More heed was paid to the politician’s reputation than in \textit{New York Times}. In a joint judgment, Mason CJ, Toohey and Gaudron JJ weighed up the advantages of the \textit{New York Times} test, which substantially eliminated the ‘chilling effect’ of a threatened action for defamation, against the principal criticism that it set ‘too little store by the reputation of the person defamed.’\textsuperscript{204} They opted to give higher protection to reputation than to freedom of political speech. Restrictions were justified to enable people to live with dignity in society.\textsuperscript{205}

its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one’s reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed, choice, the electorate needs to be able to identify the good as well as the bad.

\textsuperscript{201} As above.

\textsuperscript{202} n 199 above, 215.

\textsuperscript{203} \textit{Theophanous v Herald & Weekly Times Ltd} (1994) 182 CLR 104. In fashioning a new constitutional defence to override the common law of defamation, the Court owed ‘a clear intellectual debt’ to \textit{New York Times}: Stone & Williams (n 193 above) 365.

\textsuperscript{204} n 203 above, 134.

\textsuperscript{205} n 203 above, 178 - 179 (footnotes omitted) (Deane J, concurring):

\textbf{[C]urtailment of the freedom of political communication and discussion is consistent with the }[\textit{Constitution’s}]\textbf{ implication [of freedom of political communication and discussion] only to the extent to which it can, according to the standards of our society, be justified in the public interest either for the reason that it is conducive to the overall availability of the effective means of political communication and discussion in a democratic society or it does not go beyond what is necessary either for the preservation of an ordered society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society.}
Chapter 4 – The right to dignity

The High Court was not satisfied with the Theophanous finding that there was a constitutional defence to defamation based on freedom of expression, so it reformulated it in *Lange v Australian Broadcasting Corporation*. In this libel action brought by the former Prime Minister of New Zealand, the Court developed the common law defence and held that a publisher relying on qualified privilege for a communication made to the public on a government or political matter must establish that its conduct in making the publication was reasonable in all the circumstances. The Court placed a high value on the implied constitutional principle of freedom of communication concerning political or government matters. It examined the common law right to reputation and stated that the protection of the reputations of those who take part in public life was conducive to the public good. There was no reference to human dignity.

Mr Lange features again in litigation in his own country over articles critical of his performance as Prime Minister. Following a complicated series of appeals, the New Zealand Court of Appeal in *Lange v Atkinson* in 2000 took cultural differences into account and was more inclined to trust the media than in other common law jurisdictions. The outcome was that it protected false statements on political matters, provided the publishers were properly motivated and not seeking unfair advantage.

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207 As a general rule a defendant’s conduct would not be reasonable unless the defendant had reasonable grounds for believing the defamatory imputation was true, took proper steps so far as they were reasonably open to verify the accuracy of the material, and did not believe the imputation to be untrue; the privilege would be defeated if the plaintiff proved that the publication was actuated by ill will or other improper motive: n 206 above, 574. The *Lange* privilege is narrower than the relatively broad defence that applies in England, where it is not limited to institutional conceptions of politics; the Australian cases have not provided a public interest defence and the privilege there rarely encompasses speech about commercial issues: AT Kenyon ‘*Lange* and *Reynolds* qualified privilege: Australian and English defamation law and practice’ (2004) 28 Melbourne University Law Review 406 at 419.

208 n 206 above, 560.

209 n 206 above, 568.

210 Stone & Williams (n 193 above) fn 71.


212 Binchy (n 199 above) 246.
care was not a necessary criterion.\textsuperscript{213} It adopted an extended form of qualified privilege that was context-dependent, retaining the duty and interest test.\textsuperscript{214}

In \textit{Trustco Group International Ltd v Shikongo} in 2010,\textsuperscript{215} the Supreme Court of Namibia in an appeal from the High Court – which had found \textit{Bogoshi} persuasive\textsuperscript{216} – upheld development of the common law to provide a reasonable publication defence to give effect to the constitutional provisions on freedom of expression\textsuperscript{217} and the inviolability of dignity.\textsuperscript{218} The issues on appeal went to the merits\textsuperscript{219} and quantum – the award in the High Court was thought to be the highest ever in Namibia for defamation.\textsuperscript{220} O’Regan AJA, delivering the judgment on behalf of a unanimous Supreme Court, placed the onus of proof of responsible journalism and the importance of publication on the publisher.\textsuperscript{221} As many other jurisdictions had done, she rejected the balance adopted in the US in \textit{New York Times v Sullivan}, which gave much leeway to the press by finding that actual malice by a publisher was required before liability for defamation of a public official would be imposed.\textsuperscript{222} The development of a reasonable publication defence would ‘provide greater protection to the right of freedom of speech and the media protected in

\begin{itemize}
\item\textsuperscript{213} As above.
\item\textsuperscript{214} Stone & Williams (n 193 above) 376. Adrienne Stone and George Williams have concluded that the Court of Appeal seemed to be open to the prospect that competing interests should prevail over freedom of speech, and that, like other courts, it was especially concerned with the competing interest of reputation which it regarded as related to human dignity and privacy: above, 375.
\item\textsuperscript{215} [2010] NASC 6. The action was brought by the Mayor of Windhoek against a newspaper that published an article accusing him of being involved in an irregular deal relating to the sale of city land: above, [5]-[6]. He maintained that the allegations were wrong and that the article defamed him by portraying him as dishonest, abusive of his mayoral position and neglectful of his duties to the public: above, [6].
\item\textsuperscript{216} n 215 above, [20].
\item\textsuperscript{217} Constitution of the Republic of Namibia 1990, Sec 21(1)(a). It is subject to reasonable restriction: Sec 21(2).
\item\textsuperscript{218} Sec 8.
\item\textsuperscript{219} Neither party defended strict liability as being a reasonable restriction on freedom of expression in a democratic society: n 215 above, [48]. The newspaper proposed that the common law be developed by putting the onus on the plaintiff to prove the falsity of the defamatory statement, whereas the respondent considered that the defence of reasonable publication as set out in \textit{Bogoshi} was appropriate: n 215 above, [35], [48].
\item\textsuperscript{220} n 215 above, [21].
\item\textsuperscript{221} ‘The effect of the defence is to require publishers of statements to be able to establish not that a particular fact is true, but that it is important and in the public interest that it be published, and that in all the circumstances it was reasonable and responsible to publish it.’: n 215 above, [53].
\item\textsuperscript{222} n 215 above, [36]-[37].
\end{itemize}
section 21 without placing the constitutional precept of human dignity at risk.\textsuperscript{223}

On quantum, the primary question was whether the award of damages was grossly disproportionate to the injury suffered.\textsuperscript{224} O’Regan AJA reviewed awards in other cases\textsuperscript{225} and referred to Sachs J’s views in Dikoko on the incongruity of trying to establish a proportionate relationship between vindication of reputation and determining the amount of compensation, since reputation was restored – not by money – but by a judicial finding in favour of the integrity of the individual.\textsuperscript{226} But she also referred to Sachs J’s opinion that damages were still important in a world that remained so money-oriented.\textsuperscript{227} While taking account of the aggravating circumstances of the publication, she reduced the quantum of damages by more than 40%.\textsuperscript{228}

To summarise my findings in the comparative analysis I have just undertaken of defamation actions involving the media and public figures, there are some trends evident in the philosophical bases for protection of freedom of speech and reputation. The individual’s reputation is universally regarded as deserving of respect, albeit not specifically recognised as a separate right in many jurisdictions. Society has an interest in protecting the reputations of individuals, so it is not solely the concern of the isolated person. It matters to individuals how society views them, as well as how they regard their own dignity and self-worth. Freedom of expression – particularly in the political context in a participative democracy – is an important value to society and its members.\textsuperscript{229} Therefore, there is some tolerance of publication errors being made in haste. The proportionality analysis is central to deciding the balance between the competing rights and the answers to the queries raised varies in different jurisdictions according to their cultural values.

Reverting to South Africa, it is quite possible that the common law would have been developed to provide a reasonable care defence in defamation in any event on the basis of the Roman-law \textit{dignitas} concept even without the elevation of human dignity in the Constitution. This happened in other

\textsuperscript{223} n 215 above, [53]. She did not decide the issue of whether the defence of reasonable publication was confined to media defendants: n 215 above, [56].

\textsuperscript{224} n 215 above, [90].

\textsuperscript{225} n 215 above, [92]-[94].

\textsuperscript{226} n 215 above, [90], citing n 175 above, [110].

\textsuperscript{227} n 215 above, [91], citing n 175 above, [120].

\textsuperscript{228} n 215 above, [95]-[96].

\textsuperscript{229} See Thint Holdings (Southern Africa) (Pty) Ltd v National DPP [2008] ZACC 14, 2009 1 SA 141 (CC) [52].
common law countries where dignitas was unknown and dignity was not a constitutional right or expressed value.

4.5 Sexual violence

The right to dignity is clearly breached by sexual violence. The Supreme Court of Appeal mentioned its humiliating and degrading effect in *S v Chapman.* Notwithstanding the vile nature of sexual violence and society’s laudable desire to deter sexual crimes, the alleged perpetrator’s dignity also has to be respected in the criminal process. Imprisonment without culpability or in the absence of the exercise of free will to make a rational choice is contrary to constitutional values. The legislature has some scope to balance the dignity interests of the offender and the victim, but there is a limit. O’Regan J described the boundaries to the imposition of strict liability in *S v Coetzee.*

230 1997 3 SA 341 (SCA) 3: Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. Cf *People (DPP) v Tiernan* [1988] IR 250 (SC) 253. Violence against women is a manifestation of the exercise of male power over them: *Masiya v DPP (Pretoria)* [2007] ZACC 9, 2007 5 SA 30 [28], [77]-[78]. The global institution of male dominance remains despite having been exposed, analysed and organised against for decades: CA MacKinnon ‘Gender – The future’ (2010) 17 Constellations 504 at 504.

231 See *Bothma v Els* [2009] ZACC 27, 2010 2 SA 622 (CC) [33]. The Court of Appeal in Botswana held that a law that mandatorily denied bail to anyone accused of rape was not in the public interest and breached the constitutional right to personal liberty: *S v Marapo* [2002] AHRLR 58 (BwCA 2002) [25], citing Constitution of the Republic of Botswana 1966, Sec 5(3)(b).

232 The restriction on the right and the means used must be proportionate to the public interest to be served: Sachs *The strange alchemy of life and law* (n 56 above) 206.

233 1997 3 SA 527 (CC) [177]: [S]ignificant leeway ought to be afforded to the legislature to determine the appropriate level of culpability that should attach to any particular unlawful conduct to render it criminal. It is only when the legislature has clearly abandoned any requirement of culpability, or when it has established a level of culpability manifestly inappropriate to the unlawful conduct or potential sentence in question, that a provision may be subject to successful constitutional challenge.
In Ireland strict liability is also regarded with suspicion by the courts where imprisonment is a sanction. The Supreme Court in *CC v Ireland* asserted that imprisonment without proof of *mens rea* for a serious crime would be incompatible with liberty and dignity and therefore it found unconstitutional legislation imposing strict liability for unlawful carnal knowledge of a minor.234 Hardiman J expressed the Court’s belief that *mens rea* was necessary because ‘to criminalise in a serious way a person who is mentally innocent is indeed “to inflict a grave injury on that person’s dignity and sense of worth” and to treat him as “little more than a means to an end”’.235

The link between inequality and lack of respect for dignity was noted by the Constitutional Court in *Carmichele*, when it endorsed the importance to one’s dignity of freedom from the threat of sexual violence.236 Because of the entrenchment of the rights to life, dignity and freedom and security of the person in the Constitution and because the Bill of Rights bound all state authorities, the Court not only indicated that there was a negative duty on the state not to infringe those rights, but found that in some circumstances there would also be a positive duty on the state ‘to provide appropriate protection to everyone through laws and structures designed to afford such protection.’237 The Court then went on to set in motion what has turned out to be what Iain Currie and Johan de Waal described as ‘considerable development of the law of delict’ under the common law in the light of the Constitution.238 It has led to the state’s vicarious liability for failure to prevent

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236 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) [62] (footnote omitted):

In addressing these obligations [of the police force] in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence. As it was put by counsel on behalf of the *amicus curiae*:

‘Sexual violence and the threat of sexual violence goes to the core of women’s subordination in society. It is the single greatest threat to the self-determination of South African women.’

237 n 236 above, [44].
238 n 8 above, 304.
injury. The Constitutional Court in *Carmichele* contrasted the system in the US – differentiating between action and inaction in holding the state not liable for not preventing harm – with the positive obligations imposed by the South African Constitution and the ECHR. It pointed out that the South African Constitution, like the German Constitution, embodies ‘an objective, normative value system.’ The Constitutional Court did not develop the common law itself, but referred the case back to the lower court for reconsideration. Currie and de Waal explained that on reappraisal, the law of delict was developed to encompass state liability in circumstances where state authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life or physical security of an identified individual or individuals from the criminal acts of a third party and ... they failed to take measures within the scope of their powers, which, judged reasonably, might have been expected to avoid that risk.

In *Carmichele* the Constitutional Court adopted the approach of the European Court of Human Rights in *Osman v UK* where it had been found that the right to life in Article 2 ECHR obliged the state in some circumstances to take pre-emptive action to prevent harm.

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239 n 236 above, [45].


241 n 8 above, 305.

242 n 236 above, [45]. See G Devenish ‘The evolution and development of a value-based and teleological interpretation of statute and common law in South Africa as a result of the 1996 Constitution’ in Quansah & Binchy (n 17 above) 113 - 114; F du Bois ‘State liability in South Africa: A constitutional remix’ (2010) 25 *Tulane European and Civil Law Forum* 139 at 142 - 143, 145 - 146, 166, 171; MacQueen (n 166 above) 368 - 369, 386.

243 (App no 23452/94) (2000) 29 EHR 245. The European Court sketched the parameters of the positive obligation under the ECHR, above, 305 [115]: It is common ground that the State’s obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. It recognised the ‘difficulties involved in policing modern societies, the unpredictability...
In *Van Eeden* the Supreme Court of Appeal considered the obligations of the police to a woman who was sexually assaulted, raped and robbed by a serial rapist who had escaped from police custody. It held that the police owed the public a legal duty to act positively to prevent the escape from custody of a known dangerous criminal likely to commit further sexual offences where measures to prevent his escape could reasonably and practically have been taken by the police. The state was vicariously liable for the actions of the police and she was entitled to damages. The existence of the duty of the police in these circumstances accorded with the legal convictions of the community and there were no considerations of public policy militating against its imposition. The finding was based on the state’s constitutional imperatives to protect human dignity, equality and freedom and security of the person. Vivier ADP judged the state’s liability by the yardstick of reasonableness taking into account policy and the community’s legal convictions. There are no pre-defined limits to the state’s liability, but, as stated by Vivier ADP, each case is individually assessed using the criteria for negligence.

Ms K, who had had an argument with a boyfriend with whom she had been out for the evening, was looking for a telephone to call home when she met three police officers. They offered her a lift home which she accepted. However, they took her to a deserted place, raped and abandoned her. The Court in *K v Minister of Safety and Security* unanimously held that the Minister was vicariously liable. Although the policemen’s conduct was a clear of human conduct and the operational choices which must be made in terms of priorities and resources’ and held that the duty on the state ‘must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities’: above, 305 [116].

244 *Van Eeden v Minister of Safety and Security* [2002] 4 All SA 346 (SCA).
245 n 244 above, [24].
246 n 244 above, [13], [24].
247 n 244 above, [9]:
A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment, based inter alia upon its perception of the legal convictions of the community and on considerations of policy.
248 n 244 above, [22]:
[O]ur courts do not confine liability for an omission to certain stereotypes but adopt an open-ended and flexible approach to the question whether a particular omission to act should be held unlawful or not. In deciding that question the requirements for establishing negligence and causation provide sufficient practical scope for limiting liability.
249 2005 6 SA 419 (CC).
deviation from their duty, there existed a sufficiently close relationship
between their employment and the wrongful conduct. O’Regan J un-
surprisingly held that the police officers had breached K’s rights to dignity
and security of the person in Sections 10 and 12 of the Constitution, and
went on to explain why the state as employer should be liable in tort for their
actions.250

In committing the crime, the policemen not only did not protect the
applicant, they infringed her rights to dignity and security of the person.
In so doing, their employer’s obligation (and theirs) to prevent crime was
not met. There is an intimate connection between the delict committed
by the policemen and the purposes of their employer. This close con-
nection renders the respondent liable vicariously to the applicant for the
wrongful conduct of the policemen.

The finding of vicarious liability was possible because the state and the
police had constitutional obligations to prevent crime in general under Section
205(3) of the Constitution.251 The policemen also had a statutory obligation
as part of their work to ensure the safety and security of all South Africans
and to prevent crime.252 Their duty extended to protect the public from
crime within the police force as well as from the more usual source in the
wider community. The existing common law had a test for establishing
vicarious liability similar to that in other jurisdictions focusing both on ‘the
subjective state of mind of the employees’ and the objective question, whether
the deviant conduct was ‘nevertheless sufficiently connected to the
employer’s enterprise’.253

The Court developed the common law on vicarious liability, as O’Regan
J considered that the objective element of the test relating to ‘the connection
between the deviant conduct and the employment’ was sufficiently flexible
to incorporate constitutional and other norms.254 When a court utilised
the test, there was a requirement ‘to articulate its reasoning for its conclusions as
to whether there is a sufficient connection between the wrongful conduct

250 n 249 above, [57].
251 It reads: ‘The objects of the police service are to prevent, combat and investigate
crime, to maintain public order, to protect and secure the inhabitants of the Republic
and their property, and to uphold and enforce the law.’
252 n 249 above, [18], citing Preamble to the South African Police Service Act 1995.
253 n 249 above, [44].
254 As above.
and the employment or not. In applying the test to the facts in K’s situation, O’Regan J held that the objective test had been satisfied as, first, the policemen and their employer all bore a statutory and constitutional duty to prevent crime and protect the members of the public. Second, in addition to the general duty to protect the public, the uniformed policemen had offered to assist K and she had accepted their offer. Third, the conduct of the policemen constituted the commission of the rape and the simultaneous omission of failing while on duty to protect her from harm. These three inter-related factors make it plain that viewed against the background of K’s constitutional rights and the constitutional obligations of the policemen and the state, the connection between the conduct of the policemen and their employment was sufficiently close to render the state vicariously liable.

This decision was a fair development of the common law. There was a sufficient nexus between the wrong perpetrated and the employment responsibilities of the police officers to justify a finding of vicarious liability. It has implications for the accountability of the state where employees commit wrongs while deviating from the normal performance of their duties. It also could have application in jurisdictions outside South Africa, as O’Regan J cited foreign jurisprudence to support her reasoning. So it could involve the state in making reparation for abuse by employees with a duty to protect the public, such as those working in institutions caring for children or others in state care, members of the fire brigade, hospital staff or air traffic controllers involved in transgressions.

255 As above.
256 n 249 above, [51].
257 As above.
258 n 249 above, [53].
259 As above.
261 She cited case-law from England, Canada and the US: n 249 above, [36]-[37], [38]-[40], [41]-[42].
4.6 Children

A child has a right to dignity of its own. Sachs J described the independent personality of the child in *S v M*. The implications of independence for children are personal and associative.

The dignity rights of children range across a broad spectrum and engage freedom to express themselves, communicate, and to know and form their own identities. To enable them to make lifestyle and moral choices when they grow up, education in the broad sense is indispensable. They are entitled to experience and enjoy their childhood in secure surroundings.

Specific children's rights are contained in Section 28 of the Constitution. There is constitutional recognition that, in all matters concerning them, children's 'best interests are of paramount importance'. This rule has some practical difficulties in application, the most serious of which is the absence of guidelines to ascertain its scope. The express recognition of children's rights in the Constitution has had an effect beyond the provision's immediate reach and has given an impetus to children's access to equality and other constitutional rights, as Langa DCJ stated in *Bhe*.

Section 28 of the Constitution provides specific protection for the rights of children. Our constitutional obligations in relation to children are particularly important for we vest in our children our hopes for a better life for all. The inclusion of this provision in the Constitution marks the

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262 2008 3 SA 232 (CC) [18]: 
Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.

263 *S v M* (n 262 above) [19] (Sachs J):
Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.

264 Sec 28(2). See Rautenbach (n 5 above) 422 - 426.

265 B Bekink & D Brand ‘Constitutional protection of children’ in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 194 - 195. There are varying views on whether it is defective because it is broad and vague, or whether its flexibility is beneficial: above, 194.

266 *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) [52] (footnotes omitted).
constitutional importance of protecting the rights of children, not only those rights expressly conferred by section 28 but also all the other rights in the Constitution which, appropriately construed, are also conferred upon children. Children, therefore, may not be subjected to unfair discrimination in breach of section 9(3) just as adults may not be.

In that case the Court found that the African customary law rule of male primogeniture, in the form that it had come to be applied in relation to the inheritance of property, discriminated unfairly against women and extra-marital children, who still suffered from ‘social stigma and impairment of dignity’.267 Ngcobo J partially dissented and considered that the principle of primogeniture did not unfairly discriminate on the basis of age and birth against younger children in the family, as the limitation on their rights imposed by entrusting the responsibilities of a deceased family head to the eldest child was reasonable and justifiable, bearing in mind that the African culture cherished respect for elders, who were required to mentor the young.268 Statutory provisions governing succession and intestacy also breached the constitutional rights to equality in Section 9(3) and to dignity in Section 10.

The best interests of the child have been given some judicial consideration. In Fitzpatrick where legislation prohibiting intercountry adoption was held to be contrary to the rights of the child in Section 28 to the extent that it absolutely proscribed adoption of a South African born child by non-South Africans, Goldstone J did not impose a rigid meaning on the child’s best interests.269 One of the objects of the Hague Convention is to establish safeguards to ensure that adoptions take place in the best interests of the

267 n 266 above, [59]. In Tanzania the prohibition on the sale of inherited clan land by females (but not by males) was held to constitute discrimination on the grounds of sex: Ephrahim v Fastery [1990] LRC (Const) 757 (High Court of Tanzania). In adjudicating on a dispute over the distribution of the estate of an intestate polygamous man, the Court of Appeal in Kenya found that it would be unfair discrimination on the grounds of sex to allocate daughters minimal shares on the basis that they would marry: Rono v Rono [2005] AHRLR 107 (KeCA 2005).

268 n 266 above, [181], [183].

Goldstone J pointed out the need for flexibility to ensure the child’s welfare. The Court found in Du Toit that the statutory exclusion of an otherwise suitable lesbian couple from adopting a child infringed not only the rights of the proposed adoptive parents, but also breached the principle that the child’s best interests were paramount and infringed the child’s right to care in Section 28(1)(b) of the Constitution. Skweyiya AJ criticised the Child Care Act for thus depriving children ‘of the possibility of a loving and stable family life’, which was ‘a matter of particular concern given the social reality of the vast number of parentless children’ in South Africa.
Chapter 5

Association of dignity with other rights

The value of dignity is frequently used as an aid to interpret other rights and to give them substance. Human dignity’s foundational status² has meant that it serves as a background principle in the interpretation and development of other rights.² Heinz Klug pointed out the similarity between South African and German jurisprudence in this respect – both regard human dignity as a foundational value and both have specific rights to dignity.³ Reva Siegel has discerned at least three distinct usages of dignity in the substantive due process and equal protection cases in the United States: dignity as life, dignity as liberty, and dignity as equality.⁴ Dignity as ‘liberty’ can be seen when dignity resembles Kantian autonomy, described by Siegel as ‘the right of individuals to be self-governing and self-defining, and their commensurate right not to be treated as mere objects or instruments of another’s will.’⁵ When dignity

1 Human rights emerged because of human dignity serving as ‘a conceptual hinge’ to connect the internalised rationally justified morality anchored in the individual conscience with coercive positive enacted law: J Habermas ‘The concept of human dignity and the realistic utopia of human rights’ (2010) 41 Metaphilosophy 464 at 470.
3 As above.

229
‘is concerned with respect, honor, and social standing, and concerns the right of persons to be respected as an equal member of the polity rather than denigrated, subordinated, or excluded’, it is dignity as ‘equality’.6

5.1 Freedom and security

Specific safeguards for the freedom and security of the person are contained in Section 12 of the Constitution.7 Section 12(1) is devoted to personal freedom,8 while Section 12(2) relates to bodily and psychological integrity.9

5.1.1 Personal freedom

Freedom and security of the person at substantive and procedural levels are in issue when the liberty of the individual is at stake.10 They can arise in civil
matters as well as in relation to crime. Legitimate deprivation of liberty normally follows a fair trial and conviction. The length of detention must be reasonable, equally applied to all in similar circumstances and give an incentive to improve by a promise of early release for good behaviour. A fair trial respects the dignity of the accused, of the justice system and of society as a whole. The democratic principle of equality demands that all be treated fairly. Section 12(1) of the Constitution contains detailed provisions protecting the individual’s freedom and security, while the right to a fair trial is in Section 35(3). There is a case-by-case analysis of whether there has been an infringement of the constitutional right to personal freedom. Dignity and equality as foundational values are relevant in the assessment of the factual situation.

The judges in the Constitutional Court in Ferreira v Levin held conflicting views as to the breadth of freedom protected by Section 11 of the interim Constitution. Ackermann J felt that a broad interpretation of freedom was warranted, as in its absence dignity had no practical meaning since people would be unable to achieve self-fulfilment and realise the full extent of their dignity. Chaskalson P considered that dignity was not dependent on that wide a reading of freedom. Sachs J also disagreed with Ackermann J’s rendition of Section 11, but thought that the overall constitutional setting, the foundational values and the rights to dignity and privacy would give

11 Parole has a restorative justice aim: Van Vuren v Minister of Correctional Services [2010] ZACC 17, 2010 12 BCLR 1233 (CC) [51]. Retrospective deprivation of credits to advance the date of consideration for parole deprived an offender of liberty and did not conform with the rule of law: Van Wyk v Minister of Correctional Services [2011] ZAGPPHC 125 (North Gauteng High Court, Pretoria) [22].

12 1996 1 SA 984 (CC). See Klug (n 2 above) 152.

13 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: n 12 above, [49].

14 n 12 above, [173):

[N]or do I consider it necessary, as Ackermann J has suggested that it may be, to adopt such a construction in order to give substance to the right to human dignity. In the context of the multiplicity of rights with which it is associated in Chapter 3, human dignity can and will flourish without such an extensive interpretation being given to section 11(1). In the Prostitution Reference in Canada Lamer J cautioned against defining liberty or security of the person in the Canadian Charter in terms of attributes such as dignity, self-worth and emotional well-being, as liberty would then be all inclusive and would give rise to questions about the independent existence in the Charter of other rights and freedoms such as freedom of religion and conscience or freedom of expression: Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man) [1990] 1 SCR 1123 (SC of Canada) 52.
more substance to freedom. 15 Modern society requires state intervention and the inevitable curtailment of individual liberty to some extent in order to provide an environment conducive to the enjoyment of freedom by all. Sachs J rightly said it was unrealistic nowadays to ‘equate freedom simply with autonomy or the right to be left alone’. 16 The effective exercise of individual choice depends not just on the state refraining from interference, but taking positive interventionist steps to ensure that people can choose. Mutual compatibility in society is necessary for realisation of freedom, as Sachs J explained: 17

Freedom and personal security are thus achieved both by protecting human autonomy on the one hand, and by acknowledging human interdependence on the other. The interdependence is not a limitation on freedom, but an element of it.

The right to freedom in Section 11 of the interim Constitution arose also in Bernstein v Bester where O’Regan J considered that the foundational value of dignity would aid interpretation of freedom, security and other rights. 18 In S v Thebus the doctrine of common purpose was held to be constitutional and did not violate the rights to dignity or to freedom. 19 Moseneke J did not

15 n 12 above, [255]:
The text of section 11, which includes a prohibition against detention without trial, as well as the exclusion of torture and other forms of physical and emotional ill-treatment, indicates a narrow concern with the theme of bodily restraint or abuse, rather than a sweeping repudiation of any impediment whatsoever to the orderly pursuit of happiness. On the other hand, the express acknowledgement of the rights to dignity and privacy in sections 10 and 13 respectively, read together with the preamble and the afterword, establish a setting which allows for a more expansive role for the word freedom.

16 n 12 above, [250] (footnote omitted).

17 n 12 above, [251] (footnote omitted).

18 1996 2 SA 751 (CC) [148]:
[Section 11(1)] needs to be understood in the context of the fundamental commitment to dignity expressed in our Constitution in section 10. Our Constitution represents an emphatic rejection of a past in which human dignity was denied repeatedly by an authoritarian and racist government. … The recognition of the value of human beings is a cardinal principle of the Constitution and one which will inform the interpretation of many of the specific rights in the Constitution. Ackermann J in De Lange v Smuts (a challenge to committal to prison for failure to produce documents and to provide information in insolvency proceedings), considered it significant that the use of committal to prison as a means to enforce the disclosure of information in insolvency proceedings was not constitutionally or otherwise objectionable in other open and democratic societies based on dignity, equality and freedom: 1998 3 SA 785 (CC) [39].

19 2003 6 SA 505 (CC).
accept the defence argument that the legal rule dehumanised the perpetrators, because they had chosen voluntarily to participate in the criminal escapade.\textsuperscript{20} Deprivation of liberty in South Africa must be in accordance with the basic tenets of the legal system.\textsuperscript{21}

The legislation allowing for imprisonment of judgment debtors was found to be a violation of Section 11(1) of the interim Constitution in \textit{Coetzee v Government of the Republic of South Africa}, when Sachs J treated the right to dignity as ‘intertwined with’ the freedom and security rights, and an aid to interpreting them.\textsuperscript{22} The Constitutional Court held in \textit{Malachi v Cape Dance Academy International (Pty) Ltd} that the arrest and detention of an alleged debtor intending to flee the country breached the right to freedom and security in Section 12 of the Constitution and was not a justifiable limitation.\textsuperscript{23} The procedural device of civil imprisonment came to the Cape through Roman-Dutch law and was retained with some modification after the English administration replaced the Dutch authority in the Cape in the early 18th century; later, other territories in South Africa legislated for civil imprisonment based on the Cape model; after the establishment of the Union of South Africa in 1910 it was consolidated and modified by successive

\textsuperscript{20} ‘[A] person who knowingly, and bearing the requisite intention, participates in the achievement of a criminal outcome cannot, upon conviction in a fair trial, validly claim that his or her rights to dignity and freedom have been invaded.’: n 19 above, [41].

\textsuperscript{21} This approach corresponds loosely with that of the Canadian courts in dealing with the standard of ‘fundamental justice’ in Section 7 of the Canadian Charter of Rights and Freedoms: I Currie & J de Waal \textit{The Bill of Rights handbook} (2005) 296.

\textsuperscript{22} 1995 4 SA 631 (CC) [43]. In assessing whether the limitation of rights was reasonable and necessary, Sachs J did not establish ‘an impossibly high threshold’ which would rule out ‘genuine weighing by Parliament of reasonable alternatives within the broad bracket of what would not be unduly oppressive’ and indicated that what mattered in ‘finding “the least onerous solution”’ was that ‘the means adopted by Parliament fell within the category of options which were clearly not unduly burdensome, overbroad or excessive, considering all the reasonable alternatives’: above, [60]. Eva Brems commented that although the maximisation criterion was being applied in principle here, it was interpreted in a way that significantly lowered the standard; instead of looking for the least onerous solution, the Court looked for a not unduly onerous solution: E Brems ‘Human rights: Minimum and maximum perspectives’ (2009) 9 \textit{Human Rights Law Review} 349 at 364 - 365.

\textsuperscript{23} Cf \textit{Julius v Commanding Officer, Windhoek Prison} 1996 NR 390 (High Court of Namibia).

\textsuperscript{20} [2010] ZACC 13, 2010 6 SA 1 (CC) [34], [41]. Legislation permitting lenders to seize and sell the property of defaulting debtors breached the right of access to court in Section 34 of the Constitution and was not a permitted limitation: \textit{Lesapo v North West Agricultural Bank} [1999] ZACC 16, 2000 1 SA 409 (CC). Contrast \textit{Road Accident Fund v Mdeyide} [2010] ZACC 18, 2011 2 SA 26 (CC).
legislation, which ultimately abolished civil imprisonment as such, but
effectively neutralised the abolition by retaining imprisonment of a judgment
debtor who had failed to satisfy a judgment debt for contempt of court.24 In
1986 the South African Law Commission recommended abolition of this
procedure; at the request of the Minister of Justice, a further investigation
was launched by the Commission and it recommended provisionally that
the mechanism of civil imprisonment be retained with modifications.25

From a comparative law perspective, there is no universal approach to
imprisonment for civil debt. Some countries have prohibited it entirely;26
others have forbidden imprisonment for non-payment of a contractual
obligation, but have allowed imprisonment for civil contempt of court of a
recalcitrant debtor with ability to pay. The remedy of imprisonment for the
failure to pay a judgment debt can be traced to ancient legal systems such as
the Mosaic legislation and the Twelve Tables of early Roman law.27 The
origins of the ban on civil imprisonment date back to 1606 in English law,
when nobles were not liable to be arrested for debt because – as explained by
the Star Chamber – of their dignity and the presumption of sufficient wealth
that could be seized.28 Eventually in 1970 the ban on imprisonment for debt
in England was extended to all.29 Several international and regional human
right instruments adopted since the Second World War prohibit
imprisonment for failure to comply with an order for payment of a contractual
debt.30 They include the International Covenant on Civil and Political Rights
(ICCPR), article 11 of which reads: ‘No one shall be imprisoned merely on
the ground of inability to fulfil a contractual obligation.’31 There is a very
similar provision in the Fourth Protocol to the European Convention on

24 W le R de Vos ‘Civil imprisonment: The impact of the new Constitution’ (1994) 5
Stellenbosch Law Review 133 at 135.
25 De Vos (n 24 above) 136.
26 Eg, France and the Netherlands: de Vos (n 24 above) 139.
27 De Vos (n 24 above) 134 - 135.
28 J Waldron Dignity, rank, and rights (2012) 56 - 57, citing Isabel, Countess of Rutland’s
Case (1606) 6 Co Rep 52 b, 77 ER 332 at 333.
29 De Vos (n 24 above) 138 - 139, citing Administration of Justice Act 1970.
30 De Vos (n 24 above) 141.
31 International Covenant on Civil and Political Rights (adopted 16 December 1966,
entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Art 11 is excluded
from the provisions in ICCPR which may be derogated from in times of public
emergency: art 4(2).
Human Rights (ECHR). The American Declaration of the Rights and Duties of Man does not confine the prevention of imprisonment to debt, but covers other civil obligations with the following wording: ‘No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.’

In Chinamora v Angwa Furnishers (Private) Ltd the Supreme Court of Zimbabwe found that there were sufficient legal safeguards to prevent the jailing of an impecunious debtor. The Constitution of Zimbabwe contained a specific recognition that a person could be deprived of personal liberty as authorised by law ‘in execution of the order of a court made in order to secure the fulfilment of an obligation imposed on him by law’. The Court held that the legislative provisions and the court rules did not violate the inhibition on deprivation of personal liberty in Section 13(1) of the Constitution. Gubbay CJ distinguished Coetzee, as in Zimbabwe there was adequate protection for the debtor since the law differentiated between debtors who could not pay and those who refused to pay. The reformative

32 ‘No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation’: ECHR Protocol No 4 securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Art 1.


35 Constitution of the Republic of Zimbabwe 1979, Sec 13(2)(c).

36 Neither was the constitutional protection of the law for every person in Section 18(1) violated, since it was specifically subject to other constitutional provisions, including Section 13(2)(c) allowing deprivation of liberty to ensure fulfilment of a legal obligation: n 34 above, 169 - 170. Because of the avoidable nature of punishment in imprisonment for civil debt, the Court also held that it did not amount to degrading treatment under Section 15(1) of the Constitution: n 34 above, 169. The Court pointed out that a sentence of imprisonment could not be adjudged unconstitutional unless it was blatantly disproportionate to the quality of the offence – the humiliation and degradation felt by a person sentenced to a term of imprisonment did not of itself constitute degrading treatment: n 34 above, 168.

37 n 34 above, 167. The onus was on the creditor to establish the debtor’s ability to pay: n 34 above, 166. The procedure required the debtor to produce evidence of his financial position, warned him of the possibility of imprisonment and, by enjoining the court to conduct a meticulous inquiry into his ability to pay, ensured that that issue was properly addressed and examined: n 34 above, 166 - 167. Where the debtor did not attend the hearing, the court would not order imprisonment unless satisfied that there had been personal service of the summons, and, in practice, the court only entertained an application for imprisonment when other enforcement methods had been considered or tried and were inappropriate or unsuccessful: n 34 above, 167.
Human dignity and fundamental rights in South Africa and Ireland

and autonomous elements necessary to render constitutional imprisonment for non-payment of civil debt are evident in Gubbay CJ’s judgment, as he considered it essential that the debtor should have the choice to avoid prison by having access to funds to pay the amount due. He recognised that imprisonment of an impecunious debtor was contrary to international human rights instruments, which were not concerned with the debtor who had the means to pay but obdurately declined to do so. They were aimed at protection of the individual from imprisonment where there was a genuine inability to pay. The international code was not breached in Zimbabwe, which also only targeted those who refused to pay.

In a somewhat analogous situation in *Hicks v Feiock* concerning the burden of proof in punishment for contempt of court of a father for failure to make child support payments, the US Supreme Court focused on the difference between criminal contempt and civil contempt, due process being required only for the former. Justice White pointed out the choice to avoid the conditional penalty available in civil contempt, where it was specifically

When the Irish High Court found that the legislation permitting imprisonment for debt was unconstitutional on the grounds that it breached the guarantee of fair procedure and that it was a disproportionate interference with the debtor’s right to liberty, Laffoy J referred to the Supreme Court of Zimbabwe’s distinction of *Coetzee: McCann v Judge of Monaghan District Court* [2009] IEHC 276.

38 n 34 above, 163:
Thus the only real effect of imprisonment of an impoverished debtor is that of punishment. It is a punishment that can be avoided by a debtor who is able but unwilling to pay; for satisfaction of the judgment remains within his power. But it becomes mandatory against one without the means to pay. It discriminates between one and the other.

39 n 34 above, 162.

40 n 34 above, 162 - 163.

41 485 US 624 (1988). The case was referred back to the state court for further consideration, as the majority considered it was unclear whether civil or criminal contempt was involved. Justice O’Connor for the dissentients in *Hicks* looked at the beneficiary of the proceedings to assist in ascertaining the nature of the punishment, as she stated, ‘[t]he most important indication is whether the judgment inures to the benefit of another party to the proceeding.’ above, 646. Having considered the objective features of the proceeding and the sanction in order to infer whether it was criminal or civil, the minority concluded it was civil contempt, since the penalty was intended to enforce maintenance payments and not simply to punish for non-compliance with a court order: above, 646, 650 - 651.

Sachs J in *Coetzee* referring to the imprisonment of a judgment debtor and the different objectives of a criminal trial, cited *Hicks* as re-affirming ‘the distinction between imprisonment for a fixed period as a punishment for doing something forbidden, and imprisonment as a flexible remedial instrument for failure to fulfil an obligation’: n 22 above, [43], fn 34.
designed to compel the doing of some act, in contrast to an unconditional penalty which was criminal in nature because it was ‘solely and exclusively punitive in character.’ The theme of free choice has resonances in Gubbay CJ’s judgment in *Chinamora*.

The Supreme Court of India in *Jolly George Verghese v Bank of Cochin* invoked the value of dignity when it held that a simple default to discharge a judgment debt did not merit imprisonment, as enjoined by article 11 of ICCPR. The Court construed the constitutional rights to equality before the law and equal protection of the laws, to freedom and to fair procedure before deprivation of liberty in the light of the value of dignity. Krishna Iyer J affirmed that the ‘high value of human dignity and the worth of the human person’ obligated the state not to incarcerate except under law which was ‘fair, just and reasonable in its procedural essence.’ The legislation was unconstitutional because it implied that a sanction could be imposed if a debtor had the ability to pay at any time since the judgment, even though he later became penniless. The Court required that there be a comprehensive view of the person’s situation. Imprisonment of a person to recover a debt required ‘proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness.’ An element of dishonesty could also justify imprisonment, as Krishna Iyer J indicated when he set out the parameters:

The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the

45 Art 19.
46 Art 21.
47 n 43 above, 921.
48 n 43 above, 922. Krishna Iyer J adverted to the change in the legal approach over time, as he stated, ‘[a] modern Shylock is shackled by law’s humane handcuffs’: n 43 above, 916. He expanded on the equal worth of the poor, ‘[i]t is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of daridra Narayana, is no crime…’: n 43 above, 922.
49 n 43 above, 922.
50 As above.
51 As above.
decree or a substantial part of it. … [C]onsiderations of the debtor’s other pressing needs and straitened circumstances will play prominently.

Imprisonment for crimes of strict liability infringes the right to freedom because the will to commit a crime is absent. South African criminal law, founded on liberal philosophy, as Shannon Hoctor wrote, holds humans morally autonomous and assumes the individual can distinguish right from wrong, has the competency to decide how to act and the capability to realise that decision.52 Because of human dignity and autonomy, the individual must not be treated as an object or instrument.53 These moral principles find expression in the necessity for there to be mens rea before deprivation of liberty for a crime.54 O’Regan J in S v Coetzee said it had been acknowledged by the courts ‘on countless occasions’ that ‘the state’s right to punish criminal conduct rests on the notion that culpable criminal conduct is blameworthy and merits punishment.’55 Strict liability uses the offender as an instrument of deterrence and can only be allowed for regulatory or minor infringements of the law with correspondingly limited sanctions. Similar principles were applied in Irish law in CC v Ireland, where the Supreme Court held that a provision which criminalised and exposed a person without mental guilt to a maximum sentence of life imprisonment failed to respect the liberty or dignity of the individual.56

As criminal liability without fault is not consonant with basic tenets of the legal system, Iain Currie and Johan de Waal have deduced that its constitutionality in South Africa depends on it being justified under the general limitation clause.57

53 As above.
54 n 52 above, 309. Markus Dubber urges that levels of mens rea (eg, purpose, knowledge, recklessness, and negligence) should represent degrees to which the offender’s act can be conceptualised, first, as a manifestation of her capacity for autonomy and, second, as a manifestation of her view of the victim as a non-person, ie, as lacking the capacity for autonomy: MD Dubber ‘Dignity in penal law and penal police’ (2009) Working Paper http://ssrn.com/abstract=1530545 (accessed 28 September 2013) 5.
55 1997 3 SA 527 (CC) [162].
56 [2006] IESC 33, [2006] 4 IR 1. Subsequently the Criminal Law (Sexual Offences) Act 2006 criminalised defilement of a child, but provided for a defence of ‘honest belief’ that the child was over age in section 2(3) and section 3(5). The question of the burden of proof of ‘honest belief’ was considered in People (DPP) v Egan [2010] IECCA 28.
57 n 21 above, 297.
The criminal law also incorporates the communitarian aspect *ubuntu*, which is closely aligned to dignity. Langa J described the link between dignity and *ubuntu*, and the mutuality of respect in society in *Makwanyane*.

*Ubuntu* recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

The interrelationship in communities and the equality in dignity between individuals curtail the freedom to act without regard for the other.

Section 12(1)(c) of the Constitution providing for the right to be free from public or private violence, together with the rights to life and human dignity, impose a positive duty on the state to protect individuals in some circumstances. Because of the constitutional imperative to protect dignity and personal freedom and security, the Court held in *Baloyi* that the state is obliged to deal with domestic violence. Sachs J referred to the positive and negative aspects to the right not to be physically abused.

58 Hoctor (n 52 above) 315.

59 *S v Makwanyane* 1995 6 BCLR 665 (CC) [224]. Habermas emphasised the need to anchor human dignity in equal social status as members of an organised community, where citizens derive their self-respect from the fact that they are recognised by all other citizens as subjects of equal actionable rights: n 1 above, 472.

60 The formulation of the right to freedom from public and private violence as an aspect of the right to freedom and security justifies state intervention in domestic violence; the fact that the right to freedom from violence is a discrete right dispels any argument that the right to freedom and security only provides a guarantee against arbitrary arrest and detention: H Combrinck ‘The right to freedom from violence and the reform of sexual assault law in South Africa’ in J Sarkin & W Binchy (eds) *Human rights, the citizen and the state: South African and Irish approaches* (2001) 185.

61 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) [44]. The South African Constitution, like the ECHR, by on occasion requiring operational intervention by the state to prevent harm, points in the opposite direction to the absence of positive rights in the US Constitution: above, [45].

62 *S v Baloyi* 2000 2 SA 425 (CC). This was significant, as there had been a perception that domestic violence was solely a private dispute: W Amien ‘Recent developments in the area of women’s rights in South Africa: Focusing on domestic violence and femicide’ in Sarkin & Binchy (n 60 above) 171 - 172.

63 n 62 above, [11] (footnotes omitted). Read with section 7(2), section 12(1) has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence.
The courts have developed the common law incrementally in accordance with constitutional principles to impose vicarious liability in delict on the state, where negligent omissions by the police allowed members of the public to be killed or injured. The Supreme Court of Appeal in *Minister of Safety and Security v Van Duivenboden* held that the negligent conduct of police officers in possession of information reflecting on the fitness of a person to possess firearms gave rise to a duty to take reasonable steps to act on that information in order to avoid harm occurring, such that individuals injured as a result were entitled to compensation from the state.64 Nugent JA for the majority based his assessment of the circumstances when it should be unlawful to culpably cause loss on the prevailing norms in South Africa.65 He approached this task in a structured manner and ruled out intuition as a guide.66 He considered that the norm of accountability had an important role in determining whether a legal duty ought to be recognised.67 Where accountability could be secured without delictual liability through the political process or by another judicial remedy,68 compensation would not necessarily be payable by the state.69 In the absence of an alternative method of accountability, an action would lie provided there were no countervailing

Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the defensive rights of everyone not to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman or degrading way.


65 n 64 above, [16].

66 ‘When determining whether the law should recognize the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.’: n 64 above, [21].

67 As above.

68 The African Commission requires that a remedy be available, effective and sufficient: *Jawara v The Gambia* [2000] AHRLR 107 (ACHPR 2000) [31]. A remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint: above, [32].

69 n 64 above, [21]. Cf *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 3 SA 121 (CC).
The state had a constitutional duty to protect an individual’s constitutional rights to human dignity, life and security of the person, and, as there was no offsetting public interest, liability attached to the state.\(^\text{71}\) The issue was not the general duty of the police to investigate crime.\(^\text{72}\)

The Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* approved of taking into consideration accountability, as well as other constitutional norms such as ‘the principle of effectiveness and the need to be responsive to people’s needs’, in a contextual enquiry to determine whether a legal duty exists.\(^\text{73}\)

In *Minister of Safety and Security v Hamilton* the Supreme Court of Appeal held that the police had a legal duty to exercise reasonable care in considering, investigating, recommending and granting an application for a firearm licence and that the state was liable in damages to a person injured by the licence holder.\(^\text{74}\) The police were obliged to take reasonable steps to investigate whether the applicant was competent and fit to possess a firearm. The identifiable norms that Van Heerden AJA balanced were the individual’s right to life, bodily integrity and security of the person against ‘policy considerations such as the efficient functioning of the police, the availability of resources and the undoubted public importance of the effective control of firearms’.\(^\text{75}\) He based his decision, not directly on the Constitution, but on the common law and statutory provisions.\(^\text{76}\) However, he was satisfied that the existence of the legal duty on the police in the circumstances was consistent with society’s norms and values as reflected in the Constitution.\(^\text{77}\)

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\(^{70}\) ‘Where the state’s failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm.’ n 64 above, [21].

\(^{71}\) n 64 above, [22]. Marais J concurred in the outcome, but for different reasons. He did not base his decision on constitutional grounds.

\(^{72}\) As above.


\(^{74}\) [2003] 4 All SA 117 (SCA).

\(^{75}\) n 74 above, [35].

\(^{76}\) n 74 above, [36].

\(^{77}\) As above.
5.1.2 Damages for breach of fundamental rights

The question of whether damages over and above those under the normal delictual headings should be awarded for breach of fundamental rights was raised in *Fose*.[78] *Fose* claimed damages from the State for a series of assaults by members of the police force. In addition to common law damages for pain and suffering, insult, shock, past and future medical expenses and loss of enjoyment of the amenities of life, he claimed ‘constitutional damages’ including an element of punitive damages[79] for the infringement of his constitutional rights mainly not to be tortured nor subjected to cruel, inhuman or degrading treatment.[80] He also relied on violation of his rights to dignity[81] and privacy.[82] The legal issue that came before the Constitutional Court was whether constitutional damages could and ought to be awarded as appropriate relief under Section 7(4)(a) of the interim Constitution for breach of constitutional rights.[83]

According to Ackermann J, the fact that litigation was a costly venture in a country with many poor people made it even more imperative to secure an effective remedy in the event of a claim being successful.[84] He accepted that it might be necessary for the courts ‘to “forge new tools” and shape innovative remedies’ in order to do so.[85] In the case at hand involving claims for assault, however, the Constitutional Court found that an award of constitutional damages against the state on top of damages at common law would not be appropriate.[86] Ackermann J considered that the civil and criminal laws should

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79 n 78 above, [12].
80 Interim Constitution of the Republic of South Africa 1993, Sec 11(2).
81 Sec 10.
82 Sec 13.
83 n 78 above, [1].
84 n 78 above, [69]:
[A]n appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.
85 As above.
86 n 78 above, [73], [75], [88], [104], [106].
be kept separate and that penalties should only be imposed following a criminal prosecution with the attendant procedural safeguards. From his wide-ranging comparative review of damages in foreign jurisdictions and under the ECHR, he ascertained that in some countries (including Ireland) constitutional damages are awarded. He was averse to requiring the state to pay excessive damages for the wrongdoing of the police, as the deterrent effect on individual police officers was doubtful and public monies could be put to better use to prevent assaults by the police in future.

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87 n 78 above, [70].
89 n 78 above, [25]-[57]. He distinguished the foreign jurisprudence, as differences in law and procedure existed between the jurisdictions reviewed and South Africa: n 78 above, [58]. The statutory relief and the award of constitutional damages based directly on the Constitution in the US were legislative and judicial responses to the perceived inadequacy of the common law tort remedies: n 78 above, [55]. The recognition of constitutional torts in the US established the right of citizens to hold government accountable for individual harms, which departs from the more traditional democratic approach of holding the government accountable collectively by exercising the will of the majority in elections: SJ Wermiel ‘Law and human dignity: The judicial soul of Justice Brennan’ (1998) 7 William and Mary Bill of Rights Journal 223 at 235.
90 The Irish Supreme Court has held that in an appropriate case exemplary or punitive damages for breach of constitutional rights might be awarded as an effective deterrent: Conway v Irish National Teachers Organisation [1991] 2 IR 305 (HC, SC). After this case it was clear that punitive damages might be awarded for breach of a constitutional right in Ireland, but it was less easy to identify the criteria for granting them: W Binchy ‘Constitutional remedies and the law of torts’ in J O’Reilly (ed) Human rights and constitutional law: Essays in honour of Brian Walsh (1992) 217. The circumstances in which exemplary damages would be awarded was clarified subsequently: Shortt v Commissioner of An Garda Síochána [2007] IESC 9, [2007] 4 IR 587. The Supreme Court indicated that exemplary damages served several potential purposes including to mark the court’s disapproval of a defendant’s outrageous conduct: above, [108], [253]. They were also punitive and they might financially punish a defendant as a deterrent to that defendant as well as a deterrent generally to the arrogant use or abuse of power: above, [109], [253]. Although in the form of a financial penalty, an award of exemplary damages was also ‘a moral sanction, a mirror to “the proper indignation of the public”’: above, [110] (Murray CJ).
91 n 78 above, [72] (footnote omitted):

In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are ‘multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform’, it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement.
The same attitude is apparent in Didcott J’s judgment where he elaborated on the downside of punitive damages against the state. Unlike Ackermann J, he was completely opposed to the introduction by the judiciary of punitive or exemplary damages against the state in any circumstances and was unambiguously of the view that it was a matter for the legislature to decide after investigation by the Law Reform Commission, consultation with experts in the area and perhaps even a judicial enquiry. He was open to the possibility of punitive or exemplary damages against non-state parties because the funds would not come from the public coffers and would be a deterrent, but even if that were thought appropriate it should be the product of legislative action and not of judicial innovation. Kriegler J also viewed an award of punitive damages against the state for assault as futile, but he did not rule out punitive damages in all circumstances.

It is clear that none of the judges favoured punitive damages against the state in assault cases. The taxpayer would end up paying for excessive enrichment of the person assaulted, who took the initiative to sue. The evidence in Fose seemed to indicate that assaults and torture by police officers were widespread. The remedy should not be to make excessive awards of damages against the state. To stamp out corruption in the police force would

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92 n 78 above, [84]:
Payment of punitive damages would come from the public purse and go to the plaintiff alone. Few potential torturers would be scared greatly by such a sequel, one not affecting their own pockets. Nor could it strengthen the cause of vindication for an individual claimant, or even a series of them, to be enriched at the expense of the taxpayer.

93 n 78 above, [85]–[86].
94 n 78 above, [87]. Contrast Shortt (n 90 above) [229] (Hardiman J).
95 n 78 above, [103]:
The relief in this case would come from the public coffers and be directed towards the appellant. The policemen implicated in the appellant’s claim could not possibly be deterred by a payment of damages bearing no relation to their own finances. Nor do we vindicate the Constitution by enriching a particular claimant at the cost of the taxpayer – particularly when the problem is far larger than the claimant concerned. In other words, we do not adequately defend the Constitution by merely granting punitive damages in this case, or even in several cases. … I should stress that punitive damages is not ‘appropriate relief’ on these facts because it is inefficacious for dealing with the kind of problem that the appellant posits.

96 Contrast the decision of Mwaungulu J in the High Court of Malawi when his award of damages for false imprisonment for 19 years compensated the plaintiff and punished the state for the way it treated him: Munthali v AG [2002] AHRLR 102 (MwHC 1993) [27]. His award took into account the injury to feelings (indignity, mental suffering, distress and humiliation): above, [22].

97 n 78 above, [22], [81], [89].
require a practical solution such as better training, supervision and discipline of the police.

The decision in *Fose* is a narrow one and it did not decide whether punitive damages for breach of constitutional rights generally would be appropriate. Currie and de Waal’s assessment is that *Fose* established two general principles – first, where the violation of constitutional rights entails the commission of a delict, an award of damages in addition to those available under the common law will seldom be available and, second, even where delictual damages are not available, constitutional damages will not necessarily be awarded for a violation of human rights.98

5.1.3 Bodily and psychological integrity
Any doubts that might have existed over whether and to what extent personal freedom allowed control over one’s body, mind and thoughts, were removed by Section 12(2) of the Constitution. Abortion is permitted by the right to make decisions concerning reproduction, so this controversial issue does not get as much public debate in South Africa as elsewhere.99 In acknowledgment of medical and scientific developments, experiments cannot be carried out without informed consent.100 Currie and de Waal have formulated the following universal question concerning dignity and freedom to find out if the experiments proposed are justified, ‘[w]hen and to what extent can the benefits which accrue to society for medical and scientific experimentation outweigh considerations of individual dignity and autonomy?’101

The essence of the right to freedom and security of the person is a right to be left alone, which creates a sphere of individual bodily inviolability.102 Section 12(2)(b) distinguishes between ‘security in’ one’s body, which protects bodily integrity against intrusions by the state or others, and ‘control over’ the body, which is the protection of bodily autonomy or self-determination against interference. Currie and de Waal have described them as different components of the right to be left alone – the former in the sense of ‘being left unmolested by others’ and the latter in the sense of ‘being allowed to live the life one chooses’.103

98 n 21 above, 221.
99 Sec 12(2)(a).
100 Sec 12(2)(c).
101 n 21 above, 311.
102 Currie & de Waal (n 21 above) 308.
103 n 21 above, 309.
5.2 Fair trial and imprisonment

Detailed rights for those arrested, detained and accused are set out in Section 35 of the Constitution. Detainees and sentenced prisoners have the right to ‘conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment’. Fair trial rights are enumerated at length – 15 specific rights being listed in Section 35(3) and providing for matters such as a public trial, the presumption of innocence and not to be compelled to speak or to testify or to give self-incriminating evidence.

5.2.1 Criminal trials

Unlike the apartheid-era rigid system of law enforcement in accordance with the dictates of Parliament, the new South African constitutional legal system was a complete turnaround. It created an upheaval in the assessment of substantive and procedural issues arising in criminal trials. The contrast was apparent to Kentridge AJ in *S v Zuma* when he pointed out that henceforth criminal trials were required to be conducted in accordance with ‘notions of basic fairness and justice’ and that the right to a fair trial embraced ‘a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.’ Moseneke J adverted to the comprehensive nature of the constitutional guarantees in criminal trials in *Thebus*, ‘the Bill of Rights authorises and anticipates prosecution, conviction and punishment of individuals

104 The arrested person has the right to remain silent, to be informed of that fact, not to be compelled to make a confession, to be brought to court within 48 hours and then either charged, released or informed of the reason for continuing the detention, and to be released on reasonable conditions should the interests of justice so permit: Sec 35(1)(a)-(f).
105 Sec 35(2)(e). They also have rights to be informed of the reason for detention, to consult a lawyer, (at state expense, if substantial injustice would otherwise result), to bring a *habeas corpus* application, and to communicate with and be visited by close family and religious and medical advisers: Sec 35(2)(a)-(d), (f). Dingake J in Botswana High Court held that criminal proceedings were unconstitutional when an accused had been detained without trial for over 16 months and was only informed of the charge just before the start of the trial: *Sekwati v DPP* [2008] BWHC 263.
106 Sec 35(3)(c).
107 Sec 35(3)(b).
108 Sec 35(3)(j).
109 1995 2 SA 642 (CC) [16].
provided it occurs within the context of a procedurally and substantively fair trial and a permissible level of criminal culpability.\footnote{110}

The right to a fair trial and the presumption of innocence are key elements in safeguarding the liberty and dignity of the accused.\footnote{111} Avoiding a wrongful conviction is not the only reason for the constitutional provisions to ensure a fair trial, but they are also necessary to uphold dignity and equality, as Ackermann J discerned in \textit{S v Dzukuda}, having pointed out that dignity, equality and freedom lie ‘at the heart of a fair trial in the field of criminal justice’.\footnote{112}

The consequences of a conviction have severe social implications and cause the community to shun the offender. The rationale behind a fair trial takes into account the associative aspects of the individual and not simply the isolated subjective effects of incarceration on the convicted person. A guilty verdict is the official imprimatur on publicly blaming a person for breaching standards set by society and, as Otto Lagodny said, ‘is meant to stigmatize and dishonour the violator’, thus encroaching on the offender’s

\footnote{110 n 19 above, [36] (footnote omitted).} \footnote{111 \textit{Zuma} (n 109 above) [22]; \textit{S v Manamela} 2000 3 SA 1 (CC) [40]. Cf \textit{R v Oakes} [1986] 1 SCR 103, where the Canadian Supreme Court stated that the presumption of innocence protects liberty and dignity; it held that a reverse onus on an accused to disprove on the balance of probabilities that drugs in his possession were for the purpose of trafficking violated the presumption of innocence and was not a justifiable limitation; there was no rational connection with the objective. On \textit{Oakes}, see J Church \textit{et al}, \textit{Human rights from a comparative and international law perspective} (2007) 90 - 91.} \footnote{112 2000 4 SA 1078 (CC) [11] (footnote omitted): There are … elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality. On the right of an indigent accused to legal aid to ensure a fair trial, see \textit{Government of the Republic of Namibia v Mwilima} [2002] NASC 8 (SC of Namibia).

Jeremy Waldron described the right to a hearing, where both sides can probe and respond to evidence before a tribunal, which listens to them and gives the response to their arguments in the reasons for its decision, as embodying a crucial dignitarian idea – respecting the dignity of people as beings capable of explaining themselves: n 28 above, 54. By allowing arguments to be put forward to explain how their position fits into a coherent conception of the law, law conceives of people as bearers of reason and intelligence – also a tribute to human dignity: n 28 above, 54 - 55. The right to legal representation follows from people’s right to a hearing to express their own view, as they may be unable to do so perhaps because they are poor public speakers or ignorant of the law: D Luban ‘Lawyers as upholders of human dignity (when they aren’t busy assaulting it)’ [2005] \textit{University of Illinois Law Review} 815 at 819. David Luban reasons that our own subjectivity lies at the very core of our concern for human dignity: above, 821.
human dignity.¹¹³ The justification for the guilty verdict is the offender’s misuse of responsibility, which Lagodny has portrayed as ‘one of the core aspects of human personality’.¹¹⁴ In *S v Manamela* in a joint judgment dissenting on the application of the limitation clause to the presumption of innocence on the facts, but concurring with the majority that the legislation relating to receiving stolen goods infringed both the constitutional right to silence and the presumption of innocence, O’Regan J and Cameron AJ highlighted the benefits for society and the individual of holding people responsible for their actions.¹¹⁵

In order to avoid an unwarranted violation of dignity, which society can only tolerate in regulatory or minor offences with insignificant consequences, the necessity for constitutional safeguards grows with the seriousness of the offence and the public interest in securing a conviction, which Sachs J in *S v Coetzee* labelled the ‘paradox at the heart of all criminal procedure.’¹¹⁶

An agent of the apartheid regime accused of war crimes abroad retained the right to a fair trial despite the heinous and devastating nature of his activities.¹¹⁷ It was alleged that Dr Basson (an employee of the South African National Defence Force) had conspired to murder members of SWAPO in Namibia by injecting them with drugs and had provided cholera bacteria to poison the water supply of a SWAPO refugee camp in order to manipulate the outcome of elections in Namibia. Sachs J in the Constitutional Court based Dr Basson’s right to a fair trial and the state’s interest in the prosecution of war crimes on the same humanitarian principles of dignity, equality and

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¹¹³ O Lagodny ‘Human dignity and its impact on German substantive criminal law and criminal procedure’ (1999) 33 *Israel Law Review* 575 at 578 (footnote omitted). In *Oakes* Dickson CJ referred to the accused being subjected ‘to social stigma and ostracism from the community’: n 111 above, [29].

¹¹⁴ n 113 above, 578.

¹¹⁵ n 111 above, [100], citing T Honoré *Responsibility and fault* (1999) 125:

> ‘[W]e do well, indeed we are impelled … to treat ourselves and others as responsible agents. But the argument for welcoming this conclusion is not that our behaviour is uncaused – something that we cannot know and which, if true, would be a surprise – but that to treat people as responsible promotes individual and social well-being. It does this in two ways. It helps to preserve social order by encouraging good and discouraging bad behaviour. At the same time, it makes possible a sense of personal character and identity that is valuable for its own sake.’

¹¹⁶ n 55 above, [220].

¹¹⁷ *S v Basson* 2005 1 SA 171 (CC).
freedom.\footnote{118 n 117 above, [126].} According to Sachs J, ‘the clandestine use of state power to murder and dispose of opponents’ showed the ultimate disrespect for these new constitutional values.\footnote{119 n 117 above, [112].} Endorsement by the established authorities of activities violating fundamental human rights is a betrayal of society’s trust in the state to lead by example and the perpetrators should be held accountable.

The benefits of a fair trial extend beyond the interests of the accused and the effect on convicts of societal disapproval of them to upholding the dignity of the judicial system and society’s entrusting of the administration of justice to the courts.\footnote{120 Sachs J described the presumption of innocence as protecting not only the individual on trial, but maintaining ‘public confidence in the enduring integrity and security of the legal system’: \textit{S v Coetzee} (n 55 above) [220].}

In \textit{Kaunda v President of the Republic of South Africa} the families of South African citizens, security workers who feared they would be tried as mercenaries, sought an order directing the South African government to intervene to ensure protection of their rights abroad.\footnote{121 2005 4 SA 235 (CC).} The Constitutional Court refused to order the government to intervene. Sachs J’s opinion was that the government’s obligations did not stop at the borders of the country; while it had ‘an extremely wide discretion as to how best to provide what diplomatic protection it can offer’, it had ‘a clear and unambiguous duty to do whatever is reasonably within its power to prevent South Africans abroad, however grave their alleged offences, from being subjected to torture, grossly unfair trials and capital punishment.’\footnote{122 n 121 above, [275].}

Currie and de Waal have identified the three prongs to the rationale underlying the right to silence as first, reliability to ensure the truth, second, ‘a belief that individuals have a right to privacy and dignity which, whilst not absolute, may not be lightly eroded’ and, third, ‘to give effect to the privilege against self-incrimination and the presumption of innocence.’\footnote{123 n 21 above, 751 (footnotes omitted).} This rationale has multiple connections with respect for dignity. Ackermann
J in Ferreira explained the right against self-incrimination as based on dignity and the rights to privacy and autonomy intermingled with it.¹²⁴

5.2.2 Humane detention conditions

Detainees awaiting trial and sentenced prisoners are entitled to have their dignity respected.¹²⁵ This has been copper-fastened by the Constitutional rights to dignity in Sections 10 and 35(2)(e) and by the foundational

¹²⁴ n 12 above, [98], citing Thomson Newspapers Ltd v Director of Investigation and Research [1990] 67 DLR (4th) 161 at 200 a - c (SC of Canada) (Wilson J, dissenting): ‘Having reviewed the historical origins of the rights against compellability and self-incrimination and the policy justifications advanced in favour of their retention in more modern times, I conclude that their preservation is prompted by a concern that the privacy and personal autonomy and dignity of the individual be respected by the state. The state must have some justification for interfering with the individual and cannot rely on the individual to produce the justification out of his own mouth. Were it otherwise, our justice system would be on a slippery slope towards the creation of a police state.’ Luban’s view is that compulsory self-incrimination is humiliating, because it enlists a person’s own will in the process of punishing her thereby splitting her against herself and causing self-alienation, which the law must never override on pain of violating human dignity: n 112 above, 833 - 835. Ferreira was cited by Kearns J for the propositions of law, first, that legislation compelling examinees to answer questions put to them (even when the answers might incriminate them) should be necessary (ie, no other method existed which could achieve the desired object, but which was less intrusive of the examinee’s right against self-incrimination); second, that the privilege against self-incrimination application depends on time, place and context (being a more powerful principle closer to a trial situation and providing greater protection when self-incrimination takes the form of oral communication rather than when the incriminating material has an objective reality): Dunnes Stores Ireland Co v Ryan [2002] IEHC 61, [2002] 2 IR 60 at 110, 116, 117.

constitutional values. Because each person has their own identity, each case should be considered individually. According to van Zyl J in Stanfield v Minister of Correctional Services, ‘[w]hat will be “consistent with human dignity” in any particular case will, of course, depend on the facts and circumstances of each such case.’

Although electricity is not regarded as a necessity in South Africa given the conditions of impoverishment in which many people live, the High Court in Strydom v Minister of Correctional Services considered that for maximum security prisoners in solitary confinement for 18½ hours a day for all or a substantial portion of the remainder of their lives access to electricity was an indispensable requirement that could not be characterised as ‘no more than a comfort or a diversion’ and ‘could be an amenity of life that makes the difference between mental stability and derangement’. Indefinite deprivation of electricity to enjoy at least some recreational privileges could also affect their prospects of rehabilitation and could amount to cruel or degrading treatment or punishment or detention in conditions inconsistent with human dignity.

At common law in South Africa there was a long-standing recognition of the right of prisoners to be treated with dignity. In 1912 the Appellate Division of the Supreme Court in Whittaker v Roos held in favour of two awaiting-trial prisoners, who had been unable to raise bail and had been

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126 2003 12 BCLR 1384 (C) (High Court, Cape of Good Hope Division) [89]. Van Zyl J was critical of the prison authorities ‘lumping together’ all prisoners suffering from terminal diseases when they refused to grant parole to a terminally ill prisoner suffering from lung cancer because of the effect of his release on the penal system and on other terminally ill prisoners: above, [127]. He held that Mr Stanfield should have been released on parole to die with dignity in the company of his family and he placed the prisoner in a societal setting when there was an unavoidable limit on his time to enjoy his dignity on earth, stating: ‘The applicant is fully entitled to spend the remaining portion of his life ensconced in his own home in the consolatory embrace of his family. When the time comes for him to pass on, he must be able to do so peacefully and in accordance with his inherent right to human dignity.’: above, [132]. Cf Mnguni v Minister of Correctional Services [2005] ZACC 13, 2005 12 BCLR 1187 (CC).

127 1999 3 BCLR 342 (W) (High Court, Witwatersrand Local Division) [15], referring to Minister of Justice v Hofmeyr 1993 3 SA 131 (A) 141H - 142A.

128 n 127 above, [15]. In Strydom high security prisoners wished to have electricity for recreational purposes to enable them to watch television and to listen to radio and music.

129 This protection was developed to extend to all prisoners – whether awaiting trial, in detention without trial, or sentenced.
placed in solitary confinement. In what later become known as ‘the Innes dictum’, Innes J was clear that prisoners retained their personal rights and personal dignity except to the extent defined by law or necessitated by their imprisonment.

Hoexter JA in Minister of Justice v Hofmeyr approved of the Innes dictum, which meant ‘that the extent and content of a prisoner’s rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common law rights.’ The conditions of detention

1912 AD 92. Prisoners awaiting trial were entitled to the special protection of the Court, since they were ‘in a position of peculiar difficulty and helplessness’: above, 125. The segregation order was illegal, as the differentiation it made between them and other awaiting-trial prisoners was neither warranted by the prison regulations nor necessitated by the requirements of prison discipline; the exceptional rigour which the segregation involved amounted to a substantial punishment: above, 121.

True, the plaintiffs’ freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect for what remained. The fact that their liberty had been legally curtailed could afford no excuse for a further illegal encroachment upon it. … They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed.

The action of the prison authorities in confining the two men in punishment cells and subjecting them to consequential disabilities and discomfort – such as being prohibited from smoking, restricted in exercising, deprived of their boots in the cells, and handcuffed when being moved within the jail – was a wrongful and intentional interference with the ‘absolute natural rights relating to personality,’ to which everyone was entitled: n 130 above, 122. This constituted an injuria, which is a delict dependent on intent, and, in addition to the actual pecuniary loss, it attracted compensation for ‘the insult, indignity and suffering’ caused: n 130 above, 123. Their ill-treatment was a serious issue, as Innes J stated, ‘[a] deliberate aggression upon personal dignity and personal liberty is not a trivial matter’; he disagreed with the trial Court’s conclusion that the case was not one for heavy damages, and remarked, ‘however reprehensible a man’s views may be he is entitled to have his personal liberty adequately protected.’: n 130 above, 125.

n 130 above, 122 - 123;

131 n 130 above, 122 - 123:

Hoexter JA considered that the Innes dictum was not confined to awaiting-trial prisoners, but was of general application: as above. The Supreme Court unanimously upheld the award of damages to William Hofmeyr, a law student, who – although lawfully arrested and detained under emergency powers – had been held unjustifiably in isolation. His effective solitary confinement was underscored and exacerbated by ‘the deprivations suffered … in regard to lack of indoor exercise, the ban on books and magazines, and the absence of a portable radio in his cell’: n 127 above, 152.

When reviewing the quantum of damages, Hoexter JA took a serious view of the effect of solitary confinement on a detainee and agreed with Diemont J’s following remarks in Hassim v Officer Commanding, Prison Command, Robben Island, ‘I can think of few greater hardships than for an active man to be locked up in a small cell day and night, week after week and month after month, in enforced idleness’: n 127 above, 157, citing 1973 3 SA 462 (C) (SC Cape Provincial Division) 480 B-C.
open to scrutiny are not confined to the physical environment, but, as found by Hoexter JA, extend to the psychological sphere. He endorsed the general approach reflected in ‘the residuum principle’ enunciated by Corbett JA (dissenting) in Goldberg v Minister of Prisons. The respect owed to every individual in view of each person’s inherent dignity and worth applied regardless of their situation as a prisoner or otherwise. Brand J in the High Court reiterated the position at common law in Van Biljon, when he held that two prisoners should be provided with anti-viral therapy which had been prescribed for them on medical grounds. The Supreme Court of Appeal insisted that the humane treatment of prisoners based on constitutional values have a practical effect, when in Minister of Correctional Services v Kwakwa it set aside a new privilege system that withdrew advantages given to unsentenced prisoners, and Navsa JA stated:

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133 n 127 above, 145: One of an individual’s absolute rights of personality is his right to bodily integrity. The interest concerned is sometimes described as being one in corpus, but it has several facets. It embraces not merely the right of protection against direct or indirect physical aggression or the right against false imprisonment. It comprehends also a mental element. See also L Ackermann Human dignity: Lodestar for equality in South Africa (2012) 93.

134 n 127 above, 141, citing Goldberg v Minister of Prisons 1979 1 SA 14 (A). Corbett JA’s recognition that prisoners have residual rights and liberties, which are inviolable, is evident, above, 39: It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. Of course, the inroads which incarceration necessarily make upon a person’s personal rights and liberties ... are very considerable. ... Nevertheless, there is a substantial residuum of basic rights which he cannot be denied. Corbett JA’s rejection of a rigid approach to distinguishing between ‘comforts’ (privileges) and ‘necessities’ (rights) was also approved by Hoexter JA, who had regard to the context in which the prisoners found themselves: n 127 above, 141, referring to Goldberg above, 41. What is regarded as a comfort in some cases can be essential to physical or mental survival in others: Hofmeyr (n 127 above) 153 (Hoexter JA). Cf Krager v Minister of Correctional Services [2005] ZAGPHC 24 (High Court, Transvaal Division) [28], [33], [36]; Denton v Director-General, National Intelligence Agency [2006] AHRLR 241 (GaHC 2006) (High Court of Gambia) [33].

135 ‘The plain and fundamental rule is that every individual’s person is inviolable.’ Hofmeyr (n 127 above) 153 (Hoexter JA). Cf Krager v Minister of Correctional Services [2005] ZAGPHC 24 (High Court, Transvaal Division) [28], [33], [36]; Denton v Director-General, National Intelligence Agency [2006] AHRLR 241 (GaHC 2006) (High Court of Gambia) [33].


137 [2002] ZASCA 17, [2002] 3 All SA 242 (A) [32].
The manner in which we treat our prisoners should not be out of line with the values on which the Constitution is based. Human dignity and the advancement of human rights and freedoms and respect for the rule of law are not just hollow phrases. They must be made real.

The promotion of transparency, accountability and good governance, and the constitutional right to information\(^{138}\) ensured access to a report into the death of a prisoner from AIDS.\(^{139}\)

However, it would be wrong to think that the courts over the years had upheld invariably the rights of all categories of prisoners to humane detention conditions – particularly those relating to their psychological well-being. Ogilvie Thompson JA delivering the judgment of the Appellate Division of the Supreme Court in \textit{Rossouw v Sachs} distinguished between those detained without trial and unconvicted prisoners awaiting trial.\(^{140}\) He overruled a lower court ruling which had held that a prisoner detained without trial was entitled to receive reading matter and writing materials.\(^{141}\) The encouragement of prisoners to study – even though specifically mentioned in the prison regulations – received no practical judicial support in \textit{Hassim v Officer}\(^{138}\) Sec 32.

\(^{138}\) \textit{Treatment Action Campaign v Minister of Correctional Services} [2009] ZAGPHC 10 (High Court, Transvaal Division) [23], [35]-[36], [38], [40].

\(^{139}\) 1964 2 SA 551 (AD) 560, 564. Unlike an awaiting-trial prisoner, a detainee could be detained in custody pursuant to legislation ‘at any place’, was not entitled to bail, and could be interrogated: above, 559. Although he called the legislation permitting the detention of suspects or reluctant witnesses ‘novel and drastic’ because it ran counter to the general principles of criminal law against self-incrimination and also precluded a detainee from having access to a legal adviser, Ogilvie Thompson JA accepted the doctrine of parliamentary supremacy and went on the determine that the true purpose of the continued detention authorised by the statute was to induce the detainee to speak and not to ‘alleviate the lot of a detainee’: above, 558 - 561, 564. Parliament could not be presumed to have intended to authorise maltreatment, such as impairing the detainee’s physical or mental health by assaults or inadequate food or living conditions: above, 561, 564. But neither was the detainee to be encouraged to study nor to have library facilities like convicted prisoners: above, 562. Drawing on the analogy of the public interest in disregarding safeguards to liberty in times of extreme emergency, such as war, the legislature could combat subversive activities against public order and the safety of the state: above, 562 - 563. Ogilvie Thompson JA also accepted the validity of the distinction between necessities and comforts, a detainee being entitled to the former as ‘a matter of right’ but to the latter ‘only as a matter of grace’: above, 564 - 565.

\(^{140}\) John Dugard criticised this decision because the court exercised ‘a series of choices’ favouring the executive and failed to disapprove of the detention law which departed from accepted principles of justice: J Dugard \textit{Human rights and the South African legal order} (1978) 336. The court did not simply declare the law, nor was it ‘mechanically guided to the legislative intent by fixed rules of precedent and principle’: as above.
Chapter 5: Association of dignity with other rights

Commanding, Prison Command, Robben Island, where Diemont J in the Cape Provincial Division of the Supreme Court considered that prison officers had the 'widest discretion' to strike a balance between rehabilitation and enforcing discipline, which in effect gave them control over whether, when and what a prisoner could study. Contrary to the majority in Goldberg, Corbett JA's view in relation to the censorship of books and periodicals sent to prisoners detained under security laws was that the prison rules or policy could not deprive them of all access to news.

Grosskopf J of the Cape Provincial Division of the Supreme Court found in Cassiem v Commanding Officer, Victor Verster Prison that detainees had pre-existing rights not dependent on statute and that these rights were merely controlled – not taken away –by legislation. In contrast, the Appellate

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142 n 132 above, 476 - 477. Notwithstanding that the reasons given for withdrawing permission to study were 'most unconvincing' and that Diemont J found the authorities' ban on legal studies 'quite extraordinary', he was not prepared to interfere with their decisions; while he accepted that deprivation of books was a hardship for an intellectual, he drew an analogy with the hardship for some people to go without cigarettes and held that the right to use the prison library was a privilege that could be withdrawn: n 132 above, 477.

When it came to considering segregation of prisoners, Diemont J discerned a difference between segregation and solitary confinement in the statutory code: n 132 above, 479. The legislation did not provide for complete segregation without work; Hassim was prevented from doing any work, his exercise was severely curtailed, and he was confined to the same type of single cell as was used for solitary confinement for punishment purposes: n 132 above, 480. However, he had not been given a fair hearing prior to being ‘marched straight off to the isolation cell’ for failing to hand over library books; Diemont J ordered that Hassim be removed from the isolation cell, as he concluded that he had not been merely segregated, but had been placed in solitary confinement as a punishment with the probable intention that it should continue for six months, and this was invalid because he had not been given a hearing and, in any event, the period of confinement exceeded the maximum period of 30 days permitted by legislation: n 132 above, 481.

143 n 134 above, 50. He considered that a prisoner’s rights extended beyond the physical to ‘his mental and psychological well-being’, which was also ‘of basic importance’: n 134 above, 41.

144 1982 2 SA 547 (C) 552. A notice issued by the Minister of Justice equated detainees with awaiting-trial prisoners: above, 550 - 551. As the correctness of the Innes dictum in respect of awaiting-trial prisoners had never been questioned, by extension it also applied to detainees: above, 551. Grosskopf J respected the terms of the legislation, but he interpreted the executive’s actions in accordance with the principles of justice, requiring that authority be exercised reasonably for the purpose for which it was given: above, 552. The regulations only permitted a privilege to be withdrawn when that particular privilege had been abused and not as a means of punishment for unrelated misconduct: above, 553. He upheld the entitlement of two Cape Malay detainees to seek redress from the Court when their rights to regular outdoor exercise, letters and visits, and to procure food and reading material were curtailed following an altercation between them and a prison officer because they greeted black detainees, with whom they were prohibited from having any contact: above, 549, 554.
Division of the Supreme Court in *Mandela v Minister of Prisons* took a less sympathetic attitude to a convicted prisoner’s challenge to confiscation of privileged documents by the prison authorities. The Court accepted that, for the maintenance of good order, discipline and security, legislation could make inroads into the fundamental right of a prisoner to a legal adviser.

Deliberate neglect of those imprisoned is unacceptable, but there is also a positive obligation to provide adequate sustenance and reasonable facilities for existing with dignity – even when resources are scarce. The condemnation of torture and of cruel and inhumane treatment and punishment has been the foundation for the recognition of the right of prisoners to live in conditions where they have sufficient space, food, bedding, and washing and toilet facilities. I will now take a closer look at the development of this jurisprudence, which has attempted to address the appalling overcrowded and pathetic conditions in which prisoners have been kept in some countries.

De Swardt AJ of the South African High Court held in *Lee v Minister of Correctional Services* that the State was liable to pay damages in delict to a prisoner, who contracted tuberculosis while incarcerated in an overcrowded maximum security prison. The prison authorities had not taken reasonable steps to prevent the spread of the disease and had failed to preserve the prisoner’s rights to dignity and to treatment that was not inhuman or degrading.

In Malawi, a prisoner in *Masangano v AG* claimed on behalf of himself and his fellow prisoners that the insufficient and poor quality diet, food, clothing and bedding, and the overcrowding and other conditions in prison

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145 1983 1 SA 938 (A).
146 Jansen JA noted that fundamental rights continue after imprisonment, but might be curtailed: n 145 above, 957.
149 n 148 above, [263], [268]-[269].
150 Malawi had a history of overcrowded conditions aggravated by poor ventilation contributing to the deaths of prisoners. 259 inmates died in a space of about 18 months: *Masangano v AG* [2009] MWHC 31 at 52 - 53, 55, citing Malawi Prison Inspectorate Report 2004. See also *Achuthan (Banda) v Malawi* [2000] AHRLR 144 (ACHPR 1995) [4], [7].
151 n 150 above.
amounted to torture and cruel, inhuman and degrading treatment or punishment.\footnote{This was prohibited by the Constitution: Constitution of the Republic of Malawi 1994, Sec 19(3).} They also argued that their right to human dignity\footnote{Sec 19(1).} was violated by the provision of only one meal a day.\footnote{n 150 above, 12. The State defended the case on the basis that the issues were non-justiciable, being outside the judiciary’s area of competence, and concerned matters of national policy and security: n 150 above, 18. It maintained that the allocation of resources was beyond the purview of the judges, as it involved value judgments having regard to economic and policy considerations: n 150 above, 19. The High Court dismissed these arguments, which were not applicable when the rights of prisoners were involved: n 150 above, 28 - 29. It pointed out that the doctrine of non-justiciability had been criticised because it sought to protect the executive and undermined private rights while weakening the doctrine of separation of powers; in addition it had been argued that it had ‘the potential of obstructing confidence and certainty in the expectation of access to the courts for private litigants.’: n 150 above, 27. Having noted that the application of the doctrine of non-justiciability was in decline in the United Kingdom and that the human rights culture was now fully fledged, the Court did not think ‘that a court should adopt a hands-off approach’ where there was a complaint of violation of prisoners’ rights or human rights: n 150 above, 28 - 29.} The High Court found that the overcrowding and poor ventilation amounted to inhuman and degrading treatment of the inmates contrary to Section 19 of the Constitution.\footnote{n 150 above, 56. The Court asserted the judiciary’s duty to protect the human rights retained by prisoners despite their imprisonment, and made an analogy between the modern view that socio-economic rights were justiciable and the justiciability of prisoners’ rights: n 150 above, 28 - 29, 32. It directed the State within 18 months to take concrete steps to reduce prison overcrowding by half, and thereafter by periodic reductions to eliminate overcrowding, and also to improve the ventilation in prisons and prison conditions generally: n 150 above, 60. Although one of the specified constitutional rights of prisoners is to be detained under conditions consistent with human dignity, including ‘at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State’ (Sec 42(1)(b)), the Court based its decision on the general inviolability of dignity and the prohibition on inhuman and degrading treatment in Section 19.}

There have been similar findings in Zimbabwe, where lack of resources was not entertained as an excuse for failure to have decent prison conditions. In 

\textit{Kachingwe v Minister of Home Affairs} the Supreme Court declared in 2005 that police holding cells were degrading and inhumane in violation of the prohibition in the Constitution\footnote{Constitution of the Republic of Zimbabwe 1979, Sec 15(1).} and were unfit for holding criminal suspects.\footnote{[2005] ZWSC 134.} It made an order with extensive directions to the State to ensure that cells be of reasonable size for the number they were used to accommodate
and that the conditions in which suspects were held be improved. There was an obligation on the state to shield everyone from violations of the wide-ranging ban on degrading and inhumane treatment – not to infringe it itself.

In Namibia the High Court found in McNab v Minister of Home Affairs that the conditions in a police holding cell were degrading and inhuman and violated an arrested man’s constitutional right to dignity. The European

158 In 1999 the Court had made detailed orders directed to the prison authorities in a case concerning the severe conditions in which three US citizens awaiting-trial on terrorism and weapons charges were held in small individual cells in a maximum security prison: Blanchard v Minister of Justice, Legal and Parliamentary Affairs [2000] 1 LRC 671. Even though these awaiting-trial prisoners were entitled to the presumption of innocence, they had not been allowed to communicate with each other, to wear their own clothes nor to receive food from outside the prison. For several weeks they had been stripped naked and shackled in leg-irons overnight: above, 676, 682. The prison authorities maintained that their treatment was justified by the seriousness of the charges and the danger that they might escape, but the Supreme Court disagreed with this rationale and held that the prolonged duration of the ill-treatment and its physical and mental effects attained the minimum level of severity necessary to constitute a violation of Section 15(1) of the Constitution, which guaranteed protection from inhuman or degrading punishment or treatment: above, 679, 681.

Gubbay CJ delivering the unanimous judgment of the Court had recognised the need for wide-ranging deference to be accorded to the prison administrators in the adoption and execution of policies and practices they adjudged necessary to preserve order and security, but – notwithstanding this – the courts had a continuing responsibility to enforce constitutional rights: above, 677, citing Conjwayo v Minister of Justice, Legal and Parliamentary Affairs [1991] 1 ZLR 105 (S) (SC of Zimbabwe) and Woods v Minister of Justice, Legal and Parliamentary Affairs [1994] 1 LRC 359 (SC of Zimbabwe). Gubbay CJ condemned the use of leg-irons and handcuffs except for the prevention of escape during transportation or to restrain violent behaviour: above, 676.

159 Gubbay CJ stated, Blanchard (n 158 above) 680:

[T]he aim … is to protect both the dignity and the physical and mental integrity of the individual. The prohibition relates not only to acts that cause physical pain but also to those that cause mental suffering to the victim. It is the duty of the state to afford protection against such acts by legislative and other measures, as may be necessary; not, through its officials, to be responsible for their perpetuation.

The provision in the Constitution was akin to art 7 of ICCPR (‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’): Blanchard (n 158 above) 680, referring to ICCPR (n 31 above).


161 Constitution of the Republic of Namibia 1990, Art 8. The small, overcrowded, poorly-ventilated cell in which he was held was filthy, and infested with cockroaches and lice; toilet facilities were not private; food was served in rubbish bins: n 160 above, [50]. Angula AJ considered that the police officers were not responsible for the notorious horrendous conditions, but liability rested with the State: n 160 above, [49]. Cf Methobi v Director of Prisons [1996] LSCA 92 (CA of Lesotho).
Court of Human Rights has also found that overcrowding and poor prison conditions are a violation of the prohibition on degrading treatment in Article 3 ECHR. In Orchowski v Poland respect for dignity required that the state be responsible for assuring the health and welfare of prisoners. An intention to debase or humiliate is not a necessary ingredient in a violation of Article 3.

In Scotland in Napier v Scottish Ministers Lord Bonomy had no hesitation in condemning systematic slopping out, ‘[i]t is clear beyond doubt that, by imposing the regime of slopping out upon prisoners, the respondents failed to accord respect to their dignity.’ He rebutted the defence argument that only serious ill-treatment attaining a minimum level of severity fell within the scope of Article 3 of the ECHR and asserted that it could be infringed by exacerbation of suffering flowing from various measures for which the authorities were responsible.

162 Sharon Dolovich considers that in the US the prohibition on cruel and unusual punishment in the Eighth Amendment would be breached if an incarcerated person suffered physical or psychological harm from living under conditions of extreme overcrowding and its attendant effects: S Dolovich ‘Cruelty, prison conditions, and the Eighth Amendment’ (2009) 84 New York University Law Review 881 at 908.

163 (App No 17885/04) ECHR 22 October 2009 [120]: Under Article 3 the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.

Constraints on resources were not an exculpatory factor, above, [153]: The Court is aware of the fact that solving the systemic problem of overcrowding in Poland may necessitate the mobilisation of significant financial resources. However, it must be observed that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention ... and that it is incumbent on the respondent Government to organise its penitentiary system in such a way that ensures respect for the dignity of detainees, regardless of financial or logistical difficulties. Should the state be unable to reach the threshold, ‘it must abandon its strict penal policy in order to reduce the number of incarcerated persons or put in place a system of alternative means of punishment’: above, [153].


165 2005 SC 229 (Court of Session Outer House) [51]. For a review and assessment of Napier, see S Foster ‘Prison conditions, human rights and article 3 ECHR’ [2005] Public Law 35 at 35 - 37, 39, 43.

166 n 165 above, [64].

167 n 165 above, [73], citing Pretty v UK (App no 2346/02) (2002) 35 EHRR 1 [52]. The conditions of detention, taken together, were found to have diminished Robert Napier’s human dignity and aroused in him feelings of anxiety, anguish, inferiority and humiliation, thereby subjecting him to degrading treatment: n 165 above, [78].
5.3 Privacy and autonomy

There is a general right to privacy in the South African Constitution, a subset of which – couched in negative terms – are specific rights to be free from interference by the state and others in a tangible physical sense. There is no separate right to autonomy in the South African Constitution. According to Currie and de Waal, the South African Constitution is unusual in combining protection against illegal searches and seizures with the general right to privacy and in making the former a component of the latter. The general right to privacy extends beyond territorial and physical integrity and control over correspondence with others to the freedom to develop one’s personality by making and implementing personal decisions of an intimate self-defining nature and by forming relationships. As with all rights, the right to privacy is not absolute and can be limited by societal considerations and the entitlements of other members of the community.

5.3.1 Common law dignitas

A common law right to privacy based on dignitas pre-dated the Constitution. It coincided with the US model of non-interference with the individual and diminished the more a person exposed himself to society, as explained by Ackermann J in Bernstein:

\[\text{Napier}\] is an indication that the UK courts, applying Art 3 ECHR, may not stick rigidly to the European Court of Human Rights standard designed to apply throughout Europe, but will seek to evolve a sense of ‘minimum standards’ which is more exacting: S Livingstone et al, \textit{Prison law} (2008) 255.

168 Sec 14:

Everyone has the right to privacy, which includes the right not to have
(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed.

169 n 21 above, 315.

170 In Germany the right to develop one’s personality is a necessary and implicit corollary to the guarantee to respect human dignity; since it can be limited by the rights of others, the German Federal Constitutional Court has had to scrutinise complex situations to shape its contours and zealously guards the integrity of the intimate core of privacy against intrusions by others and by the state; it has distinguished between a private sphere of action in which the person’s personality develops from actions taken as a consequence of interaction with society: LAA Pagán ‘Human dignity, privacy and personality rights in the constitutional jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico’ (1998) \textit{67 Revista Jurídica de la Universidad de Puerto Rico} 343 at 354 - 355.

171 n 18 above, [68] (footnotes omitted).
In South African common law the 'right to privacy is recognised as an independent personality right which the courts have included within the concept of dignitas'. 'Privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state'. In *Financial Mail (Pty) Ltd v Sage Holdings Ltd* it was held that breach of privacy could occur either by way of an unlawful intrusion upon the personal privacy of another, or by way of unlawful disclosure of private facts about a person. The unlawfulness of a (factual) infringement of privacy is adjudged 'in the light of contemporary boni mores and the general sense of justice of the community as perceived by the Court'.

He gave the following examples of wrongful intrusion and disclosure under common law which breached confidence and invaded personal space: entry into a private residence, the reading of private documents, listening in to private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion, and the disclosure of private facts contrary to the existence of a confidential relationship.

The *actio iniuriarum* protects the right to privacy under dignitas. To succeed in this cause of action in the law of delict, it is necessary to prove impairment of privacy, wrongfulness and intention (*animus iniuriandi*) – therefore negligence is insufficient to render the wrongdoer liable. The degree of protection afforded privacy at common law is quite restricted. The plaintiffs in *NM v Smith* sought its development along the lines in which the law of defamation, also protected by the *actio iniurarum*, had been expanded by the Supreme Court of Appeal in *Bogoshi*. The Constitutional Court in a majority decision in *NM v Smith* held in favour of the plaintiffs and awarded them damages for the revelation of private information about them without their consent on the basis that the revelations had been intentional.

172 n 18 above, [69] (footnotes omitted).
173 *NM v Smith* 2007 5 SA 250 (CC) [55].
174 n 173 above.
Therefore it was not necessary to develop the common law of privacy, as they succeeded under the existing *actio iniuriarum* requiring intention. Madala J for the majority did not rule out the development of the common law in an appropriate case. O’Regan J dissenting on the facts, considered that the common law of privacy should be developed by requiring the media not to negligently or unreasonably reveal private information without consent. She imposed greater delictual liability on the media than on ordinary citizens because of the power of the media and their potential to cause widespread harm to individuals on account of the ease and speed of transmission of information to a large audience. She pointed to the dual factors governing the media’s conduct, when she explained why they had a greater obligation to respect privacy than ordinary individuals, ‘the media are not only bearers of rights under our constitutional order, but also bearers of obligations.’ The right to freedom of expression was put in the balance with the duty to respect people’s rights to privacy and dignity.

Sachs J in *NM v Smith*, supporting Madala J’s majority judgment, also made some observations favourable to development of the common law. He approved of the development of the law of defamation in *Bogoshi* in a way that was sensitive to contemporary concerns and realities, a well-weighted means of balancing respect for individual personality rights with concern for freedom of the press. The principles developed in it were ‘eminently transportable to the law of privacy.’ He praised *Bogoshi* for harmonising rights and looking at the context. Langa CJ dissenting in part, agreed with O’Regan J that the common law must be developed in accordance with the spirit, purport and objects of the Bill of Rights, as required by Section 39(2) of the Constitution. The change should be made with regard to media defendants and he thought it ‘constitutionally appropriate that the media

177 n 173 above, [57].
178 n 173 above, [179].
179 n 173 above, [177].
180 n 173 above, [177] (footnote omitted).
181 n 173 above, [203].
182 As above.
183 n 173 above, [204]:

[It seeks to harmonise as much as possible respect for human dignity and freedom of the press, rather than to rank them in terms of precedence. The emphasis is placed on context, balance and proportionality, and not on formal and arid classifications accompanied by mantras that favour either human dignity or press freedom.]
should be held to a higher standard than the average person.\textsuperscript{184} He did not approve of negligent disclosures of private facts by individuals not in the media, but it was not something that was appropriate for the law to regulate, as ‘to extend that standard to ordinary people, and thus to everyday relationships, would be to extend the law too far into intensely personal space.’\textsuperscript{185}

5.3.2 Scope of constitutional privacy

The constitutional right to privacy is more extensive than that at common law. Ackermann J, in a wide-ranging and deep analysis in Bernstein, pointed out that the scope of privacy was closely related to the concept of identity and that privacy was based on ‘what is necessary to have one’s own autonomous identity’, not on a libertarian ‘unencumbered self’.\textsuperscript{186} He referred to Rainer Forst’s multi-level approach to identity – first, from the abstract individual; second, to the concrete communal; third, to societal membership; and fourth, to the community of humanity itself.\textsuperscript{187} At the third level of political discourse, concrete difference and common equality are reconciled, and membership of society requires an acceptance of the individual’s obligations towards the right of every member not to be excluded.\textsuperscript{188} The community of humanity ‘demands mutual respect as a universal moral duty towards persons as moral persons’.\textsuperscript{189}

Privacy is respect for identity and autonomy, which are aspects of individual dignity.\textsuperscript{190} Ackermann J’s review of German law led him to conclude, ‘[p]rivacy is also protected out of respect for dignity’.\textsuperscript{191} Dignity

\begin{itemize}
\item \textsuperscript{184} n 173 above, [94].
\item \textsuperscript{185} As above.
\item \textsuperscript{186} n 18 above, [65] (footnote omitted).
\item \textsuperscript{187} n 18 above, [66] (footnotes omitted).
\item \textsuperscript{188} n 18 above, fn 92, citing R Forst ‘How not to speak about identity: the concept of the person in a theory of justice’ (1992) \textit{18 Philosophy & Social Criticism} 293.
\item \textsuperscript{189} n 18 above, fn 93, citing Forst (n 188 above).
\item \textsuperscript{190} Dignity is at the heart of the approach to privacy: A Chaskalson ‘Human dignity as a constitutional value’ in D Kretzmer & E Klein (eds) \textit{The concept of human dignity in human rights discourse} (2002) 140.
\item \textsuperscript{191} Bernstein (n 18 above) [77] (footnote omitted).
\end{itemize}
embraces privacy, but is more far-reaching than it.192 O’Regan J in Khumalo v Holomisa saw privacy as supportive of dignity.193

In Hyundai it emerged that the right to privacy is broader than the reach of dignity, as juristic persons – who are not the bearers of human dignity – have privacy rights, albeit not as intense as those of individuals.194 In Thint it was reiterated that a corporate entity does not bear human dignity and therefore ‘its rights of privacy are much attenuated compared with those of human beings.’195

Langa DP in Hyundai adopted Ackermann J’s view of privacy as deriving from dignity and described the contraction of the sphere where privacy can be expected as one moves further into community:196

[Privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core. This understanding of the right flows … from the value placed on human dignity by the Constitution.

Currie and de Waal deduce from this that a value (perhaps the principal value) served by privacy is human dignity.197

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193 2002 5 SA 401 (CC) [27] (footnotes omitted):
It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity.

194 Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd 2001 1 SA 545 (CC) [18].

195 Thint (Pty) Ltd v National DPP [2008] ZACC 13, 2009 1 SA 1 (CC) [77] (footnote omitted).

196 n 194 above, [18], citing Bernstein (n 18 above) [77].

197 n 21 above, 320.
5.3.3 Rationale for privacy protection

O’Regan J in *NM v Smith* identified at least two inter-related reasons for the constitutional protection of privacy, the first flowing from the constitutional conception of what it means to be a human being, implicit in which was the right to choose what personal information of ours is released into the public space. The more intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information.\(^{198}\)

The second reason for protecting privacy flowed from the democratic need to curb the power of the state and to prevent it from denying liberty and dignity by interfering with our private space.\(^{199}\) She explained the mutually supportive nature of dignity, freedom and privacy, which are central to human existence.\(^{200}\)

The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing.

The Constitutional Court in *NM v Smith* upheld the individual’s right to choose what personal information to reveal to others and to prohibit or put boundaries on further dissemination of the information. Madala J, having referred to the nature and scope of the right of privacy in many jurisdictions as envisaging a concept of the right to be left alone, described it as encompassing ‘the right of a person to live his or her life as he or she pleases.’\(^{201}\) In that case three HIV-positive women claimed that their rights to privacy and dignity had been violated by publication of their names and HIV status in a biography. The Court made it clear that it was not an impairment of dignity to be HIV positive, but that the women’s dignity could be infringed by publishing intimate medical facts about them without their consent.\(^{202}\)

\(^{198}\) n 173 above, [129], [132].
\(^{199}\) n 173 above, [133].
\(^{200}\) n 173 above, [32]-[33].
\(^{201}\) n 173 above, [131] (footnote omitted).
\(^{202}\) n 173 above, [48], [92], [139].
making the distinction, O’Regan J put control over disclosure of personal information within the realm of privacy, breach of which infringed dignity. She had no doubt that the right to privacy protects people from the publication of private medical information without their consent and that an appropriate balance had to be struck between this right and freedom of expression. O’Regan J found on the facts that publication of the applicants’ names and HIV status was neither intentional nor negligent, so she dissented.

The US and German concepts of human dignity are close to each other in the field of privacy, particularly informational privacy and data protection, which act as a buffer against the state’s tendency to invade into its citizens’ personal affairs. The German Federal Constitutional Court has held that under Article 1 of the Basic Law everyone has the right to informational self-determination. The American term ‘privacy’ expresses the right to protection of the individual private sphere. Roberta Kwall has also pointed out that the interest served in many privacy and publicity cases in the US embodies a spiritual quality rather than an interest in property or reputation. Because of the high level of attention the German Federal Constitutional Court pays to dignity, the range of social interactions where privacy is protected is wider than that accorded privacy in American jurisprudence.

203 n 173 above, [139]:
It needs to be said clearly that the stigma attached to those living with HIV/AIDS is inconsistent with the constitutional value of human dignity. Disclosing that a person is living with HIV/AIDS cannot therefore be an infringement of dignity on the grounds that members of the community may improperly think less of them because they are suffering from this frightening illness. It does undermine their dignity to the extent that it denies those living with HIV/AIDS the right to determine to whom and when their illness should be disclosed, which is itself an aspect of the right to privacy …

204 n 173 above, [136], [147].
205 n 173 above, [168], [189].
208 Benda (n 206 above) 450.
210 Pagán (n 170 above) 359.
In the US the privacy right represents the constitutional recognition of a liberty interest to make fundamental personal decisions and can be curtailed by a compelling state interest.\(^{211}\)

The different understandings of the notions of liberty and privacy in the US and Continental Europe lead to differing views on human dignity — Europeans tend to build their sense of dignity upon personal integrity and honour, being reluctant to divulge personal information, while Americans' sense of personal dignity is focused on liberty from intrusion by the state.\(^{212}\)

### 5.3.4 Contextual extent of privacy
The right to privacy extends beyond the confines of the home, as is evident from *Magajane* where legislation permitting searches to detect illegal gambling was found to be too broad.\(^{213}\) Van der Westhuizen J indicated that one of the considerations in assessing whether privacy had been breached or was justified was the individual's 'expectation of privacy', which is 'more attenuated the more the business is public, closely regulated and potentially hazardous to the public.'\(^{214}\) The purpose of the statutory provision is relevant. Generally there is a low expectation of privacy in business premises, but here the aim to collect evidence for a criminal prosecution was significantly intrusive.\(^{215}\) Dignity and personality are adversely affected by unauthorised searches and seizures, as they invade the individual’s private sphere.\(^{216}\)

### 5.3.5 Conflicting interests
Even though they are closely connected and mutually supportive, at times there can be a conflict between autonomy, freedom and privacy on the one hand and dignity on the other. Waiver of dignity is not wholly within the

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\(^{211}\) Pagán (n 170 above) 361 - 362.


\(^{213}\) *Magajane v Chairperson, North West Gambling Board* 2006 5 SA 250 (CC).

\(^{214}\) n 213 above, [50].

\(^{215}\) n 213 above, [94].

\(^{216}\) n 213 above, [64].
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power of the beholder. Society and humanity at an overarching level have an interest in preserving dignity – even against the wishes of members of society who may not want to uphold their own dignity whether because they have a different idea of what dignity means, are willing to forego dignity as understood by others, their self-esteem is so low that they do not recognise their own dignity, or for some other reason.

The conflict was analysed when the statutory ban on prostitution survived a challenge by a narrow majority in S v Jordan. All the judges concluded that the prostitution provision did not infringe the rights to human dignity and economic activity, and that if it did limit the right to privacy, such limitation was justifiable. They differed on the question of whether the law criminalising prostitution constituted unfair gender discrimination. O’Regan and Sachs JJ, who dissented on the equality issue, pointed out in a joint judgment that the dignity of the prostitute is infringed by her own actions and choices rather than by the law. They assessed the extent of the right to

217 Certain degrading behaviour may be wrongful even if the victim consents, as society has an interest in preserving human dignity: V Bergelson ‘Autonomy, dignity, and consent to harm’ (2008) 60 Rutgers Law Review 723 at 730. The concept of dignity does not reflect the subjective state of mind of the perpetrator or the victim, but instead has an ‘objective,’ normative meaning: above, 730 - 731.


218 A preference for any one individual’s rights when in conflict with those of another must be guided by respect for the equal and inherent dignity of both: BB Lockwood, Jr et al ‘Working paper for the Committee of Experts on limitation provisions’ (1985) 7 Human Rights Quarterly 35 at 77.

219 2002 6 SA 642 (CC). Cf the Canadian Supreme Court’s majority decision to uphold the constitutionality of legislation making it illegal to solicit in public for the purposes of prostitution and to keep a bawdy house: Prostitution Reference (n 14 above). On dignity and prostitution, see N Rao ‘Three concepts of dignity in constitutional law’ (2011) 86 Notre Dame Law Review 183 at 228 - 229.

220 n 219 above, [74]:
To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one’s body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) [Sexual Offences Act 1957] but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.

privacy based on the relationships between the parties. The scope of privacy was determined by the nature of the relationship concerned.\(^{221}\) It was pertinent in ‘core’ intimate personal relationships, but not in cold commercial transactions – even those involving the sale of sex in the ‘penumbra’ of privacy.\(^{222}\) O’Regan and Sachs JJ explained:\(^{223}\)

> [C]entral to the character of prostitution is that it is indiscriminate and loveless. It is accordingly not the form of intimate sexual expression that is penalised, nor the fact that the parties possess a certain identity. It is that the sex is both indiscriminate and for reward. The privacy element falls far short of ‘deep attachment and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one’s life’. By making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money.

Although the prostitute’s privacy is reduced, she still retains the right to have her dignity respected by the police and her customers.\(^{224}\) While ‘her expectations of privacy are relatively attenuated’ and she is placed ‘far away from the inner sanctum of protected privacy rights’, the prostitute is not stripped ‘of her right to be treated with dignity as a human being and to have respect shown to her as a person’.\(^{225}\)

The judgment of Ngcobo J for the majority in *Jordan* is a defensive one in response to the minority judgment of Sachs and O’Regan JJ. The minority took a broader view and looked at the social setting rather than solely at the legislation. In their dissent finding that the prostitution provision constituted unfair indirect discrimination, they pinpointed the vulnerable position of

\(^{221}\) n 219 above, [80].  
\(^{222}\) As above.  
\(^{224}\) n 219 above, [74].  
\(^{225}\) n 219 above, [83].
prostitutes in society. There is an ambiguous attitude to prostitutes and their clients, where the former are stigmatised and the latter forgiven.

In De Reuck legislation banning possession of child pornography was held to be a justifiable infringement of privacy and freedom of expression of a film producer charged with importing and possessing it. The film producer’s rights to privacy and expression had to give way to the dignity rights of the child. It was not just the dignity of the child the subject of the pornography that was infringed, but, as Langa DCJ stated, the humanity of all children was impaired.

5.4 Freedom of expression

Many battles over constitutional rights are between those seeking to assert freedom of expression and those who perceive the ideas sought to be communicated as a threat to their dignity. Frequently free speech has to yield to other constitutional rights or its curtailment is justified under the

226 Andrew Foster criticised the majority and minority decisions in Jordan, and concluded that the Constitutional Court was applying dignity selectively and contrary to women’s interests: A Foster ‘The role of dignity in Canadian and South African gender equality jurisprudence’ (2008) 17 Dalhousie Journal of Legal Studies 73 at 90 - 92.

227 De Reuck v DPP (Witwatersrand Local Division) 2004 1 SA 406 (CC).

228 n 227 above, [63]:

Children’s dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. ... There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available. The chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity and integrity of children.

229 Democracy and dignity are both simultaneously empowering and legitimate forms of constraint. Sometimes the protection of democracy demands constraints on individuals’ human rights to ensure that the fullest possible deliberation takes place. Those in power may be least interested in ensuring a debate on constraints and may baulk at the idea of legislating such constraints; therefore judges have to be trusted to juggle commitments to dignity and democracy in the context of individual complaints, and in the process they are usually careful not to cause a constitutional crisis by usurping the legislature: A Clapham Human rights obligations of non-state actors (2006) 558 - 559.
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Section 16(1) of the South African Constitution, contains a general guarantee to all of freedom of expression and lists several specific inclusions in the overall right. The interim Constitution contained no specific exclusions, so Section 16(2) is a novelty barring from protection war propaganda, incitement of imminent violence, and hate speech inciting harm based on race, ethnicity, gender or religion. The hate speech provision was inserted in response to representation by interest groups.

5.4.1 Rationale for freedom of expression

Ronald Dworkin has grouped the justification for free speech into the instrumental, which protects democracy and produces good effects for the rest of us, and the constitutive, which supposes that free speech is valuable, not just on account of its consequences, but because it is an essential feature of a just political society that government treat all its adult members (except the incompetent) as responsible moral agents. The instrumental view

230 The principle on which freedom of expression is founded (respect for the autonomy and dignity of human beings) also gives rise to other fundamental rights, ranging from personal security and privacy to citizenship and equality; since speakers should be required to respect the fundamental rights of others, the same ideals that justify freedom of speech can determine the limits of that freedom: SJ Heyman Free speech and human dignity (2008) 2.

231 Sec 16(1):
   a) freedom of the press and other media;
   b) freedom to receive or impart information or ideas;
   c) freedom of artistic creativity; and
   d) academic freedom and freedom of scientific research.

233 Sec 16(2)(b).

234 Sec 16(2)(c). Many democratic countries restrict hate speech, having weighed orators' interests to the right of free expression against both the dignitary harm to individuals and the collective harm to pluralism: A Tsesis 'Dignity and speech: The regulation of hate speech in a democracy' (2009) 44 Wake Forest Law Review 497 at 521. Alexander Tsesis considers that the international trend to regulate hate speech is grounded in what is meant to 'secure for all citizens the prerequisites of a life worthy of human dignity': as above, citing MC Nussbaum 'Constitutions and capabilities: “Perception” against lofty formalism' (2007) 121 Harvard Law Review 4 at 7. See Rao (n 219 above) 251 - 253.


236 R Dworkin Freedom's law: The moral reading of the American Constitution (1996) 200. Justice Brennan's view was that rights of expression and of conscience reaffirmed 'the vision of human dignity in many ways'; he mentioned, first, self-governance by demanding robust public debate on issues of public importance, which was vital to the development and dissemination of political ideas, and, as importantly, by forging personal political convictions; and, second, the freeing up of private space for intellectual and spiritual development: n 5 above, 442 - 443.
considers that politics is more likely to discover truth, if political discussion is free,237 or that government is more likely to be less corrupt if it lacks power to punish criticism.238 The constitutive angle has two dimensions, the first being that morally responsible people insist on making up their own minds about what is good or bad in life or politics, or true or false in matters of justice or faith, so the government insults citizens when it denies them the right to hear contrary opinions that might persuade them to dangerous or offensive convictions.239 Dworkin describes the free reception of ideas as central to dignity, ‘[w]e retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.’240 Many regard moral responsibility as also having another, more active, aspect leading to the second constitutive dimension of expressing our convictions to others out of respect and concern for them and so that truth be known, justice served, and the good secured.241 The articulation of all types of views is posed by Dworkin as dually beneficial by upholding the dignity of both the giver and the recipient. The worth of each individual is accepted by acknowledging the equality of everyone to communicate their ideas.242

John Mubangizi has mentioned a third reason why freedom of expression should be given constitutional protection, which is that free speech encourages debate and improves the chances that the truth will surface.243

In response to critics of Justice Brennan’s stance on free speech, Stephen Wermiel observed that for him it was the ability of the speaker to speak that was at the core of the ideal of human dignity, which he sought to protect in the face of the countervailing interests of the majority who found the speech unwanted or offensive: n 89 above, 236 - 237.


238 n 236 above, 200.

239 As above.

240 As above.

241 As above.

242 Dworkin also developed his theory of citizens’ obligation to comply with the laws of a legitimate state from the principles of dignity and equality: S Sreedhar & C Delmas ‘State legitimacy and political obligation in Justice for hedgehogs: The radical potential of Dworkinian dignity’ (2010) 90 Boston University Law Review 737 at 745.

243 JC Mubangizi The protection of human rights in South Africa: A legal and practical guide (2004) 87. Steven Heyman considers that the elements of liberty correspond to the major justifications for freedom of expression, ie, that freedom of expression is an aspect of external freedom, essential for individual self-realisation, indispensable to democratic self-government, and promotes the search for truth: n 230 above, 2.
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This could be regarded as embraced by both of Dworkin's groupings, which overlap. Eric Barendt traced the truth argument back to Milton, although it is especially associated with John Stuart Mill. The three underlying reasons identified were mentioned by O'Regan J in SANDU.

Laurence Tribe's analysis of the various rationales for free speech led him to assert that any adequate conception of it must draw on several strands of theory to protect a rich variety of expressional modes. No adequate conception of free speech can be developed in purely instrumental or 'purposive' terms. Free speech is not only a means to some further end, such as successful self-government, social stability or the less instrumental discovery and dissemination of truth, but, as Tribe suggests, it is in part also

244 n 236 above, 201.
245 EM Barendt Freedom of speech (2005) 7. McLachlin J (dissenting) in R v Keegstra, having referred to the truth rationale for freedom of expression as dating back to Milton, acknowledged that it had been criticised as there was no guarantee that the free expression of ideas would in fact lead to the truth: [1990] 3 SCR 697 (SC of Canada) 110 - 111. However, she considered it could still be argued that it assisted in promoting the truth in ways which would be impossible without freedom of expression: above, 111. Dickson CJ (for the majority) also had doubts about the universal application of the truth rationale and cautioned against overplaying 'the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas': above, 69 - 70. Jacob Weinrib found it surprising that the Supreme Court of Canada had not engaged in an analysis of whether the traditional purposes of freedom of expression cohere with the values in the Canadian Charter, given the transformative implications of the Charter and the Court's indications in Keegstra that the purposes taken as underlying freedom of expression might be inadequate: J Weinrib 'What is the purpose of freedom of expression?' (2009) 67 University of Toronto Faculty of Law Review 165 at 167.

246 South African National Defence Union v Minister of Defence 1999 4 SA 469 (CC) [7] (footnotes omitted):

Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

As Ryan Haigh has noted, in this passage O'Regan J demonstrated that freedom of speech is fundamental: RF Haigh 'South Africa's criminalization of “hurtful” comments: When the protection of human dignity and equality transforms into the destruction of freedom of expression' (2006) 5 Washington University Global Studies Law Review 187 at 208, fn 138.

Cf the view of Dumbutshena AJA of the Namibian Supreme Court that in a democracy 'the citizens must be free to speak, criticise and praise where praise is due'; he continued, '[m]utated silence is not an ingredient of democracy because the exchange of ideas is essential to the development of democracy': Kauesa v Minister of Home Affairs [1995] NASC 3; 1995 11 BCLR 1540 (NmS) 28.

248 n 247 above, 785.
an end in itself, ‘an expression of the sort of society we wish to become and the sort of persons we wish to be’. Much of our commitment to free speech is because it enhances personal growth and self-realisation. Intellect and rationality cannot accommodate what Tribe described as ‘the emotive role of free expression – its place in the evolution, definition, and proclamation of individual and group identity.

Dworkin’s constitutive rationale corresponds with the theory of free speech as an integral aspect of self-fulfilment described by Barendt, who expanded on its benefits for the individual:

Restrictions on what we are allowed to say and write, or (on some formulations of the theory) to hear and read, inhibit our personality and its growth. A right to express beliefs and political attitudes instantiates or reflects what it is to be human. …

There is perhaps something uniquely valuable in intellectual self-development. The reflective mind, conscious of options and the possibilities for growth, distinguishes human beings from animals.

While the self-fulfilment argument may justify giving constitutional protection to free speech, this rationale is closely linked to general liberty or moral autonomy. Barendt points out that unlimited speech justified on the basis of self-fulfilment, dignity and equality may be contrary to respect for human dignity.

Currie and de Waal have noted traces of Dworkin’s instrumental and constitutive arguments in the South African jurisprudence interpreting the right to freedom of expression. His instrumental strand can be seen in Kriegler J’s judgment in S v Mamabolo when he indicated that freedom of expression as the communication of ideas is essential for democracy.

249 As above.
250 n 247 above, 787.
251 As above.
252 n 245 above, 13.
253 n 245 above, 14.
254 n 245 above, 15.
255 n 21 above, 361.
256 2001 3 SA 409 (CC) [37]:
Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to go-
O’Regan J articulated the constitutive strand – and, indeed, the instrumental one also – in Khumalo. Both strands are also evident in Mokgoro J’s judgment in Case, where she considered that the statutory prohibition on pornography breached freedom of expression in the interim Constitution because it was overbroad. Apart from seeing the dual purpose of freedom of expression, she rightly understood constitutional rights as interrelated and uniting to sustain societal interplay that is of benefit to the giver and receiver of information, which also accords with Dworkin’s views. In addition to the advantage to the speaker of broadcasting ideas to another and being listened to, there is a boomerang effect in being able to refine thoughts as a result of the listener’s feedback.

vernment theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed.

Haigh cited this passage as a demonstration by the Constitutional Court that freedom of speech is fundamental: n 246 above, 208, fn 138. See A Sparks Beyond the miracle: Inside the new South Africa (2003) 78 - 82.

257 ‘Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.’ n 193 above, [21].

258 Case v Minister of Safety and Security 1996 3 SA 617 (CC) [27] (footnotes omitted): We must understand the right embodied in section 15 not in isolation, but as part of a web of mutually supporting rights enumerated in the Constitution, including the right to ‘freedom of conscience, religion, thought, belief and opinion’, the right to privacy, and the right to dignity. Ultimately, all of these rights together may be conceived as underpinning an entitlement to participate in an ongoing process of communicative interaction that is of both instrumental and intrinsic value.

Cf the Supreme Court of Canada’s finding that the Criminal Code’s prohibition on possession of child pornography infringing freedom of expression was justified under the limitations clause, except for two aspects which were overbroad: R v Sharpe 2001 SCC 2, [2001] 1 SCR 45. The reverse onus putting the onus of disproving obscenity on the importer was held unconstitutional in a challenge to the seizure of erotica by customs authorities, although the remainder of the legislation was justified: Little Sisters Book and Art Emporium v Canada (Minister of Justice) 2000 SCC 69, [2000] 2 SCR 1120 (SC of Canada).


259 Case (n 258 above) [25] (footnote omitted):

But my freedom of expression is impoverished indeed if it does not embrace also my right to receive, hold and consume expressions transmitted by others. Firstly,
Freedom of expression’s importance for good government and for humanity was recognised by Yacoob J in Phillips when he said it was ‘integral to democracy, to human development and to human life itself.’ O’Regan J in NM v Smith, where she dissented on the facts, stressed the interrelationship between rights and also the weight to be given to freedom of expression in personal development by exchanging ideas resulting in motivation to action. The outward manifestation of religion and culture are protected by the right to freedom of expression. The banning of Hindu students from wearing nose studs in school limited their right to express their religion and culture which Langa DCJ said was ‘central to the right to freedom of expression’. Religious and cultural practices are ‘central to human identity and hence to human dignity which is in turn central to equality.’

my right to express myself is severely impaired if others’ rights to hear my speech are not protected. And secondly, my own right to freedom of expression includes as a necessary corollary the right to be exposed to inputs from others that will inform, condition and ultimately shape my own expression. Thus, a law which deprives willing persons of the right to be exposed to the expression of others gravely offends constitutionally protected freedoms both of the speaker and of the would-be recipients.

Freedom of expression is important because it is an indispensable element of a democratic society. But it is indispensable not only because it makes democracy possible, but also because of its importance to the development of individuals, for it enables them to form and share opinions and thus enhances human dignity and autonomy. Recognising the role of freedom of expression in asserting the moral autonomy of individuals demonstrates the close links between freedom of expression and other constitutional rights such as human dignity, privacy and freedom. Underlying all these constitutional rights is the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them.

In liberal rights discourse, freedom of thought and conscience are each considered to be absolutely protected from interference by the law, but the right to manifest one’s thought or conscience in the form of speech or other action is subject to reasonable limitation by the state on certain specified grounds: PG Danchin ‘Defaming Muhammad: Dignity, harm, and incitement to religious hatred’ (2010) 2 Duke Forum for Law & Social Change 5 at 20 - 21.

The Supreme Court of Zimbabwe held that expulsion of a Rastafarian from school because of the expression of his religious belief through his hairstyle violated his right to religious expression and was discriminatory: Dzvova v Minister of Education Sports and Culture [2007] ZWSC 26.

See Botha (n 220 above) 206 - 207.
5.4.2 Exclusions from protection

The South African Constitution is read as a whole. Doing so enabled Langa DCJ to indicate in *Islamic Unity Convention* that the reason for the qualifications to freedom of expression in Section 16(2) was the threat to the foundational values including dignity.\(^{265}\) He found that any restriction on freedom of expression beyond the terms allowed in Section 16(2) ‘encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution.’\(^{266}\) The *Islamic Unity Convention* litigation resulted from a complaint by the South African Jewish Board of Deputies to the Independent Broadcasting Authority that an interview broadcast by a community station owned by the Islamic Unity Convention breached the IBA’s Code of Conduct which prohibited the broadcasting of material ‘likely to prejudice relations between sections of the population, i.e. Jews and other communities.’\(^{267}\) In a challenge by the Islamic Unity Convention to the constitutionality of the Code, the Court held that the Code limited the right to freedom of expression and went on to consider whether the limitation was justifiable. It noted that the regulation of broadcasting was a legitimate objective and was mandated by the Constitution because of its importance to national unity and the founding values of dignity, equality and freedom. Langa DCJ considered that the labelling of people by virtue of their innate identity – particularly in view of South Africa’s history of institutionalised discrimination – undermined these values.\(^{268}\) The Court held that the Code went too far and was not sufficiently

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\(^{265}\) *Islamic Unity Convention v Independent Broadcasting Authority 2002 4 SA 294 (CC) [32]: Implicit in its provisions [Section 16(2)] is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to. See Kende (n 220 above) 198 - 200.

\(^{266}\) n 265 above, [34].

\(^{267}\) n 265 above, [2]. The interview dealt with Israel and Zionism as a political ideology; it was asserted that Jewish people were not gassed in concentration camps: n 265 above, [1].

\(^{268}\) n 265 above, [45] (footnote omitted): South African society is diverse and has for many centuries been sorely divided, not least through laws and practices which encouraged hatred and fear. Expression that advocates hatred and stereotyping of people on the basis of immutable characteristics is particularly harmful to the achievement of these values as it reinforces and perpetuates patterns of discrimination and inequality.
focused to guide broadcasters in what they might or might not broadcast. While the prohibition in the Code was declared unconstitutional and invalid, the Court’s declaration of invalidity was made subject to the proviso that no protection was given to the broadcasting of material that contravened the specific exclusions in Section 16(2).

The hate speech excluded from protection is limited to that which amounts to incitement to cause harm. There are contrary views as to whether the exclusion extends to hurtful comments.\(^{269}\) Ryan Haigh has pointed out that the right to express one’s thoughts and to communicate freely with others ‘affirms the dignity and worth of every member of society, and allows each individual to determine what is true and to realize his or her full human potential’.\(^{270}\) He argues that dignity should not be used to prevent free speech not amounting to the urging of violence.\(^{271}\) Control over speech during the apartheid era led to oppression and the stripping of people of their dignity.\(^{272}\) Dissenters should be able to express their views. Prohibiting criticism or the airing of contrary views does not change the attitudes of racists or bigots, but, as Haigh thought, may push them underground, where they may become more dangerous.\(^{273}\) Encouragement of diverse and dissenting voices is healthy in a democracy. This is in the interests of all, as the principle of suppression of views, once established, could affect oneself in another capacity or a different situation in future. Tolerance – even of one’s opponents’ views – is necessary for the security of all in society, as Thomas Paine stated, ‘[h]e that would make his own liberty secure, must guard even his enemy from

269 In *Keegstra* where a teacher had been convicted of wilfully promoting hatred against an identifiable group by communicating anti-semitic statements to his students, the Supreme Court of Canada found that legislation prohibiting hate speech infringed freedom of expression, but was justified under the limitations clause; *mens rea* meant that the offence required intent to promote hatred or knowledge of substantial certainty of it as a consequence; Dickson CJ for the majority stated that freedom of expression in Canada protected all content of expression attempting to convey a meaning (except when communicated in a physically violent form): n 245 above, 37. There is a distinction between expressive activity that is inconsistent with the dignity of all persons (dignity being a public value which requires that persons not be subject to hatred), on the one hand, and expressive activity which is merely offensive (offence being a subjective reaction rooted in the beliefs of private persons and associations), on the other: Weinrib (n 245 above) 184.

270 n 246 above, 208 (footnote omitted).

271 Weinrib has criticised Ronald Dworkin’s analysis of autonomy (a right to moral independence) as permitting hate speech, because he overlooks the capacity of hate speech to undermine the autonomy of others: n 245 above, 178 - 179.

272 Haigh (n 246 above) 209.

273 As above.
oppression; for if he violates this duty, he establishes a precedent that will reach to himself. 274 Haigh concluded, ‘[dignity] should not be used as a means to restrict essential freedoms, such as speech, thereby stripping individuals of the very qualities that they are trying to instill into society.’ 275

On the other hand, Currie and de Waal submit that the hate-speech exception includes harm to dignity interests on the basis that it is the speech itself that causes the social and psychological harm, and not the audience ‘who may or may not be sufficiently fired up to translate the message into violent action’. 276 They define hate speech as ‘advocacy of hatred on a listed ground, intended to cause harm to dignity.’ 277

5.4.3 Limits to protection
Restrictions on freedom of expression have often been justified under the limitations clause. One of the factors to be taken into account in the limitations analysis is the nature of the right and in South Africa freedom of expression in itself is not a foundational value. It plays a vital role in democracy, but there are more significant values to be borne in mind. O’Regan J explained in Khumalo: 278

[Although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality.

Because of its nature, it has been curtailed when there are more pressing values in play.

Any type of expression not specifically excluded under Section 16(2) is protected to some extent, but may be limited by the application of the foundational values. The South African courts have adopted the broad

275 n 246 above, 210.
276 n 21 above, 377. Weinrib considers that hate speech may be limited because it seeks to use rights that are founded in the value of human dignity in a manner that denies the dignity of others, and the capacity of others to hold rights, including the right to free expression: n 245 above, 187.
277 n 21 above, 377.
278 n 193 above, [25] (footnote omitted). In Germany the right to dignity has also interacted dramatically with rights to information and freedom of expression providing in the case of Germany a right to control personal information: Klug (n 2 above) 153.
European standard of protection instead of the US position where certain categories of expression are unprotected forms of speech. In De Reuck Langa DCJ confirmed approval of the European Court of Human Rights’ approach in finding that the Section 16(1)(b) right ‘to receive or impart information or ideas’ applied ‘… not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb…’. Hence child pornography was protected and restrictions on it were subject to justification under a limitation analysis, but it stands on the fringe of expression deserving slight protection because it is of minor benefit to the individuals in question. In view of the underlying reasons for freedom of expression, Langa DCJ did not see the statutory restrictions on child pornography as attacking ‘the core values of the right.’

In defamation actions dignity is balanced against freedom of expression, as O’Regan J made plain in Khumalo:

The chilling effect of defamation laws and high awards on freedom of the press is regularly criticised – more often than not by journalists. However, in

279 De Reuck (n 227 above) [48]-[49]. Heyman advocates the adoption in the US of a liberal humanist approach and understanding freedom of expression within a broader conception of rights based on human dignity and autonomy; this would recognise a strong, liberal right to freedom of expression, while affording protection against the most serious forms of ‘assaultive speech’; his rights-based theory of the First Amendment would replace the modern conception of First Amendment issues as conflicts between the individual right to free speech and ‘social interests’ such as dignity and equality. n 230 above, 2, 4.

280 n 227 above, [49], citing Islamic Unity Convention (n 265 above) [29], quoting Handyside v UK (1976) 1 EHRR 737 at 754.

281 n 227 above, [59]. He continued: ‘Expression that is restricted is, for the most part, expression of little value which is found on the periphery of the right and is a form of expression that is not protected as part of the freedom of expression in many democratic societies.’ n 227 above, [59] (footnote omitted).

282 n 193 above, [28].
Chapter 5: Association of dignity with other rights

Dikoko v Mokhatla

Swkeyiya J thought it a good thing supportive of dignity that people would desist from saying something potentially defamatory resulting in curbing free speech.283

The existence or extent of freedom of commercial speech was an unresolved issue in the *Laugh It Off* case, where Moseneke J described freedom of expression as ‘a vital incidence of dignity, equal worth and freedom’ carrying ‘its own inherent worth’ and serving ‘a collection of other intertwined constitutional ends in an open and democratic society.’284 The case involved a conflict between Laugh It Off Promotions CC, a small South African corporation that made social commentary by altering well-known trade marks and printing them on T-shirts for sale, and an international corporation trading as Sabmark International, whose trade mark it had altered. The Constitutional Court decided the case on the basis that Sabmark had failed to prove Laugh It Off’s infringement of its trade mark, as it did not show that it was likely to suffer economic harm.285 Sachs J, in a concurring judgment, would have upheld the decision on more substantial grounds, giving more weight to expression rights and ‘the uniquely expressive weight of the parodic form used.’286 He rightly regarded criticism of the status quo and branding as healthy in a democracy and supportive of human dignity.287 Although the issue of commercial speech was not ruled on in *Laugh It Off*, the Constitutional Court had recognised the individual and collective sides to expression in *SANDU* when O’Regan J indicated ‘the importance, both for a democratic society and for individuals personally, of the ability to form and express

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283 2006 6 SA 235 (CC) [141]:
A person who suspects that they may possibly be about to defame someone else is cognisant of the fact that if they do, there may be legal consequences. As a result, they either refrain from making the utterance or do some background checking first. So the kinds of utterances which are chilled are those which an ordinary person may suspect to be defamatory in nature. The chilling of this kind of expression is by no means an undesirable result and is in line with the framework of intersecting rights outlined above in which freedom of expression may well have to take a back seat to dignity in certain circumstances.

284 *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 1 SA 144 (CC) [45].

285 It was not necessary to make a finding on freedom of expression relied on by Laugh It Off.

286 n 284 above, [74].

287 n 284 above, [108]:
Laughter too has its context. It can be derisory and punitive, imposing indignity on the weak at the hands of the powerful. On the other hand, it can be consolatory, even subversive in the service of the marginalised social critics. What has been
opinions, whether individually or collectively, even where those views are controversial. 288

The US Supreme Court took the view initially that commercial advertising was not encompassed in the right to free speech. In 1942 in Valentine v Chrestensen it upheld a ban on commercial advertising – even when combined with political protest, which had constitutional protection. 289 More than 20 years later in New York Times v Sullivan it found that paid advertising for political purposes was protected. 290 The change of direction was complete in Bigelow in 1975, when the Court struck down a statute in Virginia prohibiting a commercial advertisement for legal abortion services in another state. 291 The information was of interest to the women wishing to have an abortion and to the general public, who could be concerned with law reform and with legal developments in other states. Justice Blackmun distinguished Chrestensen, which he said was limited to upholding the ban on commercial advertising as ‘a reasonable regulation of the manner in which commercial advertising could be distributed.’ 292 It was not authority for the proposition that all statutes regulating commercial advertising were immune from constitutional challenge. 293

To revert to South Africa, in Phillips the Constitutional Court in a majority decision held that freedom to receive and impart information or ideas and freedom of artistic creativity protected in Section 16(1)(b) and (c) were infringed by overbroad restrictions on places of entertainment selling

relevant in the present matter is that the context was one of laughter being used as a means of challenging economic power, resisting ideological hegemony and advancing human dignity.

Free speech as a motivator for change was also referenced by McLachlin CJ and LeBel J of the Canadian Supreme Court in a joint judgment, when they stated, ‘[free speech] allows a person to speak not only for the sake of expression itself, but also to advocate change attempting to persuade others in the hope of improving one’s life and perhaps the wider social, political, and economic environment’: Retail, Wholesale and Department Store Union, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd 2002 SCC 8, [2002] 1 SCR 156 [32].

288 n 246 above, [8].
292 n 291 above, 819.
293 n 291 above, 819 - 820.
liquor. Less restrictive measures could have secured the state’s interest in controlling the negative effects of the over-consumption of liquor in public places.

By a majority in *South African Broadcasting Corporation v National DPP* the Constitutional Court held that as reconciliation of rights was not possible, in the situation that arose the right to a fair trial should prevail over the right of the media to broadcast court proceedings. In the interests of justice, the court should ‘seek to reconcile the fundamental rights at issue with its obligation to ensure that the proceedings before it are fair.’ Although there is no hierarchy of rights in the Constitution, the Court considered that there are circumstances in which one right will take precedence. The tendency is towards fair trial rather than in favour of freedom of expression and open publication of court proceedings. Mokgoro J (dissenting), having said that she considered the public broadcaster had the right and freedom to disseminate information correlating with its duty to inform the public, which, in turn, had the right to receive information, continued, ‘[i]n an open democracy based on the values of equality, freedom and human dignity, the

294 n 260 above. The challenge was brought by a licensed premises where there was striptease dancing, but the legislation was wide enough to apply to plays and concerts irrespective of whether they represented ‘serious works of art or the communication of thoughts and ideas essential for positive social development’: n 260 above, [15].

295 2007 1 SA 523 (CC). There were political overtones, as the accused was appealing against his conviction for corruption for bribing Jacob Zuma (now President of South Africa) in order to protect a French armaments company. Daniel Erskine analysed this case and summarised the Constitutional Court’s approach, ‘[t]he Court recognizes the frustration in granting all rights coequal status because in such a situation none of the rights may receive full expression.’ DH Erskine ‘Judgments of the United States Supreme Court and the South African Constitutional Court as a basis for a universal method to resolve conflicts between fundamental rights’ (2008) 22 St John’s Journal of Legal Commentary 595 at 604.

296 n 295 above, [53].

297 n 295 above, [55].

298 According to the majority, ‘[g]iven that a court has a primary obligation to ensure that the proceedings before it are fair, that obligation will always figure large in the exercise of discretion’: as above.

299 The legal relations described by Mokgoro J are as conceived by Wesley Hohfeld, who devised a scheme of opposites and correlatives in which a right and a duty are correlatives, the opposite of rights being ‘no-rights’ and a duty being the opposite of a privilege: WN Hohfeld ‘Some fundamental legal conceptions as applied in judicial reasoning’ (1913) 23 Yale Law Journal 16 at 30. See also WN Hohfeld ‘Fundamental legal conceptions as applied in judicial reasoning’ (1917) 26 Yale Law Journal 710 at 710. On the relevance of Hohfeld’s theory of jural relations to human rights, see SRS Bedi *The development of human rights law by the judges of the International Court of Justice* (2007) 58 - 59.
right of the public to be informed is one of the rights underpinned by the value of human dignity.\textsuperscript{300}

5.5 Equality

There are tests to be applied by the court in sequence in order to decide if the constitutional guarantees concerning equality have been breached under the framework elaborated in \textit{Harksen v Lane}.\textsuperscript{301} As described by Evadné Grant, Section 9(1) plays a 'gate-keeping role'.\textsuperscript{302} A measure that does not fall foul of Section 9(1) because the differentiation has a rational connection with a legitimate purpose may still constitute unfair discrimination.\textsuperscript{303} Allowing for the fact that to legislate is to discriminate in some fashion, the Court in \textit{Prinsloo} distinguished between 'differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination'.\textsuperscript{304} It may be justified as corrective action under Section 9(2).\textsuperscript{305} In \textit{Van Heerden} Moseneke J disagreed with previous interpretations of Section 9(2) as an exception to the equality code.\textsuperscript{306} He underlined the transformative purpose of the entire of Section 9 and an integrated interpretation of the Constitution – with substantive equality (including remedial measures) reaching out its tentacles.\textsuperscript{307}

\textsuperscript{300} n 295 above, [120].
\textsuperscript{301} E Grant 'Dignity and equality' (2007) 7 Human Rights Law Review 299 at 315 - 316. See also Ackermann (n 133 above) 184 - 186.
\textsuperscript{302} n 301 above, 316. See Harksen v Lane 1998 1 SA 300 (CC) [42] (Goldstone J). A provision in the Matrimonial Property Act 1984 unjustifiably denied spouses equal protection and benefit of the law: \textit{Van der Merwe v Road Accident Fund} 2006 4 SA 230 (CC) [58], [63].
\textsuperscript{303} Van der Westhuizen J explained the difference between the two provisions in \textit{Weare v Ndebele} [2008] ZACC 20, 2009 1 SA 600 (CC) [72] (footnotes omitted):
Whereas the core of section 9(1) is the idea that no-one is above or beneath the law and that all persons are subject to law impartially applied and administered, the core of the right against discrimination in section 9(3) is dignity. Differentiation becomes unfair discrimination when it is based on grounds that have the potential to impact upon the fundamental dignity of human beings.
\textsuperscript{304} Prinsloo v Van der Linde 1997 3 SA 1012 (CC) [23].
\textsuperscript{305} Grant (n 301 above) 316.
\textsuperscript{306} \textit{Minister of Finance v Van Heerden} 2004 6 SA 121 (CC) [32].
\textsuperscript{307} n 306 above, [31]. See Ackermann (n 133 above) 354 - 356, 361 - 363, 388 - 389, Kende (n 220 above) 166 - 169. Since corrective action is an issue which impacts on the determination of discrimination under Section 9(3), there is a potential overlap between the application of Section 9(2) and (3); this can be seen in \textit{Van Heerden}
Apart from those enumerated in Section 9(3), there are other grounds of unfair discrimination in respect of which there is no presumption of unfairness. The Constitutional Court in *Prinsloo*, relying on South Africa’s historical reliance on institutionalised discrimination, identified violation of human dignity as the discerning feature of discrimination, whether on listed or unlisted grounds. The Court made a distinction between the guaranteed right to equality and the right to equal treatment, which does not invariably apply, ‘[i]n Dworkin’s words, the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment.’ In *Harksen* Goldstone J amplified the features of discrimination on an unlisted ground, relying on the potential to impair dignity or an analogous effect. He cautioned against trying to be too definitive about the grounds of discrimination and illustrated their wide-

where the majority of the Court held that the measure was aimed at ameliorating past disadvantage, and therefore fell within the ambit of Section 9(2), while the minority held that the matter should be resolved under the non-discrimination clause, and Sachs J in a separate concurring opinion took a holistic approach focusing on substance rather than technicalities: Grant (n 301 above) 322 - 323.

Transformation involves not only the fulfilment of socio-economic rights, but also the provision of greater access to education and opportunities through various mechanisms, including affirmative action measures: P Langa ‘Transformative constitutionalism’ (2006) 17 Stellenbosch Law Review 351 at 352.

308 *Prinsloo* (n 304 above) above, [28].

309 n 304 above, [31] (footnote omitted):

Given the history of this country we are of the view that discrimination has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity. … In our view unfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

Recognition of human dignity understood here as the antithesis of the exclusion of humanity under apartheid is concerned with the denial of dignity and does not provide a positive definition: J Small & E Grant ‘Dignity, discrimination, and context: New directions in South African and Canadian human rights law’ (2005) 6(2) Human Rights Review 25 at 37.


311 ‘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.’ n 302 above, [46].
ranging nature.312 Because it determines the burden of proof, the distinction between the listed and unlisted grounds is important procedurally, but, as Grant says, ‘from the point of view of principle, the underlying conception that unites them is the “potential to impair dignity”’.313

Citizenship was held to be an unlisted ground in Larbi-Odam where temporarily-employed foreign teachers with residence permits claimed their dismissal as part of a redundancy programme constituted unfair discrimination, since – unlike citizens – they were not entitled to apply for permanent positions.314 Mokgoro J in the Constitutional Court found that foreign citizens were a vulnerable group because they were a minority with little political muscle, citizenship was a personal attribute which was difficult to change, and foreign citizens were vulnerable to threats and intimidation.315 She used the potential to impair dignity as the yardstick for unfair discrimination.316

The determining factor in ascertaining whether discrimination is unfair is the impact it has on its victims.317 Currie and de Waal have emphasised the central importance of dignity to understanding unfair discrimination, which is hurtful or demeaning differential treatment and occurs ‘when law or conduct, for no good reason, treats some people as inferior or incapable of less deserving of respect than others’ or ‘when law or conduct perpetuates or does nothing to remedy existing disadvantage and marginalisation.’318

312 n 302 above, [49]: These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted.

313 n 301 above, 318.

314 Larbi-Odam v MEC for Education (North-West Province) 1998 1 SA 745 (CC).

315 n 314 above, [19]-[20]. This provides some insight into the kinds of factors that might be taken into account in determining discrimination, but is not a comprehensive approach: Grant (n 301 above) 318.

In a challenge to legislation regulating the private security industry, the majority and minority both identified refugees as a vulnerable group: Union of Refugee Women v Director, Private Security Industry Regulatory Authority 2007 4 BCLR 339 (CC) [24], [28]-[31], [82], [113], [117], [122]-[123], [127].

316 n 314 above, [20].

317 Currie & de Waal (n 21 above) 244, citing Harksen (n 302 above) [50]-[51].


In Van Heerden (n 306 above) [116] (footnote omitted), Ngcobo J explained the effect on dignity of being regarded as a second-class citizen:
Goldstone J in *Harksen* set out the factors to be considered when determining whether the impact is unfair, one of which is ‘the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.’\(^{319}\) The contextual factors can be summarised as past systematic disadvantage, the nature and purpose of the challenged measure, and its effect on dignity or, as Grant has labelled them, historical disadvantage, corrective action and impact.\(^{320}\) They, and others which may emerge, are assessed objectively and cumulatively to determine whether discrimination is unfair.\(^{321}\)

The impact of a city council’s policy of selective recovery of debts on residents of white neighbourhoods was held by the majority of the Constitutional Court in *City Council of Pretoria v Walker* to be ‘at least comparably serious to an invasion of their dignity.’\(^{322}\) Even if the discriminatory measures have some benefits for the disadvantaged, they can be unfair if the basis of the distinction is insulting to dignity. In *Moseneke v Master of the High Court*

Human dignity is harmed by unfair treatment that is premised upon personal traits or circumstances that do not relate to the needs, capacities and merits of different individuals. Often such discrimination is premised on the assumption that the disfavoured group is not worthy of dignity. At times, as our history amply demonstrates, such discrimination proceeds on the assumption that the disfavoured group is inferior to other groups. And this is an assault on the human dignity of the disfavoured group. Treating people as inferior is invidious discrimination: Waldron (n 28 above) 48.

\(<\text{footnotes}\>\)

\(^{319}\) n 302 above, [51].

\(^{320}\) n 301 above, 320, 321, 323. Foster pointed out similarities between the *Harksen* test to analyse equality issues and the test in Canada derived from *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SC of Canada): n 226 above, 78 - 79. He considered that the focus on dignity may be particularly problematic in the area of economic and social rights, as courts are less inclined to equate unequal divisions of economic rights with dignity and self-worth, although – in contrast with *Harksen* – he was heartened by the Constitutional Court’s association of dignity with socio-economic issues in *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC): n 226 above, 88, 96.

\(^{321}\) *Harksen* (n 302 above) [51].

\(^{322}\) 1998 2 SA 363 [81]. Sachs J disagreed on the facts, but gave his view on what could constitute a serious impact analogous to infringement of dignity, above, [129] (footnote omitted):

It might well be that even in the absence of concrete disadvantage, the symbolic effect of a measure (or the absence of a measure that should have been taken) could impair dignity in a way which constitutes unfair discrimination. This could arise if the selective enforcement involved deliberate targeting whether direct or disguised, or was so related in impact to patterns of disadvantage as to leave the persons concerned with the understandable feeling that once more they were being given the short end of the stick.

See comments of Kende (n 220 above) 163 - 166; Small & Grant (n 309 above) 33, 44; LA Williams ‘The justiciability of water rights: Mazibuko v City of Johannesburg’ (2009) 36 Forum for Development Studies 5 at 17 - 21, 44.
a separate system of administration of estates of deceased people depending on their colour rather than on their economic needs or geographic location was held to be unfair discrimination and also a breach of the right to dignity in Section 10 of the Constitution.323

If the discrimination is unfair under Section 9(3), it may still survive as a limitation permitted by law in accordance with Section 36.324 The limitation clause requires an examination of whether less restrictive means are available to achieve the purpose of the legislation.325

323 2001 2 SA 18 (CC). Sachs J pointed out the legislation’s faulty foundation notwithstanding the fact that it provided a cheap system for administering estates for black people, above, [22] (footnotes omitted):

The Minister and the Master suggested that the administration of deceased estates by magistrates was often convenient and inexpensive. However, even if there are practical advantages for many people in the system, it is rooted in racial discrimination which severely assails the dignity of those concerned and undermines attempts to establish a fair and equitable system of public administration. Any benefits need not be linked to this form of racial discrimination but could be made equally available to all people of limited means or to all those who live far from the urban centres where the offices of the Master are located. Given our history of racial discrimination, I find that the indignity occasioned by treating people differently as ‘blacks’, as both section 23(7) and the regulations do, is not rendered fair by the factors identified by the Minister and the Master.

324 An excellent insight into the judicial decision-making process and the role of proportionality in assessing the constitutionality of the limitation of rights can be seen in the writings of Albie Sachs, who said that the Constitutional Court (of which he was a member) was required to make value judgments, to establish the context, analyse the public objectives sought to be realised and the extent to which the law protected rights: A Sachs The strange alchemy of life and law (2009) 208. In determining whether the extent of the limitation was proportionate, the Court gave considerable weight to governmental discretion in the choice of means to achieve a legitimate purpose and granted a margin of appreciation to the government’s capacity to make factual evaluations of social priorities and areas requiring legislative intervention: above, 208 - 209. The Court gauged the measure concerned with the constitutional measuring-rod of what would be permissible in an open democratic society based on human dignity, equality and freedom, which involved comparisons with other jurisdictions and checking international legal reasoning and practice: above, 209.

Goldstone J in Harksen summarised the process to limit a right: ‘This will involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality.’: n 302 above, [52]. O’Regan J disagreed with the majority finding that there was no unfair discrimination against an insolvent man’s solvent wife, who maintained that her property had been expropriated by the trustees of her husband’s estate under the Insolvency Act 1936 – she had no doubt that the extent of the impairment of the interests of the solvent spouse was ‘substantial and sufficient to constitute unfair discrimination’: n 302 above, [100]. She went on to carry out a limitations analysis and concluded that the limitation on the wife’s right was not justifiable, as the interests of creditors seemed to be favoured disproportionately and there were no similar provisions in other legal systems: n 302 above, [111].

325 Sec 36(1)(e). The Constitutional Court regularly uses less restrictive means arguments in its reasoning: Brems (n 22 above) 361. Several other jurisdictions (eg, Germany
5.5.1 Gender

In *President of the Republic of South Africa v Hugo* a prisoner, who was a single father of a child under 12, challenged the constitutionality of the pardon granted by President Mandela to mothers of children under that age. He claimed it unfairly discriminated against him and his son on the ground of sex or gender in violation of Section 8 of the interim Constitution. The Court below held that the pardon was unconstitutional. The appeal succeeded, the majority finding that the pardon amounted to discrimination, but that it was not unfair. The history of past discrimination against women entitled the President to redress past disadvantage. Male prisoners who felt they should be pardoned for family circumstances were entitled to petition the President individually for release. The Court recognised that equality commits to recognising each person’s individual worth as a human being. It is not confined to redressing past disadvantage, but is also a positive obligation to accord equal dignity to all.

Goldstone J linked closely dignity and equality:

> At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the

and Switzerland) use the ‘least restrictive alternative’ criterion in their constitutional human rights doctrine: Brems (n 22 above) 360.

326 1997 4 SA 1 (CC).
328 Goldstone J cited L’Heureux-Dubé J’s analysis of equality, n 326 above, [41], citing *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-5:

> ‘Equality … means nothing if it does not represent a commitment to recognizing each person’s equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.’

The Court relied strongly on Canadian jurisprudence for its definition of equality and the placing of dignity at the forefront of individual rights.

The property system in customary marriage was found to constitute gender-discrimination, as it rendered women ‘extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent’: *Gumede (born Shange) v President of the Republic of South Africa* [2008] ZACC 23, 2009 3 SA 152 (CC) [36]. The exclusion of widows in potentially polygynous Muslim marriages from the statutory provisions for spouses in intestate succession constituted unfair discrimination on the grounds of religion, marital status and gender, and was not a justifiable limitation: *Hassam v Jacobs* [2009] ZACC 19, 2009 5 SA 572 (CC).

establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.

David Beatty cites Hugo as an example of a case holding that there is nothing wrong with singling out one gender for special treatment to promote greater equality between the two.\(^{330}\)

Goldstone J, who wrote the majority opinion, found the pardon did not fundamentally impair fathers’ ‘rights of dignity or sense of equal worth.’\(^{331}\) His views reveal an outdated attitude stereotyping the role of women in the home. However, O’Regan J (concurring) had an interesting alternative perspective to offer. She identified the disadvantage suffered by mothers in society on account of their traditional childminding role as a social fact

Jeremy Waldron considers that dignity as applied in Hugo is mainly a negative idea, being primarily a way of blocking the impact of group characterisations on individual dignity, rather than a way of talking affirmatively about the dignity of groups: J Waldron ‘The dignity of groups’ (2008) New York University School of Law Public Law Research Paper No 08-53 http://ssrn.com/abstract=1287174 (accessed 26 September 2013) 18. He concluded, ‘[i]n the last analysis, Hugo-dignity, even when applied to groups is still an individualist idea’: as above. See also Grant (n 301 above) 300; Kende (n 220 above) 92 - 101, 110 - 116; McCrudden (n 220 above) 691; Small & Grant, (n 309 above) 33 - 34.

Beatty's criticism of these three opinions was for the judges' failure to exercise the power of judicial review 'in a detached and impartial way. … they claimed a sovereignty over John Hugo, and other fathers like him, to interpret such acts of discrimination for themselves that they had no authority to make. They dismissed Hugo's own self-understanding as not worthy of the Court's respect.': n 330 above, 97.
resulting in inequality in work.\textsuperscript{332} This view of women's inferior place in the work force attributable to the traditional role accorded to them is correct, but is not relevant in the context of imprisonment. Women were not jailed simply because of their gender, but because they had breached the criminal law. The President's remission reinforced the disadvantage under which women in general laboured, as it confirmed their primary role in society as chldminders rather than attempting to reverse that stereotypical attitude.\textsuperscript{333} There was no recognition that men also had parental responsibilities – indeed, some of the male fathers imprisoned could have been the primary carers.\textsuperscript{334}

Mokgoro J, who agreed that the pardon was unfair discrimination, but considered it justified under Section 33 of the interim Constitution, categorised the stereotyping of fathers as an affront to their dignity and equality.\textsuperscript{335} The judgments of Kriegler J (dissenting) and Mokgoro J accord better with the concept of dignity as applying to all equally than does that of Goldstone J. The Presidential pardon did not take into account the individual circumstances of mothers who might not be the primary carers, nor of imprisoned fathers who had childminding duties. All of the judges in Hugo

\textsuperscript{332} [T]he responsibility for child rearing is also one of the factors that renders women less competitive and less successful in the labour market. The unequal division of labour between fathers and mothers is therefore a primary source of women's disadvantage in our society.': n 326 above, [110].

\textsuperscript{333} Kriegler J (dissenting from the finding that the pardon was constitutional) pointed out that the advantage given by the pardon to women prisoners was not for the purpose of redressing any discriminatory treatment accorded to them compared with men in the penal setting: n 326 above, [84]. He considered that the pardon's '[r]eliance on the generalisation that women are the primary care givers' was harmful as it tended 'to cramp and stunt the efforts of both men and women to form their identities freely': n 326 above, [80].

Cf Justice Ginsburg's dissent in Miller (n 327 above). Her dissent reflected concerns of individual fairness, as there was not a persuasive fit between the government's means and ends in the legislation in question; she opposed the 'preference' for women because she considered that unequal treatment of mothers and fathers legally reinforced gender stereotypes: N Rao 'Gender, race, and individual dignity: Evaluating Justice Ginsburg's equality jurisprudence' (2009) 70 Ohio State Law Journal 1053 at 1065.

\textsuperscript{334} The generalisation perpetuated the attitude that men 'can have only a secondary/ surrogate role in the care of their children' and the pardon reinforced a view that was 'a root cause of women's inequality' in society: n 326 above, [83].

\textsuperscript{335} n 326 above, [92] (footnote omitted):

[D]enying men the opportunity to be released from prison in order to resume rearing their children, entirely on the basis of stereotypical assumptions concerning men's aptitude at child rearing, is an infringement upon their equality and dignity. The Presidential Act does not recognize the equal worth of fathers who are actively involved in nurturing and caring for their young children, treating them as less capable parents on the mere basis that they are fathers and not mothers.
accepted the relevance of respect for dignity, but came to differing conclusions through varying routes.\textsuperscript{336}

5.5.2 Marital status

In common with many other countries, the issue of whether distinctions made on the grounds of marital status – whether between married and unmarried individuals, between married and unmarried couples, or between a husband and wife within marriage – are legally acceptable has been divisive.\textsuperscript{337}

In \textit{Harksen} the solvent spouse of an insolvent man was unsuccessful in her challenge to insolvency legislation, which she alleged discriminated against her because of her marriage thereby infringing her property rights.\textsuperscript{338}

The Constitutional Court in a majority decision found that she had been treated differently from other people who might have had dealings with the insolvent on the grounds of her marital status, but that the discrimination was not unfair. The legislation inconvenienced her by burdening her with resisting the claim of the trustees of her husband’s estate; however, this did not violate her dignity. O’Regan J (dissenting on this aspect) regarded the legislation as adversely affecting the solvent spouse’s interests and amounting to unfair discrimination, which was not justifiable under the limitations clause since the interests of creditors were favoured disproportionately. Relying on \textit{Brink v Kitshoff}\textsuperscript{339} and \textit{Prinsloo},\textsuperscript{340} she pointed out that the anti-discrimination provision had been interpreted primarily as ‘a buffer against the construction of further patterns of discrimination and disadvantage’ and that the desire to avoid discrimination was underpinned by the Constitution’s commitment to human dignity.\textsuperscript{341}

\textsuperscript{336} It may be that the majority was reluctant to risk political and public ire by finding that the iconic President Mandela, although well-intentioned, had erred by unwittingly perpetuating inequality.

Rory O’Connell analysed Hugo, as well as other cases, and concluded that the concept of dignity is ‘sufficiently broad so as to allow judges to invoke unarticulated norms to decide difficult issues’ and might ‘reinforce stereotypes and prejudices rather than combat them’. R O’Connell ‘The role of dignity in equality law: Lessons from Canada and South Africa’ (2008) 6 International Journal of Constitutional Law 267 at 284.

\textsuperscript{337} In South Africa the series of successful sexual-oriented challenges to legislation according benefits only to ‘spouses’ gave considerable impetus to arguments that denying these benefits to opposite-sex life partners was also unfair discrimination: Currie & de Waal (n 21 above) 254.

\textsuperscript{338} n 302 above.

\textsuperscript{339} 1996 4 SA 197 (CC).

\textsuperscript{340} n 304 above.

\textsuperscript{341} n 302 above, [91].
Sachs J – also dissenting – considered that the unfair discrimination arose because the legislation did not treat the spouses as independent entities and breached their rights to human dignity and privacy. In contrast to the majority, he viewed the legislation as representing ‘more than an inconvenience to or burden upon the solvent spouse’, as it affronted ‘his or her personal dignity as an independent person within the spousal relationship’ and perpetuated an archaic vision of marriage viewed in the light of constitutional values. The views of O’Regan and Sachs JJ were more insightful than those of the majority. They detected that the dignity of the spouses had been compromised by treating them as a unit.

The divisiveness in equality cases, where the Constitutional Court was required to take what Albie Sachs described as ‘constitutionally-guided value judgments’ emerged again in *Volks v Robinson* – a challenge to legislation providing for maintenance for the surviving spouse from the estate of a deceased husband or wife on the grounds that it should also have applied to heterosexual unmarried couples. Mrs Robinson had been in a permanent life partnership with a man for 16 years up to the time of his death, but they did not marry although there was no legal obstacle to marriage. She claimed that the legislation was discriminatory on the grounds of marital status and that it also breached her right to dignity. The Court in a majority verdict rejected the claim of unconstitutionality on the basis that it would be invidious to impose an obligation to maintain a partner after death, but not during their joint lifetimes. Skweyiya J did not regard the differentiation based on

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342 n 302 above, [118]. He discerned accurately the insidious, subtle and sometimes disguised nature of discrimination, n 302 above, [123] (footnotes omitted):

> [W]hat is most relevant to the question of unfairness is the assumption which puts together what constitutional respect for human dignity and privacy requires be kept asunder. This is one of those areas where to homogenise is not to equalise, but to reinforce social patterns that deny the achievement of equality … The intrusion might indeed seem relatively slight. Yet an oppressive hegemony associated with the grounds contemplated by section 8(2) may be constructed not only, or even mainly, by the grand exercise of naked power. It can also be established by the accumulation of a multiplicity of detailed, but interconnected, impositions, each of which, de-contextualised and on its own, might be so minor as to risk escaping immediate attention, especially by those not disadvantaged by them.

Barrington J in the Irish High Court in similar fashion pointed out that treatment as an inferior can manifest itself in a superficially trivial regulation: *Brennan v AG* [1983] ILRM 449 (HC) 481.

343 n 324 above, 210.

344 2005 5 BCLR 446 (CC).
marriage as anathema to dignity. A stance influenced by constitutional values and that was more discerning than that of the majority was taken by Sachs J in a dissenting judgment where he regarded the issue from the viewpoint of the family relationship rather than parsing the strict rules of matrimonial law.

Like Volks in South Africa, Nova Scotia (AG) v Walsh was a divisive case in Canada with the same outcome and, again, differing judicial interpretations. There was disagreement between the judges on the application of choice and liberty to the facts and the impact on dignity. The majority felt that the dignity of those who chose not to marry and to avail themselves of that status should be respected by not imposing the benefits of marriage on heterosexual cohabiting couples. Bastarache J took the view that the dignity of common law spouses was not affected adversely and rationalised it by relying on

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345 n 344 above, [62]: Mrs Robinson is not being told that her dignity is worth less than that of someone who is married. She is simply told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance. It is that people in a marriage are obliged to maintain each other by operation of law and without further agreement or formalities. People in the class of relationships to which she belongs are not in that position. In the circumstances, it is not appropriate that an obligation that did not exist before death be posthumously imposed.

346 Embarrassingly for him, his judgment was over twice as long as that of the majority: Sachs (n 324 above) 211.

347 n 344 above, [222]: I should add that while it is true that caring for one’s family is one of life’s great joys, and as such calls for no extra reward, fairness does not inevitably translate into sacrifice. … It would indeed be a perverse interpretation of family law that obliged one to disregard the fact that the circumstances of need in which a typical survivor might find herself, were produced precisely by her selfless devotion to the deceased and their family during his lifetime. I believe it is socially unrealistic, unduly moralistic and hence constitutionally unfair, for the Act to discriminate against the powerless and economically dependent party, now threatened with destitution, on the basis that she should either have insisted on marriage or else withdrawn from the relationship.

autonomy.349 In contrast L’Heureux-Dubé J in dissent recognised a threat to dignity.350 She saw choice as a more complex issue and did not accept the argument that the legislation was enacted to respect choice and therefore did not violate the claimant’s dignity.351

The divergence between the judges in these cases relating to different treatment of married and unmarried couples is a symptom of the changing attitude towards marriage emerging in society worldwide. Rory O’Connell observed in the case-law a dilemma over the colliding roles of autonomy and welfare in the meaning of dignity.352

5.5.3 Sexual orientation

Complaints of discrimination on the grounds of sexual orientation have been less favourably received in the courts than those based on gender differences. Beatty has found that South Africa is among the countries where gays and lesbians have had a higher level of success in challenging traditional laws than elsewhere.353 He instances South Africa’s Constitutional Court, the European Court of Human Rights and the UN Human Rights Committee as being sympathetic to decriminalising sexual behaviour of homosexuals in

349 ‘There is no deprivation of a benefit based on stereotype or presumed characteristics perpetuating the idea that unmarried couples are less worthy of respect or valued as members of Canadian society. All cohabitants are deemed to have the liberty to make fundamental choices in their lives.’: n 348 above, [62].

350 n 348 above, [118]:
Failing to recognize the contribution made by heterosexual unmarried cohabitants is a failure to accord them the respect they deserve. This failure diminishes their status in their own eyes and in those of society as a whole by suggesting that they are less worthy of respect and consideration. Their dignity is thereby assaulted: they are the victims of discrimination.

351 ‘[I]t is incorrect to paint each unmarried cohabitant with the same brush as regards the “choice” to cohabit. For many, choice is not an option. For those where choice is in fact an option, few structure their lives by marrying or not marrying to take advantage or avoid particular legal obligations.’: n 348 above, [157].

352 ‘The tension that these cases highlight – between an interpretation of dignity that mandates a protection of a person’s autonomy, or free choice, and one that mandates consideration for a person’s needs and welfare – reflects a significant divergence in the understanding of the concept of dignity.’: n 336 above, 280 (footnote omitted).

353 n 330 above, 99.
contrast with the Supreme Courts of Ireland, the US, Zimbabwe, and Germany’s Constitutional Court (at least initially).

In the Sodomy case, Ackermann J had no hesitation in finding that the impact intended and caused by the legislation was ‘flagrant, intense, demeaning and destructive of self-realisation, sexual expression and sexual orientation’ and went on to robustly condemn it. South Africa overturned legislation making it impossible for same-sex partners to adopt children.

354 The US Supreme Court decriminalised sodomy as it violated the Due Process Clause of the Fourteenth Amendment in Lawrence v Texas, when Justice Kennedy acknowledged that ‘adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons’: 539 US 558 (2003) 567. It overruled Bowers v Hardwick 478 US 186 (1986). Neomi Rao regarded Lawrence as suggesting a substantial opening for the development of a European conception of human dignity, as the Supreme Court conceived of dignity as liberty to engage in sexual acts without criminal sanction and also in the broader sense of being free from demeaning condemnation by the state: N Rao ‘On the use and abuse of dignity in constitutional law’ (2008) 14 Columbia Journal of European Law 201 at 240 - 241. Rao pointed out that Lawrence was significant as well in the adoption by the Supreme Court of European juridical methodology, avoiding the traditional strict scrutiny or rational basis review and coming close to proportionality by examining the state’s justifications for its statute, in addition to using European conceptions of dignity: above, 242. Maxine Goodman described Lawrence as marking a substantial shift by advancing human dignity as part of affording liberty and not simply as shifting from a privacy to a liberty interest: MD Goodman ‘Human dignity in Supreme Court constitutional jurisprudence’ (2006) 84 Nebraska Law Review 740 at 762. Goodman stated that the novelty in Lawrence was the Court’s explicit reference to human dignity as a guiding precept: above, 793. Jeremy Miller remarked that the Court’s focus on the demeaning impact of the statute reflected awareness that what was being protected was not the individuals’ right to do what they like behind closed doors, but protection of the right to be an individual (even if a personal decision is regarded as ‘wrong’ by others): JM Miller ‘Dignity as a new framework, replacing the right to privacy’ (2007) 30 Thomas Jefferson Law Review 1 at 41. Reva Siegel deduced that Lawrence was based on entangled rationales protecting dignity as equality in addition to dignity as liberty; the case raised questions of autonomy and self-definition and of social standing and respect: n 4 above, 1741 - 1742. See further comments on Lawrence. J Goehring ‘Lawrence v Texas: Dignity, a new standard for substantive rational basis review?’ (2004) 13 Tulane Journal of Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues 727; N Levit ‘Theorizing and litigating the rights of sexual minorities’ (2010) 19 Columbia Journal of Gender and Law 21 at 29 - 31, 36; Rao (n 219 above) 212, 257, 267, 270; JQ Whitman ‘The two Western cultures of privacy: Dignity versus liberty’ (2004) 113 Yale Law Journal 1151 at 1162, 1214.


357 ‘There is nothing before us to show that the provision was motivated by anything other than rank prejudice and had as its purpose the stamping out of these forms of gay erotic self-expression.’: n 356 above, [76]. Heinz Klug referred to the Sodomy case to illustrate the enrichment of the right to equality by its interaction with the right to dignity: n 2 above, 152 - 153.
jointly and held that restricting joint adoption to married persons discriminated on the grounds of sexual orientation and marital status. In addition to breaching the right to equality, it infringed dignity rights and the principle of the paramountcy of a child’s best interests. Guardianship and custody rights had been granted to only one of the lesbian partners, thus violating the dignity rights of the other partner by denying her due recognition as a parent, which Skweyiya AJ described as ‘demeaning’.

Goldstone J, delivering the unanimous decision of the Constitutional Court in J v Director General, Department of Home Affairs, found there was an analogous differentiation in the legislation confining recognition as parents and guardians of children conceived by artificial insemination to heterosexual couples. Kathleen Satchwell was a South African judge, who had lived in a committed relationship with her same-sex partner for many years. She challenged the employment benefits given to judges, as some were restricted to judges’ spouses. The Constitutional Court unanimously found

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359 n 358 above, [37].

360 n 358 above, [29].

361 2003 5 SA 621 (CC) [14].
that the legislation and regulations concerning judges were unconstitutional, because they discriminated on the grounds of sexual orientation.362

The Intestate Succession Act 1987 was unconstitutional to the extent that it conferred rights of intestate succession on heterosexual spouses but not on permanent same-sex life partners. In her judgment on behalf of a unanimous Constitutional Court, van Heerden AJ confirmed the High Court finding that the legislation breached the equality and dignity rights under Sections 9 and 10 of the Constitution of the surviving partner to a permanent same-sex life partnership in which the partners had undertaken reciprocal duties of support.363

The Aliens Control Act 1991 facilitated the immigration into South Africa of foreign national spouses of permanent South African residents, but did not extend the same benefits to South African gays and lesbians in permanent same-sex life partnerships with foreign nationals. The Constitutional Court held that it discriminated unfairly on the intersecting and overlapping grounds of sexual orientation and marital status, and seriously limited the equality rights and the right to dignity of permanent same-sex life partners thereby breaching Sections 9(3) and 10 of the Constitution.364 The statute discriminated in a way which was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Ackermann J cited Canadian jurisprudence in his judgment for the unanimous Court, thereby evidencing that substantive equality is achieved in Canada and in South Africa through the focus on dignity.365 He pinpointed the deep effect of discrimination on individual homosexuals touching their very

362 Satchwell v President of Republic of South Africa 2002 6 SA 1 (CC). The Court referred to women-to-women marriages in African traditional societies: above, [12]. This is a rare instance of African perspective in South African jurisprudence: Carey Miller (n 357 above) 226. See Kende (n 220 above) 139 - 140.

363 Gory v Kolver 2007 4 SA 97 (CC) [19].

364 National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 2 SA 1 (CC). See Kende (n 220 above) 138 - 139; Quansah (n 357 above) 211 - 212.

365 The Court used Canadian case-law to support pivotal aspects of its decision, particularly on overlapping categories of discrimination, the notion of equality and its application to the definition of the concept of family: Carey Miller (n 357 above) 225. It brought foreign jurisprudence to bear on the issue of the appropriate remedy and used it to support its decision to ‘read in’ words to correct the legislation: as above.
existence and rocking the twin values of equality and dignity.\textsuperscript{366} He was conscious of the benefits – not just for the individuals involved, but for society – of equal treatment and respect for dignity of all. ‘[T]he bell tolls for everyone’, because, as L’Heureux Dubé J of Canada said, the social costs of discrimination are high and damage the fabric of society.\textsuperscript{367} In Quilter v AG Thomas J of the Court of Appeal in New Zealand had a similar view, ‘[i]f [the basic human rights of minority groups are being denied], it is important to spell that denial out if the basic dignity of everyone in a more enlightened age is to be secured.’\textsuperscript{368}

South Africa introduced legislation allowing same-sex marriages\textsuperscript{369} as a result of the Constitutional Court’s judgment in \textit{Fourie} holding that the common law and the Marriage Act 1961 were inconsistent with the equality rights in Sections 9(1) and 9(3) and the right to respect for dignity in Section 10 of the Constitution to the extent that they made no provision for same-sex couples to enjoy the status, entitlements and responsibilities accorded to

\textsuperscript{366} n 364 above, [42]:
The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.

\textsuperscript{367} n 364 above, [82], citing Canada (AG) v Mossop (1993) 100 DLR (4th) 658 at 698 b. See the efforts by the Supreme Court of Canada to support equality in \textit{Chamberlain v Surrey School District No 36} 2002 SCC 86, [2002] 4 SCR 710, where there were colliding dignities in claims to freedom of religion and expression on the one hand and equality on the grounds of sexual orientation on the other; the majority held that a school board’s decision not to approve books depicting same-sex parented families was unreasonable in the context of a legislative educational scheme whereby approval of books was to be considered according to the broad principles of tolerance and non-sectarianism.

\textsuperscript{368} n 364 above, fn 110, citing [1998] 1 NZLR 523 (CA) 550.

\textsuperscript{369} Civil Union Act 2006. South Africa was only the fifth country in the world to legalise gay unions: AK Wing ‘The South African Constitution as a role model for the United States’ (2008) 24 \textit{Harvard BlackLetter Law Journal} 73 at 76.
heterosexual couples.\textsuperscript{370} The issue was not privacy, but enhancement of dignity and of the equality of same-sex couples by public acknowledgment of their status, as Sachs J noted, ‘what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law.’\textsuperscript{371} He adverted to the change in societal attitudes over time, '[i]t is an end in itself not merely a means to an end. It is a means to an end that amounts to an end in itself.'

\textsuperscript{370} *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC). Sachs J made it clear that an examination of context is imperative to ascertain the impact that an apparently neutral distinction could have on the dignity and sense of self-worth of the persons affected: above, [151]. He pointed out that differential treatment in itself does not necessarily violate the dignity of those affected, but when separation ' implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status', it becomes constitutionally invidious: above, [152]. See also EC Christiansen ‘Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice’ (2010) 13 *Journal of Gender, Race & Justice* 575 at 595, 597 - 600, 609 - 611; McCrudden (n 220 above) 720.


\textsuperscript{371} n 370 above, [78]. Justice Kennedy took a similar stance in *Lawrence* (n 354 above), which Nancy Levit said had a centrally communitarian thrust requiring the state to affirmatively promote behaviours it wants to support instead of simply imposing the negative onus of not intruding on people's privacy; as Levit stated, '[i]t is an end in itself not merely a means to an end. It is a means to an end that amounts to an end in itself.'

In its decision decriminalising consensual homosexual practices, Delhi High Court relied on the South African *Sodomy* case, Justice Blackmun's dissent in *Bowers v Hardwick* and *Paris Adult Theatre I v Slaton* 413 US 49 (1973) to demonstrate that the right to be left alone was not merely a negative right but implied the more substantive right to private intimacy and autonomy: P Baruah ‘Logic and coherence in Naz Foundation: The arguments of non-discrimination, privacy, and dignity’ (2009) 2 *National University of Judicial Sciences Law Review* 505 at 515, citing *Naz Foundation v Government of NCT of Delhi* WP (C) No 7455/2001, 160 (2009) DLT 277.
now dare openly to speak its name’.372 The acceptance of the reality and integrity of the intimate life of homosexuals led to a change in the law.373

5.5.4 Group identity

South African jurisprudence highlights the dignity of groups and community.374 It looks at the individual not as an isolated entity, but in association with family and wider society. The value of *ubuntu* in practice paints a picture of an inclusive grouping where the individual’s identity is respected in the pursuit of the common good. The aim is that all members be committed to the interests of the group as a whole, or at least accept and understand restrictions necessary to benefit the community.375 Sonja Grover rightly indicated that a person has dignity as part of a collective and as an individual.376 In *Merafong Demarcation Forum*, van der Westhuizen J categorised the struggle against colonialism and the apartheid regime’s

372 n 370 above, [78]. The fight for lesbian and gay equality was a gradual process beginning with the decriminalisation of sodomy, then various partnership rights were recognised by the courts and finally, after ten years, marriage rights were granted by the legislature after the intervention of the Constitutional Court: Bilchitz (n 5 above) 69. Bilchitz used this progression to illustrate that law is evolutionary and that the great social justice movements have taken time to achieve just laws: as above.

373 The recognition of equal respect for the sexuality of others is a theme that is only beginning to percolate successfully in lesbian, gay, bisexual, and transgendered rights cases: Levit (n 354 above) 36. O’Regan J differed in the remedy and she would have given immediate relief by developing the common law and reading words in to the statute: n 370 above, [169]. Although the formal difference between the remedies proposed by Sachs and O’Regan JJ related to the requirements of the separation-of-powers doctrine, Theunis Roux considers that what separates the judgments is a difference of opinion concerning the way in which the Constitutional Court should build public support for decisions of constitutional principle: T Roux ‘Principle and pragmatism on the Constitutional Court of South Africa’ (2009) 7 International Journal of Constitutional Law 106 at 122. Cf remedy granted by the Court of Appeal for Ontario in *Halpern v Canada (AG)* (2003) 225 DLR (4th) 529 [156].


375 Human dignity determines the essence of a democratic legal order, *ie*, those rights citizens of a political community must grant themselves if they are to respect one another as members of a voluntary association of free and equal persons: Habermas (n 1 above) 469.

376 S Grover ‘A response to Bagaric and Allan’s “The vacuous concept of dignity”’ (2009) 13 International Journal of Human Rights 615 at 617. Dignity may mean respect for individual autonomy – for the capacity of each person to choose how to live – or it may require social recognition of one’s lifestyle or group: Rao (n 333 above) 1080 - 1081. See also Rao (n 219 above) 187 - 189.
Bantustan policy as a struggle ‘for the recognition of the dignity of individuals and communities’ as well as for one united country.377

According to Ziyad Motala and Cyril Ramaphosa, traditional African societies showed a great respect for human dignity, conceptualised in modern times as African humanism.378 Decisions in the community were taken by consensus for the benefit of the overall group, where economic benefits were shared and ‘individualism was discouraged’.379 When the person is seen in the first instance as a member of a community rather than as an individual, rights only have relevance if derived from relations with others.380

South Africa is a rainbow nation with people of many different cultures and origins living there. It tries to accommodate the interests of each group within a framework of equal treatment of all. In Gauteng School Bill the Constitutional Court was asked to resolve a dispute over the constitutionality of certain provisions of an education Bill in Gauteng.381 The task was to find the correct balance between the importance of overcoming systemic inequality inherited from the past, on the one hand, and preventing legally enforced or de facto assimilation of groups wishing to preserve and develop a distinctive identity, on the other.382 An understanding of the other as well

377 Menafong Demarcation Forum v President of the Republic of South Africa 2008 5 SA 171 (CC) [23].
379 n 378 above, 45 - 46, citing President Kaunda of Zambia (footnote omitted).
380 n 378 above, 46. Ziyad Motala and Cyril Ramaphosa describe the South African Constitution as moving ‘beyond the common law and its concept of atomistic individuals, towards a consideration of the interests of the majority’ resulting in individuals being required on occasion to make sacrifices for the common good: n 378 above, 409. When an individual claims rights against the community, this has implications for the person's autonomy, self-worth and right to privacy: Baruah (n 371 above) 521.
381 Gauteng Provincial Legislature: Re Gauteng School Education Bill of 1995 1996 3 SA 165. The petitioners maintained that the legislation did not protect the minority rights of the Afrikaans-speaking community and relied on the education rights in Article 32 of the interim Constitution: above, [5].

382 According to Sachs J, this task was primarily a matter for democratic resolution by the legislatures, and not for adjudication by the courts in the first instance: n 381 above, [91].
as respect for others' dignity and freedom are essential for the smooth running
of a multi-cultural society, as sketched by Prof Carel Boshoff and Carel
Boshoff IV, who advocated not closing our eyes to
the existential reality, intensity and meaning of this intercultural en-
counter, to the confrontation with those other worlds outside one's own,
worlds in which human lives exist with no less legitimacy and no less
right to be. … We should… try to find ways in which this encounter could
proceed to an active communication, mutually recognising the others'
autonomy and dignity; entering into communion, aiming at a reciprocal
revelation and understanding of each other.385

Discrimination against defined types of people is an attack on the dignity of
the group. It is countered by implementing substantive equality resulting
from an investigation of the effect on the dignity of the members of the group.384

5.5.5 Comparative equality jurisprudence
This subsection will review developments in equality jurisprudence in other
countries in order to enlighten the assessment of the South African case-
law.385 The focus will be particularly on Canada, India and the US. South
Africa, in common with Canada,386 uses human dignity in law not only as a

383 C Boshoff (IV) & C Boshoff 'The sociopolitical conditions for democratic nation-
building: an Afrikaner point of view' in N Rhodie & I Liebenberg (eds) Democratic
384 Sachs J explained in the Sodomy case (n 356 above) [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.
385 Comparative law is being used increasingly by courts on a regular basis as persuasive
authority. Human rights advocates see the role of comparison as that of persuasion to
an essentially moral position: C McCrudden 'Judicial comparativism and human
use of comparative methods by judges in human rights adjudication varies immensely
between jurisdictions, within jurisdictions across time, and between the types of
386 On dignity in Canadian equality law, see J Bates 'Human dignity – an empty phrase
in search of meaning?' (2005) 10 Judicial Review 165; Hogg (n 258 above) Vol 2 at
628 - 633.
right or as an interpretative or underlying value, but as an anchor in defining inequality. Dignity can assist in reaching ‘a transformed society in which quality of life is improved and people’s potential is freed.’ Unlike other systems of formal equality, which have a comparative base, the South African Constitution focuses on historically disadvantaged and vulnerable people. Assessment of inequality is not a rules-bound formal procedure, but is adapted to the individual without being subjective either from the claimant’s or from the judge’s perspective. The individual’s social relations, membership of a group and place in the wider community are taken into account by ‘application of the identified contextual factors, which focus attention on the effect of such discrimination on the dignity of the applicant.’ As in German jurisprudence, the community dimension is recognised in South Africa.

The Canadian Supreme Court has defined dignity in more subjective terms than the South African Constitutional Court. The emphasis on feelings in Canada adds more to the concept of dignity than simply looking

387 In South Africa, dignity and equality are interdependent, inequality being established through group-based differential treatment or through differentiation perpetuating disadvantage leading to scarring of the sense of dignity and self-worth: Chaskalson (n 190 above) 140. In Canadian and South African equality law, human dignity functions as a determining factor of the discrimination test: Small & Grant (n 309 above) 35. See also McCrudden (n 220 above) 690.

388 S Cowen ‘Can “dignity” guide South Africa’s equality jurisprudence?’ (2001) 17 South African Journal on Human Rights 34 at 42. Susie Cowen agrees with the assumption in the Constitutional Court’s jurisprudence that equality ‘should be informed by another value, that it does not stand alone as a value’: above, 40.

389 Small & Grant (n 309 above) 38. On the impact on a member of the group, see Sodomy case (n 356 above) [125]. The inequality of treatment ‘leads to and is proved by the indignity’: n 356 above, [124].

390 Grant (n 301 above) 312 - 313. This is clear from Sachs J’s rejection of autonomy as the sole attribute of dignity in the Sodomy case, where he placed the individual in a social setting: (n 356 above) above, [117]. The South African approach contrasts with that in Canada, which relies on individual merit or capacity: Small & Grant (n 309 above) 41.

391 Grant (n 301 above) fn 150.
at dignity as status.\textsuperscript{392} After three cases in 1995 (all with strong dissents)\textsuperscript{293} revealing diverse approaches to equality, the Canadian Supreme Court resolved the internal conflict when it adopted a united front in \textit{Law} affirming that the purpose of the equality provision in Section 15(1) of the Canadian Charter\textsuperscript{394} was to prevent a violation of dignity.\textsuperscript{395} Some confusion arose over the application of the dignity test in equality cases after \textit{Law}. Different interpretations of equality and dissenting opinions continued to be seen, as in \textit{Gosselin v Quebec (AG)} where a welfare recipient brought a class action challenging a social assistance scheme on behalf of all welfare recipients under 30, who had been subject to a differential regime.\textsuperscript{396} The majority of five judges, in a deeply divided Supreme Court with four dissenter, held against the class action, as an examination of the contextual factors set out in \textit{Law} did not support a finding of discrimination and denial of human dignity. The view of Arbour J in dissent supports fulfilment of basic needs in furtherance of socio-economic rights and full enjoyment of civil and political

\textsuperscript{392} ‘Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society \textit{per se}, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.’: \textit{Law} (n 320 above) [53] (Iacobucci J).

Scholars criticised the focus in \textit{Law} on dignity, as the decision’s doctrinal effects were regarded as weakening the Supreme Court’s equality standard: Baer (n 370 above) 462. Susanne Baer saw two problems with \textit{Law}, first, contrary to the idea of equality, it used dignity as the placeholder for a particular morality – but equality was directed precisely at forestalling the introduction of particular moralistic values into legislation; second, it employed dignity as a vehicle for paternalism: n 370 above, 463 - 464. She suggested reconsidering dignity in the light of liberty and equality in order to avoid the reintroduction of problematic paternalism into constitutional law: n 370 above, 465. Ackermann disagrees with Baer on a few points: n 133 above, 339 - 340.


\textsuperscript{394} Canadian Charter of Rights and Freedoms 1982.

\textsuperscript{395} n 320 above, [51], [88]. The Court endorsed a contextual approach based on what was reasonable rather than accepting without question the claimant’s own perspective of his or her feelings: n 320 above, [88]. On \textit{Law}, see Ackermann (n 133 above) 163 - 164, 234 - 238.

\textsuperscript{396} 2002 SCC 84, [2002] 4 SCR 429. For discussions on \textit{Gosselin} see: Bates (n 386 above) 167 - 168; Foster (n 226 above) 88; Grover (n 376 above) 620 - 621; Hogg (n 258 above) \textit{Vol 1} at 916, \textit{Vol 2} at 380 - 381, 632, 669; McCrudden (n 220 above) 701, 707, 719; Rao (n 219 above) 218; RJ Sharpe & K Roach \textit{The Charter of Rights and Freedoms} (2005) 298, 308 - 309; Small & Grant (n 309 above) 48 - 49, 53.
306  Human dignity and fundamental rights in South Africa and Ireland

All judges in Gosselin accepted dignity as the indicator for equality, but differed in their application of it to the facts.

Individual circumstances are scrutinised closely to see if dignity has been impaired. In Nova Scotia (Workers' Compensation Board) v Martin the Canadian Supreme Court unanimously condemned as unjustified discrimination workers' compensation legislation excluding chronic pain sufferers from the regular workers' compensation system and providing instead benefits for just four weeks. Gonthier J found that the dignity of those with chronic pain was affected by society's refusal to accept that their pain was real and on a par with other disabled people.

There was considerable criticism of the use of dignity following Law. In R v Kapp in 2008, the Canadian Supreme Court – having acknowledged that substantive (not formal) equality was incorporated in the Charter – referred to the criticism of using dignity as a legal test rather than as an underlying value. The Court's new interpretation in Kapp of Law restored the earlier priority given to the perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. In Canada and South Africa the focus on the context to ascertain if there is inequality resulting in infringement of dignity means 'the judge is less concerned with precedent – although still concerned with certainty and continuity – and more concerned with ensuring that for the case at hand – human dignity is protected' and there are 'continual reminders in the cases that the equality analysis is a guideline for

397 n 396 above, [392]. Dennis Davis cited Arbour J’s judgment as an illustration of the potential for a positive rights approach; she interpreted the right to life in the Canadian Charter as including a positive duty to provide a means of livelihood and supported her conclusion that a right to life can impose a positive obligation on the state by reference to other rights, where questions of resources were not at issue: n 73 above, 707 - 708.


399 n 398 above, [5].

400 One of the critics argued that, for Section 15 claims, dignity should be replaced with a reformulated grounds analysis focusing on individual and group vulnerability on the basis that the primary purpose of the equality provision was to protect the vulnerable from state-imposed burdens or disadvantages, recognising the potential for the majority to marginalise minority interests understood as social and economic resources, or opportunities to access resources: RJ Fyfe ‘Dignity as theory: Competing conceptions of human dignity at the Supreme Court of Canada’ (2007) 70 Saskatchewan Law Review 1 at 17.

401 2008 SCC 41, [2008] 2 SCR 483 [22]-[23]. See Ackermann (n 133 above) 165 - 166, 241 - 245.
courts to follow, not a set of new rules to be mechanically applied without critical analysis of the ultimate purpose.\textsuperscript{402}

As in South Africa and Canada, judicial interpretation of the Namibian Constitution has accorded a prominent role to the underlying value of dignity.\textsuperscript{403} Noting that similar weight was given to it in the South African Constitution,\textsuperscript{404} the Namibian Supreme Court affirmed its pervasive nature in \textit{Africa Personnel Services (Pty)}\textsuperscript{405}. Some critics objected to the prominent role played by personal feelings of affront in the analysis of unfair discrimination in South Africa and had misgivings about the suitability of the dignity-based approach with its risk of excessive individualism.\textsuperscript{406} Grant has answered these critics and concluded that the South African approach was better than any other because it provided a coherent approach to achieving substantive equality.\textsuperscript{407} The protection of rights formed part of an integrated scheme aimed at ensuring protection for and promotion of the inherent dignity of all.\textsuperscript{408}

Ronald Dworkin distinguished between the right to equal treatment and the right to treatment as an equal.\textsuperscript{409} Human dignity is an implied value

\textsuperscript{402} Small & Grant (n 309 above) 53. See also C Albertyn & B Goldblatt ‘Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality’ (1998) 14 \textit{South African Journal on Human Rights} 248.

\textsuperscript{403} Constitution of the Republic of Namibia 1990.

\textsuperscript{404} \textit{Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia} [2009] NASC 17 fn 89.

\textsuperscript{405} n 404 above, [33] (footnote omitted).

However, in Namibia infringement of dignity is not a pre-requisite in all cases for success in proving breach of a fundamental right. The Court in \textit{Africa Personnel Services (Pty)} rejected the State’s attempt to narrow the ambit of the right to engage in economic activity to individuals on the basis that it protected only the dignity interest of human persons, which the State argued would not extend to juristic persons. Adopting a purposive approach, it broadened its scope to corporations and put equality on the same footing as dignity: n 404 above, [40].

\textsuperscript{406} Grant (n 301 above) 325. See Botha (n 220 above) 212 - 214.

\textsuperscript{407} n 301 above, 326 - 328.

\textsuperscript{408} n 301 above, 328.

\textsuperscript{409} R Dworkin \textit{Taking rights seriously} (1978) 227. The right to equal treatment is the right to an equal distribution of some opportunity or resource or burden, whereas the right to treatment as an equal is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else. Charles Taylor categorised Dworkin’s distinctions as a liberal society adopting no particular substantive view about the ends of life, but uniting around a strong procedural commitment to treat people with equal respect: C Taylor ‘The politics of recognition’ in C Taylor \textit{et al}, \textit{Multiculturalism: Examining the politics of recognition} (1994) 56. Foster has stated that for Dworkin it was the right to be treated with equal respect and concern that was fundamental, a view of dignity and equality reminiscent of the language of judges in both Canada and South Africa: n 226 above, 81.
underlying the US equality jurisprudence, although not highlighted – or, indeed, in some politically contentious cases not even named – as such. As early as 1944 Justice Murphy dissenting in Korematsu clearly had regard to the dignity of the individual when he castigated treating all those in a group as inferior on the basis of the behaviour of some of its members.410 Ten years later the value of human dignity – although not overtly stated – was to the fore in the unanimous decision of the US Supreme Court in Brown v Board of Education where Chief Justice Warren described the effect of racial segregation in public schools as denigrating to the feelings of black children.411

The primary purpose of eliminating discrimination has been to protect the dignity of the victims. The Supreme Court recognised this in Heart of Atlanta Motel when it refused to accept that a hotel owner could restrict its clientele to white people.412 Justice Brennan saw the common thread of

410 Korematsu v US 323 US 214 (1944). Referring to the exclusion of all those of Japanese descent from a military area in California during World War II, Justice Murphy was conscious of the need to hold each individual accountable for their own actions and not to stigmatise minorities: above, 240.

411 347 US 483 (1954) 494. In Brown Thurgood Marshall (subsequently appointed to the Supreme Court) argued and demonstrated that state-enforced segregation violated the Fourteenth Amendment; his achievement as an advocate in that case has been described as embodying ‘his consummate victory’ amidst all his triumphs: LC Moore & T Wyatt Cummings ‘Justice Thurgood Marshall and his legacy: A living legend’s unceasing commitment to justice and equality’ (1991) 35 Howard Law Journal 37 at 41. While Chief Justice Warren’s opinion dealt squarely with education, its outgrowth rendered ‘separate but equal’ untenable in any sphere: Moore & Wyatt Cummings above, 41. Goodman is correct in her assessment that in this decision – often described as motivated by the Court’s interest in protecting the human dignity of black school children – the Court sought not just to protect black children’s public image and reputation, but to protect them from feeling inferior and discouraged: n 354 above, 753. Brown was not simply a proportionality exercise to balance the adverse effect on black children of segregated education against the possible loss of self-esteem of white children by integrated schooling: S Tsakyrakis ‘Proportionality: An assault on human rights?’ (2009) 7 International Journal of Constitutional Law 468 at 487 - 488.

412 Heart of Atlanta Motel, Inc v US 379 US 241 (1964). While the main focus of the case was on the division of power between Congress and the states, the Court discerned that the aim of the Civil Rights Act 1964 was to uphold personal dignity. Justice Clark, delivering the opinion of the Court, referred to the fact that the Senate Committee had made it clear that its fundamental object was ‘to vindicate “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments”’: above, 250, citing S1732 S Rep No 872, 88th Cong 2d Sess (10 February 1964) 16. Justice Goldberg, in a concurring opinion, quoted more extensively from the Senate Committee, which had stressed the personal humiliating effect of discrimination and not simply the commercial or social aspect: above, 291 - 292, citing S Rep No 872 above, 16.

The Supreme Court has addressed race and gender discrimination in a robust well-reasoned methodical fashion and has not been waylaid by attributing undue deference to claims of intrusion on freedoms of expression and association.
humiliation and affront to dignity running through discrimination whether on the grounds of race or gender when he confronted a clash between men’s freedom of association and women’s exclusion from full membership of a non-profit national organisation in *Roberts v United States Jaycees*.413

Despite the dissenting view of Justice Black that the Due Process Clause of the Fourteenth Amendment was designed to protect against racial discrimination and his reluctance to extend it to a welfare payment,414 the majority in *Goldberg v Kelly* insisted that a welfare recipient should be afforded a fair hearing prior to termination of benefit. Public assistance was influenced by a recognition that external forces contributed to poverty and a tradition of protecting people’s dignity in the US.415 After *Goldberg* the Court’s willingness to advance human dignity in welfare rights faltered.416 However, there have been some notable dissenting opinions including that of Justice Marshall417 in *Dandridge v Williams*, where by a narrow majority the Court held that Maryland was entitled to impose a monetary cap on the amount of aid paid to families with dependent children regardless of the size of the

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413 n 223 above, 625. In delivering the opinion of the Court, Justice Brennan referred to the dual damage caused by discrimination – to the individual’s dignity and to society by depriving it of the benefit of every member’s full participation: as above. The Court used a proportionality analysis to assist it in coming to its conclusions and in order to justify publicly its decision. Extrajudicially, Justice Brennan pointed out that recognition of full equality for women – equal protection of the laws – ensured that gender had no bearing on claims to human dignity: n 5 above, 442.

Having analysed *Brown*, *Heart of Atlanta Motel* and *Roberts* in her review of decisions on access to education and accommodations, Goodman concluded that human dignity retained its strength as a constitutional value, despite competing public opinion: n 354 above, 765.

414 Justice Black described a welfare payment as payment of ‘a promised charitable instalment’ by the government: *Goldberg v Kelly* 397 US 254 (1970) 275. While he conceded that some of the language of the Fourteenth Amendment can protect others, he described its main aim thus, ‘all know that the chief purpose behind it was to protect ex-slaves’: as above. In common with the attitude taken by judges internationally, the US Supreme Court allows considerable latitude to the states to decide on social welfare issues and in dispensing available funds: *King v Smith* 392 US 309 (1968) 318 - 319.

415 ‘From its founding, the Nation’s basic commitment has been to foster the dignity and wellbeing of all persons within its borders.’: *Goldberg* (n 414 above) 264 - 265 (Justice Brennan). The *Goldberg* holding moved the Supreme Court’s human dignity focus to a realm beyond the criminal justice system: *Wermiel* (n 89 above) 232. See also *Church et al* (n 111 above) 144 - 145; *Rao* (n 219 above) 236 - 237.

416 Goodman (n 354 above) 784. See also *Church et al* (n 111 above) 146 - 147.

417 As the last Justice appointed by a Democratic President, Justice Marshall found himself in the role of ‘perennial dissenter’ amid conservative Republican appointees: Moore & Wyatt Cummings (n 411 above) 47.
family and its actual need. In his judgment in which he was joined by Justice Brennan, Justice Marshall’s view was that the basis for discrimination was inalterable by the children affected in the same manner as birth within or outside marriage was outside their control.

The jurisprudence over the right to withdraw medical treatment has focused primarily on the liberty and best interests of the patient, rather than on the equality right. The liberty interest is also central to the abortion litigation. Justice Stevens dissenting in part in Planned Parenthood of Southeastern Pennsylvania v Casey took a holistic view of human rights when he consolidated liberty, equality and dignity.

419 n 418 above, 523, citing Levy 391 US 68 (1968):

\[ \text{[G]overnmental discrimination between children on the basis of a factor over which they have no control – the number of their brothers and sisters – bears some resemblance to the classification between legitimate and illegitimate children which we condemned as a violation of the Equal Protection Clause in Levy v Louisiana. Lisa Crooms described Justice Marshall’s contribution to our understanding of fundamental rights and constitutional equality as relying on the basic premise that personhood, citizenship and humanity, as matters of constitutional law, require a vigilant court intent on achieving lofty constitutional objectives outstripping outdated notions of liberty, justice and equality: LA Crooms ‘A stone’s throw to justice: Liberty, equality, and women’s rights in the Supreme Court opinions of Justice Thurgood Marshall’ (2009) 52 Howard Law Journal 559 at 582. Baer has called a move to substantive equality ‘the move from an understanding of discrimination as difference, and from an understanding of equality as a group right, to an understanding of discrimination as disadvantage’, which ‘turns equality into a right to respect and recognition, enabling people to exercise their right to self-determination and to lead a dignified life’: n 370 above, 455.}

Because people’s identities develop within the social world, respect for human dignity also entails a state commitment to meeting dependency needs through supporting caretaking and human development so that people can lead dignified lives: M Eichner ‘Families, human dignity, and state support for caretaking: Why the United States’ failure to ameliorate the work-family conflict is a dereliction of the government’s basic responsibilities’ (2010) 88 North Carolina Law Review 1593 at 1617.

420 The equality dimension received scant attention in Cruzan, where Chief Justice Rehnquist, who delivered the Court’s majority opinion, dismissed it in a footnote contending that dissimilar treatment of those capable of making decisions for themselves and those lacking that capacity was justified: Cruzan v Director, Missouri Department of Health 497 US 261 (1990) 287 fn 12. See Rao (n 219 above) 233 – 234.

421 Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term. The mandatory waiting period denies women that equal respect.’ 505 US 833 (1992) 920. Planned Parenthood differs from earlier abortion decisions in that the Court’s decision making was expressly informed by human dignity as part of a woman’s liberty interest: Goodman (n 354 above) 761. See also Rao (n 219 above) 211, 231.
In *Rice v Cayetano*, where the issue was the right to vote for trustees of a state agency in Hawaii, Justice Kennedy pointed out that the same suspect rationale – diminution of dignity in disregard of each person’s individuality – was behind classification by ancestry and categorisation by race. The Supreme Court in *Bush v Gore* identified one source of the fundamental nature of the right to vote as lying ‘in the equal weight accorded to each vote and the equal dignity owed to each voter.’ The requirement of due process necessitating a fair hearing was asserted by the Supreme Court in a majority decision in *Hamdi v Rumsfeld*. Maxine Goodman’s view is that while Justice O’Connor, writing for the plurality, did not refer to human dignity, the outcome that citizen-detainees should receive fair notice of the reasons for their being classified as enemy-combatants and a right to a hearing before a neutral decision-maker showed that human dignity partially shaped the Court’s decision.

Due process, liberty, privacy and dignity were invoked by the Court in *Lawrence v Texas* when by a majority of six to three it overturned *Bowers v Hardwick* and decriminalised intimate sexual conduct between homosexuals. Justice Kennedy encompassed succinctly the elements of freedom, privacy and dignity involved in opting for a personal relationship without fear of being branded a criminal, when he stated, ‘adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.’

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423 531 US 98 (2000) 104. In a majority decision, the Court held in *Bush* that the manual recounts in the Florida vote for President violated the Equal Protection Clause of the Fourteenth Amendment, as they did not satisfy the minimum standards required for the non-arbitrary treatment of voters. See JA Gardner ‘The dignity of voters – A dissent’ (2010) 64 University of Miami Law Review 435 at 453 - 454. For criticism of reliance on the concept of the human dignity of individual voters rather than on the dignity in their civic role of performing a public service, see Gardner above, 254 - 258.
424 542 US 507 (2004). In *Hamdi* a US citizen captured in Afghanistan, who was categorised as an enemy combatant for allegedly fighting with the Taliban, was considered to have an entitlement to be given a meaningful opportunity to contest the factual basis for his detention before a neutral decision-maker.
425 n 354 above, 793.
426 n 354 above.
427 n 354 above.
428 n 354 above. He interpreted liberty as extending beyond spatial bounds to a more transcendent dimension, explaining that it ‘presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct’: n 354 above, 562.
My review of US jurisprudence shows a clear concern for protection of human dignity as a long-standing basic value in society underlying the Constitution. The Supreme Court judges have not given as deep a philosophical or legal analysis of dignity as in other jurisdictions such as South Africa and Canada. Sometimes, indeed, they have avoided crediting dignity overtly as the rationale behind their decisions, but it can be implied that protection of human dignity was the motivating force of at least some of the judges. There can be no doubt that human dignity was the foundation for the equality decisions on race and gender. It also gave an initial impetus to substantive equality in the welfare area by grounding the due process right to a fair hearing before termination of a benefit, but it has not developed into providing substantive equality or socio-economic rights. Notwithstanding the threat to US security from international sources in the twenty-first century, the value of human dignity has survived in the jurisprudence to provide due process rights for those suspected terrorists who manage to challenge their detention in the Supreme Court.

The constitutional concept of equality in India has been given a wide reach because of the insistence by the courts that its interpretation should be deep and its application meaningful. Zafar Khan sees an extensive role for equality – reaching to the social and economic spheres, promoting fraternity among human beings, and protecting the status and dignity of all. Gurkirat Kaur called the task of the framers of the Indian Constitution 'stupendous',

The Court viewed the Equal Protection Clause as guaranteeing formal equality, so it declined to invalidate the offending statute on that basis and instead held that it violated the substantive right to liberty under the Due Process Clause, which gave homosexuals 'the full right to engage in their conduct without intervention of the government': n 354 above, 578. Catharine MacKinnon has lamented the Court's focus on the privacy right to liberty instead of addressing sex equality, as she considered that the decision extended heterosexuality's substantively sex-unequal rules rather than challenging and changing them: CA MacKinnon 'The road not taken: Sex equality in Lawrence v. Texas' (2004) 65 Ohio State Law Journal 1081 at 1089.

See E Daly 'Human dignity in the Roberts Court: A story of inchoate institutions, autonomous individuals, and the reluctant recognition of a right' (2011) 37 Ohio Northern University Law Review 381.

ZA Khan 'Equality through legislative measures: The law in book versus the law in action' in M Shabir (ed) Quest for human rights (2005) 250. The caste-ridden Indian society was ripe for equality measures, as it had resulted in the development of unequal social groups who monopolised benefits and privileges for themselves at the expense of the underprivileged, the deprived and the exploited: above, 249.
as ‘[a] people suffering oppression under a feudal system were grimly
struggling to be reborn into a life of dignity and hope.’

The traditional idea of equality based on reasonable classification
was adopted and developed by the Supreme Court initially. The equality right
in Article 14 of the Indian Constitution forbids class legislation, but it
does not forbid reasonable classification to achieve specific ends.
The concept of equality based on reasonable classification was challenged by
Bhagwati J in a judgment on behalf of himself and two of the other five
judges in *Royappa*, where he laid down a new more expansive idea of equality
opposed to the dictatorial notion of arbitrary action. Returning to the
same theme of equality as being contrary to arbitrary action in *Maneka*
Gandhi, Bhagwati J rejected ‘a narrow, pedantic or lexicographic approach’ to the equality clause.\textsuperscript{437} He described the central normative importance of the rights to equality, life and liberty as supportive of human dignity.\textsuperscript{438} After this case, there was a definite change in the construction of Article 14 by the courts, as they responded to society’s hopes and aspirations, and it was clear that Article 14 went much beyond the principle of classification.\textsuperscript{439} A unanimous Supreme Court in Nakara assimilated the doctrines of classification and arbitrariness.\textsuperscript{440} Equality before the law combined with the right to live with human dignity ensured that detainees could not be deprived of their rights without fair, just and reasonable procedures in Mullin.\textsuperscript{441}

The equality provisions in the Constitution in India have not been confined to inalterable categories like race or gender, nor to static conditions. In Randhir Singh, where police drivers succeeded in achieving pay parity with other government drivers, the Court gave substance to the fundamental rights to equality before the law and to equal opportunities in public employment by enlivening them through the use of a directive principle providing for equal pay for equal work for men and women.\textsuperscript{442} Reddy J did not interpret the directive principle as applying only to equivalence between

\textsuperscript{437} Maneka Gandhi v Union of India [1978] INSC 16, 1978 SCR (2) 621 (SC of India) 674. He continued, ‘[n]o attempt should be made to truncate its all embracing scope and meaning for, to do so would be to violate its activist magnitude’: as above.

\textsuperscript{438} ‘These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent.’: n 437 above, 667. ‘The entire world is a family’ was the motto of Vedic civilisation; all had equal opportunity in all walks of life in ancient India; the Vedic age was more liberal in providing equal status to the people: Kaur (n 431 above) 65.

\textsuperscript{439} Anand (n 434 above) 24.

\textsuperscript{440} In Nakara the Court allowed a challenge to the liberalisation of the formula for calculation of state pensions applicable only to those retiring after a stipulated date: Pandey (n 432 above) 80. Desai J, delivering the Court’s judgment, referred to development of equality to help the weaker sections of society or others in need of assistance, and continued, ‘[l]egislative and executive action may accordingly be sustained if it satisfies the twin tests of reasonable classification and the rational principle correlated to the object sought to be achieved.’: Nakara v Union of India [1982] INSC 103, 1983 (2) SCR 165 at 179 - 180.

\textsuperscript{441} In Mullin the Supreme Court held that a detainee should be allowed interviews with her family and legal adviser: Mullin v Administrator, Union Territory of Delhi [1981] INSC 12, 1981 SCR (2) 516.

\textsuperscript{442} Randhir Singh v Union of India [1982] INSC 24, 1982 (3) SCR 298 (SC of India).
men and women. Affirmative action was seen by Bhagwati J on behalf of the majority in *Jain* as part and parcel of equality, and not an aberration.

The constitutional aims of social justice, equality and dignity reach out to draw in the marginalised to a position of equality with other members of society, as the Court demonstrated in 1995 when it protected vulnerable workers who had been exposed to asbestos in *Consumer Education and Research*. Gender equality in India includes protection from sexual harassment and the universally recognised human right to work with dignity.

Article 16 of the Indian Constitution provides for equality of opportunity in public employment. Reservation of positions for any backward class which the state considers is inadequately represented is allowed by Article 16(4). The temporary exemption of certain castes and tribes from

443 He was insistent that the fundamental rights should be meaningful to `the vast majority of the people' and stated, `[q]uestions concerning wages and the like, mundane they may be, are yet matters of vital concern to them and it is there, if at all that the equality clauses of the Constitution have any significance to them.': n 442 above, 305.

444 *Jain v Union of India* [1984] INSC 115, 1984 (3) SCR 942 (SC of India). Wholesale reservation of places in colleges for deprived sectors was not permitted, but partial reservation could sometimes be allowed to the extent necessary to fulfil the requirements of the equality provision in Article 14 of the Constitution: Pandey (n 432 above) 85. Equality should be real for the historically deprived: *Jain* above, 968.

445 `Social justice is a dynamic device to mitigate the sufferings of the poor, weak, Dalits, Tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person.': *Consumer Education & Research Centre v Union of India* [1995] INSC 91, JT 1995 (1) 636 (SC of India) 657 [20].

In another case it was held that life insurance cover should be offered to all on equal terms and could not be confined to employees of the state and of other reputable firms, as to do otherwise would be to breach the equality clause when applied to the right to livelihood as an extension of the right to life: *LIC of India v Consumer Education & Research Centre* [1995] INSC 272, 1995 SCC (5) 482 (SC of India).

446 Pandey (n 432 above) 101. Even though there was no legislation in place to provide safeguards, the Supreme Court stepped in to fill the vacuum and laid down extensive guidelines for employers and for those running institutions to ensure the prevention of sexual harassment of working women: *Vishaka v State of Rajasthan* [1997] INSC 665.

447 The so-called `Downtrodden' group in India is not homogenous; its three major divisions (Scheduled Castes, Scheduled Tribes and the Other Backward Classes), each having its own characteristic features, distinctive backgrounds and particular problems, comprised 30% of the population in 2006: Kaur (n 431 above) 74.

448 The Indian Constitution allows for affirmative action in favour of `Scheduled Castes', which is an official euphemism for `untouchables': Khan (n 430 above) 251. Groups have been isolated and disadvantaged by their `untouchability' because of their low status in the traditional Hindu caste hierarchy, which exposed them to ill-treatment, severe disabilities, and deprivation of economic, social, cultural and political opportunities: Khan (n 430 above) 252.

449 Affirmative action is permitted under the Constitution for `Scheduled Tribes', who have `an astoundingly marginal share' in Indian politics and, hence, large development
passing a test for promotion was challenged unsuccessfully in *State of Kerala v Thomas*, where the Supreme Court was divided on the issue.450 The Supreme Court in *Thakur* – a challenge to affirmative action to reserve places in schools for members of castes451 and other backward classes – approved of Bhagwati J’s views in *Minerva Mills* linking equality with dignity and liberty and effectively according socio-economic rights the same status as civil and political rights.452 Balakrishnan CJ in *Thakur* cited a passage from Bhagwati J’s partially dissenting judgment in which he regarded the Directive Principles of State Policy453 as imposing a duty on the State to act to achieve equality for the poor.454

From my review of the jurisprudence of the Indian Supreme Court, it is evident that the equality rights in the Constitution have been developed over the years from the confines of the relatively narrow focus of a rigid classification test to encompass the prevention of arbitrary differentiation and even projects have displaced millions of them, without any compensation: K Sibal ‘Law, the Constitution, weaker sections, women, minorities, scheduled castes and their development’ in Shabbir (n 430 above) 2.

450 [1975] INSC 224, 1976 (1) SCR 906. One of the majority, Mathew J, analysed the nature of equality of opportunity in depth and distinguished it from formal equality, focusing instead on the need for true equality divorced from life’s hazards and irrespective of one’s position in society: above, 948.


452 *Thakur v Union of India* [2008] INSC 613 [174]. The Indian Supreme Court has derived socio-economic rights from a constitutional text written as a guarantee of non-interference: Beatty (n 330 above) 155.


453 Constitution of India 1950, Part IV.

454 *Minerva Mills Ltd v Union of India* [1980] INSC 141, 1981 SCR (1) 206 (SC of India) 324:

The Directive Principles therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country. It will thus be seen that the Directive Principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people who do not have even the bare necessities of life and who are living below the poverty level.
more ambitiously to the attempt to realise practical equality in a wide socio-economic sphere for a substantial minority suffering from historical deprivation attributable to a variety of sources. The concept of dignity has been used by the Inter-American Court of Human Rights to adjudicate whether differentiation was legitimate. Treatment of a group as inferior crossed the boundary.

An approach to equality giving a prominent role to the value of dignity is best placed to achieve substantive equality. The serious comprehensive attempts to give effect to substantive equality by the judiciary in both South Africa and Canada are credited by Joan Small and Evadné Grant to the legal realisation of human dignity being at the conceptual centre of the development of their equality jurisprudence. Apart from the impact of court decisions on the litigants directly concerned, the methodology of human rights litigation in countries like Canada and South Africa supports a dialogue between court and legislature, which could provoke legislative changes. To inhibit frivolous claims and to avoid subjective decisions – both from the judges’ and the claimants’ perspectives – it is important that a recognised structure be put on the use of the concept of dignity in relation to equality. Equality may be undermined by focusing primarily on dignity and losing sight of group discrimination.

By requiring a claimant to show historical group prejudice, the Namibian Supreme Court has restricted the application of the anti-discrimination clause


456 n 309 above, 54. This is ‘not an abstract, individualistic notion, but a concept about the relation between the individual and state, and individual and group, which is circumscribed by concern, respect and consideration’: as above.


458 O’Connell has urged that attention be given to the forms of hierarchy and disadvantage (in the sense of systematic exclusion from community benefits) in society in order to redress them; his conclusion contains a salutary warning of the misuse of the dignity concept by the judiciary not making clear its underlying contextual norms and using it to limit anti-discrimination measures: n 336 above, 285.
in its Constitution. In Müller the Court confined claims for redress to situations of past discrimination where the dignity of all was not recognised.459

The Namibian Constitution does not include sexual orientation as one of the prohibited grounds of discrimination in Article 10(2). Although the majority decision in Frank was decided on the grounds of the right to a fair hearing, O’Linn AJA for the majority was not prepared to find that a same-sex couple was entitled to be treated on an equal basis as heterosexual couples.460 The Namibian Supreme Court’s stance on sexual orientation has reflected the attitude of a conservative society, which apparently wishes to impose the views and moral standards attributed to the majority on all and to enforce those standards on the homosexual community by fear of criminal sanctions for breaching traditional values.461 O’Linn AJA accepted that the guideline for the judiciary was to give the Constitution a broad liberal pur-

459 Müller v President of the Republic of Namibia [1999] NASC 2; 2000 6 BCLR 655 (NmS) 18. Herr Müller, a German citizen, married a Namibian and wanted to take her surname on marriage, but he could not do so without complying with more formalities than a woman who wished to adopt her husband’s surname. He challenged the legislation relying, inter alia, on his rights to equality before the law and freedom from discrimination on the grounds of sex. The State successfully defended the claim on the basis that the legislation did not breach substantive equality. The Court accepted that the differentiation created by the legislation was grounded on one of the specified grounds in Article 10(2) of the Namibian Constitution, but the differentiation did not in any way impair Herr Müller’s dignity. Strydom CJ explained why this was the case, above, 20: ‘The Appellant, being a white male, who immigrated to Namibia after Independence, cannot claim to have been part of a prior disadvantaged group. It can furthermore not be said that the purpose of the section was to impair the dignity of males individually or as a group or to disadvantage males.’

The UN Human Rights Committee subsequently found that the gender-based approach of the legislation violated the prohibition on discrimination in ICCPR: Müller v Namibia UNHR Committee (28 June 2002) 74th Session UN Doc CCPR/C/74/D/919/2000 [6.8], citing ICCPR (n 31 above) art 26.


Apart from the fact that sexual orientation was not one of the listed grounds on which discrimination was prohibited, there was no legislative trend in favour of it – in fact the trend was in the opposite direction: above, 132 - 133. The lesbian applicant had not pleaded that her right to dignity was violated, but his view would not have been different if she had done so: above, 142. Article 14 of the Constitution gave the right to marry to men and women (Constitution of the Republic of Namibia 1990, Art 14(1)), so O’Linn AJA declined to take over the legislature’s role in extending the provisions of immigration control legislation to same-sex life partnerships; he considered that the legislature’s failure to include in the legislation ‘an undefined, informal and unrecognized lesbian relationship with obligations different from that of marriage’ might amount to ‘differentiation’, but was not ‘discrimination’: above, 143. He also declined to regard a homosexual couple as a family, described in Article 14(3) of the Constitution as the ‘natural’ and ‘fundamental’ group unit of society: above, 119.

461 O’Linn AJA stated that the value judgment to be made must take cognisance in the first place of ‘the traditions, values, aspirations, expectations and sensitivities’ of the Namibian people and should be objectively derived from various sources including...
positive interpretation, but he confined it unnecessarily to conform with the majority viewpoint at the expense of the equality, dignity, freedom and privacy of those with non-conformist traits in intimate personal preferences. In my view, he retracted from the judiciary’s democratic duty to uphold the rights of minorities to equality in the formation and expression of their identities. O’Linn AJA pointed out that the provisions relating to equality and non-discrimination in the Namibian Constitution corresponded to those in the Constitution of Zimbabwe. The case of *Banana v S* in the Supreme Court of Zimbabwe, where the majority upheld the constitutionality of the common law crime of sodomy, was cited liberally in the judgment of the Namibian Court. There was a notable conflict between the views of McNally JA for the majority and of Gubbay CJ in dissent in *Banana*.

Although the Botswana Court of Appeal held in *Kanane* that a provision in its Penal Code targeting indecent behaviour in public or private was unconstitutional on the grounds of gender discrimination because it did not extend to women, it did not strike it down as it had been amended by the legislature to be gender neutral since the date of the offence. Mwaikasu J

the Constitution and the institutions of Namibia as expressed in parliamentary debates and legislation, judicial or other commissions, public opinion as established in properly conducted opinion polls, evidence, court judgments, referenda and expert publications. This extensive list can hardly be described as containing objective sources by which to gauge the import of constitutional values. See SK Amoo ‘The constitutional jurisprudential development in Namibia since 1985’ in N Horn & A Bösl (eds) *Human rights and the rule of law in Namibia* (2008) 55 - 56.

462 n 460 above, 101.

463 n 460 above, 133.

464 n 355 above.

465 n 460 above, 115, 133 - 138.

466 See Quansah (n 357 above) 213 - 215. McNally JA was guided by public opinion and relied heavily on the US Supreme Court decision in *Bowers* in finding that the criminalisation of sodomy between men was not unconstitutional, as discrimination on the grounds of sexual orientation was permissible – the law did not discriminate on the basis of gender: n 355 above, 670, 673, citing n 354 above. The Constitution of Zimbabwe included gender – but not sexual orientation – among the listed grounds of prohibited discrimination: Constitution of the Republic of Zimbabwe 1979, Sec 23(2).

Gubbay CJ distinguished the much criticised US decision and found that the common law crime amounted to gender discrimination, which was not justified under the limitations clause in the Constitution: n 355 above, 643, referring to Constitution of the Republic of Zimbabwe 1979, Sec 23(5)(b).

467 *Kanane v S* 2003(2) BLR 64 (CA).

468 Quansah (n 357 above) 206. Public opinion led the Court, which put the onus on the appellant to show that the public demanded decriminalisation – a hurdle he was unable to surmount: KN Bojosi ‘An opportunity missed for gay rights in Botswana: *Ujowa Kanane v The State*’ (2004) 20 *South African Journal on Human Rights* 466 at 473.
in the High Court\(^{469}\) (approving of Lord Devlin’s view) had completely subordinated the individual to society leaving little room for deviation from the moral norms of the majority and ignoring any call to respect human dignity.\(^{470}\) The same conservative attitude in sexual matters prevails in Malawi, where two men – living together as husband and wife (one of whom a psychiatrist assessed as having gender disorientation) – went through an engagement ceremony and were convicted by the Blantyre Chief Resident Magistrate in May 2010 of buggery and indecent practices.\(^{471}\)

My examination of jurisprudence on sodomy in Southern Africa (excluding South Africa) reveals that society’s conservative outlook has diverted the judiciary in some quarters at least from taking cognisance of the dignity of the individual in its equality decisions where non-conforming sexual behaviour arises. A broader comparative analysis shows that a deeper less superficial approach to human dignity is essential in order to recognise the worth of each individual and to permit each life to flourish in a society where equality is the desired norm.\(^{472}\) The South African structured use of dignity in equality jurisprudence with the context in which it is being used clearly defined in accordance with constitutional norms illustrates this truth.

At the conclusion of my review of the impact of human dignity on equality in South Africa, it is pertinent to remind ourselves of the dual place of dignity in the equality analysis under Section 9 of the Constitution: first,
impairment of dignity is the test of unfairness; and, second, it is one of the values underpinning the assessment of reasonable limitation on equality in a democracy.\textsuperscript{473}

\textsuperscript{473} The various steps to assess inequality under Section 9 can be summarised as:

1. The threshold test under Section 9(1) is whether the challenged measure differentiates between people or groups of people, and, if so, whether there is a rational connection between the differentiation and a legitimate government purpose at which it is aimed. The lack of rationality is a fatal blow to the measure.

2. If it passes the rationality examination, it may be justified as corrective action for past discrimination under Section 9(2).

3. Even if rationally connected to the legislative aim, the measure may be unfair discrimination on one of the listed grounds in Section 9(3). There is a presumption of unfairness, if the differentiation is on one of the listed grounds (Sec 9(5)).

4. Alternatively, it may be unfair discrimination on an unlisted ground (Prinsloo (n 304 above) [28]). No presumption of unfairness applies in this case.

5. The impact on the victims is the test of unfairness. If the measure has the potential to impair dignity or an analogous effect, it is unfair.

6. Equality may be limited in accordance with Section 36, to the extent that the restriction is reasonable in a society based on the democratic values of dignity, freedom and equality.

More than one ground can be taken into account when assessing whether there is unfair discrimination at step 3. This is evident from the wording of Section 9(3) and from Sachs J’s judgment in the Sodomy case, where he pointed out that an approach based on context and impact acknowledges that grounds of unfair discrimination can intersect and allows evaluation of discriminatory impact on a combination of grounds ‘globally and contextually, not separately and abstractly’; alternatively, he opined that ‘a context rather than category-based approach might suggest that overlapping vulnerability is capable of producing overlapping discrimination’ n 356 above, [113] (footnote omitted). The more complex multidimensional approach used in South Africa is very difficult within the US constitutional context: Wing (n 369 above) 79.
6.1 Interpretation of economic and social rights

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


3. n 1 above, [23]:

There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential. Yacoob J reiterated the link between poverty and the reduction of a person in their human dignity, which was separate from the physical discomfort of deprivation, in *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 4 SA 237 (CC) [81].
As the provisions of the South African Constitution were modelled on those in the International Covenant on Economic Social and Cultural Rights (CESCR), United Nations material is relevant and a valuable source of guidance for South African courts. Yacoob J confirmed that the South African requirement of ‘progressive realisation’ of housing was taken from article 2.1 of CESCR and that it bore the same meaning in both documents.

In *Grootboom* there was a need to balance the right to human dignity with the available resources of the state, the ‘available resources’ term being common to CESCR and the Constitution. *Grootboom* is the seminal case not just on the right to housing and shelter, but also because of its impact on the interpretation of all socio-economic constitutional rights.

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6 n 1 above, [45]. However, he found the UN material of little help in ascertaining the extent of the housing provision, as there was a significant distinction between a right to adequate housing and the right of access to adequate housing in Section 26 of the South African Constitution; there was also a difference between the obligations on the state in both documents, CESCR requiring appropriate steps and the Constitution reasonable legislative and other measures: n 1 above, [28].

7 The obligation on the state under CESCR is ‘to take steps, individually and through international assistance and co-operation … to the maximum of its available resources’: CESCR (n 4 above), art 2(1). The Committee on ESCR has noted that the phrase ‘to the maximum of its available resources’ was intended to refer to both the resources existing within a state and those available from the international community: UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ 5th Session (1990) in ‘Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (29 July 1994) UN Doc HRI/GEN/1/Rev.1, 48 [13]. In view of this, it is clear that in assessing resources a court has jurisdiction to look beyond the available budget: J Ansah ‘The right to development as applied in national law’ in MA Baderin & R McCorquodale (eds) *Economic, social and cultural rights in action* (2007) 441 fn 150.

8 David Carey Miller regarded this as the most significant aspect of the final decision, with the Court pointing out the realisation of socio-economic rights would be progressive – the most urgent need being dealt with first: n 5 above, 215, citing *Grootboom* (n 1 above) [45].

A review of the case-law seeking enforcement of socio-economic rights emphasises the Constitutional Court's understanding that the Constitution is to be read as a whole. The provisions for housing, healthcare, welfare and other socio-economic rights are not construed in isolation, but are informed by the foundational values. Human dignity comes to the fore constantly as the lodestar in all aspects of the Constitutional Court's deliberations, whether they be for the purpose of ascertaining the threshold right, its interpretation and application to particular situations, or the limitation assessment. Albie Sachs confirmed that in *Grootboom* the Court was strongly influenced by the need to deal with rights in the Bill of Rights as interrelated and interdependent. The Court was guided by respect for the foundational values (especially human dignity), which necessitated that the right of access to housing not be separated from the right to human dignity, resulting in the State being obliged to take account of the qualitative dimension and not to give just a quantitative response.

10 To remove the difficulties caused by measuring dignity subjectively, Katharine Young advocates an objective notion of dignity and cites as an example South Africa’s constitutional protection of equality, which prohibits harm to dignity experienced according to some society-wide standard: KG Young ‘The minimum core of economic and social rights: A concept in search of content’ (2008) 33 *Yale Journal of International Law* 113 at 136.

11 A Sachs *The strange alchemy of life and law* (2009) 179. The ‘tripartite typology of interdependent duties’ (first developed by Henry Shue and endorsed by some of the General Comments issued by the Committee on ESCR) is explicitly embraced by the South African Constitution in Section 7(2), which obliges the state to respect, protect, promote and fulfil the rights in the Bill of Rights: M Pieterse ‘Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience’ (2004) 26 *Human Rights Quarterly* 882 at 888 - 889. Pierre de Vos has substantiated the interdependence and indivisibility of all human rights in the South African Bill of Rights, and stated that all rights are aimed at guaranteeing each individual the freedom to live his or her life with dignity and respect: P de Vos ‘Pious wishes or directly enforceable human rights? Social and economic rights in South Africa’s 1996 Constitution’ (1997) 13 *South African Journal on Human Rights* 67 at 70, fn 12.

12 Sachs (n 11 above) 179. Albie Sachs pointed out that in securing protection of the rights of particularly vulnerable people, courts are guided by the values of an open democratic society, which repudiates past ‘forms of oppression, hardship, division and discrimination’; he continued, ‘[this society] acknowledges the foundational character of the principle of human dignity, and aspires to accept people for who they are’: n 11 above, 214.
6.2 Enforceability of socio-economic rights

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

13 A formerly widespread presumption (still prevailing in the United States) is that civil and political rights entailing negative obligations were justiciable, but that socio-economic rights imposing positive duties were not. Mark Kende sees two problems with the American constitutional tradition where the courts are reluctant to determine funding, which is regarded as preserve of the executive – first, it is an oversimplification since the South African Constitutional Court’s experience is that protecting socio-economic rights sometimes requires the Court to negative government actions; second, enforcing negative rights also implicate budgetary matters: MS Kende ‘The South African Constitutional Court’s embrace of socio-economic rights: A comparative perspective’ (2003) 6 Chapman Law Review 137 at 155 - 156. The US Supreme Court has not embraced President Franklin D Roosevelt’s ‘freedom from want’ as a constitutional norm: Kende above, fn 9, citing FD Roosevelt ‘The annual message to the Congress’ (6 January 1941) in 9 The public papers and addresses of Franklin D Roosevelt (1969) 663 at 672 (1941).


15 The South African case-law has evolved from the rejection of individual rights claims to recognition of collective rights to comprehensive government programmes to address urgent social needs: JM Woods ‘Justiciable social rights as a critique of the liberal paradigm’ (2003) 38 Texas International Law Journal 763 at 790. A remedy was granted to an individual when the state was ordered to reinstate a social grant and to pay arrears with interest to a poor vulnerable woman with 100% permanent disability, who was probably unaware of her entitlement to arrears, Yacoob J finding that the state had acted unconscionably in relying on prescription of her claim: Njongi (n 3 above) [80], [85], [92]. For a review and assessment of Njongi, see EC Christiansen ‘Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice’ (2010) 13 Journal of Gender, Race & Justice 575 at 604 - 607, 612.
6.3 Separation of powers

An argument regularly used against the enforcement by the courts of socio-economic rights is that under the separation of powers doctrine, these are matters of policy more properly left to the legislature and executive.\textsuperscript{16} The separation of powers issue arose in the TAC case\textsuperscript{17} over the right to healthcare, when Counsel for the State argued that the questions raised belonged to the sphere of government policy and were outside the judiciary’s domain.\textsuperscript{18} This argument, if accepted, would have curtailed somewhat the scope of the decision in Grootboom.\textsuperscript{19} The judges did not retreat, as the Constitution itself had given them the task of enforcing constitutional rights and of considering whether the State had given effect to its corresponding obligations.\textsuperscript{20} Although conceding that the judicial arm is ill-suited to adjudicate on socio-economic issues, the Court pointed out that the Constitution obligated the courts, first, to insist that measures be taken by the State as mandated by the Constitution and, second, to test those measures against the reasonableness standard.\textsuperscript{21}

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

\textsuperscript{16} It is said that democracy requires accountability from the elected legislature rather than intervention by an unelected judiciary without the competencies, knowledge or resources to decide on social priorities.

\textsuperscript{17} Minister of Health v Treatment Action Campaign (No 2) 2002 5 SA 721 (CC).

\textsuperscript{18} Sachs (n 11 above) 181.

\textsuperscript{19} As above.

\textsuperscript{20} n 17 above, [99]. The Court rebuffed any notion that it would be exceeding its remit if it found the State had failed to give effect to its constitutional obligations and in its judgment defended its position in strident terms, ‘[i]n so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.’ as above.

\textsuperscript{21} n 17 above, [38]. The reasonableness test may not be adequate to translate social rights into tangible benefits for rights-holders as a group in accordance with international law provisions: Pieterse (n 11 above) 896. David Bilchitz also criticised the reasonableness test, because reasonableness cannot alone provide content to adjudicate cases based on socio-economic rights; it is context-dependent and lacks a principled basis on which to found decisions: D Bilchitz ‘Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence’ (2003) 19 South African Journal on Human Rights 1 at 9 - 10.

The South African Constitutional Court has frequently used a collaborative approach to resolve breaches of socio-economic rights. Starting with *Grootboom*, it found that the State should include in its housing plan provision for shelter for those who were in desperate need. The Court placed the dignity of human beings in a central position in assessing the reasonableness of state action in housing. Consideration of dignity is invariably involved in assessment of a socio-economic right. Instead of

22 In the early cases the Court began to develop a flexible conception of the separation of powers, which benefits all branches of government, as the courts have the power to make orders that affect government policies directly and it also permits the executive and legislative branches to have a role in interpreting the extent of their obligations under the Constitution: B Ray ‘Policentrism, political mobilization, and the promise of socioeconomic rights’ (2009) 45 *Stanford Journal of International Law* 151 at 175.

23 n 1 above. The extent of shelter to be provided was contextual depending on the exact circumstances of those who were homeless including factors such as the weather conditions. The plan should be balanced, flexible and cover emergency situations as well as providing for short, medium and long term needs: n 1 above, [43]. The Court ordered that the State should build into its housing plan provisions for those ‘with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations’: n 1 above, [99].

24 n 1 above, [83]. Cf *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZASCA 47. In that case the Supreme Court of Appeal found that the inflexible application of the City’s policy of not providing temporary accommodation to those most in need who were evicted from privately-owned buildings subjected them to continued violation of their dignity as its effect was that they were rendered homeless on eviction and vulnerable to eviction wherever they went because they were unable to afford other accommodation: above, [66]-[67].

25 There are many juridical examples of how the norm of dignity has practically guided the interpretation of economic and social rights, including its use by the German Constitutional Court to give meaning to the ‘existential minimum’ of social welfare in the German Basic Law, by which society is obliged to provide everyone with the socio-economic conditions adequate for a dignified existence: Young (n 10 above) 134. In refugee law a human rights approach has broadened the scope of application of socio-economic rights in New Zealand by focusing on human dignity rather than on the traditional criterion of economic proscription, which is an almost complete denial of the ability to earn a living: A Anderson ‘On dignity and whether the Universal Declaration of Human Rights remains a place of refuge after 60 years’ (2009) 25 *American University International Law Review* 115 at 136. In one example the New Zealand Refugee Status Appeals Authority granted refugee status to a Roma family from the Czech Republic who had experienced severe discrimination in employment, provision of healthcare and housing, and the education of their children, and would face the same upon return; the Authority acknowledged the dignity aspect of these types of claims and gave significant weight to the effect on the appellants of their ‘long experience of involuntary abasement’: Anderson above, 138, citing Refugee Appeal No 71193/98 (Sept 9, 1999) (NZ Refugee Status App Auth) 14 - 15, available at [http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_19990999_71193.pdf](http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_19990999_71193.pdf).

Jeanne Woods thinks human dignity may be too elusive a concept to provide a foundation on which to ground the full range of human rights, as the social, economic
coming to a decision on the extent of the right, the Court left it to the State to build the protection to be afforded to the destitute homeless into its plans. It did not accept that the minimum core obligation formulated by the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR) applied to socio-economic rights in the South African Constitution. In any and cultural pre-conditions of a dignified human life remain marginalised in the dominant rights discourse; she proposed human need as a more comprehensive framework for theorising social rights claims, which are indispensable to full development of the person represented by the concept of dignity: n 15 above, 763 - 764. Woods predicted that the demand for second- and third-generation rights will play a galvanising role in the ongoing struggle of the impoverished to realise fully the dream of human dignity: n 15 above, 793.

In assessing reasonableness, it would not ‘enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent’: n 1 above, [41]. Eva Brems commented that this approach to progressive realisation – avoiding a court enquiry on whether more favourable measures could have been adopted – did not lead to maximisation of human rights protection: E Brems ‘Human rights: Minimum and maximum perspectives’ (2009) 9 Human Rights Law Review 349 at 357.

It rejected the minimum core approach as insufficiently flexible and dependent on a level of knowledge and expertise that the Court lacked: n 1 above, [33]. Yacoob J pointed out that the minimum core obligation in international law is determined generally by having regard to the needs of the most vulnerable group entitled to the protection of the right in question: n 1 above, [31]. Adoption of the minimum core would have established an objective minimum standard; failure to meet that standard by the government would have meant automatic violation of the right: Ray (n 22 above) 159.

The view of the Committee on ESCR is that there is incumbent on every state party ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’ in CESC; an assessment as to whether a state has discharged its minimum core obligation must take account of resource constraints applying within the country concerned; to succeed in attributing its failure to meet its minimum core obligations to a lack of available resources, a state ‘must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations’: UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ (n 7 above) [10].

By referring to ‘minimum core obligation’ rather than ‘minimum core content’ (often defined as the nature or essence of a right), the Comment has avoided the minimum content becoming the ceiling rather than the floor; instead of ranking the various components of a human right in some sort of hierarchy according to relative worth, the question changes to one of timing, so that a state that has ratified CESC will ask what it must do immediately to realise the right: AR Chapman & S Russell ‘Introduction’ in AR Chapman & S Russell (eds) Core obligations: Building a framework for economic, social and cultural rights (2002) 9. The minimum core obligation formulation is a way to accommodate the reality that many economic, social and cultural rights (and often civil and political rights as well) require resources that are simply not available in poor countries; this approach affirms that even in highly straitened circumstances, a state has irremovable obligations that it is assumed to be able to meet: above, 10.

See J Church et al, Human rights from a comparative and international law perspective (2007) 289 - 290. For criticism of the Constitutional Court’s rejection of the minimum core standard, see Pieterse (n 11 above) 897 - 898.
event, the Court built its decision around dignity and what was reasonable rather than on a minimum core or housing on demand for the most needy.\textsuperscript{28} The contextual assessment of reasonableness was wide-ranging considering not solely the position of the needy, but also the social, economic and historical environments and the institutional capacity for implementation of the housing programme.\textsuperscript{29}

\textsuperscript{28} It left open the possibility of invoking the minimum core in other cases to assist in determining whether the measures taken were reasonable, but to do that it would need to have enough information to assess what would be the appropriate level in the conditions pertaining in South Africa: n 1 above, [33]. For a defence of the Constitutional Court’s refusal to adopt directly the minimum core, see Kende (n 13 above) 153; MS Kende ‘The South African Constitutional Court’s construction of socio-economic rights: A response to critics’ (2004) 19 Connecticut Journal of International Law 617 at 622 - 624. John Bessler has urged the Constitutional Court to move towards minimum core entitlements for HIV/AIDS-affected children without familial support in order to protect orphans and the vulnerable consistent with children’s constitutional rights and the overarching philosophy of \textit{ubuntu}: JD Bessler ‘In the spirit of \textit{ubuntu}: Enforcing the rights of orphans and vulnerable children affected by HIV/AIDS in South Africa’ (2008) 31 Hastings International and Comparative Law Review 33 at 111.

Young prefers the Court’s use of reasonableness instead of enquiring into a minimum essential core of a right, as it is more normatively open and sociologically framed: n 10 above, 140. Karin Lehmann considers the reasonableness approach to be jurisprudentially sounder than the minimum core, which she views as inappropriate as a tool of judicial decision making, but she takes issue with the Court’s insistence on not examining \textit{how} the public purse is spent: n 9 above, 165.

As a precursor to the proportionality test, one of the requirements to justify a human rights restriction set out by the Canadian Supreme Court in \textit{R v Oakes} [1986] 1 SCR 103 was a ‘minimal impairment’ test; but the Court was not able to apply the \textit{Oakes} test strictly and consistently, so it reformulated it to a reasonable impairment test: Brems (n 26 above) 360, 365.

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

The extent of deference to the other branches of government can be gauged from the reticence of the Court to impose its own views, thereby emphasising the principal role of the other branches of government in developing appropriate policies to enforce socio-economic rights; the Court also noted that enforcement of these rights required considerable flexibility, as ‘a wide range of possible measures could be adopted by the state to meet its obligations’: Ray (n 22 above) 159 - 160, citing n 1 above, [41].
6.4 International Covenant on Economic, Social and Cultural Rights

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

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

- an obligation to take steps to achieve the rights immediately on ratification of CESCR;
- a duty to avail of externally available aid to do so;
- a commitment to use resources to the fullest possible extent;
- the aim of continuous progress to the goal of comprehensive provision of the rights; and

30 Although CESCR is politically neutral (neither supporting nor condemning any particular socio-economic system), it is ideological to the extent that it synthesises portions of each of major political ideologies as they converge on principles of human dignity and economic, social and cultural rights: P Alston & G Quinn ‘The nature and scope of states parties’ obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 Human Rights Quarterly 156 at 219. The Committee on ESCR asserted CESCR’s neutrality between political and economic systems, subject to the proviso that government be democratic, that all human rights be respected, and that those systems recognise the interdependence and indivisibility of the two sets of human rights: UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ (n 7 above) [8].

31 CESCR (n 4 above) Preamble, 2nd para.
32 Preamble, 1st para.
33 Art 11.1.
34 Art 12.1.
35 Art 13.1.
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- the use of whatever means are appropriate to achieve the aim in the context prevailing in relation to each right in the particular state in question with encouragement to enact legislation to do so.36

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

Some illumination of the onus imposed by article 2.1 can be found in General Comment No 3 of the Committee on ESCR on the nature of states’ obligations.38 By ratifying CESCR, states undertake obligations of conduct and of result.39 The unqualified phrase ‘to take steps’ requires ‘deliberate, concrete and targeted’ action within a reasonably short time towards the goal of full realisation of the rights to be achieved progressively.40 While recognising that full realisation of all economic, social and cultural rights takes time and requires some flexibility, the principal obligation of result is

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

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

38 UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ (n 7 above). Some observers consider that the General Comments have developed an authoritativeness usually reserved for advisory opinions and enjoy a significant degree of acceptance by state parties: Young (n 10 above) 143.

39 UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ (n 7 above) [1].

40 UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ (n 7 above) [2]. The undertaking to take steps is an obligation of conduct distinguishable from and less demanding than a guarantee, but nonetheless represents a clear legal undertaking of immediate application: Alston & Quinn (n 30 above) 165 - 166.

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

In the light of its experience of over 10 years, the Committee on ESCR concluded that the *raison d’être* of CESCR demanded a minimum core obligation. The onus is on a state claiming inability to achieve the minimum core to show that the deficiency occurred notwithstanding every effort to use all available resources to satisfy the minimum requirement as a matter of priority. There are varying views as to whether the minimum applies primarily to the individual enjoyment of a right or to society-wide levels of

41 UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ (n 7 above) [9]. The principle of progressive realisation places a burden on states to show discernible progress towards the enjoyment by everyone of the rights established by CESCR: S Leckie ‘Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights’ (1998) 20 Human Rights Quarterly 81 at 93.

The obligation to ensure progressive achievement exists independently of an increase in resources; regardless of constraints on resources, a state will have to demonstrate that it is taking steps to realise the rights progressively; in the absence of increased resources, what is required is at least the effective use of existing resources; progressive implementation can be effected by the development of the societal resources necessary for the realisation of the recognised rights for everyone: de Vos (n 11 above) 97.

Any deliberately retrogressive measures must be taken only after ‘the most careful consideration’, bearing in mind all the rights in CESCR and continuing to utilise fully ‘the maximum available resources’: UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ (n 7 above) [9]. It would require to be justified under the limitations provisions in art 4 CESCR: Leckie above, 99.

Dennis Davis pointed out a significant difference between the Committee’s approach and the concept of reasonableness developed by the Constitutional Court from international jurisprudence, *ie*, the former imposes on the state the obligation to implement elements of the right immediately, but the concept of reasonableness adopted in *Grootboom* provides far less clarity about the core content of the right: DM Davis ‘Socioeconomic rights: Do they deliver the goods?’ (2008) 6 International Journal of Constitutional Law 687 at 698 - 699.

Progressive realisation is mostly monitored through the use of indicators and benchmarks; indicators allow both comparisons and follow-up over time, yet, as Brems concluded, they are generally not suited for the evaluation of individual instances of rights restrictions: n 26 above, 356.

42 *Its raison d’être* is to establish clear state obligations: UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ (n 7 above) [9]. CESCR is a treaty that gives rise to formal obligations and, as such, it must be interpreted in the light of the customary rules of treaty interpretation in international law with particular emphasis on the principle of good faith, which indicates that states ratifying a treaty undertake to give substantial effect to it: Alston & Quinn (n 30 above) 160.

43 UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ (n 7 above) [10].
enjoyment. Even in dire circumstances, states have to 'strive to ensure the widest possible enjoyment of the relevant rights'; neither is the need for monitoring and plans to promote the rights removed by lack of resources. When there are severe financial constraints, such as in a recession, states must adopt relatively low-cost targeted programmes to protect the vulnerable. The more affluent states have an obligation to assist those less fortunate.

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

In contrast, Karin Lehmann believes that there are significant conceptual flaws with the minimum core, as it has inherent contradictions, and does not take into account 'the starkly utilitarian choices that inform the allocation of resources among the beneficiaries of socio-economic rights'. She pointed out that the Committee and scholars are not always clear whether their conception of the minimum core is absolute or relative and neither are they specific on how competing interests should be ranked.

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44 Leckie (n 41 above) 101.
45 UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ (n 7 above) [11].
46 UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ (n 7 above) [12].
47 UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ (n 7 above) [14].
48 Young (n 10 above) 124.
49 Young (n 10 above) 115.
50 n 10 above, 121 - 122.
51 Young (n 10 above) 151.
52 n 9 above, 182.
53 n 9 above, 183, 185.
Debate on the rights and obligations under CESCR has focused on whether legislation is necessary, justiciability, progressivity, and the impact of retrograde steps. The General Comment provides answers to these questions, although academic scholars are sharply divided on some of them. While not clearly mandated by CESCR, legislation is advocated by the Committee and it will not be possible to achieve non-discriminatory exercise of the rights without it.

6.4.1 Justiciability

Since some – at least – of the rights are immediately realisable, they are justiciable. The originally perceived division between negative civil and political rights, on the one hand, and positive socio-economic rights, on the other, is false. Even the former impose some expenditure on the state. The South African experience demonstrates that socio-economic rights are justiciable, and that judicial decisions can respect the separation of powers in a democracy in the process of promoting their universal progressive realisation. The UN Justiciability Report recounts that Sandra Liebenberg advised that the South African Constitution encompassed a wide range of socio-economic rights on an equal footing with civil and political rights and

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54 Justiciability refers to the ability of a court to adjudicate a dispute and order remedies for constitutional violations: Woods (n 15 above) fn 19.

Differences of opinion on the justiciability of socio-economic rights surfaced during the drafting of CESCR as early as 1951, when the French representative (René Cassin) considered that recourse to legal proceedings was envisaged in the event of deprivation of those rights, but he was contradicted by the US representative (Eleanor Roosevelt), who responded that they were not justiciable: Alston & Quinn (n 30 above) 170.

At international level there has been little judicial attention to socio-economic rights, which has given rise to the self-fulfilling perception that they are non-justiciable – despite challenges to this perception from ‘a rich theoretical literature’ and emerging case-law from domestic courts: D Marcus ‘The normative development of socioeconomic rights through supranational adjudication’ (2006) 42 Stanford Journal of International Law 53 at 58 - 59.

55 Where existing legislation is in violation of the obligations under CESCR, article 2.1 would require legislative action to be taken: Alston & Quinn (n 30 above) 167.

56 On the arguments concerning the nature of socio-economic rights and whether they are qualitatively different from civil and political rights, see Ray (n 22 above) 151 - 152. Jürgen Habermas considers that universal equal human dignity grounds the indivisibility of all categories of human rights, the classical civil rights (the liberal rights and the democratic rights of participation) only acquiring equal value when supplemented by social and cultural rights: J Habermas ‘The concept of human dignity and the realistic utopia of human rights’ (2010) 41 Metaphilosophy 464 at 468.
that the courts were moving towards improved protection of human rights.\textsuperscript{57} She referred to \textit{Grootboom} as establishing three important principles: first, the justiciability of economic, social and cultural rights could not be determined in the abstract; second, all rights were interdependent and interrelated; and, third, it developed the ‘reasonableness’ standard to determine whether the state was complying with its socio-economic obligations, the Court citing with approval the interpretation of progressive implementation in General Comment No 3.\textsuperscript{58} Liebenberg’s conclusion indicated that the Constitutional Court’s approach showed respect for the other branches of government.\textsuperscript{59} From her observations it is clear that socio-economic rights can be justiciable without infringing on the separation of powers.


\textsuperscript{58} As above.

\textsuperscript{59} She stated (as above) that \textit{Grootboom}: sought to strike an appropriate balance between the constitutional responsibility of the courts to enforce the duties imposed by socio-economic rights, and the role of the legislature and the executive in a democracy to make and implement laws and policies, thereby fostering a relationship of accountability, transparency and responsiveness between judiciary, legislature and executive.
There has been a trend towards the justiciability of socio-economic rights nationally and internationally. The duty not to discriminate is justiciable since it has immediate full application.

The Canadian delegate at the workshop that gave rise to the UN Justiciability Report urged that the relationship between the courts and the legislature should be constructive rather than a power struggle, so that adjudicating socio-economic rights enhanced participatory democracy; he pointed out that even in a country without explicit domestic legal recognition of social and economic rights, and one in which there remained considerable caution about excessive judicial interference, there was a solid foundation on which social and economic rights could be claimed and adjudicated, and, furthermore, it was wrong to assume that adjudication of socio-economic rights was not relevant in an affluent country: UN Justiciability Report (n 57 above) [9]. For an assessment of justiciability of social and economic rights in Canada, see P Coomans ‘Some introductory remarks on the justiciability of economic and social rights in a comparative constitutional context’ in Coomans (n 2 above) 12; D Wiseman ‘Methods of protection of social and economic rights in Canada’ in Coomans (n 2 above) 173 - 205.

In India the judiciary invoked powers under the Constitution to interpret and press for implementation of social and economic rights, there having been a change of attitude in the 1950s by the Supreme Court, progressively deeming fundamental rights contained in the Constitution justiciable through the requirement that all State action was to conform to requirements of justice and reasonableness: UN Justiciability Report (n 57 above) [11]. On enforcement of social rights in India, see Coomans above, 13; S Muralidhar ‘Judicial enforcement of economic and social rights: The Indian scenario’ in Coomans (n 2 above) 237 - 267; S Muralidhar ‘India: The expectations and challenges of judicial enforcement of social rights’ in Langford (n 21 above) 102 - 123.

All the presentations on the national experiences at the UN workshop demonstrated the reasonableness requirement; the delegates emphasised that there were many ways to ensure the enjoyment of economic, social and cultural rights, and that both courts and treaty bodies tended to defer largely to states on how to implement rights: UN Justiciability Report (n 57 above) [12].

An analysis by David Marcus of the case-law of supranational tribunals by level of obligation confirmed that failures to respect socio-economic rights as defined in international law were in fact justiciable, but that these courts had issued virtually no decisions concerning obligations to protect or fulfil: n 54 above, 55 - 56.

At the international level, the European system confirmed the justiciability of economic and social rights as a common European heritage with positive obligations on states: UN Justiciability Report (n 57 above) [13]. The Inter-American structure had particular success in implementing rights to education, but also guaranteed trade union rights: UN Justiciability Report (n 57 above) [14].

UN Justiciability Report (n 57 above) [6], [16]. Other CESCR rights that are described with sufficient clarity and precision are also justiciable; in common with civil and political rights, there are some elements which need to be spelled out in more detail in national legislation, and tailored to the specific national context, needs and resources: UN Justiciability Report (n 57 above) [6]. Woods has counteracted the argument that the normative contents of social rights are too vague to be legally enforceable by pointing out that it overlooks the valuable work at international level to define these norms as well as the collective judicial expertise in constitutional construction: n 15 above, 771.
6.4.1.1 Judicial enforcement in Europe

This subsection will review the judicial enforcement of socio-economic rights nationally in a number of countries in Europe, where quite a few constitutions invoke the importance of the two ideals of human dignity and fundamental equality.63 The explicit rights to work64 and to social security65 contained in the Constitution of Finland, which also guarantees the inviolability of human dignity,66 have been implemented by the courts.67 Invoking the constitutional guarantees by public authorities of adequate social, health and medical services and of support for families and others responsible for providing for children, the Helsinki Court of Appeals held in the Child-Care Services case that the city was responsible to a parent for the damage caused as a result of its delay in providing day care places.68

Positive socio-economic rights guaranteed by the Preamble to the French Constitution of 194669 are legally binding on all public authorities,70 but their justiciability is understood differently when compared to civil and political rights.71 In Lefevre v Ville d’Amiens the French Supreme Court
confirmed that adequate accommodation (one of the constitutional objectives to protect human dignity) includes the provision of potable water.\textsuperscript{72}

The German Constitutional Court has imposed socio-economic duties on the state from an expansion of the positive obligations that flow from civil and political rights and has been willing to intervene to ensure that the government has taken sufficient steps where rights are manifestly violated.\textsuperscript{73} Although a considerable margin of discretion must be given to the German state in deciding how it ought to effect socio-economic rights, a court can evaluate the reasonableness of the measures applied.\textsuperscript{74} The courts have translated the constitutional principles of the welfare state and the concept of human dignity into state obligations to provide an ‘existential minimum’ or ‘vital minimum’ giving those in need access to food, housing and social assistance.\textsuperscript{75}

The Swiss Federal Court derived an implied constitutional right to basic necessities and, acknowledging its lack of competence to determine resource allocation, it said it would set aside legislation if the outcome failed to meet

\textsuperscript{72} Cour de Cassation, Troisième chambre civile, [Supreme Court, 3rd Civil Chamber], Arrêt No 1362, 15 December 2004. The Court ruled that a landlord is responsible for providing access to potable water to a tenant as part of the conditions to provide reasonable accommodation. See summary in COHRE Leading Cases (n 68 above) 45 - 46.

The guarantee of health, material security, rest and leisure, and the right of those incapable of working because of their age, physical or mental condition, or economic situation, contained in the 1946 Preamble (para 11) were the basis of a decision by the Court of Appeal of Riom to set aside a private body’s implementation of a legislative measure excluding foreigners from the ambit of a welfare benefit aimed at disabled people: Pech (n 69 above) 274, citing CA Riom, 29 January 1996, Droit social (1996), 987.

\textsuperscript{73} M Langford ‘Hungary: Social rights or market redivivus?’ in Langford (n 21 above) 255. The Germans’ constitutional right to choose their occupation and place of training and the equality clause in the Basic Law (Basic Law for the Federal Republic of Germany 1949, Arts 12(1) & 3 respectively) were the foundations for the Constitutional Court’s placing the onus on the state to prove that the maximum possible number of places were provided in medical school to candidates selected fairly in accordance with objective criteria: Numerus Clausus I case (1972), 33 BverfGE 303 (German Constitutional Court). See summary in COHRE Leading Cases (n 68 above) 46; Langford (n 67 above) 6; Langford ‘Hungary: Social rights or market redivivus?’ above, 255; Marcus (n 54 above) 66.

\textsuperscript{74} H Choma ‘Constitutional enforcement of socio-economic rights: South African case study’ (2009) 6(6) US-China Law Review 41 at 44.

the minimum claim required by constitutional rights. In a case in 1995 brought by three non-nationals excluded from social welfare support on the basis of their illegal status in Switzerland, it held that such exclusion was a violation of an implied constitutional right to a basic minimum level of subsistence. It derived this right from, first, the constitutional principle of human dignity guaranteeing every person what they can expect from the community because of their humanity; second, the right to life as a core content of personal freedom, which would no longer be guaranteed were the most minimum prerequisites for survival not guaranteed; third, personal freedom as a guarantee of all elementary aspects of personality development; and, fourth, the equality principle guaranteeing minimum material justice.

The right to subsistence in this case met the conditions of justiciability, as it was oriented to the minimum required as a fundamental right and what constitutes an indefeasible prerequisite for a humanly dignified life was clearly determinable in judicial proceedings. The Court did not find a constitutional right to a guaranteed minimum income, but held that all that was constitutionally required was that which was essential for a humanly dignified existence and which had the ability to guard against an undignified existence as a beggar.

Social rights are not labelled specifically justiciable fundamental rights in the Spanish Constitution, but merely as principles governing economic and social policy that are excluded from judicial review. Notwithstanding this, the courts have succeeded in giving some protection to socio-economic

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76 Langford (n 67 above) 24, citing V v Einwohnergemeinde X und Regierungsrat des Kantons Bern BGE/ATF 121 I 367 (Swiss Federal Court) 27 October 1995.
77 V v Einwohnergemeinde X (n 76 above), available at ESCR-Net http://www.escr-net.org/docs/i/401055. See also summary in COHRE Leading Cases (n 68 above) 71 - 72.
78 The right to a minimum level of subsistence was a condition for the exercise of these other written constitutional rights. The minimum core approach is particularly evident in jurisdictions where social interests are judicially protected through civil rights: Langford (n 67 above) 24.
79 The Court considered that entitlements to benefits are justiciable if, first, they can be adequately defined normatively and, second, they can be concretised and implemented by the judge utilising the procedures and means at the disposal of the court.
81 Arts 39 - 52.
82 Art 53(3). See Coomans (n 60 above) 11.
rights, either directly by determining a certain minimum content of a right that should be guaranteed under all circumstances, or by recognising social rights in connection with fundamental rights that are fully justiciable.83

In contrast with the situation in Spain, the Portuguese Constitution contains detailed justiciable rights in relation to healthcare.84 The Portuguese Constitutional Court held in 2002 that a statute abolishing a guaranteed minimum income scheme for all those aged 18 years or over and replacing it with another scheme that omitted to guarantee a social integration income for those aged between 18 and 25 years violated the right to a decent minimum income inherent in the principle of respect for human dignity.85

The theme of human dignity has also guided the Hungarian Constitutional Court in its adjudication of the right to social security enshrined in its country’s Constitution,86 which contains many social rights justiciable at the behest of

83 Coomans (n 60 above) 11. Social rights and principles can act as safeguard clauses to prevent the legislature from arbitrarily restricting previously recognised social standards in two ways, first, through recognition of a minimum essential core of benefits or social institutions which must be preserved and, second, through the control of reasonableness and proportionality exercised on social policies: MJ Añón & G Pisarello ‘The protection of social rights in the Spanish constitutional system’ in Coomans (n 2 above) 79 - 80. In 1982 in a decision on prima facie retrogressive measures, on the grounds of the obligation of public authorities to promote conditions promoting real and effective equality (Constitution of Spain 1978, Art 9(2)) and on the basis of the principle of the social state, the Constitutional Court stated, ‘the workers cannot be deprived without sufficient reason for it, from social achievements already obtained’: Añón & Pisarello above, 80, citing Decision 81/1982 [3].

The right to health (Art 43) is not included in the explicitly justiciable fundamental rights, but it has been protected by connecting it with other fundamental rights, especially the right to information (Art 20(1)(d)), the right to privacy (Art 18), and environmental rights (Art 45). See Añón & Pisarello above, 91. In 2003, the Supreme Court stipulated that the information given to patients ought to be punctual, correct, true, confidential, extended over time, accurate and thorough, and placed the onus on the doctors to prove compliance with these requirements: Añón & Pisarello above, 91 - 92, citing Decision 29 May 2003.

84 Constitution of the Portuguese Republic 1976, Art 64. The Constitution lists many social rights, distinguishes between various categories of people who might need, and deserve, material assistance, and is unusual in suggesting a number of ways in which the state can meet its obligations to the needy: Fabre (n 63 above) 18.

The Portuguese Constitutional Tribunal ruled in 1984 that abrogation of the National Health Service violated a negative obligation to protect services already established in pursuance of a constitutional duty: Portuguese Constitutional Tribunal (Tribunal Constitucional), Decision (Acórdão) N° 39/84, 11 April 1984. Once a social service was created in fulfilment of a positive constitutional duty, the constitutional respect for the then existing right gave rise to a negative obligation not to abolish it. See ICJ Justiciability Report (n 75 above) 32 - 33.

85 Portuguese Constitutional Court, Ruling N° 509/02, 19 December 2002.

86 Constitution of the Republic of Hungary 1949, as amended, Art 70/E.
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an individual. The government’s 1995 austerity plan, which involved shifting to a new system of benefits, was challenged in the courts. In the *Social Benefits* case, the Court stressed that the constitutional requirement of legal certainty – the most significant basis for the protection of acquired rights – necessitated a changeover period to allow those affected time to adjust to the amended provisions. In 1998 in the *Welfare Act* case, the Court suspended proceedings challenging the level of unemployment benefit pending receipt of a study to allow an assessment of whether regular social aid due under the Act together with other benefits would secure the minimum livelihood necessary for the realisation of the right to human dignity in line

87 Langford (n 73 above) 251 - 252. Although there are specific social welfare rights in the Constitution, the Court has been reluctant to interfere with the roles of the legislature and the executive in making political decisions on the levels of benefit that are to apply and in setting priorities in the Hungarian welfare system: Coomans (n 60 above) 11. The Court will not enquire into the effectiveness or reasonableness of measures adopted by the state except in very limited cases: Langford (n 73) 252. It remarked that it was only in a few exceptional cases that certain social rights in the Constitution have an element of subjective (justiciable) right: Langford (n 73 above) 252, citing Constitutional Court of Hungary, Decision 28/1994, 20 May 1994 (*Environmental Protection* case) [29(b)]. The Court has also demonstrated a marked reticence to base its decisions on the constitutional rights to welfare, and, where the choice existed, it has opted to derive welfare rights indirectly either from property rights (Art 13) or by affirming the right to a basic minimum level of survival from the right to life (Art 54(1)). Other tactics it has used to avoid directly relying on welfare rights have been to subject government actions to the test of arbitrariness or to use a proportionality analysis to balance the individual’s interests against the public interest: Langford (n 73 above) 253. The doctrine of legitimate expectation has prevented the precipitous deprivation of existing benefits.

Ofari Atta J of Ghana also expanded the right to life and linked it closely with human dignity, when he stated in *Asare v Ga West District Assembly* (Suit No 36/2007) (Ghana High Court) 2 May 2008 at 6:

> [T]he right to life is not limited to deprivation of life *per se*. It encompasses all other rights that make the enjoyment of the right complete and meaningful. Any treatment that derogates from the living of a full life constitutes violation of it. … [T]he right to life must be read in conjunction with other rights especially the right to human dignity…

See R. Uitz & A Sajó ‘A case for enforceable constitutional rights? Welfare rights in Hungarian constitutional jurisprudence’ in Coomans (n 2 above) 99 - 104.

88 Constitutional Court of Hungary, Decision 43/1995, 30 June 1995. The Court evaluated the reduction or termination of social security benefits according to the criteria for the protection of property. It noted that social benefits may not be reduced below a minimal level required for the right to social security: Langford (n 73 above) 258.

See summary in COHRE Leading Cases (n 68 above) 47. For an assessment of this case and related decisions, see Langford (n 73 above) 256 - 259; Uitz & Sajó (n 87 above) 110 - 113.

89 Art 54(1).
with the constitutional requirement specified in the *Social Benefits* case. In a majority decision in the *Housing* case in 2000, having found that the right to social security did not establish subjective rights and therefore a fundamental constitutional right to housing could not be derived from it, the Constitutional Court held that the basic right to human life and dignity together with the right to social security only obliged the state to provide accommodation for the homeless if human life was in imminent danger.

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


91 Constitutional Court of Hungary, Decision 42/2000, 8 November 2000 (Housing case). See Langford (n 73 above) 262 - 263; Uitz & Sajó (n 87 above) 114 - 115. The decision has been criticised because the Court did not delve into international jurisprudence to determine the content of social right and failed to note that an independent right to housing had been repeatedly recognised at international level; a second criticism was levelled at the decision because the Court failed to develop a more robust jurisprudence for evaluating whether the state was meeting its constitutional obligations by simply meeting the demand of the minimum level: Langford (n 73 above) 263.


93 Constitutional Court of Latvia, Case No 2000-08-0109, 13 March 2001. See summary in COHRE Leading Cases (n 68 above) 56 - 57. It was significant that – even though the objective of payments was to protect employees – the workers could not opt to pay the premiums direct to the state and could control neither their employer’s actions nor the state’s efforts to collect the monies due. The Court did not relax the obligations on the state on account of the economic hardships – its duty to collect the funds endured in financially difficult times. Efficient and effective implementation measures were required to comply with international obligations – legislation on its own did not suffice. The availability of social aid to those who were unable to provide for themselves was not a substitute for the constitutional right to social security in the form of social insurance, which the state was obliged to implement.

The international obligations arising under the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (Universal Declaration) and CESCR influenced the Court’s decision. It noted that viewpoints on the legal nature and binding force of these international instruments had advanced since they were introduced, citing the Limburg Principles as requiring the state to immediately undertake measures, employing all the necessary standards, to ensure implementation of CESCR rights at least on the minimum level: UN Commission on Human Rights, 43rd Session ‘The Limburg Principles on the Implementation of CESCR’ (8 January 1987) UN Doc E/CN.4/1987/17 (Limburg Principles). It also cited the stipulation in General Comments 3 (UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3’ (n 7 above) and 9 (UN Committee on Economic, Social and Cultural Rights ‘General Comment No 9’ 19th Session (3 December 1998) UN Doc E/C.12/1998/24) that measures should be implemented in a reasonably short
was a failure to observe the objective of social insurance, which served to implement social justice, social security and rights indispensable for the dignity of the person.

Because the United Kingdom does not have a written constitution, there has been less scope there for an expansive jurisprudence on socio-economic issues. However, the principles of administrative law have come to the aid of some litigants94 and the European Convention on Human Rights (ECHR)95 has been the basis of some decisions favourable to claimants – particularly since enactment of the Human Rights Act 1998.96 The judges are generally reluctant to interfere with the political role of the legislature and the executive, but have done so when necessary.97 The House of Lords held that a local education authority – faced with a reduction in government funding – was not entitled to take the availability of financial resources into account when it reduced the amount of home tuition for a child, who was unable to attend school because of illness.98 It based its decision on a strict interpretation of the statute, which had imposed a duty (not a discretionary power) on the education authority to provide education for ill children.99

Lord Woolf in *R v North and East Devon Health Authority, ex p Coughlan* critically appraised a health authority’s actions in closing a nursing home without providing a suitable alternative for its residents.100 He held that the closure was an unjustified breach of a promise to Miss Coughlan that she would have a home for life in the facility, which gave rise to a legitimate expectation that the health authority would not resile from its promise unless time after CESCR has taken effect in a state and that every state was obliged to secure implementation of the most essential liabilities at least on the basic level.

The Latvian Constitutional Court’s enthusiasm for considering international law contrasts with the attitude of its Hungarian counterpart, which rarely does so: Langford (n 73 above) 252. See Marcus (n 54 above) 64, fn 63.

94 For a review of the protection of welfare rights in administrative law in the UK, see JA King ‘United Kingdom: Asserting social rights in a multi-layered system’ in Langford (n 21 above) 279 - 284.
96 On Human Rights Act 1998 jurisprudence involving welfare interests, see King (n 94 above) 286 - 292.
97 See E Palmer ‘The role of courts in the domestic protection of socio-economic rights: The unwritten constitution of the UK’ in Coomans (n 2 above) 169 - 171.
98 *R v East Sussex County Council, ex p Tandy* [1998] AC 714 (HL). For a review and assessment of *Tandy*, see Palmer (n 97 above) 149 - 150.
99 n 98 above, 749.
100 [2001] QB 213 (CA). See King (n 94) 283.
there was an overreaching justification for doing so.⁹¹ The expectation related to a substantive benefit. Even though the Human Rights Act was not in force at the time of his decision, Lord Woolf considered the impact of Article 8 of the ECHR, which was relevant since the case concerned the applicant's home.⁹² Miss Coughlan viewed the possible loss of her accommodation in the nursing home as life-threatening; the Court understood why she took such a serious view of the situation and accepted that an enforced move of the kind intended would be ‘emotionally devastating and seriously anti-therapeutic’.⁹³ It found that the decision to close the nursing home constituted unfairness amounting to an abuse of power by the health authority and would be a breach of Article 8.⁹⁴

The enactment of the Human Rights Act ensured that the House of Lords rejected a planning authority’s plea for an injunction to prevent gypsies from occupying land with their mobile homes and caravans following the refusal of planning permission.⁹⁵ Because Article 8 of the ECHR was engaged, the Court would have regard to all the circumstances and would only grant an injunction when it was just and proportionate to do so.⁹⁶ The Court respected the separation of powers and would not examine matters of planning policy and judgment within the purview of the planners, but the courts would not grant an injunction simply because a planning authority considered it necessary or expedient to restrain a planning breach.⁹⁷

The House of Lords in a majority decision in Ghaidan v Godin-Mendoza found that there was a breach of Article 8 in combination with the anti-discrimination provision in Article 14 of the ECHR because of the less favourable treatment of a homosexual couple under the Rent Act 1977.⁹⁸ One of the reasons Baroness Hale gave in her judgment for finding that the guarantee of equal treatment was essential to democracy was that democracy

101 n 100 above, [89].
102 n 100 above, [90]-[93].
103 n 100 above, [92].
104 n 100 above, [117].
106 n 105 above, [18], [28], [58], [74], [87]-[89].
107 n 105 above, [28], [30], [70], [98].
108 [2004] UKHL 30, [2004] 2 AC 557. There was no rational or fair ground for the distinction in the Act, which confined rights of succession to the husband or wife of a deceased tenant. The Court interpreted the legislation in conformity with the ECHR and held that the survivor in a homosexual relationship was entitled to succeed to the statutory tenancy. See King (n 94 above) 290 - 291.
was founded on the principle that each individual has equal value and was breached by regarding others as inferior. As she stated:

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

6.4.1.2 Judicial enforcement under the African Charter

Moving from Europe to another continent, the African Charter affirms explicitly some socio-economic rights, ie, the right to work under equitable and satisfactory conditions and to receive equal pay for equal work, the right to education, and the right to enjoy the best attainable state of physical and mental health with an obligation on the states ‘to take the necessary

109 n 108 above, [132]. The other reasons she gave were that unequal treatment damaged society as a whole because of the waste of resources in making wrong assumptions about people and because of the damage to social cohesion by the creation of an under-class with a rational grievance; unequal treatment was the reverse of the rational behaviour now expected of government and of the state requiring that power not be exercised arbitrarily; and it was a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups (even when they were unpopular with the majority); she summarised, ‘[d]emocracy values everyone equally even if the majority does not.’: as above.

110 n 108 above, [132], citing Pretty v UK (2002) 35 EHRR 1 at 37, [65].


113 Art 17(1).

114 Art 16(1). In view of their condition and disabilities, mental health patients should be accorded special treatment to enable them not only attain but also sustain their optimum level of independence and performance: Purohit v The Gambia [2003] AHRLR 96 (ACHPR 2003) [81]. As fundamental rights are at stake, the African Commission does not give much leeway to the states in relation to mental healthcare, and considers that the mentally ill ‘should never be denied their right to proper health care, which is crucial for their survival and their assimilation into and acceptance by the wider society’: above, [85]. Their inherent human dignity (a basic right to which all human beings, regardless of their capabilities, are entitled) was not respected and they were dehumanised by being branded ‘lunatics’ and ‘idiots’ in the Gambia’s Lunatics Detention Act: above, [57], [59]. The Act also infringed the patients’ right to be heard prior to being detained and to their right to challenge the two medical certificates from general practitioners forming the basis of their detention: above, [71]-[72].
measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.  

The African Commission on Human and Peoples' Rights interpreted the Charter as containing unenumerated rights in *Social and Economic Rights Action Centre v Nigeria*, when it held that the internationally recognised socio-economic rights which are not explicitly recognised in the Charter should be regarded as implicitly included. It found that the right to food was ‘inseparably linked to the dignity of human beings’ and was therefore essential for the enjoyment and fulfilment of other rights such as health, education, work and political participation.

The Preamble to the Charter leaves no doubt that all rights are interconnected and states, ‘the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights’. The specific embodiment in Article 5 of every individual’s right to ‘the respect of the dignity inherent in a human being’ has provided a basis on which the Commission has found violations of the Charter where economic and social issues have arisen in conjunction with alleged violations of civil and

115 Art 16(2). The Charter permits states to make complaints of Charter violations by other states to the African Commission on Human and Peoples’ Rights, and empowers the Commission to consider, study and report on communications from individuals, groups and organisations in respect of human rights violations: Arts 48 - 49, 55 - 59. See UN Justiciability Report (n 57 above) [15].


117 Heyns (n 111) 691. The Commission read in a right to shelter or housing deduced from the provisions on health, property and family life: n 116 above, [60], referring to African Charter (n 112 above) Arts 16, 14 and 18(1) respectively. The corollary of the combination of the provisions protecting the right to health, the right to property, and the protection accorded to the family forbade the wanton destruction of shelter because when housing was destroyed, property, health, and family life were adversely affected: n 116 above, [60].

118 n 116 above, [65].

119 African Charter (n 112 above) Preamble, 8th para. See Odinkalu (n 111 above) 188; UN Justiciability Report (n 57 above) [15].

120 The African Charter is unlike international Covenants and regional instruments in recognising respect for human dignity as a distinct right: Odinkalu (n 111 above) 214. Chidi Odinkalu considers that this achieves the radical consequence of breaking down artificial barriers imposed on the implementation of economic, social and cultural rights, for, as Odinkalu states, ‘respect for human dignity is a primordial value incapable of being pigeon-holed into any artificial categories of rights’: as above.
political rights. In the absence of an express guarantee of a right to housing, the Commission based protection for housing-related rights on the guarantee of human dignity, including the prohibition of torture and cruel, inhuman and degrading treatment also mentioned in Article 5.121 The Commission found in Modise v Botswana122 that the state had breached, *inter alia*, the right to dignity of a stateless man on whom it had enforced homelessness.123 On similar lines the Commission ruled in Amnesty International v Zambia that by forcing two political opponents to live as stateless people under degrading conditions, Zambia had deprived them of their family and deprived their families of their support in violation of the dignity of a human being guaranteed in Article 5.124

6.4.2 Progressivity
Having completed my review of justiciability of socio-economic rights in Europe and under the African Charter, I am returning to CESCR to consider the progressivity element. In this, socio-economic rights differ from civil and political rights, which are all immediately enforceable.125 But the variable economic conditions pertaining in each state mean that not every socio-economic benefit can be extended to the general populace instantaneously.126 The continuous obligation to improve until all the rights have been fully

121 Odinkalu (n 111 above) 209 - 210.
123 Odinkalu (n 111 above) 210. He had been forced to live for seven years in ‘No Man’s Land’ between South Africa and Botswana, which the Commission stated exposed him to ‘personal suffering and indignity’ in violation of his right to freedom from cruel, inhuman or degrading treatment: n 122 above, [91].
125 Brems categorised the minimum core obligation as ‘a bottom line’, which is much lower than the borderline under civil and political rights; full realisation is ‘a horizon line’, which is not a maximum, but approaches good or best practice; in between the two lines, state behaviour may or may not conform to treaty obligations, depending amongst others on the availability of resources: n 26 above, 355.
126 The African Commission has adopted a realistic stance taking cognisance of the poverty in African countries. It has interpreted the right to health in Article 16 of the African Charter as imposing a progressive duty on the state, which is obliged ‘to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind’: Purohit (n 114 above) [84].

Cf Swaziland National Ex-Mine Workers Association v Minister of Education [2010] SZSC 35 (SC of Swaziland) on the right to free primary education under the Constitution of the Kingdom of Swaziland 2005, Sec 29(6).
realised is a practical solution, which is flexible enough to cater for different situations and financial changes over time.127

When resources are so severely stretched as to require unavoidable cutbacks, states need to be very careful not to act precipitously or in-discriminately. Priority must be given to the vulnerable, international funds and aid tapped,128 cost-effective measures pursued, monitoring of progress on implementation maintained, and strategies pursued to ultimate achievement of socio-economic goals. Any regressive measures should have the least impact on the marginalised in society.

6.5 Judicial enforcement in South Africa

Reverting to South Africa, the decision in Grootboom has been hailed worldwide as a laudable precedent for the judicial enforcement of socio-economic rights.129 However, it has been criticised for failing to lead to an

127 The travaux préparatoires for CESC show that supporters of the idea of progressive achievement defended it as a necessary accommodation to the vagaries of economic circumstances, while opponents held the opposite view and feared that it enabled lame excuses to be pleaded in justification of non-implementation: Alston & Quinn (n 30 above) 175.

128 There is a view that we are collectively charged with seeking a world in which each person has the possibility of a life of dignity and that this demands that each one contributes (or at the very least does not undermine) the processes of global governance aimed at securing human dignity: K A Appiah ‘Dignity and global duty’ (2010) 90 Boston University Law Review 661 at 671, 672, 674 - 675. Participation as citizens of nation-states in the creation of international institutions to achieve this aim and through other forms of collective action (such as supporting aid organisations) is urged on individuals by concern for the dignity of each human being: above, 671 - 672.

Habermas urged that in international relations moral obligations between states (and citizens) should be recognised as being grounded in the democratic status-bound idea of human dignity: n 56 above, 478 - 479.

129 It has been described as establishing a relationship of collaboration between the State and the judiciary whereby each branch of government brings its particular skills to bear on the problem of realising socio-economic rights: M Wesson ‘Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court’ (2004) 20 South African Journal on Human Rights 284 at 307. The Court’s strategy in Grootboom and other socio-economic rights cases may have been to devise a review standard that allowed it greater flexibility to manage its relationship with the political branches: T Roux ‘Principle and pragmatism on the Constitutional Court of South Africa’ (2009) 7 International Journal of Constitutional Law 106 at 136.
The Court did not utilise its supervisory jurisdiction to impose a time limit on revision of the housing plan to incorporate assistance for the destitute homeless. Neither did it follow up to ensure that the dignity of Irene Grootboom was given the respect it deserved in the long run. This unfortunate and brave lady died in her forties eight years after the Constitutional Court ruled in her favour. At the time of her death she was still living in a shack, homeless and penniless. In theory the claimants could have reverted to the courts to take more strident action to have the State relieve their situation, but they did not have the financial resources to do so.

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

### 6.6 Housing

The *Grootboom* litigation arose after Ms Grootboom with 510 children and 390 other adults, who had been living in appalling conditions in an informal

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130 The Constitutional Court developed its jurisprudence in later cases to provide more valuable relief, and even based its decision to award damages to a private property owner for the absence of an appropriate mechanism to give effect to an eviction order against unlawful occupiers on the failure of the state to provide an effective remedy as required by the rule of law and entrenched in Section 34 of the Constitution: *Modderklip* (n 29 above) [51].

131 See Davis (n 41 above) 701. In later cases the Court refined its approach and retained a supervisory role: see *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) [7].


133 As above. The fact that her family were not yet housed in reasonable accommodation showed how difficult it was to realise the socio-economic rights in the Constitution: Sachs (n 11 above) 274.

134 n 129 above, 306.

135 n 129 above, 307. See also Liebenberg (n 21 above) 100. The Constitutional Court has an increased understanding that more judicial oversight is critical and has utilised it to develop an effective enforcement mechanism: B Ray ‘Residents of Joe Slovo Community v Thubelisha Homes and Others: The two faces of engagement’ (2010) 10 *Human Rights Law Review* 360 at 368.
squatter settlement in the Western Cape, decided to move out and illegally occupied someone else’s land.136 Having been evicted, they were left homeless and were living again in intolerable conditions while waiting in the queue for their turn to be allocated low-cost housing. Their legal challenge was based on claims that the government was obliged under Section 26 of the Constitution to provide them with adequate basic shelter (a minimum core) until they obtained permanent housing and that the children had an unqualified right to shelter under Section 28(1)(c) of the Constitution.137

Yacoob J amalgamated the right to access to adequate housing in Section 26(1) of the Constitution with the progressive realisation obligation on the State in Section 26(2), thereby eliminating a finding of the immediate right to a home.138 There was at the very least, a negative obligation placed on the State and others ‘to desist from preventing or impairing the right of access to adequate housing.’139 He regarded the prohibition on arbitrary evictions in Section 26(3) as an elaboration on the negative right.140 As Yacoob J described it, the manner in which the eviction took place did not respect the dignity of those being moved on and affected them in a fundamental way.141 At the least, the State had breached its negative obligation in relation of housing, as it had not ensured that the evictions were executed humanely.142

136 n 1 above, [4]. See Chaskalson (n 14 above) 603 - 605; Choma (n 74 above) 43 - 46, 50 - 51; Davis (n 41 above) 692 - 694, 697; Kende (n 13 above) 142 - 145; MS Kende Constitutional rights in two worlds: South Africa and the United States (2009) 245 - 248; Pieterse (n 11 above) 892 - 894, 901 - 902; Rao (n 90 above) 237 - 238, 265; LA Williams 'The justiciability of water rights: Mazibuko v. City of Johannesburg' (2009) 36 Forum for Development Studies 5 at 14 - 16; Woods (n 15 above) at 783 - 786.

137 n 1 above, [18].

138 n 1 above, [34]. Daniel Erskine considered that the judicial gloss of reading the two subsections together as mutually supportive because of their textual proximity solved the inherent conflict between them, but diminished one right by subsuming the other within the primary right: DH Erskine ‘Judgments of the United States Supreme Court and the South African Constitutional Court as a basis for a universal method to resolve conflicts between fundamental rights’ (2008) 22 St John’s Journal of Legal Commentary 595 at 621 - 622.

139 n 1 above, [34], citing Certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 (CC) [78].

140 n 1 above, [34].

141 ‘[T]he eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt.’: n 1 above, [88]. The State had funded, and assisted in, the eviction of the claimants and had failed to engage in mediation aimed at reaching a settlement: as above.

142 As above. Section 26(3) specifically prohibits demolition of a person’s home without a court order, as well as controlling evictions. The Western Cape High Court held that
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The Court did not put the primary obligation under Section 28(1)(c) to provide shelter for children on the State, but instead placed this duty on the parents. As the children implicated in *Grootboom* were not in care or abandoned, the State had no separate obligation to them under Section 28. The Constitutional Court unanimously found that neither Section 26 nor 28 gave an entitlement to shelter or housing immediately upon demand, but that the housing programme in the Cape Metro (the supervisory tier of local government in the area) fell short of the obligations imposed upon the State in that it failed to provide for any form of relief to those desperately in need of access to housing. The need to give central place to human dignity in assessing individual needs and state action came from the requirement that human beings ‘be treated as human beings.’

In formulating a solution, the Court emphasised the need to consider individual circumstances and not to rely on merely showing that its measures were capable of achieving a ‘statistical advance’ in the realisation of the right; according to Yacoob J, the Constitution required that everyone be treated with ‘care and concern’ and even statistically successful measures which ‘fail to respond to the needs of those most desperate’ might not pass the test. In addition to the duty to respect socio-economic rights by requiring the state to refrain from law or conduct depriving people of access to their rights, the Court set out the criteria for judging whether it had fulfilled its positive duties to protect, promote and fulfil them – the state must take reasonable legislative and other measures within its available resources to achieve progressive realisation of each of the rights.

Section 26(3) modified the common law by requiring a plaintiff, who seeks to evict a person from his or her home, to allege relevant circumstances which entitle the court to issue an eviction order: *Ross v South Peninsula Municipality* [2000] 4 All SA 85 (C).

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143 n 1 above, [77]. If the parents failed, the State was obliged to intervene: as above. The Court sought to harmonise rights and solved the conflict between an adult’s and a child’s right to adequate housing by qualifying the child’s right so that it is effectuated through the parents or family, or, in default, through governmental measures: Erskine (n 138 above) 622.

144 n 1 above, [79].

145 n 1 above, [95].

146 n 1 above, [83]. The need to treat people as human beings has been a recurrent theme in Yacoob J’s judgments: see, *eg*, *Joe Slovo* (n 131 above) [65], [69], [76].

147 n 1 above, [44].

The housing policy was unreasonable not only from the perspective of the class of person excluded, but also for the effect such exclusion could have on the national housing programme as a whole. Lehmann described the Court’s approach as utilitarian, since sacrificing the interests of those desperately in need of shelter would not have led to the actual realisation of medium- and long-term housing needs; the scale of the problem was such that there would have been continuing land invasions from the landless and homeless. Jeanne Woods considers that Grootboom illustrates that because of the collective character of social rights the standards of minimum core obligations and progressive realisation in international human rights law do not necessarily impose limitations on rights, but can be stringent criteria by which a court can measure states’ compliance.

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

149 Lehmann (n 9 above) 172.
150 n 9 above, 172.
151 n 15 above, 786.
152 n 1 above, [97]. The Commission has a constitutional duty to ‘monitor and assess the observance of human rights’: Constitution of the Republic of South Africa 1996, Sec 184(1)(c). It has power ‘to investigate and to report on the observance of human rights’ and ‘to take steps to secure appropriate redress where human rights have been violated’: Sec 184(2)(a) & (b).
The Court made it clear that mere legislation was not enough and that the state was obliged to act to achieve the intended result, with legislation being supported by policies reasonably conceived and reasonably implemented: n 1 above, [42]. As superficial compliance through development of a written programme is insufficient to meet the reasonableness standard, the deference to legislative judgments is not absolute: Ray (n 22 above) 160.
154 There was no specific right of return to Court, if the claimants’ plight was not addressed adequately or at all within a stipulated or reasonable period. In contrast in Joe Slovo, the Court permitted the parties to approach the Court in the event of its
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The Constitutional Court found a more precise and effective solution in *Jaftha v Schoeman*, the first case where the concept of adequate housing – briefly discussed in *Grootboom* – was considered at length and where the problem was perhaps less complicated with just one person aggrieved and a readily available remedy capable of effecting an immediate improvement.155

The Order was framed as an answer to prevent interference rather than as a positive obligation requiring vast expenditure by the state.156 Maggie Jaftha (unemployed and in ill-health) borrowed R250, which was to be repaid in instalments, but she failed to meet all of the repayments, was sued for the amount due and her house was sold to pay the debt.157 The Court found that the Magistrates’ Courts Act 1944, as a measure which permitted a person to be deprived of existing access to adequate housing, limited the rights protected in Section 26(1) of the Constitution.158 It allowed execution against the homes of indigent debtors resulting in them losing their security of tenure and,

order not being complied with or if the order gave rise to unforeseen difficulties: n 131 above, [7].

In a dispute over the eviction of squatters in Ghana, the High Court pointed out that even in *Grootboom*, the court did not interfere with the executive’s execution of its housing programme and did not reverse the eviction of the plaintiffs, which had already taken place; Appau J distinguished the situation in Ghana from the position in South Africa, where the Constitution made provision for adequate housing in order to redress the forcible appropriation of black people’s land during the apartheid era: *Abass v Accra Metropolitan Assembly* (Misc 1203/2002) (Ghana High Court) 24 July 2002 (*Sodom and Gomorrah* case) 12. The Court found that the planned eviction was lawful and would not infringe the squatters’ fundamental rights. Appau J referred to Yacoob J’s condemnation of land invasions in *Grootboom* and his view that it might be reasonable for the state not to provide housing in response to repeated land invasions, as reasonableness must be determined on the facts of each case: above, 12 - 13, citing n 1 above, [92].

155 2005 2 SA 140 (CC). The decision was a significant development in the Court’s approach to the review of the obligations imposed by social rights: S Liebenberg ‘Needs, rights and transformation: Adjudicating social rights in South Africa’ (2005) 6(4) ESR Review: Economic and Social Rights in South Africa 3 at 6. See also Brand (n 2 above) 217 - 218; Liebenberg (n 21 above) 93 - 94, 100.

156 The Constitutional Court (in contrast to the court below’s view) found that there was a negative content to socio-economic rights: n 155 above, [33]. In 1997 Pierre de Vos correctly discerned the negative element in socio-economic rights, which placed a duty on the state to respect an individual’s existing access to adequate housing; therefore the specific constitutional protection from eviction in Section 26(3) was unnecessary, but was useful in overcoming courts’ reluctance to explore the full range of the negative obligations engendered by socio-economic rights: n 11 above, 80 - 81.

157 n 155 above, [4]. In her challenge to the validity of provisions in the Magistrates’ Courts Act 1944 dealing with the sale in execution of property to satisfy a debt, Jaftha relied on her constitutional right to have access to adequate housing: n 155 above, [2]. An eviction would mean that she could not apply for state housing: n 155 above, [12].

158 n 155 above, [34].
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... even worse, losing the chance of being re-housed so that they could enjoy conditions in which their dignity could prosper again. Judicial oversight of the execution process would be the most appropriate method ofremedying the over-breadth of the legislation. The Constitutional Court read in words to the Act so that a court would consider the circumstances before ordering a sale in execution of immovable property where insufficient movables had been found to satisfy the judgment debt.

Mokgoro J, delivering the judgment in Jaftha on behalf of a unanimous Court, confirmed the view in Grootboom that any claim based on socio-economic rights 'must necessarily engage the right to dignity', which is 'invariably implicated.' The lack of adequate food, housing and healthcare was 'a blight' on people's dignity. The Committee on ESCR also viewed the right to dignity as inherently linked with socio-economic rights and had emphasised the need not to give the right to housing a restrictive interpretation, but to see it as 'the right to live somewhere in security, peace and dignity.' The history of forced summary evictions in the apartheid days and the criminalisation of those bucking the system by remaining in occupation showed the extent to which access to adequate housing was linked to 'dignity and self-worth', as transgressors suffered 'double indignity – the loss of one's home and the stigma that attaches to criminal sanction.' The importance to dignity of a home and the onslaught to a person's humanity by arbitrary deprivation of the opportunity to regain a home is evident.

159 n 155 above, [39]. The legislation was not justifiable and could not be saved to the extent that it allowed executions where no countervailing considerations in favour of the creditor justified the sales in execution: n 155 above, [52].
160 n 155 above, [61].
161 n 155 above, [64].
162 n 155 above, [21], citing n 1 above, [83].
163 n 155 above, [21].
164 n 155 above, [24], citing The Right to Adequate Housing (Art 11(1)) UNCESCR General Comment 4 (1991) 13 December 1991 E/1992/23 [7]. The UN Committee identified security of tenure as one factor in determining adequacy: n 155 above, [24], citing General Comment 4 above, [8].
165 n 155 above, [27] (footnote omitted).
166 n 155 above, [39] (Mokgoro J): Relative to homelessness, to have a home one calls one’s own, even under the most basic circumstances, can be a most empowering and dignifying human experience. The impugned provisions have the potential of undermining that experience. The provisions take indigent people who have already benefited from housing subsidies and, worse than placing them at the back of the queue to benefit again from such subsidies in the future, put them in a position where they might never again acquire...
The Court found it unnecessary to decide whether the right of access to housing had horizontal application, but focused on the constitutionality of the eviction process on account of the sale of property for a relatively trivial debt. It balanced the rights of the debtors against those of creditors and achieved a fair outcome. The remedy was satisfactory for the applicant and ensured that there would not be a recurrence. The Court was not prepared to simply declare the legislation invalid and leave it to the legislature to bring in new provisions. It steered a delicate course between two competing interests and reached an excellent decision.

The Constitutional Court favoured reconciliation of interests in preference to the triumph of one right over another when it tried to resolve a large-scale squatter issue that came before it in Port Elizabeth Municipality. In response to a petition signed by 1,600 people living in the neighbourhood and the landowners, the Port Elizabeth Municipality sought eviction orders against 68 people, including 23 children, who occupied 29 shacks erected on privately-owned land, where some of the squatters had lived for up to eight years.

such assistance, without which they may be rendered homeless and never able to restore the conditions for human dignity.

Mokgoro J noted that poverty had converted a welfare issue to a property problem:

There is a contrast between the duty of government to its citizens and the duty of one private person to another, as, first, private persons rarely have power over decisions of others remotely comparable to the power of government over its citizenry and, second, private individuals ordinarily have liberty to act for a wide variety of reasons: KW Simons ‘Dworkin’s two principles of dignity: An unsatisfactory nonconsequentialist account of interpersonal moral duties’ (2010) 90 Boston University Law Review 715 at 732.

Habermas considers that the more deeply civil rights suffuse the legal system as a whole, the more often their influence permeates the horizontal relations among individuals and groups, collisions between competing rights in hard cases often being resolved by appealing to a violation of human dignity whose absolute validity grounds a claim to priority: n 56 above, 469.

On the horizontal application of the South African Bill of Rights, see Liebenberg (n 21 above) 78 - 79.

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC). The Court sought a solution that would best comport with dignity, as there were commensurate interests on both sides of the conflict; the use of the concept of human dignity allowed the Court to contextualise its decision in light of the history of apartheid: C McCruden ‘Human dignity and judicial interpretation of human rights’ (2008) 19 European Journal of International Law 655 at 718, 719. See also Brand (n 2 above) 214, 228 - 229; Liebenberg (n 21 above) 92.

n 168 above, [1]-[2]. The squatters were willing to move provided they were given notice and were allocated suitable alternative land: n 168 above, [2]. The Municipality resisted their entreaties, as they would be queue-jumping by being given alternative accommodation over those on the housing list: n 168 above, [3].
It sought a ruling that it was entitled to evict unlawful occupiers without providing alternative accommodation or land.\textsuperscript{170} The Court felt obliged to go beyond its normal remit and to enter the realm of judicial management to find a just and equitable solution balancing all the interests based on good neighbourliness and shared concern.\textsuperscript{171} Sachs J,\textsuperscript{172} delivering the Court’s unanimous judgment, pointed out the indignity to society as well as to the poor caused by homelessness exacerbated by the State.\textsuperscript{173} He encouraged the poor as autonomous beings not to abrogate responsibility for relieving their own plight and admonished the landowners not to stereotype the squatters by refusing to treat each one as a human being.\textsuperscript{174} The reconciliation of the individual with the community was evident in the concept of \textit{ubuntu}, which

\begin{flushleft}
\textsuperscript{170} n 168 above, \[6\]. Property rights under Section 25 and the housing provisions in Section 26 of the Constitution were in contention. In Ghana, Ofari Atta J rejected a somewhat similar claim from those whose occupation or activities were tainted by illegality, when he stated, ‘\textit{encroachers cannot have any right to compensation or alternative accommodation’}: \textit{Asare (n 87 above) 10.}

\textsuperscript{171} n 168 above, \[36\]-\[37\]. The Municipality had not engaged properly with the squatters and the Court encouraged it to try to resolve the issue itself or to agree to the appointment of a skilled negotiator to reach a solution acceptable to the trespassers and to the landowners: n 168 above, \[61\]. When the Court decided that it would not uphold the eviction order, it justified its decision to limit the right of the landowners to be free from unlawful deprivation of their land as being the choice more congruent with dignity: McCrudden (n 168 above) 718. In contrast in \textit{Joe Slovo}, the Court ordered the residents in an informal settlement to vacate to facilitate redevelopment plans, but required the state to provide them with temporary accommodation pending their being rehoused and also gave a substantive remedy by directing the state to provide 70% of the new houses in the redeveloped area to residents of the informal settlement: n 131 above, \[7\]. On the innovations in \textit{Joe Slovo}, see Ray (n 135 above) 368 - 370. On \textit{Joe Slovo}, see also A Pillay ‘Economic and social rights adjudication: Developing principles of judicial restraint in South Africa and the United Kingdom’ [2013] \textit{Public Law} 599 at 611 - 613. Cf \textit{Kariuki v Town Clerk, Nairobi City Council} [2011] eKLR (High Court of Kenya, 4 March 2011).

\textsuperscript{172} Sandra Liebenberg approved of Sachs J’s careful analysis of the historical, socio-economic, political and legal factors that fuel occurrences such as the eviction of poor people from their homes: n 155 above, \[5\].

\textsuperscript{173} ‘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.’: n 168 above, \[18\].

\textsuperscript{174} n 168 above, \[41\]: ‘\textit{[T]hose seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity. At the same time those who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency.}’
combines individual rights with a communitarian philosophy. Mediation was compatible with ubuntu, as Sachs J considered that its use in the avoidance of ‘polarising litigation’ could promote respect for human dignity and underline the fact that we all live in a shared society.

A similar reconciliatory attitude was adopted in Occupiers of 51 Olivia Road when the Court required the parties to co-operate together to find a solution. The City of Johannesburg wanted to evict more than 400 occupiers of buildings in the inner city because they were unsafe and unhealthy. The Court held unanimously that Section 26(2) of the Constitution obliged the municipality to engage meaningfully before ejecting people from their homes if they would become homeless after the eviction. The legislation making it a crime for people to remain in buildings after an eviction notice by the City, but before any court order for eviction, was unconstitutional.

The Constitutional Court gave an instant remedy and read in words to the legislation so that it included a proviso that criminalised only those people

175 n 168 above, [37]. African traditions more fully encompass the social dimensions of the person and human need, the concept of personhood having a normative content that expresses the relationship between social rights and duties: Woods (n 15 above) 778.
176 n 168 above, [42]. Sachs J adopted a Dworkinian attitude when he advocated the adoption by the judiciary of a practical route when balancing conflicting intrinsic interests, ‘the courts must accordingly do as well as they can with the evidential and procedural resources at their disposal.’: n 168 above, [38].
177 Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg 2008 3 SA 208 (CC).
178 n 177 above, [1]. At issue was whether the municipal authority had made reasonable provision for housing for those thousands of people who were said to be living in desperate conditions in the inner city and also whether eviction provisions were constitutional. The Court had made an interim order requiring the parties to engage meaningfully with each other with a view to addressing the possibilities of short term steps to improve current living conditions and of alternative accommodation for those who would be rendered homeless: n 177 above, [5]. The parties reached consensus that the City would not eject the occupiers, that it would upgrade the buildings and that it would provide temporary accommodation, and they agreed to meet to discuss permanent housing solutions: n 177 above, [24]-[26]. There was a conflict between the local authorities’ duty to control unsafe buildings and their obligation to provide shelter for the homeless.
179 n 177 above, [18]. While the City has obligations to eliminate unsafe and unhealthy buildings, its constitutional duty to provide access to adequate housing meant that potential homelessness must be considered when it decides whether to evict people from buildings: n 177 above, [46].
180 n 177 above, [49].
who, after service upon them of an order of court for their eviction, continue to occupy the property.\footnote{181}

Yacoob J placed human dignity and respect for life as the priorities for the municipality in the balance between protecting property and the housing rights of city dwellers.\footnote{182} The Court reiterated that because dignity is a constitutional value, rights such as housing in Section 26 cannot be regarded in isolation, the requirement to bear dignity in mind involves treating people as human beings, and state action must be reasonable.\footnote{183} There must be engagement with the people affected to try to find a solution.\footnote{184} Sandra Fredman praised the collaborative way in which the Court dealt with the difficult task of enforcing socio-economic rights in this case, resulting in the Court’s being enabled to issue a mandatory remedy without stepping on the toes of democratic decision-makers as well as incorporating those affected so they can monitor the remedy.\footnote{185}

\footnote{181}{\textit{n 177 above, [51], [54].}}
\footnote{182}{\textit{n 177 above, [16] (footnotes omitted): [The City] also has the obligation to fulfil the objectives mentioned in the preamble to the Constitution to ‘[i]mprove the quality of life of all citizens and free the potential of each person’. Most importantly it must respect, protect, promote and fulfill the rights in the Bill of Rights. The most important of these rights for present purposes is the right to human dignity and the right to life. In the light of these constitutional provisions a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together.}}
\footnote{183}{\textit{n 177 above, [10], citing Grootboom (n 1 above) [82]-[83]. A holistic approach was required by local authorities when reaching decisions – they should not deal with issues of safety of buildings and housing of the evicted occupants separately: n 177 above, [44]. Bessler has called for a holistic, multi-faceted approach to protect children affected by HIV/AIDS: n 28 above, 94.}}
\footnote{184}{\textit{n 177 above, [11], citing Grootboom (n 1 above) [87]. The Court developed the engagement process further in Joe Slovo, where it set out detailed agendas for the content of the engagement with timelines: n 131 above, [7].}}
\footnote{185}{S Fredman \textit{Human rights transformed: Positive rights and positive duties} (2008) 122. Fredman considers it possible to structure the adjudication of positive human rights duties in a way which strengthens rather than detracts from democracy: above, 123. There is scope for this in South Africa where the \textit{locus standi} rules are wide permitting easy access to the courts for pursuing public interest litigation and where there is fertile ground for development because of the tradition of resistance to apartheid: above, 122. To develop the process she advocates that the courts resile from relying on the adversarial system to solve issues involving positive obligations on the state and pay more attention to alternatives aimed at securing the appropriate response: above, 123. Brian Ray deduced from the judgment that the Court continues to prefer political over legal solutions, as it expressed optimism that future engagement would be meaningful and emphasised that both parties had a duty to continue to negotiate; the}
On reviewing the housing litigation, it is clear that Section 26 of the Constitutional has been interpreted in the light of right to dignity in Section 10 and the constitutional value of respect for human dignity. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998 protected the dignity of unlawful occupiers, while endeavouring to allow landowners recover their property. It emphasised the individual treatment of occupiers with particular attention being paid to the most vulnerable.\(^\text{186}\)

The consideration by the court of the availability of suitable alternative accommodation in evictions is based not just on the right to access to housing, but on the individual’s right to be treated with dignity, as there is an obligation on the State to ensure that evictions are conducted humanely.\(^\text{187}\)

Enforcement of rights to housing is difficult for individuals and for government. The South African executive has not been vigilant to prevent illegal occupation of land and buildings. Neither has its housing programme kept pace with the demand.\(^\text{188}\)

Lilian Chenwi observed that the South African experience shows that having a myriad of progressive laws and policies on housing rights and evictions is not sufficient, as their actual enforcement is the most vital facet.\(^\text{189}\)

The proliferation of informal settlements is a highly visible sign in South Africa of the shortage of housing. Provincial legislation – the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 2007 – was enacted to address the elimination and upgrading of slums.\(^\text{190}\)

Abahlali baseMjondolo Movement of South Africa, an organisation representing thousands of shackdwellers, challenged the constitutionality of section 16

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\(^{186}\) L Chenwi ‘Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions’ (2008) 8 Human Rights Law Review 105 at 117.

\(^{187}\) Chenwi (n 186 above) 128.

\(^{188}\) The virtually uncontrolled influx of refugees from neighbouring countries has exacerbated the problem, as has the attraction of comparatively rich South Africa for foreign drug peddlers.

\(^{189}\) n 186 above, 137. She continued, ‘[t]hough courts do have an important role in ensuring adequate enforcement of the rights to adequate housing and to protection from forced evictions, their impact is limited if their decisions are not enforced adequately.’ as above.

\(^{190}\) If successful, it was expected to become a blueprint for similar legislation in other provinces: Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal [2009] ZACC 31 [16]. [126].
of the Slums Act, which would oblige the owner of property illegally occupied to take eviction proceedings against the occupiers and, in default, would compel the municipality to do so. The plaintiffs failed in the High Court, so the matter came before the Constitutional Court, where the judges unanimously agreed on the competence of the provincial legislature to pass the legislation, as it related to housing – a concurrent national and provincial legislative competence. The majority held that section 16 breached the right of access to housing in Section 26(2) of the Constitution and also contravened the rule of law. The Court found that the legislation obliged the institution of eviction proceedings even if the owner or the municipality thought it would not be justified. Moseneke DCJ for the majority considered that this elimination of discretion eroded and considerably undermined the protections against the arbitrary institution of eviction proceedings.

This decision reinforced the need to treat illegal occupiers humanely and to engage with them to try to find a solution before resorting to the courts for enforcement. The timeframe for complying with the obligation would be determined by notice issued by the provincial government, which had not yet acted to bring the section into operation: n 190 above, [49].

Yacoob J, who dissented on the housing rights aspect, proposed an interpretation of section 16 in conformity with the Constitution, which effectively involved reading in six safeguards: n 190 above, [80]. This was a step too far for Moseneke DCJ, as it would have the effect of rewriting section 16 in a manner that was not apparent on its face and that was in conflict with the coercive design of section 16 to eliminate slums and informal settlements: n 190 above, [115]. He expanded on the implications of the legal uncertainty that would arise for vulnerable people and others concerned with implementing the legislation: n 190 above, [124].
an eviction order. Chenwi has assessed the effect of the Constitutional Court’s ruling as requiring the government to focus more on providing adequate housing rather than on eliminating slums.195

6.7 Healthcare, water and social security

In Soobramoney, the first case to be brought seeking socio-economic rights, the Constitutional Court was reluctant to interfere with the executive’s role in deciding priorities in healthcare and in fixing budgets.196 Mr Soobramoney was an unemployed diabetic who suffered from heart disease and chronic irreversible renal failure.197 He had been availing himself of private medical treatment, but was no longer able to afford it.198 He asked to be admitted to the dialysis program of a state hospital, but did not qualify for admission.199 His claim to receive renal dialysis treatment was based on the provision in Section 27(3) of the Constitution that no-one may be refused emergency medical treatment and on the right to life in Section 11.200


197 n 196 above, [1].

198 n 196 above, [5].

199 The hospital had a shortage of dialysis machines and trained nursing staff: n 196 above, [2]. Because of limited resources it had adopted a policy of admitting only those patients who could be cured within a short period and those with chronic renal failure who were eligible for a kidney transplant.

200 n 196 above, [7].
The Court held that the right not to be refused emergency medical treatment meant that a person who suffers a sudden catastrophe which calls for immediate medical attention should not be denied ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment, but Mr Soobramoney did not fall into this category. Chaskalson P considered the Indian case of *Paschim*, where the Supreme Court in the context of a welfare state had found that a government hospital had a duty to provide timely medical assistance to a person needing life-saving treatment. However, he distinguished it because there was a different context in India where the treatment was available but denied.

Having rejected consideration of Mr Soobramoney’s claim under Section 27(3), the Court turned to Section 27(1) and (2) to determine his right to have access to healthcare services provided by the state within its available resources. Craig Scott and Philip Alston have criticised the Constitutional Court for not considering *Paschim* in greater depth, as far-reaching positive duties were imposed on the state. They considered that had Section 27(3) been interpreted in light of the right to life and the general duties to fulfil rights in Section 7 so as to generate a positive claim on resources, it would have mandated a heightened constitutional priority for emergency medical services.

201 n 196 above, [20] - [21]. The ‘able and available’ limitation read into Section 27(3) followed on from the Court’s stating without analysis that the subsection creates a negative right only: Scott & Alston (n 196 above) 236.


203 n 196 above, [18]. Chaskalson P highlighted the context of historical disadvantage in South Africa, where there were great disparities in wealth as a legacy of apartheid, necessitating the transformation of society by improving living conditions – including access to adequate health services – in order to achieve the constitutional aim of a society where there would be ‘human dignity, freedom and equality’: n 196 above, [8]. See J Small & E Grant ‘Dignity, discrimination, and context: New directions in South African and Canadian human rights law’ (2005) 6(2) Human Rights Review 25 at 43 - 44. On the need to overcome the social problems that resulted from apartheid by establishing a society based on social justice, see *Modderklip* (n 29 above) [36].

204 n 196 above, [20]. Chaskalson P pointed out that the right to medical treatment was a discrete right in the South African Constitution and, as it was not dependent on being inferred from the right to life, it could not mean that the treatment of terminal illnesses had to be prioritised over other forms of medical care such as preventative healthcare: n 196 above, [19]. The right to emergency treatment in South Africa had to be interpreted in the context of the availability of health services generally. Craig Scott and Philip Alston have criticised the Constitutional Court for not considering *Paschim* in greater depth, as far-reaching positive duties were imposed on the state: n 196 above, 245 - 247. They considered that had Section 27(3) been interpreted in light of the right to life and the general duties to fulfil rights in Section 7 so as to generate a positive claim on resources, it would have mandated a heightened constitutional priority for emergency medical services: n 196 above, 245. See also Sripati (n 202 above) 110 - 111.
resources. It deferred to the executive, as its view was that responsibility for making the difficult decisions of fixing the health budget and deciding upon the priorities that needed to be met lay with political organs and the medical authorities; it would be slow to interfere, if the decisions were rational and taken in good faith. Sachs J remarked on our interdependence in society, which required a sharing of resources rather than priority being given to the rights of the autonomous individual. The threshold at which one may avail oneself of a right is fixed by adjudicating between equal claims and the balancing process is not to be regarded as limiting the right of the individual failing to qualify for the service. The Court accepted the reality that socio-economic rights can only be provided by the State in accordance with the resources available. It was hampered in taking action because priority-setting was the role of the executive. The importance of having a healthcare policy and implementing it was stressed. Here there was a plan which ranked entitlements to medical treatment.

205 n 196 above, [22]. The Court did not analyse separately the nature of his rights under Section 27(1), but focused on the state’s management of scarce resources to achieve the progressive realisation of the entitlement of everyone to have access to healthcare in Section 27(2).


207 n 196 above, [54]. Woods construed Sachs J’s remarks as proposing a new framework for collective rights, which substituted interdependence for autonomy as its bedrock principle: n 15 above, 782. See also Bilchitz (n 21 above) 22.

208 Contrast Young’s deduction that the decision in Soobramoney constituted a state limitation of the right that was deemed a justifiable infringement: n 10 above, 169.

209 Scott and Alston urged the courts not to defer unduly to the other branches of government when adjudicating on the socio-economic rights in the Constitution and to take the active role envisaged for them by promoting the values of dignity, freedom and equality to transform the living conditions of the poor: n 196 above, 268. Dikgang Moseneke pointed out that the judiciary, being vested with substantive powers of review over the exercise of public or private power, was commanded by the Constitution to observe its transformative mission; his assessment was that – but for a few decisions – the Constitutional Court had crafted an impressive body of progressive constitutional jurisprudence true to the overarching constitutional enterprise of transforming society: D Moseneke ‘Transformative adjudication’ (2002) 18 South African Journal on Human Rights 309 at 319.

210 While Mr Soobramoney contended that the refusal by the renal unit to give him the dialysis treatment he required to stay alive was unreasonable, it was not suggested that the hospital guidelines were unreasonable or that they were not applied fairly and rationally when the hospital decided that he did not qualify for dialysis: n 196 above, [25], [44]. Madala J pointed out that constitutional rights are not absolute and may be limited by scarce resources, stating, ‘the Constitution accepts that it cannot solve all of our society’s woes overnight, but must go on trying to resolve these problems.’ n 196 above, [43].
Daniel Erskine described the Court’s purposive rational decision approach to the interpretation of conflicting rights in this case as pragmatic, acutely focusing on the exercise of rights within the reality presented, and concluded that the Court’s interpretation allowed full effect to be given to Mr Soobramoney’s rights while honouring them in relation to the overall constitutional text. Mark Kende commented that the ruling illustrated that a court can take socio-economic rights seriously and yet still respect separation of powers concerns and legislative competence. The Court supported the utilitarian choice by the political organs and the medical authorities; most scholars accept that Mr Soobramoney’s interest in prolonging his life had to be sacrificed in the interest of the general welfare.

However, Woods criticised the Court’s adoption of a utilitarian perspective as ‘extremely problematic’ reasoning in a rights context, since the point of giving policy choices the priority status of fundamental rights is to avoid the utilitarianism inherent in majority decision making. She has interpreted the decision as indicating that the Court would not consider the state’s resources as a whole, but in effect limited the state’s duty to whatever resources it had already allocated to healthcare in general, and dialysis in particular. Brian Ray pointed out that the Court established a restrained approach to interpreting the right to healthcare in Soobramoney, as it deferred to the government’s justification for the resource allocation policy by applying a basic rationality standard. But the Court nonetheless signalled a willingness to look behind government justifications for particular socio-economic programmes where appropriate and required that the justifications also be taken in good faith, suggesting that the Court will not only test the government’s policy decisions against an objective rationality standard but will consider subjective evidence that the government’s objectively reasonable actions are designed to evade its constitutional obligations.

Writing extrajudicially, Arthur Chaskalson indicated that where the lack of human or financial resources is put in issue by the state, more than a ‘bald

211 n 138 above, 610 - 611.
212 n 13 above, 147.
213 Lehmann (n 9 above) 169. See also Brand (n 2 above) 215, 223, 227.
214 n 15 above, 782. See also Liebenberg (n 155 above) 5.
215 n 15 above, 780.
216 n 22 above, 157 - 158.
217 Ray (n 22 above) above, 158.
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assertion’ of resource constraints will be required.\textsuperscript{218} He cited \textit{Soobramoney} as an example of where the state had to give details of the character of the constraints to be assessed on the reasonableness standard, thereby conforming to the principles of accountability and effectiveness.\textsuperscript{219} The Court concluded that ‘available resources’ has both a wide and narrow application; the wide application of the term resources means the national resources, including donor aid money, and the narrow application of resources refers to the executive’s budgeted resources for a particular section/department; while the Court took the view that budget allocation should be primarily left to the executive, the Court, however, could examine the use of resources.\textsuperscript{220}

In later cases where there was more scope for criticising the authorities’ guidelines and their implementation, the Constitutional Court developed the reasonableness criterion – the seeds of which had been sown in \textit{Soobramoney} – and showed that it was prepared to exercise its constitutional role in upholding individual rights against the state. As a consequence of the decision, Mr Soobramoney had to face death without further medical intervention, but it is difficult to put forward a cogent argument from a legal perspective that the Court’s finding should have been different in circumstances where there were reasonable guidelines in place to deal with limited resources and where the guidelines had been applied rationally.\textsuperscript{221} I disagree with Wesson’s view that the approach in \textit{Soobramoney} seems to have been largely abandoned and that instead \textit{Grootboom} laid the foundation for the adjudication of socio-economic rights.\textsuperscript{222} He does not support his allegation with any evidence or arguments.\textsuperscript{223}

Access to healthcare under Section 27 was in issue again in the \textit{TAC} case, which arose because the government restricted dissemination of an anti-
HIV drug for pregnant mothers.\textsuperscript{224} The Treatment Action Campaign (TAC) wanted the restrictions lifted. Not only did the Court make a declaratory order that Section 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child-transmission of HIV, but it went further and made a mandatory order directing the government without delay to make the drug available and to take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector.\textsuperscript{225}

It reiterated the attitude it had taken to the minimum core in \textit{Grootboom}, ruling out a self-standing right ‘entitling everyone to demand that the minimum core be provided to them’, although the minimum core

\textsuperscript{224} n 17 above. See Brand (n 2 above) 220, 223 - 224, 228, 229; Chaskalson (n 14 above) 605 - 607; Choma (n 74 above) 46 - 48; Davis (n 41 above) 694 - 697; Erskine (n 138 above) 632 - 634; Forman (n 196 above) 715, 717 - 718, 719; Kende (n 13 above) 147 - 150; Kende (n 136 above) 251 - 254; JC Mubangizi & BK Twinomugisha ‘The right to health care in the specific context of access to HIV/AIDS medicines: What can South Africa and Uganda learn from each other?’ (2010) 10 \textit{African Human Rights Law Journal} 105 at 115 - 116, 118 - 119, 131 - 132; Pieterse (n 11 above) 894 - 895; Pillay (n 171 above) 604 - 605, 607; Woods (n 15 above) 786 - 790.

\textsuperscript{225} n 17 above, [135]. The Court recognised the government’s role in developing policies when it acknowledged that the mandatory orders it made did not preclude the government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods became available to it for the prevention of mother-to-child-transmission of HIV, as above. The Constitutional Court did not go as far as the High Court, which had granted a structural interdict requiring the State to submit its revised policy to the court to enable it to satisfy itself that it was consistent with the Constitution; it felt that was not necessary since the government had always respected and executed orders of the Constitutional Court and there was no reason to believe that it would not do so: n 17 above, [129].

In 2006 the High Court made a structural interdict (an order with a supervisory component) compelling the provision of anti-retro viral treatment to prisoners with HIV/AIDS: \textit{EN v Government of RSA} [2006] AHRLR 326 (SAHC 2006) [32]-[33]; it subsequently ordered that it be implemented forthwith: \textit{EN v Government of RSA} 28 August 2006 (High Court, Durban and Coast Local Division). See K Roach & G Budlender ‘Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?’ (2005) 122 \textit{South African Law Journal} 325 at 328 - 335.

Ray considered that the most significant aspect of the decision in \textit{TAC} was the specific terms of the order, when the Court – in a marked departure from previous cases – required the government to take specific action to correct the constitutional defect, but later in the same order gave the government express permission to ignore that directive and determine for itself what specific action Section 27 required: n 22 above, 164.

Eric Christiansen pointed out that the order in \textit{TAC} had a wide impact, as it not only resulted in a significant expansion of testing and counselling related to HIV
might be relevant in certain circumstances to the test of reasonableness under Section 27(2). 226

TAC had argued that *Grootboom* did not go far enough, that the Bill of Rights was based on the notion of individual rights and therefore the courts should assist an individual whose circumstances fell short of achieving the minimum core of entitlements consistent with the maintenance of human dignity. 227 The Court rejected that argument and decided that the minimum core obligation could be satisfied through broad government programmes aimed at meeting minimum needs. 228 While Rosalind Dixon confirmed that the Court granted a stronger remedy than it had in *Grootboom* by making a mandatory order, she pointed out the weakness in the Court’s decision by prescribing a purely declaratory remedy – without a deadline – with regard to the government’s general obligation to develop and implement a plan for the full rollout of the drug. 229 There has been criticism of *TAC* for not embracing the minimum core. 230 David Bilchitz suggested that the Order in *TAC*

transmission, but also identified minimum standards that presumably apply in many related healthcare circumstances; furthermore, it highlighted the additional risk that the judiciary may require greater action than might have been taken by the executive or legislature had governmental discretion been exercised in an adequate timely manner: n 196 above, 401. See also Christiansen (n 15 above) 590; Langwallner (n 206 above) 271.

226 n 17 above, [34].
227 n 17 above, [28]; Sachs (n 11 above) 181.
228 Sachs (n 11 above) 182. Sachs, writing extrajudicially, considered that the Court’s decision made the best use of scarce resources to realise socio-economic rights and that to concede to *TAC*’s submission would have been to prioritise those who pursued their rights vigorously with the best lawyers: n 11 above, 181.

If social rights are understood as collective rights, individual remedies are not necessarily the most efficacious response; *TAC* illustrates that a court order enforcing a constitutional legislative command ultimately will benefit specific individuals: Woods (n 15 above) 790. As Christiansen concluded, even a holding affecting only a single person can force the government to rethink and reformulate its response to a diverse set of social welfare needs: n 196 above, 401, citing *Njongi* (n 3 above).

229 R Dixon ‘Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited’ (2007) 5 *International Journal of Constitutional Law* 391 at 398. Wesson considered that the crucial factor that separated *TAC* from *Grootboom* was not greater assertiveness on the part of the Court, but the fact that extending an entitlement to a drug – where medically indicated and where, if necessary, testing and counselling were available – had only limited cost-implications and did not involve issues requiring great expertise: n 129 above, 296. Lehmann also identified the negligible cost implications as a distinguishing feature in *TAC*: n 9 above, 175. Another distinction was that the interests of the individual HIV-positive pregnant women and their children were commensurate with the general public welfare that they receive treatment: n 9 above, 176.

230 Wesson (n 129 above) fn 6, citing Bilchitz (n 21 above).
could have been improved by the Court retaining supervisory jurisdiction, the absence of which shows undue deference to the other branches of government and an unwillingness to retain responsibility for the effectiveness of its orders.\footnote{231} Where a person's survival is at stake, the Court should adopt a robust approach to protect the most vulnerable.\footnote{232} T\textit{AC} was not revolutionary and did not copper-fasten the right to a minimum core in all circumstances, but the Court found a more practical remedy that proved more effective than that in \textit{Grootboom}.\footnote{233}

The issue of immigrants' entitlements to welfare was raised in \textit{Khosa}.\footnote{234} Destitute Mozambicans with permanent residency in South Africa had been refused welfare assistance on the basis that they were not South African citizens.\footnote{235} The Court unanimously held that the provisions relating to children were unconstitutional, as they established grants for children whose parents were South African citizens but failed to provide for children who might be South African citizens and whose parents were not.\footnote{236} The Court was divided on the rights of adult immigrants. The majority held that the Constitution vests the right to social security in 'everyone' and that permanent residents are bearers of this right, so their exclusion from the welfare scheme was not a reasonable way to achieve the realisation of the right to social

\footnote{231}{\textit{n 21 above, 26.}}

\footnote{232}{\textit{As above. Bilchitz has proposed that there be progressive realisation of the recognition of animals as having worth in their own right, which would most likely mean that meat-eating would only be permissible where necessary for a human being's survival, as the animals' interest in life and to be free from suffering would outweigh the right of most humans to kill them for food: D Bilchitz 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' (2009) 25 \textit{South African Journal on Human Rights} 38 at 69.}}

\footnote{233}{\textit{Iain Currie and Johan de Waal comment that the Constitutional Court's treatment of the content of the right to healthcare is minimal, because its general approach to the positive dimensions of socio-economic rights is to avoid giving them content and to adjudicate instead of the reasonableness of the implementation measures: I Currie & J de Waal \textit{The Bill of Rights handbook} (2005) 591.}}


\footnote{235}{\textit{n 234 above, [2]-[3].}}

\footnote{236}{\textit{n 234 above, [78], [136].}}
security in Section 27.237 The legislation also infringed the right to equality, as it was discriminatory and unfair, and not justified under the limitation clause.238 The Court read in the words ‘or permanent resident’ after the word ‘citizen’ in each of the challenged provisions in the relevant legislation.239 Mokgoro J for the majority saw that the basic necessities were essential in a country where human dignity was valued.240 She considered that the lack of funds to survive without seeking help from the community was likely to have a ‘serious impact on the dignity’ of the permanent residents who were ‘cast in the role of supplicants.’241 Notwithstanding their disagreement on the outcome, dignity was accepted by all the judges as a central con-

237 n 234 above, [85]. Context was all important when considering reasonableness and it was relevant to consider the purpose served by social security, the impact of the exclusion from it, the relevance of the citizenship requirement to that purpose and the impact on other intersecting rights – in this case equality rights: n 234 above, [49]. Wesson thought that Khosa sharpened the reasonableness standard to some extent and that the Court was certainly more willing than in Groothoom to impose far-reaching financial obligations on the state where it failed to meet the reasonableness standard: n 129 above, 297. Unlike in Soobramoney and Groothoom where the Court specifically noted that the government policies were developed in good faith, the majority in Khosa found that the policy judgments in this case were the result of a flawed process as evidenced by the government’s conduct throughout the litigation, when it failed to meet deadlines set by the Court and incurred a punitive wasted costs order, which the Court felt was warranted because of its wilful default in both the High and Constitutional Courts and its failure to comply with Court directions: Ray (n 22 above) 165 - 166.

238 n 234 above, [80]. The fact that the applicants were part of a vulnerable group in society was relevant and rendered them worthy of constitutional protection in circumstances where intentional, statutorily sanctioned unequal treatment stigmatised them in the community: n 234 above, [74]. A central constitutional principle is that the interests of the most vulnerable must be protected: Bilchitz (n 232 above) 39. Bilchitz gave Khosa as an example of a case where, in relation to equality, the vulnerability of a particular group was an important factor in determining whether or not unfair discrimination was present: n 232 above, fn 5, citing n 234 above, [71]-[74].

239 n 234 above, [89]. The minority thought that the exclusions were a reasonable limitation of the right of access to social security, and accepted the State’s argument that there were insufficient resources to provide for everyone within the country’s borders and it was entitled to prioritise its citizens: n 234 above, [120], [134].

240 n 234 above, [52] (footnote omitted):
The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.

241 n 234 above, [76]. Liebenberg pointed out that Mokgoro J subverted the normal discourse around social assistance creating dependency on the state by highlighting its role in relieving the burden on poor communities and fostering the dignity of permanent residents; she used this to illustrate how the courts can contribute to transformation
Dignity was a criterion to be applied in assessing other rights and in coming to a decision on whether a limitation on a right was justifiable. The constitutional guarantee of social security was given concrete effect even though resources were limited. Perhaps this is because the extension of welfare was achievable and affordable – unlike the granting of housing rights.

*Mazibuko* was the first case to raise the right of access to water. Residents in Phiri, an area in Soweto, challenged arrangements for the supply of water because they considered that the free basic water allowance was insufficient and that the introduction of pre-paid meters was unlawful and discriminatory. They relied, *inter alia*, on the right of access to sufficient water in Section 27(1)(b), which led to consideration of the extent of the state’s duty under Section 27(2) to progressively realise that right within available resources. The selection of Phiri for installation of pre-paid meters founded their claim of violation of the right to equality in Section 9(1) by differentiating without rational connection to a legitimate government purpose. The absence in Phiri of the choice of using credit meters, which were installed in households in the affluent white suburbs, was the basis of their allegation of unfair racial discrimination contrary to Section 9(3). The High Court and the Supreme

by their rhetorical role in social rights judgments, which is important even where the courts feel constrained by institutional politics from making orders that will have an extensive impact on existing budgetary allocations: n 155 above, 7.

242 n 234 above, [52], [114].

243 Davis considers that the Court took the bold decision to extend social benefits to permanent residents by focusing on the concepts of dignity and equality rather than on the express wording of Section 27 – its approach apparently unfettered by the reasonableness standard that dominated the earlier cases: n 41 above, 703.

244 The majority imposed a higher standard on the South African State for the granting of welfare than on more affluent countries like the US, Canada and the UK, where citizenship was a qualifying criterion: n 234 above, [54], [124]. Davis concluded that *Khosa and Modderklip* (n 29 above) moved beyond the administrative law approach to socioeconomic rights adopted in the early cases: n 41 above, 704. On *Modderklip*, see Brand (n 2 above) 214; Davis (n 41 above) 704, 708; Kende (n 136 above) 258 - 259; Liebenberg (n 21 above) 92 - 93, 100; Ray (n 22 above) 188 - 191.


246 For reviews and assessments of the High Court decision, see Choma (n 74 above) 51 - 53; M Langford & A Russell ‘“Global precedent” or “reasonable no more”? The Mazibuko case’ (2008) 19 *Journal of Water Law* 73; SC McCaffrey & KJ Neville ‘Small capacity and big responsibilities: Financial and legal implications of a human
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Court of Appeal\textsuperscript{247} held in their favour against the City of Johannesburg, but the Constitutional Court unanimously overturned the lower courts’ decisions and found that the state’s measures were reasonable and not in breach of equality rights.

O’Regan J delivered the Court’s judgment and analysed the considerable amount of evidence presented in great detail.\textsuperscript{248} Consistently with its stance in \textit{Grootboom} and \textit{TAC}, the Court found that Section 27(1) did not grant a right to everyone on demand to sufficient water, but had to be read with the positive duty on the state in Section 27(2) to take reasonable measures within available resources to implement progressively the right of access to water.\textsuperscript{249} O’Regan J deferred to the government’s better institutional capacity to decide on the level of service to provide based on the resources available.\textsuperscript{250}

One important limitation of \textit{Grootboom} is that usually there is no obligation on the state to go beyond the national targeted minimum standard for those already receiving it until all have achieved the minimum.\textsuperscript{251} On the equality aspect, the Constitutional Court found that the installation of pre-paid meters in Soweto was because the revenue generated from the water service there was much less proportionate to that received from other areas and, as the unaccounted for water was greatest there, the introduction of pre-

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\textsuperscript{247} See Williams (n 136 above) 45 - 46.

\textsuperscript{248} The state was obliged to justify its water policy in Johannesburg meticulously. Every aspect was examined, such as the purpose of the measures, which was to address the serious problems of unaccounted for water loss and the high level of non-payment of water charges in Soweto. The City of Johannesburg accepted its constitutional obligation to progressively provide sufficient water to all. It had considered the advantages and disadvantages of the various options available before selecting the solution to be implemented in Phiri as a pilot project before being rolled out to other areas in Soweto. The policy catered for those who could not afford to pay by allowing them to come forward to be means-tested and registered as indigent; those on the register were obliged to accept pre-paid meters.

\textsuperscript{249} n 245 above, [50].

\textsuperscript{250} She felt it desirable that the democratically elected and accountable organ of state should have that role: n 245 above, [61].

\textsuperscript{251} n 245 above, [76] (O’Regan J) (footnote omitted): In most circumstances it will be reasonable for municipalities and provinces to strive first to achieve the prescribed (and, in the absence of a challenge, presumptively reasonable) minimum standard, before being required to go beyond that minimum standard for those to whom the minimum is already being supplied. This is consistent with this Court’s jurisprudence in \textit{Grootboom} where the Court held that a government policy may not ignore the needs of the most vulnerable.
paid meters was not irrational. Therefore the differentiation between categories of people was rationally connected to a legitimate government purpose and passed muster under Section 9(1).

O’Regan J used the Harskens253 criteria to determine whether the measures were unfair discrimination. There was no racial discrimination, since other poor black areas did not have pre-paid meters.254 According to O’Regan J’s analysis, in any event, the difference between the pre-paid and credit meters was not disadvantageous to the residents in Phiri.255 The fact that there was no choice to have a credit meter in Phiri was not discriminatory, because those in the white suburbs had effectively little option to have a pre-paid meter.256 She pointed out the need for differential measures to redress poverty caused by past inequality, ‘correcting the deep inequality which characterises our society, as a consequence of apartheid policies, will often require differential treatment.’258

Unlike the lower courts, the Constitutional Court, in line with previous decisions, refused to specify a minimum core or to give content to the concept of ‘sufficient water’.259 In answer to the residents’ submission that it was pointless to litigate socio-economic rights if the courts were not going to specify the content of the rights, O’Regan J – conscious of the limitations on the judicial system to assess these matters – pointed out that the court’s role was to hold the government to account for the reasonableness of its measures.260 If the government failed to act at all, the courts would oblige it

252 n 245 above, [145]-[147].
253 Harskens v Lane 1998 1 SA 300 (CC).
254 n 245 above, [151].
255 n 245 above, [149].
256 n 245 above, [154]. Although they formed a vulnerable group, the purpose for which the pre-paid meters were installed was ‘a laudable, indeed necessary, government objective, clearly tailored to its purpose’: as above.
257 n 245 above, [155].
258 n 245 above, [156]. Where there is a wide wealth gap in society, the concentration of economic power at the upper end of the income distribution has tremendous effects on the distribution of power and benefits the wealthy: S Sreedhar & C Delmas ‘State legitimacy and political obligation in Justice for hedgehogs: The radical potential of Dworkinian dignity’ (2010) 90 Boston University Law Review 737 at 756.
259 n 245 above, [56]. What was a reasonable quantity amounting to sufficient water would vary depending on the contextual issues such as the geographical and temporal circumstances – the state’s obligation, after all, was to progressively implement the right of access to water within available resources, both of which can change over time.
260 n 245 above, [161].
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...to do so. It if had acted, it would assess its policy for reasonableness. A policy could be unreasonable, as in Grootboom, because it omitted to provide for those in desperate need, or, as in TAC, because its policy contained unreasonable limitations or exclusions. There was also an obligation on the state to keep its policy under review, and this the City had done in Mazibuko by making changes following monitoring, research and analysing surveys carried out to see how the policy was being implemented. The constitutional obligation on the government did not require it ‘to be held to an impossible standard of perfection’ and the Constitution did not require courts ‘to take over the tasks that in a democracy should properly be reserved for the democratic arms of government.’ Rather, through the medium of the courts, the government could ‘be called upon to account to citizens for...

261 n 245 above, [67].
262 As above.
263 As above. Jenny Wakely described O’Regan J’s statement that a measure would be unreasonable only if it made no provision for those most desperately in need as an ‘extremely low standard’ for determining reasonableness (arguably no higher than the ‘rationality’ requirement in Soobramoney) and submitted that a higher standard would be constitutionally permissible without infringing on the separation of powers or on the State’s democratic legitimacy particularly in light of the express protection for socio-economic rights in the Constitution: J Wakely ‘Social and economic rights – A retreat by the South African Constitutional Court?’ (2010) 28 Irish Law Times 153 at 155. However, Wakely does not seem to have taken into account that O’Regan J went on to confirm that limitations in the policy would also be assessed for reasonableness. The limitations to be examined would presumably include those applicable to the most needy.
264 n 245 above, [67].
265 As above.
266 Some changes had been made since the litigation started, which indicated that the City was pro-active. O’Regan J commented that if the litigation has prompted the changes, this was beneficial: n 245 above, [163]. It justified the considerable effort and cost of litigating. She outlined what litigation adds to a participative democracy, n 245 above, [160]:

The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy. A participative democracy is a partnership between the people as a whole and government, and is distinct from a majoritarian, merely statistical conception of democracy, as it fuses democracy and state legitimacy: Sreedhar & Delmas (n 258 above) 749. In this passage the Constitutional Court re-emphasised that socio-economic rights play primarily a political role: Ray (n 135 above) 371.

267 n 245 above, [161].
its decisions’ in compliance with the constitutional principles requiring government to be responsive, accountable and open.268

Some elements of O’Regan’s reasoning are questionable. At times she strained the meaning of words and the text she was interpreting.269 However, she did keep pressure on the state by requiring a continual review of policies and making it clear that the courts would insist that this be done and be shown to be done. She enhanced understanding of the role of the courts in conflicts over socio-economic demands by illustrating how litigation arising is part of the participative democratic system of holding government accountable. Her judgment showed considerable deference to the other organs of state.270 It must be disheartening for some to find that there can be no hope of compelling the state to improve their conditions until all have achieved the same standard they have already reached.

268 As above. Davis pointed out that socio-economic jurisprudence is one important means to achieve the implementation of the critical principles of transparency, accountability and participation: n 41 above, 710. On the interests of all in transparency and responsiveness in a constitutional democracy, where ‘dialogue and the right to have a voice on public affairs is constitutive of dignity’, see Sachs J in Minister of Health v New Clicks South Africa (Pty) Ltd 2006 2 SA 311 (CC) [627]. Jonathan Lewis has criticised the latter case: J Lewis ‘The Constitutional Court of South Africa’ (2009) 125 Law Quarterly Review 440 at 444, 455 - 456, 465.

269 Eg, when she downplayed the significance of TAC, n 245 above, [64]. See P de Vos ‘Water is life (but life is cheap)’ (13 October 2009) http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/ (accessed 18 March 2010).

270 Wakely described the Court’s approach as ‘conservative’ and found its decision surprising as it represented ‘a significantly deferential attitude’ in comparison with some of its earlier judgments: n 263 above, 154, 155.
Chapter 7

Irish case-law on dignity

7.1 Historical development

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

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1 T John O'Dowd identified four themes in the use of human dignity by Irish judges, ie, first, it is a, if not the, fundamental constitutional value; second, it implies that each human being is entitled to be treated as being of equal worth and value in and for themselves; third, it relates to a conception of the essential attributes of human personality, which are typically realised through the development of natural human capacities; fourth, it is the basis for specific rights or entitlements and helps to determine their weight and content: TJ O'Dowd 'Dignity and personhood in Irish constitutional law' in G Quinn et al (eds) Justice and legal theory in Ireland (1995) 165 - 166.

2 See State (Burke) v Lennon [1940] IR 136 at 143 (HC, Gavan Duffy J), 178 (SC, Geoghegan J); Buckley (Sinn Féin) v AG [1950] IR 67 (SC) 80; Re Philip Clarke [1950] IR 235 (SC) 246, 248.

3 The other aims are to achieve national unity and establish harmonious international relationships.

In contrast to the English tradition, Continental European culture and law has placed a high value on dignity. In Europe dignity was associated with republicanism, 'dignities' in the sense of aristocratic privileges being extended to all citizens as a result of the French Revolution. Based on the philosophy of Jean-Jacques Rousseau, it had a communitarian emphasis and was linked with fraternity rather than with liberty, which is more highly esteemed in North America. The movement for social reform during the nineteenth century invoked the concept of dignity. From the middle of that century the demand for humane conditions of existence became a prominent socialist slogan. The 'dignity of labour' supported calls for egalitarianism and the provision of social welfare by the state. The French Catholic philosopher, Jacques Maritain, was influential in bringing the concept of human dignity into practical international politics after World War II in reaction to the excesses of Nazism. He viewed human rights as essential for promotion of the common good rather than as espousing radical ethical individualism. Eschewing communism as well as liberal individualism, Maritain promoted a personalistic type of society, whose advocates he described as seeing the mark of human dignity in the power to make the 'goods of nature serve the common conquest of intrinsically human, moral, and spiritual goods and of man's freedom of autonomy.'

In Ireland dignity as a value has informed other constitutional rights. In his seminal judgment in Quinn's Supermarket v AG in 1971, Walsh J

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5 The tension between the two traditions manifested itself in Quebec, where the Francophones felt that the cultural dignity of the French was insufficiently respected by much of Anglo Canada: CA MacKinnon Are women human? And other international dialogues (2006) 77.
7 As above. See also MA Glendon A world made new: Eleanor Roosevelt and the Universal Declaration of Human Rights (2001) xvii.
8 McCrudden (n 6 above) 660.
10 McCrudden (n 6 above) 661.
12 McCrudden (n 6 above) 662.
pronounced the equality guarantee in Article 40.1 as relating to the dignity of human beings.14

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

Kenny J demonstrated an extraordinarily restrictive view of equality in Murtagh Properties v Cleary, where he completely emasculated Article 40.1 in his consideration of the objection by the barmen's union to the employment of women in pubs.15 The guarantee in relation to personal rights under Article 40.3 has proven more useful in practice than the equality guarantee in Article 40.1.16

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15 [1972] IR 330 (HC). See Doyle 'The human personality doctrine in constitutional equality law' (n 14 above) 104; Doyle Constitutional equality law (n 14 above) 128, 160; Doyle Constitutional law: Text, cases and materials (n 14 above) [3-35], [5-34].

16 G Hogan & G Whyte JM Kelly: The Irish Constitution (2004) [7.2.05]. Some members of the Supreme Court relied on Article 40.1 in finding that the exclusion of non-ratepayers and women from juries was unconstitutional, while others considered that there was a breach of Article 38.5 because juries were not representative: de Buirne v AG [1976] IR 38 (SC). Article 40.1 was one of the constitutional provisions breached in: King v AG [1981] IR 233 (HC, SC) (the offence of loitering with intent); CM v TM (No 2) [1990] 2 IR 52 (HC) (wife's dependent domicile); W v W [1993] 2 IR 476 (SC) (approved of CM v TM (No 2); McKinley v Minister for Defence [1992] 2 IR 333 (SC) (extension to wife of husband's common law right to sue for loss of consortium and servitium). It was also breached in: O’G v AG [1985] ILRM 61 (HC) (ineligibility of a childless widower to adopt a child already in his custody); McMahon v Leahy [1984] IR 525 (SC) (unequal treatment in extradition of an escaper); SM v Ireland
O’Hanlon J made extensive references to dignity and equality in Catholic tracts, the primary school curriculum and UN texts, when he made a declaration in the High Court in 1993 in *O’Donoghue v Minister for Health* that the State had failed to provide for free primary education of a profoundly handicapped boy contrary to Article 42.17

Because of excessive reverence for the separation of powers doctrine and a fear of intruding on the territory of the legislature and executive, the Irish courts have failed to deliver socio-economic rights backed by effective remedies. There were some exceptional cases where mandatory orders were made in the 1990s in the High Court.19 In 1988 Costello J in *O’Reilly v* (No 2) [2007] IEHC 280, [2007] 4 IR 369 (difference in maximum sentence for indecent assault based on gender of victim). Article 40.1 ‘requires that people who appear before the Courts in essentially the same circumstances should be dealt with in essentially the same manner’: *State (Keegan) v Stardust Victims’ Compensation Tribunal* [1986] IR 642 (SC) 658; *Dunphy v DPP* [2005] IESC 75, [2005] 3 IR 585 [30].

There was no breach of Article 40.1 in: *State (Keegan) v Stardust Victims’ Compensation Tribunal* [1986] IR 642 (SC) 658; *Dunphy v DPP* [2005] IESC 75, [2005] 3 IR 585 [30].

There was no breach of Article 40.1 in: *State (Keegan) v Stardust Victims’ Compensation Tribunal* [1986] IR 642 (SC) 658; *Dunphy v DPP* [2005] IESC 75, [2005] 3 IR 585 [30].

*Heaney v Minister for Finance* [1986] ILRM 164 (HC) (alleged inequality in the prize bond scheme); *Kerry Co-Operative Creameries Ltd v An Bord Bainne Co-Operative Ltd* [1990] ILRM 664 (HC) (allocation of shares based on a member’s current trading); *Browne v AG* [1991] 2 IR 58 (HC) (taxation of company cars also used privately by sales representatives); *People (DPP) v Quilligan (No 3)* [1993] 2 IR 305 (SC) (no invidious discrimination in treatment of those arrested under Offences against the State Act 1939 and those arrested on other grounds); *Bloomer v Incorporated Law Society of Ireland* [1995] 3 IR 14 (HC) (value of an academic qualification); *McMenamin v Ireland* [1996] 3 IR 100 (HC, SC) (judges’ qualification for full pension); *Molyneux v Ireland* [1997] 2 ILRM 241 (HC) (power of arrest without warrant for aggravated assault in Dublin only); *Riordan v An Taoiseach* [2000] 4 IR 537 (HC, SC) (government appointment without prior public advertisement); Re Article 26 and ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999 [2000] IESC 19, [2000] 2 IR 360 (non-nationals’ access to courts); *Criminal Assets Bureau v PS* [2004] IEHC 351, [2009] 3 IR 9 (anonymity of CAB witnesses); *Gavrylyuk v Minister for Justice, Equality and Law Reform* [2008] IEHC 321 (immigrants who had not been informed of deportation order permitted to seek subsidiary protection); *JD v Residential Institutions Redress Review Committee* [2009] IESC 59, [2010] 1 IR 262 (exclusion on grounds of age from voluntary redress scheme).


18 The separation of powers doctrine (a central feature of the Constitution) is dealt with in provisions relating to the legislature, executive and judiciary, viz, no law is to be made save by the Oireachtas (Art 15.2.1°), the executive power of the State in both domestic and foreign affairs is vested in the Government (Arts 28.2 & 29.4.1°), and only the courts may exercise the judicial function save in the case of limited functions in the non-criminal field (Arts 34.1 & 37.1): DG Morgan *A judgment too far? Judicial activism and the Constitution* (2001) 84. See also DG Morgan “Judicial-o-centric” separation of powers on the wane?” (2004) 39 Irish Jurist 142.

Chapter 7 – Irish case-law on dignity

*Limerick Corporation* in the High Court opened the door to the possibility of judicial activism in this area when he accepted it was arguable that freedom and dignity required the provision of basic services for homeless and deprived young people.\(^20\) However, he distinguished between commutative and distributive justice,\(^21\) and concluded that the courts had no role in deciding the latter, stating:\(^22\)

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

A person's home is constitutionally inviolable because free and secure occupation of it is necessary for human dignity. When the Court of Criminal Appeal held in *Barnes* that an occupier can use retaliatory force to protect his dwellinghouse against a burglar, Hardiman J expanded on its intangible significance:\(^23\)

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

In condemning the requirement to pay a deposit to become an election candidate as contrary to the equality guarantee, Herbert J in the High Court in *Redmond v Minister for the Environment* held that discrimination on the

\(^20\) [1989] ILRM 181 at 193.
\(^21\) n 20 above, 193 - 194.
\(^22\) n 20 above, 195. Despite these observations, there is some basis for claiming that the Constitution commits itself to a more substantive conception of democracy: Doyle *Constitutional law: Text, cases and materials* (n 14 above) [13-57]–[13-58]. See also Doyle *Constitutional equality law* (n 14 above) 42 - 46; G Whyte *Social inclusion and the legal system: Public interest law in Ireland* (2002) 13 - 14, 43 - 54, 360 - 362; Whyte (n 19 above) 3 - 8; G Whyte ‘Rights and judicial activism’ in B Fanning et al (eds) *Theorising Irish social policy* (2004); G Whyte ‘A tale of two cases – Divergent approaches of the Irish Supreme Court to distributive justice’ (2010) 32 Dublin University Law Journal 365.
\(^23\) *People (DPP) v Barnes* [2006] IECCA 165, [2007] 3 IR 130 [58]. On the extent of the right to use force to effect an arrest, compare *Ex p Minister of Safety and Security: Re S v Walters* 2002 4 SA 613 (CC).
grounds of wealth attacked the dignity of the poor.24 This was a refreshing
decision in which Herbert J was faithful to the idea of dignity enunciated by
Walsh J in Quinn’s Supermarket.25 If applied in other areas, it could be the
springboard for making a real difference to people’s lives and in achieving
social justice26 for the underprivileged in our society.

Dignity is integral to the right to life. McCarthy J in Murray v Ireland
considered the right to procreate children within marriage essential to the
human condition and personal dignity.27 The Supreme Court was confronted
with a dispute over the status of frozen embryos in Roche v Roche.28 As the
human embryo was generally accepted as having moral qualities and a moral
status, having present in it all the genetic material for the formation of life,
being the first step in procreation and containing within it ‘the potential, at
least, for life’, Murray CJ confirmed that its creation and use cannot ‘be
divorced from our concepts of human dignity’.29

There are different judicial opinions on whether a child has the right to
realise its personality and dignity. They were included in the rights of the
child listed by O’Higgins CJ in his dissent in G v An Bord Uchtála.30 Hamilton
CJ and Denham J in the Supreme Court in DG v Eastern Health Board agreed
with his views.31 However, there was disagreement over children’s rights

finding that the Oireachtas did not have power pursuant to Article 16.7 to regulate
elections by establishing conditions (monetary or otherwise) for the nomination of
candidates: King v Minister for the Environment (No 2) [2006] IESC 61, [2007] 1 IR
Doyle Constitutional law: Text, cases and materials (n 14 above) [15-46].

25 n 14 above, 13.

26 For a critique of a social justice theory of human rights, see J Donnelly ‘Human rights

27 [1991] ILRM 465 (SC) 476. The Supreme Court upheld Costello J’s finding in the
court below that the right to procreate was a personal right under Article 40 rather
than one falling within the ambit of the rights of the family as an institution in Article
41: above, 469, 472 (Finlay CJ); above, 474, 476 (McCarthy J).

30 [1980] IR 32 (SC) 56. See Doyle Constitutional law: Text, cases and materials (n 14 above)
[4-21]–[4-25], [4-29], [5-10]; Shannon (n 17 above) [1-11], [1-14], [12-05].

31 [1997] IESC 7, [1997] 3 IR 511 at 523, 537. See Shannon (n 17 above) [1-16], [11-
127]–[11-128].
between the Supreme Court judges in *TD v Minister for Education*.32

In the Preamble to the Constitution, dignity is coupled with freedom as a constitutional aim. Rationality and free will are the *raison d’être* of dignity. So in the case-law, the values of freedom and dignity are intertwined. Henchy J referred to them in tandem in *McGee v AG*, which established the right to marital privacy.33 Hamilton P in *Kennedy v Ireland* identified them as the basis of the right to privacy.34 The Irish courts have consistently described the right to privacy in a way which emphasises its connection with dignitary values.35

A conflict can be perceived between the claims of the common good and the individual’s freedom.36 Three different concepts of the common good are operative in Irish constitutional law, *ie* first, a utilitarian interpretation of the common good identified with what the majority believe to be in their own best interests in the disposition of specific ‘goods’; second, an ideological ideal proposed for the community by those who consider themselves to be wiser than the electorate in matters of this nature (at the time when the Constitution was drafted, this reflected a rather homogeneous picture of Irish identity as Roman Catholic, rural, and republican); third, presupposing agreement among the members of the community that there are some individual rights which are so basic that they should never be compromised, and that other individual rights may only be compromised as an unavoidable means of guaranteeing other basic rights, this approach interprets the common

32 [2001] IESC 101, [2001] 4 IR 259 at 295, 318. See Doyle *Constitutional law: Text, cases and materials* (n 14 above) [4-53]; Shannon (n 17 above) [4-31]–[4-34], [4-67]–[4-69].

In a referendum held in 2012 on the amendment of the Constitution to incorporate the provisions on children’s rights contained in the Thirty-first Amendment of the Constitution (Children) Bill 2012, the people approved the repeal of Article 42.5 and the insertion of Article 42A.

33 [1974] IR 284 (SC) 326. *McGee* has been described as the most important decision in Irish constitutional jurisprudence: W Binchy ‘Autonomy, commitment and marriage’ in O Doyle & W Binchy (eds) *Committed relationships and the law* (2007) 171.

On *McGee*, see H Delany *et al*, *The right to privacy: A doctrinal and comparative analysis* (2008) 34 - 35, 39; Doyle *Constitutional law: Text, cases and materials* (n 14 above) [4-11]–[4-12], [4-14], [4-18]–[4-19], [4-34]–[4-36], [5-07]–[5-09], [10-02], [17-16]; L Flynn ‘Missing Mary McGee: The narration of woman in constitutional adjudication’ in Quinn *et al* (n 1 above) 96 - 104; Morgan *A judgment too far? Judicial activism and the Constitution* (n 18 above) 23 - 24.

34 [1987] IR 587 (HC) 593.

35 Delany *et al* (n 33 above) 37.

good as a means to an end, or at least as a subsidiary end, and includes the whole complex of institutional and social arrangements which the community recognises as instrumental or necessary for living together in harmony.37

Henchy and McCarthy JJ (both dissenting) in Norris v AG were loath to allow the intolerant view of homosexual conduct triumph over the freedom of the individual to express a deeply personal choice in a central feature of his being.38 Based on Costello J’s understanding of the common good, reconciliation of individual rights with the moral aspect of society is the aim rather than one taking precedence over the other.39 In an essay in 1987 Costello defined the common good as ‘the whole ensemble of conditions which are brought about by collaboration in a political community for the benefit of each person in it.’40 His definition was based on the sense in which it was used in the Preamble to ensure the ‘dignity and freedom of the individual.’ He thought it necessary ‘to reconcile other aspects of the common good (for example the attainment of social justice) with the need to promote, as part of the common good, the exercise of fundamental rights.’41

The plaintiffs in Zappone v Revenue Commissioners invoked their dignity as human beings as the basis of a right to marry and argued that to prohibit same-sex marriage was discrimination on the grounds of gender and sexual orientation.42 Dunne J rejected the challenge and stated that the right to

37 DM Clarke ‘The concept of the common good in Irish constitutional law’ (1979) 30 Northern Ireland Legal Quarterly 319 at 340 - 341.
38 [1984] IR 36 (SC) 78, 102. On Norris, see Binchy (n 33 above) 164 - 167; E Carolan ‘Committed non-marital couples and the Irish Constitution’ in Doyle & Binchy (n 33 above) 244 - 245; Delany et al (n 33 above) 35 - 36, 37 - 38, 40, 44, 58, 63, 230, 231; Doyle Constitutional law: Text, cases and materials (n 14 above) [3-31]–[3-32], [4-13]–[4-16], [5-35]; Morgan A judgment too far? Judicial activism and the Constitution (n 18 above) 28 - 29.
41 As above.
42 [2006] IEHC 404, [2008] 2 IR 417 [117]. The plaintiffs also sought, but did not pursue, recognition of their Canadian marriage under private international law; because they were domiciled in Ireland, their capacity to marry was in issue: above, [1], [45], [139]. For reviews of Zappone, see Carolan (n 38 above) 263 - 266; Doyle Constitutional law: Text, cases and materials (n 14 above) [9-27]–[9-29]; A O’Sullivan ‘Same-sex marriage and the Irish Constitution’ (2009) 13 International Journal of Human Rights 477 at 482 - 483, 485 - 488. Contrast Minister of Home Affairs v Fourie 2006 1 SA 524 (CC).

The lex domicilii of the parties governs the capacity to marry, while the formalities must comply with the lex loci celebrationis. Even if the marriage complies with these requirements, recognition can be withheld on the grounds of public policy. On
marry implied in Article 41 had always been understood as opposite sex marriage.\textsuperscript{43} She discerned little evidence of a consensus around the world to support a widespread move towards same-sex marriage.\textsuperscript{44}

public policy, see J Fawcett & JM Carruthers Cheshire, North & Fawcett: Private international law (2008) 908 - 910. Ease of dissolution of a marriage does not affect its validity; a foreign marriage contracted in accordance with a local law allowing its dissolution by mutual consent or at the will of one of the parties, with merely formal conditions of official registration, was recognised on appeal: Nachimson v Nachimson [1930] P 217 (CA). This decision has received some criticism: W Binchy Irish conflicts of law (1988) 212.

On the moral arguments for recognition of same-sex partnerships, see O Doyle ‘Moral argument and the recognition of same-sex partnerships’ in Doyle & Binchy (n 33 above) 124 - 158. The crucial difference between non-sexual committed relationships and same-sex committed sexual relationships is not the presence of a sexual relationship but the willingness explicitly to assume exclusive and presumptively lifelong commitment: O Doyle ‘Sisterly love: the importance of explicitly assumed commitment in the legal recognition of personal relationships’ in S FitzGibbon et al (eds) The jurisprudence of marriage and other intimate relationships (2010) 324.

\textsuperscript{43} n 42 above, [241]. Dunne J also refused recognition to a polygamous marriage contracted in Lebanon by parties domiciled there, even though their capacity to marry was not in doubt: H v A [2010] IEHC 497. Her refusal was based on public policy grounds and on the traditional meaning of marriage in Ireland informed and guided by the status given to marriage in the Constitution, which she indicated involved a lifelong commitment (notwithstanding the introduction of divorce). The private international law issue deserved a deeper analysis than that given by Dunne J. She did not probe the effect of non-recognition on the parties to the polygamous marriage, which was in accordance with their religious beliefs and cultural background. The human rights aspect was not explored, in contrast to the approach in Daniels v Campbell 2004 5 SA 331 (CC). Neither did she consider invoking international norms to develop Irish law by embracing a broader notion of marriage to accommodate a pluralist and multi-cultural society; like heterosexual monogamous marriage, same-sex or polygamous marriage establishes a lifelong commitment respectful of the parties’ autonomy and human dignity. Dunne J rightly discounted Conlon v Mohamed [1989] ILRM 523 (SC) as a relevant precedent. In that case a potentially polygamous Islamic religious marriage in South Africa was not recognised; however, one of the parties was not domiciled in South Africa and did not have the capacity to contract a polygamous marriage.


\textsuperscript{44} n 42 above, [242]. Jeffrey Redding concluded that dignity is a much more complicated, contested and dynamic concept than same-sex marriage advocates and supportive courts acknowledge: JA Redding ‘Dignity, legal pluralism, and same-sex marriage’ (2010) 75 Brooklyn Law Review 791 at 832. The core of human dignity is the distinctive
Freedom of choice in *morality* and religion was above interference by the law according to McGovern J in *Roche v Roche*. \(^{45}\)

It is not for the Courts to weigh the views of one religion against another, or to choose between one moral view point and another. All are entitled to equal respect provided they are not subversive of the law, and provided there are no public policy reasons requiring the Courts to intervene. Moral responsibility exists even in the absence of law and arises out of the freedom of choice of the individual.

There was a significant development in *Re a Ward of Court (withholding medical treatment) (No 2)*, when Denham J declared that there was an unenumerated right\(^{46}\) to dignity under Article 40.3.1°. \(^{47}\) It was combined with the rights to self-determination and to refuse medical treatment. \(^{48}\) The right to be treated with dignity was in addition to the right to privacy. \(^{49}\) Since then, the self-standing right to dignity has been accepted by the Supreme Court in *Re Article 26 and the Health (Amendment) (No 2) Bill 2004*. \(^{50}\) The Court discerned in the right to private ownership in Article 43.1.1° a moral quality ‘intimately capacities of human beings to reason, to relate to one another and to make and adhere to free choices: W Binchy ‘Human dignity: Its implications for marriage, the family and society’ in FitzGibbon *et al* \(^{n 42\text{ above}}\) 5.

On the extent of recognition or rejection of same-sex marriage, see LD Wardle ‘Gender neutrality and the jurisprudence of marriage’ in FitzGibbon *et al* \(^{n 42\text{ above}}\) 40 - 44, 62 - 65.


\(^{47}\) \([1996]\) 2 IR 79 (SC) 163. See Binchy \(n 33\text{ above}\) 163 - 164; Carolan \(n 38\text{ above}\) 250; Delany *et al* \(n 33\text{ above}\) 13, 37, 40 - 41; Doyle *Constitutional equality law* \(n 14\text{ above}\) 196 - 197; Doyle *Constitutional law: Text, cases and materials* \(n 14\text{ above}\) [5-03]–[5-06], [5-38]–[5-40].

\(^{48}\) \(n 47\text{ above}\) 126, 129, 132, 161.

\(^{49}\) \(n 47\text{ above}\) 163. Charleton J also treated dignity and privacy as separate rights when considering the treatment of a mentally ill patient involuntarily detained: *Maria (ET)* v Clinical Director of the Central Mental Hospital \([2010]\) IEHC 378 [24].

\(^{50}\) \([2005]\) IESC 7, \([2005]\) 1 IR 105 [28]. See Doyle *Constitutional law: Text, cases and materials* \(n 14\text{ above}\) [6-03]–[6-05], [6-14], [6-17], [6-55]–[6-56], [6-60]–[6-61], [6-67], [11-07]–[11-08], [11-24]–[11-27], [17-18].
related to the humanity of each individual’, but since property owners must respect the rights of other members of society, Article 43.2.1° declared that their rights were regulated by the principles of social justice. Murray CJ deduced that the property interests of the less wealthy required to be especially defended, stating, ‘[t]he property of persons of modest means must necessarily, in accordance with those principles, be deserving of particular protection, since any abridgement of the rights of such persons will normally be proportionately more severe in its effects.’

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

The values of human dignity took centre stage in Hardiman J’s decision in *North Western Health Board v HW*, when he refused to order compulsory medical tests and deferred to the views of the individual, albeit those views were held on non-medical and objectively irrational grounds.

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52 n 50 above, [120]. In an exception to a deferential interpretation of the principles of social justice, the Supreme Court developed Article 43.1.1° in a manner unprecedented in modern property rights jurisprudence: R Walsh ‘The Constitution, property rights and proportionality: A reappraisal’ (2009) 31 Dublin University Law Journal 1 at 7, 20. It was the first suggestion in any Irish property rights judgment that there may be a link between the degree to which people are politically protected and the judges’ willingness to intervene in defence of their property rights: above, 30. This approach could lead to a holistic assessment of the fairness of laws and counteract a tendency towards a means-end ‘fit’ in the proportionality analysis: above, 9.

Eoin O’Dell and Gerry Whyte considered that this sensitivity to the plight of vulnerable citizens may require fiscal legislation dealing with tax liability or imposing public charges to make provision for hardship cases as well as requiring heightened judicial scrutiny of legislation that primarily affects vulnerable persons of modest means: E O’Dell & G Whyte ‘Is this a country for old men and women? – In re Article 26 and the Health (Amendment) (No. 2) Bill 2004’ (2005) 27 Dublin University Law Journal 368 at 390.


54 [2001] IESC 90, [2001] 3 IR 622 at 746 - 747. See Doyle *Constitutional law: Text, cases and materials* (n 14 above) [9-02]–[9-03], [9-87]–[9-97]; Shannon (n 17 above) [1-02], [1-18], [1-23], [1-37], [1-38], [1-48], [2-02], [11-60], [12-33]–[12-38], [12-56], [16-11], [16-36]–[16-39], [16-49].
(DPP) v Davis he drew attention to ‘the profound values, based fundamentally on respect for human rights and dignity, which underlie the need to ensure proper treatment for prisoners and other accused persons’.55

7.2 Philosophy

The depth of philosophical assessment by the judiciary of the meaning of dignity has been shallow with a handful of exceptions. Frequently the courts have avoided dealing with the dignity factor at all, particularly if there is another value, right or express constitutional provision giving an answer to the problem. This attitude has prevented a holistic view of the Constitution. The Constitution is perceived as being out of tune with twenty-first century Ireland in certain respects.56 It has been overshadowed recently by the ECHR, which some think is a better fit for resolution of the conflicts and demands arising in modern Ireland. Apart from the direct benefits to the protection of rights from the ECHR, Colm O’Cinneide considers that its incorporation into Irish law may have the indirect effect of giving an impetus to Irish constitutional jurisprudence.57 The emphasis on dignity in the European Court of Human Rights may give a fillip to dignity in the Irish courts and result in more attention being paid to this prime constitutional concept.58

While there are no obvious reference points for philosophical analysis in the Irish case-law, a trawl of judgments does bear some fruit. The uniqueness of the individual is acknowledged. Keane J (dissenting) in IO’T v B in 1997 highlighted the unique value of each person irrespective of parentage, when

55 [2001] 1 IR 146 (CCA) 154. The right to a fair trial is superior to the community’s right to prosecute: People (DPP) v Z [1994] 2 IR 476 (HC, SC); PO’C v DPP [2000] 3 IR 87 (SC) 96 - 97.
56 I Bacik ‘Future directions for the Constitution’ in Doyle & Carolan (n 14 above) 135.
57 C O’Cinneide ‘The European Convention on Human Rights and the Irish constitutional system of rights protection: Complementary or divergent?’ in Doyle & Carolan (n 14 above) 529.
58 The concept of human rights is the result of a synthesis of morality and law, with human dignity playing a mediating function; human dignity served as a conceptual hinge in establishing the connection between the internalised, rationally justified morality anchored in the individual conscience and the coercive, positive, enacted law: J Habermas ‘The concept of human dignity and the realistic utopia of human rights’ (2010) 41 Metaphilosophy 464 at 470.
he ruled out the centrality to dignity and the personality of the right to know one's natural parents.59

The human personality doctrine has received judicial recognition.60 McKechnie J in Foy v An t-Ard Chlaraithoír articulated the right of everyone to human dignity and considered that each person should have the freedom to express their own personality.61 The need to forge one’s own identity and the rights to self-determination and autonomy are essential.

Dignity does not apply solely to a lonely figure. Relationships (familial and companionship) are important to the individual. Finlay CJ in AG v X had regard to the mother’s relationships with her family and society where her activities occur.62 O'Higgins J in Equality Authority v Portmarnock Golf Club said that friendships are based on delight in others’ company, which cannot be analysed logically.63 According to Hardiman J in an obiter dictum in the Court of Criminal Appeal, perception by others is important to the individual as well as subjective well being.64 Denham J (dissenting) in DPP v Redmond referred to the fact that a person not guilty by reason of insanity has not the status of a convict and that this perception affected a person's dignity.65

The sanctity of life and death with dignity were examined extensively by the Supreme Court in the Ward of Court case.66 Lynch J in the High Court had proceeded on the basis that the right to life was not absolute and that a person

59 [1998] 2 IR 321 (SC) 371. See Doyle Constitutional law: Text, cases and materials (n 14 above) [4-46]–[4-52], [4-55]; Shannon (n 17 above) [9-216]–[9-217].
60 See Doyle ‘The human personality doctrine in constitutional equality law’ (n 14 above).
63 [2005] IEHC 235. See Doyle Constitutional law: Text, cases and materials (n 14 above) [8-39]–[8-41].
64 Davis (n 55 above) 153.

The Supreme Court has found that there is no constitutional right to commit suicide or to arrange for the termination of one's life at a time of one's choosing: Fleming v Ireland [2013] IESC 19 [114], [137]. See J Mortimer ‘Supreme Court dismisses assisted suicide appeal’ (2013) 107(7) Gazette of the Law Society of Ireland 14.
had a right to die a natural death, to decline medical treatment. He accepted that a person may elect not to enforce personal rights, having autonomy over her own life, subject to the common good and public order and morality.

On appeal, Hamilton CJ took the same approach and based the sanctity of human life ‘on the nature of man’. O’Flaherty J emphasised the right to be let alone (founded on bodily integrity and privacy) and focused on the ward’s quality of life. It was in her best interests that ‘nature should take its course … without artificial means of preserving what technically is life, but life without purpose, meaning or dignity.’ In contrast, Egan J (dissenting) gave precedence to the right to life (the highest constitutional right), and therefore stated, ‘[i]n view of the constitutional guarantees it would require … a strong and cogent reason to justify the taking of a life.’

Denham J associated dignity with privacy. In her comprehensive judgment, she (unlike Hamilton CJ) recognised a conflict between the rights of the individual and the common good (the community interest in preserving life). Her thorough analysis of the right to life distinguished between the absolute respect for life and the lower standard for the State to defend, vindicate and protect life. She was correct in regarding the sanctity of life

67 ‘A person has a right to be allowed to die in accordance with nature and with all such palliative care as is necessary to ensure a peaceful and dignified death.’: n 47 above, 94.

68 ‘[D]espite the fact that the right to life ranks first in the hierarchy of personal rights, it may nevertheless be subjected to the citizen’s right of autonomy or self-determination or privacy or dignity’: as above. Contrast S v Makwanyane 1995 6 BCLR 665 (CC) [214] (Kriegler J).

69 n 47 above, 123. The naturalistic fallacy he applied to conclude that the ward ought to be allowed to die has been described as ‘a very dubious form of natural law reasoning’: Doyle Constitutional law: Text, cases and materials (n 14 above) [5-04].

70 ‘The ward may be alive but she has no life at all. … she is not living a life in any meaningful sense.’: n 47 above, 130, 131.

71 n 47 above, 134.

72 n 47 above, 136.

73 ‘A constituent of the right of privacy is the right to die naturally, with dignity and with minimum suffering.’: n 47 above, 163. ‘Decision-making in relation to medical treatment is an aspect of the right to privacy; however, a component in the decision may relate to personal dignity.’: as above.

74 n 47 above, 162:

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

75 ‘The requirement to defend and vindicate the life is a requirement “as far as practicable”, it is not an absolute. Life itself is not an absolute.’: n 47 above, 160.
as not mandating preservation of life at all costs.\textsuperscript{76} However, she took a restricted view of human dignity and did not see it as inherent.\textsuperscript{77} Her interpretation of the constitutional equality right was expansive.\textsuperscript{78}

Edwards J in the High Court stressed the importance of communication to the individual’s dignity when he enquired into the lawfulness of the detention in hospital of a South African woman kept in isolation as a probable source of an infectious disease.\textsuperscript{79} He posed the question, ‘[d]oes her right to human dignity not entitle her to be appraised of the full implications of her situation?’ \textsuperscript{80}

Hardiman J used the Kantian terminology of the individual’s sense of worth and the importance of not using people as a means to an end in \textit{CC v Ireland}.\textsuperscript{81} The social stigma attached to an employer labelled a criminal for an employee’s acts done without the employer’s knowledge or approval was a factor in the Supreme Court’s finding that the knowledge and guilty intent necessary for criminal responsibility were missing from the attempt to impose vicarious liability in the Employment Equality Bill 1996.\textsuperscript{82}

\textsuperscript{76} n 47 above, 161:
In respecting a person’s death we are also respecting their life – giving to it sanctity. That concept of sanctity is an inclusive view which recognises that in our society persons, whether members of a religion, or not, are all under the Constitution protected by respect for human life. A view that life must be preserved at all costs does not sanctify life. A person, and/or her family, who have a view as to the intrinsic sanctity of the life in question are, in fact, encompassed in the constitutional mandate to protect life for the common good – what is being protected (and not denied or ignored or overruled), is the sanctity of that person’s life. To care for the dying, to love and cherish them, and to free them from suffering rather than simply to postpone death, is to have fundamental respect for the sanctity of life and its end.

\textsuperscript{77} ‘The medical treatment is invasive. This results in a loss of bodily integrity and dignity.’: n 47 above, 158. See Binchy (n 14 above) 316 - 317.

\textsuperscript{78} ‘[A]ll citizens as human persons are equal before the law. This is not a restricted concept, it does not mean solely that legislation should not be discriminatory. It is a positive proposition.’: n 47 above, 159.

\textsuperscript{79} \textit{VTS v Health Service Executive} [2009] IEHC 106 at 63.

\textsuperscript{80} As above. He pointed out, as above:
[No one has sat down to work out, or to plan, exactly what information the patient needs to have, how it is to be communicated, how issues of trust and confidence tending to undermine effective communication are to be addressed, what special skills may be necessary to ensure effective advocacy both with and on behalf of the patient, and who is to have responsibility for it.


As can be seen from the instances of judicial comments on the philosophical basis of dignity and the meaning of life, there is no discernible coherent thread running through the Irish case-law and, overall, there was no great debate on the meaning of life. Doubtless, the human personality and the dignity of the individual are key. While personality has been mentioned in many cases, the analysis was scant. There is a right and freedom to express one’s unique personality, subject to harmonisation with the rights of others and the common good. Self-esteem is important, but relationships with others and others’ perception of the individual are also central aspects of one’s dignity.

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

Many of the now well-established and frequently-cited principles of Irish law were enunciated originally by Walsh J. With his courageous scrutiny of the Constitution, he identified its core values and the basis of its equality guarantee in human dignity linked to social justice. However, not all of his judgments can survive criticism – beside his advances for equality are instances where he gave less meritorious factors precedence, eschewing the equality guarantee or avoiding consideration of human dignity for alterna-

87 de Búrca (n 16 above).
tive options. Although he regarded the child as having an independent personality, he did not support the human dignity of unmarried fathers and his decision in *Nicolaou* was rightly criticised by Barrington J three decades later. Constitutional supremacy dominated his thinking. He did not treat the judicial role as inferior to that of the other arms of state. His judicial legacy will be long-lasting, but the potential of the equality guarantee he outlined has not been realised.

A significant, but less pervasive, contribution to Irish jurisprudence was made by Barrington J. His classification test in *Brennan v AG* was adopted by the Supreme Court. He searched for norms on which to ground his decisions and was willing to act to compel the government to protect human rights. In *Corway* he displayed frustration with the emphasis on religion in the Constitution. Two other defenders of human rights were Henchy and McCarthy JJ, the dissentients in *Norris*. The former’s definition of the right to marital privacy as an unenumerated constitutional right in *McGee* hastened the liberation of Irish society. He considered the meaning of human dignity, and leveraged the equality guarantee. Although he believed in a harmonious interpretation of the Constitution, he shirked from reshaping the law of torts in *Hanrahan*. McCarthy J’s humane

89 G (n 30 above).
91 WO’R v EH (Guardianship) [1996] 2 IR 248 (SC) 278 - 280.
93 Quinn’s Supermarket (n 14 above) 13.
96 Employment Equality Bill (n 82 above).
99 n 38 above.
100 n 33 above, 325 - 326.
102 King v AG (n 16 above) (SC) 257; State (DPP) v Walsh [1981] IR 412 (SC) 449 - 450; McMahon v Leahy (n 16 above) 540 - 542; People (DPP) v Quilligan (No 2) [1989] IR 46 (SC) 56.
approach was evident in *JK v VW*, where he took greater cognisance than the majority of the position of the committed unmarried father, whom he considered should have natural rights.\(^{105}\) His commitment to equality is evident in *McKinley*.\(^{106}\) Unlike the current Supreme Court, he did not avoid philosophical analysis and, dissenting in *Cooke v Walsh*, he reserved for a future case with a full debate the issue of whether a plaintiff with no real appreciation of her plight should get only nominal damages.\(^{107}\)

Kenny J will be remembered for his finding in *Ryan v AG* (upheld by the Supreme Court)\(^{108}\) that there are unenumerated constitutional rights,\(^{109}\) but his view that the equality guarantee did not apply to women in their work activity in *Murtagh Properties* is best forgotten – although he redeemed matters by finding that reference in Article 45 to all men and women having equal rights to an adequate means of livelihood\(^{110}\) meant that all had a right to earn a livelihood under Article 40.3.\(^{111}\)

Murray CJ had a repressed perception of the judiciary’s function. In *Roche* he placed the onus firmly on the Oireachtas to make the initial policy determination to enable a legal definition to be made of when ‘the life of the unborn’ begins to enjoy constitutional protection.\(^{112}\) However, he did not hesitate to address governmental lapses when social justice was endangered and the Supreme Court struck down the Health Amendment Bill in defence of the less wealthy,\(^{113}\) or when a moral sanction was required to reflect the public indignation at executive action in *Shortt*.\(^{114}\) He associated dignity with status in *PO'C v DPP*.\(^{115}\)

Of the current judges, Denham CJ is notable for her finding of a right to dignity in the *Ward of Court* case, where her diligent judgment was most thorough.\(^{116}\) Based on the concept of equality allied to the separation of

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106 n 16 above.  
108 n 46 above, 344 - 345.  
109 n 46 above, 313.  
110 Constitution of Ireland 1937, Art 45.2.i.  
111 n 15 above, 335 - 336.  
112 n 28 above, [54].  
113 n 50 above, [120].  
115 n 55 above, 103.  
116 n 47 above.
powers doctrine, she upheld the application of legislation to the executive in *Howard*.\(^\text{117}\) She applies a harmonious interpretation\(^\text{118}\) and can support her comprehensive judgments by well-researched arguments.\(^\text{119}\) Similar to the South African style, she employs the tools of proportionality and reasonableness.\(^\text{120}\) She is conscious of the importance of ensuring children’s welfare\(^\text{121}\) while respecting their rights to liberty, equality and to realise their personality and human dignity.\(^\text{122}\) For her the separation of powers is not an inhibiting factor.\(^\text{123}\) Hers was the lone voice to favour of the rights of the mother and parent in *Sinnott v Minister for Education*.\(^\text{124}\) Denham CJ’s record is one of support for human rights on sound legal grounds.

An intellectual capable of impressive legal reasoning, Hardiman J produces interesting judgments that uphold individual rights against state interference.\(^\text{125}\) He has a rigid aversion to judges meddling in policy matters, which he regards as strictly the preserve of the legislature and executive.\(^\text{126}\) For him, immigration decisions are administrative issues for the executive without much judicial oversight.\(^\text{127}\) His perception of human dignity is of the adult viewed as a worthy\(^\text{128}\) secure\(^\text{129}\) member of society.\(^\text{130}\) He upholds the principle of personal responsibility in criminal law;\(^\text{131}\) but he has not recognised the presence of social justice in modern tort law.\(^\text{132}\) He located the child’s constitutional rights within the family protected by the state.\(^\text{133}\) His

118 *Roche* (n 28 above) [147].
120 *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3 [19], [40].
121 *McD v L* [2009] IESC 81 [50].
122 *DG* (n 31 above) 534 - 538. See also *TD* (n 32 above) 295; *North Western Health Board* (n 54 above) 719.
123 *TD* (n 32 above) 299, 311, 314 - 315.
124 n 19 above, (SC).
125 *North Western Health Board* (n 54 above); *Shortt* (n 114 above).
126 *TD* (n 32 above) 360 - 362.
127 *Meadows* (n 120 above).
128 *CC* (n 81 above) [44].
129 *Barnes* (n 23 above) [58], [62], [64].
130 *Davis* (n 55 above) 150 - 154.
131 *CC* (n 81 above).
133 *North Western Health Board* (n 54 above) 755.
Human dignity and fundamental rights in South Africa and Ireland

Preference is for a harmonious interpretation\(^\text{134}\) with a restricted role for proportionality.\(^\text{135}\)

In \textit{Shortt} the same stance as Murray CJ and Hardiman J was adopted by Fennelly J,\(^\text{136}\) who has a broader view of equality\(^\text{137}\) and the meaning of human dignity than some of his colleagues. He has articulated that the dignity of prisoners should be respected,\(^\text{138}\) which has translated into the provision of a remedy for a prisoner assaulted in an unprovoked attack by a fellow inmate.\(^\text{139}\) He did not sideline the humanity of the natural father in \textit{McD v L}.\(^\text{140}\)

There was a display of human empathy in McKechnie J’s judgments in \textit{Foy}, where he was constrained initially by the rights of the transsexual’s family and by the terms of the Constitution from finding in favour of Dr Foy.\(^\text{141}\) He expressed his personal views in \textit{GT v KAO} that the unmarried father should have more rights recognised because of the constitutional values of prudence, justice, charity and dignity, but again these views were not legally sustainable because Article 41 has been interpreted in a narrow way to accord recognition only to the marital family.\(^\text{142}\)

Of the current High Court judges, two of those with long service (Laffoy and Kelly JJ) deserve to be mentioned. Laffoy J held in \textit{McCann v Judge of Monaghan District Court} that the provisions for imprisonment for debt infringed the liberty of the individual and violated the constitutional guarantee of fair procedures.\(^\text{143}\) When faced with inequality and unfair treatment of the vulnerable and powerless, she has intervened to redress the wrong being caused.\(^\text{144}\) She has not demurred from applying the equality guarantee.\(^\text{145}\) Although her decision to order the release of the prisoner in \textit{A v Governor of Arbour Hill Prison} was logical, it was overturned on appeal.

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\(^{134}\) Roche (n 28 above) [181], [183].

\(^{135}\) Meadows (n 120 above).

\(^{136}\) n 114 above, [274].

\(^{137}\) Portmarnock Golf Club (n 119 above).

\(^{138}\) Creighton \textit{v} Ireland [2010] IESC 50 [4].

\(^{139}\) Creighton \textit{v} Ireland 14 June 2013 (HC).

\(^{140}\) n 121 above, [78]-[79], [81].

\(^{141}\) n 61 above.

\(^{142}\) \textit{GT v KAO (Child Abduction)} [2007] IEHC 326, [2008] 3 IR 567 [50]-[51].

\(^{143}\) [2009] IEHC 276.

\(^{144}\) O’Donnell (a minor) \textit{v} South Dublin County Council [2007] IEHC 204.

\(^{145}\) \textit{SM v Ireland (No 2)} (n 16 above).
because of the far reaching consequences.\textsuperscript{146} Also overturned on appeal has been the fearless decision of Kelly J addressed to the state in defence of neglected children in \textit{TD}.\textsuperscript{147} In contrast, his decision to ensure the welfare of a homeless youth with a serious personality disorder by ordering his detention was upheld.\textsuperscript{148}

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

### 7.3 Personal responsibility

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

#### 7.3.1 Criminal law

It was held in \textit{CC} that \textit{mens rea} is necessary for a serious criminal offence.\textsuperscript{149} Justice required that the person’s dignity be respected\textsuperscript{150} and this was not observed in crimes of absolute liability.\textsuperscript{151} Similarly, vicarious liability for crimes is repugnant and was the basis on which a provision in the Employment Equality Bill was found to be unconstitutional.\textsuperscript{152} The detriment to the individual in the eyes of society was not balanced by the laudable aim

\begin{itemize}
  \item \textsuperscript{147} \textit{TD v Minister for Education} [2000] 3 IR 62 (HC); n 32 above (SC). Cf \textit{DB} (n 19 above).
  \item \textsuperscript{148} \textit{DG} (n 31 above).
  \item \textsuperscript{149} n 81 above, [61]. Cf \textit{S v Coetzee} 1997 3 SA 527 (CC).
  \item \textsuperscript{150} O’Higgins CJ associated justice with dignity: \textit{State (Healy) v Donoghue} [1976] IR 325 (SC) 348. See also \textit{AG v DMK} [2004] IEHC 609 (Peart J).
  \item \textsuperscript{151} n 81 above, [48]-[49], [68].
  \item \textsuperscript{152} n 82 above.
\end{itemize}
of the legislature.\textsuperscript{153} As indicated in \textit{S v Coetzee}, \textit{mens rea} is also a requirement in South Africa.\textsuperscript{154}

Before analysing the nature and purpose of \textit{mens rea} in criminal law, it would be helpful to define criminal law, but that is impossible since there is no universally accepted definition.\textsuperscript{155} The characteristics generally found in criminal conduct are that it usually involves a public wrong and a moral wrong.\textsuperscript{156} A guilty mind (\textit{mens rea}) is the traditional \textit{sine qua non} of a crime.\textsuperscript{157} It contains the mental fault ingredient of a crime and signifies intention to cause harm, or recklessness (whether deliberate or indifferent) as to the consequences of an action, but it is now sometimes deployed to describe negligence in the sense of failure to comply with a standard of conduct.\textsuperscript{158}

The beginning of the modern concept of \textit{mens rea} is probably found in Anglo-

\begin{quote}
\textsuperscript{153} n 82 above, 373 - 374 (Hamilton CJ):

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

\begin{quote}
\textsuperscript{154} n 149 above.
\end{quote}

\begin{quote}
\textsuperscript{155} D Ormerod \textit{Smith and Hogan's criminal law} (2011) [1.3]. There is a need for a global substantive criminal law. Catherine MacKinnon has called for an extension of the definition of rape as a crime against humanity to cover situations where rape has become banal, such as in South Africa: n 5 above, 246.
\end{quote}

\begin{quote}
\textsuperscript{156} Ormerod (n 155 above) [1.3]. The public element invariably means a degree of stigmatisation – even if the individual is diverted before trial and dealt with by way of caution; there is a marked public condemnation publicly communicated – the public has an important role in punishing wrongs that have a harmful effect on society and do not merely interfere with private rights: Ormerod (n 155 above) [1.3.1]. Morality and the criminal law are not co-extensive; many acts are now prohibited simply on the grounds of social expediency: Ormerod (n 155 above) [1.3.2.1]. For the most part, it is inappropriate for the law (particularly the criminal law) to intervene in people's intimate personal lives if no harm is caused to society: Ormerod (n 155 above) [1.3.2.2]. A difficult question is when intervention is justified where the harm is self-inflicted or the recipient consents.
\end{quote}

\begin{quote}
\textsuperscript{157} Ancient criminal law tried to make people answer for all their intentional misdeeds; exceptions to this harsh attitude were recognised gradually leading to the emergence and development of the \textit{mens rea} concept: RM Perkins 'A rationale of \textit{mens rea}' (1939) 52 \textit{Harvard Law Review} 905 at 905.
\end{quote}

\begin{quote}
\textsuperscript{158} Ormerod (n 155 above) [5.1]. \textit{Mens rea} has no single meaning – every crime has its own \textit{mens rea} which can only be ascertained by looking at its statutory definition or the case-law: Ormerod (n 155 above) [5.3]. The true meaning of \textit{mens rea} as a blameworthy state of mind at common law requires not only that the accused's conduct be a voluntary expression of his will (intentional, not accidental or done in a state of somnambulism or automatism), but also knowledge of the consequences of the action (guilty knowledge): JLJ Edwards Mens \textit{rea} in \textit{statutory offences} (1955) 249
\end{quote}
Saxon law.\textsuperscript{159} The idea of punishment for intentional wrong in secular law has parallels with penance for evil thoughts in religion.\textsuperscript{160}

The reception of\textit{ mens rea} into Anglo-American law may be ascribed to some extent to the significance of the Irish Catholic Church, which was at one time the most influential church in Britain and Ireland,\textsuperscript{161} but in any event there is no doubt that the Christian Church with its absorption of Hebrew thought had an impact on the legal concept.\textsuperscript{162} In Hebrew law, a guilty mind – initially punished on a tribal basis – evolved over time into personal guilt.\textsuperscript{163} It contained the seeds of personal responsibility.\textsuperscript{164} Christian theology influenced Anglo-Saxon law by requiring a moral basis to punishment – a guilty mind attracted a punitive sanction.\textsuperscript{165}

\begin{itemize}
  \item Negligence (blameworthy inadvertence) describes the state of mind of a person who ought to have known, and is not so reprehensible as the state of mind of a person who wilfully shuts his eyes to the obvious: Edwards above, 256. See also Perkins (n 157 above) 913 - 915; JWC Turner 'The mental element in crimes at common law' in L Radzinowicz & JWC Turner (eds) \textit{The modern approach to criminal law: Collected essays} (1945) 200 - 211.
  \item A Lévitt ‘The origin of the doctrine of\textit{ mens rea}' (1922) 17 \textit{Illinois Law Review} 117 at 120. The mental state of the criminal was not a significant feature in Roman law: above, 118. Although the Irish Brehon law did not set up crime as a species of liability distinct from civil wrong, it differentiated in the way the law enforced criminal and civil liability based on the moral nature of the act by which liability was incurred: L. Ginnell \textit{The Brehon laws: A legal handbook} (1894) 184 - 185. A wilful act was punished more severely, e.g., the amount of the fine payable for separating body from soul by killing another (\textit{eiric} or \textit{eric}) was higher for an intentional killing than for an accidental one: Ginnell above, 188. In Irish law, morality and law intermingled.
  \item A Lévitt (n 159 above) 133, 136.
  \item Lévitt (n 159 above) 119. As the church leaders who came into power in Britain with the Norman Conquest had access to the writings of the church fathers of the Irish Church, the insistence on the part of the Irish law that\textit{ mens rea} was to be considered in punishing homicide may have had some influence on the development of the Anglo-Saxon theory of\textit{ mens rea}: as above.
  \item Lévitt (n 159 above) 128. By the end of the 12th century canon law was a powerful influence on English law: FB Sayre ‘\textit{Mens rea}' (1932) 45 \textit{Harvard Law Review} 974 at 982 - 983.
  \item Lévitt (n 159 above) 127. ‘Noxal surrender' and deodand whereby the chattel or person that caused harm was delivered for punishment to the victim (or at a later stage in history to the state) was derived from Hebrew law: Lévitt (n 159 above) 120, 128.
  \item As Lévitt put it, ‘[a]ll the ills which follow [a man's] acts must be paid for.': Lévitt (n 159 above) 120.
  \item Lévitt (n 159 above) 136. In criminal law, compensation was payable to the victim for the damage to the body, while the interests of the king and of God were met by inflicting punishment for the evil thought that accompanied it: Lévitt (n 159 above) 136 - 137. Early criminal law developed out of the blood feud and rested upon the desire for vengeance, which sought a blameworthy victim based on fault or evil design: Sayre (n 162 above) 975. In time, blood-vengeance was abolished and the state stepped in to replace the victim’s family; later, the religious influence gradually
\end{itemize}
One of the conclusions Francis Sayre drew from his study of the development of the mental requisites of crime was that the strong tendency of the early days to link criminal liability with moral guilt made it necessary to free from punishment those who perhaps satisfied the requirements of specific intent for particular crimes but who, because of some personal mental defect or restraint, should not be convicted of any crime. Many commentators consider that *mens rea* should continue as the normative base for crime. Despite the requirement at common law for *mens rea* to be a came to be ignored in theory, but remained in practice: Lévitt (n 159 above) 137. *Mens rea* from the middle of the 13th century smacked strongly of general moral blameworthiness: Sayre (n 162 above) 988. This was an exceedingly vague concept, which was refined by the judiciary on a case by case basis to delineate the mental requisites for felonies, each crime being analysed separately to take into account the different social and public interests that were relevant: Sayre (n 162 above) 994. The moral test in the law focused at first on moral guilt, asking whether the act was voluntary: Turner (n 158 above) 201. As the conception of moral guilt is necessarily grounded on a free mind voluntarily choosing evil rather than good, new general defences, such as insanity, infancy and compulsion also began to take shape based upon the lack of a guilty mind and thus negating moral blameworthiness: Sayre (n 162 above) 1004. The focus on moral guilt gave way to a doctrine that looked at whether the accused had foresight of the act’s consequences, but inadvertence did not ground liability at common law: Turner (n 158 above) 215 - 216. The expression *mens rea* was used to find out whether the action could be imputed to the accused (a voluntary act) and also to ascertain whether the accused realised its probable consequences: RM Jackson ‘Absolute prohibition in statutory offences’ in Radzinowicz & Turner (n 158 above) 270. For criticism of use of the phrase ‘voluntary act’, see Perkins (n 157 above) 912 - 913.  

**166** n 162 above, 1021. Sayre also concluded that whatever the early conception of *mens rea* may have been, as the law grew the requisite mental elements of the various felonies developed along different lines to meet exigencies and social needs which varied with each felony: n 162 above, 1019. The nature of the crime was central, criminal responsibility being more readily assigned to corporations irrespective of motive for breaches of laws protecting public health, regulating gambling and controlling the sale of liquor and food: HJ Laski ‘The basis of vicarious liability’ (1916) 26 Yale Law Journal 105 at 131 - 132. *Mens rea*, the mental factor necessary to prove criminality, has no fixed continuing meaning: Sayre (n 162 above) 1016. There remained a residuum of cases where criminality was absent by reason of the general lack of a law-breaking or criminal mind, and the lack of *mens rea* developed as a recognised defence – they included cases where the defendant acted under a reasonable mistake of fact, and cases where the defendant intended an act constituting only a trivial infraction of the law which without the defendant’s negligence resulted in death or some serious unintended criminal consequence: Sayre (n 162 above) 1022.  

**167** Sayre, writing in 1933 concerning the growth of statutory offences punishable without any criminal intent, anticipated opposition from the community if a significant sanction were imposed, FB Sayre ‘Public welfare offenses’ (1933) 33 Columbia Law Review 55 at 55 - 56: Does the modern conception of criminality, which seems to be shifting from a basis of individual guilt to one of social danger, presage the abandonment of the classic requirement of a *mens rea* as an essential of criminality? ... Criminality is and always will be based upon a requisite state of mind as one of its prime factors. ... To inflict substantial punishment upon one who is morally entirely innocent, who...
precursor for criminal responsibility, early tendencies towards strict responsibility were revived on a large scale in the later part of the nineteenth century through the literal construction of legislation on public welfare offences.168 In *Woodrow*, strict liability was imposed on a tobacco retailer for possession of adulterated tobacco, although he was unaware that it was contaminated.169 In effect the statute criminalised negligence. The rationale for dispensing with *mens rea* was the difficulty for the prosecution in proving knowledge of the content where public welfare was at stake.

Twenty years later in *R v Stephens*, the octogenarian owner of a quarry managed by his sons as his agents was convicted of public nuisance caused by rubbish falling into a river when a wall collapsed.170 He sought a new trial, on the ground that the judge misdirected the jury by telling them that he would be liable for the acts of his workers in depositing the rubbish from the quarries so as to become a nuisance, though without his knowledge and against his orders.171 The Queen's Bench Division unanimously upheld the trial judge’s direction. Mellor J identified the object of the indictment as the prevention of the recurrence of the nuisance.172 He described the proceedings as criminal in form, but civil in substance.173 The same approach was adopted caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement.

168 GL. Williams *Criminal law: The general part* (1961) [75].
169 *R v Woodrow* (1846) 15 M & W 404, 153 ER 907. See Williams (n 168 above) [76], [78]. Pollock CB considered that it was reasonable for the legislation to require dealers to be responsible for the quality of the product supplied to the public and to be aware of its character, and regarded the legislature’s policy decision imposing a duty to take care as justified on the basis of traders’ responsibility for the ‘goodness’ of products ‘whether they know it or not’: *Woodrow* above, 415, 912. Parke B (construing the statute literally and satisfied that the authorities had discretion to relieve hardship) found that the public inconvenience of proving knowledge, which would seldom be achieved, warranted criminalisation for possession and outweighed the hardship caused by conviction of ‘an innocent man’ who had not taken a warranty: *Woodrow* above, 417, 913. Although Alderson B equated knowledge of possession with knowledge of the facts, he confined this to physical possession – not actual knowledge of the contents: *Woodrow* above, 418, 913. On the variable relation of knowledge to guilt, see Perkins (n 157 above) 917 - 921.
170 (1866) LR 1 QB 702 (QB).
171 n 170 above, 703.
172 n 170 above, 709.
173 n 170 above, 708. The prosecutor was unable to bring an action in tort – hence, the need to proceed by indictment; if it were strictly a criminal proceeding, the defence would rightly be entitled to object that there was no *mens rea*; the fact that the owner was responsible for and benefited from the carrying on of a continuous business activity was relevant, whereas his desire not to offend did not lessen his liability for the nuisance committed by his employees: n 170 above, 709.
by Blackburn J, who was keen not to erode the general rule that a principal is not criminally answerable for the act of an agent. 174 Both Mellor and Blackburn JJ attempted to remove the stigma of a crime where moral impropriety in the form of an intention to offend was absent and the protection of the public warranted a stringent deterrent to induce more care in the future by operators profiting from an economy growing increasingly more industrialised.

By 1909 the jettisoning of mens rea for a statutory offence 175 aimed at protecting the public had become accepted in England. 176 The pattern in the United Kingdom was paralleled in countries such as Canada, Australia and New Zealand, but some legal systems did not follow this path. 177 In the United States the movement towards public welfare offences commenced

174 He aligned the conviction with civil liability, n 170 above, 710: [W]here a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause a nuisance to a private right, for which an action would lie, if the same nuisance inflicts an injury upon a public right the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment.

175 In 1895 Wright J had affirmed the presumption that mens rea, 'an evil intention, or a knowledge of the wrongfulness of the act,' was an essential ingredient in every offence, although that presumption was liable to be displaced by the words of the statute creating the offence or by the subject-matter: Sherras v De Rutzen [1895] 1 QB 918 (DC) 921. He identified three principal classes of exceptions to the norm, ie, first, a class of acts which were not criminal in any real sense, but were prohibited under a penalty in the public interest; second, some (and perhaps all) public nuisances; third, cases in which, although the proceeding was criminal in form, it was really only a summary mode of enforcing a civil right: above, 921 - 922. Remarkable exceptions – apart from these classes – were bigamy and abduction of a girl under 16 even though the abductor believed in good faith and on reasonable grounds that she was over that age: above, 921. See Jackson (n 165 above) 268. On bigamy, see Sayre (n 167 above) 74 - 75.

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

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

Strict responsibility became commonplace for minor offences relating to public welfare: Williams (n 168 above) [76].

177 Williams (n 168 above) [76] fn 2. An example is Switzerland, where the only absolute prohibition was on Press libels: as above. It was long-established at common law that a master was responsible for criminal libels committed by a servant without the master's knowledge or consent; the rationale was not simply that entrepreneurs benefiting from the sale of books or newspapers should pay because they enjoyed the profits of the enterprise, but liability was attributed because publication could cause irreparable damage and the law should protect the interests of the personality as best it could: Laski (n 166 above) 132.
about the middle of the nineteenth century quite independently of the English development. The Supreme Court in *Morissette v US* accepted that the legislature had power to dispense with *mens rea* in new statutory offences. The rationale identified in *Morissette* for requiring blameworthiness as a precursor to a crime was the free will of the individual and the person’s capacity to choose to do right or wrong. Its basis was human dignity, although Justice Jackson did not use this term explicitly when he explained the embedded nature of *mens rea* in the US legal system. The high value placed on freedom of the individual in the US explains the attraction of the core belief that guilty intent is essential to constitute a crime at common law.

178 Sayre (n 167 above) 62, 83.

179 Justice Jackson distinguished new offences from ones merely adopting into federal statutory law a concept of crime already well defined in common law; when common law definitions were adopted in statutes, the judiciary would not take silence on intent in the legislation as implying that intent was not necessary when it was a feature of the offence at common law: 342 US 246 (1952) 262. Justice Jackson resisted the prosecution’s argument for dropping the need for guilty intent in the crime of conversion, the purpose and effect of which would be ‘to ease the prosecution’s path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries’; it was not the judiciary’s function to extend ‘[s]uch a manifest impairment of the immunities of the individual’ to common law crimes: above, 263. For reviews of *Morissette*, see HL Packer ‘*Mens rea* and the Supreme Court’ [1962] Supreme Court Review 107 at 119 - 121; FJ Remington & OL Helstad ‘The mental element in crime – A legislative problem’ [1952] Wisconsin Law Review 644 at 644 - 647.

In 1933, Sayre had discerned two cardinal principles to assist in determining practically which offences did and which did not require *mens rea*, where the statute creating the offence was silent as to the requisite knowledge: n 167 above, 72. The first criterion was the character of the offence. He identified the dual purpose of criminalisation, as ‘singling out wrongdoers for the purpose of punishment or correction and of regulating the social order’ – where the former purpose was the primary aim, *mens rea* was commonly required, but where the latter purpose was more important, the offences, which were ‘of a merely regulatory nature’, were frequently enforceable irrespective of any guilty intent. The second criterion depended on the possible penalty – if it were serious and imprisonment was a possibility, the individual interest of the defendant weighed too heavily to allow conviction without proof of a guilty mind.

180 n 179 above, 250 - 252 (footnotes omitted): The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child’s familiar exculpatory ‘But I didn’t mean to’...

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.
Jerome Hall did not approve of the change from proof of knowledge of the offence, and supported ‘the general thesis that moral culpability should remain the essence of criminal liability’. Glanville Williams considered that strict liability was reprehensible, as it was ‘an affront to the personality’, it did not deter the unscrupulous real culprits, and it abused the moral sentiments of the community. His view was that a practice of branding people as criminals who were without moral fault tended to weaken respect for the law and the social condemnation of those who break it.

A focus on dignity and equality in South Africa and Ireland has shaped the criminal law by restricting strict liability for offences and requiring mens rea before a finding of guilt for breaches that are not minor or regulatory matters. Likewise vicarious liability is only imposed for less serious

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

182 n 181 above, 996.

183 He set out the arguments for and against strict liability: n 168 above, [89]. A frequent justification was that it would be a waste of time to have to enquire into each case because of the large number of transgressions before the courts and the fact that usually the defendant was probably culpable, but proof of this was difficult. The creation of strict responsibility was thought to be a better way of ensuring compliance with the law than responsibility based on fault. Its proponents regarded the exclusion of an enquiry into mens rea as not being unjust where the penalty was small. Williams rebutted this by pointing out that the humiliation of the trial and the odium of a conviction were more pertinent. Furthermore, there was no record that the accused was morally innocent – on the contrary, a finding of guilt gave rise to a criminal record.

184 Strict liability is odious because those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities: HLA Hart Punishment and responsibility: Essays in the philosophy of law (2008) 152. While early English law had no subtle analysis of the mental element in liability, it
transgressions. The criminal law tolerates some vicarious liability and strict liability on the grounds of public policy in order to protect the welfare of the community, to support social order,\textsuperscript{185} and where it is more effective in ensuring compliance to abandon proof of intent because of the difficulty in securing sufficient evidence of \textit{mens rea} in each case.

7.3.2 Vicarious liability in tort
In tort law, vicarious liability may be necessary to support dignity. In South Africa the principle of accountability in the context of the state’s duty to ensure enjoyment of human rights has justified vicarious liability of the state for failures by the police.\textsuperscript{186} The state has a special responsibility (different from that of private persons), as its \textit{raison d’être} is to serve and protect the public.\textsuperscript{187} In Ireland the Supreme Court by a majority in \textit{O’Keeffe v Hickey} declined to find the State liable in tort for sexual abuse of a primary school student by a school principal, as he was employed by the Catholic Church authorities and worked under their management.\textsuperscript{188} The State was not the

considered at least sub-consciously the individual’s state of mind for acts or omissions in a given set of circumstances: PH Winfield ‘The myth of absolute liability’ (1926) 42 \textit{Law Quarterly Review} 37 at 37.

Social order is for the benefit of each person and for the common good of all. As noted in Hogan & Whyte (n 16 above) [2.1.32], [2.1.42], the Supreme Court indicated in \textit{Re Article 26 and the Offences against the State (Amendment) Bill 1940} [1940] IR 470 (SC) 478 that the maintenance of true social order was a pre-condition to assuring the dignity and freedom of the individual. Teresa Iglesias described one of the fundamental ethico-legal claims upheld in the fifth paragraph of the Preamble: ‘The only purpose of our socio-legal living together as a people, as a civil society under law, is our common good. This is the good of every one, and the good of all living together. These two goods, the individual and the social, are inseparable.’; T Iglesias ‘The dignity of the individual in the Irish Constitution – The importance of the Preamble’ (2000) 89 \textit{Studies} 19 at 26.

The state acts through people (its employees). The Constitutional Court found that the courts had a duty to develop the common law delictual duty to act having regard to the spirit, purport and objects of the Bill of Rights: \textit{Carmichele v Minister of Safety and Security} 2001 4 SA 938. See also \textit{Minister of Safety and Security v Van Duiwenboden} [2002] 3 All SA 741 (SCA) [22]; \textit{Van Eeden v Minister of Safety and Security} [2002] 4 All SA 346 (SCA) [4], [24]; \textit{K v Minister of Safety and Security} 2005 6 SA 419 (CC). On the \textit{K} case, see CJ Roederer ‘The constitutionally inspired approach to vicarious liability in cases of intentional wrongful acts by the people: One small step in restoring the public’s trust in the South African police services’ (2005) 21 \textit{South African Journal on Human Rights} 575 at 577 - 579, 581 - 606; C Roederer ‘The transformation of South African private law after ten years of democracy: The role of torts (delict) in the consolidation of democracy’ (2006) 37 \textit{Columbia Human Rights Law Review} 447 at 511 fn 308, 516 - 520.


\textsuperscript{188} n 132 above. See N Cox \textit{et al}., \textit{Employment law in Ireland} (2009) [3-25]–[3-26], [3-81]–[3-87], [10-20]; C O’Mahony ‘State liability for abuse in primary schools:
employer and therefore was not vicariously liable to compensate the victim.

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

Systemic failure and O’Keeffe v. Hickey’ (2009) 28 Irish Educational Studies 315 at 319 – 321; Shannon (n 17 above) [14-144]–[14-149].

189 The course of employment test articulated by John Salmond (previously couched in language resonant of power and subservience) deemed a master responsible for a wrongful act of a servant if it was either (1) authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master: RFV Heuston Salmond on the law of torts (1977) 465. While the test has been attractive in the context of the tort of negligence, its limits have been acknowledged in relation to intentional torts: D Ryan ‘Making connections: New approaches to vicarious liability in comparative perspective’ (2008) 30 Dublin University Law Journal 41 at 43 - 44.

190 The Canadian Supreme Court put a gloss on the Salmond test for employees’ unauthorised intentional wrongs and, in a case involving sexual abuse of a child in a residential care facility, it asked instead the broad policy question (based on the provision of a remedy and the deterrent effect) of whether the wrongful act was sufficiently related to authorised conduct to justify the imposition of vicarious liability, which would generally be appropriate where there was a significant connection between the creation or enhancement of a risk and the wrong that accrued from it: Bazley v Curry [1999] 2 SCR 534. The Court thought it fair that an employer engaged in a particular business should pay the generally foreseeable costs of that business: above, [41]. Factors that might be considered to determine the sufficiency of the connection between the employer’s creation or enhancement of the risk might include the opportunity that the enterprise afforded the employee to abuse power, the extent to which the wrongful act might have furthered the employer’s aims, the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise, the extent of power conferred on the employee in relation to the victim, and the vulnerability of potential victims: as above. The Court adopted the pragmatic enterprise risk theory approach in Bazley. On the day the judgment in Bazley was delivered, the Court distinguished it by a narrow majority in a companion decision concerning the sexual abuse of children, who were members of a club providing recreational activities: Jacobi v Griffiths (1999) 2 SCR 570.

On vicarious liability in Canada, see E Keane ‘The test for imposing vicarious liability: A debate in the Irish courts’ (2007) 2(1) Quarterly Review of Tort Law 12 at 12 - 13; DR Wingfield ‘Perish vicarious liability?’ in JW Neyers et al (eds) Emerging issues in tort law (2007) 399 - 400; Ryan (n 189 above) 45 - 55; Shannon (n 17 above) [14-150]–[14-153]. The Canadian judiciary has also utilised equitable principles to widen the remedy for sexual abuse: Shannon (n 17 above) [14-158]–[14-159].

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

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

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193 n 132 above, [95]: I have nonetheless concluded, with a number of English academic authorities, that the judgment seems guided by a perceived need to find for the plaintiffs rather than ‘any discernible sense of direction’. Apart from the very marked degree of enthusiasm for the Canadian cases, there is no development of a coherent legal principle nor is there even a clear articulation, which is certainly a feature of the Canadian cases, of what are said to be the ‘policy issues’.

194 [2003] HCA 4, [2003] 3 LRC 726. See Wingfield (n 190 above) 402 - 403; Ryan (n 189 above) 59 - 63.

195 n 132 above, [116]-[118].

196 n 132 above, [117].

197 n 132 above, [51]. Hardiman J’s concentration on the control test is incorrect, as in modern conditions the notion that an employer has the right to control the manner of work of all employees is a fiction, e.g., a professionally trained person such as a house.
through these remarks—responsibility for one’s own actions (and not for those of others) is key, and the practical impact of taking responsibility for the tort can have many negative effects on commerce that attempts should be made to avoid.

Hardiman J did not give equal consideration to the impact of the wrong on the victim nor to the effect on the victim of not recovering compensation for the wrong done to him or her. He regarded blame only from the perspective of individual responsibility, and did not contemplate faulting the system for creating the relationship between the victim and the employee.\textsuperscript{198} Social justice might require that the State be liable for failing to protect the individual’s personal rights.\textsuperscript{199}

The conflict between the desire that an innocent victim should receive financial recompense and that the State should not be ‘the insurer of last resort’ is evident in the judgments in \textit{O’Keeffe}. Arguments can be put forward to support the proponents of both viewpoints. From the State’s perspective, it is not fair that it should be expected to pay without being blameworthy simply because it could raise the financial resources to do.\textsuperscript{200} Unless system blame is taken into account, it is difficult to sustain the normative foundation

surgeon at a hospital is a servant for whose torts the employer is responsible and it is unrealistic to suppose that a theoretical right to control how a skilled worker does his job can have much substance: Rogers (n 192 above) [20-4]. Nowadays it is common to take a ‘composite’ approach in which the various elements of the relationship are considered as a whole: Rogers (n 192 above) [20-5].


\textsuperscript{199} The special relationship between a housing authority and a tenant created an implied warranty that the flat let was fit for human habitation: \textit{Siney v Dublin Corporation} [1980] IR 400 (SC). In that case there was a proximity of relationship creating a general duty on one side and a justifiable reliance by the other side on the observance of that duty: above, 422. Because of their relationship, a housing authority owed a duty to an indigent borrower to ensure by a proper valuation that the mortgaged house would be a good security for the loan: \textit{Ward v McMaster} [1988] IR 337 (SC) 342, 351. See BME McMahon & W Binchy \textit{Law of torts} (2013) [19.08]-[19.11], [19.19]-[19.31].

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

\textsuperscript{200} See n 132 above, [41]-[50] (Hardiman J).
for extending vicarious liability in the absence of either an employer-employee relationship between the State and the perpetrator, or direct control over the activities of the perpetrator without an intervening party in a position of responsibility. To reduce the question of liability simply to the ability to pay is a utilitarian concept that does not survive critical analysis.

In O’Keeffe the Supreme Court did not consider whether the State should be liable for failure to exercise adequate supervision to detect the abuse because of constitutional obligations to defend and vindicate personal rights.\textsuperscript{201} The European Court of Human Rights held in Z v UK that liability could accrue to the State for its failure to protect people by not preventing ill-treatment of which it knew or ought to have had knowledge.\textsuperscript{202} The duty of the State to provide for education in Article 42.4 of the Constitution could give rise to a positive obligation to monitor the schools financed by the State in order to detect wrongdoing and to preserve the integrity of the pupils whom the State rightly requires to be educated pursuant to Article 42.3.2°.\textsuperscript{203} Similar to the constitutional position in South Africa and Germany, the Irish State has a specific social mission, which could require a distinct notion of governmental liability to reflect adequately the implications of this understanding of the State.\textsuperscript{204}

The issue of vicarious liability was directly confronted by the Supreme Court in 2009 in Reilly v Devereux\textsuperscript{205} just three months after its decision in O’Keeffe. In Reilly a gunner in the army alleged he was sexually abused over a number of years by his sergeant major. The Supreme Court unanimously held that the Defence Forces could not be vicariously liable for sexual abuse committed by its employees.\textsuperscript{206} In his judgment for the Court, Kearns J examined the formal relationship in the army structure between the two State employees – the sergeant major exercised a supervisory and disciplinary role over the gunner, but he was not in the same position as a school teacher or boarding house warden in relation to a child.\textsuperscript{207} Neither was the nature of the employment one which would have encouraged close personal contact

\textsuperscript{201} On liability for systemic failure, see O’Mahony (n 188 above) 321 - 324.
\textsuperscript{202} (App no 29392/95) (2002) 34 ECHR 3 [73]. See O’Mahony (n 188 above) 325.
\textsuperscript{203} O’Mahony (n 188 above) 327 - 328.
\textsuperscript{204} Du Bois (n 187 above) 175.
\textsuperscript{206} The judgment of Kearns J on behalf of the Court has attracted considerable criticism: Cox et al (n 188 above) [3-88]-[3-95]; Ryan (n 191 above) 468 - 471.
\textsuperscript{207} n 205 above, [28].
where some inherent risks might exist, such as between a swimming instructor and young recruits.\(^{208}\) There was no intimacy implicit in the relationship nor was there any quasi-parental role or responsibility for personal nurturing.\(^{209}\) Kearns J read the Supreme Court’s earlier judgment in *O’Keeffe* as taking a firm stand on ruling out the close connection test for vicarious liability,\(^{210}\) but he did not take into account that the Court was divided and the comments on the test for vicarious liability were *obiter dicta* since the *ratio decidendi* in *O’Keeffe* was that the abuser was not an employee of the State. The judgment of Hardiman J in *O’Keeffe* influenced Kearns J, who noted the former’s antipathy towards any extension of the doctrine of vicarious liability which would make the taxpayer liable for the criminal actions of the employees of State bodies in circumstances where the State was not at fault.\(^{211}\) He also referred to Hardiman J’s reluctance to make findings that would raise policy issues.\(^{212}\)

In view of the confusing picture on liability of the State that has arisen in Irish law, it will be helpful to remind ourselves of the traditional and modern rationales for imposing vicarious liability.\(^{213}\) At common law vicarious liability (a form of secondary liability) was imposed on a blameless employer for the acts of an employee while acting in the course of his employment.\(^{214}\) This was contrary to common law principles where responsibility followed fault, the idea being that competent individuals, being free to choose their course of action, should accept the consequences of their decisions.\(^{215}\)

\(^{208}\) As above.

\(^{209}\) As above.

\(^{210}\) n 205 above, [29].

\(^{211}\) n 205 above, [31].

\(^{212}\) As above.

\(^{213}\) On the justifications for vicarious liability, see Cox *et al* (n 188 above) [3-56]–[3-59]; Laski (n 166 above) 126 - 130.

\(^{214}\) *Majrowski v Gay’s and St Thomas’s NHS Trust* [2006] UKHL 34, [2007] 1 AC 224 [7].

\(^{215}\) Lord Nicholls explained, *Majrowski* (n 214 above) [8]:

This principle of vicarious liability is at odds with the general approach of the common law. Normally common law wrongs, or torts, comprise particular types of conduct regarded by the common law as blameworthy. In respect of these wrongs the common law imposes liability on the wrongdoer himself. The general approach is that a person is liable only for his own acts. In *Majrowski*, which arose from an allegation of harassment in the form of bullying and intimidation of one employee (a clinical auditor co-ordinator) by another (his departmental manager), it was held that, unless a statute expressly or impliedly indicated otherwise, the principle of vicarious liability applied where an employee, acting in the course of his employment, committed a breach of a statutory obligation: n 214 above, [2], [17], [57], [73]-[74], [78], [81]. See Ryan & Ryan (n 192 above) 4, 6 - 7.
early development of vicarious liability was founded on utilitarian considerations based on the notion of a wealthy master reaping the rewards from controlling a servant\(^\text{216}\). The traditional rationale has changed over the years because of various factors affecting policy, such as the risks caused by those benefiting from trade, the financial disparity between entrepreneurs and those whom they engage to put their ideas into effect, loss distribution,\(^\text{217}\) and deterrence of risky behaviour by punishing aberrations.\(^\text{218}\)

While causation is the indispensable element of every species of tort liability, the law has to make a decision reflecting a moral calculation about where in the chain of events that leads to a harmful occurrence responsibility for the occurrence is to be attributed.\(^\text{219}\) It restricts the ability of an injured person to seek compensation from another to those circumstances where the latter is morally bound to pay.\(^\text{220}\) Efficient loss distribution is morally justified only on utilitarian principles: the party who is better placed to bear the burden

\(^{216}\) Imperial Chemical Industries Ltd v Shatwell [1965] AC 656 (HL) 685 (Lord Pearce): The doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice. The master having (presumably for his own benefit) employed the servant, and being (presumably) better able to make good any damage which may occasionally result from the arrangement, is answerable to the world at large for all the torts committed by his servant within the scope of it.

\(^{217}\) Two competing moral principles are reflected in modern tort law – the first (by far the strongest) is the principle of justice derived from the social contract, and the second theory is derived from utilitarianism, which lurks behind the ideas of efficient loss distribution and deterrence (by this yardstick the law must distribute the burdens or risk-creating behaviour causing harm in a manner that expands social welfare over all): Wingfield (n 190 above) 407 - 408, 410. Although the primary aim of tort law is the pursuit of corrective justice, which requires somebody who has harmed another without justification to indemnify the other, Lord Steyn observed that it also involves notions of distributive justice: n 192 above, 4 - 5.

\(^{218}\) Lord Nicholls elaborated, Majrowski (n 214 above) [9]:

\[^{[}\]these factors are that all forms of economic activity carry a risk of harm to others, and fairness requires that those responsible for such activities should be liable to persons suffering loss from wrongs committed in the conduct of the enterprise. This is ‘fair’, because it means injured persons can look for recompense to a source better placed financially than individual wrongdoing employees. It means also that the financial loss arising from the wrongs can be spread more widely, by liability insurance and higher prices. In addition, and importantly, imposing strict liability on employers encourages them to maintain standards of ‘good practice’ by their employees. For these reasons employers are to be held liable for wrongs committed by their employees in the course of their employment.

See Ryan & Ryan (n 192 above) 3.


\(^{220}\) Wingfield (n 190 above) 406.
of an injury-produced activity does so.221 Using this moral justification for vicarious liability, David Wingfield has narrowed down the pertinent question to whether society is better off by making the enterprise whose activities carry an inherent risk of harm, which it is unreasonable to impose on other members of society, bear the costs of any harm that materialises from this risk or whether society is better off by making the victim bear the harm.222

7.4 Prisoners’ rights

There is consensus on the broad statement that prisoners do not lose all their rights and liberties when they are imprisoned. The treatment of detainees and prisoners is governed by a requirement that their dignity be respected notwithstanding justifiable reasons for their detention or the heinous nature of their crimes. However, the nature, extent and implementation of their residual rights are contested issues. Two of these at least – humane detention conditions and the exercise of the right to vote – have received limited support in Irish law.

7.4.1 Humane detention conditions

Respect for dignity has become a feature in complaints by prisoners of the conditions under which they are detained.223 The courts have been opposed to releasing prisoners because of unsuitable facilities, but have been somewhat more sympathetic to granting them lesser relief – albeit circumscribed by the demands on the prison service to maintain order and discipline and by the de facto constraints on prisoners’ liberty attributable to their incarceration as a result of their own criminal conduct. Barrington J in the High Court in State (Richardson) v Governor of Mountjoy Prison was unequivocal in his recognition of prisoners’ rights of access to the courts, stating, ‘[t]here is no iron curtain between the Constitution and the prisons in this Republic’.224 He accepted that the slopping out procedures in Mountjoy Prison breached the prisoner’s unenumerated right to health, but dismissed her right to privacy.
argument. He did not analyse her right to dignity at all, although she invoked it. This can be contrasted with the South African courts’ long-standing analysis of the effect of detention conditions on the dignity of prisoners going back as far as *Whittaker v Roos* in 1912. In simply distinguishing between the existence and the exercise of a right, Barrington J’s analysis is scant – it is virtually meaningless to possess a right that one cannot exercise. An intensive examination of the justification for curtailing rights in prison and of the extent of the inroads into the prisoner’s rights coupled with application of the proportionality test would have been more apt.

Although slopping out has been acknowledged by the courts and the prison authorities as breaching prisoner’s rights, it has not been eliminated in Irish prisons. The courts have not granted orders of *mandamus* to redress the situation, but have been tolerant of the delays in reforming the system. In *Brennan v Governor of Portlaoise Prison*, an application for habeas corpus, Budd J found that the threshold of ‘exceptional circumstances’ required for making the conditional order absolute had not been reached. An order of habeas corpus would only be justified where for instance there was an element of bad faith and the prisoner’s constitutional rights were being consciously and deliberately violated or where the prisoner was being subjected to inhuman or degrading treatment seriously threatening the life or health of the prisoner and the authorities were unwilling or unable to rectify those conditions. Budd J was satisfied to rely on the prison authorities to implement the ending of slopping out in a modernisation programme.

225 n 97 above, 92 - 93. Barrington J considered that the appropriate relief would be an absolute order of *mandamus* and adjourned the case to see if recommendations for improvement were implemented without the necessity for an order: n 97 above, 93. When it was re-entered, the court was informed that the matters complained of were in the process of being remedied and so Barrington J made no actual order of *mandamus*: noted by Budd J in *Brennan v Governor of Portlaoise Prison* [1998] IEHC 140, [1999] 1 ILRM 190 at 202. On slopping out in Scotland, see *Napier v Scottish Ministers* 2005 SC 229 (Court of Session Outer House, Scotland).

226 n 97 above, 84.

227 1912 AD 92 (SC).

228 This forbearance accords with the courts’ antipathy towards granting mandatory orders in the last decade: Hogan & Whyte (n 16 above) [7.4.43] fn 79.

229 n 225 above, 201, 206.

230 n 225 above, 205, 208.

231 n 225 above, 207. Despite repeated criticism by the courts over many years, he thought it ‘remarkable’ that the Prison Rules have not been revised, but he did not see the courts having any role in intervening to amend them or to require the other arms of government to do so: n 225 above, 209.
A prisoner spokesperson for the Real IRA complained in *Mulligan v Governor of Portlaoise Prison* that slopping out procedures violated his personal rights under Article 40.3.1° to bodily integrity, not to have his health placed at risk, and not to be subjected to torture, inhuman or degrading treatment or punishment. Alternatively he claimed that the prison conditions amounted to inhuman and degrading treatment under Article 3 and violated his right to private life in Article 8 ECHR. He sought a declaration that his detention breached his rights and a remedy in damages. Because constitutional issues were raised, MacMenamin J confirmed that the established norms of tort law were not adequate fairly and justly to address the range of issues arising, and it was necessary to balance the positive against the negative aspects of the applicant’s detention. The attenuation of rights necessitated by imprisonment must be proportionate, the diminution not falling below ‘the standards of reasonable human dignity and what is to be expected in a mature society.’ The obligation on a prison authority was to vindicate the individual rights and dignity of each prisoner insofar as practicable.

MacMenamin J found that the ventilation, sanitation and hygiene regime at the prison fell significantly below the standard expected at the time. The constitutional rights at issue were not absolute and the state’s duty was to defend and vindicate them insofar as was practicable. Absent evidence of overcrowding or ‘doubling up’ in cells, he was unable to find that the use of a chamber pot in the cell actually violated the prisoner’s rights of privacy or human dignity to a degree to give rise to a cause of action. There was no violation of the applicant’s negative right to be protected against inhuman or degrading treatment, as no ‘evil purpose’ was shown.

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233 n 232 above, [7].
234 n 232 above, [5].
235 n 232 above, [105], [109].
236 n 232 above, [14].
237 As above.
238 n 232 above, [43].
239 n 232 above, [90], [93].
240 n 232 above, [117]. The applicant as a Real IRA prisoner was relatively privileged to have a cell to himself at all times: n 232 above, [14]. The conditions of detention did not seriously endanger the prisoner’s life or health: n 232 above, [111].
241 n 232 above, [91]. Cf *State (C) v Frawley* [1976] IR 365 (HC) 374 (Finlay P). On *State (C) v Frawley*, see Byrne et al (n 223 above) 40 - 42, 77 - 78.
Based on a review of the jurisprudence of the European Court of Human Rights, the minimum level of severity required to establish breaches of the ECHR was not achieved in *Mulligan*.\footnote{232} The factors to be taken into account in measuring the minimum level of severity for a breach of Article 3 ECHR as set out by the European Court of Human Rights in *Bakhmutskiy v Russia* include the duration of detention and ‘the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim’.\footnote{88} The state is obliged to ensure that a prisoner is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.\footnote{95}

A positive intention to humiliate or to debase the prisoner was not necessary in order to impinge on human dignity, which occurred when a prisoner’s self-esteem was lowered by living in overcrowded conditions for an extended period.\footnote{96} The Court held that, in addition to a violation of Article 3 ECHR, there was a breach of Article 13 because of the lack of an effective accessible remedy for the prisoner to complain about the general conditions of his detention.\footnote{101} Significantly, it noted that a remedy must be effective in practice as well as in law.\footnote{98}

The dignity claim was given some weight in *Devoy v Governor of Portlaoise Prison* when Edwards J acknowledged that among the residual constitutional rights of a prisoner which were not abrogated or suspended was ‘the right to

\footnote{232}{n 232 above, [161], [164].}

\footnote{88}{(App no 36932/02) ECHR 25 June 2009 [88].}

\footnote{95}{As above .}

\footnote{96}{n 243 above, [96]:
[T]he Court finds that the fact that the applicant was obliged to live, sleep and use the toilet in the same cell as so many other inmates for almost six years was itself sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and to arouse in him feelings of fear, anguish and inferiority capable of humiliating and debasing him.
On overcrowding, see also *Orchowski v Poland* (App No 17885/04) ECHR 22 October 2009.}

\footnote{101}{n 243 above, [101].}

\footnote{98}{n 243 above, [98].}
be treated humanely and with human dignity. The individual is viewed not in isolation, but in contact with others in the community. On the facts, the Court held that the prisoner had not been isolated and therefore he had not been treated inhumanely. The state’s duty under Article 40.3.2° of the Constitution extends to protection of ‘the integrity of the human mind and personality’ and requires that a prisoner be given the opportunity of ‘meaningful interaction with his human faculties of sight, sound and speech’.

There has been a series of claims by prisoners for damages for assault by other prisoners. In *Muldoon v Ireland* Hamilton P affirmed that prisoners have a right to freedom from harassment. The prison authorities are required to take all reasonable steps and reasonable care not to expose any of the prisoners to a risk of damage or injury, but the law does not expect them to guarantee an injury-free term of imprisonment. A balance has to be struck between the need to respect the dignity of all prisoners by avoiding excessively intrusive or frequent body searches in the search for weapons in order to protect prisoners from each other and the demands on the prison service to provide a safe environment by supervision and reasonable security measures. Murphy J in *Bates v Minister for Justice* posed the dilemma for the authorities, ‘[n]o doubt prison management is a constant battle between the need to preserve security and safety on the one hand and, on the other hand, the obligation to recognise the constitutional rights of the prisoners and their dignity as human beings.’

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249 As above:

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

250 As the restriction on the prisoner was not in accordance with the Prison Rules, which could have been justifiably invoked, the Court made a declaration of unlawfulness but declined to order his release.
254 n 253 above, 86. See McDermott (n 224 above) [7-27].
Chapter 7 – Irish case-law on dignity

The same theme resonated in Fennelly J’s judgment in *Creighton v Ireland.* In that case a prisoner had been awarded damages in the High Court for injuries suffered in a knife attack by a fellow inmate in a confined area. As it was not satisfied that White J had given the case proper consideration in the court below, where he had based the award on inadequate supervision, the Supreme Court remitted it to the High Court for further consideration. Following a re-hearing before O’Neill J, Mr Creighton was awarded €150,000 for the injuries sustained.

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

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255 n 138 above, [4]:
Prisons may, as an inevitable consequence of the character of persons detained, be dangerous places. Prisoners are entitled to expect that the authorities will take reasonable care to protect them from attack by fellow prisoners. What is reasonable will, as always, depend on the circumstances. As the cases recognise, prison authorities may have to tread a delicate line between the achievement of the objective of protecting the safety of prisoners and the risks of adopting unduly repressive and inhumane measures. They must balance the protective function and possible demand for intrusive searches against the need to permit prisoners an appropriate degree of freedom of movement and human dignity.

256 n 138 above, [15], [18], [22]. White J had not probed the facts thoroughly and avoided coming to any conclusion on the nature of the knife used or the level of overcrowding before concluding that the ‘prison authorities could not reasonably have been expected to have been in a position to prevent an attack on the plaintiff’.


258 [2011] IEHC 84 [2]-[3], [6], [36]. Following an arson incident when he was on remand in Limerick Prison, Sage had been afforded protective custody on request in Mountjoy Prison where he was taken after sentencing: above, [3]-[4]. On his transfer to Cork, he maintained he believed he would remain in protective custody, but he was attacked on his second day there: above, [5]-[6], [14]. Evidence was given that the prison authorities in Cork had not been informed that the prisoner had concerns for his safety: above, [9].

259 n 258 above, [29].
prisoners. The evidence of the prison authorities was more persuasive that that of the plaintiff, who did not discharge the burden of proof that the authorities had notice of his concerns for his safety in Cork. The yard where the assault occurred was supervised at the time and the emergency response was adequate and timely. The existence in prison of the weapon used in the assault did not necessarily connote negligence on the part of the defendants. Because of the conflict in evidence, Irvine J’s dismissal of the claim was understandable. She took cognisance of the need to protect prisoners’ dignity by avoiding over-intrusive body searches and restrictions on their movements. The authorities had reacted promptly when it became aware of concerns for Mr Sage’s safety and had no reason to believe he would be at risk when transferred to Cork.

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

260 n 258 above, [17]:
It is undoubtedly the case that the task faced by prison authorities in seeking to balance the prisoner’s rights to bodily integrity against their competing right to a model of confinement, which will protect their dignity, will generate the notion of citizenship and avoid unnecessary dehumanisation is very difficult. Cf Casey v Governor of Midlands Prison [2009] IEHC 466 [12], [22], [34]. See Keane (n 257 above) 31.

261 n 258 above, [23], [36]. The prison service’s obligation was to take reasonable care for his safety, but they were not obliged to transfer him to what they considered to be the safest prison: n 258 above, [22].

262 n 258 above, [24].

263 n 258 above, [34].

264 (n 224 above) [7-19].

265 McDermott (n 224 above) [7-21].

266 McDermott (n 224 above) [7-19].

267 McDermott (n 224 above) [7-20].
The dignity of prisoners is not respected fully by the state. Calls for reform of our prison system have gone unheeded. Overcrowding is rife in some jails and impedes the privacy and dignity of prisoners. A proper balance needs to be struck between all prisoners, so that preservation of the dignity of one is not at the expense of another. We could follow the example in French law and strive to protect the dignity of the victim as well as that of the accused. Undoubtedly the state has a difficult task to ensure security, while respecting the dignity of prisoners. The courts have been too indulgent of the state’s neglect of prisons and of its failure to provide reasonable living conditions with adequate space for those detained, although Hogan J’s decision in *Kinsella v Governor of Mountjoy Prison* is a refreshing change. By constructive engagement with the executive, he achieved prompt improvement in a prisoner’s detention conditions without breaching the separation of powers.

The state has taken no effective measures to address the systemic causes of persistent overcrowding in prisons nor to provide sanitation facilities respectful of prisoners’ dignity. As has happened in South Africa, intervention by the courts to improve poor prison conditions can be done in a way that is consistent with the separation of powers, but makes the prison authorities accountable. Lack of resources is no excuse for failing to address repeatedly highlighted deficiencies. As illustrated by the cases reviewed, some judges have expressly accepted that the human dignity of prisoners is entitled to protection. But recognition of the state’s constitutional obligation to protect their rights has not usually produced positive outcomes for prisoners. Finlay P and MacMenamin J resiled from giving them a remedy because of the absence of an evil purpose, although this is not a requirement under the

268 Contrast the favourable outcomes for prisoners following judicial analysis of constitutional values in *Strydom v Minister of Correctional Services* 1999 3 BCLR 342 (W) (SA High Court, Witwatersrand Local Division) and *Stanfield v Minister of Correctional Services* 2003 12 BCLR 1384 (C) (SA High Court, Cape of Good Hope Division) with *Richardson* (n 97 above), *Brennan* (n 225 above) and *Mulligan* (n 232 above).

269 See *Davis* (n 55 above) 151.


271 n 251 above, [15], [17].

272 See McDermott (n 224 above) [2-03]–[2-04].

273 Edwards, Fennelly, Irvine, MacMenamin and Murphy JJ.

274 Hogan J’s decision in *Kinsella* is a notable exception.
ECHR and has not been a barrier in African cases. Cases have been lost on account of findings of fact against prisoners. This is an inevitable hazard in litigation and is understandable to some extent. Failure has also ensued when the wrong order (habeas corpus) has been sought.

7.4.2 The franchise
The Supreme Court denied equality to prisoners in relation to a fundamental right and duty of citizens in a democracy when it made a petty distinction between a prisoner’s right to vote and curtailment of the exercise of the franchise in *Breathnach v Ireland*.

This can be contrasted with the outcome to similar challenges in South Africa and Canada, and before the European Court of Human Rights, although in all of these cases, which were decided by a majority, the matter was controversial. In *NICRO* the South African legislation was found unconstitutional, as it breached the right to vote and did not pass the rationality test for limitation of rights. Ngcobo J (dissenting) considered that the restriction on voting rights was justified, since crime struck at the very core of the fabric of society by violating fundamental human rights such as the right to life, the right to freedom and security, the right to property and the right to dignity, and undermining the rule of law.

The majority of the Supreme Court of Canada in *Sauvé v Canada* asserted the need for clear justification for infringement of fundamental rights by the...
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legislature, and was not persuaded that the court should defer – even in the interests of dialogue with the legislature.284 The Grand Chamber of the European Court of Human Rights in Hirst v UK referred to Sauvé and the South African case of August.285 It found that the right to vote286 was not a privilege any longer, but neither was it an absolute right.287 Ireland was among the 13 countries listed in Hirst where all prisoners were barred from or unable to vote,288 but legislation has since been passed permitting prisoners to apply for a postal vote.289 The offender’s capacity for autonomy and participation in democracy can be strengthened by having the ability to vote

284 n 278 above, [9], [17]. McLachlin CJ, delivering judgment on behalf of the majority, accepted that there can be no precise proof of philosophy, politics or society’s interests, but insisted that there must be convincing reasonable justification based on a constitutionally valid reason for infringement – not just ‘a simple majoritarian political preference for abolishing a right altogether’ or vague and symbolic objectives: n 278 above, [18], [20], [22]. She felt strongly that refusing to allow the exercise of the franchise reneged on the pledge to respect each person, ‘denying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual’: n 278 above, [35], citing August v Electoral Commission 1999 3 SA 1 (CC) [17]. Gonthier J for the minority took issue with her view that temporary disenfranchisement of prisoners undermined their inherent worth and, on the contrary, he regarded deprivation of voting as part of the punishment of an autonomous individual who had made a free choice to commit a crime, and stated, n 278 above, [73]:

[It] could be said that the notion of punishment is predicated on the dignity of the individual: it recognizes serious criminals as rational, autonomous individuals who have made choices. When these citizens exercise their freedom in a criminal manner, society imposes a concomitant responsibility for that choice.

He considered that temporary disenfranchisement of serious criminal offenders reiterated society’s commitment to basic moral values and was ‘morally educative for both prisoners and society as a whole’ – rather than undermining the dignity or worth of prisoners, the removal of their vote took seriously the notion that they were free actors and attached consequences to actions that violated core values: n 278 above, [75], [92].


285 n 279 above, [35]-[37] (Sauvé) and [38]-[39] (August (n 284 above).

286 ECHR Protocol No 1, Art 3.

287 The states were allowed a margin of appreciation to justify restrictions on voting by prisoners perhaps on the grounds of security or the prevention of crime and disorder: n 279 above, [59]-[60], [69]. The legislation had legitimate aims (the prevention of crime by sanctioning the conduct of convicted prisoners, and the enhancement of civic responsibility and respect for the rule of law), but it failed the proportionality test since there was no evidence that the legislature had sought to weigh competing interests or to assess the proportionality of a blanket ban, which was ‘a blunt instrument’ stripping indiscriminately a significant category of persons of their right to vote: n 279 above, [74]-[75], [79], [82], [85]. See S Tsakyrakis ‘Proportionality: An assault on human rights?’ (2009) 7 International Journal of Constitutional Law 468 at 486.

288 n 279 above, [33].

289 Electoral (Amendment) Act 2006 secs 2 & 3.
while in prison.\textsuperscript{290} The ethics of human dignity and rights are especially relevant to the moral standing of criminals, as they normally have little social standing and are in a similar position to those who cannot be protected by any moral concept other than respect for humans as such.\textsuperscript{291}

7.5 Family

The institution of marriage\textsuperscript{292} has been designated specifically for protection in Article 41 of the Constitution.\textsuperscript{293} In the absence of a similar provision in the South African Constitution, the safeguards for marriage and the family there are based on the foundational constitutional values and on human dignity.\textsuperscript{294} The nexus between marriage and the family in the Irish document and the omission of a clause prohibiting discrimination on the grounds of marital status have meant that less protection has been afforded to extra-marital family units, which are not given recognition.\textsuperscript{295}

Unmarried fathers have been the target of arbitrary differentiation and unreasonably denied the opportunity to express their identity through their relationship with their children and by participating in the lives of their offspring.\textsuperscript{296} The Irish courts have not considered the constitutional rights of


\textsuperscript{291} YM Barilan ‘From \textit{imago dei} in the Jewish-Christian traditions to human dignity in contemporary Jewish law’ (2009) 19 \textit{Kennedy Institute Ethics Journal} 231 at 232. Those who cannot be protected by any other moral concept include people with severe developmental disabilities, comatose persons, and cadavers: as above.

\textsuperscript{292} The right to marry is a personal right protected by Article 40.3.1, and can be regulated by the Oireachtas in accordance with the common good: \textit{O’Shea v Ireland} [2006] IEHC 305, [2007] 2 IR 313.

\textsuperscript{293} Art 41.3.1. See \textit{Murphy v AG} [1982] IR 241 (HC, SC); \textit{Muckley v Ireland} [1985] IR 472 (HC, SC); \textit{Greene v Minister for Agriculture} [1990] 2 IR 17 (HC); \textit{Hyland (n 97 above) (HC, SC)}. Contrast \textit{Madigan v AG} [1986] ILRM 136 (HC, SC).

\textsuperscript{294} Certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 (CC) (First Certification case) [100]. See also \textit{Dawood v Minister of Home Affairs} 2000 3 SA 936 (CC) [28], [36]-[37]; \textit{Booyzen v Minister of Home Affairs} 2001 4 SA 485 (CC) [8], [10]; \textit{Volks v Robinson} 2005 5 BCLR 446 (CC) (majority view).

\textsuperscript{295} See \textit{O’Brien v Stoutt (n 88 above) (HC, SC)}. The right to travel (but not the disparate treatment of marital and non-marital children) ensured a satisfactory outcome in \textit{State (M) v Minister for Foreign Affairs} [1979] IR 73 (HC).

\textsuperscript{296} Only in the last 100 years have Western countries recognised the duties of fathers to their non-marital children: Barilan (n 291 above) 239. On the non-marital family in Irish law, see Binchy (n 83 above) 202 - 203. On unmarried fathers and guardianship,
unmarried fathers in the full light of the constitutional values of human dignity, equality and freedom. In Nicolaou the Supreme Court addressed the rights (or lack of rights, as it emerged) of the unmarried father of a child sent for adoption without his consent.297 The father claimed that that he had rights that could be exercised when the mother abrogated her entitlements, and alleged unfair discrimination based on sex and paternity. While Walsh J in the Supreme Court was willing to accept that the mother had natural rights, he did not examine when her rights could be limited. He had no hesitation in condemning all unmarried fathers to be without rights in relation to their child, irrespective of the individual circumstances. He referred to children conceived as a result of rape and to fathers who might have no interest in their children, but he sacrificed the committed fathers with the uninvolved ones.298 No distinction was made between responsible and irresponsible fathers. This was not the case in South Africa, when in Fraser the Constitutional Court found that legislation dispensing with the unmarried father’s consent to adoption in all circumstances breached the constitutional rights to equality and was discriminatory.299

In WO’R v EH the Irish Supreme Court by a majority held that the concept of de facto family ties was not recognised under the Constitution, which defined the family as one founded on marriage.300 The Court unanimously accepted Finlay CJ’s recognition in JK v VW that the natural father could have extensive rights (but not based on the Constitution), where the child was born as a result of a stable and established relationship and was nurtured at the commencement of its life by a father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family.301 Barrington J (dissenting) criticised Walsh J’s judgment in Nicolaou, on the grounds that, although Walsh J referred to equality as human persons under Article 40.1, he went on to treat Mr Nicolaou (a caring parent) the same way as a natural father with no interest in his child, which amounted to unfair


297 n 90 above.
298 n 90 above, 641.
300 n 91 above.
301 n 105 above, 447. See Shannon (n 17 above) [9-125]–[9-127]. Note observations of McKechnie J: GT v KAO (n 142 above) [50]-[51].
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discrimination by treating people in different situations equally.302 Furthermore, the failure of the Adoption Board to inform Mr Nicolaou of the proposal to give his child for adoption, even though he had notified the Board he would oppose it, was extraordinary and Walsh J’s description of its omission as ‘impolitic’ was too mild.303 Barrington J considered that it was illogical to acknowledge the rights of the child and the mother under Article 40.3 and to deny that the concerned father also had rights under the same provision.304

In addition to the South African example, Canadian jurisprudence can be an indicator of how the Irish courts could address the fragile legal standing of fathers. Wilson J (dissenting) in R v Jones pointed out the significance to identity of familial bonds from the viewpoint of fulfilling obligations rather than of exercising rights.305 The Supreme Court of Canada approved of this view in Trociuk, when Deschamps J delivering the Court’s unanimous judgment based her analysis of the breach of the equality right on the impairment of dignity and stated, ‘[p]arents have a significant interest in meaningfully participating in the lives of their children.’306

7.6 Children’s rights

The uncertainty over the nature of children’s rights was epitomised by the divergence between the judges in TD.307 The applicants in TD were disadvantaged children in need of accommodation and treatment in high support units. The responsible state authorities had been found to have failed

302 n 91 above, 278 - 280.
303 n 91 above, 280, citing n 90 above, 639.
304 n 91 above, 284.
305 ‘The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual’s sense of self and of his place in the world.’: [1986] 2 SCR 284 (SC of Canada) [79].
306 Trociuk v British Columbia (4G) 2003 SCC 34, [2003] 1 SCR 835 [15]. In this case it was held that legislative provisions giving the mother absolute discretion to unacknowledge the biological father on the birth registration forms and not to include the father’s surname in the child’s surname violated the father’s right to equality, as they discriminated on the grounds of sex (Canadian Charter of Rights and Freedoms 1982, Sec 15(1), and were not justified under the limitations clause since they did not impair the father’s rights as little as reasonably possible (Sec 1). The absence of historical disadvantage against fathers as a group was not determinative: above, [20]. See Hogg (n 284 above) 664.
307 n 147 above (HC); n 32 above (SC).
in their obligations to vindicate the children’s rights. As there were delays in implementing the policy formulated by the authorities to deal with the general problem of children with special needs, Kelly J in the High Court granted a mandatory injunction directing that the facilities be provided for them in accordance with the adopted policy.\(^{308}\) The Supreme Court in a majority decision allowed the respondents’ appeal. In the High Court, Kelly J referred to the High Court case of *FN v Minister for Education* decided some five years earlier when Geoghegan J made a declaration that a minor was entitled to treatment to ensure his welfare.\(^{309}\) Kelly J approved of Geoghegan J’s identification of needy children’s rights to appropriate facilities and granted the injunction because of the delays.\(^{310}\) In *FN* Geoghegan J had endorsed the rights of the child enunciated by O’Higgins CJ in *G v An Bord Uchtála* as ‘a child having been born has the right to be fed and to live, to be reared and educated, and to have the opportunity of working and realising his or her full personality and dignity as a human being’ and approved of his view that these rights must be protected and vindicated by the State.\(^{311}\) Geoghegan J commented that Walsh\(^{312}\) and Henchy J\(^{313}\) had made similar observations.\(^{314}\)

308 n 147 above.  
310 n 147 above, 85.  
311 n 309 above, 415, citing *G* (n 30 above) 56.  
312 Walsh J expounded on the child’s independent natural right to life as a person, stating, *G* (n 30 above) 69:  
The child’s natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and to follow his or her conscience. The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation. It lies not in the power of the parent who has the primary natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child or to terminate its existence. The child’s natural right to life and all that flows from that right are independent of any right of the parent as such.

313 Henchy J’s view of the child’s constitutional right was more circumscribed, his description of it being within the realms of education, *G* (n 30 above) 91:  
As to the constitutional right of the child, it arises under Article 40, s. 3, by analogy with Article 42, s. 1, and it amounts to a right to be accorded, with due regard to what the circumstances reasonably allow, an upbringing which will provide for the religious and moral, intellectual, physical and social education of the child. Whereas this right, as guaranteed by Article 42, s. 1, to legitimate children, is coupled with a correlative duty imposed on the parents – a duty which is related to their means – the analogous right of illegitimate children which is to be implied under Article 40, s. 3, cannot be necessarily exercisable in the context of a correlative duty imposed on the father or mother.

314 n 309 above, 415.
The South African Constitutional Court in *S v M* also took the view that the child has its own independent personality and dignity.315

To summarise the Supreme Court's attitude to children's rights in *TD*, one judge (Denham J in dissent) had a strong belief that they attached to the children in their own right;316 another (Keane CJ) considered children had rights, but only on the assumption that *G v An Bord Uchtála* had been correctly decided;317 Murphy J did not accept that the *ratio decidendi* in *G v An Bord Uchtála* was as extensive as Geoghegan J held in *FN*;318 the remaining two judges (Hardiman319 and Murray320 JJ) reserved their position.

There were concerns in Ireland that because of the prime position occupied by the institution of the (marital) family under Articles 41 and 42, parental autonomy and control could take priority over the child's welfare and best interests.321 The welfare of the child encompassed within the Constitution was focused on preventing serious impairment of the child's welfare interests rather than on actively promoting them.322 Conflict existed between national law and Ireland's international obligations to protect children.323 The general trend in international law is to regard children as individuals possessing rights independently of their parents.324 The emphasis has switched from parental rights to parental responsibilities in South Africa,325 where the courts have begun to recognise the interests of the child as occurring in communion with the interests of the parents and the common

315 2008 3 SA 232 (CC) [18]-[19].
316 n 32 above, 295 - 296.
317 n 32 above, 281 - 282.
318 n 32 above, 318.
319 n 32 above, 345.
320 n 32 above, 325.
321 Shannon (n 17 above) [1-05]–[1-07].
322 Shannon (n 17 above) [1-09]. Cf F Ryan ‘21st century families, 19th century values: Modern family law in the shadow of the Constitution’ in Doyle & Carolan (n 14 above) 371 - 374. See *North Western Health Board* (n 54 above).
323 Shannon (n 17 above) [1-54], [1-56], [1-72]. On the domestic effect of international treaties in Ireland, see S Egan *The United Nations human rights treaty system: Law and procedure* (2011) [1.16].
325 Shannon (n 17 above) [1-65]. See *Bannatyne v Bannatyne* [2002] ZACC 31, 2003 2 SA 363 (CC) [30].
good. A comprehensive provision in the Irish Constitution similar to that in Section 28 of the South African Constitution setting out the rights of the child and stipulating that the child’s best interests are paramount in every matter concerning the child would be appropriate. In a referendum held in 2012 the people approved the amendment of the Irish Constitution to affirm each individual child’s inherent rights and to provide that in stipulated circumstances the child’s best interests should be paramount.

7.6.1 Corporal punishment

Is there an obligation on the state to ban corporal punishment by a parent? If corporal punishment is bad for adults, then is it not bad for children, who are people too? There is an inherent conflict between smacking, which is fundamentally violent and authoritarian, as a form of punishment and the ideals of peace, harmony and dignity contained in international human rights instruments. As we have seen, some interpret the Convention on the Rights of the Child (CRC) with the guidelines in the UN general comments as outlawing all parental corporal punishment. Legalised violence against children is prohibited, but the definition of ‘violence’ is critical to resolving the issue. Parents may defend smacking on the grounds that it is not violence.

326 Shannon (n 17 above) [1-71].
328 The amendment provided for the repeal of Article 42.5 and the insertion of Article 42A. But even without an amendment, there was scope for improving the protection given to children in the existing legal system. Under the guise of respecting the separation of powers, the Supreme Court as guardian of the Constitution had been remiss in not intervening to protect children by directing mandatory orders to the State where warranted: Law Society of Ireland Law Reform Committee (n 327 above) 8, 60; Shannon (n 17 above) [1-106]. Intervention by the courts is not a breach of the separation of powers, which has to bow to the supremacy of the Constitution: DG Morgan The separation of powers in the Irish Constitution (1997) 231 - 232.
329 Pete (n 324 above) 447.
330 As above.
332 In particular see UN Committee on the Rights of the Child ‘General Comment No 8’ (2 March 2007) UN Doc CRC/C/GC/8. On General Comment No 8, see MDA Freeman ‘Upholding the dignity and best interests of children: International law and the corporal punishment of children’ (2010) 73(2) Law and Contemporary Problems 211 at 220 - 224. The views of a UN Committee do not prevail over Irish law where the terms of a Covenant have not been enacted: Kavanaugh v Governor of Mountjoy Prison [2002] IESC 13, [2002] 3 IR 97.
in retribution for bad behaviour but is for educational purposes – they may even say (as maintained by the parents in *Christian Education*) that it is warranted in service of the fundamental right to a proper education required by their duty to educate their children. This is a subjective view that is not amenable to independent scrutiny. The perspective of society on the value of corporal punishment as an educational mechanism has changed – particularly in Ireland where we have seen widespread child abuse by those entrusted with the care of children or in positions where they had access to them.

The supremacy of the Constitution may prevent Ireland from complying with the ECHR requirement that a state take positive steps to protect children from inhuman or degrading treatment or punishment. Following the European Court of Human Rights’ decision in *A v UK* the imprecise common law defence of ‘reasonable chastisement’ should no longer be available to a parent.


The emphasis in punishment theories has shifted from retribution to deterrence, reparation to the victim, and reform of the perpetrator. The salient feature of English penal policy at the end of the 18th century has been described as ‘a crude utilitarianism aiming at the reduction of crime through terror’: L Radzinowicz & JWC Turner ‘Punishment: Outline of developments since the 18th century’ in Radzinowicz & Turner (n 158 above) 39.

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

335 Shmueli (n 324 above) 210.

336 Despite the express recognition of children in their own right in the constitutional amendment of 2012, the remaining emphasis in the Irish Constitution on parental autonomy may still be an obstacle to an outright ban on all corporal punishment and make it difficult to formulate an exemption for parental punishment based on an objectively reasonable standard.

Recognising the difficulties and noting the gradual development of the criminal law of assault, the Law Reform Commission had recommended waiting to abolish the common law chastisement exception until parents had been re-educated. Law Reform Commission ‘Report on Non-Fatal Offences Against the Person’ (LRC 45-1994) [9-212], [9-214]. See Shannon (n 17 above) [2-33]–[2-34].
as a defence to an assault charge. \[337\] I will now consider whether Irish law is in conformity with the ECHR requirements. Has any gap that existed in the common law been sealed by the Non-Fatal Offences against the Person Act 1997?

Corporal punishment in schools is a thing of the past insofar as Irish law is concerned. \[338\] There has not been as decisive a ban on parental corporal punishment. \[339\] Statutory exceptions and definitions leave room for a parent charged with assault to plead that the force applied to the child constituted reasonable chastisement as permitted at common law, that there was a lawful excuse for the attack, or that Irish society accepts that parents can hit their children. The law is imprecise and does not provide adequate protection for children against ill-treatment in the home. Despite its positive obligation to intervene to protect rights, \[340\] the Irish State continues to collude in the violation of a minor’s dignity by standing on the sidelines and declining to criminalise unambiguously an assault by a parent on a child. \[341\] If children are regarded as possessing independent dignity, \[342\] the idea that they are the property of their parents so as to permit authoritarian control to be maintained

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

Reforms in the UK since that A v UK did not abolish the defence of reasonable chastisement entirely and the law there retains the concept that hitting children can be not only acceptable, but right: L Hoyano & C Keenan Child abuse: Law and policy across boundaries (2010) 187.

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

339 Sec 22(1) of the 1997 Act stipulates that the Act has effect ‘subject to any enactment or rule of law providing a defence, or providing lawful authority, justification or excuse for an act or omission.’ Section 2 decriminalises assault if there is a ‘lawful excuse’: sec 2(1). Neither is an offence committed ‘if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person’: sec 2(3).

340 Shannon (n 17 above) [2-29]–[2-30].

341 See JA Scutt ‘Sparing parents pain or spoiling the child by the rod: Human rights arguments against corporal punishment’ (2009) 28 University of Tasmania Law Review 1 at 7.

342 Some Irish judges have referred to the child’s dignity in his or her own right, including Geoghegan J in FN (n 309 above) 415; Denham J (dissenting) in TD (n 32 above) 295. Cf S v M (n 315 above) [18]; DPP Transvaal v Minister for Justice and Constitutional Development [2009] ZACC 8, 2009 4 SA 222 (CC) [123] (Ngcobo J).
by violence is no longer tenable. A clear ban outlawing parental corporal punishment is necessary to comply with our international obligations.

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

I will now outline the duties imposed on parents, as the steps they take to fulfil those duties are relevant to the question of whether they may use corporal punishment as an educational tool. The primary duty to care for, protect, and raise the child rests on the parent, who may have a liability in tort law for negligence for damage or injury caused by a child because of entrusting the child with dangerous articles, the child’s dangerous propensities or failure to control the child properly. Article 42.1 of the Constitution refers to the right and duty of parents to provide for ‘the religious and moral,

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343 Scutt (n 341 above) 22.
344 Freeman (n 332 above) 216.
347 Stewart (n 345 above) 33.
348 Freeman (n 332 above) 221.
349 Stewart (n 345 above) 33. See also CRC (n 331 above) art 18(1).
350 D Glendenning Education and the law (2012) [9.105]. The incident giving rise to the claim may be attributable to the parent’s lack of success in supervising and controlling the child’s activities, or, more broadly, to some deficiency in parenting: S Van Praagh ‘“Sois sage” – Responsibility for childishness in the law of civil wrongs’ in Neyers et al (n 190 above) 76.
intellectual, physical and social education of their children.\footnote{Parents have a dual role – they are expected to foster a child’s sense of autonomy and self-fulfilment, and also to underline the child’s sense of responsibility for self and others: Van Praagh (n 350 above) 64. The rights that parents have over their children flow partly from their interest in having a relationship with them, and partly from their need to have these rights to carry out their duties: Stewart (n 345 above) 22.} The extent of that duty and the leeway given to parents to decide the tactics to fulfil it change in accordance with societal views, which are influenced by the law (including international instruments).

As well as condemning clearly violence and the degrading treatment of children, the CRC acknowledges parents’ rights and duties.\footnote{Article 5 obliges states to respect their ‘responsibilities, rights and duties … to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.’ Article 14 asserts that parents can and must provide direction to the child in ‘a manner consistent with the evolving capacities of the child’ (art 14(1) in the exercise of his or her right to freedom of thought, conscience and religion (art 14(2).} States have to assist parents in the performance of their child-rearing responsibilities,\footnote{Ayoola JSC in the Nigerian Supreme Court stated, ‘[t]he right to freedom of thought, conscience or religion implies a right not to be prevented, without lawful justification, from choosing the course of one’s life, fashioned on what one believes in, and a right not to be coerced into acting contrary to religious belief’: Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo [2002] AHRLR 159 (NgSC 2001) [73].} which are underpinned by the best interests of the child.\footnote{The amendment of the Irish Constitution approved by the people in 2012 would allow provision to be made by law (a) for adoption of a child when its best interests so require and (b) for the best interests of the child to be the paramount consideration when certain proceedings are being resolved: Art 42A.2.2°, 42A.4.1°.} Although recognising parents’ rights and duties, the CRC places them in the context of the child’s rights and best interests. Notwithstanding the fact that the latter is a vague principle open to various interpretations in different places and times, the CRC does not give any scope for parental discretion to use corporal punishment for educational or other purposes. The parents’ rights are supplemental to those of the child.

The margin of appreciation allowed to states under the ECHR is not replicated in the CRC. Furthermore to constitute degrading treatment or punishment under Article 3 ECHR, a minimum level of severity must be
reached.\textsuperscript{355} In \textit{A v UK} the European Court of Human Rights looked at the context.\textsuperscript{356} The difficulty arises in framing a provision that would allow corporal punishment by a parent below the minimum threshold of severity. The attempt by the UK to do so has not been successful and has satisfied neither abolitionists, supporters, the police nor social workers.\textsuperscript{357}

On one side of the fence stand paternalistic traditionalists who believe parents know best and place the authority of the family centre stage.\textsuperscript{358} On the other side are those – fearful of inflicting injury – who support individual rights viewing the child as an independent entity.\textsuperscript{359} Benjamin Shmueli has proposed an approach mid-way between these protagonists based on a relational worldview where the individual is connected to society and not isolated.\textsuperscript{360} His model has educational and preventative elements.\textsuperscript{361} He considers that an integrated approach which focuses mainly on the human rights of the child, but does not ignore parental rights, is best.\textsuperscript{362} He maintains that this approach is in line with the CRC that sees the child as a human being with rights and not merely as a person who needs extensive protection by society and the law.\textsuperscript{363}

355 On assessment of the minimum level of severity, see \textit{A v Ireland} (App no 25579/05) (2011) 53 EHRR 13 [164].

356 ‘The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.’: n 337 above, [20] (footnote omitted).

357 Freeman (n 332 above) 236. The Committee of Ministers of the Council of Europe continued to supervise execution of \textit{A v UK} after legislation permitting a parent to hit a child was enacted following the judgment by the European Court of Human Rights: Freeman (n 332 above) 235. On corporal punishment in the UK, see B Shmueli ‘Corporal punishment in the educational system versus corporal punishment by parents: A comparative view’ (2010) 73(2) \textit{Law and Contemporary Problems} 281 at 299.


359 Shmueli (n 358 above) 62. They wish society to have uniform desirable norms that do not bend before different cultural viewpoints and are enforced in an egalitarian manner on the whole population: as above.

360 n 358 above, 64.

361 n 358 above, 137. The criteria Shmueli lists as justification for a criminal prosecution include, first, intentional or reckless parental conduct without good faith and not in the best interest of the child; second, a negative motive (not educational, which is \textit{prima facie} positively motivated); and, third, deviation from reasonable, proportionate and moderate parental conduct: n 358 above, 132 - 134.

362 n 357 above, 320.

363 As above.
There is much merit in the state exerting its influence to sway public opinion towards a humane method of disciplining children that does not involve corporal punishment. Indeed, the CRC obliges states to take social and educational measures to protect children. But this does not absolve the legislature from addressing the issue. Although civil remedies may be appropriate in certain circumstances, a prohibition on parental corporal punishment in criminal law is still necessary. Ireland has already been found in breach of its obligation under the European Social Charter to protect children against violence because it had the defence of ‘reasonable chastisement’ and therefore corporal punishment was not fully prohibited.

In 2006 the UN Committee on the Rights of the Child expressed concern at Ireland’s continuing failure to prohibit corporal punishment within the family, and urged that this be done. It also pressed Ireland to educate parents and the general public about the unacceptability of corporal punishment, to promote positive non-violent forms of discipline as an alternative, and to take into account its General Comment No 8.

### 7.6.2 Privacy and property interests

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

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364 European Social Charter (revised) ETS No 163 (ESCR) Art 17.
365 Freeman (n 332 above) 238 - 241.
367 n 366 above, [40].
368 n 366 above, [40], citing UN Committee on the Rights of the Child ‘General Comment No 8’ (n 332 above).
369 On the duty to ensure a safe environment, see Glendenning (n 350 above) [6.114], [9.04], [10.21], [12.68]. The State may impinge on a child’s property rights while protecting the common good: *Landers v AG* [1975] 109 ILTR 1 (HC) 5 - 6.
arose in the South African case of *Pillay*. 370 A balance is sought between the property and privacy rights of the students and their freedom of expression, religion and culture, on the one hand, and the school’s authority to educate, on the other.

The US Supreme Court in *New Jersey v TLO* held that schoolchildren have legitimate expectations of privacy, which are not waived at the school gates. 371 However, an individual’s expectation of privacy depends on the context and the locus. The Court viewed the school’s need to maintain a proper learning environment as equally legitimate as the child’s expectations of privacy. 372 In striking the balance between the two, it examined the reasonableness in all the circumstances of the search. 373 There was a two-step test in determining reasonableness – the search had to be justified as reasonable at its inception and also in the manner in which it was conducted. 374

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

### 7.6.3 Non-traditional relationships

Scientific and medical advances combined with the acceptance of non-traditional personal relationships have given rise to contentious and difficult legal issues relating to the rights and duties to children and their welfare and best interests. The Supreme Court in *McD v L* adjudicated on the position of

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370 *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC).
372 n 371 above, 340.
373 n 371 above, 341. In this case the search was of a 14 year-old girl found smoking cigarettes in a school lavatory contrary to a school rule: n 371 above, 328.
374 n 371 above, 341.
a sperm donor known to the natural mother of the child and her lesbian partner.375 When the father’s rights to access and guardianship of the child were disputed, the Court decided the matter on the basis of the child’s best interests and remitted the action to the High Court to consider his access arrangements. The biological father had no constitutional rights of access or guardianship, but had a statutory right to apply to court for such orders. Fennelly J emphasised the relevance of the circumstances arising in each case, ‘[i]t is both right and natural to have particular regard to the context of conception, birth and subsequent family links.’376 On a scale of interested parties, the sperm donor did not carry much weight, as Fennelly J reasoned, ‘[t]o the extent that Finlay CJ and Denham J postulated a scale for assessment of “rights of interests or concern,” it seems likely that the sperm donor would be placed quite low, certainly by comparison with the natural father in a long-term relationship approximating to a family.’377

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

375 n 121 above. See M Farrell ‘Court rejects “de facto families” in lesbian couple case’ (2010) 104(1) Gazette of the Law Society of Ireland 14; Shannon (n 17 above) [16-93]–[16-96].
376 n 121 above, [78].
377 n 121 above, [79].
7.7 The embryo, body parts and human tissue

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

Let us begin by looking at the embryo. From a moral perspective, the status of the embryo depends on whether and to what extent it is thought to possess human dignity. At one extreme, is the full dignity position granting the embryo full moral status worthy of the same level of protection as an adult. At the other extreme, is the no dignity position, which views the embryo itself as having no intrinsic value or status. Between these extremes comes the intermediate stance dubbed the limited dignity position by Deryck Beyleveld and Shaun Pattison. The most popular limited stand is the proportional dignity position, which regards the moral status of the embryo as increasing with gestational development.

379 For an argument in favour of the existence of such rights, see D Beyleveld & R Brownsword ‘My body, my body parts, my property?’ (2000) 8 Health Care Analysis 87.
380 R Brownsword Rights, regulation and the technological revolution (2008) 63. He posed ‘the burning question’ whether an individual should have property claims of this kind in relation to that individual’s own body or removed body parts: as above.
381 Beyleveld & Pattinson (n 381 above) 186.
382 Beyleveld & Pattinson (n 381 above) 186.
383 As above.
384 As above.
385 As above. The fundamentally different viewpoints in Europe concerning the moral status and dignity of the embryo generated a patchwork of local regulatory positions.
Having sketched the moral position, it is time to analyse the case-law on the embryo. In Roche Hardiman J did not regard the fertilised but unimplanted ovum as property, and considered that the applicant wife could not rely on her personal rights under Article 40.3.1° as an alternative to having the fate of the frozen embryo decided on the basis of whether it came within the definition of ‘unborn’ in Article 40.3.3°. All the Supreme Court judges in that case resiled from analysing the meaning of life. According to Murray CJ, as it raised contentious moral, philosophical, theological and scientific issues, it was a matter for the legislature to decide based on policy choices or for a constitutional amendment. He avoided deciding on whether frozen embryos constituted ‘life of the unborn’, as it was not a justiciable issue and the appellant had not succeeded in establishing it. Denham J was satisfied that the term ‘unborn’ does not refer to an unimplanted embryo.

on the use of human embryos for research: R Brownsword ‘Introduction: Global governance and human rights’ in Brownsword (n 381 above) 5. In Ireland, the issue of when human life should begin to enjoy the benefit of legal protection is contentious, as was evident in the Report on Assisted Human Reproduction, when Gerry Whyte dissented strongly from recommendations envisaging the deliberate destruction of the embryo: Commission on Assisted Human Reproduction, Report (Dublin, April 2005) 73 - 76.

386 n 28 above, [184]. For reviews of Roche, see R Byrne & W Binchy Annual review of Irish law 2009 (2010) 246 - 251, 313 - 319, 469 - 480; A Mulligan ‘Roche v Roche: Some guidance for frozen embryo disputes’ (2010) 13 Trinity College Law Review 168. On the High Court decision (n 45 above), see Doyle Constitutional law: Text, cases and materials (n 14 above) [5-23]–[5-28].

387 n 28 above, [48], [50], [54]. See J Mortimer ‘Judges call for legislation on assisted human reproduction’ (2010) 104(2) Gazette of the Law Society of Ireland 12.

388 Art 40.3.3°.

389 n 28 above, [55]. The conclusion of all of the judges (except Murray CJ) was that the term ‘unborn’ did not refer to the frozen embryo. The underlying reason for their stance was their interpretation of the goal of the Eighth Amendment inserting Article 40.3.3° into the Constitution and its language. The aim of the Amendment was to prevent abortion being legalised in Ireland. Four of the judges confined the Amendment’s reach to the child or foetus intra-womb. Murray CJ disagreed and considered that simply because the embryo existed outside the womb did not mean it was excluded from protection: n 28 above, [36].

390 n 28 above, [148]. She analysed the context in which the Eighth Amendment was passed and its wording: n 28 above, [126]-[144]. It was introduced ‘to copper fasten the protection provided in the statutory regime, to render unconstitutional the procuring of a miscarriage’: n 28 above, [130]. She was satisfied that the mischief to which it was addressed was that of ‘the termination of pregnancy, the procuring of a miscarriage, an abortion’: n 28 above, [134]. ‘The capacity to be born, or birth’ defined the right protected and arose after implantation: n 28 above, [144].
Hardiman J (with whose interpretation Geoghegan and Fennelly JJ agreed) concluded that the ‘unborn’ referred to ‘the foetus en ventre sa mere, the embryo implanted in the womb of the mother.

Moving to the other side of the Atlantic, the US District Court of the Eastern District of Virginia treated frozen embryos as property in *York v Jones*. Justice Daughtrey of the Supreme Court of Tennessee in *Davis v Davis* considered it was not helpful to ask whether pre-embryos were property in order to decide their legal status, since embryos had no intrinsic value to either party, their value lying in their potential to become children. While

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391 From the wording of the Eighth Amendment and its historical context, Geoghegan J took the view that ‘the unborn’ refers to a child in the womb not yet born and that the constitutional provision dealt exclusively with the baby in the mother’s womb: n 28 above, [209], [217].

392 Fennelly J was satisfied that Article 40.3.3° did not extend to nor include frozen embryos which have not been implanted: n 28 above, [229].

393 n 28 above, [183]. Hardiman J adopted this position because of the context of the Eighth Amendment – those who promoted it thought it necessary to take active steps to prevent the legalisation of abortion whether by legislation or by judicial decision: n 28 above, [178]. The frozen embryo was not implanted and therefore did not fall within the ambit of the Amendment.

394 717 F.Supp 421 (1989). The Court held that a husband and wife were entitled to have a frozen embryo transferred from an institute for reproductive medicine in Virginia to California. A disposition agreement between the institute and the couple created a bailment relationship, which imposed an absolute obligation on the bailee to return the embryo to the bailor when the purpose of the bailment had terminated: above, 425. The plaintiffs’ claims for breach of contract and detinue were well-founded. See NR Walz ‘Abandoned frozen embryos and embryonic stem cell research: Should there be a connection?’ (2007) 1 University of St Thomas Journal of Law and Public Policy 122 at 138.

395 842 SW 2d 588 (1992) 598. See Walz (n 394 above) 129 - 130.

The modern view of property and legal rights over it has also generated divergent views in the less controversial and deeply personal area of the use of domain names on the internet. Questions have arisen as to whether domain names are regarded as property and whether an action lies for conversion of intangible property. Conversion of intangible property varies significantly across jurisdictions in the US: CW Franks ‘Analyzing the urge to merge: Conversion of intangible property and the merger doctrine in the wake of *Kremen v Cohen*’ (2005) 42 Houston Law Review 489 at 492. The US Court of Appeals held that in California the owner of a domain name could sustain an action for conversion: *Kremen v Cohen* 337 F.3d 1024 (2003) (US Court of Appeals 9th Circuit). It confirmed that a plaintiff must fulfil three requirements to establish the tort of conversion: first, ownership or right to possession of property; second, wrongful disposition of the property right; and, third, damages: above, 1029, citing GS Rasmussen & Associates, Inc v Kalitta Flying Services, Inc 958 F.2d 896 (1992) (US Court of Appeals 9th Circuit) 906. It affirmed that the concept of property is broad and includes ‘every intangible benefit and prerogative susceptible of possession or disposition’: above, 1030, citing *Downing v Municipal Court* 88 Cal App.2d 345 (1948) (Court of Appeals of California) 350.

On the historical development of conversion and its modern elements in the US, see Franks above, 494 - 502; E Kohm ‘When “sex” sells: Expanding the tort of conversion to encompass domain names’ (2003) 23 Loyola of Los Angeles Entertainment Law
they were neither persons nor property, they were deserving of more respect than other human tissue because of that potential. He found that the couple who provided the gametes had decision-making rights. The societal interest as expressed in public policy is a constraint on the individuals' freedom to decide the embryos' fate. In the absence of their wishes being ascertained or a prior agreement between them, the constitutional right to privacy grounded in the concept of liberty was determinative.

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

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396 n 395 above, 597.
397 As above:

398 n 395 above, 598, 604. The right of procreational autonomy (composed of two rights of equal significance – the right to procreate and the right to avoid procreation) is a vital part of an individual's right to privacy: n 395 above, 600 - 601. In the event of a dispute over conflicting constitutional claims, the Court balanced the interests of the parties: n 395 above, 603 - 604. Under contract law, the Court would have been prepared to enforce a prior agreement between the couple on the disposal of unimplanted embryos: n 395 above, 597.


through joint disposition agreements. The Supreme Court of Massachusetts took a more restrained view of the enforceability of the parties’ agreement on the use of embryos, when in \textit{AZ v BZ} it was dubious that an agreement prepared by and for the assistance of the clinic represented the intent of the husband and the wife regarding disposition of the preembryos in the case of a dispute between them. Moreover, even if the document had represented the couple’s intentions, the Court would have declined to enforce it on the grounds of public policy upholding their privacy and liberty interests. Another nuance was added by the Supreme Court of New Jersey in \textit{JB v MB}, where it accepted that agreements on the use of embryos were enforceable, but public policy permitted either party to resile later.

From these cases, it can be seen that the trend in the US has been to assess rights in relation to the embryo from the perspective of privacy tempered by public policy. The starting point has been that freedom to contract is upheld

JE Penner formulated two versions of the bundle of rights thesis – first, the ‘substantial’ version, where property is a bundle of rights in the sense that property is a naturally complex normative relation that should be regarded as an historically contingent association of various rights; and, second, the ‘conceptual’ version, which expresses the idea that ‘property’ is a concept that is not applied on the basis of some set of necessary and sufficient criteria, but that in a particular case the various incidents or indicia of property may add up in some way, or show sufficient resemblance to a paradigm, such that ‘property’ is correctly applied to describe it: JE Penner ‘The “bundle of rights” picture of property’ (1996) 43 \textit{University of California at Los Angeles Law Review} 711 at 722 - 723.

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

401 n 399 above, 564. She summarised, ‘[t]he relevant inquiry thus becomes who has dispositional authority over them.’: as above. This suggests a similarity to property law: Walz (n 394 above) 132 - 133.


403 n 402 above. 162 (Justice Cowin):

We derive from existing State laws and judicial precedent a public policy in this Commonwealth that individuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a mechanism for forcing such relationships when they are not desired. This policy is grounded in the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship.

404 ‘[T]he better rule, and the one we adopt, is to enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos.’: 783 A.2d 707 (2001) 719. See Walz (n 394 above) 134 - 135.
and agreements are enforceable when they are not in conflict with public policy to further research of benefit to society. Although not overtly expressed as such, the interests of the parties in relation to the embryo have been regarded as analogous to property rights. The embryo has generally not got the venerated status of a person or the inanimate rank of property, but its progenitors have decision-making rights over it which may be limited by public policy.

After this analysis of the position of the embryo, I will now review some decisions on rights over body parts and human tissue. Staying in the US, the case of Moore v Regents of University of California heard by the California Supreme Court illustrates well the divisive nature of the issues arising and the contrasting views on ways to resolve them. 405 Mr Moore’s spleen had been removed and was used for research purposes without his knowledge. The majority held that he had a cause of action for breach of the physician’s disclosure obligations, but not for conversion. 406 Justice Panelli dismissed the artificial attempt to construct a property-based claim – an unnecessary exercise since there were more appropriate avenues of redress that would protect privacy and dignity.407 Justice Mosk (dissenting) gave a more con-


406 Justice Panelli pointed out that Moore did not expect to retain possession of his cells following their removal, and therefore he was unable to sustain an action for their conversion, which required retention of an ownership interest in them: n 405 above, 136 - 137.

407 n 405 above, 140: [O]ne may earnestly wish to protect privacy and dignity without accepting the extremely problematic conclusion that interference with those interests amounts to a conversion of personal property. Nor is it necessary to force the round pegs of ‘privacy’ and ‘dignity’ into the square hole of ‘property’ in order to protect the patient, since the fiduciary-duty and informed-consent theories protect these interests directly by requiring full disclosure.

He gave three reasons why Moore’s tissue should not be treated as property, which the plaintiff needed to establish in order to ground an action for conversion: first, a fair balancing of the relevant policy considerations counselled against extending the tort; second, problems in this area were better suited to legislative resolution; and,
sidered analysis of the nature of property, a variable concept subject to limitation, and found in effect that decision-making rights were property interests. He deduced that protection of Moore’s dignity pointed to the vesting in him of a right to profit from his own cells.

Confronted with a dispute over the commercialisation of the results of research into Canavan disease based on tissue, blood samples and genetic information donated voluntarily by the plaintiffs in Greenberg v Miami Children’s Hospital Research Institute, Inc, the US District Court of the Southern District of Florida followed Justice Panelli’s reasoning in Moore and held that no action lay for conversion, as a donor retained no property interest after the donation was made. With resonances of Justice Mosk’s third, the tort of conversion was not necessary to protect patients’ rights: n 405 above, 142 - 143. Two policy considerations of overriding importance were, first, protection of a competent patient’s right to make autonomous medical decisions, which was grounded in well-recognised and long-standing principles of fiduciary duty and informed consent; the second one was not to threaten with disabling civil liability innocent parties engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample was, or might be, against a donor’s wishes: n 405 above, 143.

Justice Mosk’s argument as to why the judiciary should adjudicate and develop tort law, even when the legislature has competence, was persuasive: n 405 above, 176. Contradictory policy considerations were in tension. Justice Mosk highlighted the ethical implications and also mentioned equity – particularly when the parties were not in an equal bargaining position – as a second policy determinant promoted by recognising that every individual has a legally protectible property interest in his own body and its products: n 405 above, 173 - 174. He stated, ‘[o]ur society values fundamental fairness in dealings between its members, and condemns the unjust enrichment of any member at the expense of another.’ n 405 above, 174. Justice Arabian appreciated the problem outlined by Justice Mosk, but disagreed on the solution, being unwilling to decide the contentious moral, philosophical and religious issues arising simply at the level of tort law, n 405 above, 149.

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

The Florida Court accepted the distinction made in Moore between the patented results of research and the excised material used in the research: above, 1074 - 1075. In the interests of encouraging research, the claim for an extension of the duty of informed consent to cover economic interests was dismissed decisively on the basis that the plaintiffs, being voluntary donors rather than objects of human experimentation, were to be treated differently: above, 1070 - 1071. Moreno J was wary of the consequences of requiring the sharing of information with the donors, as he stated, ‘imposing a duty of the character that Plaintiffs seek would be
dissent in *Moore*, the plaintiffs’ claim for unjust enrichment in *Greenberg* was successful.411

Stephen Munzer divided all body rights into personal rights and property rights, differentiating between them on the basis that the latter protected the choice to transfer, while the former protected interests or choices other than the choice to transfer.412

There have been several instruments adopted at international and regional level regulating scientific development and requiring protection of human rights and human dignity in the process.413 This can be seen in the Universal Declaration on Bioethics and Human Rights adopted by UNESCO in 2005,414 when it continued the same theme evident in the Universal Declaration on

unworkable and would chill medical research as it would mandate that researchers constantly evaluate whether a discloseable event has occurred: above, 1070 (footnote omitted). If this additional requirement were imposed on researchers, it ‘would give rise to a type of dead-hand control that research subjects could hold because they would be able to dictate how medical research progresses’: above, 1071.

Also like *Moore*, the individual’s expectations were relevant, Moreno J dismissing the conversion claim because ‘these were donations to research without any contemporaneous expectations of return’: above, 1076.

For an analysis of expectations and an explanation of the connection between property and expectations, see Munzer (n 400 above) 28 - 31. For reviews of *Greenberg*, see Brownsword (n 405 above) 476 - 477; Hakimian & Korn (n 405 above) 2502 - 2504; Hardcastle (n 405 above) 71 - 73; Laurie (n 378 above) 321 - 322; Ram (n 405 above) 157, 165 fn 224, 169, 170 fn 247; Vard (n 405 above) 123 - 125.

411 n 410 above, 1072. They were entitled to recompense for a continuing research collaboration, into which they had invested ‘time and significant resources in the race to isolate the Canavan gene’: n 410 above, 1072 - 1073.

412 n 400 above, 48 - 49. He arrayed those personal rights on two different but related spectra; the first spectrum ranged from rights that protect only interests, through rights that protect both interests and choices, to rights that protect only choices; the second ranged from non-waivable rights, through those that were waivable with qualifications, to rights waivable at the option of the right-holder; property rights in the body could be sub-divided into weak and strong varieties, a weak property right involving only a choice to transfer gratuitously and a strong property right involving a choice to transfer for value: n 400 above, 49.

413 On the linkage between human rights and new technologies, and on the bioethical triangle (human rights, a dignitarian ethic and a utilitarian ethic) in the emerging international regulatory framework, see: Brownsword (n 308 above) 35 - 41; R Brownsword ‘Human dignity, ethical pluralism, and the regulation of modern bio-technologies’ in T Murphy (ed) *New technologies and human rights* (2009) 21 - 26; T Murphy ‘Repetition, revolution, and resonance: An introduction to new technologies and human rights’ in Murphy above, 1 - 2. On the meaning of dignity in these instruments, see C Foster *Human dignity in bioethics and law* (2011) 92 - 95.

the Human Genome and Human Rights of 1997\textsuperscript{415} and in the intervening International Declaration on Human Genetic Data.\textsuperscript{416} Dignity in the context of scientific advances concerning our genetic make-up seems synonymous with individual uniqueness and worth.\textsuperscript{417} The Council of Europe has stressed the imperative of protecting human dignity in instruments such as the Convention on Human Rights and Biomedicine,\textsuperscript{418} and the several Additional Protocols to the latter on Cloning,\textsuperscript{419} the Transplantation of Organs and Tissues of Human Origin,\textsuperscript{420} and Biomedical Research.\textsuperscript{421} Even though regulating ethical issues does not fall within the competence of the European Union, bioethics became a central part of the EU public debate and an integral component of governance because the European authorities deemed it necessary not to neglect moral debate in the face of rising competition on the internal market.\textsuperscript{422} Unlike in the US, an increasing amount of European


\textsuperscript{417} A Clapham Human rights obligations of non-state actors (2006) 540.


\textsuperscript{419} Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings (1998) ETS No 168, Preamble.


\textsuperscript{422} N Lenoir ‘Biotechnology, bioethics and law: Europe’s 21st century challenge’ (2006) 69 Modern Law Review 1 at 3. There has been criticism of EU governance of new
legislation dealing with the market includes ethical considerations and references to human dignity in legislation do not seem out of place.\textsuperscript{423}

The European Court of Justice ruled in \emph{Brüstle v Greenpeace} that the concept of ‘human embryo’ for the purpose of ascertaining the scope of the prohibition on patentability includes any human ovum, as soon as fertilised, if it is such as to commence the process of development of a human being.\textsuperscript{424} It also encompasses any non-fertilised human ovum capable of commencing that process because of the technique used to obtain it.\textsuperscript{425}

Francis Fukuyama has advocated the defence of human dignity by viable political institutions in the real world of politics and not just in philosophical tracts.\textsuperscript{426} South Africa has legislated to control the use of human tissue and gametes and to regulate research in the National Health Act 2003. Consent of the donor is necessary\textsuperscript{427} and payment to the donor is prohibited except for reimbursement of reasonable costs.\textsuperscript{428} Irish legislation on these moral and ethical questions would assist in clarifying the legal implications and would give much-needed guidance to medical personnel and researchers.

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\textsuperscript{423} Lenoir (n 422 above) 4.
\textsuperscript{424} Case C 34/10 \textit{Brüstle v Greenpeace eV} (ECJ, 18 October 2011) [35].
\textsuperscript{425} n 424 above, [36]. The Advocate General had proposed that an invention should be excluded from patentability where the application of the technical process for which the patent was filed necessitated the prior destruction of human embryos or their use as base material: n 424 above, (ECJ, Opinion Adv G Bot, 10 March 2011) [8], [119]. He pointed out in his Opinion that human dignity is a principle that must be applied to the human body from fertilisation (the first stage in its development): above, [96]. See F Duffy ‘Seed money’ (2011) 105(4) \textit{Gazette of the Law Society of Ireland} 38.
\textsuperscript{426} F Fukuyama \textit{Our posthuman future: Consequences of the biotechnology revolution} (2002) 177; Brownsword (n 308 above) 314. On Fukuyama’s conception of ‘human dignity, see above, 171 - 174; R Brownsword ‘What the world needs now: Techno-regulation, human rights and human dignity’ in Brownsword (n 381 above) 217 - 218; Brownsword (n 308 above) 314 - 315.
\textsuperscript{427} Secs 55(a), 57(4)(b), 62(1)(a), 71(1)(b), 71(2)(d) & 71(3)(a)(iv).
\textsuperscript{428} Sec 60(4)(a).
7.8 Privacy

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

In the context of the right to privacy, Hamilton P in Kennedy linked freedom and dignity to democracy, ‘[t]he nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society.’

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

What are known as the seven deadly sins are anathematised as immoral by all the Christian Churches and it would have to be conceded that they are capable, in different degrees and in certain contexts, of undermining vital aspects of the common good. Yet it would be neither constitutionally permissible nor otherwise desirable to seek by criminal sanctions to legislate their commission out of existence in all possible circumstances. To do so would upset the necessary balance which the Constitution posits between the common good and the dignity and freedom of the individual. What is deemed necessary to his dignity and freedom by one

429 n 33 above.
430 n 33 above 326.
431 n 34 above, 593.
432 The right to privacy inevitably engages the rights of autonomy and dignity: Binchy (n 33 above) 166.
433 n 38 above, 78.
man may be abhorred by another as an exercise in immorality. The pluralism necessary for the preservation of constitutional requirements in the Christian, democratic State envisaged by the Constitution means that the sanctions of the criminal law may be attached to immoral acts only when the common good requires their proscription as crimes.

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

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

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434 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC).
435 n 38 above, 71, 78, 95, 100.
436 n 38 above, 104. See Binchy (n 83 above) 189 - 190.
438 n 437 above, [13].
439 n 437 above, [31].
pointed out that by instigating a prosecution the complainant forfeited the right to privacy to an extent. The effect of a conviction on an accused would be significant, as he would be disgraced, lose his liberty and reputation, and be consigned to professional oblivion. These high stakes merited intruding on the complainant’s right to privacy.

A contentious contemporary issue is whether compulsory testing for HIV is justified, and, if so, in what circumstances. In *Diau v Botswana Building Society* the Botswana Industrial Court held that termination of a woman’s employment for refusing to undergo a HIV test constituted inhuman and degrading treatment, which conclusion was derived from ‘the premise that the human body is inviolable and respect for it is a fundamental element of human dignity and freedom.’ Dingake J pinpointed the right to dignity as the key value underlying equality and other human rights. An individual is free ‘to resist any potential violation to his or her privacy or bodily integrity.’ Dismissal for refusing to undergo the test constituted an assault

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440 n 437 above, [27].
441 As above.
442 Neither did the principle of equality of arms inherent in a fair trial, which required equal treatment between the parties, allow a superior status to be given to one side’s expert: n 437 above, [16], [32]-[33]. See also *Mackie v Wilde* [1998] 2 IR 570 (HC); *Murphy v GM* [2001] IESC 82, [2001] 4 IR 113 at 155, aff’d [1999] IEHC 5.
443 Policies purportedly designed for prevention and control of HIV/AIDS can themselves lead to human rights violations, either because they are poorly conceived or applied in an arbitrary and biased manner, eg, both quarantine and involuntary testing policies are counterproductive and/or harmful because they result in discrimination and excessive infringements on personal freedoms; that, in turn, drives people away from testing, eclipses the opportunity for treatment and care, and undermines prevention efforts: *V Iacopino et al ‘HIV/AIDS and human rights in Botswana and Swaziland: A matter of dignity and health’* (2011) 34 Hastings International and Comparative Law Review 149 at 166.

The Namibian Labour Court set out the precise tests required as part of the compulsory medical examination for military service and held that no otherwise fit and healthy person may be excluded from enlistment solely on the basis of such person’s HIV status: *Nanditume v Minister of Defence* [2002] AHRLR 119 (NaLC 2000) [40].

444 Constitution of the Republic of Botswana 1966, Sec 7(1).
445 2003 (2) BLR 409 (BwIC) 41. The same court had held in an earlier case that termination of the contract of employment of another employee because she tested HIV positive was unfair: *Jimson v Botswana Building Society* [2005] AHRLR 86 (BwIC 2003).
446 ‘In liberal moral philosophy human dignity is considered to be what gives a person their intrinsic worth as human beings, consequently every human being must be treated worthy of respect.’: n 445 above, 38.
447 As above.
on the employee’s dignitas, which Dingake J defined by reference to South African case-law as that ‘valued and serene condition in her social or individual life which is violated when she is, either publicly or privately subjected by another to offensive and degrading treatment, or when she is exposed to ill-will, ridicule, disesteem or contempt’. The Court in Diau also found that the termination of her employment infringed the employee’s right to liberty, to which Dingake J gave a broad meaning, going beyond ‘mere freedom from physical constraint’ to grant protection to ‘a narrow sphere of personal autonomy wherein individuals may make inherently private choices free from irrational and unjustified interference by others.’

A pre-requisite for voluntary testing is informed consent mandated by the individual’s right to self-determination and freedom to choose. Before consent is classified as ‘informed’, the person ‘must be made to fully appreciate the consequences and implications of his or her consent.’ South African case-law has fleshed out the parameters of informed consent. In C v Minister of Correctional Services it was held that a prisoner could validly consent to a HIV test only if he or she understood the object and purpose of the test, understood what a positive result could entail, had time and place to reflect on the information received about the test, and had the freedom to refuse the test. Pre-test counselling is the norm, as is post-test counselling when there is a positive test result. Kirk-Cohen J found that failure to obtain a prisoner’s informed consent could give rise to civil liability by way of an actio injuriarum for invasion of privacy. Innes CJ in Waring & Gillow Ltd v Sherborne

448 n 445 above, 41, citing Gardiner AJA in Minister of Posts and Telegraphs v Rasool 1934 AD 167.
449 Sec 3(a).
450 n 445 above, 45. The autonomy protected encompassed ‘only those matters that can properly be characterized as inherently personal, such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence’: as above.
451 n 445 above, 41 - 42.
452 As above.
454 n 453 above, 301. See Cameron (n 453 above) 74.
formulated the essential independent elements of consent as knowledge, appreciation and consent.\(^{456}\) Since then the additional elements of voluntariness of consent, consent not contra bonos mores and the capacity to consent have been added.\(^{457}\)

When compulsory testing against the individual’s will is allowed, the concern is not usually solely the patient’s health, but rather society’s interest in protecting others.\(^{458}\) The Diau decision was influenced by international guidelines, which encouraged voluntary testing and discouraged compulsory testing of employees because it was unnecessary and promoted stigmatisation.\(^{459}\) The fact that the building society employer was not an arm of state did not prevent constitutional rights from having horizontal effect.\(^{460}\)

In line with foreign jurisprudence, a broad purposeful interpretation was given to the Constitution.\(^{461}\)

Those who have tested positive for HIV are safeguarded from discrimination in various spheres in many countries including in the labour market in South Africa\(^{462}\) and India,\(^{463}\) and in prison in Botswana.\(^{464}\) In Nigeria the state breached the prohibition on torture,\(^{465}\) which comes under the umbrella of the right to dignity in the Nigerian Constitution,\(^{466}\) and also failed to

\(^{456}\) Fombad (n 455 above) 49, citing 1904 TS 340 at 344.

\(^{457}\) Fombad (n 455 above) 49 (footnote omitted).

\(^{458}\) Fombad (n 455 above) 69. Eg, in C, the dispute arose because the defendant adopted a new policy which required prisoners who served in the kitchen to undergo an HIV test to ensure that those with the virus were not allowed to prepare or serve food and in this way, it was hoped, reduce any chances of transmitting the virus to others: n 453 above. See Fombad (n 455 above) 69.

\(^{459}\) n 445 above, 19.

\(^{460}\) n 445 above, 22, 31.

\(^{461}\) n 445 above, 28, 44.

\(^{462}\) Hoffmann v South African Airways 2001 1 SA 1 (CC).


\(^{466}\) Sec 34(1).
provide healthcare as required by the African Charter\textsuperscript{467} when prison authorities detained HIV infected prisoners without giving them medical treatment.\textsuperscript{468}

As found by the South African Constitutional Court in \textit{NM v Smith}, although the worth of an individual is not reduced by being HIV positive, because of her privacy rights and autonomy she has control over revelation of information about her condition, which affects a deeply personal feature touching her dignity.\textsuperscript{469} Her consent before publication of her HIV status is essential. Patient care in the context of HIV and AIDS requires the application of strict protocols for the testing, treatment, and disclosure of a patient’s HIV status to ensure that patients are effectively treated and that their rights \textit{inter alia} to dignity, freedom and security of the person and privacy are protected.\textsuperscript{470}

Edward Bloustein regarded privacy as ‘a dignitary tort’, since the injury was ‘to our individuality, to our dignity as individuals’.\textsuperscript{471} The right to privacy is not absolute and restrictions may be necessary because of society’s interest in dignity and the fact that rights are reciprocal.\textsuperscript{472} Ackermann J indicated in \textit{Bernstein v Bester} that there are limitations on the right to privacy when an individual’s activities acquire a social dimension by the person entering into relationships beyond the ‘most intimate core of privacy’.\textsuperscript{473} The development

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\textsuperscript{468} \textit{Odafe v AG} [2004] AHRLR 205 (NgHC 2004). See Durojaye (n 463 above) 134 - 136. Ebenezer Durojaye has criticised the decision for failing to find that the denial of treatment to HIV positive prisoners amounted to discrimination and a violation of the right to life, and for not taking a critical look at international human rights jurisprudence on the link between right to health and other rights: n 463 above, 150.
\textsuperscript{469} 2007 5 SA 250 (CC).
\textsuperscript{470} Veriava (n 453 above) 309.
\textsuperscript{472} Delany \textit{et al}, (n 33 above) 58. See also Steyn (n 192 above) 7 - 8. An infringement of the right to privacy may be justified on a paternalistic basis to protect the individual from harm and also to protect others: see \textit{Maria} (n 49 above) [24].
\textsuperscript{473} 1996 2 SA 751 (CC) [77]. Limitations on the right to privacy were justifiable in \textit{Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd} 2001 1 SA 545 (CC), \textit{S v Jordan} 2002 6 SA 642 (CC) and \textit{De Reuck v DPP (Witwatersrand Local Division)} 2004 1 SA 406 (CC), but not in \textit{Case v Minister of Safety and Security} 1996 3 SA 617 (CC) nor \textit{Magajane v Chairperson, North West Gambling Board} 2006 5 SA 250 (CC). As less restrictive means were available to protect privacy and dignity, restrictions on freedom of expression were not justified in \textit{Johncom Media Investments Ltd v M} [2009] ZACC 5, 2009 4 SA 7 (CC).
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of the common law to provide the defence of reasonable publication in defamation actions had its origins in many countries in dignity.474 Justification for violation of privacy could be developed along similar lines.475

7.9 Socio-economic rights

Judicial timidity in social and economic disputes has been at the expense of enforcing constitutional values in circumstances where the State’s protracted inaction was inexcusable. After O’Reilly in 1988, the trail ran cold and the judiciary did not advance down the road of judicial activism, preferring the safer highway of trusting the other organs of state to fulfil their primary role under the Constitution – a misplaced trust as shown in hindsight. While Costello J held he had no power to adjudicate on distributive justice nor to award damages for past breaches of the plaintiff’s constitutional rights, he did grant a declaration that the defendant was obliged to review its building programme and to vary it if housing needs for which no proposals had been made arose subsequent to the programme’s adoption.476 In another case six years later, Costello J modified his views on the courts’ powers, when he found that Travellers’ constitutional right to bodily integrity was infringed by the appalling conditions unfit for human habitation under which they were living.477 Construing the Housing Act 1988 in the light of the constitutional duty towards the plaintiffs and the factual position in which they found themselves, he concluded:478

474 See National Media Ltd v Bogoshi 1998 4 SA 1196 (SCA); Khumalo v Holomisa 2002 5 SA 401 (CC).
477 O’Brien v Wicklow Urban District Council 10 June 1994 (HC) 2 - 4. Costello J stated, above 3 - 4:
I don’t think it is necessary to say whether I am now expressing a different view to the one which I expressed in the case of O’Reilly and Ors. v. Limerick Corporation. …
Even, however, if the view which I am now expressing represents a change of views on my part then I accept that my views have changed.
478 n 477 above, 4.
If statutory powers are given to assist in the realisation of constitutionally protected rights by a Local Authority and if the powers are given to relieve from the effects of deprivation of such constitutionally protected rights and if there are no reasons why such statutory powers should not be exercised then I must interpret such powers as being mandatory.

Although he considered he could not order that serviced halting sites be provided for particular plaintiffs or in any particular order, he did grant a mandatory injunction addressed to the local authority to provide serviced sites at particular locations.\footnote{479 n 477 above, 5 - 7.} However, the Supreme Court has not qualified its opposition to enforcing socio-economic rights.

Respect for humanity permeates from the civil and political sphere into the socio-economic realm. Survival \textit{simpliciter} is not enough – living conditions suitable for the maintenance of a lifestyle conducive to development of a person’s full potential are vital components of a meaningful existence. This results in rights to education, work, housing, health, and welfare in an amenable environment. There is also a view that full participation in a democracy and enjoyment of civil and political rights is only possible when the necessities of life have been fulfilled. The differences in quality and justiciability between civil and political rights on the one hand and socio-economic rights on the other have been eroded in recent decades and they are no longer corralled as strictly as they used to be perceived.\footnote{480 See P de Vos ‘Pious wishes or directly enforceable human rights? Social and economic rights in South Africa’s 1996 Constitution’ (1997) 13 \textit{South African Journal on Human Rights} 67 at 68 - 71.}

There are several ways in which the Irish Constitution could be interpreted to give proper effect to the underlying constitutional values. The references to dignity and freedom in the Preamble deserve to be emphasised more in judgments as indicators of these values which are to be reflected in outcomes.\footnote{481 See Whyte \textit{Social inclusion and the legal system: Public interest law in Ireland} (n 22 above) 45 - 52. The significance of the ideal of human dignity is not restricted to those constitutions that expressly refer to it: H Botha ‘Human dignity in comparative perspective’ (2009) 20 \textit{Stellenbosch Law Review} 171 at 176.}

The equality guarantee in Article 40.1 has been under-estimated. The true reach and intent of Walsh J’s views in \textit{Quinn’s Supermarket}\footnote{482 n 14 above.} can be gleaned from his assessment in \textit{Crotty v An Taoiseach} that the promotion of
equality and social justice accorded with the constitutional goals of personal dignity and freedom. Because Walsh J found that freedom, equality and social justice were compatible with the Constitution’s aims of the dignity and freedom of the individual, it can be deduced that dignity embraces social justice as well as equality.

The unenumerated rights in Article 40.3.1° which the State is enjoined to respect, defend and vindicate, and the obligation on the State in Article 40.3.2° to protect and vindicate the life, person, and property rights of every citizen are sources on which rights to decent living conditions can be based. Traditionally there has been a bias towards upholding property rights. In post-colonial societies, when indigenous people wish to preserve their culture and to fulfil their development needs they focus on their affinity with a place and try to affirm their identity by claiming property rights. However, attempting to fit their desires within the contours of property may not express fully what they require to live a dignified life where their heritage and lifestyle preferences are respected.

483 n 86 above, 776:
The preamble [to the Single European Act] goes on to state that the parties are determined ‘to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.’ So far as the latter aspirations are concerned no objection could be taken to them having regard to the fact that the preamble of the Constitution of Ireland sets out that one of the aims of the Constitution is to safeguard the dignity and freedom of the individual and to assist in establishing concord with other nations.


gaming rights in the High Court, when it was held in a majority decision that their native title to what became the Central Kalahari Game Reserve had not been extinguished and that the government had wrongfully deprived them of possession of their land, but the Court rejected their claim for restoration of water – the government having terminated their supplies of essential services when they removed them from the Reserve. Subsequently residents in the Reserve brought proceedings, which were successful on appeal, for the right to sink boreholes themselves for water. The Court held in favour of the applicants on statutory and on constitutional grounds. The constitutional prohibition on inhuman or degrading treatment was an absolute and unqualified right, which involved the Court making a value judgment, in the exercise of which it was entitled to have regard to international consensus on the importance of access to water. On that basis, the Court referred to two documents – first, a UN Committee report of 2003 on the implementation of the International Covenant on Economic, Social and Cultural Rights which stated that the human right to water was indispensable for leading a life in human dignity; and, second, to the recognition by the UN General Assembly in July 2010 of the right to water, when it called on states to ensure full transparency of the planning and implementation process in the provision of safe drinking water and sanitation and the active, free and meaningful participation of local communities and stakeholders.


488 Moselthanyane v AG (BwCA 27 January 2011).

489 n 488 above, [19], referring to Sec 7(1).

The social and economic benefits necessary to support a life going further than mere existence to the full flourishing of a human being cannot be obtained easily (or at all) through the property lens. The concerns of vulnerable and marginalised indigenous groups can be addressed best by a multi-pronged approach embracing socio-economic rights, cultural and ethnic identity, and property interests, while having due regard to their right to participate in determining their future.491

The right to fair procedures can ensure that benefits already granted cannot be removed without due notice. The prior right to be heard protects against arbitrary deprivation of existing entitlements.

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

As education rights in Article 42 are clearly justiciable, one might expect that there would be no hesitation by the judiciary in enforcing individual claims in this area on the grounds of the separation of powers. Nevertheless, there is a reticence to grant mandatory orders directed to the State to fulfil its constitutional role.

Like in India, the directive principles of social policy in Article 45 can be used by the judiciary at the very least as an interpretative aid to ascertain the existence of an unenumerated right under Article 40.3.1°.492 They could also be referenced to interpret statutory law.

491 See ILO & ACHPR, Overview Report (n 487 above) v, ix, 123.

Costello J held that the court might for certain purposes have regard to the principles of social policy set out in Article 45, notwithstanding the wording of the Preamble thereto: AG v Paperlink Ltd [1984] ILRM 373 (HC). Cf Murtagh Properties (n 15 above) 335 - 336; Nova Media Services Ltd v Minister for Posts and Telegraphs [1984] ILRM 161 (HC). The Supreme Court has queried whether the High Court was correct in having regard to the directive principles: Planning and Development Bill (n 51 above) 356.
The judiciary’s fear of over-stepping the constitutional boundary and breaching the separation of powers is too cautious. The South African Constitutional Court is an example of a court fulfilling its role of protecting and enforcing constitutional rights without usurping the functions of the legislature or the executive. It has gradually become more confident in asserting itself as a defender of human rights, while simultaneously involving the other arms of government in matters properly within the ambit of political decision making. It has left the minutiae of welfare plans to the politicians and the administrative authorities, while encouraging engagement with the people affected and showing a preference for resolution between the parties by direct negotiation or a mediated settlement. The democratic principles of transparency and accountability are applied to the executive, which the Court has called to justify its decisions and actions with evidence produced from proper records. Times and circumstances change, so flexibility in policies and plans is not only permitted, but is a necessary ingredient. Good faith is a pre-requisite for state involvement in the solution to conflicts arising – the Constitutional Court has not hesitated to grant mandatory orders and to exercise supervisory jurisdiction when it doubts the bona fides of the


Brian Foley has argued that judicial deference is not defensible when constitutionality is presumed and hypothetical assumptions are made about legislative constitutional decision making; he proposed substituting instead what he termed ‘due deference’ to be extended only if the legislature justifies its answer to the constitutional question under examination, the state bearing the burden of laying this justification before the court: B Foley Deference and the presumption of constitutionality (2008) 356.

Tim Murphy concluded that the reason why economic rights are not afforded constitutional recognition in Ireland is because the state and its institutions (including the judiciary and virtually all political parties) are committed to a form of liberal-capitalist economic system which tacitly incorporates inequalities and poverty: T Murphy ‘Economic inequality and the Constitution’ in T Murphy & P Twomey (eds) Ireland’s evolving constitution, 1937 - 1997: Collected essays (1998) 179.


495 On the importance of establishing the state’s legal (as opposed to ethical or political) accountability, see AE Yamin ‘The future in the mirror: Incorporating strategies for the defense and promotion of economic, social, and cultural rights into the mainstream human rights agenda’ (2005) 27 Human Rights Quarterly 1200 at 1212 - 1215.
government. In this it is fulfilling its constitutional mandate. By doing less it would fail to carry out its proper function.

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

The South African example in applying constitutional principles to relationships between private parties could also be followed by the Irish courts. The seeds for finding that social and economic rights have horizontal

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

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

498 The South African courts’ role in taking seriously the adverse effects of policy on the poor is less dependent on specific clauses in the Constitution than on broader jurisprudential considerations that can alter existing legal concepts: DM Davis ‘Socio-economic rights: Do they deliver the goods?’ (2008) 6 International Journal of Constitutional Law 687 at 708. See also EC Christiansen ‘Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice’ (2010) 13 Journal of Gender, Race & Justice 575 at 577.


effect in tort law have already been sown and could be nurtured to vindicate constitutional rights.501

The plight of Travellers has received sympathy in Ireland, but frequently it has simply been a nominal sympathy that has not been translated into concrete improvements in their living conditions or into the removal of prejudice against them. They fall into the category of a vulnerable minority group, which has been the object of historic discrimination. The incorporation of the ECHR into Irish law has had a favourable – albeit limited – impact on their situation. Laffoy J held in the High Court in _O'Donnell (a minor) v South Dublin County Council_ that the right of a Traveller family with three severely disabled members to respect for their private and family life, and their home in Article 8 ECHR was breached by having to live with the knowledge of the local authority in severely overcrowded conditions in a mobile home.503 However, the Irish Constitution could have produced the same result, if the personal rights enshrined in it had been given a purposive meaning. The Supreme Court’s view in _TD_504 that the courts had no role in interfering with the role of the Oireachtas on the allocation of resources and its admonition to exercise restraint in finding any more unenumerated rights (particularly of a socio-economic nature) in Article 40.3.1° constrained Laffoy J in _O'Donnell_.

The Traveller status of the family was not relevant in _O'Donnell._505 Laffoy J distinguished _Doherty v South Dublin County Council_, in which Charleton J held that an elderly homeless Traveller couple living in an unsuitable damp caravan without toilet facilities were not entitled to have a plumbed centrally

501 See Binchy (n 485 above) 11 - 13.

502 See Whyte _Social inclusion and the legal system: Public interest law in Ireland_ (n 22 above) 218 - 219.

503 n 144 above. See F de Londras & C Kelly _European Convention on Human Rights Act: Operation, impact and analysis_ (2010) [5-31]; P Kenna ‘Land law, property, housing and environment law’ in Kilkelly (n 275 above) [6.43]-[6.46]; D Langwallner ‘Separation of powers, judicial deference and the failure to protect the rights of the individual’ in Doyle & Carolan (n 14 above) 273 - 276.

504 n 32 above. See Doyle _Constitutional law: Text, cases and materials_ (n 14 above) [4-53]: [4-54], [13-19]-[13-52]; Foley (n 493 above) 196 - 204; Mullally (n 84 above) 301 - 303; Whyte _Social inclusion and the legal system: Public interest law in Ireland_ (n 22 above) 358 - 362. The conclusions of Denham J (in dissent) in _TD_ imported a reasonableness criterion analogous to that in South Africa: Langwallner (n 503 above) 272.

505 Laffoy J was careful to make it clear that she was not finding that the State had a positive obligation to make provision for every Traveller family, but the case was about the particular circumstances of one family, which had three severely disabled members, who were acknowledged by the housing authority to have been living in unacceptable conditions for two years and whose plight was not going to be alleviated for more than another year.
heated mobile home with an electricity supply provided for them when they opted for halting site accommodation and refused a reasonable offer of standard housing in an apartment pending the provision of a permanent place for them in a new residential caravan park.\textsuperscript{506} Charleton J accepted as authoritative Barron J’s judgment in \textit{University of Limerick v Ryan}\textsuperscript{507} that the courts had a role to play in ensuring that the housing authority fulfilled its statutory duty, which involved not only an assessment of the housing needs of all (the Traveller and settled communities alike), but acting upon it.\textsuperscript{508}

In \textit{Doherty} Charleton J differentiated between positive and negative obligations under the Constitution – the state guarantee in Article 40.3 being ‘a promise never to infringe a right’ fell within the latter category.\textsuperscript{509} When it came to positive action to defend and vindicate the personal rights of the citizen, the text of the Constitution limited the State’s duty to doing as much as was practicable.\textsuperscript{510} Charleton J concluded that the obligation to take into account the sensitivities of various communities, including Travellers, when interpreting administrative measures was not unlimited and, following the decision of the European Court of Human Rights in \textit{Chapman v UK}, he held that a nomadic lifestyle did not give rise to an automatic duty on states to

\textsuperscript{506} \textit{Doherty v South Dublin County Council (No 2)} [2007] IEHC 4, [2007] 2 IR 696. See de Londras & Kelly (n 503 above) [4-41], [5-31].
\textsuperscript{507} 21 February 1991 (HC).
\textsuperscript{508} n 506 above, [29]. He cited two cases, where orders were made that serviced halting sites should be provided by housing authorities within twelve months: n 506 above, [29], citing \textit{O’Brien} (n 477 above), \textit{County Meath VEC v Joyce} [1997] 3 IR 402 (HC).
\textsuperscript{509} n 506 above, [36].
\textsuperscript{510} As above. In certain circumstances, the State might have an obligation to intercede consistent with its financial and administrative commitments; Charlton J observed that a similar problem arose in relation to the ECHR, as there was no positive requirement to act to uphold private and family life in Article 8: as above. Although he noted Costello J’s remarks in \textit{O’Brien} (n 477 above) that conditions which were ‘totally unacceptable in a Christian community and which could be relieved if the statutory powers of a local authority were exercised and without any great expense’ could give rise to an obligation to intervene, the present case did not pass that threshold: n 506 above, [39]. He stated, ‘I would find it impossible to apply the tests of culpability and of inhuman treatment where a number of offers of housing have been made, and where the best form of halting site accommodation is to be made available to the applicants within eighteen months.’: n 506 above, [40].
intervene in favour of preserving this way of life under the ECHR. The European Court of Human Rights in Chapman was reluctant to become embroiled in policy matters which it adjudged were properly the preserve of the politicians. The same reticence is evident in the Irish courts and can be seen in Charleton J’s judgment, which sets a high bar to be overcome before judicial action is warranted.

Three deficiencies in Charleton J’s judgment are worth mentioning. First, although he rightly concluded that the Court in Chapman did not say that states had an automatic duty to intervene to preserve a nomadic lifestyle, he did not give sufficient weight to its finding that the vulnerable position of gypsies as a minority meant that ‘some special consideration should be given to their needs and their different lifestyle … in arriving at … decisions in particular cases’ and therefore Article 8 ECHR imposed on states a positive obligation (albeit limited) to facilitate the gypsy way of life. Second, he did not refer to the subsequent decision of the European Court of Human


512 n 511 above, [99]. The Court only went so far as to say it was ‘clearly desirable’ that every human being should have ‘a place where he or she can live in dignity and which he or she can call home’, but it recalled that Article 8 did not give a right to be provided with a home and neither did any of the jurisprudence of the Court acknowledge such a right: n 511 above, [99]. See S Fredman Human rights transformed: Positive rights and positive duties (2008) 204; Kenna (n 503 above) [6.34]; C O’Cinneide ‘Equality, Irish law and the ECHR’ in Kilkelly (n 275 above) [3.30].

513 n 506 above, [46]:

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

514 n 511 above, [96].
Rights in Connors v UK which repeated that this positive obligation existed and strengthened it by finding that the states' margin of appreciation will tend to be narrower where the right at stake is crucial to ‘the individual’s effective enjoyment of intimate or key rights.’ 515 Third, he did not consider the fact that life in a caravan was part of the Travellers’ identity and that what was in contention was more than their home, but an integral part of their way of being. 516

The criminalisation of trespass in 2002517 was directed at travellers. This has resonances of a similar provision in the apartheid era’s Prevention of Illegal Squatting Act 1951. 518 Next I will look at the case-law in this area and compare the legal position in both jurisdictions.

In McDonagh v Kilkenny County Council members of the Travelling community refused to comply with notices served by the police directing them to leave lands owned by the Council and to remove their caravans. 519 They were charged then with the offence of failing to comply with the directions. 520 In addition to attacking the criminalisation provisions, 521 the Travellers sought to compel the housing authority to give them priority in the provision of accommodation and, in the meantime, to consent to them remaining on the land they were occupying. Their action failed in toto. O’Neill J held that Kilkenny County Council had considered their housing application, which it had rightly refused based on the material presented to it. Because it was uncontested that Kilkenny County Council owned the

515 (App no 66746/01) (2005) 40 EHRR 9 [82], [84]. The Court in Connors was of opinion that a serious interference with rights under Article 8 required ‘particularly weighty reasons of public interest by way of justification and the margin of appreciation to be afforded to the national authorities must be regarded as correspondingly narrowed’: above, [86]. On Connors, see Sandland (n 511 above) 493 - 496.

516 The European Court of Human Rights in Chapman categorised the applicant’s occupation of her caravan as ‘an integral part of her ethnic identity as a gypsy, reflecting the long tradition of that minority of following a travelling lifestyle’: n 511 above, [73].


518 See Jaftha v Schoeman 2005 2 SA 140 (CC) [27]; Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC) [8]-[10].


520 Criminal Justice (Public Order) Act 1994 sec 19D.

521 The Travellers challenged the validity of the statute on the basis that criminal trespass was a strict liability offence excluding the operation of defences like necessity or mistaken belief as to consent to enter. They maintained that the legislation was vague
property onto which the Travellers had moved with their caravans without the Council’s consent, they were undoubtedly trespassers and in breach of the Council’s rights.\textsuperscript{522} Although O’Neill J referred to jurisprudence of the European Court of Human Rights, he did not use it to inform his decision. Neither did he review critically the stance of the housing authority to the Travellers’ application for accommodation, which was rejected on procedural grounds. Their failure to obtain housing resulted in them being rendered illegal by trespassing because they had nowhere to go.\textsuperscript{523} The nomadic lifestyle as a legitimate aspect of their identity central to their humanity and dignity was not recognised. The situation was akin to that found in Connors.\textsuperscript{524}

In December 2008 Peart J also rejected the defence of necessity in \textit{Dublin City Council v Gavin} when the plaintiff sought an injunction to remove Travellers who were trespassing with about 30 caravans on the Council’s lands.\textsuperscript{525} Even though he found against the Travellers, he adjourned the question of what order the Court should make until the Council had a site ready for occupation by the Gavins. He pointed out that common sense suggested that consultations should take place between the parties to try to resolve the issues in contention. Within a year the Council returned to Court and reversed the presumption of innocence in Article 38.1 of the Constitution and Article 6(2) of the ECHR. They claimed that the orders violated their dwelling (their caravan homes) contrary to Article 40.5. Their rights to a fair trial under Article 6 ECHR and to private or family life under Article 8 were also in contention.

\textsuperscript{522} The constitutional right to protection for their dwelling did not permit them to invade land and establish their dwelling on it. Just because they were disgruntled with the outcome of their application for accommodation did not mean they could take the law into their own hands. Neither could they use the defence of necessity as justification for illegal entry.

\textsuperscript{523} There was a minimum residence requirement for inclusion in the Traveller Accommodation Programme, but the problem these Travellers faced was that they had no place where they could reside legally in the area to qualify.

\textsuperscript{524} n 515 above, [94]:
It would rather appear that the situation in England as it has developed, for which the authorities must take some responsibility, places considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle while at the same time excluding from procedural protection those who decide to take up a more settled lifestyle.

\textsuperscript{525} [2008] IEHC 444. Because they feared for their safety on account of bad relationships with other Travellers with whom they were in dispute, the extended Gavin family did not engage with the Council who had identified what it regarded as a site suitable for their accommodation needs. Necessity did not justify an ‘uncontrolled and un-controllable regime’ in which people could enter another’s land and claim a right to remain until they were re-housed. The defence of necessity in emergency situations could only be invoked when the interests that were being protected were those of the property owner – not the interests of the trespasser.
to seek an injunction against the Gavins, as it had a site available for them. Despite the ‘minimalist approach’ taken by the Council to address the Gavins’ legitimate concerns about safety at the site proposed for them, Peart J granted the injunction with a stay for three months and hoped again that meaningful discussions would take place.\textsuperscript{526} The Council had complied with its duties to prepare a Traveller Accommodation Programme.

There are some common features in South Africa and Ireland – in both countries there is an obligation on the state to develop a housing plan and to keep it under review; in neither jurisdiction does an individual have an immediate right to a home.\textsuperscript{527} However, the South African judiciary has developed a more innovative and effective approach to solving conflicts between the homeless and property owners (whether private or the state). It places responsibility on the state to act positively to reconcile interests and to achieve social cohesion. The courts consider the effect on human dignity of being homeless. Steps taken to address homelessness and to protect property-owners’ rights are measured against human rights standards where dignity is to the fore.\textsuperscript{528} Everyone has the right to be treated with respect for dignity. Property owners’ rights are not given priority over other rights – unlike the position in Ireland.\textsuperscript{529} The yardstick of reasonableness is used to balance rights. The most vulnerable are protected to a much greater extent. The courts have not been content simply to exhort the parties to consult\textsuperscript{530} with each other in an effort to reach a mutually acceptable solution, but have exercised judicial management\textsuperscript{531} in a dynamic fashion monitoring progress to relieve inhuman conditions, taking steps to ensure that meaningful engagement actually takes place\textsuperscript{532} and requiring all involved to take

\textsuperscript{526} [2009] IEHC 477. He urged ‘a fresh, imaginative and realistic approach’ to dealing with an otherwise intractable enduring problem.

\textsuperscript{527} Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC).

\textsuperscript{528} On the positive duties that ensue when human rights values are articulated in assessing the right to housing, see Fredman (n 512 above) 204 - 206.

\textsuperscript{529} See Mullally (n 84 above) 294, 295; Blake v AG [1982] IR 117 (HC, SC). However, property owners’ rights ceded to the common good in AG v Southern Industrial Trust Ltd [1960] 94 ILTR 161 (HC, SC).

\textsuperscript{530} On the key elements necessary to have a consultative process that fosters participation and deliberative democracy, see Fredman (n 512 above) 210 - 211.

\textsuperscript{531} On the need for the court to engage in judicial management, see Port Elizabeth Municipality (n 518 above) [36].

\textsuperscript{532} See Occupiers of 51 Olivia Road, Bena Township v City of Johannesburg 2008 3 SA 208 (CC) [16]; Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 3 SA 454 (CC) [7].
responsible to act so as to achieve a resolution that respects the rights of others and advances harmony in the community.

The principles in ubuntu of respect for dignity while living in a shared society have been influential in shaping the solutions reached. The effect of not protecting the human dignity of the vulnerable impacts on the dignity of all in society and not solely on the people directly involved. The South African judges have enhanced the democratic value of equality by holding the other branches of the state accountable for fulfilling their constitutional duties. They have engaged all parties in that process to work together to devise and implement housing programmes that satisfy the needs of the vulnerable and the demands of social solidarity insofar as is reasonably possible. The state is obliged to provide an effective remedy as required by the rule of law.533

The new constitutional order in South Africa prevents the branding of unlawful occupiers of buildings as criminals without a court order having first been obtained. In Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg, the Constitutional Court ordered the reading into legislation of a proviso that a crime was only committed when those who had been served with a court order for eviction failed to obey it.534 In Ireland the constitutional rights to fair procedures based on Articles 34 and 40.3.1° and to liberty in Article 40.4.1° could ground a challenge to the trespass crime.535

The international instruments having a bearing on socio-economic rights which have been ratified by Ireland are a ready and fertile source of guidance for the Irish courts when assessing claims for improvements in living conditions.536 The Irish courts have not availed themselves of their assistance – unlike their South African counterparts.

533 President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 5 SA 3 (CC) [51]. On Modderklip, see Fredman (n 512 above) 210.
534 n 532 above, [51].
535 These provisions were the basis of Laffoy J’s finding that legislation permitting imprisonment for debt was unconstitutional in McCann (n 143 above).
536 The fact that a country is a signatory to international or regional human rights treaty containing social rights may be a sufficient basis to ground judicial authority in those areas, given that asserting judicial authority may ultimately rely on individual and institutional judicial choices (rather than constitutional entrenchment): L. Forman ‘Ensuring reasonable health: Health rights, the judiciary, and South African HIV/AIDS Policy’ (2005) 33 Journal of Law, Medicine & Ethics 711 at 720.
7.10 Equality

7.10.1 Substantive equality?
Walsh J’s profound statement linking equality with human dignity in Quinn’s Supermarket was utilised in subsequent cases to restrict the ambit of the equality guarantee from applying to situations where the individual was involved in activities. It could have been interpreted in an expansive manner to deliver substantive equality. In Murtagh Properties the trade union did not maintain that women were incapable of bar waitressing or inadequate as such, which gave Kenny J the latitude to hold that Article 40.1 did not apply, as it related to peoples’ ‘essential attributes as persons, those features which make them human beings’ and had ‘nothing to do with their trading activities or with the conditions on which they are employed.’ This viewpoint is wrong, as the antagonism towards women was based on their attributes as persons and not on their working capacity. Their female gender was innate and incapable of change. A positive aspect of the decision was Kenny J’s reliance on the Directive Principles of Social Policy in Article 45 to aid his interpretation of Article 40.3. The statement in the former that all men and women have equal rights to an adequate means of livelihood was key to his finding that all people (women as well as men) had a right to earn a livelihood under Article 40.3.

537 n 14 above, 13.
538 Substantive inequality has been described as socially institutionalised subordination, which cumulatively and systematically shapes access to human dignity, respect, resources, physical security, credibility, membership in community, speech and power: CA MacKinnon ‘Reflections on sex equality under law’ (1991) 100 Yale Law Journal 1281 at 1298.
541 n 15 above, 336.
Gerard Hogan and Gerry Whyte consider that the judiciary has not fleshed out the constitutional guarantee of equality. They saw signs of judicial reappraisal of the restrictive version of the human personality doctrine, but speculated that the constitutional guarantee could be bypassed in favour of domestic and European legislation on equality.

The scope for substantive rather than formal equality is greatly enhanced by aligning it with dignity. Human dignity evolves in meaning with a social process concerned with dynamic patterns of human expectation and interaction. Substantive equality operating by equal worth, as in South Africa, may demand different treatment to respect specific needs. This requires a contextual enquiry supported by a structure – not simply an outcome based on the subjective opinion of a judge. The methodology of human rights litigation in South Africa and in Canada supports dialogue between the courts and the legislature, which can lead to the latter responding by promoting concepts of human dignity and equality developed by the judiciary.

Anti-discrimination laws provide effective redress leading to structural change when they are interpreted in the light of their effect on human dignity. There are circumstances when the constitutional equality guarantee and the precept to respect human dignity have horizontal application, thereby affecting relationships between private individuals. Non-discrimination against vulnerable groups such as Travellers, homosexuals, migrants and asylum seekers could be addressed in a deeper way in Ireland by a focus on

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542 n 16 above, [7.2.05] (footnotes omitted):
In contrast to comparative and international jurisprudence, jurisprudence on the guarantee of equality in the Irish Constitution is remarkably underdeveloped. To date, the debate about the differing conceptions of equality has, to a large extent, passed Article 40.1 by; Irish judges have also yet to consider whether that provision embraces the concept of indirect discrimination. … during much of its history, Article 40.1 was effectively sidelined by a restrictive judicial interpretation of the human personality doctrine and during the heyday of judicial activism that commenced in the 1960s, the judiciary showed a marked preference for other constitutional provisions, notably Article 40.3, over Article 40.1 as a basis for their decisions.

543 n 16 above, [7.2.06].


546 Small & Grant (n 545 above) 51.

547 Small & Grant (n 545 above) 54 - 55.
dignity and the real import of Article 40.1 of the Constitution. In Ireland the equality guarantee in the Constitution has been sidelined for too long\(^{548}\) and is ripe for development.

7.10.2 Public recognition

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

What are the contours of the concept of public benefit and recognition of clubs? The most widely known advantage of registered clubs\(^{549}\) is the entitlement to sell alcoholic drinks.\(^{550}\) In an exception to the norm, only a registered club devoted primarily to athletics can admit persons under 18 as members.\(^{551}\) A registered club may hold functions for its own benefit,\(^{552}\) and public functions for community, charitable or benevolent purposes.\(^{553}\) If it wishes to hold a lottery for members, a club does not need to seek a permit.\(^{554}\) Exemption from income tax is a benefit that a club established to promote athletics or amateur games or sports may claim.\(^{555}\) From the foregoing listing,

\(^{548}\) See Butler, (n 540 above) 92.

\(^{549}\) Registration takes place following a successful court application pursuant to the Registration of Clubs Acts 1904 - 2004: D McNamara A legal guide for clubs and associations (2005) 25.

\(^{550}\) Sales are generally restricted to members and their guests on the club premises: McNamara (n 549 above) 25. See also McNamara (n 549 above) 39 - 40. Although not usually utilised by clubs, they may also operate an ‘off-licence’ for members only: McNamara (n 549 above) 40 - 41. Subject to complying with the licensing laws, they can avail themselves of other privileges such as obtaining a permit to have a club extension when alcohol may be sold to members after the hours normally permitted: McNamara (n 549 above) 41. A sports club may be allowed to serve alcohol once a year to the general public attending a special event in its premises or grounds: Intoxicating Liquor Act 1962 sec 14. See C Cassidy Cassidy on the Licensing Acts (2010) [14-36]; McNamara (n 549 above) 42 - 43.

\(^{551}\) Registration of Clubs (Ireland) Act 1904 sec 4, as amended by Intoxicating Liquor Act 1988 sec 42.

\(^{552}\) Intoxicating Liquor Act 2000 sec 29(1).

\(^{553}\) Sec 29(2)(a). A registered club can organise weddings or other functions for a member or a member’s family: sec 29(2)(b). See McNamara (n 549 above) 43.

\(^{554}\) Gaming and Lotteries Act 1956 sec 23. See McNamara (n 549 above) 60.

\(^{555}\) Taxes Consolidation Act 1997 sec 235.
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it is clear that there are many advantages that accrue to clubs. In addition to prohibiting the sale of alcohol by discriminating clubs, there is scope for further restrictions to be applied to them. However, given the difficult task of achieving a harmonious interpretation of the constitutional rights to freedom of association and to equality in these circumstances, a balance between them is required taking into account the common good and the freedom of the individual. The Constitution allows the regulation and control in the public interest of the exercise of the right to associate. Respect for human dignity and the aim of encouraging all to achieve their full potential should tilt the balance in favour of the restrictions.

The limitations proposed would be a significant sanction on a club. An objection might be made that it would be unfair to impose a penalty solely on the grounds of discrimination in the absence of a breach of the licensing or criminal laws, as was canvassed in the Supreme Court in Portmarnock Golf Club. The decision in that case was based on an interpretation of the statute, so it did not resolve the constitutional issue. In his comments, which we can regard therefore as obiter dicta, Hardiman J criticised the penalisation of a discriminating club by targeting a legitimate activity. In view of the

556 Art 40.6.1°(iii).
557 As above.
559 n 119 above, 269:

The first oddity about this particular sanction is that it is imposed without any necessity to establish a breach of rule or law and indeed none is alleged. An ordinary licence to sell alcoholic drink can be lost for repeated breaches of the licensing law or on objection on the grounds of bad character. Nothing of the sort is alleged here nor is any irregularity whatsoever concerning the club’s making alcoholic drinks available. He went on to find fault with the wording of the particular statute in dispute, stating, ‘there is a rule of law, and a canon of statutory interpretation, prohibiting doubtful penalisation i.e. the imposition of a penalty by language which is less than clear.’; as above. Geoghegan J was forthright in his condemnation of the method adopted by the legislature in the Equal Status Act 2000, n 119 above, 280:

The method by which the Oireachtas has chosen to encourage (and in reality to force) ‘discriminating clubs’ to abandon the ‘discrimination’ is not merely unusual but quite extraordinary. The sanction is the future prohibition on the sale of intoxicating liquor even though that trade had nothing whatsoever to do with any alleged ‘discrimination’. Furthermore, the effect of the provision is that … the ‘discriminating’ club may continue forever ‘discriminating’ if it is satisfied to lose its club registration and, therefore, the authority to sell liquor. … [T]he Act provides for the unusual indirect means of enforcement in relation to ‘discrimination’ within the internal arrangements of a club.
attenuation of the scope for achieving equality, a legislative amendment is 
desirable to preclude the narrow interpretation of the exemption for 
discriminating clubs in the Equal Status Act\footnote{Equal Status Act 2000 sec 9(1)(a). On the 
definition of a ‘discriminating club’ and the legal consequences of being 
determined as such, see Cassidy (n 550 above) [14-24], [35-12]–[35-14].} adopted by O’Higgins J in the 
High Court\footnote{n 63 above. See E Song ‘No women (and dogs) allowed: A 
comparative analysis of discriminating private golf clubs in the United States, 
Ireland, and England’ (2007) 6 Washington University Global Studies Law Review 181 at 181, 184, 194 - 195.} and by the 
majority in the Supreme Court. The minority interpretation by Denham and 
Fennelly JJ is to be preferred.

In South Africa a stronger positive stance has been taken in the Promotion 
of Equality and Prevention of Unfair Discrimination Act 2000. There is a ‘duty 
and responsibility’ on ‘all persons’ (not just on the State) to promote 
equality.\footnote{Secs 24(2), 27(1) & 28(3)(a).} Ministerial regulations are mandated to require, \textit{inter alia}, clubs and 
sports organisations to prepare equality plans, abide by prescribed codes 
of practice, or report on measures to promote equality.\footnote{Sec 27(2).} Race, gender and 
disability are singled out as particular targets for the promotion of equality.\footnote{Sec 28.} 
Clubs and sports associations are among the sectors included in an illustrative 
list where widespread unfair practices need to be addressed.\footnote{Sec 29.}

7.10.3 Contractual freedom

Autonomy as an aspect of human dignity is the foundation of the basic 
principle of freedom of contract.\footnote{Brownsword (n 415 above) 183.} Individuals can reason and choose their 
route in life. They are viewed as having the capacity to take responsibility to 
judge and evaluate their ends and needs in the light of what is reasonable and 
fair in their own circumstances, and to act on this assessment.\footnote{P Benson ‘Equality of opportunity and private law’ in 
Friedmann & Barak-Erez (n 415 above) 219.} Another principle is that the parties to a contract are equals and can bargain with each 
other in good faith to reach a mutually acceptable agreement on terms. The 
dignity that is inherent in every person is also at the root of equality.\footnote{Brownsword (n 415 above) 188.} 
Mutual respect is the associative side of dignity.\footnote{See Barkhuizen v Napier 2007 5 SA 323 (CC) [140] (Sachs J in dissent).} A third feature is the
public interest in certainty, which inspires confidence in the market place and supports the sanctity of contract.570

But where deeply personal issues are concerned, contractual freedom may have to cede to society’s interest in protecting the dignity of humanity. Profound moral questions are raised when an individual wishes to treat their body as a marketable commodity. Only things – not people – can be bought and sold. The Kantian command inhibiting the treatment of a person as an object prevents the marketing of body parts.571 It has also stopped dwarf-throwing contests and is relevant to contracts concerning the use of embryos, surrogacy and body parts.572 The responsibility to recognise the equal standing of others should avoid a contract to discriminate against others or imposing such an obligation on another.573 In *Horwood v Millar's Timber and Trading Co Ltd* all three judges were united in their outright opposition to the constraints placed on a borrower in a contract under which he assigned to the lender all his earnings and covenanted that he would not leave his employment without the latter’s consent.574

Sometimes autonomy and equality are absent or diminished by the imbalance of power between the bargaining sides. The apparent freedom to choose may be illusory. An assessment of the effects of the contract on the


571 Brownsword (n 415 above) 192.


573 Benson (n 567 above) 224 - 225. A contract of self-enslavement or one that severely limits a person’s ability to participate in economic and social life or to fulfil familial or political responsibilities is void *ab initio* by policy: Benson (n 567 above) 224.

574 [1917] 1 KB 305 (CA). The Court held that the contract was bad as being contrary to public policy, since it unduly and improperly fettered the borrower’s liberty of action. Lord Cozens-Hardy MR equated the situation to slavery, above, 312: ‘[I]t certainly seems to me to savour of serfdom to say ‘You shall not leave the house in which you are living without my consent; you shall not dispose of a chair or a table in your house on which I have no charge without my consent, and if you do the whole amount of principal and interest will immediately become payable instead of being payable by instalments.’ Warrington LJ stated, ‘[t]he man has put himself … almost body and soul in the power of this money-lender.’: above, 314. Scrutton LJ was not using ‘overstrained or poetical language’ by depicting the unfortunate man as ‘the slave of the money-lender’: above, 317. The terms of the contract went far further than was reasonably necessary to protect the moneylender and were dangerous to the interests of the public: above, 318.
dignity and equality of the parties to it might show that one party had no real choice whether to enter into the agreement in the first place or to negotiate the terms. Unfair conditions may be oppressive. Even though there is a reluctance to interfere with contracts, they have been eroded in some circumstances when they have been deemed unreasonable. In her comparative study of fundamental rights application in contract cases, Chantal Mak found a preoccupation with the equilibrium of contractual relationships. Despite the fact that systemic bias and the effects of systemic exclusion prevail in social relations, recognition of the other as equal informs the contract, and the law’s task is to ensure that inequalities do not translate into legal realities.

In Germany this has resulted in the judicial scrutiny of contracts between banks and individuals. The courts there have paid particular attention to contracts of suretyship entered into by close relatives of the main debtor. Children have a right not to be subjected to a loan guarantee that was part of a contract between a bank and their parents, if it was given simply to comply with the bank’s policy to gain as much loan security as possible, even from people who neither profit from the loan nor know whether they will ever be able to guarantee it, and where it is most likely that the parent–child hierarchy

575 C Mak Fundamental rights in European contract law: A comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England (2008) 301.


577 Baer (n 576 above), citing FCC (Loan guarantee), 1 BvR 567, 1044/89, BVerfGE 89, 214 (19 October 1993). On this case, see also M Habersack & R Zimmermann ‘Legal change in a codified system: Recent developments in Germany suretyship law’ (1999) 3 Edinburgh Law Review 272 at 276 - 277; K Heine & R Janal ‘Suretyships and consumer protection in the European Union through the glasses of law and economics’ in AC Ciacchi & S Weatherill (eds) Regulating unfair banking practices in Europe: The case of personal suretyships (2010) [4.2.1]-[4.2.2]; MacQueen (n 475 above) 376; P Rott ‘Germany’ in Ciacchi & Weatherill above, 257 - 258, 260 - 261.

578 If there is a striking discrepancy between the obligation incurred and the surety’s financial potential, the courts examine closely the surety’s motivation and the circumstances in which the contract was concluded; the aim is to protect the surety from a lifelong liability if the guarantee was not given as a result of an act of free self-determination: Habersack & Zimmermann (n 577 above) 281. For the agreement to be set aside, an intolerable imbalance must have been created between the contracting parties because of the impairment of the surety’s ability to reach a free and responsible decision: Habersack & Zimmermann (n 577 above) 282.
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was influential.\textsuperscript{579} Social inequality as well as respect for and recognition of the individual inform an assessment of liberty.\textsuperscript{580}

The Irish courts may set aside a contract entered into under duress\textsuperscript{581} or undue influence.\textsuperscript{582} They also have equitable jurisdiction to intervene in unconscionable bargains.\textsuperscript{583} This power has been exercised sparingly and the criteria for intervention have not been considered by the Supreme Court. The concern is with procedural justice.\textsuperscript{584} One of the elements to the transaction that the party seeking relief must show in order to succeed is that the weaker party was under a bargaining impairment, as the parties did not meet on equal terms, and was therefore placed at a serious disadvantage.\textsuperscript{585} In a commercial loan or when a bank deals with a surety, the abuse of the imbalance in power between the parties where the lender is aware of the vulnerability of the customer is a critical issue. To insist on people taking responsibility for the consequences of their freely-made decisions (even though they may be foolhardy choices) respects their dignity.

The South African courts have accepted the principle that unconscionable, unduly harsh or oppressive contractual provisions could be struck down for

\textsuperscript{579} Baer (n 576 above) 450. An unintended result of section 8 of the Married Women's Status Act 1957, which was enacted in recognition of the family solidarity, is that the beneficiary of a contract where threats or pressure were involved may not have engaged in the intimidation, and, indeed, might not even be aware of it. This is because section 8 of the Act provides that when a contract expressly benefits a third party, who is the spouse or child of one of the contracting parties, the third party can enforce it.

\textsuperscript{580} Baer (n 576 above) 450.


\textsuperscript{582} O'Flanagan v Ray-Ger Ltd [1983] IEHC 83. See Clark (n 581 above) 387. The equitable rule of undue influence is part of a broader general principle of public policy to save people from being victimised by other people: PA McDermott Contract law (2001) [14.45].

\textsuperscript{583} Grealish v Murphy [1946] IR 35 (HC). See Clark (n 581 above) 385, 391, 393, 505. Unconscionable bargain is concerned with contracts where the stronger party knows that the weaker party labours under a special disadvantage: McDermott (n 582 above) [14.148].

\textsuperscript{584} M Enright Principles of Irish contract law (2007) [18-87].

\textsuperscript{585} Enright (n 584 above) [18-86]. The other elements to be shown appear to be that the other party took advantage of that weakness by exploitative conduct, that the transaction was manifestly improvident, and that she did not obtain adequate advice: as above. Murphy J stated that the availability of ‘appropriate independent legal advice’ would afford a bank a defence, see Bank of Nova Scotia v Hogan [1996] IESC 2, [1996] 3 IR 239 at 249. O’Donovan J considered that in the absence of any actual or constructive knowledge that a co-guarantor was not a free agent, a bank was not under any obligation to ensure she obtained independent legal advice: Ulster Bank Ireland Ltd v Fitzgerald [2001] IEHC 159 [10]; see P O’Callaghan & A O’Donoghue ‘Ireland’ in Ciacchi & Weatherill (n 577 above) 344 - 345.
being against public policy, but have been slow to allow fundamental rights or values to influence the law of contract in practice.

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

7.10.4 Consumers
It is a myth that the parties in business to consumer commerce are equal. In modern life everyday purchases are made in stores or online where there is no question of the customer negotiating the terms. Consumers have the freedom not to buy and to shop around, but they will not be able to find an alternative vendor who will treat them as equals and negotiate every term individually with them. The development of mass consumer markets, standard form dealing and carefully crafted exclusion clauses have resulted in the erosion of freedom of contract. To augment the autonomy of the customer, modern law regulates the bargaining process without directly regulating the bargain itself. Where the parties dealt on an informed consent basis and entered freely into the agreement, the sanctity of the contract will be upheld. Accordingly there is much legislation to protect consumers of goods and services by having an obligatory ‘cooling-off’ period, bringing terms to their notice to make them aware of the consequences and prohibiting unfair conditions. Although some exclusionary provisions are declared void, the preference is to subject questionable provisions to a test of reasonableness, which is a check on the integrity of the particular bargaining situation. There is a limit to paternalist intervention to protect parties from the


587 Moseneke (n 570 above) 10. See also H Corder ‘Judicial activism of a special type: South Africa’s top courts since 1994’ in Dickson (n 83 above) 358 - 359.

588 Brownsword (n 415 above) 184. See also Brownsword (n 405 above) 481.

589 Brownsword (n 415 above) 186.

590 As above.

591 As above.
consequences of their own decisions. Dignity can empower people to choose, but it can also be a constraint warranting an examination of the circumstances to see if the parties chose with full knowledge of what they were doing.

Term freedom is modified, first, by regulating contracts that compromise the contractor’s own dignity, and, second, when contracts compromise the community’s vision of respect for human dignity. By adding respect for human dignity to public policy, the community takes control of what is good for contractors and society at large. Partner freedom is constrained by equality laws. The European notion of dignity as having a relational character is closely connected with solidarity and can require private actors performing vital services to take into account the needs of all citizens. Clauses in contracts can be avoided because they fail to align with the right to material conditions that make life worthwhile. Health insurance and the provision of services of general interest like telecommunications, electricity and gas in the era of privatisation might be affected. Non-discriminatory access to credit with fair contractual terms and suitable remedies against over-indebtedness are required to remove barriers to self-development.

The reticence of the South African courts to interfere with consumer contracts is evident from the Supreme Court of Appeal’s decision in Afrox

592 Brownsword (n 415 above) 195.
593 As above. Public policy cannot be used to dismantle autonomy or human dignity in the name of the community of moral agents: A Reichman ‘Property rights, public policy and the limits of the power to discriminate’ in Friedmann & Barak-Erez (n 415 above) 272.
594 Brownsword (n 415 above) 197.
595 MR Marella ‘Human dignity in a different light: European contract law, social dignity and the retreat of the welfare state’ in Grundmann (n 572 above) 132, 135, 140.
596 Marella (n 595 above) 140. This could happen when limits are placed on a tenant’s right to have her family live with her, as happened in a French case: Marella (n 595 above) 141 - 142, citing Cour de Cassation, 3e Civ, 6 March 1996, Dalloz 1996, 167, annotated by Lamy.
597 Marella (n 595 above) 142 - 143.
599 Marella (n 595 above) 145.
Healthcare, when it would not set aside an exemption clause in a standard form contract for patients in a private hospital.600

7.10.5 Employees
From one perspective, a contract of employment could be looked at as the commodification of a person – the sale and objectification of people has long been condemned as contrary to the most basic human right not to be a slave.601 Therefore, the labour market is subject to stricter scrutiny.602 An alternative view is that the employment relationship empowers people to realise their goals and to earn money to enable them to thrive in life. If an individual freely chooses to work in return for payment without duress or coercion, in the modern market economy there is no normative basis for objecting to it in principle.603 Concern for human dignity604 can ground intervention to nullify contracts of an exploitative nature, such as human

600 Afrox Healthcare Bpk v Strydom 2002 6 SA 21 (SCA). See Corder (n 587 above) 358; MacQueen (n 475 above) 379.

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

601 TD Rakoff ‘Enforcement of employment contracts and the anti-slavery norm’ in Friedmann & Barak-Erez (n 415 above) 283 - 285.

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

603 Control in the workplace takes place as a matter of institutional organisation rather than personal domination: Rakoff (n 601 above) 292.

604 On the relevance of dignity to modern employment law, see DC Yamada ‘Human dignity and American employment law’ (2009) 43 University of Richmond Law Review 523 at 546 - 552.
trafficking and prostitution, as well as employment in inhumane conditions for low pay below subsistence level.605

The freedom to select employees is curtailed by anti-discrimination laws.606 The requirement to respect the dignity of the individual in the way workers are treated is evident in anti-bullying and harassment policies, and is recognised in law.607 Newman J made this clear in Horkulak v Cantor Fitzgerald International when he pointed out, ‘[t]he law has developed so as to recognise an employment contract as engaging obligations in connection with the self esteem and dignity of the employee.’608

Participation in negotiating working conditions is mandated in some circumstances and gives workers a measure of control over their daily activities by eroding somewhat a hierarchical structure.609 As the worker is free to quit, work ceases to be ‘involuntary servitude’.610 Contracts that restrict former employees from setting up in competition or working for other employers are examined for compliance with competition rules and could also be challenged on the basis of dignity. On the latter argument, quitting work is regarded as a positive act encapsulating a human power to start life afresh.611 The denial of the opportunity to do so may be tested for reasonableness taking into account the individual circumstances.

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

605 Human dignity has been described as ‘a flexible valve for broad public intervention’: G Mundlak ‘Human rights and the employment relationship: A look through the prism of juridification’ in Friedmann & Barak-Erez (n 415 above) 311.
607 On workplace bullying, see Yamada (n 604 above) 562 - 565.
609 In RWDSU v Saskatchewan, Wilson J (dissenting) pointed out that free negotiation was valued because it enabled workers to participate in establishing their own working conditions, and, she continued, ‘[i]t is an exercise in self-government and enhances the dignity of the worker as a person.’ Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 v Saskatchewan [1987] 1 SCR 460 (SC of Canada) [54].
610 Rakoff (n 601 above) 292.
611 Rakoff (n 601 above) 293.
Commercial Code. The legislator’s rules did not sufficiently protect the agent’s economic basis of existence. The Court alluded to the basic precondition of freedom of contract – there can only be fair and just results if there is an ‘approximate equilibrium of bargaining power’ between the parties.

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

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

612 Mak (n 575 above) [2.2.2.1], citing BVerfG 7 February 1990, BVerfGE 81, 242. The Court found that the clause was formulated so broadly that it would effective prevent him from working in his line of business for two years: Mak (n 575 above) 72. The agent might have to change professions, but compensation for the inherent disadvantages had been generally excluded. Even though he had agreed to the non-competition clause, the Court considered that the contract gave the employer too much power to restrict his autonomy. See also O Cherednychenko ‘Fundamental rights and contract law’ (2006) 2 European Review of Contract Law 489 at 492; OO Cherednychenko ‘Fundamental rights and private law: A relationship of subordination or complementarity?’ (2007) 3(2) Utrecht Law Review 1 at 6 - 7; R Ellger ‘The European Convention of Human Rights and Fundamental Freedoms and German private law’ in Friedmann & Barak-Erez (n 415 above) 177.

613 Ellger (n 612 above) 177, citing BVerfG 7 February 1990 [1990] JZ 691 at 692.

614 Legislation concerning dismissal should be interpreted in a manner compatible with the values of reasonableness and fair dealing in an open and democratic society and should not be confined to review on ‘the very narrow grounds of procedural misconduct’: Sidumo v Rustenburg Platinum Mines Ltd [2007] ZACC 22, 2008 2 SA 24 (CC) [158] (Sachs J).

615 (App no 20605/92) (1997) 24 EHRR 523 [45].

Chapter 7 – Irish case-law on dignity

7.11 Blasphemy

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

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

618 J Weinrib ‘What is the purpose of freedom of expression?’ (2009) 67 University of Toronto Faculty of Law Review 165 at 185. On the principle of using religious norms to interpret the Constitution, see GF Whyte ‘Some reflections on the role of religion in the constitutional order’ in Murphy & Twomey (n 493 above) 54 - 60.

619 Weinrib (n 618 above) 185.


621 Secs 36 & 37. There was vehement opposition to the new statutory offence: TJ O’Dowd ‘Ireland’s new Defamation Act’ (2009) 1 Journal of Media Law 173 at 173.

622 Art 40.6.1°(i).

623 Art 44.2.1°.

624 Art 40.1.

625 Art 42.1.

626 Unenumerated personal rights: Art 40.3.1°.

627 Relevant also are the ECHR provisions relating to respect for private and family life (Art 8), freedom of thought, conscience and religion (Art 9), and freedom of expression (Art 10): ECHR (n 4 above). Any restriction of these ECHR rights that are necessary in a democratic society must be prescribed by law and proportionate to a legitimate aim. Their exercise is to be secured without discrimination on the grounds of religion, political or other opinion, minority association or other status: Art 14.
As freedom of speech benefits democratic government, enhances the quest for truth and promotes individual self-fulfilment, its limitation is not permitted lightly. The constitutional guarantee relating to it is subject to public order and morality, as is the guarantee concerning freedom of conscience and religion. Although the preservation of public order is essential to enable all members of society live in peace free from fear and violence with their equal status and dignity in society recognised by the rest of the community, the rare threat to it is no longer a credible justification for criminalising blasphemy. There are other means available to provide a non-threatening supportive environment where all may strive to realise their full potential and life ambitions, and where human flourishing and respect for dignity in its broadest meaning can take place. The strongest argument for prohibiting blasphemy is that it causes injury to feelings in the special

629 Contrary to the liberal emphasis on freedom of speech, in Islamic law a different normative understanding of the public sphere justifies the suppression of blasphemy: PG Danchin ‘Defaming Muhammad: Dignity, harm, and incitement to religious hatred’ (2010) 2 Duke Forum for Law & Social Change 5 at 21.
630 Art 40.6.1°.
631 Art 44.2.1°.
632 Public order has two dimensions – the narrow one of keeping the peace by preventing fighting or violence from breaking out, and the broader one of society’s interest in maintaining among us a proper sense of one another’s social or legal status: J Waldron ‘Dignity and defamation: The visibility of hate’ (2010) 123 Harvard Law Review 1596 at 1604.
634 The publication of material and speech likely to stir up hatred against a group on account of listed characteristics (including religion) is an offence: Prohibition of Incitement to Hatred Act 1989 secs 1 & 2.
sphere of deeply personal religious beliefs. The concern is for the effect on the targets – not with the right to express moral disapproval of their beliefs.

I propose to consider whether it is possible to frame a blasphemy offence with a defence that does not compromise dignity. But before doing that, I will outline the legislation brought in to remedy the lacuna in the law that was identified in Corway. In the absence of a legislative definition, the Court found it impossible to say of what the offence of blasphemy consisted. By section 36 of the Defamation Act 2009, a fine of up to €25 000 can be imposed for the offence of publishing or uttering 'blasphemous matter' defined as that which is 'grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion'. Mens rea is a requirement, as

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635 LRC Consultation Paper (n 633 above) [231]. In 1917 the House of Lords held that a denial of Christianity, apart from scurrility or profanity, did not constitute the offence of blasphemy: Bowman v Secular Society [1917] AC 406. Lord Finlay stated, 'the crime of blasphemy is not constituted by a temperate attack on religion in which the decencies of controversy are maintained': above, 423. By then the purpose of blasphemy law had shifted from protecting religion per se, to preventing religious offence: S Ranalow 'Bearing a constitutional cross: Examining blasphemy and the judicial role in Corway v. Independent Newspapers' (2000) 3 Trinity College Law Review 95 at 98. Later in English law the rationale of the offence moved from the public (the tendency to corrupt public order) to the private (the hurt caused to the feelings of individual citizens): LRC Consultation Paper (n 633 above) [121]. On Bowman, see O'Brien (n 633 above) 421. Some commentators dismiss arguments about offended religious feelings as sentimental claims and consider that in a democracy there should be no protection against insult to feelings (even those related to values held sacred): M Pinto 'What are offences to feelings really about? A new regulative principle for the multicultural era' (2010) 30 Oxford Journal of Legal Studies 695 at 696 - 697. Meital Pinto has proposed that the claims of offence to feelings be reconceptualised as claims of offence to integrity of cultural identity and has argued that vulnerable cultural identities ought to be protected: above, 697, 722 - 723.


637 The Supreme Court held that the common law crime of blasphemy related to an established church that pre-dated the enactment of the Constitution and could not have survived it: n 98 above, 501. See N Cox Blasphemy and the law in Ireland (2000) 53 - 59; N Cox Defamation law (2007) [1.4.3]; M Kealey ‘Publish and be damned’ (2006) 100(3) Gazette of the Law Society of Ireland 20; O’Brien (n 633 above) 396, 425 - 427, 429; Ranalow (n 635 above) 96, 101.

638 n 98 above, 502. The Supreme Court’s decision suggests an impatience with the religious character of the Constitution and a reluctance to seek to rehabilitate its language in the light of other contemporary constitutional values: Binchy (n 83 above) 196. See also Daly (n 628 above) 249 - 250; Ranalow (n 635 above) 104, 107 - 110.

639 Sec 36(1).

640 Sec 36(2)(a).
there must be an intention to cause outrage.\footnote{Sec 36(2)(b). There is an exemption for matter having ‘genuine literary, artistic, political, scientific, or academic value’ in the eyes of a reasonable person: sec 36(3).} Excluded from protection are profit-making organisations or cults and those that employ ‘oppressive psychological manipulation’.\footnote{Sec 36(4).}

Should any prosecutions ensue, there are several avenues of attack that could be launched on the legislation. First, ‘religion’ is not defined, so the boundaries of the curtailment of free speech are neither certain nor readily ascertainable and the offence could be challenged on the grounds of vagueness.\footnote{The ECHR requires that a law restricting freedom of expression be formulated with sufficient precision to enable a citizen to regulate his or her conduct: LRC Report (n 620 above) 12.} It would appear from the reference to ‘any’ religion that Christian\footnote{On the Christian character of the Constitution, see D Costello ‘The natural law and the Irish Constitution’ (1956) 45 Studies 403 at 405, 414; Re Tilson [1951] IR 1 (HC) 13 - 15.} and non-Christian faiths are protected. But does the protection extend to polytheistic creeds or to religions which deny the existence of personal deities?\footnote{See LRC Consultation Paper (n 633 above) [107].} The human dignity of those with such beliefs merits protection on an equal basis with adherents to more widely practiced theologies. Second, an offence could be committed by a vigorous challenge to a religious activity such as human sacrifice that denigrates human dignity and is a crime.\footnote{See LRC Consultation Paper (n 633 above) [237].} The legislation has not been qualified by the exclusion of criminal offences from matters held sacred. Third, robust criticism of a religion’s treatment of one gender (normally women) as inferior and of unequal status could lead to the critic being prosecuted. Fourth, an accused could attempt to show that virtually all religions employ oppressive psychological manipulation and curtail free thinking thereby inhibiting the exercise of freedom of conscience. This argument would fail, as the legislation would be given a purposive interpretation precluding the extension of the exclusion to established religions not generally regarded as organisations or cults.

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

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

However, there is an overarching objection to criminalising blasphemy that falls foul of the ECHR – it is not necessary to do so in a democratic society. Maintenance of public safety or protection of the rights of others does not demand it. To categorise it as a crime is a disproportionate reaction. It has been invoked so rarely that it has been described as ‘a constitutional oddity’.647

In its analysis of restrictions on freedom of expression, the European Court of Human Rights has been prepared to undertake an exacting appraisal of national decisions by emphasising pluralism, tolerance and broad-mindedness.648 The case-law shows an evolution from a timid and over-cautious stance to a more robust review, where the Court analyses the allegedly offensive nature of the contested statements in the light of more objective public sentiments, rather than the subjective feelings of specific individuals.649 It has required all exercising the freedom to manifest their religion (irrespective of whether they do so as members of a religious majority or a minority) to ‘tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their

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647 Ranalow (n 635 above) 95.
649 Harris et al (n 648 above) 482.
faith’. In *Klein v Slovakia* the Court held that the right to freedom of expression had been breached when a journalist was convicted of ‘defamation of nation, race and belief’ for defaming the highest representative of the Roman Catholic Church in Slovakia and thereby offending its members.651

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

In South Africa there are doubts that the crime of blasphemy would survive constitutional challenge, as it applies only to the Christian God.652 The constitutional exclusion of hate speech based on religion or on race, ethnicity or gender that incites people to cause harm from the protection afforded to freedom of expression is an alternative model that Ireland could consider.653 The harm targeted might be confined to the narrow range of physical harm, but it would be more in conformity with constitutional values to adhere to a broader definition of harm to dignity interests.654 Supplementary legislation would be necessary to prohibit hate speech and to provide for remedies for breach that could include criminal sanctions.655 As it would not be appropriate or proportionate to criminalise comments intended to be hurtful (as opposed to harmful), the ambit of criminal activity should be confined within narrow clearly defined parameters.

650 *İa v Turkey* (App no 42571/98) (2007) 45 EHRR 30 [43]. They ‘cannot reasonably expect to be exempt from all criticism’: as above. On A, see Tsakyrakis (n 287 above) 484 - 485.

651 (App no 72208/01) (2010) 50 EHRR 15 [50], [55]. The journalist had sharply criticised the prelate for calling for the withdrawal of the film ‘The People vs. Larry Flynt’ and the accompanying poster, and he wondered why Catholics did not leave the Church as it was headed by such an ‘ogre’: above, [10]-[12], [51]. The Court was unanimously of the view that the ‘strongly worded pejorative opinion’ related ex-clusively to the archbishop personally and disagreed with the domestic courts’ findings that the journalist discredited and disparaged a sector of the population on account of their Catholic faith: above, [51]. See Harris *et al* (n 648 above) 484.

652 *Du Plessis v De Klerk* 1996 3 SA 850 (CC) [19], [50], [54]; *S v Lawrence* 1997 4 SA 1176 (CC) [149]; I Currie & J de Waal *The Bill of Rights handbook* (2005) 394.

653 Sec 16(2)(c).

654 See Currie & de Waal (n 652 above) 377.

655 In South Africa legislation has widened the constitutional conception of hate speech to encompass discriminatory speech that undermines human dignity, where the intention is to be hurtful: Promotion of Equality and Prevention of Unfair Discrimination Act 2000 secs 1(1)(xxii)(b)(ii) & 10(1). See Currie & de Waal (n 652 above) 377 - 379.
Chapter 8
Remedies and scope of fundamental rights in Ireland

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

8.1 Remedies

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

8.1.1.1 Defamation
There have been wild excesses to what is adjudged fair compensation in defamation actions. I will now look at the Irish case-law. In De Rossa v Independent Newspapers the Supreme Court by a majority of four to one upheld an award of £300,000 to a politician for libel in a newspaper article alleging that he had been involved in serious crime. Hamilton CJ found that Irish law complied with the requirements of the Constitution and of the European

Convention on Human Rights (ECHR),\textsuperscript{2} as it provided ‘that the award must always be reasonable and fair and bear a due correspondence with the injury suffered’ and there was a requirement to set aside a disproportionately high award.\textsuperscript{3} He placed a high value on the emotional impact, stating, ‘[o]ne of the most important factors in the assessment of damages is the effect of the libel on the plaintiff’s feelings.’\textsuperscript{4} The concern was not solely with reputation and loss of good name in the eyes of the public, but with the impingement of a hurtful and humiliating attack on the individual’s core personality. Denham J (dissenting) favoured guidelines being given to the jury on quantum\textsuperscript{5} and more searching scrutiny on appeal based on the criteria of reasonableness and proportionality.\textsuperscript{6} She considered large awards ineffective as a compensation mechanism.\textsuperscript{7}

The criterion of proportionality to determine whether or not an award is excessive also applies in South Africa, but the threshold to be reached before it will be upset is higher. Mokgoro J pointed out in the Constitutional Court in \textit{Dikoko v Mokhatla}, that an appellate court would only interfere ‘if … the award … was palpably excessive, clearly disproportionate in the circumstances of the case, grossly extravagant or unreasonable or so high as to be manifestly unreasonable.’\textsuperscript{8} According to Mosenek DCJ, special circumstances justifying encroachment were found when the trial court awarded high or low damages on the wrong principle or when the award was ‘so

\textsuperscript{2} Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (ECHR). In a complaint by the newspaper against Ireland, the European Court of Human Rights agreed with the parties that the award interfered with the newspaper’s freedom of expression, that it was prescribed by law and that it pursued the legitimate aim of protecting the reputation and rights of others: \textit{Independent News and Media plc v Ireland} (App no 55120/00) (2006) 42 EHRR 46 [109]; to be necessary in a democratic society, an award of damages following a finding of libel had to bear a reasonable relationship of proportionality to the injury to reputation suffered: above, [110]; in view of the measure of appellate control and the margin of appreciation, the Court did not find that the safeguards against a disproportionate award were ineffective or inadequate: above, [132]. See Cox (n 1 above) [13.3.2.2].

\textsuperscript{3} n 1 above, 458.

\textsuperscript{4} n 1 above, 464.

\textsuperscript{5} n 1 above, 483.

\textsuperscript{6} n 1 above, 481.

\textsuperscript{7} n 1 above, 478:

The jury should be able to compare the value of what courts usually award to people in personal injury actions. Compensation is a notional remedy in both instances. The lame do not walk after an award of compensation. The defamed do not cease to have been defamed after an award of damages. An order of damages is an artificial form by which a court gives a remedy to an injured person.

\textsuperscript{8} 2006 6 SA 235 (CC) [58] (footnotes omitted).
unreasonable as to be grossly out of proportion to the injury inflicted."9 Unlike Ireland, damages for defamation in South Africa are determined by the judge – there is no jury. This difference may influence the greater reliance placed on the assessment by the judge at first instance in South Africa. De Rossa and Dikoko, where a public official successfully sued a politician for defamation, followed somewhat similar paths and had the same outcome – notwithstanding the apparent difference between the two countries in the leeway allowed to the lower court. The majority in both cases upheld the awards and there were dissenting views in both cases that high awards should be curtailed. However, in South Africa the two judges who dissented on quantum (Sachs and Mokgoro JJ) considered the effect on the dignity of the target of the defamatory remarks and favoured a smaller award coupled with an apology and restoration of the relationship between the parties. The dignity of the parties was not mentioned in Ireland.

The Supreme Court of Namibia followed the Dikoko test in Trustco v Shikongo.10 O’Regan AJA noted that although money was not sufficient to restore the individual’s reputation,11 in a commercialised world it could not be discounted as it carried symbolic weight and was a deterrent.12 She went on to compare awards in other defamation actions and, having found that the damages in Trustco were ‘considerably in excess of the awards generally made for defamation’, she reduced them significantly.13 ‘The allegations in Trustco concerned abuse of public office by an elected mayor in a land deal, but – unlike De Rossa – there was no implication of involvement in serious crimes like armed robbery, forgery, drug-dealing, prostitution and protection rackets.14 If financial recompense were felt to be the appropriate remedy, the gravity of the crimes imputed to De Rossa warranted a high award. However, there was no consideration of other ways of repairing the damage to De Rossa’s dignity or of restoring relationships with the journalist who wrote the offensive article.

9 n 8 above, [95] (footnote omitted). The standard at issue was whether there was ‘a glaring disproportionality between the amount awarded and the injury to be assuaged’, the ultimate test being whether in all the circumstances of the case the compensation was ‘a reasonable and just measure of the harm’: n 8 above, [95].

10 O’Regan AJA asked the primary question whether the award was ‘grossly disproportionate to the injury suffered as a result of the defamation’ and acknowledged that one of the difficulties in applying the test was how to quantify harm to reputation in monetary terms: Trustco Group International Ltd v Shikongo [2010] NASC 6 [90].

11 As above, citing Dikoko (n 8 above) [110] (Sachs J).

12 n 10 above, [91], citing Dikoko (n 8 above) [120] (Sachs J).

13 n 10 above, [96].

14 n 1 above, 437 - 438.
The year following the *De Rossa* decision, Denham J dissented in part again when the same issues arose in *O'Brien v Mirror Newspapers* in an appeal against an award of £250 000 for libel in an article alleging bribery of a politician in order to secure radio and mobile phone licences.\(^{15}\) The standing in the community of the person libelled was a relevant factor.\(^{16}\) By a majority the Supreme Court held that the award was disproportionately high and remitted the matter to the High Court for a new trial on the issue of damages only. When the case was re-heard some six years later, the jury more than doubled the award to €750 000.\(^{17}\)

In the libel action brought by Monica Leech, a public relations consultant, against Independent Newspapers following allegations that she had obtained public contracts from a government minister because she was having an extra-marital affair with him, an issue arose over whether the defendant should be entitled to third-party discovery of documents submitted to an inquiry into the allegations ordered by the Dáil.\(^{18}\) Public interest straddled both sides of the equation – on the one hand, in ensuring the viability of *ad hoc* inquiries by fulfilling the obligation of confidentiality to the participants, and, on the other, in full disclosure and the administration of justice.\(^{19}\) O’Neill J, refusing to order discovery,\(^ {20}\) held that there were cases where confidentiality was itself in the public interest. The jury awarded her €1 872 000 – a

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15 *O'Brien v Mirror Group Newspapers Ltd* [2000] IESC 70, [2001] 1 IR 1. See Cox (n 1 above) [11.2.1.2.2].

16 n 15 above, 37. Denham J adhered to her view that instructions to juries on *quantum* should be altered so as to give them greater guidance and that there should be more searching scrutiny on appeal to maintain the appropriate balance between the rights of the individual and of freedom of expression: n 15 above, 37. Information on the compensation granted in other libel and personal injuries actions might help to maintain a proper monetary balance, n 15 above, 35:

At the least, reference could be made to the level of damages in previous libel cases decided by the Supreme Court and to the level of awards in serious personal injury cases, as has been introduced in other common law countries. Such judicial guidelines may be a safeguard against a disproportionate award. In the absence of such guidelines, merely to require the award to be proportionate is an inadequate protection against a disproportionate award.


19 n 18 above, [12].

20 The parties had considerable other resources available to them, including the report from the inquiry: n 18 above, [15].
record for a libel action.\(^{21}\) That record was broken in November 2010 in *Kinsella v Kenmare Resources* when a businessman was awarded €10m damages (€9m compensatory and €1 aggravated damages)\(^{22}\) for a libellous press release issued by his employers after he went naked into the company secretary’s hotel bedroom in Mozambique where they were attending a board meeting.\(^{23}\)

The size of these awards reflects the very high value the general public (as articulated by the jury) places on the individual’s dignity. False allegations of deliberate wrong-doing involving crime and corruption, and – even more so – sexual impropriety, strike at the core of a person’s being, since they concern the exercise of free will for an odious purpose affecting the person’s standing in the community. They wound their feelings and humiliate them. A good reputation in society is guarded zealously and is essential for self-esteem. The significance of these rights is underlined in Article 40.3.2° of the Constitution, where the ‘good name’ of the citizen is one of four aspects of the citizen singled out for particular state protection and vindication. Given the undoubted worth of the rights protected by defamation actions, the question must be posed as to what is the most appropriate remedy. Is society’s disapproval to be marked by the size of the award and, if so, is an extremely generous sum appropriate? Perhaps the finding that the individual has been defamed should go a considerable distance towards relieving the public opprobrium and vindicating the plaintiff. Maybe the damage caused could be redressed by other measures such as publicising the court’s findings widely and a public acknowledgment by the defendant of the falseness of the libellous remarks.

Apart from the conflict between freedom of expression and the individual’s right to a good name, there are two competing interests in play in the assessment of damages for defamation – on the one hand, the individual’s


\(^{22}\) On compensatory and aggravated damages, see P Giliker & S Beckwith *Tort* (2011) [17-004]–[17-005], [17-008].

\(^{23}\) *Kinsella v Kenmare Resources plc* 17 November 2010 (HC). Mr Kinsella was prone to sleep-walking and an investigation by an independent solicitor on behalf of the company found there was no conscious attempt on his part to enter her room and that he had no improper motive. The press release said he was being asked to resign from the company’s audit committee. See C Coulter ‘Businessman wins €10m libel award against ex-employers’ *Irish Times* (Dublin, 18 November 2010) 1; E Keane ‘Defame game’ (2011) 105(1) *Gazette of the Law Society of Ireland* 36 at 37. The case is under appeal to the Supreme Court.
reputation which can be repaired to a large extent by an apology accompanied by publicity and is not dependent entirely on money for restoration, and, on the other, the deterrent effect to protect the individual and the community generally from a culture of malicious or careless commentary.24 Steps have been taken in Ireland to reform the law in this area. The Defamation Act 2009 permits the parties to an action to make submissions on damages to the court25 and the judge is obliged to give directions to the jury on damages26 where the cause of action accrued after the commencement of the Act.27 Previously when no guidelines were given to jurors on quantum, it was unsurprising that juries had unrealistic ideas about what was the appropriate financial recompense for a damaged reputation. As favoured by the minority in Dikoko28 there is a school of thought that money is inappropriate reparation for hurt to one’s name and that a modest sum coupled with a public apology is more compatible with restoring respect for the dignity of the injured party. The Defamation Act provides the defendant wishing to make amends with the facility to offer to do so.29 As occurs in Britain,30 such an offer may lead to a discount in compensation, since damages are to be assessed having regard to all of the circumstances of the case,31 including the making of an offer to make amends,32 and the offering or making of an apology,33 correction or retraction.34

25 Sec 31(1).
27 Sec 3(1).
28 n 8 above.
29 Sec 22. See Mohan & Murphy (n 26 above) 51 - 52.
31 Sec 31(3).
32 Sec 31(4)(e).
33 A defendant may give evidence in mitigation of damages of the making or offering of an apology: sec 24. See Mohan & Murphy (n 26 above) 52.
34 Sec 31(4)(d).
8.1.1.2 Catastrophic injuries

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

In * Cooke v Walsh* the majority in the Supreme Court considered that compensation should be moderate where the plaintiff had ‘only a mild awareness or appreciation of his condition due to the severe brain damage he sustained in the accident’ and therefore he had ‘been spared the considerable mental suffering which would follow from knowledge or appreciation of the virtual destruction of his life.’35 McCarthy J (dissenting) had reservations about that approach and pointed out that the trial judge did not consider the significance of the injury itself in measuring damages, but only the plaintiff’s appreciation of it.36

The Supreme Court in *Sinnott v Quinnsworth Ltd* held that in assessing general damages ‘the objective must be to determine a figure which is fair and reasonable’, having regard, *inter alia*, ‘to the ordinary living standards in the country, to the general level of incomes, and to the things upon which the plaintiff might reasonably be expected to spend money.’37 The factors considered by the Supreme Court in *Dunne v National Maternity Hospital* included the extent to which the plaintiff had ‘any appreciation or awareness of his condition and of the amenities of living’ which he had lost.38 The Court raised – but did not decide – the issue of whether a plaintiff who has no awareness of his condition as a result of injuries tortiously inflicted should be entitled to nil or nominal general damages only.39 In *Lindsay v Mid-Western Health Board*, Morris J in the High Court held that where the plaintiff had little or no awareness of his or her condition, there was no rule of law either

36 n 35 above, 223. As the issue had not been fully debated, he preferred to await a suitable case on ‘the question as to whether or not an individual who has no real appreciation of his plight should be awarded other than a relatively nominal sum for general damages’: n 35 above, 223.
37 [1984] ILRM 523 at 532.
39 n 38 above, 119.
limiting the general damages to be awarded to a nominal figure or precluding the awarding of such damages altogether.\textsuperscript{40} In contrast to this view are obiter comments by Quirke J in \textit{Yun v Motor Insurers Bureau of Ireland} when he countenanced no general damages at all for an unconscious plaintiff.\textsuperscript{41}

The House of Lords took a different stance in \textit{H West \& Son Ltd v Shephard} when in a majority decision it confirmed that general damages should be assessed objectively and therefore a permanently unconscious claimant should receive damages for loss of amenity at the top end of the scale of compensation.\textsuperscript{42} The majority of consultees in a study by the English Law Commission on damages for non-pecuniary loss felt that to apply a subjective test based on the victim’s awareness – thereby awarding lower compensation for catastrophic injuries than for less serious ones – would be unjust and would have an anti-deterrent effect; it was considered that although permanently unconscious victims do not go through pain and suffering, substantial damages were justified by the unconscious victim’s complete loss of amenity, and that failure to recognise this would be to undervalue victims and to trivialise their experiences.\textsuperscript{43}

Dickson J in the Supreme Court of Canada in \textit{Andrews v Grand \& Toy Alberta Ltd} – rather than attempting to set a value on lost happiness – was attracted to the functional approach, which assessed the compensation required to provide the injured person ‘with reasonable solace for his misfortune’, solace in this sense being taken to mean ‘physical arrangements which can make his life more endurable rather than “solace” in the sense of sympathy.’\textsuperscript{44} A similar focus on solace is apparent in the High Court of

\textsuperscript{40} [1993] 2 IR 147. The case was brought on behalf of a plaintiff who had suffered irreversible brain damage and had been in a deep coma for 18 years at the time of trial.

\textsuperscript{41} [2009] IEHC 318, [2009] 7 JIC 1701 at 22 - 23. Quirke J indicated that general damages in tort may be reduced, or even eliminated altogether, where there is a lack of insight into one’s own condition: above, 22. In catastrophic injuries cases ‘a modest or no award for general damages may be made where general damages will have little or no compensatory consequence for the injured person’: above, 23.

\textsuperscript{42} [1964] AC 326 (HL). See Law Commission ‘Damages for Personal Injury: Non-Pecuniary Loss’ (Law Com No 257, 1999) [2.9].

\textsuperscript{43} n 42 above, [2.13]. The Law Commission did not recommend any change in the rules for general damages for permanently unconscious claimants nor for conscious, but severely brain-damaged, victims: n 42 above, [2.19], [2.24]. It also rejected moving from the traditional ‘diminution of value’ approach – where damages put a value on what the claimant has lost, irrespective of how the sum awarded will be spent – to the Canadian ‘functional’ approach where damages are meant to provide comfort and solace to the claimant, by enabling him or her to obtain other means of satisfaction to replace what has been lost: n 42 above, [2.4], [2.7].

\textsuperscript{44} [1978] 2 SCR 229 at 261 - 262.
Australia’s decision in *Skelton v Collins*, when it adopted a subjective approach and favoured the dissents of Lord Devlin and Lord Reid in *H West & Son Ltd.*

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

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

46 Constitution of Ireland 1937, Art 40.3.2°.
47 Art 40.3.1°.
48 [2008] IESC 35, [2008] 4 IR 679. Hardiman J considered that the best rendition of ‘vindicate’ combined the definitions ‘defend against encroachment or interference’ and ‘clear of blame, justify by evidence or argument’: above, [75].
49 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) [28].
50 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) [35]. As David Bilchitz put it, ‘“dignity” is essentially about the recognition of worth and the consequent treatment that must be accorded to individuals who have such worth’: D Bilchitz ‘Moving beyond arbitrariness: The legal personhood and dignity of non-human animals’ (2009) 25 *South
By considering the implications for the human dignity of the victim and bearing in mind society’s values, a modest sum in compensation for injuries to the unaware plaintiff could be sufficient. Too high a figure runs the risk of appearing to value life and dignity only as commodities and not for their intrinsic value, whereas too low an amount would be regarded as demeaning. The same rationale can be adapted to apply to injuries caused to those who are what David Bilchitz described as ‘moral patients’ (infants, young children, the senile and those with severe mental impairments) as opposed to ‘moral agents’ (all adult, rational human beings). Though unable to act out of a sense of duty, moral patients have certain rights that moral agents must respect.

Compensation for future pecuniary losses poses separate problems that could be solved by the introduction of structured settlements with periodic payments, which would give financial security to the plaintiff while avoiding the risk of unjust enrichment of the next-of-kin in the event of an early demise. A report undertaken for the High Court recommending periodic payments justified the change by invoking the values of justice and fairness, as well as taking into account the best interests of those injured. In the United Kingdom the government has encouraged the use of periodic payments ostensibly simply because it is a fairer system, but in reality there are political reasons for the reform.
Applying a dignity analysis, the plaintiff is better served by periodic payments for future pecuniary losses, as they would provide the resources to live independently without having to resort to the state for support and without the fear that a lump sum would turn out not to be sufficient. The countervailing argument that the plaintiff should have immediate control over a capitalised sum is unsound – the purpose of damages for future outlays is to restore the plaintiff to the original position and this is more likely to be done by periodic payments than by the lump sum lottery. The aim is not to put the plaintiff in a better position than before the accident by having ready access to a fund provided for future outlays over an indefinite period, but to relieve any worries about inability to meet expenses.

8.1.2 Detention of mentally ill patients

A parallel area where rights to freedom and personal autonomy may not be adequately protected is that of detention of compliant non-competent mentally ill people. Legislation provides that in making a decision on a person's care and treatment, that person's right to 'dignity, bodily integrity, privacy and autonomy' is to be respected. However, the statutory definition of 'voluntary patient' is not aimed at ascertaining whether the individual truly consented to being admitted. The Supreme Court held in EH v Clinical Director of St Vincent's Hospital that it was not framed in terms of a person who freely and voluntarily gave consent to an admission order but rather someone who was not the subject of an admission or renewal order. Adopting a paternalistic rather than a rights-based view, the Court dismissed non-compliance with the formalities required for detention where there was no gross abuse of power as a mere technicality that did not require a remedy provided the detention was in the best interests of the patient.

A voluntary patient is not free to leave, as he or she may be detained for 24 hours, during which period a psychiatrist may certify that the patient suffers from a mental disorder and should be detained. In McN v Health Service Executive Peart J justified the detention of vulnerable patients with dementia.

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56 Mental Health Act 2001 sec 4(3). See D Whelan Mental health law and practice: Civil and criminal aspects (2009) [5-10]–[5-22], [5-31].
57 Mental Health Act 2001 sec 2(1).
58 [2009] IESC 46, [2009] 3 IR 774 [41]. See Whelan (n 56 above) [5-32]–[5-37].
59 n 58 above, [50].
60 Mental Health Act 2001 secs 23 & 24.
initially admitted as involuntary patients, but whose status was changed to voluntary even though they lacked sufficient mental capacity to choose to consent to remain.\footnote{2009} They could leave if they were in a position to do so accompanied by a responsible family member. Their continuing presence at the hospital was permissible on the basis that it was in their best interests, there was a duty of care to them and it would be grossly negligent to release them immediately simply because there was no legal basis for keeping them.

McMahon J in \textit{SM v Mental Health Commission}, while acknowledging the paternal nature of the legislation, gave effect to the rights and protections specifically included in the Mental Health Act 2001, when he found that a renewal order relating to an involuntary patient which did not specify a particular period of time, but merely provided that it was ‘for a period not exceeding 12 months’ was void for uncertainty and did not provide a legal basis for detention.\footnote{2008} His finding of a violation of the patient’s right to liberty (albeit it did not result in immediate release of the patient, as his order was with a stay of four weeks) was a vindication of her rights and would have been ‘just satisfaction’ for violations of a procedural nature as required by Article 41 ECHR.\footnote{2005}

In \textit{Bournewood} in the UK it was held that the informal admission of compliant patients without capacity to consent was justified by the common law doctrine of necessity.\footnote{1998} In that case the tort of false imprisonment had not been committed, since the actions taken were in accordance with the duty of care to the patient in his best interests. Lord Steyn thought it was an unfortunate result of the decision that compliant incapacitated patients did not have statutory protections and considered that ‘[i]their moral right to be treated with dignity’ required nothing less.\footnote{2004} The key factor according to the

\footnote{2009} \footnote{2008} \footnote{2005} \footnote{1998} \footnote{2004}
European Court of Human Rights was that healthcare professionals had exercised complete and effective control over the patient’s care and movements. It found a breach of his right to liberty and security under Article 5(1) ECHR, as the common law doctrine of necessity at the time was underdeveloped and his detention was unlawful because of the absence of fixed procedural safeguards to avoid arbitrariness. The right to judicial review of the lawfulness of his detention in Article 5(4) ECHR was also breached, since habeas corpus or judicial review proceedings were not wide enough to bear on the essential conditions for the lawful detention of a person on the ground of unsoundness of mind.

8.1.3 Mediation

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

A community shaped by the value of harmony will put significant value in mediated solutions. Mediation is now encouraged in Ireland as an alternative dispute mechanism. The South African courts have formalised

66 HL (n 63 above) [91].
67 HL (n 63 above) [118]-[120], [124].
68 HL (n 63 above) [135], [140], [142].
69 Self-determination is the intrinsic value of mediation: J Nolan-Haley ‘Self-determination in international mediation: Some preliminary reflections’ (2006) 7 Cardozo Journal of Conflict Resolution 277 at 278 - 279. It is connected to self-governance and individual autonomy, and offers procedural justice protections, providing parties with fairness and dignity: above, 278. By actively participating in the mediation process and voluntarily consenting to an outcome that is free of any coercive influences, respect for human dignity is promoted and parties’ perceptions of procedural justice are enhanced: above, 278 - 279. See also Law Reform Commission ‘Consultation Paper on Alternative Dispute Resolution’ (LRC CP50-2008) [3.140]- [3.145], [3.150]; Law Reform Commission ‘Report on Alternative Dispute Resolution: Conciliation and Mediation’ (LRC 98-2010) [3.74], [3.76].
71 In 2010 the Law Reform Commission recommended that there should be a statutory framework for mediation and conciliation: LRC Report (n 69 above) [2.15], [2.47], [2.51], [3.04], [12.01], [12.09]-[12.10], [12.15], app (draft Mediation and Conciliation Bill 2010).
the mediation process, which promotes human dignity in recognition of the fact that we live in a shared society.\textsuperscript{72}

8.2 \textbf{Scope of fundamental rights}

Using the Hohfeldian model\textsuperscript{73} to translate constitutional values, rights and obligations into tangible legal concepts, it is essential to have clarity on who has rights and obligations, to give coherent answers to what those rights and obligations are in varying circumstances, to define the types of obligations owed by different actors, to specify whether the obligations are actual or potential, and to identify their triggers. Solutions develop over time as different situations affecting relationships emerge. The nature of the obligations will vary. Do they apply only to the relationship between the individual and the state or have they horizontal application? Are they negative or positive? Is there a time constraint on claiming constitutional rights?

8.2.1 \textbf{Who has obligations?}

Historically a constitution was regarded as necessary to protect the individual from intrusion by the state. With the development of human rights law, its reach has expanded to cover the activities of non-state actors – at least in some spheres. As human rights are now regarded as indivisible, a cogent case can be made to apply the principles of equality, non-discrimination and other fundamental rights between private citizens.\textsuperscript{74} Full protection for human dignity cannot be achieved by confining constitutional rights to the vertical relationship between the citizen and the state.

\textsuperscript{72} Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC) [42]. See also S v Williams 1995 3 SA 632 (CC) [75]; Du Plessis v De Klerk 1996 3 SA 850 (CC) [186]; Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC) [88]; Sidamo v Rustenburg Platinum Mines Ltd [2007] ZACC 22, 2008 2 SA 24 (CC) [94]; Occupiers of 51 Olivia Road, Bendor Township v City of Johannesburg 2008 3 SA 208 (CC); Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 3 SA 454 (CC) [166], [337].


\textsuperscript{74} See J Habermas ‘The concept of human dignity and the realistic utopia of human rights’ (2010) 41 Metaphilosophy 464 at 468 - 469.
8.2.1.1 The state and public enterprises
It is uncontroversial now that rights enforceable against the state can be enforced against state-owned enterprises. Depending on the context and the purpose of the right, they may also be invoked in relation to private parties. In Botswana in Diau a building society, which was not an organ of state but which operated in the public domain, was bound to obey the constitutional strictures respecting the liberty and privacy of its employees and forbidding discrimination and inhuman and degrading treatment. There is an analogy between the power of the state – the original rationale for introducing constitutional rights aimed at restricting government interference with citizens – and that wielded by the modern corporation (frequently operating on a global basis). In both situations there is gross inequality between the strength and influence of the powerful body, on the one hand, and the weak bargaining power residing in citizens, employees, consumers and members of the public affected by corporation’s activities, on the other. Dingake J saw no reason to differentiate between state and private conduct when considering the scope of the right to liberty, equality before the law and human dignity, because, as he put it, ‘to draw such differentiation may authorize constitutional violations by private persons, that properly ought not be permitted.’

To ensure certainty in the law and to avoid a haphazard approach to constitutional interpretation, some guidelines are necessary on when and in what situations the horizontal application of rights is required. A good starting point is the principle enunciated by Friedman JP in South Africa in Baloro v University of Bophuthatswana that any activity, operation, undertaking or enterprise operating in the community and open to the public, is subject to the horizontal application of fundamental rights.

75 Diau v Botswana Building Society 2003 (2) BLR 409 (BwIC) (Botswana Industrial Court).
76 See n 75 above, 30.
77 n 75 above, 31.
78 1995 4 SA 197 (B), cited in Diau (n 75 above) 30. Application of this principle means that rights would be enforceable against entities such as, first, corporations, multinational and local companies that engage in trade, commerce and business with the public, have employees and are involved in numerous undertakings; second, commercial and professional firms which rely on the public for their custom or support; and, third, hotels, restaurants and the like: as above.
8.2.1.2 Transnational corporations

In the past decade attempts have been made to render transnational corporations (TNCs) accountable in law for their actions, which may breach human rights. With the extraordinary growth of businesses that span multiple jurisdictions and have more wealth than many countries,\(^79\) they have been able to evade responsibility despite having the capacity to infringe human dignity on a wide scale by their activities. The general public and the environment have been affected as well as TNCs' employees, suppliers, consumers and others in direct relationships with them. There is widespread acceptance that businesses should not infringe human rights, but there was a view (resisted by many enterprises and states) that they also had positive obligations to protect human dignity.\(^80\) I will now look at the efforts made to control TNCs and to hold them to account and will probe the underlying rationales for doing so.

As concern grew at the capacity of TNCs to endanger human rights, in 2000 the UN initiated the Global Compact, which is a voluntary network for businesses and other stakeholders that encourages corporate social responsibility\(^81\) by adhering to ten principles.\(^82\) The latter are derived from


\(^80\) Globalisation and privatisation of hitherto publicly provided services have extended the reach of TNCs giving them power frequently exceeding that of individual states. The respective roles and responsibilities in the human rights matrix of states and TNCs are in contention. By imposing duties to protect human rights on TNCs, some feared that this would relieve states of their well-recognised obligation to do so and might foster a laissez-faire attitude towards human rights among governments. TNCs doing business with corrupt states were accused of being complicit in human rights abuses. On corporations as complicit with governments, see SR Ratner ‘Corporations and human rights: A theory of legal responsibility’ (2001) 111 Yale Law Journal 443 at 500 - 504.


\(^82\) UN ‘Global Compact’ http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (accessed 24 September 2013). It is not a code of conduct, but is a partnership between the UN, business, international labour and major transnational civil society organisations: G Kell & JG Ruggie ‘Global markets and social legitimacy: The case for the “Global Compact”’ (1999) 8(3) Transnational Corporations 101 at 104.
the Universal Declaration of Human Rights (Universal Declaration)\(^\text{83}\) and other United Nations instruments in the areas of human rights, labour, the environment and anti-corruption.\(^\text{84}\)

The UN Sub-Commission on the Promotion and Protection of Human Rights adopted draft Norms on the Responsibilities of TNCs for Human Rights in August 2003.\(^\text{85}\) While confirming the primary responsibility of states for promoting and respecting human rights,\(^\text{86}\) the draft Norms pointed out that TNCs, their officers and employees had human rights responsibilities, being obliged to respect norms in UN treaties.\(^\text{87}\) They


\(^{84}\) The exhortatory nature of the principles is evident as companies are simply asked to ‘embrace, support and enact, within their sphere of influence, a set of core values’. Businesses are told that they ‘should’ support and respect the protection of internationally proclaimed human rights: principle 1. A stronger warning is given against assisting others to breach human rights, as they should ‘make sure’ they are not complicit in human rights abuses: principle 2.


\(^{86}\) Preamble, paras 1 & 19.

\(^{87}\) Preamble. Having acknowledged the Global Compact, the Sub-Commission felt that more than a voluntary initiative was warranted and was motivated to set standards by the increasing influence of TNCs on account of globalisation combined with their...
imposed a widespread onus on TNCs to ‘promote, secure the fulfilment of, respect, and ensure respect of and protect human rights’ within their ‘spheres of activity and influence’. The UN Commission on Human Rights was not impressed with the draft Norms and did not approve them. Instead in 2005 the UN Secretary-General appointed John Ruggie as a Special Representative on human rights and business. Ruggie criticised the Norms stridently in his report in 2006 for inventing a new avenue of international law that spoke directly to TNCs and for failing to define properly the obligations falling on states and TNCs. His report in 2008 presented a three part policy framework capacity to do good (‘to foster economic well-being, development, technological improvement and wealth’) and to do harm affecting the lives of individuals through their business and employment practices and their interactions with governments; a justification given for UN intervention was the universality of human rights: as above. The draft Norms proposed to impose direct responsibilities on TNCs and to make them accountable to the UN: paras 15 - 16. States were to be responsible for implementation by TNCs of the Norms and ‘other relevant national and international laws’ backed by criminal sanctions: paras 17 - 18. A civil remedy was also envisaged with TNCs being liable to pay compensation to those affected by failure to comply with the Norms: para 18.

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


involving the state obligation to protect against human rights abuses, corporate responsibility to respect all human rights, and the need for remedies to address breaches of human rights standards.92

Ruggie continued his work by developing Guiding Principles to make the ‘Protect, Respect and Remedy’ framework operational.93 Following an extensive consultation process, they were endorsed by the UN Human Rights Council in June 2011.94 They start with the state’s unequivocal duty to protect human rights – grounded in international human rights law – by taking appropriate steps to prevent, investigate, punish and redress human rights


Human dignity and fundamental rights in South Africa and Ireland

abuse through ‘effective policies, legislation, regulation, and adjudication.’ The provisions on corporate responsibility to respect human rights place the onus to avoid infringing internationally-recognised human rights, to address adverse human rights impacts with which they are involved in their own activities, and to try to prevent or mitigate those to which they are directly linked by their relationships, on all enterprises irrespective of ‘their size, sector, operational context, ownership and structure.’ This has horizontal application and does not depend on state-involvement. The final part of the trilogy is the provision of an effective remedy as part of the state’s duty to protect human rights with the Guiding Principles envisaging a range of measures not confined to judicial, administrative and legislative means.

The normative base for the protection of human rights in the globalised business world has its roots firmly in human dignity, which is inherent in

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95 n 93 above, principle 1 & commentary. Less dogmatic is the requirement that states ‘set out clearly the expectation’ that TNCs respect human rights, but significantly its reach extends throughout their operations: principle 2. Policy coherence is to be achieved by states ensuring that government departments, agencies and state institutions are aware of and observe the state’s human rights obligations in fulfilling their mandates: principle 8. That coherence is to be maintained when states conclude international agreements or contracts – they should retain adequate policy and regulatory ability to protect human rights while providing the necessary protection for investors: principle 9 & commentary. More muted is the stipulation to ‘promote respect for human rights’ in public procurement: principle 6 & commentary. When involved in multilateral institutions, states are encouraged to spread respect for human rights and to promote the Guiding Principles: principle 10 & commentary. The state should foster respect for human rights in the business community by enforcing human rights-friendly laws, giving guidance and encouraging (sometimes requiring) enterprises to communicate their human rights performance: principle 3. It has stricter obligations to ensure respect for human rights by businesses with which it has closer connections, ie, those that are state-owned or controlled, receive state support and services, or provide outsourced services: principles 4 - 5.

As the ‘host’ state in conflict-affected areas may be unable to protect human rights adequately because it lacks effective control, the ‘home’ state has a role to play to assist in ensuring that businesses are not involved with human rights abuse: principle 7 & commentary. A state should deny access to public support and services for a business that refuses to co-operate in addressing its involvement in gross human rights abuses: principle 7(c). State policies, legislation, regulation and enforcement measures must be effective in addressing the risk of business involvement in gross human rights abuses: principle 7(d). See SL Seck ‘Conceptualizing the home state duty to protect human rights’ in Buhmann et al (n 82 above) 50 - 51.

96 n 93 above, principles 11 - 14. Policies (based on a policy statement to which enterprises express commitment thereby embedding their responsibility to respect human rights) and processes should be in place to identify human rights risks, remediate adverse impacts that occur and to ensure accountability: principles 15 - 16. A reduction in the risks of claims is a collateral benefit of continual due diligence to rule out complicity: principle 17 & commentary. Remediation is obligatory in the event of a lapse with priority being given to the most severe or urgent impacts: principles 22, 24.

97 n 93 above, principles 25 - 31.
every person and is the rationale for human rights and obligations. The autonomy and consciousness of those subject to humiliation generates human rights. The concept of dignity is concerned not just with the absence of indignities, but also with ensuring access to basic amenities to allow for the full development of the human personality.

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

The question can be posed as to whether TNCs are participants in society with mutual rights and duties. For Denis Arnold, the answer is ‘yes’ on two alternative grounds: first, corporations are properly understood as agents capable of intentional action and can be duty bearers that are morally responsible for their actions; second, all corporations are populated by

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98 Clapham (n 82 above) 536.
99 Clapham (n 82 above) 546. This intrinsic view deriving rights from human agency also has an instrumental aspect, since people have a fundamental interest in having the freedom to pursue the goals they have identified as making their lives worthwhile and in a minimal provision of health, physical welfare, and education necessary to pursue those goals: Arnold (n 82 above) 385.

Four secure moral claims (to have a life, to lead one’s life, to freedom from cruel degrading treatment and against severe unfairness) can all be thought of as requirements of human dignity and are the grounds of human rights: JW Nickel Making sense of human rights (2007) 66, 69.

100 Andrew Clapham reasoned that non-state actors must have obligations to protect human rights and to allow for the full realisation of the human potential: n 82 above, 546.
101 n 94 above, [3]. The Global Compact’s principles are derived from the Universal Declaration, whose raison d’être is human dignity and equality.

102 Jägers (n 79 above) 39. The object and purpose of the provisions in the core human rights documents increasingly require that the obligations apply at the horizontal level to private entities: Jägers (n 79 above) 70.

103 Halpern (n 82 above) 139. ‘All participants in society interact with an individual’s dignity and thus have human rights obligations; dignity does not spring from the relationship between an individual and the state, but between an individual and all others.’ Halpern (n 82 above) 139 - 140. The placing of the individual in a community and in relationships implicates others who have mutual rights and duties: Arnold (n 82 above) 385.
individual employees who are agents and, as such, are duty bearers. Yet another justification for regarding TNCs as bearing duties is that they frequently assert their own legal rights in society and have the resources to pursue them. Therefore justice and equality require that they carry reciprocal duties.

The more difficult task is to identify what precise duties TNCs have and in what circumstances. The tripartite typology of duties developed by Henry Shue is a useful tool in this endeavour. Negative obligations to respect human rights by not interfering with them can clearly be attributed to TNCs where they have a special relationship with the rights holders, such as employees, consumers and the wider community affected by their activities. Where TNCs operate in partnership with others violating human rights or when they enter into contracts with abusive states, they may be complicit in breaching people’s rights and have a duty not to co-operate or to disengage.

Even when they are not embroiled in situations of abuse, TNCs may have an opportunity to take positive action to fulfil human rights by aiding the deprived. Ethical claims of imperfect obligation cannot be transcribed

104 n 82 above, 387 - 388.
105 See A Reinisch ‘The changing international legal framework for dealing with non-state actors’ in Alston (n 79 above) 85. This is what Arnold calls the moral principle of ‘fair play’: n 82 above, 389.
106 H Shue Basic rights: Subsistence, affluence, and US foreign policy (1996) 52. Shue distinguished between duties to avoid depriving, to protect from deprivation and to aid the deprived: above, 52. He elaborated his typology, first, by requiring (as part of protection from deprivation) enforcement of duty and the designing of institutions that avoid the creation of strong incentives to violate duty and, second, by setting out the categories of deprived to whom the duty to aid arises (those who are one’s special responsibility, who are victims of social failures in the performance of duties, and who are victims of natural disasters): above, 60. See Jägers (n 79 above) 76.
107 Jägers (n 79 above) 79 - 80.
108 Jägers (n 79 above) 80 - 83.
109 From an ethical perspective, Amartya Sen deduced that we should not proceed on the assumption that we owe nothing to others, unless we have actually harmed them, as we have a basic general obligation to be willing to consider seriously what we should reasonably do: A Sen Elements of a theory of human rights (2004) 32 Philosophy & Public Affairs 315 at 340. See also A Sen The idea of justice (2009) 372 - 373.

Arnold considers that the world’s affluent populations may hold a common obligation to ensure that global institutions that have a direct impact on poverty and economic development, such as the World Bank, the UN and the International Monetary Fund, operate within the bounds of justice and respect human rights: n 82 above, 387. On the IMF, see F Gianviti ‘Economic, social, and cultural human rights and the International Monetary Fund’ in Alston (n 79 above) 113 - 138; Reinisch (n 105 above) 63.
readily into precise legal rights. Where a TNC operates an essential service or one normally provided by the state, a credible case can be made for finding it has inherited obligations to protect human rights. This is relevant when public services and utilities are privatised, and monopolies are dismantled to make way for competition in the market.

Public acceptance of the content of human rights and of their enforceability can ensure that they become a reality in law – open debate advances this process. Voluntary codes of conduct or exhortations by the UN can help. However, sometimes TNCs can profess to adhere to certain standards in order to improve their public image, while at the same time ignoring them in practice. Recently there has been depressingly stark evidence in the financial markets of the mayhem that can follow when reliance is placed on ‘light touch regulation’. Therefore it is worthwhile identifying those human rights that engender correlative obligations on TNCs and enshrining them as legal obligations in an international instrument. The UN draft Norms attempted to do that, but they failed to provide a normative publicly acceptable base for their proposals and were much too ambitious in equating the obligations on TNCs with the duties on states. Ruggie’s approach of requiring compliance with clear obligations and encouraging adherence to those that are still not widely accepted will be more successful.

The mechanisms for enforcing human rights against TNCs could be developed. The International Criminal Court might be given a remit to try TNCs for international crimes. Whether or not this happens depends on the political will to do so by a significant number of players. In the meantime, TNCs can be held to account before national courts. Because of the transnational nature of TNCs’ operations, this situation is not ideal. Jurisdiction

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110 In the laws of some countries there is a legal demand to provide reasonable help to third parties: Sen *The idea of justice* (n 109 above) 375. See also Sen ‘Elements of a theory of human rights’ (n 109 above) 342.

It is not easy to imply a legal obligation on TNCs to use the opportunities presented, except where the TNC acts de facto in place of a ‘failed state’ and, even then, its responsibility will be mostly confined to ensuring that an individual has access to resources needed for survival: Jägers (n 79 above) 84 - 85. The size and resources of a corporation will govern the extent of the obligation: Jägers (n 79 above) 85.

111 As Sen indicated, ‘the understanding and viability of human rights are … intimately linked with the reach of public discussion, between persons and across borders. The viability and universality of human rights are dependent on their ability to survive open critical scrutiny in public reasoning.’: ‘Elements of a theory of human rights’ (n 109 above) 356. Apart from being legally enforceable, there are other ways, such as recognition, monitoring and agitation, which can be effective in advancing the cause of human rights: ‘Elements of a theory of human rights’ (n 109 above) 343. See also Reinisch (n 105 above) 69.
may be contested or individual states may not have the capacity or resources to deal with the complexity of the legal and evidentiary issues arising.

8.2.1.3 Private relationships

Examples of countries where constitutional rights are applied horizontally are Brazil,\textsuperscript{112} India,\textsuperscript{113} Malawi,\textsuperscript{114} Namibia,\textsuperscript{115} Sri Lanka,\textsuperscript{116} South Africa,\textsuperscript{117} and Zambia.\textsuperscript{118} In contrast, the Canadian Supreme Court found in \textit{RWDSU v Dolphin Delivery} that the Canadian Charter did not apply to private litigation completely divorced from any connection with government.\textsuperscript{119}

There are several reasons why constitutional rights in Ireland apply to private relationships where there is no public element. To ascertain whether they have horizontal application, the purpose of the right as well as the text and spirit of the Constitution will be relevant. Support for the proposition that rights have horizontal application can be drawn from the fact that the Constitution is binding on the judiciary as an arm of the State.\textsuperscript{120} Therefore, the courts are obliged to play their part in respecting, defending and vindicating personal rights under Article 40.3.1° and in the State’s protection


\textsuperscript{114} Butler (n 112 above) 78.

\textsuperscript{115} See \textit{Diau} (n 75 above) 26.

\textsuperscript{116} See \textit{Diau} (n 75 above) 27.

\textsuperscript{117} See \textit{Diau} (n 75 above) 27 - 28.

\textsuperscript{118} Butler (n 112 above) 78, fn 8.


This decision has been severely criticised for being contrary to the spirit of the Charter: \textit{Diau} (n 75 above) 25 - 26.

\textsuperscript{120} Butler (n 112 above) 81.
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and vindication duties in Article 40.3.2°. As judicial acts must conform to the Constitution, the common law whether invoked in private litigation or in cases where there is a public element is subject to constitutional scrutiny. If the Constitution provides a comprehensive normative system for all law within the State, harmony with that value system throughout the legal system is desirable – particularly when the people is sovereign under the Constitution. ‘True concern with protection of individuals’ rights from private persons requires the Constitution to apply horizontal relations when the existing private common law is inadequate.

8.2.1.3.1 Irish case-law

Walsh J affirmed the doctrine of constitutional supremacy in *Meskell v CIE* when he stated, ‘the Constitution … is superior to the common law and … must prevail if there is a conflict between the two.’ He reiterated that the courts are obliged to develop a remedy for breach of a constitutional right where none currently exists. This principle has given rise to a theory of ‘constitutional torts’. It is the courts’ role to define when and which constitutional rights are enforceable between private citizens. The judiciary has been content to rely on tort law to fulfil a role for which it was not designed.

121 Butler (n 112 above) 81 - 82.


123 Roederer (n 122 above) 459 - 460.


125 n 124 above, 132 - 133:

[A] right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and … the constitutional right carries within it its own right to a remedy or for the enforcement of it. See Gardbaum (n 119 above) 396; B Walsh ‘The judicial power, justice and the Constitution of Ireland’ in D Curtin & D O’Keeffe (eds) *Constitutional adjudication in European Community and national law: Essays for the Hon. Mr. Justice T.F. O’Higgins* (1992) 150.

126 Butler (n 112 above) 81 - 82, fn 24.

127 There are important distinctions between enforceability of a constitutional right against the State and against an individual, as the relationship between the citizen and the State is not the same as that between citizens: W Binchy ‘Constitutional remedies and the law of torts’ in J O’Reilly (ed) *Human rights and constitutional law: Essays in honour of Brian Walsh* (1992) 201 - 202. The political ties between the citizen and the State are based on normative premises which differ from the ties between citizens as members of society: above, 202. Although a constitutional right may be enforceable against the
designed. Henchy J’s reluctance in *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd* to re-shape the contours of tort to align with constitutional norms is evident from the excuse he offered for not doing so, ‘the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof.’

He conceded that judicial intervention might be justified if it could be shown that the tort in question was ‘basically ineffective’ to protect a constitutional right.

Because the Irish Constitution confers subjective rights on individuals against the state and also generates objective norms that determine the validity of all other forms of law, litigants are able to challenge the constitutionality of legislation or the common law in private law actions, even when no state action is directly involved. In *McDonnell v Ireland*, Barrington J asserted that constitutional rights did not need recognition by the legislature or by the common law to be effective – the courts would define them if necessary and ‘fashion a remedy for their breach.’

He sounded a note of caution when he said, ‘constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules.’ Constitutional rights were applied directly to regulate the internal affairs of a private body in *Glover v BLN Ltd*. McCracken J distinguished *Glover* in *Carna Foods Ltd v Eagle Star Insurance Co (Ireland) Ltd*, when he held that there was no requirement for an

State and against another citizen, this does not necessarily mean that the conditions for eligibility for an award of compensation against both are identical: as above.

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128 Binchy (n 127 above) 207; O’Cinneide (n 124 above) 245 - 246.
130 n 129 above, 636.
131 O’Cinneide (n 124 above) 217. Colm O’Cinneide explained it thus, ‘a private litigant in the private law case can assert that the law being challenged is not a binding legal norm, on the basis that it is incompatible with the Constitution, and therefore should not be applied in the case, or alternatively should be applied in a manner compatible with the Constitution.’: as above.
133 n 132 above, 148.
134 [1973] IR 388 (SC). Walsh J stated, ‘public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures.’: above, 425.

A company director’s contract had been terminated for serious misconduct and neglect without giving him prior notice of any complaints. See O’Cinneide (n 124 above) 220 - 221. The right to fair procedures under Article 40.3 of the Constitution applies to the Government’s exercise of the power of removal: *Garvey v Ireland* [1981] IR 75 (SC).
insurance company to give reasons for cancelling or refusing to renew a policy. He did not consider that any principle of natural justice or constitutional justice applied to that decision.

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

The relationship between a union and its members is subject to its members having the democratic right to participate in its processes as a corollary to the constitutional right to join it. The special position of a teachers’ union towards pupils warranted an award of exemplary damages for its intentional breach of a child’s right to free primary education. A road transport operator obtained an injunction against a competitor carrying on an unlicensed service to stop a breach of his constitutional right to earn a livelihood, as the maximum fine possible was derisory and did not protect him.

136 He expressed concern at the effect of imposing constitutional rights directly in the context of purely commercial relationships between private parties, as it ‘would be a serious interference in the contractual position of parties in a commercial contract and with very wide-ranging consequences’: n 135 above, 531. See O’Cinneide (n 124 above) 236.
139 As above.
142 Lovett v Gogan [1995] 3 IR 132 (SC). See O’Cinneide (n 124 above) 226. Cf Parsons v Kavanagh [1990] ILRM 560 (HC). In the latter case, it was held that the right to
The children of a man who suffered brain damage necessitating permanent hospitalisation in an industrial accident claimed damages from his employer for the non-pecuniary benefits deriving from the parent-child relationship in *Hosford v John Murphy and Sons Ltd.* They invoked their constitutional rights as a family under Article 41 as well as a right that their father should not be prevented by injury from fulfilling his right and duty to educate them under Article 42. Costello J thought that damages would in principle be recoverable if the employer’s careless act amounted to a constitutional wrong which inflicted harm on them, as ‘otherwise, the protective provisions of the Constitution would be vacuous and valueless.’ His analysis of the nature of the rights granted showed that Article 41.1 gave a right to protection from legislation or *deliberate* acts of *state* officials attacking or impairing the constitution or the authority of the family. The Constitution targeted arbitrary state action – not negligence. It followed that the employer’s *negligent* action had not infringed any constitutional right enjoyed by members of the affected family.

When a breach of constitutional rights by the state has been established, damages are not necessarily awarded. In the *Blascaod Mór* case, where legislation was declared invalid because it used pedigree as a basis of classification, Budd J refused to award damages. For public policy reasons he felt that there must be considerable tolerance of the legislature. In any event, the plaintiffs had ‘largely been vindicated’ by the declaration of
invalidity of the legislation.\textsuperscript{150} Budd J’s explanation for his thinking this shows that how one is viewed by others is important.\textsuperscript{151} Restoring a person’s standing in the community can be more supportive of dignity than monetary compensation.

On the other hand, damages may not be sufficient to vindicate a personal right and a judicial determination may be necessary. The Supreme Court refused to strike out as an abuse of process the action \textit{Grant v Roche Products} brought by the father of a man who committed suicide following the taking of a prescribed drug.\textsuperscript{152} The drug company offered to settle for the full value of the claim, but the father refused to accept it. Hardiman J confirmed that the only way the deceased’s right to life could be vindicated was by a judicial hearing into the claim that his death was caused by the defendant’s wrongdoing followed by a determination of liability.\textsuperscript{153}

Laffoy J grappled with the issue of whether damages should be awarded in the problematic long-running Blehein litigation,\textsuperscript{154} in which it had been held that a statutory restriction on issuing proceedings to challenge treatment while involuntarily detained in a mental hospital infringed the constitutional right to access to the court.\textsuperscript{155} The context was important – here the fundamental right to liberty had been restricted, a serious infringement ‘on any consideration of the hierarchical framework of constitutional rights’.\textsuperscript{156} The difficulty in ascertaining the measure of damages had to be distinguished

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\textsuperscript{150} n 148 above, 590.

\textsuperscript{151} ‘The informed public is aware of their [the plaintiffs’] stance and their vindication by the pronouncements of the Supreme Court as to the unjustified discrimination against them and the infringement of their property rights.’ as above.

\textsuperscript{152} n 48 above.

\textsuperscript{153} n 48 above, [70], [75]. He held that a finding of wrongful death, might, in certain circumstances, confer a tangible benefit on the relatives of the deceased person: n 48 above, [68], [82].


\textsuperscript{156} [2010] IEHC 329 [12.9]. Another factor to be taken into account was the nature and extent of the adverse impact on the plaintiff resulting from such civil wrong as he would have been in a position to establish in the litigation which he was precluded from prosecuting; a significant countervailing factor was the status of the impugned legislation (in \textit{Blehein} the Act had survived for almost 60 years after its enactment, benefited from the presumption that it was constitutionally valid and had been applied consistently in the courts): as above.
\end{flushleft}
from the impracticability or impossibility of providing redress.\textsuperscript{157} Public policy and the common good justified the Supreme Court's demurral from awarding damages for the \textit{ultra vires} exercise of statutory power in \textit{Pine Valley Developments Ltd v Minister for the Environment}\textsuperscript{158} and \textit{Glencar Explorations plc v Mayo County Council (No 2)}.\textsuperscript{159}

\subsection*{8.2.1.3.2 Analysis of Irish approach}

The case-law shows that the use of the direct horizontal effect approach of the constitutional tort endorsed in \textit{Meskell} and \textit{Glover} is uncommon, occurring only when the existing statutory or common law has not addressed the wrong in question.\textsuperscript{160} If a remedy for the constitutional breach can be found in tort, the courts have accepted the law ‘warts and all’. They have not attempted to develop it to bring it into conformity with constitutional norms. The scope and extent of the \textit{Meskell} doctrine is uncertain.\textsuperscript{161} It is unclear whether the constitutional tort is actionable \textit{per se} or only on proof of damage, whether liability is strict, whether all constitutional rights are actionable in the private sphere, and how the balancing process works in the resolution of private disputes where conflicting rights and interests are at stake.\textsuperscript{162}

The uncertainty has its foundation in the Supreme Court’s failure to establish an overarching test to determine whether a constitutional right will be given horizontal effect, and, if so, to what degree and extent.\textsuperscript{163} The absence

\begin{itemize}
\item \textsuperscript{157} [2010] IEHC 329 [12.7]. Laffoy J decided to deal with the issue of whether the claim was statute-barred first, considering it undesirable (unless necessary to do so) to embark on the determination of a fundamental issue as to whether transcendent considerations existed which rendered it undesirable that the plaintiff be awarded damages: [2010] IEHC 329) [12.10]. In 2013 she found that the plaintiff’s personal constitutional rights were subject to limitation by statute, that they were vindicated by the declaration of invalidity of the statutory restriction on issuing proceedings, but that he did not have an entitlement to damages: [2013] IEHC 319 [60], [65]-[66].
\item \textsuperscript{158} [1987] IR 23 (SC) 38, 40.
\item \textsuperscript{159} [2001] IESC 64, [2002] 1 IR 84 at 128.
\item \textsuperscript{160} The courts have not analysed the legitimacy of the direct horizontal effect approach, as contrasted with the vertical ‘state action’ or indirect horizontal effects doctrines: O’Cinneide (n 124 above) 223. The ambiguity in the key precedents has led to questioning of whether the direct horizontal approach has actually been established as a fixed constitutional doctrine in Irish constitutional law: O’Cinneide (n 124 above) 224.
\item \textsuperscript{161} O’Cinneide (n 124 above) 223. See also C O’Cinneide ‘The European Convention on Human Rights and the Irish constitutional system of rights protection: Complementary or divergent?’ in O Doyle & E Carolan (eds) \textit{The Irish Constitution: Governance and values} (2008) 522.
\item \textsuperscript{162} D Oliver & J Fedtke ‘Comparative analysis’ in Oliver & Fedtke (n 113 above) 480.
\item \textsuperscript{163} O’Cinneide (n 124 above) 229.
\end{itemize}
of guidance on horizontal effect could impact on personal autonomy, as private individuals and bodies may be unsure or unaware of the constitutional obligations that may be imposed on them.\textsuperscript{164} Timidity about applying the equality guarantee in Article 40.1 in private relations will ensure that entrenched views rooted in prejudice and stereotyping will continue unchallenged and that a powerful elite will remain in the ascendant.\textsuperscript{165} In contrast to its attitude to equality, the Supreme Court imposed constitutional norms directly to restrain private clinics, advice centres\textsuperscript{166} and student unions\textsuperscript{167} from giving information on abortion, despite the fact that they had not acted contrary to any specific common law or legislative rules.\textsuperscript{168}

Because of the greater caution exhibited since the early 1990s, the Irish courts develop existing law which regulates a matter within the scope of constitutional rights only where the scope of the tort is ‘basically ineffective’ or ‘plainly inadequate’ to vindicate the constitutional rights at issue.\textsuperscript{169} Costello P in \textit{W v Ireland (No 2)\textsuperscript{170}} ruled out adjusting the existing law of torts where it addressed the constitutional right invoked. He accepted the Meskell doctrine that the Constitution was to be construed as providing a discrete cause of action for damages for infringement of a constitutional right which was not protected by common law or by statute law, and that an injunction

\begin{itemize}
  \item \textsuperscript{164} O’Cinneide (n 124 above) 230.
  \item \textsuperscript{165} On the doubt that exists as to whether Article 40.1 applies as between private individuals, see O’Cinneide (n 124 above) 230 - 232.
  \item \textsuperscript{166} \textit{AG (Society for the Protection of Unborn Children Ireland Ltd) v Open Door Counselling Ltd \textsuperscript{1988} IR 593 (SC). See O Doyle \textit{Constitutional law: Text, cases and materials} (2008) [5-12].
  \item \textsuperscript{167} \textit{Society for the Protection of Unborn Children (Ireland) Ltd v Grogan \textsuperscript{1989} IR 753 (SC). See M Cahill ‘Constitutional exclusion clauses, Article 29.4.6° and the constitutional reception of European law’ (2011) 34 \textit{Dublin University Law Journal} 74 at 93 - 96.
  \item \textsuperscript{168} O’Cinneide (n 124 above) 233 - 234. This severely infringed the freedom of action and communication of the defendants, who prior to being injunctioned could not have known that they were necessarily acting contrary to Irish law: O’Cinneide (n 124 above) 234. It transpired ultimately that the State’s actions were not justified, as the European Court of Human Rights found a breach of Article 10 ECHR because the restraint imposed on receiving or imparting information was disproportionate to the aims pursued: \textit{Open Door Counselling v Ireland \textsuperscript{1993} 15 EHRR 244. See F de Londras & C Kelly \textit{European Convention on Human Rights Act: Operation, impact and analysis} (2010) [6-32].
  \item \textsuperscript{169} O’Cinneide (n 124 above) 237.
  \item \textsuperscript{170} [1997] IEHC 212, [1997] 2 IR 141. The victim of sexual offences by a priest subsequently convicted in Northern Ireland of sexual abuse was not entitled to damages for the delay in prosecuting him attributable to the failure of the Attorney General to endorse extradition warrants. The High Court held that the Attorney
could be granted to prohibit an infringement.\textsuperscript{171} He construed the State's duty to respect, defend and vindicate the personal rights of the citizens in Article 40.3.1° of the Constitution as being implemented by the 'existence of laws (common law and statutory) which confer a right of action for damages (or a power to grant injunctive relief) in relation to acts or omissions which may constitute an infringement of guaranteed rights'.\textsuperscript{172} However, he also accepted that if a provision of the law to be applied did not adequately protect the guaranteed right in a particular case, then the law would be applied without the provision, which would be rendered invalid by the Constitution.\textsuperscript{173} There is a contradiction within Costello P's judgment, as he simultaneously ruled out shaping the existing law which deals with a constitutional right, and at the same time agreed that an inadequate provision in that law could be annulled.

From this review of the application of constitutional rights in private relations, some questions arise: first, when is a tort basically ineffective so as to trigger a constitutional tort?\textsuperscript{174} Second, what rights are enforceable between private parties? Third, what kinds of infringement give a right of redress? Fourth, what remedy is appropriate? I will address each of these in turn. Ineffectiveness is not necessarily identified with unconstitutionality – the

\begin{itemize}
\item General did not owe a duty of care to the victim because there was no relationship between him and her: above, 163. Even if he did have a sufficiently proximate relationship with her, it would be contrary to public policy to impose a duty of care on him: above, 164. His role in the extradition process was to ensure proper compliance with the State's international obligations: above, 160. See Morgan & Hogan (n 124 above) [18-32], [18-40], [18-83]-[18-84]; O’Cinneide (n 124 above) 238.
\item Neither do the gardaí owe a duty of care such as would create an entitlement to damages arising from the manner in which they conduct an investigation: \textit{Lockwood v Ireland} [2010] IEHC 430.
\end{itemize}

\textsuperscript{171} n 170 above, 166. Costello P considered that constitutionally protected rights which are regulated and protected by existing common and/or statutory law comprise 'all those fundamental rights which the Constitution recognises that man has by virtue of his rational being antecedent to positive law and are rights which are regulated and protected by law in every State which values human rights': n 170 above, 164. His distinction between these fundamental rights and other secondary constitutional rights is unsound, as it not necessarily true that all fundamental rights are protected by the existing law; neither is it inevitable that constitutionally protected minor rights are not already regulated.

\textsuperscript{172} n 170 above, 166 - 167.

\textsuperscript{173} n 170 above, 167. As an example of a provision that would be rendered invalid, Costello P mentioned a limitation period which in the particular circumstance 'trenched unfairly on a guaranteed right' and deprived the plaintiff of a right to compensation: as above.

\textsuperscript{174} See C Donnelly 'The privatisation of governmental functions' in Doyle & Carolan (n 161 above) 253.
The courts should try to fill the gap. The inefficacy may be regarded as generic or contextual. Costello P took the former view in *W v Ireland (No 2).* The private law framework provided protection *in general* for bodily integrity, so he accepted the existing restrictions without interrogating their adequacy in the particular circumstances. A very narrow interpretation of the Constitution could mean that the courts would give effect to constitutional norms in private law only when the *legislature*, as distinct from the private parties involved, had failed in its constitutional duty to uphold fundamental rights. The current law, in the absence of ‘plain inadequacy’, is considered to be entirely in conformity with the Constitution and immune from alteration. The law will be scrutinised not just in relation to the plaintiff’s rights, but also as to whether it protects the defendant’s constitutional rights.

The answer to the second question as to which rights are enforceable will depend on the nature and extent of the particular right taking into account the text of the Constitution and its underlying values. The wording might show a clear intention that the onus of compliance rests solely on the state. Not all of the provisions in Articles 40 - 44, which are fundamental rights primarily for the protection of individuals, could create rights of action for breach of constitutional duty. From the cases mentioned so far, it can be seen that an individual can rely in litigation against another private actor on the rights to bodily integrity, to a livelihood, and to fair procedures under Article 40.3, and on the right of association and non-association in Article 40.6.1. Children may obtain damages for unlawful interference with their

175 Binchy (n 127 above) 208.
176 As above.
177 O’Cinneide (n 124 above) 240.
178 O’Cinneide (n 124 above) 241; Binchy (n 127 above) 202.
179 O’Cinneide (n 124 above) 241.
180 Binchy (n 127 above) 209.
182 See Binchy (n 127 above) 202 - 203. The *Meskell* doctrine could give horizontal protection to socio-economic rights as well as to civil and political rights. Walsh J stated, ‘[t]o infringe another’s constitutional rights or to coerce him into abandoning them or waiving them (in so far as that may be possible) is unlawful as constituting a violation of the fundamental law of the State’: *Meskell* (n 124 above) 134. He did not qualify his remarks by confining them to civil and political rights. In *Meskell* the rights of association and dissociation in contention were raised in the context of the right to earn a livelihood, which is an economic right. Tort law involves notions of distributive justice (in addition to corrective justice) and constitutional rights have a social justice element.
right to free primary education in Article 42.4.\textsuperscript{183} The rights in Article 41 apply to the family and to marriage as institutions, so an individual has difficulties (to say the least) in trying to invoke it. The wording of Article 44.2.1\textsuperscript{o} suggests that individuals have a civil right of action against those interfering with religious activities.\textsuperscript{184}

The potential of the equality guarantee in Article 40.1 to be utilised in private relationships has been curbed by the countervailing right to autonomy,\textsuperscript{185} as well as by concerns over its impact on legal certainty and the separation of powers.\textsuperscript{186} Violations of human dignity, a constitutional value and recognised as an unenumerated right under Article 40.3, should, in theory, give a right of redress against private actors.\textsuperscript{187} Torts such as defamation and assault already give a remedy for infringements of dignity. Extension of respect for dignity beyond what is already enshrined in statute or well-established in common law will require judicial analysis and elucidation of the circumstances in which this is appropriate. Since it is the foundation for the equal worth of all human beings, human dignity as well as equality should receive consideration commensurate with that accorded liberty in the harmonisation or balancing of rights.\textsuperscript{188} As a right might be enforceable in one circumstance but not in another, the context will also impact on whether a particular right can be pursued.

The third issue of the type of infringement that gives a right to redress has several possible answers ranging from strict liability through responsibility based on negligence or intent, to culpability only for intentional actions. Writing in 1971, John Temple Lang thought it would be odd if negligence were the basis of civil liability, as it was irrelevant to the state’s obligation to respect constitutional rights; therefore, superficially, reasonable care should not be a valid defence, leaving absolute liability as the logical choice.\textsuperscript{189} But Hosford took a different route, and leaned towards imposing liability only for intentional or irrational actions. Because of the difficulties (and perhaps impossibility) of framing an overarching general rule to apply in all circumstances, an alternative

\textsuperscript{183} Binchy (n 127 above) 203.
\textsuperscript{184} Temple Lang (n 181 above) 247.
\textsuperscript{185} On the potential of Article 40.1, see G Hogan & G Whyte JM Kelly: The Irish Constitution (2004) [7.2.24]; Temple Lang (n 181 above) 248 - 249.
\textsuperscript{186} O’Cinneide (n 124 above) 232.
\textsuperscript{187} W Binchy ‘Dignity as a constitutional concept’ in Doyle & Carolan (n 161 above) 324.
\textsuperscript{188} See Binchy (n 187 above) 325.
\textsuperscript{189} n 181 above, 247.
contextual approach addressing issues of intention and negligence in precise factual situations would be more appropriate.190

The judiciary has focused on tort law for the answer to the final question of the appropriate remedy. Damages or an injunction are accepted options.191 However, the nature of constitutional rights varies enormously and the severity of the interference with them can fluctuate widely. Sometimes it might be more satisfactory to apply the contract model rather than tort.192

Divergence from compensatory damages for violation of constitutional rights can range from nominal damages for trivial infringements to punitive damages. The latter should be awarded for a serious breach of a constitutional right irrespective of whether the right itself is categorised as important.193 Occasionally no compensation at all may be appropriate, as the court’s finding that a person’s rights have been breached is sufficient vindication – restoration in the eyes of the community is enough in the circumstances. But in our consumerist society, which places an inordinate value on money, there is a danger that the failure to be recompensed in tangible terms may undermine the value of a simple court verdict in one’s favour.

8.2.1.4 Alternative models
Before considering how the Irish system for the enforcement of fundamental rights in private law might be improved, this subsection will compare briefly how some other jurisdictions (namely the United States and Germany) have dealt with this aspect of constitutional law.

190 Binchy (n 127 above) 207.
191 Because of the courts’ reluctance to breach the separation of powers, they may not intervene to prevent infringements of constitutional rights involving policy decisions on the application of state resources. However, Meskell and tort law may provide a remedy in damages for actual infringements. The Supreme Court was opposed to granting mandatory relief in relation to the state’s constitutional obligation to provide for free primary education under Article 42.4 of the Constitution, but the High Court award of damages for breaching that right was not appealed: Sinnott v Minister for Education [2001] 2 IR 545 at 631, 640, 656, 668, 669, 697 - 712, 715, 723 - 724. While the majority in the Supreme Court did not countenance granting a mandatory injunction obliging the state to implement its policy in relation to disadvantaged children forthwith, it did not seek to prevent an award of damages if a breach had actually occurred: TD v Minister for Education [2001] IESC 101, [2001] 4 IR 259 at 285 - 288, 316, 334 - 337, 372. The courts declined to grant a health board an order permitting it to carry out a screening test on an infant whose parents had refused to consent, but it can be deduced from the judgment of Denham J in the Supreme Court that the parents would be liable to the child if disease developed: North Western Health Board v HW [2001] IESC 90, [2001] 3 IR 622 at 723, 726 - 728.
192 Binchy (n 127 above) 217.
193 Binchy (n 127 above) 218.
In contrast to the assumption in Ireland that the Constitution of 1937 altered private law, the US Supreme Court confined its protection of citizens to vertical state action because of the more restricted wording of the Fourteenth Amendment.194 This apparently firm approach has been softened by regarding the courts as part of the state and therefore restricted from enforcing unconstitutional activities in the private sphere. In *Shelley v Kraemer* the Court found that a private agreement containing a restrictive covenant preventing occupation of land by non-white people did not violate the Fourteenth Amendment, but enforcement of the racially-discriminating agreement by the courts constituted state action denying equal protection of the laws.195 The Court substantially modified the common law of defamation to ensure it conformed to the First Amendment guarantee of free speech in *New York Times v Sullivan*, a civil lawsuit between private parties.196

The Federal Constitutional Court in Germany in the *Lüth* decision in 1958 developed the doctrine known as *Drittwirkung* (third-party effect of constitutional rights), which states that, although constitutional rights bind only governmental organs, they apply directly to all private law and so have indirect effect on private actors whose legal relationships are regulated by that law.197 According to the Court, constitutional rights form ‘an objective order of values’, where the value system ‘centers upon human dignity and

194 Temple Lang (n 181 above) 243. Unlike in the US, the Irish Constitution’s conferral of a right of action for breach of constitutional rights provides a mechanism for increasing accountability of private actors engaged in the performance of governmental functions: Donnelly (n 174 above) 252.

195 334 US 1 (1948). Positive action by the state courts supported discrimination, above, 19 (Chief Justice Vinson):

> These are not cases ... in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.

See Gardbaun (n 119 above) 389, 414; O’Cinneide (n 119 above) 95 - 96; Temple Lang (n 181 above) 243 - 244.

196 376 US 254 (1964). Justice Brennan, delivering the Opinion of the Court, precluded the courts from applying a state rule of law that would have imposed invalid restrictions on the newspaper’s constitutional freedoms: above, 265. See Gardbaum (n 119 above) 389, 428 - 429, 432, 440; O’Cinneide (n 119 above) 96.

the free unfolding of personality within the social community’ and is ‘a fundamental constitutional decision affecting the entire legal system.’\(^{198}\) It influences private law, so that ‘no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.’\(^{199}\)

The American modification of the vertical state action doctrine by regarding the judiciary as part of the state and therefore precluded from enforcing activities contrary to constitutional norms in the private sphere contrasts with the position in Ireland, as does the German indirect horizontal application of constitutional norms emphasising human dignity and the place of the person in the community.

8.2.1.5 The way forward in Ireland

The direct horizontal approach is essentially sound and should be continued.\(^{200}\) Like what happened in the US in the vertical state action model, the courts can be regarded as part of the state, so that they cannot enforce measures contrary to constitutional norms in the private sector. The indirect horizontal effect doctrine could also be adopted as in South Africa. If the existing law cannot be remodelled, the constitutional tort is a last resort.\(^{201}\)

An analysis of the scope and nature of the right in question and the extent to which it is capable and appropriate to use it to alter the legal rights and obligations of individuals is an indispensable first step.\(^{202}\) The second step is full consideration of all the constitutional norms (particularly human dignity and equality), which have been overlooked in Irish jurisprudence. The third step, following the German example, is application of those norms as an objective order of values suited to a more complex diverse society in the context of the emerging liberal democratic theory in Ireland.\(^{203}\)

\(^{198}\) Gardbaum (n 119 above) 403 - 404, citing Lüth (n 197 above) 205.

\(^{199}\) Gardbaum (n 119 above) 404, citing Lüth (n 197 above) 205.

\(^{200}\) O’Cinneide (n 124 above) 247.

\(^{201}\) See O’Cinneide (n 124 above) 249.

\(^{202}\) As above.

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with the constitutional vision of promoting the common good to assure the dignity and freedom of the individual, the person is seen as a member of the social community.

It is clear from the wording of Articles 41 - 43 that the norms enshrined in the Constitution are derived from natural law and not from the state.\textsuperscript{204} The family is identified as ‘a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.’\textsuperscript{205} Parents have ‘the inalienable right and duty’ to provide for their children’s education.\textsuperscript{206} It is acknowledged ‘that man, in virtue of his rational being, has the natural right, antecedent to positive law,’ to private ownership of property.\textsuperscript{207} Since constitutional rights do not depend for their existence on the state, they are enforceable against all comers insofar as they are capable of being so applied. The Constitution delineates when it is proper for the State to intervene to protect and vindicate these inherent rights.

Unlike in the US, the Irish Constitution is not inhibitory – its primary aim is not to guard against state intervention. The courts’ role is to delve into the normative issues, to interpret them and apply them in particular situations, so that people can understand how those norms should operate in

\textsuperscript{204} The ethos of the Constitution is Christian, as is evident from the Preamble and the acknowledgment in Article 44.1 that ‘the homage of public worship is due to Almighty God’. On the Christian influence on the drafting of the Constitution, see G Hogan, \textit{The origins of the Irish Constitution: 1928-1941} (2012) 156, 210 - 218, 223 - 224, 226; Keogh (n 203 above) 19 - 25, 27 - 56, 69; Keogh & McCarthy (n 203 above) 109 - 122, 153 - 173. The prevailing superior natural law recognised in the Constitution has its foundations in the human body and soul created in God’s image giving individuals the power of reason and the obligation of conscience, which inherent characteristics demand respect and reverence from fellow citizens and the state: D Costello ‘Natural law, the Constitution and the courts’ in P Lynch & J Meenan (eds) \textit{Essays in memory of Alexis Fitzgerald} (1987) 108. See also Binchy (n 187 above) 311; D Costello ‘The Irish judge as law-maker’ in Curtin & O’Keeffe (n 125 above) 162, 164; G Hogan ‘Constitutional interpretation’ in Litton (n 203 above) 177 - 181; G Quinn ‘Legal change, natural law and the authority of courts’ in B Treacy & G Whyte (eds) \textit{Religion, morality and public policy} (1995) 105 - 106; B Walsh ‘The Constitution and constitutional rights’ in Litton (n 203 above) 89 - 91, 104; Walsh (n 125 above) 149; G Whyte ‘Introduction’ in Treacy & Whyte above, 14 - 15; GF Whyte ‘Natural law and the Constitution’ (1996) 14 \textit{Irish Law Times} 8.

Natural law has been defined as ‘the set of principles of practical reasonableness in ordering human life and human community’: J Finnis \textit{Natural law and natural rights} (2011) 280. Natural law is a philosophy of rights affirming the reality of individual responsibility within the determinate natural order: LL Weinrib ‘Natural law and rights’ in RP George (ed) \textit{Natural law theory: Contemporary essays} (1992) 298.

\textsuperscript{205} Art 41.1.1º.

\textsuperscript{206} Art 42.1.

\textsuperscript{207} Art 43.1.1º.
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Legal harmony. Interpretation is necessary because it does not automatically follow that there is a right to sue on foot of a constitutional right – the defendant may not have a correlative obligation. The courts should make the connection between the moral framework of the Constitution and the implemented moral right. Their task is to create the legal network to deliver a constitutional vision.

The South African courts have demonstrated how the common law can be moulded to reflect constitutional norms. The Supreme Court of Appeal developed the defence of reasonable publication to defamation in National Media Ltd v Bogoshi, which was approved by the Constitutional Court in Khumalo v Holomisa as it struck an appropriate balance between the protection of freedom of expression and the constitutional value of human dignity.

208 Jürgen Habermas explained that law has a more complex structure than morality because, first, it simultaneously ‘unleashes and normatively limits individual freedom of action (with its orientation toward each individual’s own values and interests)’ and, second, it incorporates ‘collective goal setting, so that its regulations are too concrete to be justifiable by moral considerations alone’: J Habermas Between facts and norms: Contributions to a discourse theory of law and democracy trans W Rehg (1998) 452. Actionable positive law can be viewed as a functional complement to morality: as above.

209 The term ‘rights’ tends to be used indiscriminately to cover what may in a given case be a privilege, power or an immunity rather than a right in the strictest sense: WN Hohfeld ‘Some fundamental legal conceptions as applied in judicial reasoning’ (1913) 23 Yale Law Journal 16 at 30. ‘Duty’ is the correlative of ‘right’: above, 31 - 32; WN Hohfeld ‘Fundamental legal conceptions as applied in judicial reasoning’ (1917) 26 Yale Law Journal 710 at 710, 717. Instead of there being a single right with a single correlative duty resting on all the persons against whom the right avails, there are many separate and distinct rights, actual and potential, each one of which has a correlative duty resting upon some one person: Hohfeld ‘Fundamental legal conceptions as applied in judicial reasoning’ above, 742.


210 The Constitution has been viewed as a philosophical and theological document: Keogh & McCarthy (n 203 above) 108. From that perspective, its legal import needs to be articulated.

211 1998 4 SA 1196.

212 2002 5 SA 401.
In contrast, the Irish courts have not produced coherent and analytically persuasive explanations of horizontality from conceptual, juridical and jurisdictional perspectives. 213

### 8.2.2 Positive obligations on the state

The extent of the state’s obligations to protect dignity can require it to take positive steps to prevent infringements not only by state actors, but also by private individuals. This may mean criminalisation of certain activities and follow up to prosecute, punish and rehabilitate offenders. 214 It can also necessitate state action to ensure that the law provides an effective remedy for civil wrongs extending to judicial intervention to secure redress for individuals in addition to legislative and administrative measures.

The judiciary is an arm of the state entrusted with a particular obligation to uphold the Constitution where the other branches of government have failed to do so. 215 Its role in fulfilling that duty is to provide a proper enforcement mechanism to deliver a remedy to those aggrieved. In Ireland a


International criminal tribunals were established at the end of the 20th century to hold individuals accountable for their part in atrocities. See, eg, Prosecutor v Akayesu (Judgment) ICTR-96-4-T, T Ch I (2 September 1998); I Bantekas International criminal law (2010) [2.6], [7.3.2], [8.3], [9.3], [9.4], [9.7], [21.11.5]; H Charlesworth & C Chinkin The boundaries of international law: A feminist analysis (2000) 237, 312, 318 - 319, 323; CA MacKinnon Are women human? And other international dialogues (2006) 238 - 239, 245.

On the development of an exception to state official immunity for core international crimes, see MA Summers ‘Immunity or impunity – The potential effect of prosecutions of state officials for core international crimes in states like the United States that are not parties to the Statute of the International Criminal Court’ (2006) 31 Brooklyn Journal of International Law 463 at 482 - 486.

215 The Community Court of Justice of the Economic Community of West African States held that the state was to be blamed for the inaction of its judicial and administrative authorities in not protecting a woman from violation of her human rights by a tribal practice of slavery: Korou v Niger [2008] AHRLR 182 (ECOWAS 2008). State liability arose as a result of ‘the tolerance, passiveness, inaction, and abstention’ of the judiciary in Niger vis-à-vis the practice: above, [85].
re-evaluation of the unnecessary excessive deference to the legislature and executive because of the separation of powers would be timely. If it were jettisoned, that would remove an obstacle to performance of the courts’ legitimate function.\textsuperscript{216} A context-sensitive review allows flexibility in the judiciary’s relationship with the executive.\textsuperscript{217}

The police as representatives of the state have an obligation to protect human rights. Yet the Irish courts have shielded the state from the natural legal consequences of failing to fulfil this duty. In \textit{Lockwood v Ireland} a rape victim claimed damages for the acquittal of her alleged rapist because his arrest was wrongful and therefore his confession was inadmissible.\textsuperscript{218} In her action against the state she based her case on negligence and breach of duty on the part of the police in invoking an invalid power of arrest. She asserted that there had been a failure to vindicate her constitutional right to bodily integrity and to ensure that justice was achieved in her case. Kearns P dismissed her claim and held that a duty of care creating an entitlement to damages from the manner in which the gardaí conduct an investigation does not arise in the absence of \textit{mala fides}.\textsuperscript{219}

Hedigan J in \textit{G v Minister for Justice Equality and Law Reform} applied the ‘now well established law’ arising from public policy that the gardaí owe no duty of care in respect of actions taken in the course of their duty to investigate and prosecute crime.\textsuperscript{220} Here the gardaí brought the husband of a woman

\begin{footnotesize}

\textsuperscript{216} In the Supreme Court, the majority (including Hardiman J) has regarded the separation of powers as rigid, whereas Denham CJ has a functional conception of it which allows greater innovation on the part of the courts: Doyle (n 166) [13-21], [13-32]–[13-33], citing \textit{TD} (n 191 above) 367 - 371, 298 - 299. See also J Wakely ‘Social and economic rights – A retreat by the South African Constitutional Court?’ (2010) 28 \textit{Irish Law Times} 153 at 154.

Irish judges have given the doctrine of the separation of powers a more stringent application than it has received in other jurisdictions such as the US or Australia, where it also occupies a central constitutional position: DG Morgan \textit{A judgment too far? Judicial activism and the Constitution} (2001) 84.

\textsuperscript{217} Binchy (n 127 above) 220.

\textsuperscript{218} n 170 above. Hedigan J followed \textit{Lockwood} when he found that a rape victim had no cause of action when she was traumatised following the collapse of the trial of the man accused of raping her because of a bungled prosecution: \textit{M v Commissioner of an Garda Síochána} [2011] IEHC 14 [6.7]. See R Byrne & W Binchy \textit{Annual review of Irish law} 2011 (2012) 600 - 601.

\textsuperscript{219} The policy grounds Kearns P relied on were, first, fear of the floodgates opening by extending the ambit of those to whom a duty of care was owed to a witness in the trial or to the event, or to the family of the victim, and, second, the inhibitory effect of the duty, which could cripple the capacity of the gardaí to investigate and prosecute crime effectively and promptly.

\textsuperscript{220} [2011] IEHC 65 [6.2], [6.4].
\end{footnotesize}
murdered in their home from the crime scene to G’s house, where he stayed and raped her. He had a history of violence and rape. The Court found that bringing the husband to G’s house after removing him from his home in order to preserve the scene of the crime was part of the gardaí’s investigatory functions and therefore no duty of care was owed to G.\(^221\) This was a premature conclusion based on the general rule without any considered analysis of the particular context. Hedigan J dealt with the case solely as a negligence claim and made no reference to the state’s constitutional obligations – even though the plaintiff invoked her constitutional rights.\(^222\) The decision is in stark contrast to the South African court’s *modus operandi* in *Carmichele*.\(^223\)

The UK has taken a somewhat similar approach to that in Ireland and the police there owe a duty of care in their investigative role only in exceptional circumstances.\(^224\) The Court of Appeal in *Desmond v Chief Constable of Nottinghamshire Police* set out the current core principle – based on public policy – that the police do not generally owe individuals a duty of care.\(^225\) But the police do not have (and cannot be given) a blanket immunity.\(^226\) In establishing whether or not a duty of care exists, it is relevant to see if the aggrieved person has other remedies, such as those available under statute.

\(^221\) n 220 above, [6.4]. Hedigan J indicated that even if a duty did exist, he would have found on the evidence that what happened was not reasonably foreseeable: n 220 above, [6.5].

\(^222\) n 220 above, [1].

\(^223\) *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).


\(^225\) [2011] EWCA Civ 3, [2011] All ER (D) 37 [31]:

[In the absence of special circumstances, the police and the Crown Prosecution Service do not generally in the interests of the whole community owe individual members of the public, be they victims, witnesses or those who are prosecuted, a common law duty of care in undertaking and performing their operational duties of investigating, detecting, suppressing and prosecuting crime. The principle is one of public policy which has regard to the practical needs of law enforcement; the need not to inhibit the police from taking difficult operational decisions and so as to avoid defensive policing; and the undesirability that judgments of policy and discretion in the most advantageous deployment of resources and so forth should be elaborately and expensively investigated in litigation or otherwise with consequent diversion of police or CPS resources.

Although the core principle might lead to hardship in some individual cases, the greater public good outweighed individual hardship: as above.

\(^226\) n 225 above, [41], [52]. State immunity in Ireland was held to be unconstitutional: *Byrne v Ireland* [1972] IR 241 (SC). See Walsh (n 125 above) 152. There is no presumption that a general statute does not apply to the State; the courts’ task is to ascertain the legislature’s intention primarily from the statute’s words: *Howard v Commissioners of Public Works in Ireland* [1994] 1 IR 101 (SC).
judicial review, for misfeasance in public office, for maladministration to an ombudsman, or under the Police Conduct Complaints Procedure. Other relevant factors are whether the claimant relied on the police in the event of economic rather than physical loss, and if the police assumed responsibility to the claimant to guard against the damage for which compensation is claimed. It is an established requirement in the UK that the courts consider carefully the individual circumstances in each case before coming to a decision on whether the police owe a duty of care.

The House of Lords in *Van Colle v Chief Constable of the Hertfordshire Police* was divided on the issue of whether the common law should be developed to provide a remedy in damages against the state for an individual injured by another after the police were aware of the threat. The majority upheld the core principle enunciated in *Hill v Chief Constable of West Yorkshire* that in the absence of special circumstances the police owe no common law duty of care to protect individuals against harm caused by criminals. ‘They disagreed with Lord Bingham’s proposed ‘liability principle’ that if a member of the public furnishes a police officer with apparently credible evidence that an identified third party presents a specific and imminent threat to his life or physical safety, the officer owes a duty to

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228 n 225 above, [51].

229 n 225 above, [32], [35].

230 There have been some exceptions to the general rule, eg, it was held that the police owed an informant a duty to take reasonable care to avoid unnecessary disclosure to the general public of information given to the police in confidence: *Swinney v Chief Constable of Northumbria Police (No 2)* 25 May 1999 Times Law Reports (QB). The case was dismissed on the merits because the police were not in breach of that duty. The Court of Appeal had refused to strike out the claim on the grounds that it disclosed no reasonable cause of action and held that the immunity generally conferred on police officers from actions in negligence in relation to the investigation or suppression of crime had to be weighed against the need to protect the confidentiality of informants and to encourage them to come forward without fear of disclosure of their identity; it is necessary to make a balanced assessment of all the public policy considerations in order to determine the question of immunity: *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464 (CA). See H Beale & N Pittam ‘The impact of the Human Rights Act 1996 on English tort and contract law’ in Friedmann & Barak-Erez (n 119) 144; E McKendrick ‘Negligence and human rights: Re-considering *Osman*’ in Friedmann & Barak-Erez (n 119) 343 - 344.

231 n 224 above.


233 n 224 above, [97].
take reasonable steps to assess the threat and, if appropriate, to take reasonable steps to prevent it being executed.\(^\text{234}\) Their rationale was based on public policy favouring the interests of the community as a whole, since the proposed duty would encourage defensive policing and divert manpower and resources from their primary function of suppressing crime and apprehending criminals. They also rejected Lord Bingham’s view that the common law should be developed in harmony with ECHR rights.\(^\text{235}\) Lord Brown considered that common law claims had different objectives from those under the ECHR – the former were designed to compensate claimants, whereas the latter were intended to uphold minimum human rights standards and to vindicate those rights.\(^\text{236}\)

Under the ECHR there is an obligation in applying the law of negligence not to grant a blanket immunity to the police and to include the fair, just and reasonable criterion as an intrinsic element of the duty of care when considering the particular circumstances.\(^\text{237}\) The European Court of Human Rights in Z v UK concluded that the inability to sue a local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law.\(^\text{238}\) The right of access to the

\(^{234}\) n 224 above, [44].

\(^{235}\) n 224 above, [58].

\(^{236}\) n 224 above, [138]. The situation in Ireland is different because constitutional values are supreme. The Supreme Court has held that the vindication of personal rights can be enforced through the law of tort, and not only through criminal or regulatory law: *Grant v Roche Products* (n 48 above). Hardiman J stated, n 48 above, [79]:

> There is thus authority, both judicial and academic, for the proposition that the law of tort is, at least in certain circumstances, an important tool for the vindication of constitutional rights, and no authority whatever for the proposition that it is concerned exclusively for the allocation of damages and with nothing else whatsoever.

Fundamental legal norms and constitutional rights take precedence over established common law norms: O’Cinneide (n 119) 84. The common law should be developed if possible to vindicate constitutional rights. Eg, in a conflict between reputation and freedom of expression, Ó Caoimh J was satisfied that he must consider whether the law of defamation as traditionally understood represented a violation of the constitutional right to freedom of expression and whether it should result in a fundamental re-statement of that law or a tempering of same: *Hunter v Gerald Duckworth & Co Ltd* [2003] IEHC 81 at 47. He favoured incremental development of the common law having regard to the requirements of the Constitution and the ECHR: above, 59.

On development of the common law and the constitutional tort, see: Meskell (n 124); Glover (n 134).

\(^{237}\) Z v UK (App no 29392/95) (2002) 34 EHRR 3 [100].

\(^{238}\) As above. The action was for the local authority’s alleged failure to take adequate protective measures in respect of the severe neglect and abuse which children were known to be suffering because of ill-treatment by their parents.
courts under Article 6 ECHR had been affirmed in *Osman v UK*, where the early striking out of a tort claim against the police breached that right. 239 There the victims of a shooting incident were entitled to have the police account for their actions and omissions in adversarial proceedings. 240 The House of Lords in *Van Colle* (applying the decision in *Osman*) held that to comprise a violation of the state's positive obligation to protect life under Article 2 ECHR by taking preventative measures to protect an individual whose life is at risk from the criminal acts of another, it had to be shown that a public authority had, or ought to have, known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that it had failed to take reasonable measures to avoid that risk. 241 In *MC v Bulgaria*, the Court noted that the police investigation was handled with significant delays and found that the effectiveness of the investigation of an allegation of rape in that case fell short of the requirements inherent in the positive obligations 'to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.' 242 An effective remedy for rape requires criminal sanctions – a civil action for damages is insufficient.

The decisions in *Lockwood* and *G* were defective in that no consideration was given to whether a duty of care arose in the precise circumstances by application of the 'fair, just and reasonable' criteria. The judges in those cases operated on the basis that a virtual blanket immunity existed in relation to the police investigation. They only countenanced an action against the police for misfeasance. Neither was any analysis done of whether the victims' right to bodily integrity or entitlement to an effective remedy had been vindicated by an alternative form of redress. In *Lockwood* the state had


240 n 239 above, [153].

241 n 224 above, [28]-[29], citing n 239 above, [115]-[116].

242 (App No 39272/98) (2005) 40 EHRR 20 [184]-[185]. The Bulgarian authorities had not investigated thoroughly a girl’s rape allegation when the perpetrators maintained she had consented to sexual intercourse and there was no direct proof of rape: above, [181]-[182]. As rape is an exercise of power, consent is irrelevant when the victim is not treated as an equal and hence is unable to protest because of her situation: CA MacKinnon *Women's lives, men's laws* (2005) 182.

submitted that she had a remedy in law to sue the accused directly for damages in a civil case, but Kearns P did not address this in his decision. Vindication of the plaintiff’s position was not necessarily grounded solely in damages – she could have wanted to hold the police accountable and to have the court assess whether they had protected her right to bodily integrity by carrying out an effective investigation.

The state’s obligation to protect the life, person, good name, and property rights of individuals under Article 40.3.2° of the Constitution requires positive action to prevent an infringement and this obligation is not satisfied by the possible existence of a common law remedy where a personal right has actually been infringed.243 The ECHR also imposes positive obligations on the state to protect and ensure respect for rights.244 These duties cannot be fulfilled simply by relying on the existing law of torts after the event.

In South Africa it was held in Minister of Safety and Security v Van Duivenboden that police officers are under an actionable duty to members of the public to take reasonable steps to act on information reflecting on the fitness of a person to possess firearms in order to avoid harm occurring.245 Nugent JA explained that what was ultimately required was an assessment, in accordance with prevailing norms, of the circumstances in which it should be unlawful to culpably cause loss.246 Accountability had an important role in determining whether a legal duty ought to be recognised, although accountability could sometimes be secured without damages through the political process or through another judicial remedy.247

As in South Africa (and unlike the UK, which does not have a distinct concept of state liability), the positive constitutional obligations imposed on the state in Ireland have broken down the rigid distinction between private and public law.248 The power of judicial review of laws for conformity with

243 Hogan & Whyte (n 185 above) [7.1.112].
244 See Airey v Ireland (App no 6289/73) (1979-80) 2 EHRR 305 (Arts 6(1) & 8 ECHR); X v Netherlands (App no 8978/80) (1986) 8 EHR 235 (Art 8 ECHR); Osman (n 239 above) (Art 2 ECHR); MC v Bulgaria (n 242 above) (Arts 3 & 8 ECHR). On Airey, see G Whyte ‘And justice for some’ (1984) 6 Dublin University Law Journal 88 at 89 - 92.
245 [2002] 3 All SA 741 (SCA) [22]. A year later the Supreme Court of Appeal held that the police had a legal duty to exercise reasonable care in relation to the grant of firearm licences and that breach of this duty gave rise to an action for damages: Minister of Safety and Security v Hamilton [2003] 4 All SA 117 (SCA).
246 n 245 above, [16].
247 n 245 above, [21].
248 See du Bois (n 224 above) 148, 170 - 172.
the Constitution is vested in the higher courts.\textsuperscript{249} The Constitution with its normative base imposes additional responsibilities on the state that do not apply to private individuals and therefore facilitates the alignment of tort law with the Constitution. The Irish courts have not shown the required diligence in weighing up the duty of care owed by the police against public policy. Only intentional transgressions by the police give rise to liability. When a right that is integral to human dignity, such as life, bodily integrity or access to justice, is put in the balance, the constitutional values of dignity and freedom should be to the fore in the judicial analysis.

8.2.3 Limitation of actions

The time limitation imposed on commencing a tort action was held to apply to a constitutional tort in \textit{McDonnell}.\textsuperscript{250} The Supreme Court decreed that it was subject to the same limitation period that applied in general law and therefore the claim was statute-barred. Keane J trivialised breaches of all constitutional rights (irrespective of their serious nature) with this remark:\textsuperscript{251}

I can see no reason why an actress sunbathing in her back garden whose privacy is intruded upon by a long-range camera should defer proceedings until her old age to provide herself with a nest egg, while a young man or woman rendered a paraplegic by a drunken motorist must be cut off from suing after three years.

\textsuperscript{249} Art 34.3.2°.

\textsuperscript{250} n 132 above. See Morgan and Hogan (n 124 above) [18-84]. \textit{McDonnell} is inconsistent with the Supreme Court’s later finding that intentional trespass to the person did not constitute ‘breach of duty’ in section 3(1) of the Statute of Limitations (Amendment) Act 1991, and therefore did not attract the shorter limitation period applying to personal injuries claims based on negligence and nuisance: \textit{Devlin v Roche} [2002] IESC 34, [2002] 2 IR 360. For an analysis of \textit{Devlin}, see R Byrne & W Binchy \textit{Annual review of Irish law 2001} (Thomson Round Hall, Dublin 2002) 435 - 442.

\textit{McDonnell} is also inconsistent with Carroll J’s finding in the High Court that a claim for damages for unlawful interference with a constitutional right was not an action based on tort: \textit{Hayes v Ireland} [1987] ILRM 651 (HC).

\textsuperscript{251} n 132 above, 160. Keane J was aware that ‘significant differences’ might arise in some contexts when general tort law was applied to constitutional rights, but it was ‘unnecessary to embark on those uncharted seas’: n 132 above, 159. He found that the same policy considerations (protection of the defendant against stale claims, expeditious trials and legal certainty) applied in an action for breach of a constitutional right, and dismissed as ‘a classically circular argument’ the proposition that an action for breach of a constitutional right with ‘all the indicia of an action in tort should have a different limitation period from that applicable to actions in tort generally, or indeed no limitation period at all, other than its origin in the Constitution itself’: n 132 above, 159 - 160, citing \textit{Tuohy v Courtney} [1994] 3 IR 1 (SC) 48.
No consideration was given to the fact that the constitutional right infringed in *McDonnell* was the right to a livelihood and that it was violated in a serious manner by the loss of a person’s job on grounds subsequently found unconstitutional.252 Furthermore, the first case in which damages for breach of constitutional rights were expressly awarded was not decided until 15 years after enactment of the Statute of Limitations 1957,253 so it could not be said that the legislature intended that the same limitations should apply to constitutional torts. The Court also noted that no blame could be attributed to the plaintiff for presuming that the legislation under which he lost his job did not violate the Constitution.254

If it had wished to do so, the Supreme Court in *McDonnell* could have devised a new rule to apply to constitutional torts. A suitable solution would be for the cause of action for breach of the right to a livelihood to accrue from the date of knowledge of unconstitutionality, which in the case of a constitutional tort based on a statute declared unconstitutional should be the date of declaration of invalidity.255 The policy reasons for the limitation of the constitutional right to a livelihood could have been examined in more depth. The Court did not analyse fully the implications of that right nor attempt to test the limitation on the grant of a remedy for its breach against policy objectives. In *Tuohy v Courtney*, Finlay CJ set the parameters of the Court’s role in assessing the impact of the statutory limitation in the light of policy around the degree of hardship caused.256 If the Court in *McDonnell* had applied these parameters, the extent of the hardship imposed on the plaintiff by restricting the time within which he could sue to a period that expired before the statute under which he forfeited his job was declared unconstitutional.

252 See *Cox v Ireland* [1992] 2 IR 503 (SC). Ngcobo J associated dignity with the right to choose one’s livelihood, when he stated, ‘[f]reedom to choose a vocation is intrinsic to the nature of a society based on human dignity’: *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) [59].

253 n 132 above, 147, citing *Meskell* (n 124).

254 n 132 above, 146.

255 O’Flaherty J acknowledged that the consequences of striking down legislation ‘can only crystallise in respect of the immediate litigation which gave rise to the declaration of invalidity’: n 132 above, 144.

256 n 251 above, 48:

The counter-balance to these objectives is the necessity as far as is practicable, or as best it may, for the State to ensure that such time limits do not unreasonably or unjustly impose hardship. Any time limit statutorily imposed upon the bringing of actions is potentially going to impose some hardship on some individual. What this Court must do is to ascertain whether the extent and nature of such hardship is so undue and so unreasonable having regard to the proper objectives of the legislation as to make it constitutionally flawed.
unconstitutional would surely have been seen to be unreasonable and unjust.

There are major exceptions to the general rule that an invalid statute, which is void ab initio, has no legal consequences.\(^{257}\) If the natural consequences of a ruling that a statute is invalid always ensued, the policy aims of legal certainty required by application of the rule of law and the attainment of social order in an organised society would be shaken. To avoid a chaotic legal system, the courts have taken a pragmatic approach and have devised methods to curtail the reach of a finding of invalidity.

The Supreme Court in *A v Governor of Arbour Hill Prison*\(^{258}\) dealt with the consequences of the findings in *CC v Ireland* that a provision in the Criminal Law (Amendment) Act 1935 was inconsistent with the Constitution.\(^{259}\) Prior to the latter finding, A had pleaded guilty to an offence under the invalid statutory provision and was serving a prison sentence for it. He sought his release, which Laffoy J ordered in the High Court because the pre-1937 statute had ceased to have legislative existence on the enactment of the Constitution – therefore the conviction was a nullity and his detention lacked due process.\(^{260}\) The Supreme Court overruled her decision and held that there was neither an express nor an implied principle of retrospective application of unconstitutionality in the Constitution.\(^{261}\) The approach to be taken to the application of retrospectivity was to assess whether the compulsion of public order and the common good would allow the application to succeed.\(^{262}\) The element of good faith on the part of the state in relying on the statute disposed the Court to hold that the conviction should be deemed to be and remain lawful. While the declaration that a law was unconstitutional applied to the parties to the litigation in which the issue arose, the principle of prospective overruling applied to others.\(^{263}\)

\(^{257}\) Morgan & Hogan (n 124 above) [11-84].


\(^{261}\) Cases that had been finally decided and determined on foot of a statute which was later found to be unconstitutional were deemed valid once the parties had exhausted their actual or potential remedies.

\(^{262}\) A harmonious interpretation of the Constitution necessitated looking at the document as a whole.

\(^{263}\) Although there was no general retrospective application, the Court left open the possibility that an exception might arise in wholly exceptional circumstances in the interests of justice. In this case A’s guilty plea indicated that he accepted the validity
The courts could bear in mind the requirement for an effective remedy while they are developing the broad notion of dealing intelligently with invalid statutes. Judicial review followed merely by a declaration of invalidity under section 5 of the European Convention on Human Rights Act 2003 is not an effective remedy. In *Carmody v Minister for Justice, Equality and Law Reform*, Murray CJ described a declaration of incompatibility as a 'remedy, such as it is, … both limited and sui generis' and confirmed that it did not accord to a plaintiff any direct or enforceable judicial remedy. The courts have a duty to deliver an effective remedy to litigants and could test the consequences of a finding of invalidity for compatibility with the principles of justice. The adjudication as to what are exceptional cases requiring the invalidity to have retrospective effect should involve consideration of the impact on the dignity of the individuals concerned.

The South African Constitutional Court refused to allow the state to rely on a limitation period to preclude Mrs Njongi, a poor uneducated woman, from recovering arrears of disability grant, which it had unlawfully decided to stop paying. The state had acted unconscionably in deciding to oppose her claim and in the way it conducted the case. In *Barkhuizen v Napier*, a challenge to a time limit on suing for damage to a car in a motor insurance contract, the courts accepted that the correct way of evaluating the validity of the clause was by determining whether it offended public policy as evidenced by constitutional values. Dignity was used to assess the weight of the charge against him at the time. He had not been able to allege any departure from natural justice in the way he had been treated but acknowledged his guilt and that his claimed release would be a windfall:

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264 [2009] IESC 71, [2010] 1 ILRM 157 at 168. In *Carmody* the Supreme Court held that where a claim is made that a statute is invalid under the Constitution and a declaration of incompatibility with the ECHR is also sought, the constitutional issue should be decided first. See de Londras & Kelly (n 168 above) [2-36]–[2-38], [7-20].

265 Njongi v MEC, Department of Welfare, Eastern Cape 2008 4 SA 237. The Court held that the state had not disavowed the unlawful decision, so the time had not started to run against her: above, [58]. In the absence of a full disavowal or full reinstatement, she would not have known that the statutory claim period had commenced: EC Christiansen ‘Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice’ (2010) 13 *Journal of Gender, Race & Justice* 575 at 605.

266 n 265 above, [85].

on both sides of the scales – the dignity of autonomy and freedom to contract on the one hand and oppression of dignity by unfair terms on the other.\(^{268}\)

As the values of dignity, freedom and equality are also enshrined in the Irish Constitution, the Irish courts could employ them as yardsticks to adjudge whether a time limit sought to be imposed on bringing a claim for a breach of a constitutional right can be allowed to stand.

\(^{268}\) Sachs J (in dissent) felt that a strong case could be made that terms that were unreasonable, oppressive or unconscionable in a standard form contract were inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom: n 267 above, [140].
Chapter 9

Summary of conclusions

After my study of the provisions in the South African and Irish Constitutions affecting fundamental rights and their interpretation by the judiciary, and my analysis of the philosophical and historical origins of the values of human dignity and equality, it is time to draw some conclusions. The propositions throughout this work have been supported with illustrations from various jurisdictions demonstrating that the South African approach is not idiosyncratic on account of the apartheid legacy of oppression and profound inequalities, but is suitable for application in other countries.

9.1 Normative framework

As there was a gap of more than half a century between the dates of adoption of the Constitutions in Ireland and South Africa, they are products of different eras and historical backgrounds. However, they are both values-based and therefore each jurisdiction can learn from the other.1 A reader of the South African document could be left in no doubt that it places enormous emphasis on the fundamental values of human dignity, equality and freedom. The scholar of the Irish fundamental law has to look a little more closely to discern that it has a similar normative spirit.

The meaningful outcomes evident in the South African cases are products of a transformative Constitution urgently required after a turbulent history produced a dysfunctional society based on fundamentally perverse values. The judiciary in the post-apartheid era had clear signposts based on newly-adopted norms democratically chosen and supported. Even though the Irish Constitution was adopted in 1937 in different circumstances, it is set in a comparable normative framework founded on human dignity and demanding mutual respect in relationships. It is obvious even from the text that religion had a strong influence on the drafting of the Constitution.\(^2\) Its philosophy is founded on the fact that human beings, by virtue of their humanity, have rights and obligations.\(^3\) In this, it anticipated the Universal Declaration of Human Rights\(^4\) by a decade. Individuals have inherent rights. While religion and conscience are deeply personal matters, they should prompt responsibility for a just and equal society.\(^5\) Social justice is a community aspiration.\(^6\)

Ronald Dworkin pointed out that fidelity to a constitutional tradition requires an appeal to the theory or principles that are either explicit or implicit in a constitution itself.\(^7\) In order to maintain ethical relevance, a constitution ought to be interpreted in the light of the changing social context.\(^8\)


\(^3\) W Binchy ‘Dignity as a constitutional concept’ in Doyle & Carolan (n 2 above) 311.


\(^8\) Zappone (n 5 above) 117.
9.2 Philosophical understandings of dignity in South Africa and Ireland

The text of the reference to dignity in the Preamble of the Irish Constitution contains similar concepts to the judicial interpretation of the fundamental constitutional values in South Africa – the individual’s freedom and dignity is set in the context of the common good prescribing social justice. It is surprising therefore that there is a notable difference in the philosophical understanding of dignity as expressed in the case-law in Ireland.\textsuperscript{9} \textit{Ubuntu}, which places the individual firmly within the community, has reinforced the South African courts’ endorsement of a communitarian perception of dignity that harmonises the rights of the individual with the reciprocal rights and duties of others in society.\textsuperscript{10} The constitutional values of human dignity, equality and freedom require the government to support the individual in the community with socio-economic benefits when necessary.\textsuperscript{11} It contrasts with the American association of dignity primarily with individual rights described by Neomi Rao as ‘a classical liberal understanding of freedom from interference.’\textsuperscript{12}

The South Africans have adopted the amalgamated notion of human dignity derived from the nature and spirituality of the social human being with the capacity to reason and free will.\textsuperscript{13} In the case-law there have been references resounding of Immanuel Kant’s imperative not to treat people as objects because of their dignity stemming from these characteristics.\textsuperscript{14} Dworkin’s view of the sanctity of life was endorsed,\textsuperscript{15} as was his stress on the

\textsuperscript{9} There is little evidence that the judicial use of the concept of human dignity has been directly affected by recent philosophical analysis: C McCrudden ‘Human dignity and judicial interpretation of human rights’ (2008) 19 European Journal of International Law 655 at 663.

\textsuperscript{10} \textit{S v Makwanyane} 1995 6 BCLR 665 (CC) [224] (Langa J), [263] (Mahomed J) (see text to n397 and n399 in Ch III). See also n415-n416 and text thereto in Ch III.

\textsuperscript{11} N Rao ‘American dignity and healthcare reform’ (2012) 35 Harvard Journal of Law and Public Policy 171 at 173. See 6.5 - 6.7 in Ch VI.

\textsuperscript{12} n 11 above, 174.

\textsuperscript{13} \textit{Bernstein v Bester} 1996 2 SA 751 (CC) [150] (O’Regan J) (see n395 and text thereto in Ch III).

\textsuperscript{14} \textit{Makwanyane} (n 10 above) [26] (Chaskalson P) (see text to n389 in Ch III); \textit{Prinsloo v Van der Linde} 1997 3 SA 1012 (CC) [31]; \textit{S v Dodo} 2001 3 SA 382 (CC) [38] (Ackermann J) (see n 95 and text thereto in Ch IV); \textit{Mohunram v National DPP} 2007 4 SA 222 (CC) [146] (Sachs J) (see n413 in Ch III).

\textsuperscript{15} \textit{Soobramoney v Minister of Health (Kwazulu-Natal)} 1998 1 SA 765 (CC) [55] (see n387 and text thereto in Ch III). Dworkin’s views on the sanctity of life also influenced the House of Lords: \textit{Airedale NHS Trust v Bland} [1993] AC 789 (HL) 826 (Hoffmann LJ).
importance of dignity in democracies\textsuperscript{16} and his interpretation of the right to equality as being the right to be treated as equals.\textsuperscript{17} Mokgoro J, dissenting in \textit{Case v Minister of Safety and Security}, referred to his insistence that pornography is guaranteed by freedom of expression because of the latter's egalitarian role.\textsuperscript{18}

Perhaps because of a fear in recent decades of bringing religious beliefs into the public domain and a reluctance to analyse the various roots of natural law, the Irish courts have not taken the same path as South Africa and have not communicated a lucid reasoned philosophical base for human dignity.\textsuperscript{19} The Constitution's Christian ethos is undeniable.\textsuperscript{20} Clearly it is a normative instrument acknowledging that rights are derived from natural law or some form of higher order than the State or the Constitution itself.\textsuperscript{21} Henchy J construed Article 40.3 of the Constitution in \textit{Norris} in a non-religious fashion and voiced a secular version of that higher order.\textsuperscript{22} Kant's dictum not to use people solely as a means to an end has been employed by Hardiman J.\textsuperscript{23} There is a liberal democratic thread in the Constitution in addition to its Christian democratic character.\textsuperscript{24} As it balances the rights of the individual and the interests of society, the Constitution has the potential to promote the communitarian goal of social inclusion.\textsuperscript{25}

The lack of philosophical analysis leaves a void with litigants and the public free to wander directionless in a legal wilderness. The strong Irish value system has been ignored by the majority of the judges who avoid considering norms. As a result they have not expressed the coherent moral thread underpinning human dignity. The sparse legal application of the

\textsuperscript{16} Makwanyane (n 10 above) [330] (O'Regan J).
\textsuperscript{17} Prinsloo (n 14 above) [32] (see text to n310 in Ch V); \textit{City Council of Pretoria v Walker} 1998 2 SA 363 (CC) [126], [128] (Sachs J).
\textsuperscript{18} 1996 3 SA 617 (CC) [23] fn 34, [45] fn 76. See also above, [26] fn 37.
\textsuperscript{19} Dignity's connection with religion has been noted: \textit{O'Donoghue v Minister for Health} [1993] IEHC 2, [1996] 2 IR 20 at 52 - 54 (O'Hanlon J).
\textsuperscript{20} See n 204 and text thereto in Ch VIII.
\textsuperscript{21} See text to n205-n207 in Ch VIII.
\textsuperscript{23} CC v Ireland [2006] IESC 33, [2006] 4 IR 1 [44] (see text to n 81 in Ch VII).
\textsuperscript{24} GF Whyte 'Discerning the philosophical premises of the Report of the Constitution Review Group: An analysis of the recommendations on fundamental rights' (1998) \textit{Contemporary Issues in Irish Law and Politics} 216 at 222, 223. See also n203 in Ch VIII.
\textsuperscript{25} Whyte (n 24 above) 224.
concept has not unearthed the full breadth of reciprocal respect for the inherent worth of the person as part of the community, but has been confined for the most part to individual dignity based only on random remarks.\textsuperscript{26} Court decisions where the right to respect for dignity has been upheld have been based on the liberal view of preventing interference with the individual.\textsuperscript{27} They have not required active measures by the State to assist and protect the person living in the community as envisaged by the Constitution;\textsuperscript{28} hence the leeway given to the police when it comes to protecting the public against infringements of dignity by private individuals,\textsuperscript{29} as well as the refusal to recognise unenumerated socio-economic rights and to grant effective remedies even when the State’s abject continuous failure to uphold those express socio-economic rights that do exist in the Constitution is apparent.\textsuperscript{30} The State’s duty not to lend its support to the continuation of discrimination between private individuals has been ignored by the courts, which have not appreciated the attack on the status of a person in the community by being regarded as inferior on the basis of a human attribute or one’s background.\textsuperscript{31}

9.3 Substantive rights

The fundamental constitutional values could be the basis for advancements in many areas, particularly in producing a more stringent ban on parental corporal punishment, striving towards substantial equality, recognition of the ethnic identity of Travellers, and reduction of overcrowding in prisons. Enforcement of socio-economic rights could have a powerful impact. When deciding on how to enforce social and economic rights in South Africa, the Constitutional Court invoked the principles of proportionality, fairness and

\textsuperscript{26} See 7.2 in Ch VII.
\textsuperscript{29} See 8.2.2 in Ch VIII.
\textsuperscript{30} \textit{TD v Minister for Education} [2001] IESC 101, [2001] 4 IR 259. Going against the pattern, social justice required the property rights of the less wealthy to be especially defended (in this case against erosion by the State): \textit{Re Article 26 and the Health (Amendment) (No 2) Bill 2004} [2005] IESC 7, [2005] 1 IR 105.
\textsuperscript{31} See 7.10.1 - 7.10.2 in Ch VII.
reasonableness to assist it in making value judgments on issues of major social and moral importance in a principled way that was true to the letter and spirit of the Constitution.\textsuperscript{32} A textual analysis and logic were no longer sufficient.\textsuperscript{33}

Values could also be applied to develop contract law to provide further protection for consumers and for others in an unequal bargaining position with powerful institutions and corporate entities in the marketplace. In tort there is room for improvements in negligence, nuisance and trespass as causes of action to redress civil wrongs. As has been hinted at in South Africa, the law of privacy might be scoped by the engagement of values to develop the common law.

A deeper meaning could be given to human dignity by seeing it in a relational context, rather than accepting simply the restricted individualistic view taken of it in the \textit{Ward of Court} case.\textsuperscript{34} If its import had been examined in \textit{Norris},\textsuperscript{35} the same ultimate outcome could have been achieved by reference to the Irish Constitution instead of having to resort to the European Court of Human Rights in reliance on the European Convention on Human Rights (ECHR).\textsuperscript{36}

\subsection{9.4 Scope}

The horizontal application of constitutional rights between non-state parties in Irish law is required to ensure the observance of constitutional personal rights in private legal relations.\textsuperscript{37} However, the judges do not discharge this

\begin{thebibliography}{99}
\bibitem{32} A Sachs \textit{The strange alchemy of life and law} (2009) 211.
\bibitem{33} As above.
\bibitem{34} \textit{Re a Ward of Court (withholding medical treatment) (No 2)} [1996] 2 IR 79 (SC).
\bibitem{35} n 22 above.
\bibitem{37} See DR Phelan \textit{Revolt or revolution: The constitutional boundaries of the European Community} (1997) 317 - 319.

Waiver of constitutional rights is another potential area for development by analogy with South African constitutional jurisprudence: Butler (n 1 above) 94, 99. See W Binchy \textit{‘Autonomy, commitment and marriage’} in O Doyle & W Binchy (eds) \textit{Committed relationships and the law} (2007) 177.
\end{thebibliography}
Human dignity and fundamental rights in South Africa and Ireland

There is a firm constitutional base for not only allowing, but mandating, the courts to enforce rights where the state is not a direct protagonist. In his review of Irish case-law, Sibo Banda found three common features supporting this conclusion: first, there is a clear constitutional duty on the state to ensure, and an individual has a corresponding right to seek, the protection and enforcement of a constitutional right; second, the satisfaction of obligations and the exercise of individual rights is not confined to the vertical relationship an individual has with the state but will also arise out of the horizontal relationship private individuals have with each other; third, the term ‘State’ under the Constitution includes the judiciary and so it is also expected to vindicate constitutional rights. The Hohfeldian view of jural relations can be commended, as it casts light on important distinctions within legal reasoning and avoids any commitment to a highly contestable view of justice and policy.

The positive obligations on the State to implement human rights are wider than have been recognised by the courts in Ireland. The key place played by accountability in a democracy has been emphasised by the South African judiciary, but as of yet the Irish prosecuting and enforcement authorities have been slow to change the culture of forgiving what at its mildest has been gross mismanagement of the financial sector without demanding even a plausible public explanation. Individuals are answerable for their actions to the people through the courts.

9.5 Remedies

The range of remedies utilised by the Irish courts could be expanded in line with those used in South Africa and Canada. If a court finds that the existing law does not uphold constitutional rights, but that there are policy choices to be made in arriving at a solution, it would enhance democracy if it made a declaration of constitutional incompatibility and allowed the legislature

time to debate and enact legislation to address the lacuna in the law. In South Africa words can be read into legislation to make it compatible with the Constitution. The approach that emerged in Ireland in 2011 in *G v District Judge Murphy* of giving an effective remedy by looking at ‘the heart of the objective’ of the constitutional provision should be replicated by more judges and they could also embrace some of the remedies employed in South Africa.

As suggested in the South African jurisprudence, a more coherent values-driven structure could be created for ascertaining the appropriate level of damages for defamation and catastrophic injuries. Alternative reconciliatory remedies for defamation could also be considered. The attempts to encourage mediation to reach mutually acceptable solutions should be continued.

40 *Eg*, the Canadian Supreme Court suspended a declaration of invalidity of offending legislation for 12 months: *Trociuk v British Columbia (AG)* 2003 SCC 34, [2003] 1 SCR 835 [46]. The South African Constitutional Court took a similar stance to allow parliament to correct the defect in the common law definition of marriage to the extent that it did not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities accorded to heterosexual couples: *Minister of Home Affairs v Fourie* 2006 1 SA 524 [162]. Where provisions in road accident legislation were unconstitutional, the Court made a declaration of invalidity, but suspended it for 18 months to allow Parliament to cure the defect; if Parliament failed to do so, the declaration would not apply retrospectively to claims finally settled or adjudicated before the date of judgment: *Mvumvu v Minister of Transport* [2011] ZACC 1, 2011 2 SA 473 (CC) [53]-[54], [57].

41 *Eg*, the Constitutional Court re-phrased the statute to correct an invalid reverse onus of proof, which was not justified under the limitations clause as the intrusion on the presumption of innocence of a person accused of receiving stolen goods was too sweeping: *S v Manamela* 2000 3 SA 1 (CC) [59].

42 [2011] IEHC 445 [36]-[37]. More than 20 years earlier, Keane J had thought that where the constitutional validity of an Act was questioned, the High Court was confined to declaring the Act or the offending provision invalid in its entirety and he did not accept that he could declare that rights had not been vindicated by the Oireachtas in the expectation that the Oireachtas would take the necessary steps to ensure that those rights were in fact protected: *Somjee v Minister for Justice* [1981] ILRM 324 (HC) 327. Hogan J in *G v District Judge Murphy* disagreed with this view, as it could compromise the capacity of the courts to provide an effective remedy where the Oireachtas had breached Article 40.1 by unjustly conferring a privilege or benefit on one select group of society: above, [36]. On the contrary, he noted that by requiring the problems created by unconstitutional omissions to be either judicially resolved or legislatively addressed, the courts contributed to ‘the proper and effective functioning of the political process in the manner envisaged by the Constitution’: above, [38]. He proposed a form of declaration regarding the scope of application of the legislation thereby remedying a legislative omission that would confine the invalidity to the plaintiffs’ circumstances: above, [40], [45]. This would be ‘a healthy feature of the separation of powers’ and ‘advance the dialogue between the three branches of government’: above, [39]. The Oireachtas could amend the legislation in future to deal with the gap exposed in the case under review and any other gaps that might become apparent: above, [45].
9.6 Constitutional imperatives

To allow the Constitution reach its full potential, some legal principles, such as the interpretative techniques employed by the courts, proportionality and accountability, can be developed further. The refashioning of torts would also be beneficial. This section will consider each of these in turn.

9.6.1 Interpretation of the Constitution

A broad purposeful interpretation is necessary to give full effect to the spirit of a constitution and to its underlying values. The literal or historical views are inappropriate. The courts in South Africa and other democracies have demonstrated the effectiveness of a wider ambit in having a significant impact on society while upholding individual rights.

Dingake J, with the support of jurisprudence from the US, captured the need to adapt to change and to make fundamental values meaningful by a wide understanding of a constitution in this passage from Diau:

"The provisions of our Bill of Rights are not time-worn adages. We (judiciary) must implement those provisions in a dynamic and purposeful manner that does not lag behind societal developments. If we don’t, the words of the constitution will be beholden to the values of the past, not the present."

A harmonious interpretation of rights can give the best effect possible to all of them, taking into account the interests of all parties and of society. This approach is preferable to a rigid hierarchy of rights, where rights conflict with each other and one gives way to the other. The African concept of ubuntu is a useful guide, as the individual is seen as a member of the community – but not at the expense of a sphere of autonomous personal

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44 Diau v Botswana Building Society 2003 (2) BLR 409 (Botswana Industrial Court) 44.
intimacy honed by a rational mind. Harmony involves a balanced mutual connectedness, but is not uniformity.45

In *Roche v Roche* Denham J favoured a harmonious interpretation of the Constitution46 that would avoid a conflict between different provisions in it.47 Hardiman J in the same case adopted a similar type of construction and was satisfied that two different analyses (a linguistic one and one based on the authorities) of Article 40.3.3° led harmoniously to the same conclusion.

Unfortunately the ultimate aim of harmonising rights is not always achievable.48 Having analysed case-law in the US and South Africa, Daniel Erskine presented a universal method to resolve conflicting rights.49 There are five steps involved in this process – first, define the issues by identifying the specific fundamental rights in conflict; second, classify them by evaluating each fundamental right against the background of the legal text containing the right; third, discern the policy and function of each right by establishing its aim and whether that aim is achieved under the factual scenario presented; fourth, see if equal respect for the fundamental rights in issue can be achieved by looking to whether both rights may harmoniously coexist through equal enforcement; finally, if harmonisation is not possible and the rights cannot coexist, resolve the conflict by applying the most rational and pragmatic construction of the rights to establish an amalgamated solitary right employing the most significant ends of the two conflicting rights.50

A systematic interpretation using a holistic understanding of fundamental rights where dignity, equality and liberty are seen as a triangle as in South

45 SC Angle ‘Human rights and harmony’ (2008) 30 Human Rights Quarterly 76 at 79. Harmony recognises an interconnectedness based in our complementary differences rather than seeing all as equivalent in value: as above. The value of harmony is in its ability to preserve and respect differences: above, 80. It demands a situationally appropriate reaction to ever-changing circumstances where continual growth occurs, requiring that it be seen as multidimensional and dynamic, and looks to the longer-term impact of short-term solutions: above, 87, 89 - 90.


47 n 46 above, [147], citing *State (DPP) v Walsh* [1981] IR 412 (SC) 425 (O’Higgins CJ).

48 Constitutional rights to a fair trial took priority over the constitutional duty to promote an accused child’s welfare rights: *DPP (Murphy) v FT* [1999] 3 IR 254 (HC) 270 - 271.

49 DH Erskine ‘Judgments of the United States Supreme Court and the South African Constitutional Court as a basis for a universal method to resolve conflicts between fundamental rights’ (2008) 22 St John’s Journal of Legal Commentary 595 at 596.

50 n 49 above, 639 - 640.
Africa is recommended by Susanne Baer. Confusion may arise by dignity being regarded as a status, which some have and others do not, rather than being inherent and incapable of being waived. Hence it is all-important that judges clarify the sense in which they are using the concept of dignity and give content to the concept. The holistic understanding where human dignity draws rights together is a reminder of their indivisibility. The involvement of human dignity, which is multi-dimensional, facilitates adapting to changing times, whether that is growth of society in general or working through different phases or experiences in people’s lives.

The Irish courts have not developed a coherent approach to constitutional interpretation. Oran Doyle concluded that in Irish constitutional law, ‘methods of interpretation function as ex post facto justifications for intuitively reached conclusions rather than as fetters on judicial power.’ It is important to have a strong judiciary respected by the public and the politicians. As David Gwynn Morgan stated, continuation of that respect is conditional on the judges’ decisions being perceived as derived from some clearly articulated,

51 S Baer ‘Dignity, liberty, equality: A fundamental rights triangle of constitutionalism’ (2009) 59 University of Toronto Law Journal 417 at 418, 420, 446. This contrasts with imagining them as a pyramid where dignity is foundational and equality and liberty are elaborations of dignity: above, 447. It is also preferable to seeing equality and liberty as competing items to be balanced on a scale where one trumps the other and dignity is absent: above, 448. Baer’s model is beyond isolated rights: above, 418 - 419. While the pyramid founded on human dignity is a good starting point for ethical considerations, it is removed from daily injustices and may fail to protect less severe cases of inhumane treatment: above, 447. Liberty is limited by the presence of others and is only sensible when connected with equality and based on recognition of dignity as self-determination: above, 449. Dignity can sometimes be too abstract and foster paternalism by imposing the majority view of moral conduct on all: above, 457. The benefits of the triangle approach are explained by Baer, ‘[f]undamental rights, if seen in light of one another, serve as reciprocal warnings against the isolated use of any one of them, or of any right merely to trump another. Each fundamental right has distinct meaning; yet they are not alone but are better understood as relating to one another, like a triangle.’ above, 468.

52 n 51 above, 457 - 458.


55 Dupré (n 54 above) 198 - 201. A more time-sensitive approach to rights is often signalled by references to the importance of human dignity. Dupré (n 54 above) 199.

56 O Doyle Constitutional law: Text, cases and materials (2008) [17-32].
consistently followed and rationally grounded principles. By devising and implementing guidelines for the interpretation and enforcement of fundamental rights – starting as outlined here – the courts could secure an esteemed position as powerful defenders of constitutional values. The judiciary might regenerate life in many long-dormant provisions of the Constitution and nurture them so that they realise their potential to transform our economy into a more equal and just society.

9.6.2 Proportionality
Since human dignity is an inherent trait, it is not always appropriate to lessen its protection by balancing it against other rights. A harmonious interpretation of rights is the ideal aim. But in less extreme situations a properly applied proportionality test is a principled systematic way of resolving conflicts. The South African and Canadian courts have employed a proportionality analysis which takes into account the context and is adaptable to different situations. Although rigid fixed rules are not appropriate when making value judgments, the methodology has to be objective and not left to the discretion of the individual judge.

58 As above. See Costello (n 43 above) 161; N McCarthy ‘Observations on the protection of fundamental rights in the Irish Constitution’ in Curtin & O’Keeffe (n 43 above) 181.
59 E.g., torture, which is an extreme invasion of dignity, is not conducive to balancing and does not meet the standard of proportionality commonly applied in liberty cases: Baer (n 51 above) 467.
61 The Constitutional Court endorsed its adoption of proportionality, when it set the standard to be met by the limitations provision in the new Constitution as ‘the conceptual requirement established by international norms relative to proportionality or balancing’: Certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 [90]. Chaskalson P had outlined the process in Makwanyane (n 10 above) [104] (footnote omitted):
   The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. … The fact that different rights have different implications for democracy… means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.
   On application of the proportionality principle in the Constitutional Court, see Sachs (n 32 above) 208 - 209, 211.
62 Albie Sachs (writing extrajudicially) stated that the South African Constitutional Court’s role in reconciling the diverse interests in an open democratic society led to
dignity is an invaluable and essential yardstick in the proportionality exercise, as it embodies and encodes elements of balancing.63

Irish judges have tended to apply the proportionality principle with deference to the legislature on the objective and the means. They have ignored the impact of the measures, although there have been some exceptions.64 Proportionality should be applied systematically as a standard, not a rule.65 The South African or Canadian models could be adapted in Ireland to provide a robust framework.66

There are signs of a change to a more stringent analysis of executive decisions in the Supreme Court. In *Meadows v Minister for Justice, Equality and Law Reform*, Murray CJ, endorsing use of the proportionality principle in association with a reasonableness standard, stated, ‘[a]pplication of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness.’67 A similar stance was taken by Denham J, who said, ‘[a] decision which interferes with constitutional rights, if it is to be considered reasonable, should be proportionate.’68 However, the Court was sharply divided with Hardiman J in dissent objecting to the effective introduction of the substance of an anxious scrutiny formula into Irish law. Kearns J (also dissenting) asserted that the proportionality test

abstract legal reasoning giving way to a form of adjudication in which purpose, context, impact and values took centre-stage, but ‘[t]his did not mean that principled legal argument and … legal coherence gave way to vague and subjective notions of the good and the desirable’: n 32 above, 202 - 203. He continued, ‘[i]t became more necessary than ever to spell out the objective principles and factual material on which the judgment relied’: n 32 above, 203.

63 Sachs (n 32 above) 203.
65 Walsh (n 64 above) 33.
67 [2010] IESC 3. He indicated that a purely formulaic decision of the executive may not be a sufficient statement of the rationale or reasons underlying a decision and that an administrative decision affecting rights and obligations should at least disclose the essential rationale on foot of which the decision was taken. The Court in *Meadows* raised the standard of scrutiny in judicial review decisions affecting fundamental rights: J Mortimer ‘Standard of scrutiny raised in judicial review decisions’ (2010) 104(3) *Gazette of the Law Society of Ireland* 10 at 13.

The South African Constitutional Court, reiterating its commitment to proportionality, stated, ‘[t]here can be no absolute standard for determining reasonableness’: *Manamela* (n 41 above) [33].
had no role to play in determining whether a court should intervene to quash the kind of administrative decision in issue. 69

A contentious issue which could very well be subject to litigation in the future is the vetting procedure for people operating in roles where they have contact with children and the vulnerable. 70 A proportionality analysis will be relevant to ascertain if the information used breaches the rights of teachers, social workers and volunteers to their good name, to earn a living and to privacy, 71 as well as a fair trial and the presumption of innocence. 72

9.6.3 The democratic mandate for accountability

The requirement for accountability stems from acceptance of personal responsibility for the consequences of decisions made. 73 Democracy necessitates respect for the dignity of individuals by enabling the participation of all in society, listening to their views, making decisions taking their opinions into account, and informing them of the reasons for the conclusions. 74

68 n 67 above, [40].
69 He described it as ‘a decision on an ad misericordiam plea made after two merit-based hearings which were not themselves challenged.’ In his view, the proportionality test was more appropriate to determine if a statutory provision was compatible with the Constitution or to consider if it invaded a constitutional right more than is necessary.
70 See F Mawe ‘Innocent until proven guilty – or not?’ (2010) 104(4) Gazette of the Law Society of Ireland 20. Vetting has become widespread and extends beyond employers, voluntary organisations and church groups to universities, where it is applied to students in some courses: above, 21.
71 In assessing the state’s obligations concerning respect for private life under the ECHR, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims of the restrictions in the ECHR being relevant: A v Ireland (App no 25579/05) (2011) 53 EHRR 13 [247], citing ECHR (n 36 above) Art 8(2).
72 Mawe (n 70 above) 20. The Irish courts held that a statutory restriction on the right to silence was justified because there was a proper proportionality between the restriction and the entitlement of the State to protect itself: Heaney v Ireland [1996] 1 IR 580 (SC) 590, aff’d [1994] 3 IR 593 (HC) 610. This was not accepted by the European Court of Human Rights, which found that the provision extinguished the very essence of the rights to silence and against self-incrimination: Heaney v Ireland (App no 34720/97) (2001) 33 EHRR 12 [55], [58].
73 In organisational terms, the principle that social power should be blocked from directly seizing administrative power finds expression in the principle of democratic accountability that occupants of political offices have vis-à-vis voters and parliaments: J Habermas Between facts and norms: Contributions to a discourse theory of law and democracy trans W Rehg (1998) 175.
74 Privileged access to the sources of knowledge used in policymaking and administration makes possible an inconspicuous domination over the colonised public of citizens cut off from these sources and placated with symbolic politics: Habermas (n 73 above) 317.
When things go wrong, there is a call for identifying the wrongdoers in order to hold them accountable. In a democratic society, those responsible are answerable to the populace for the consequences of their lapse and, in the interests of the common good, should make reparation for the harm they have caused. Autonomy, which is a feature of dignity, endows an individual with the right to act in accordance with rational choices, subject to respecting a similar right in other members of society. There is an accompanying duty on individuals to accept responsibility for the results of their actions. They are accountable and ought to accept the obligation to make good the injury caused by their failings. If they do not do so and are not pursued by the state until they have made amends, their dignity as human beings is not being respected and they are being treated as less than equal adults.

The principle of accountability is apposite in recessionary Ireland. Whatever solution is reached by the government as representatives of the Irish people in the global marketplace for solving the complicated economic, financial and human issues attributable to reckless lending and what was in retrospect foolish borrowing, society is entitled to have the causes of the problem investigated and those responsible held to account. Where there is sufficient evidence of breaches of the criminal law, charges must be brought. In civil law, the culprits are liable to pay compensation, which democratic principles require that they do to the extent that they are able. To salvage some degree of self-respect and respect for the rest of the community, they could utilise their skills to the utmost to assist in resolving the ills they have caused to others and to society in general, which has been burdened with a financial millstone for at least a decade.

There is no outward sign of the principle of accountability having been put into practice yet. Democracy and dignity suffers because of this undue forbearance.


9.6.4 Refashion torts

Drawing on the experience of the South African courts, it is clear that the law of torts could be refashioned. The Constitutional Court has explored the circumstances in which the common law should advance incrementally with the courts effecting the required change in tune with the spirit of the Constitution.77 In *S v Thebus*, Moseke J described two instances where the need to develop the common law arises: first, when a rule of the common law is inconsistent with a constitutional provision, its repugnancy would compel an adaptation of the common law to resolve the inconsistency; second, when a rule of the common law is not inconsistent with a specific constitutional provision but falls short of its spirit, purport and objects, the common law must be adapted so that it grows in harmony with the constitution's 'objective normative value system'.78 Not every development of the common law means a complete change of the rule or the introduction of a new rule.79 O'Regan J in *K v Minister of Safety and Security* explained what happens in cases that fall beyond the scope of an existing rule:80

A court faced with a new set of facts, not on all fours with any set of facts previously adjudicated, must decide whether a common-law rule applies to this new factual situation or not. If it holds that the new set of facts falls within the rule, the ambit of the rule is extended. If it holds that it does not, the ambit of the rule is restricted, not extended.

She emphasised the constitutional imperative to infuse the common law with constitutional values requiring the courts 'to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.'81

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78 2003 6 SA 505 [28]. The common law's incremental development results from the rules of precedent, which derives from a fundamental principle of justice that like cases be determined alike: *K v Minister of Safety and Security* 2005 6 SA 419 (CC) [16].
79 *K* (n 78 above) [16]. Straightforward cases are decided within the framework of an existing rule which the court applies to the set of facts presented: as above.
80 As above. See Banda (n 38 above) 274, 292.
81 n 78 above, [17].
But the Irish courts have been reluctant to apply the Constitution in a positive manner to ensure that the common law promotes constitutional values. In *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd*, the plaintiffs in a nuisance action had an uphill struggle to secure evidence that the cause of ill-health in their farm animals and in themselves as occupiers of the farm resulted from the activities of a nearby factory manufacturing pharmaceuticals. Henchy J felt constrained from shifting the onus of proof to the defendant because Article 40.3 of the Constitution, which placed a duty on the State to defend personal rights, had never been used in the courts to shape the form of any existing tort nor to change the normal onus of proof. He regarded ‘the State’ as excluding the judiciary and confined the courts’ authority to intervene only in the case of inaction by the other arms of government or when the action taken was blatantly inadequate. If a plaintiff sues on the basis of an existing tort, the limitations of that tort normally apply.

Although Henchy J acknowledged in *Hanrahan* that in the absence of a common law or statutory cause of action, a plaintiff could sue directly for breach of a constitutional right, the courts have not devised sufficient alternative remedies based directly on the Constitution. There is scope for more to be done by the articulation of constitutional torts, development of the common law, and a principled-based resumption of declaring unenumerated personal rights under Article 40.3.

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82 On the relationship between the Constitution and tort law, see W Binchy ‘Meskell, the Constitution and tort law’ (2011) 33 *Dublin University Law Journal* 339.
85 ‘[T]he courts are entitled to intervene only when there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question.’: n 83 above, 636.
86 As above.
87 n 83 above, 636, citing *Meskell v CIE* [1973] IR 121 (SC).
88 In recent years the courts have shown an antipathy towards declaring any further unenumerated rights. On the debate over the legitimacy of judicial activism in this way and the basis for the recognition of unenumerated rights under Article 40.3.1’, see T Murphy ‘Economic inequality and the Constitution’ in Murphy & Twomey (n 57 above) 173 - 179.
9.7 Lessons from the comparative study

The courts in Ireland could learn much from the South African courts’ thorough examination of the communitarian understanding of dignity. The Irish Constitution contains similar (though less prominent) norms with the person placed in society where participants have reciprocal rights and duties. The lessons from South Africa could be applied in many areas, the most pertinent of which will be summarised in this section.

The equality guarantee in Article 40.1 of the Constitution if aligned with dignity could be rescued from its continuous subordination to other constitutional rights such as freedom of association.\(^89\) South Africa enforces substantive equality which is transformative – it is not just the process equality that applies in Ireland.\(^90\) The circumstances when equality rights have horizontal application affecting private individuals might be explored in a contextual objective enquiry to yield a structured body of jurisprudence for future guidance.\(^91\) Discrimination against women and vulnerable groups – particularly Travellers, homosexuals, migrants and asylum seekers – requires to be addressed.\(^92\) Contrast the outcome in *Norris*\(^93\) with that in the South African *Sodomy* case\(^94\) – dignity did not feature in the judgment of the majority in *Norris*.\(^95\)

As has occurred in South Africa and as is mandated by the constitutional obligation on the judiciary to intervene to ensure vindication of constitutionally protected rights and values, equality read in the context of

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90 *Portmarnock Golf Club* (HC) (n 89 above) (see text to n 139 in Ch VIII).


92 Legislation obliging clubs to adopt and implement equality plans in targeted sectors such as gender, disability, race and cultural background – certainly where clubs receive public benefits – modelled on the South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000 would be a move in the right direction: see 7.10.2 in Ch VII.

93 n 22 above, (see text to n434-n436 in Ch VII).

94 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) (see text to n8-n11 in Ch IV and to n357 in Ch V).

95 W Binchy ‘The Supreme Court of Ireland’ in B Dickson (ed) *Judicial activism in common law supreme courts* (2007) 189 - 190; Binchy (n 3 above) 321 - 322.
the constitutional commitments to social justice, dignity and freedom could lead to the Irish courts consistently upholding socio-economic rights where the State failed to do so.96 Charlton J’s distinction between the State’s positive and negative obligations in Doherty and his omission to consider the Travellers’ identity97 is in sorry contrast to the Constitutional Court’s decision in Grootboom where it regarded rights as interrelated and it required the reasonableness of state action concerning the homeless to be assessed in the light of the constitutional value of human dignity.98 The High Court’s lack of consideration for the fate of evicted Travellers in McDonagh99 compares poorly with the Constitutional Court’s narrow application of legislation on management of disasters in Pheko v Ekurhuleni Metropolitan Municipality where it insisted that the municipal authority resettle those unlawfully evicted in comparable conditions within a stipulated timeframe to be monitored by the Court.100

The stereotyping and the denial of constitutional rights on the grounds of civil status to all unmarried fathers (the committed ones as well as the uninvolved) by unreservedly allowing adoption without their consent in Nicolaou101 was not replicated by the Constitutional Court in Fraser.102 Having found that the legislation was discriminatory, the Court ensured the cooperation of the democratic Parliament by giving it time to devise a solution.103

96 See Binchy (n 3 above) 318 - 319.
97 Doherty v South Dublin County Council (No 2) [2007] IEHC 4, [2007] 2 IR 696 (see text to n506-n516 in Ch VII).
98 Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC) (see text to n1-n9, n11-n12, n23-n29, n129-n133 and n136-n154 in Ch VI). The concept of reasonableness was central when the Constitutional Court assessed the City’s housing policy and found it unconstitutional to the extent that it excluded those evicted by private property owners from consideration for temporary accommodation in emergency situations: City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd [2011] ZACC 33 [87].
99 McDonagh v Kilkenny County Council [2007] IEHC 350 (see text to n519-n524 in Ch VII).
100 [2011] ZACC 34 (CC) [53].
102 Fraser v Children’s Court Pretoria North [1997] ZACC 1, 1997 2 SA 218 (CC) (see text to n297-n299 in Ch VII). Notwithstanding the growth in cohabitation, the distinction in Irish law between the constitutional recognition given to the natural mothers’ personal right to custody of their children and the very limited right vested in natural fathers continues: JMcB v LE [2010] IEHC 123, [2010] 4 IR 433 [100], [105].
103 n 102 above, [52].
Makwanyane established decisively that the prohibition of cruel and unusual punishment based on ‘the dignity of man’ meant that people should not be humiliated physically or mentally.\(^{104}\) If tolerated by the state (even when it occurs without any direct state involvement), the failure to insist on civilised standards offends all in society. Whether corporal punishment should be forbidden in the home is a contentious topic in many countries (South Africa and Ireland included).\(^{105}\) There has been much international condemnation of Ireland for not prohibiting corporal punishment within the family. It is time that Ireland banned all chastisement in the home in response to the international denunciation and the many calls for change. Combined with an educational campaign and the promotion of alternative forms of discipline, a legal prohibition could headline a change in attitudes.

Similarly, the government has procrastinated for too long in heeding the denouncements of overcrowding and bad conditions in prison.\(^{106}\) The Irish courts must stop their naïve indulgence of the executive by relying on it to address the State’s failure to respect prisoners’ dignity – at this stage there is no justification for the toleration of humiliating practices like slopping out and the deterioration of overcrowded conditions to such an extent that assaults on fellow prisoners are more likely to occur.\(^{107}\) The South African courts’ century-old tradition of recognising the residual rights of prisoners (expressed so well by Innes J in Whittaker v Roos)\(^{108}\) and the judiciary’s post-apartheid practice of engaging with the executive to ensure that infringements of human dignity do not continue provide a good template for Ireland.\(^{109}\) As

\(^{104}\) n 10 above, (see text to n412 in Ch III).

\(^{105}\) See 4.2.1 in Ch IV and 7.6.1 in Ch VII. The Court did not deal with this aspect in Christian Education South Africa v Minister of Education 2000 4 SA 757 (CC). The tension between protection of the child and state intrusion in family life was evident in the Constitutional Court when the majority held that the lack of automatic review on taking a child into temporary care was unconstitutional: C v Department of Health and Social Development, Gauteng [2012] ZACC 1 (CC).

\(^{106}\) See 7.4.1 in Ch VII. The United States Supreme Court in a majority decision affirmed a lower court order to the State of California to reduce its prison population to 137.5% of design capacity within two years and to submit a compliance plan for court approval: Brown v Plata 131 S Ct 1910 (2011) 1923, 1928, 1947.

\(^{107}\) MacMenamin J’s narrow view that prisoners only had a negative right to be protected against state intervention, which required that mala fides be demonstrated to prove a breach of duty, fails to take into account the State’s positive obligation to vindicate personal rights – an ‘evil purpose’ is not a prerequisite for a violation: Mulligan v Governor of Portlaoise Prison [2010] IEHC 269.

\(^{108}\) 1912 AD 92 (SC).

\(^{109}\) See 5.2.2 in Ch V.
prisoners lose the freedom to regulate their own situation when incarcerated, there is a particular duty on the State to protect them while they are in its custody. Happily there are signs that change may be on the way, as seen in Hogan J’s handling of *Kinsella*.110  

But no such change of direction can be observed in the case-law concerning the civil liability of the State for the failure of the police to protect human rights.111 Instead of requiring *mala fides* to establish an actionable failure and granting virtual blanket immunity from liability for botched police investigations as in *G v Minister for Justice Equality and Law Reform*,112 the Irish courts should apply the fair, just and reasonable criterion as an element of the duty of care and could follow the path taken in *Carmichele*.113 At least the courts should ensure that the police are answerable for their actions – accountability is a feature of a democratic society. Vindication of personal rights requires more than simply resorting to the established rules of tort without even considering whether the victim has an alternative remedy or can establish accountability before another forum. A remedy only for an intentional breach is insufficient.

If the police or other state employees deviate from the normal performance of their duties and abuse the public, the South African courts’ decisions in *K v Minister of Safety and Security*114 and *F v Minister of Safety and Security*,115 where they developed the common law on vicarious liability, are exemplars of best practice. When the obligation to protect rights is in issue, the existing boundaries of tort may be inadequate to accommodate the constitutional and statutory duties of the state and of the police; it will also be relevant to consider the context – perhaps the victim was vulnerable, she may have relied on the police for protection and the police may have accepted

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111 See 8.2.2 in Ch VIII.
113 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) (see text to n236-n243 in Ch IV).
114 n 78 above (see text to n249-n261 in Ch IV).
115 [2011] ZACC 37. The Constitutional Court in a majority decision extended the vicarious liability of the state to cover the wrongful act of a policeman on standby duty because there was a sufficiently close connection between the wrongful conduct and his employment assessed by giving explicit recognition to the norms involved: above, [50], [76], [81]-[82], [88].
that role. This model could be adapted to adjudicate on state liability for abuse where the perpetrator is not a state employee.116

The law of privacy is evolving in Ireland. It is desirable to have clear identification of the circumstances when the media can be restricted from publishing private information.117 The law might be developed along the lines suggested in *NM v Smith* to allow publication of such information where it was reasonable to conclude that consent had been given.118

In a different context, the parameters of informed consent established in South Africa in *C v Minister of Correctional Services* could be applied if a prisoner challenged the voluntariness of consent to a HIV test.119 Legislation regulating research and controlling the use of human tissue modelled on the South African National Health Act 2003 would bring legal certainty in a potentially contentious sphere in Ireland.120 The new legislation could also regulate artificial insemination and *in vitro* fertilisation to deal in an orderly manner with the rights and duties of donors and to avoid disputes over access and guardianship.121 The European Court of Human Rights upheld a prohibition of *in vitro* fertilisation using donor sperm or ova in *SH v Austria*, but it alerted states to keep the law under review in this continuously evolving area which is subject to dynamic scientific and legal developments.122

If a referendum is held to remove the blasphemy provision from the Irish Constitution, it could be replaced by a provision modelled on that in the South African Constitution which excludes hate speech from the protection

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116 The factors considered by the Supreme Court in *O’Keeffe* (n 28 above) and in *Reilly* (n 28 above) were too limited – social justice was ignored: see 7.3.2 in Ch VII. Additional elements here should be the responsibility of the state for the system that created the relationship between the victim and the perpetrator as well as the role of efficient loss distribution in tort liability.

117 The High Court indicated that, even though the media is free to publish information regardless of public interest, freedom of expression can be curtailed to stop widespread offensive publicity of very personal or private information which could be humiliating, violate dignity or injure the claimant’s feelings to a significant extent: *Hickey v Sunday Newspapers Ltd* [2010] IEHC 349, citing *Hosking v Runting* [2004] NZCA 34, [2005] 1 NZLR 1 [125]-[127]. For the right to privacy to prevail, there must be a legitimate expectation of privacy and publication must not be justified by legitimate public concern: as above.

118 2007 5 SA 250 (CC) (see text to n174-n185 in Ch V).

119 1996 4 SA 292 (T) (High Court) (see text to n453-n457 in Ch VII).

120 See text to n427-n428 in Ch VII.

121 See 7.6.3 in Ch VII.

122 (App no 57813/00) ECHR 3 November 2011 [118].
afforded to freedom of expression. The diverse character of an increasingly multi-cultural society demands more tolerance for the expression of dissenting views than in the past. After more than two decades in operation, it is time to review the Irish legislation prohibiting incitement to hatred, which has proven to be inadequate to deal with changes in technology and the advent of social networking since then. As was done in South Africa in 2000, consideration could be given to widening the concept of hate speech to cover discriminatory speech undermining human dignity where the intention is to be hurtful.

The Constitutional Court unanimously developed the law of defamation in *Le Roux v Dey* to allow the court to order an apology where there has been an impairment of actionable dignity in personal relationships, but this development has not extended yet to media defendants. Irish law could be expanded on the same basis, although the issue of whether the media should be ordered to apologise will need more thorough examination. Even if the bold step of a court-ordered apology is not taken, quantum should be reduced where an apology has been made or offered. Similarly in cases of catastrophic injuries the unaware plaintiff could receive a smaller award than a fully-conscious person.

The law of contract might be refined by applying constitutional values to re-assess the unequal bargaining position of the ordinary citizen with banks and other powerful institutions. However, as in South Africa, courts generally are reluctant to interfere with a free, equal and informed bargaining
process. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* all the judges agreed in principal that constitutional values should infuse contract law to ensure that justice is done – particularly when poor vulnerable people are involved in negotiations with powerful companies.  

Extension of the range of remedies and the remoulding of tort as pioneered in South Africa would be a welcome improvement. The Irish courts could play a more active role in holding the State accountable as is essential in a well-functioning democracy. The State should ensure that corporations and individuals are held to account civilly and (where appropriate) criminally before the courts. The establishment and resourcing of independent bodies to investigate white-collar crime and corruption would improve the democratic process.

If the Irish courts embraced the values enshrined in the Constitution in as enthusiastic a fashion as the judiciary in South Africa, the effect on the community and on the individuals in it could be quite dramatic. It would lead to a more open society embracing wholeheartedly minority viewpoints and cultures. There is much potential for the Irish judiciary to develop the case-law on the Constitution to give effect to its underlying values. It is the role of all three branches of government to uphold the principles supporting a society of equals in a representative democracy. While it is the duty of

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133 [2011] ZACC 30, 2012 1 SA 256 (CC) [23]-[24], [48], [71]-[72]. The majority held that this was not a suitable case in which to decide the issue of whether constitutional values required that the common law must be adapted to impose a duty on a lessor and a lessee to negotiate renewal of a lease and a rent review in good faith in compliance with a clause in the lease.

134 See text to n40–n42 above.

135 See 9.6.4 above.

136 *Eg, Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) (see text to n 73 in Ch V), *Mazibuko v City of Johannesburg* [2009] ZACC 28 (CC) (see text to n245–n270 in Ch VI).

137 See 9.6.3 above.

138 On the requirement for independence (of an anti-corruption unit in this case), see *Glenister v President of the Republic of South Africa* [2011] ZACC 6, 2011 3 SA 347 (CC).

139 The task of the framers of constitutions is to discover and express the fundamental jural presuppositions of the accommodation that people living together have made and continue to make, while the task of the courts, apart from applying statutes and explicit constitutional provisions, is to discern and express that constitutional accommodation, and the legislators’ task is to discover in it the contours of what is just in daily living: G Barden ‘Discovering a constitution’ in Murphy & Twomey (n 57 above) 9.

every institution exercising constitutional powers to keep within the limits of those powers, it is the duty of the courts to say what these limits are.\textsuperscript{141} Judges are obliged to defend the constitution when required, and it is a breach of their constitutional duties if they do not act decisively to defend the human dignity, equality and liberty of the vulnerable. A mutually supportive relationship could develop between the judiciary and the executive, as the courts are relatively immune from public opinion and in a position to enforce or declare fundamental rights that may perhaps be unpopular with the majority of society, while politicians could point to the judiciary as the raison d’être for the change.

A body of jurisprudence developed incrementally and grounded on lucid consistent rationales would fulfil the judiciary’s obligation to ensure that the Constitution’s reach is not unduly confined and that it achieves its transformative potential in private relationships. In a well-functioning legal system, the case-law will be refined and adapted to cope with the intricate dilemmas that can occur in a modern technology-driven society. Following the South African model,\textsuperscript{142} human dignity viewed in association with equality and liberty would be an excellent guide in this judicial journey.\textsuperscript{143}

\textsuperscript{141} Wheare (n 2 above) 101.

\textsuperscript{142} The South African, Irish and Australian judiciary have much in common (a culture of judicial independence, conflicts with electorally legitimated actors, a broadly common law tradition, and the privilege of finality): B Flanagan & S Ahern ‘Judicial decision-making and transnational law: A survey of common law Supreme Court judges’ (2011) 60 International and Comparative Law Quarterly 1 at 10.

\textsuperscript{143} Sibo Banda suggested adding the ideal of justice as personal dignity to the aims of private law in addition to it being seen as corrective justice or the promotion of economic efficiency: n 38 above, 296.
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