

# Chapter 36

## Dignity

### Stuart Woolman

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OS 12-05, ch36-p1

1. **Founding Provisions:** The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

7. **Rights:** (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

10. **Human Dignity:** Everyone has inherent dignity and the right to have their dignity respected and protected.

36. **Limitations:** (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.

39. **Interpretation:** (1) When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

165. **Judicial authority:** (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

181. **Establishment and governing principles [of Chapter 9 Institutions]:** (3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

196. **Public Service Commission:** (3) Other organs of state, through legislative and other measures, must assist and protect the commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. <sup>1</sup>

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1 Constitution of the Republic of South Africa, 1996 ('FC' or 'Final Constitution').

## 36.1 Introduction\*

As essentially a court lawyer, with no formal training in philosophy, I dare to take my stand on Kant because his imperatives encapsulate for me, by way of contrast and in the rationally most compelling manner that I have been able to discover, what was so obscene about apartheid. It serves as a constant reminder of our very ugly recent past. As a reforming Constitution, it is right that human dignity should be so highly valued.

Laurie Ackermann <sup>2</sup>

### (a) History of dignity

South Africa boasts one of the world's most developed bodies of dignity jurisprudence. Only the Federal Constitutional Court's gloss on the meaning of dignity in Germany's Basic Law can match the richness of our Constitutional Court's account.

\* I count myself extremely fortunate to have worked with Drucilla Cornell on this chapter. Professor Cornell not only recognized the Kantian character of our nascent body of jurisprudence, but possessed the imagination to see how a proper understanding of Kant might help us transcend the current limits of the black letter law. Although Professor Cornell disagrees strongly with some of the positions taken in this chapter, anyone familiar with her writing will recognize her handiwork in these pages. I am indebted to Laurie Ackermann for a lengthy, detailed and instructive critique of an early draft of this chapter. I further extend my thanks to Anthony Stein, Michael Bishop and Courtenay Sprague for their expert editorial interventions. All errors in argument and infelicities in style remain my responsibility alone.

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OS 12-05, ch36-p2

As the epigram from Justice Ackermann suggests, the richness of this jurisprudence flows, in part, from South African history. The Truth and Reconciliation Commission ('TRC'), for example, recognized that dignity has its roots in the simple idea that justice consists of the refusal to turn away from suffering. The TRC's unflinching commitment to the provision of a historical record of such suffering under apartheid counts as the first step in our moral re-awakening. However, the demands of dignity trace an arc that extends beyond the narrow duty to refuse to turn away from suffering to a broader duty to recognize our fellow citizens as agents capable of governing themselves. The granting of a truly universal franchise, and its exercise in the election of Nelson Mandela in 1994 (and in every other subsequent election), constitutes formal recognition of the capacity of each person to legislate for him or her self. The history of dignity in South Africa does not end there. The formal recognition of our compatriots as autonomous moral agents ratifies an even wider obligation to assist our compatriots in the conversion of their innate talents into capabilities that will, in turn, enable them to realize their preferred way of being in the world. When refracted through the prism of dignity, the Final Constitution extends our obligations, beyond the franchise and those civil liberties that permit us to legislate for ourselves, to socio-economic rights that guarantee the material transformation of the lives of each and every South African. <sup>3</sup> This brief history of our new-found ability to recognize the inherent dignity of our fellow South Africans is meant to suggest how the extension of this right progresses from mere duties of

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2 LWH Ackermann 'The Legal Nature of the South African Constitutional Revolution' (2004) 4 *New Zealand Law Review* 650('Legal Nature').

3 See S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1 (Respect for human dignity requires society to respect the equal worth of the poor by marshalling its resources to redress the conditions that perpetuate their marginalisation.)

justice to duties of virtue that have as their aim the qualitative perfection of humanity.<sup>4</sup>

Despite its deep and profound resonance with South African history, dignity is manifestly not like Auden's valley cheese — 'local, but prized everywhere'. The Constitutional Court quite consciously draws upon two exogenous sources.<sup>5</sup>

First, the Court traces dignity's place in the pantheon of political thought back to Immanuel Kant.<sup>6</sup> The existing corpus of South Africa's dignity jurisprudence tracks, in a surprisingly direct manner, the trajectory of Kant's ethical thought, and, in particular, his various formulations of the categorical imperative.<sup>7</sup> The Court's jurisprudence turns, as we shall see, in ever widening gyres of obligation: moving outward from 'the refusal to turn away' as manifest in the death penalty

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4 Dignity dominates our literary, as well as our legal, history. It is, arguably, the chief leitmotif of JM Coetzee's work. From the halting efforts of the magistrate to 'see' his blind concubine in *Waiting for the Barbarians*, to the death march of the protagonist in *Life and Times of Michael K*, to the respect accorded animals in *Disgrace* and *Elizabeth Costello*, to the demand that we bear witness to the pain, as well as the struggle for autonomy, of a fictional character in *Slow Man*, Coetzee asks that we do more than acknowledge the existence of our fellow beings — human, animal, fictive. They may not be entitled to our love. (They may, indeed, be unlovable.) But they are all entitled to their dignity. Moreover, the dignity of which Coetzee speaks follows an arc of widening obligation strikingly similar to the constitutional concerns that animate this chapter. He moves, over time, from dignity as the refusal to turn away, to dignity as the formal recognition of others as ends, to dignity as the capacity to see others as they see themselves — a challenge that is especially great when that other is neither human nor animal, but, as in the case of Paul Rayment, entirely fictional.

As to the phrase, 'qualitative perfection of humanity', I have here, in mind, the constellation of features captured by the terms 'mensch' (Yiddish) or 'menschkeit' (German). These terms represent, at bottom, a goal of every human being: to rise above our passions and, in every moral transaction, to attempt to turn ourselves, as Henry James said, into persons 'upon whom nothing is lost'. See H James *The Art of the Novel* (1907) 149.

5 Such potted histories necessarily verge on caricature. As a corrective, Laurie Ackermann suggests that an historical account of dignity's South African roots must take note of another endogenous source: the Roman-Dutch law of personality. See LWH Ackermann 'The Significance of Human Dignity for Constitutional Jurisprudence' (Lecture, Stellenbosch Law Faculty, 15 August 2005) (Manuscript on file with author) § 6 (Personality rights include the rights to dignity, life and bodily integrity, physical liberty, autonomy, reputation, feelings, privacy, self-realisation and identity.) See also J Neethling, JM Potgeiter & PJ Visser *Neethling's Law of Personality* (2nd Edition, 2005) 24-38; WA Joubert *Grondslae van die Persoonlikheidsreg* (1953); *Whittaker v Roos and Bateman*; *Morant v Roos and Bateman* 1912 AD 92, 122; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T), 381; *Jansen van Vuuren & Another NNO v Kruger* 1993 (4) SA 842 (A), 849; *National Media Ltd v Jooste* 1996 (3) SA 262 (A), 272.

Other authors have suggested that the African concept of 'ubuntu' and dignity draw on quite similar moral intuitions. See Y Mokgoro 'Ubuntu and the Law in South Africa' (1998) 4 *Buffalo Human Rights LR* 15; D Cornell & K van Marle 'Interpreting Ubuntu: Possibilities for Freedom in the New South Africa' (2006) 6 *African Human Rights LJ* — (forthcoming); D Cornell 'A Call for a Nuanced Jurisprudence' (2004) 19 *SA Public Law* 661; M Pieterse 'Traditional' African Jurisprudence' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 441; IG Kroeze 'Doing Things with Values (Part 2): The Case of Ubuntu' (2002) 13 *Stellenbosch LR* 252; R English 'Ubuntu: The Quest for an Indigenous Jurisprudence' (1996) 12 *SAJHR* 641. See also *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) ('*Makwanyane*') at paras 224-225 (Langa J) (Ubuntu captures, conceptually, '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 a 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.' (Emphasis added).)

and corporal punishment judgments, to 'the equal respect' accorded non-traditional forms of intimate association in the gay and lesbian rights cases, to 'the collective responsibility for the material conditions required for agency' contemplated in recent socio-economic rights decisions.

Second, the Court recognizes that the history of dignity is a history of the world after World War II.<sup>8</sup> It is no accident that dignity occupies a central place in German constitutional jurisprudence: for 'dignity' is the flip-side of 'never again'. And just as the Germans have promised not to shovel people into stoves, so too have South Africans promised never again to treat people like cattle to be packed off to bantustans or to be slaughtered in the middle of the night. Dignity, like the words 'never again', may now have a new and deeper meaning post-Third Reich and post-apartheid. But 'dignity', like 'never again', writes Alan Ryan, has, in fact, 'been the watchword all along.'<sup>9</sup> Ultimately, that watchword always returns us to first principles: the refusal to turn away.

### **(b) Structure of the chapter**

This chapter engages the constitutional 'watchword' of dignity in a number of discrete, but ultimately related, ways. It sets out comprehensively the black letter

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- 6 For both the drafters of the Final Constitution and for Kant, the ideal basic law attempts to give adequate effect to three sometimes covalent, sometimes conflicting 'ideas': dignity, equality and freedom.

Of this ideal basic law, Kant writes:

Surely an organisation consisting of the greatest human freedom according to the laws through which the freedom of each can coexist with that of the others (not an organisation consisting of the greatest happiness, for this will no doubt follow on its own) is at least a necessary idea. It is an idea that we must lay at the basis not merely in first drafting a political Constitution, but also in all laws; and in so doing we must initially abstract from the present obstacles, which perhaps may not so much arise inevitably from human nature, as arise, rather, from our neglecting the genuine ideas in making laws.

I Kant *Critique of Pure Reason* (trans W Pluhar, 1996) 364.

- 7 Despite the rather conservative cast of many of Kant's actual political positions — his opposition to suicide and his support for the death penalty — and some rather mystical and outré metaphysical commitments — his commitment to a noumenal free will — contemporary philosophers are willing and able 'to transpose Kants' writing, hearing them in a different key . . . from that in which they were originally written.' AW Wood 'What is Kantian Ethics' in I Kant *Groundwork of the Metaphysics of Morals* (ed and trans by AW Wood, 2002) 157. In part to disarm critics who might charge me with dilettantism, it must be stressed that the author is not a Kantian scholar and makes no claims, at all, about the best possible reading of Kant. The 'arguments' offered in these pages about Kant serve the much more modest aim of providing an analytical framework through which we might better understand the normative claims that hold our extant dignity jurisprudence together. (Moreover, my engagement with Kant is a function of the Court's own explicit, if sometimes cryptic, references to his conception of dignity.)
- 8 The former Chief Justice of the Constitutional Court has acknowledged South Africa's debt to post-World World II constitutional jurisprudence. See A Chaskalson 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193, 196 ('The affirmation of human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the second world war.')
- 9 A Ryan 'After the Fall: Judt's *Postwar: A History of Europe Since 1945*' *New York Review of Books* Volume LII, No 17 (3 November 2005) 16, 19.

law in § 36.2, § 36.3 and § 36.4. Section 36.2 offers a number of working definitions of 'dignity'. While these five definitions reflect different extensions of the term, I shall argue that these different definitions are, in fact, variations on a single theme: Kant's notion of the individual as an autonomous moral agent. Section 36.3 shows how dignity operates — as a first order rule, a second order rule, a correlative right, a value and a *grundnorm* — in both the text of the Final Constitution and in the judgments of our courts. Section 36.4 catalogues and critiques the courts' use of dignity to work out the extension of various other substantive provisions in the Bill of Rights. In § 36.5, I return to more speculative observations about how dignity operates as rule, value and ideal. Here I answer the 'realist charge' that dignity means anything and everything, and therefore nothing. I offer, in place of the realist critique, an account of dignity that I believe best fits both the remedial purpose and the overall structure of the Final Constitution. This

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account explains why dignity must function as both a rule and a regulative ideal and imagines how dignity, properly understood, might serve the ends of a trans-cultural jurisprudence that would give equal weight to — or at least mediate — African and European conceptions of justice.

### (c) Methodological concerns

A word or two of explanation about this chapter's method is in order before I set out the black letter law below.

First, neither the emphasis on the actual manner in which the courts have used and defined dignity, nor the effort to distinguish first order rules from second order rules should lead the reader to conclude that I aim to offer a purely positivist account of this body of law.<sup>10</sup>

Second, if the point of a positivist account (shorn of more controversial jurisprudential baggage) is to construct a taxonomy of all the rules that constitute the law of dignity — made up of the primary rules that impose legal obligations and the secondary rules that govern the application and the interpretation of primary rules — then my account does do something like that. But it does so only because all lawyers and academics attempting to understand dignity require a Baedeker of this sort to make their way through a complex body of jurisprudence.

Third, such a Baedeker alone is insufficient to the task of explanation. In the first place, legal rules often perform more than a single function.<sup>11</sup> Not only do different denotations of dignity operate as different kinds of rules, the very same definition of

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10 Not even HLA Hart, with whom the nomenclature of primary rules and secondary rules is most often associated, assumes that such rules exhaust the universe of obligations. See HLA Hart *The Concept of Law* (1961).

11 See JW Harris *Legal Philosophies* (1980) 105 - 109. In the accepted parlance of legal positivism, primary rules are generally understood to impose duties and obligations, while secondary rules, which are parasitic on the existence of primary rules, determine how primary rules are to be applied or to be altered. See Hart (supra) at 77-96. However, I use 'first order rule' and 'second order rule' in a technical sense not meant to evoke passionate debate about the virtues and vices of legal positivism. First order rules resolve disputes; second order rules assist in the interpretation of — though they do not necessarily determine — the content of first order rules in a manner that permits resolution of disputes. See S Woolman 'Review of Corder and Du Plessis *Understanding South Africa's Transitional Bill of Rights*' (1996) 112 *SALJ* 711, 715. See also T Morawetz 'Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory and Judging' (1992) 141 *University of Pennsylvania LR* 371.

'dignity' may operate as both a primary rule and a secondary rule. In the second place, while the word 'dignity' may not be so open-textured as to be the basic unit in a jurisprudential 'Lego-land', its multiple uses confound all attempts to reduce the courts' jurisprudence to a finite number of rules.<sup>12</sup>

Fourth, two distinct dangers attach to a purely positivist account of dignity: (a) formally fair rules may mask substantially unjust arrangements;<sup>13</sup> (b) once a constitutional norm such as dignity is reduced to rules, obedience to the law tends to supplant considerations of justice as the primary end of our political community.<sup>14</sup> We need to be regularly reminded that the legal rules that the right to dignity produces are only as good as the everyday ethical practices that inform, and regularly transform, those rules.<sup>15</sup>

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12 For an example of dignity's simultaneous application as a first order rule, a second order rule, a correlative right and a value, see *Moseneke & Others v The Master* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at paras 22–24 (Provision of Black Administration Act providing that Master of High Court had no power to handle intestate estates of black South Africans found to be both a limitation of FC s 9 — equality — because it 'assails the dignity of those concerned' and a 'limitation of the right to dignity in [FC] s 10.' Neither limitation could be justified in a state based upon the values of 'human dignity, equality and freedom.') Different judges have used dignity in different ways to resolve the very same dispute. See *Daniels v Campbell* 2004 (5) SA 331 (CC), 2004 (6) BCLR 735 (CC) (Majority uses dignity as a value to engage in statutory interpretation that permits Intestate Succession Act to be read in conformity with Final Constitution. Moseneke J, in dissent, found that the right to equality and the right to dignity had been violated, and that any legislative remedy for the violation must conform with such foundational values as dignity. Thus, dignity functions in these two judgments in the very same case as a first order rule, a second order rule, a correlative right, a value and a grundnorm.)

13 For example, John Finnis somewhat cheekily observes that 'the rule of law' is 'the name commonly given to the state of affairs in which a legal system is legally in good shape.' J Finnis *Natural Law and Natural Rights* (1980) 270. But a commitment to the rule of law alone and to the formal features of law identified with it — is a necessary but not a sufficient condition for a just or a fair society. For more on those formal criteria, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 34. As Finnis notes, regimes that are exploitative or ideologically fanatical (or some mixture of the two) could submit themselves to the constraints imposed by the rule of law if it served the realization of their narrow conception of the good. Indeed, both Stephen Ellmann and David Dyzenhaus argue persuasively that the South African government under apartheid was an exploitative and ideologically fanatical regime committed to the rule of law. See S Ellmann *In a Time of Trouble: Law and Security in South Africa's State of Emergency* (1992); D Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991). See also J Dugard *Human Rights and the South African Legal Order* (1981). Here then are two additional points about the limits of a positivist account. Although the rule of law did constrain the apartheid state — and even allowed for a cramped conception of human rights — few would allow that it was fair or just. What it was missing was any respect for individual dignity and the attendant sense that the purpose of state was to assist *all* persons to 'constitute themselves in community'. Finnis (supra) at 270–271. In addition, although the two most important constitutional doctrines developed by the Constitutional Court in its first decade of operation turn on a substantive conception of the rule of law and an account of dignity that makes it a *grundnorm* for the Final Constitution, those two doctrines alone are insufficient to guarantee the legitimacy of the new regime. For more on the rule of law, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

14 On the relationship between rule-following behaviour, obedience to authority, and justice, see § 36.5(a) *infra*.

15 For a discussion of dignity as a regulative ideal that enables us to transcend the limits of dignity as a first order rule, see § 36.5(a)(i) *infra*.

## 36.2 Definitions of dignity

This section identifies five primary definitions of dignity in the Court's jurisprudence. One aim of this taxonomy is to demonstrate how these five definitions draw down on the same basic insight: that we recognize all individuals as ends-in-themselves capable of self-governance. (Put pithily, each definition of dignity emphasizes a different dimension of our status as autonomous moral agents.) I suggest how these definitions build upon this common insight and interpenetrate one another to yield a theory of 'dignity.'

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At the same time, one must recognize that the Court's definitions yield, at best, a partial theory of dignity.<sup>16</sup> It falls then to commentators such as myself to flesh out the Court's theory, to identify the particular definition(s) or dimension(s) of dignity being deployed in a given case, and to explain, more importantly, (a) how the Court responds when one denotation of dignity conflicts with another denotation of dignity and (b) how the Court determines when one such denotation must yield to another. It should go without saying that only after one has identified, as fully as possible, the various conceptions of dignity that animate the Court's reasoning does one earn the right to engage them critically.

### (a) Individual as an end-in-herself (Dignity 1)

Justice Ackermann, the Court's original exponent of dignity, grounds the first definition of dignity in two sources that we have already identified: apartheid and the work of Immanuel Kant:

[I]t is permissible and indeed necessary to look at the ills of the past which [the Constitution] seeks to rectify and in this way try to establish what equality and dignity mean? What lay at the heart of the apartheid pathology was the extensive and sustained attempt to deny to the majority of the South African population the right of self-identification and self-determination . . . Who you were, where you could live, what schools and universities you could attend, what you could do and aspire to, and with whom you could form intimate personal relationship was determined for you by the state . . . That 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 ones own powers and to act freely as a moral agent pursuant to such understanding of 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.<sup>17</sup>

For Kant, as for Ackermann, the recognition of every human being's inherent dignity takes the form of an apparent variation on the golden rule,<sup>18</sup> the categorical imperative: 'Act in such a way that you always treat humanity, whether in your

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16 A Constitutional Court, particularly in its first few years, moves slowly. It might even be true — as a normative matter — that a Constitutional Court, as Laurie Ackermann suggests, 'ought not, even if it could, try to enunciate a total philosophical system based upon dignity.' Correspondence with Laurie Ackermann (26 January 2006)(on file with the author). See also A Honoré Ulpian: *Pioneer of Human Rights* (2002)('[I]t is a mistake to attribute to a lawyer a system of philosophy rather than a set of values.') Academics, however, are not subject to the same constraints as a court of law. The purpose of a book such as this is to offer a good faith reconstruction of the court's various doctrines, and then ask whether, in fact, such doctrines meet minimal criteria of coherence, and if they do, whether they are, ultimately, desirable.

17 Ackermann 'Legal Nature' (supra) at 650.

own person or in the person of another, never simply as a means, but always at the same time as an end.<sup>19</sup>

Stated in Kant's uncompromising terms, such an ethical algorithm might seem impossible to enact.<sup>20</sup> We all know that, even with the best of intentions, many of

the myriad interactions we have with our fellow human beings will be almost entirely instrumental. We know that whether we are taking decisions for a family, a classroom of students, a neighbourhood, a town, a province or a nation, some form of a utilitarian calculus — the greatest good for the greatest number — will enter into our considerations. And we know that the relational or communitarian quality of ethics is such that we will often privilege the claims of family, kin, neighbourhood or nation over more general or universal claims.<sup>21</sup>

How then to understand Kant in a way that is neither sentimental nor woolly? Consider Oscar Schachter's gloss on the categorical imperative: 'Respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated *merely* as instruments or objects of the will of others.'<sup>22</sup> Dignity, on this account, sets a floor below which ethical — and legal — behaviour may not fall. Although some relationships will be purely instrumental, no individual person can be treated as a mere instrument over the *entire* domain of her social interactions. This

18 As a technical matter, Kant actually rejects the golden rule as a maxim for ethical action. See I Kant *Groundwork of the Metaphysics of Morals* (trans and ed AW Wood, 2002) ('*Groundwork*') 46–47. He does so because the golden rule permits our individual inclinations to determine outcomes ('as you would have them do onto you') and does not require the attempt at moral perfection (through reason) demanded by the procedures associated with the categorical imperative. See TW Pogge 'The Categorical Imperative' in P Guyer (ed) *Critical Essays on Kant's Groundwork of the Metaphysics of Morals* (1998) 189, 191 (For Kant, 'the categorical imperative is not a version of the Golden Rule.') See also J Rawls *Lectures on the History of Moral Philosophy* (2000) ('*Lectures*') 199.

19 Kant *Groundwork* (supra) at 45–46. See also D Meyerson *Rights Limited* (1997) 12 (Refers to this formulation of the categorical imperative as a heuristic device through which we might better understand our own basic law.) That Kant should be identified as a source for constitutional doctrine in South Africa is not as outlandish a proposition as it may initially sound. In his commentary on German constitutional law and its dignity jurisprudence, Donald Kommers identifies three 'politically significant sources of ethical theory': Christian natural law, Kantian thought and social democratic thought. D Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 304.

The above variation of the categorical imperative is, in fact, Kant's second formulation. See Rawls *Lectures* (supra) at 181. Kant's numerous restatements of the second formulation enhance our understanding of his meaning (and that of our first definition). First, he writes: 'A reasonable and rational being in virtue of its nature is an end and consequently an end in itself, and must serve for every maxim as a condition limiting all merely relative and arbitrary ends.' *Groundwork* (supra) at 53. He then places the following gloss on the second formulation: 'So act in relation to every reasonable and rational being (both yourself and others) that that being may at the same time count as an end in itself.' *Ibid* at 55–56. The second formulation turns our attention to the nature of other moral agents as rational beings, who, like our own selves, are entitled to treatment as ends in themselves. The second formulation also makes, what is for Kant and for us moderns, a crucial distinction: between things which have a price — and are therefore fungible — and things which have no price — and thus have no replacement. Most of us think of ourselves and those we care about as priceless. Kant asks us to extend that recognition to all human beings: for they, like us, view themselves and their significant others as irreplaceable. See AW Wood 'Humanity as an End in Itself' in P Guyer (ed) *Critical Essays on Kant's Groundwork of the Metaphysics of Morals* (1998) 165, 170 (Wood 'Humanity as an End') (Defines the term 'individual as an end-in-itself' as 'an end with absolute worth or (as Kant also says) dignity, something whose value cannot be compared to, traded off against, or compensated for or replaced by any other value.')

floor supports — as the *Dawood* Court suggests — Chapter 2's express prohibitions on slavery, servitude and forced labour.<sup>23</sup> This definition of dignity also bars punishments that either extinguish the humanity of another entirely — say, the death penalty — or through their disproportionality reduce a human being to a *mere* signal within a large and impersonal system of social control.<sup>24</sup>

## (b) Equal concern and equal respect (Dignity 2)

Another version of Kant's moral law — more accurately described as a principle of justice — yields another dimension of dignity: 'Any action is *right* if it can coexist

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20 Kant did not view this principle as impossible to enact. Indeed, as Rawls notes, Kant found moral pietism offensive and conceived of the categorical imperative as a 'mode of reflection that could order and moderate the scrutiny of our motives in a reasonable way.' Rawls *Lectures* (supra) at 149. Perhaps the best way to characterize Kant's categorical imperative is as a reflective check, albeit a demanding one, on our moral intuitions. A contemporary example of such a reflective check — and one that continues to do a great deal of heavy lifting — is Rawls' own 'veil of ignorance'. See J Rawls *A Theory of Justice* (1972). Like the categorical imperative, the veil of ignorance serves as an intuition pump for claims about distributive justice by forcing us to forsake any knowledge of our current position in society before we begin debate on how various social goods are to be allocated. Both intuition pumps are designed to eliminate illicit information that might otherwise skew (or justify) the criteria for the distribution of important goods in favour of those who already satisfy the requisite desiderata for the distribution of those goods. See, eg, Pogge (supra) at 206 ('The categorical imperative is . . . a general procedure for constructing morally relevant thought experiments. . . [T]he categorical imperative amplifies my conscience by transforming the decision from one of marginal significance into one concerning the world at large, and also isolates my conscience by screening out personal considerations that might affect my choice of maxims but are irrelevant to my decisions about how through legislation to specify a realm of ends.')

John Rawls further claims that the categorical imperative — like the veil of ignorance — is not an 'algorithm intended to yield, more or less mechanically, a correct judgment.' Rawls *Lectures* (supra) at 166. Nor, he continues, is it correct to describe the categorical imperative as a set of rules to catch out liars, cynics and cheats. 'There are' Rawls says, 'no such rules.' Ibid. Kant, however, would seem to believe that his categorical imperative possesses such teeth — and generates such rules — when he argues that if we were to try to universalize a false promise, the universality of such a law 'would make promising, and the very purpose of promising, itself impossible: since no one would believe they were being promised anything, but would laugh at utterances of this kind as empty shams.' Kant *Groundwork* (supra) at 39. First, the procedure produces a universal law — promise-keeping — that secures the status of a law of nature. Second, given that promise-keeping comes to possess, in the adjusted social world associated with the maxim, the status of a universal law, the burden shifts to the false promiser to offer a maxim that justifies her action while still safeguarding the social practice of promising.

A syllogism may clarify how the categorical imperative operates and the extent to which it determines whether a particular act accords human beings generally the requisite level of dignity.

1. One must always respect humanity as an end in itself in one's own person as well as in the person of another.
2. The act of suicide always fails to respect humanity in one's own person as an end in itself.
3. Therefore, one must never commit suicide.

Wood 'Humanity as an End' (supra) at 181. As Wood notes, however, because step 2 — the 'intermediate premise' or minor premise — is logically independent of step 1 — the second formulation of the categorical imperative or the major premise — one may raise 'legitimate questions about which acts express respect or disrespect for humanity.' Ibid at 181. Thus, although the categorical imperative does effectively screen out many personal considerations in the process of ethical decision-making, it does not distinguish, unequivocally, all acts that respect humanity from all acts that disrespect humanity. (It would be wrong, however, to claim, as some do, that the categorical imperative always begs the question as to whether an act constitutes an act that respects humanity.)

with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.'<sup>25</sup> This primarily negative obligation not to treat another merely as a means and to recognize in that other the ability to act as an autonomous moral agent underwrites a conception of dignity as a formal entitlement to equal concern and to equal respect.<sup>26</sup> From this conception of dignity as an entitlement to equal concern and to equal respect, the Constitutional Court has constructed two different, though not entirely distinct, tests in terms of FC s 9 (the right to equality): (1) a right to equal treatment which ensures (a) that the law does not irrationally differentiate between classes of persons and (b) that the law does not reflect the 'naked preferences' of government; and (2) a right to equal treatment that guarantees that individuals are not subject to unfair discrimination on the basis of largely ascriptive characteristics.<sup>27</sup> Of this demand for equal concern and equal respect, Justice Ackermann writes:

[A]t the heart of the prohibition of unfair discrimination lies the recognition that the purpose of our new constitutional and democratic order is the establishment of a

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- 21 See C Lamore *Patterns of Moral Complexity* (1986) (Argues that deontological, utilitarian and communitarian claims describe different dimensions of moral obligation, and that no one dimension can be made wholly subordinate to another.) For decidedly more deontological, but still quite plastic views on the sources of obligation, see B Williams *Ethics and the Limits of Philosophy* (1985); A Sen *Collective Choice and Social Welfare* (1979).
- 22 O Schachter 'Human Dignity as a Normative Concept' (1983) 77 *American J of Int L* 848, 849 (Emphasis added).
- 23 For more on the relationship between dignity and the prohibitions of slavery, servitude and forced labour, see § 36.4(e) and S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 64.
- 24 For more on the relationship between dignity and sentencing, see § 36.4(c)(iii) infra, and D Van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49.
- 25 See I Kant *Metaphysics of Morals* (1797) (trans M Gregor 1991) 56, 231, 395 ('*Metaphysics of Morals*') (Kant reiterates the same principle as: (1) 'Every action is right which by itself or by its maxim enables the freedom of each individual will to co-exist with the freedom of everyone else in accordance with the universal law'; and (2) 'Act according to the maxim of ends which it can be a universal law for everyone to have.')
- 26 Kant offers a more accessible, and less rarefied, account of dignity as equal concern and equal respect in the *Metaphysics of Morals*, when he writes:
- [A] human being regarded as a person . . . is exalted above any price; for as a person . . . he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in itself, that is, he possesses a *dignity* (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of *equality* with them.
- Ibid at 557 (emphasis added).
- 27 See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) ('*Hugo*') at para 41 ('[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 respect* regardless of their membership in particular groups.' (Emphasis added).)

society in which all human beings will be accorded equal dignity and respect regardless of their membership in particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.<sup>28</sup>

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### (c) Self-actualization (Dignity 3)

Another formulation of the categorical imperative shapes a third strand of the Court's dignity jurisprudence. Kant writes: 'Act only on the maxim through which you can at the same time will that it should become a universal law.'<sup>29</sup> Here, the term that warrants the closest scrutiny is 'will'. For Kant, the hallmark of humanity is its ability to 'will' or to shape its ends through 'reason'. But when Kant writes that our humanity consists, at least in part, in our power to rationally set and will an end, he is not speaking solely of an individual's capacity to adopt an end for purely moral reasons. While Kant certainly contends that the defining feature of humanity is our capacity to overcome our instincts and that we are only truly free when we are moral, he maintains that we define ourselves — and our humanity — through the rational choice of *all* of our ends and not just those that are explicitly moral. This broader capacity to create meaning — to 'will' value into the world — gives rise to the modern political pre-occupation with 'self-actualization'.<sup>30</sup> An individual's capacity to create meaning generates an entitlement to respect for the unique set of ends that the individual pursues. In *Ferreira v Levin*, Justice Ackermann writes:

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. 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.<sup>31</sup>

Dignity, properly understood, secures the space for self-actualisation.<sup>32</sup> That said,

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28 LWH Ackermann 'Equality under the 1996 South African Constitution' in Rüdiger Wolfrum (eds) *Gleichheit und Nichtdiskriminierung im Nationalen und Internationalen Menschenrechtsschutz* (2003) 105. See also *Law v Canada (Minister of Employment and Immigration)* (1999) 170 DLR 4th 1 (SCC) at para 51 ('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.')

29 Kant *Groundwork* (supra) at 37-38 ('Act as if the maxim of your action were to become through your will a universal law of nature.')

30 See, eg, C Korsgaard *Creating the Kingdom of Ends* (1996) 106-131.

31 *Ferreira v Levin* 1996 (1) SA 984 (CC), 1996 (4) BCLR 1 (CC) ('*Ferreira*') at para 49.

however, dignity *qua* self-actualisation describes *only* a political, and not a metaphysical, state.<sup>33</sup>

#### (d) Self-governance (Dignity 4)

A third formulation of the categorical imperative helps us to identify a fourth dimension of dignity.<sup>34</sup> An essential feature of the constitutional politics that issues from the categorical imperative is the recognition of the ability of (almost) all human beings — through their capacity to reason — to legislate for themselves. Indeed, as we have just noted, it is our capacity for self-governance, and the fact that we are not simply slaves to our passions, that distinguishes man from beast. (Whether Kant is correct to make reason the *sine qua non* of humanity is another matter.<sup>35</sup>) Our capacity for self-governance — the capacity of (almost) all human

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32 The majority in *Ferreira* rejected Justice Ackermann's view that IC s 11(1) and FC s 12(1) contain a robust, self-standing freedom right. *Ibid* at paras 170–185 (Chaskalson P). The Constitutional Court accepted, subsequently, Ackermann J's thesis that dignity (FC s 10) is meant to secure the space for self-actualisation (autonomy). However, this characterization of self-actualisation turns not on a commitment to political participation (*Dignity 4*) or to social entitlements (*Dignity 5*) — also known as 'positive liberty' or 'freedom to' — but primarily on a commitment to limiting state power — also known as negative liberty or 'freedom from'. The Court's conception of dignity *qua* freedom (autonomy) is elaborated in a series of early equality cases. See, eg, *Hugo* (supra) at para 41 ('[D]ignity is at the heart of individual rights in a free and democratic society'); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) ('*Prinsloo*'); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('*NCGLE I*'). See also N Haysom 'Dignity' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 131-132.

33 See S Woolman 'The Selfless Constitution: Flourishing and Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law* - (forthcoming) (Self-actualization is not contingent upon the ability to will freely one's ends. Such a conception of freedom is a form of folk psychology. Rather, freedom consists primarily of having the capacity to participate in ways of being in the world that already give one's life the better part of its meaning); Wood 'Ethics' (supra) at 176 ('I doubt that Kant's extravagant metaphysics is the best we can do with this problem. The basic point, however, is that Kantian ethics is no more hostage to the free will problem than any other ethical theory would be that regards us as reasonable and self-governing beings'); D Cornell 'A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity and Reconciliation' (2004) 19 *SA Public Law* 666, 667 ('[I]f we give Kantian dignity its broadest meaning, it is not associated with our actual freedom but with the postulation of ourselves as beings who not only can, but must, confront . . . ethical decisions, and in making those decisions . . . give value to our world.') For Kant — and no doubt some of the justices on the Constitutional Court — freedom does describe a metaphysical state. For Kant, this freedom consists of action in accordance with a maxim that satisfies the requirements of the categorical imperative. See I Kant *Religion within the Limits of Reason Alone* (trans TM Greene & HH Hudson, 1960) 24 ('Freedom of the will is of a wholly unique nature in that the incentive can determine the will only in so far as the individual has incorporated it into his maxim (has made it into the general rule in accordance with which he conducts himself).')

34 See Rawls *Lectures* (supra) at 183 ('In the third formulation (that of autonomy) we come back again to the agent's point of view, but this time not as someone subject to moral requirements, but as someone who is, as it were, legislating universal law: here the [categorical imperative] procedure is seen as that procedure the adherence to which with a full grasp of its meaning enables us to regard ourselves as making law for a possible realm of ends.')

35 See B Williams 'The Idea of Equality' in P Laslett & WG Runciman (eds) *Philosophy, Politics and Society* (1962) 111. Williams argues that the entitlement to equal treatment flows not, as in Kant, from the ability to reason, but primarily from the recognition that others have narratives (like our own) that shape their lives, that the pursuit of the ends in such narratives give life its meaning and that equal treatment requires that a person possess the material means necessary to make the pursuit of such ends genuinely possible. Kant was, however, uncompromising in his view that both reason and freedom are pre-conditions for a meaningful existence. On Kant's account:

beings to reason their way to the ends that give their lives meaning — is largely what makes democracy the only acceptable secular form of political organization. For if we are capable of shaping our own ends as individuals, equal political treatment demands that we be able to shape them as citizens in a democracy.<sup>36</sup> At a minimum, it means we must be able to participate in the collective decision-making processes that determine the ends of our community. As Justice Sachs notes in *August v Electoral Commission*:

The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of *dignity* and of personhood. Quite literally, it says that everybody counts.<sup>37</sup>

This commitment to dignity *qua* self-governance is rather straightforward in the franchise cases.<sup>38</sup> However, dignity *qua* self-governance is, in fact, where the Constitutional Court falters most conspicuously. Dignity *qua* self-governance ought to promote the Court's commitment to representation reinforcing processes — most notably where our democratic processes cannot be profitably exploited by vulnerable minorities and out-groups. But *Prince, Jordan, Volks* and *De Reuck* sound cautionary notes about the extent to which the Court will extend itself on behalf of non-traditional associations, vocations or professions.<sup>39</sup> In these cases,

the Court reinforces a traditional morality supported by a majority of South Africans and effectively undermines the efforts of these out-groups to determine the ends of their own lives.<sup>40</sup>

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[I]n this world of ours there is only one kind of being with a causality that is teleological, that is, directed to purposes, but is yet so constituted that the law in terms of which these beings must determine their purposes is presented as unconditioned and independent of conditions in nature . . . . That being is man . . . considered as a noumenon. Man is the only natural being in whom we . . . recognize, as part of his constitution, a supersensible ability (freedom). . . . [The principle of morality — the categorical imperative] is the only possible thing in the order of purposes that is absolutely unconditioned as concerns nature, and hence alone qualifies man, the subject of morality, to be the final purpose of creation.

See I Kant *The Critique of Judgment* (trans JC Meredith, 1952) § 84. See also Rawls *Lectures* (supra) at 159. In sum, only man has the capacity to determine the laws of nature, to legislate them for himself (and others) and thus to be free in a way (of mere causality and desire) that no other entity (that we know of) is. One could subscribe to this vision of things without endorsing its religious dimensions. One could — indeed ought to — subscribe to this vision without the metaphysical baggage of an unconditioned noumenal self. One ought, however, to keep in mind that, for Kant, only by fashioning 'in ourselves a firm good will, and in shaping our world accordingly' would we qualify as the 'final purpose of creation.' Rawls *Lectures* (supra) at 162. According to Kant, absent such a good will — and a world shaped accordingly — there can be no justice, no dignity, and thus, as we noted at the outset, no reason for humanity to continue to exist.

36 For what such equal treatment in a democracy requires, see T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10.

37 See *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 17 (Emphasis added).

38 See *Minister of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC); *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC).

## (e) Collective responsibility for the material conditions for agency (Dignity 5)

This failure to accord such out-groups the requisite level of equal respect is thrown into somewhat sharper relief by the fifth and final strand of the Court's dignity jurisprudence. Here the emphasis is not *solely* on the individual ends in our

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realm of ends. The Court also contemplates a connotation of dignity that attaches to the realm *as a whole*.<sup>41</sup>

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39 See *Prince v Law Society* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) ('*Prince*'); *S v Jordan & Others (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) ('*Jordan*'); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC); *Volks v Robinson* 2005 (5) BCLR 466 (CC) ('*Volks*'). Sachs J, in dissent in both *Prince* and *Volks*, and as the author of *Fourie*, has begun to adumbrate a jurisprudence that values the meaning of non-dominant associations to their participants, but does not threaten the general principles to which the Final Constitution commits us. See *Prince* (supra) at para 149 ('[W]here there are [religious] practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the State to walk the extra mile' and to find adequate means — perhaps a carefully constructed exemption — of accommodating the practice at issue.) See also *Volks* (supra) at paras 154 and 156 (Sachs J rejects the majority's finding that the appellant, 'having chosen cohabitation rather than marriage, . . . must bear the consequences' and thus could not avail herself of the benefits of the Maintenance of Surviving Spouses Act. He contends that: '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 . . . penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them'); *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project v Minister of Home Affairs* CCT 60/04; CCT 10/04 (unreported decision of 1 December 2005) ('*Fourie*').

40 To be clear, the Constitutional Court never dismisses cavalierly the interests of a vulnerable class of persons. The point is, rather, that traditional mores inform — sometimes more and sometimes less — explicitly the reasoning of the Court. So, for example, the Court in *Jordan* concludes that the criminalization of prostitution could not be said to impair the dignity of the prostitute because 'the diminution arose from the character of prostitution itself.' *Jordan* (supra) at para 74. And since prostitutes choose this ignominious fate, the Court continues, they have no one to blame for the stigma that attaches to their profession but themselves. *Ibid* at paras 16 -17 ('If the public sees the recipient of reward as being 'more to blame' than the 'client', and a conviction carries a greater stigma on the 'prostitute' for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in.') Not only does the Court decline to take responsibility for the manner in which it reinforces such prejudice by upholding the law, it adamantly refuses to acknowledge the conditions of duress under which many sex workers operate. *Ibid* at para 16. ('It was accepted that they have a choice . . . that is limited or 'constrained'. Once it is accepted that . . . by engaging in commercial sex work prostitutes *knowingly* attract the stigma associated with prostitution, it can hardly be contended that female prostitutes are discriminated against.') Justice Sachs provides the putative grounds for upholding the legal sanctions for traditional taboos in *NCGLE I*:

There are very few democratic societies, if any, which do not penalize persons for engaging in inter-generational, intra-familial, and cross-species sex, whether in public or in private . . . The privacy interest is overcome because of the perceived harm.

*NCGLE I* (supra) at para 118. Aside from the fact that most societies, historically, have not only permitted but promoted inter-generational sex, neither the invocation of tradition nor the pressure of the status quo counts as an argument. With respect, it is just this sort of non-argument about 'perceived harm', that makes it so difficult to secure judicial solicitude for aberrant practices. Justice Sachs uses 'democratic societies' as a rhetorical strategy to suggest that the

In a series of unfair discrimination and socio-economic rights cases, the Constitutional Court has made it clear that our commitment to dignity does not flow entirely from the inalienable rights of individuals. Whether it has engaged the stigma associated with HIV/AIDS, the urgent need for shelter, the entitlement of all to adequate food and water or the desperation associated with summary evictions, the Constitutional Court has, over the past several years, repeatedly emphasized the fact that

It is not only the *dignity* of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society *as a whole* is demeaned when state action intensifies rather than mitigates their marginalisation.<sup>42</sup>

Dignity, on this account, is not simply a constellation of duties owed by the state to each subject, or a set of entitlements that can be claimed by each member of the polity. Dignity is that which binds us together as a community, and it occurs only under conditions of mutual recognition. Moreover, such mutual recognition is not merely formal. The Court in *Khosa* notes that the Final Constitution commits us to an understanding of dignity in which

wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.<sup>43</sup>

The Court's account of dignity, which has heretofore supported various conditions required for the meaningful exercise of individual moral agency, now appears to describe dignity as a collective good. The case law even features a number of

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Court shares the same set of values as the majority of South Africans. But it is an odd form of justification for a judge and a Court that prides itself on the protection it affords vulnerable groups and non-traditional associations. Indeed, the Court has recently rejected the contention that the trivial 'perceived harms' experienced by transient majorities are adequate grounds for imposing legal sanctions upon non-traditional associations. See, eg, *Fourie* (supra) at paras 60-61 (Sachs J) ('Equality . . . does not presuppose . . . suppression of difference . . . Equality . . . does not imply . . . homogenisation of behaviour . . . . [T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a majoritarian norm.')

41 See Kant *Groundwork* (supra) at 51:

I understand by a 'kingdom' a systematic union of different rational beings under common laws. Now since laws determine ends as regards their universal validity, we shall be able — if we abstract from the personal differences between rational beings, and also from the content of their private ends — to conceive of a whole of ends in systematic conjunction.

42 See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at para 18 (emphasis added).

43 *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) ('*Khosa*') at para 74. The Court's language echoes Rawls' description of a Kantian 'realm of ends' in which

everyone recognizes everyone else as not only honouring their obligation of justice and duties of virtue, but also, as it were, legislating law for their moral commonwealth. For all know of themselves and of the rest that they are reasonable and rational, and that this fact is mutually recognized.

disputes in which the dignity interests of the collective are said to trump the dignity interests of an individual.<sup>44</sup>

But with the exception of a few aperçu in the socio-economic rights cases, and an aside or two in a handful of other disputes, the Court rarely refers to our collective dignity.<sup>45</sup> The Court's circumspection, in this regard, suggests that it does not have in mind some neo-romantic conception of the political community.<sup>46</sup>

How then to comprehend dignity as a collective concern? What the Court wishes us to understand is that for dignity to be meaningful in South Africa, the political community *as a whole* must provide that basket of goods — including such primary goods as civil and political rights — which each member of the community requires in order to exercise some basic level of agency. This conception of dignity possesses several striking similarities to Amartya Sen's politics of capability.

For Sen, as for our Constitutional Court, the primary concern of the polity is not with wealth maximization. 'Wealth' as Aristotle wrote, 'is evidently not the good we are seeking; for it is merely useful and for the sake of something else.'<sup>47</sup> That something else, as Sen writes, is

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Rawls *Lectures* (supra) at 209. See also S Hoctor 'Dignity, Criminal Law and the Bill of Rights' (2004) 121 *SALJ* 265, 315 ('Dignity has a communitarian aspect: by requiring respect for others' claims to dignity, vindication of the human dignity of all is better assured, and a community of mutual co-operation and solidarity is fostered.')

44 In two High Court judgments, the general public's right to receive information (*Dignity 5*) trumped the rather attenuated privacy claims of individuals who asserted a right to withhold information (*Dignity 3*). See *S v Dube* 2000 (2) SA 583 (N); *MEC for Health, Mpumalanga v M-Net* 2002 (6) SA 714 (T). See also § 36.4(g) *infra*, for a further discussion of these two expression/privacy/dignity cases.

45 One exception is *S v Makwanyane*, where Justice Langa connects ubuntu with the dignity of individuals and the solidarity of the community:

[Ubuntu exists in] 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 a 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.

*Makwanyane* at paras 224-225 (Emphasis added).

46 The purpose of the realm of ends has nothing to do with the romantic conception of a volk who would use the institutions of the state to give effect to their preferred way of being in the world. 'For the Kantian', says Wood, 'a community of rational beings must be conceived from the ground up as the rational agreement of a plurality of distinct and equal persons who freely choose to unite their ends on terms that respect each one's autonomy. The crucial thing . . . is *not* to determine a single given collective end.' Wood 'Ethics' (supra) at 162-163 (Emphasis added). According to Wood, 'For Kant the clearest model of a realm of ends in ordinary human life is friendship, in which . . . friends unite their ends in a collective end in which their individual happinesses are swallowed up.' *Ibid* at 167. This reading does not mean that individuals subordinate their individual goals to the goals of the collective. Individual narratives still matter. Friends are a model for the realm of ends because genuine friends act out of a disinterested desire to see their friends flourish, and for no immediate benefit to themselves. Friends are always ends.

47 See Aristotle *Nicomachean Ethics* (trans D Ross 1980) Bk I, § 5, 7.

[t]he expansion of the 'capabilities' of persons to lead the kinds of lives they value — and have reason to value. . . . Having freedom to do the things one has reason to value is (1) significant in itself for the person's overall freedom, and (2) important in fostering the person's opportunity to have valuable outcomes. <sup>48</sup>

However, Sen's aims are not limited to fostering the agency of the individual. Individual agents should be understood both as ends-in-themselves and as the 'basic building blocks' of aggregate social development. The 'greater freedom' of

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individuals not only 'enhances the ability of people to help themselves and . . . to influence the world,' it is essential to the development of society as a whole. <sup>49</sup> For Sen, the link between individual capabilities and development is part of a virtuous circle. Enhancement of individual freedom — by both political and material means — leads to greater social development, which, in turn, further enhances the possibilities for individual capabilities and the freedom to lead the kinds of lives we have reason to value. <sup>50</sup>

This virtuous circle would appear to be what the Constitutional Court in *Khosa* has in mind when it ties the well-being of the worst off to the well-being of the wealthy. The enhancement of individual capabilities of the poorest members of our political community enhances the development of South Africa as a whole. Or put slightly differently, the greater the 'agency' of the least well-off members of our society, the greater the 'agency' of 'all' the members of our society. This gloss on *Khosa* emphasizes not the subjective sense of well-being that the well-off might experience by tying their well-being to that of the poor. Rather it emphasizes an increase in the objective sense of well-being that flows from the enhancement of the agency of each individual member of our society.

#### **(f) The relationship between the five definitions of dignity and the creation of a realm of ends**

We may be able to see, now, how dignity builds upon a simple premise, the refusal to turn away from suffering, and yields, ultimately, a realm of ends. The refusal to turn away marks the very beginning of our moral awareness — the first time we come to understand that others are not mere instruments for the realization of our desires, but beings who are ends in themselves. This moral awakening leads, almost ineluctably, to two further insights: (a) that others are entitled to the same degree of concern and respect that we demand for ourselves; and (b) that others are entitled to that equal respect and equal concern because they, like us, are possessed of faculties that enable them to pursue ends which give their lives meaning. <sup>51</sup> The ability to give our lives meaning and to determine the course by

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48 A Sen *Development as Freedom* (1999) 18('Development').

49 See *Development* (supra) at 18.

50 For a more detailed discussion of the relationship between our dignity jurisprudence and Sen's views, see § 36.5(a)(ii), 'Dignity and the politics of capability', infra.

51 In a recent lecture, Justice Laurie Ackermann offers a working definition of dignity that resonates with least four of the five definitions of dignity adumbrated in these pages:

which we give our lives meaning, leads to the recognition that we are able to govern our selves. At a minimum, this mutual recognition of our ability to govern our selves supports the formal political recognition that just as each one of us is entitled to govern our individual self, so too are we entitled to legislate on behalf of the broader community of which we are a part. This mutual recognition of one another as rational beings capable of ordering the ends both of our own lives and of the larger community underwrites the final insight: that we not only live in a realm of ends, but that if such a realm is to have real meaning, we must be willing to order our community in a manner that enables each individual to realize their status as an end. It is simply not enough to (a) not turn away from suffering, (b) end discrimination and (c) grant all citizens the franchise. Once we recognize others as ends we must be committed — at some level — to the provision of those material means necessary to live as ends. To refuse them such means might render meaningless the more formal guarantees found in the Final Constitution. As the Court itself notes in *Grootboom*:

The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of *human dignity*. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to *human dignity*. In short, I emphasise that human beings are required to be treated as human beings.<sup>52</sup>

Two riders must attach to this account of dignity. First, the notion that the five definitions of dignity can be viewed as building blocks out of which we can construct a realm of ends is *my* speculative exercise. Certainly, the Constitutional Court has never said as much. However, that Kant and Rawls, amongst others, have offered similar philosophical constructs gives this reconstruction of the Court's jurisprudence more than a patina of plausibility. Second, that the five definitions of dignity can be viewed as building blocks out of which we can construct a reasonably coherent theory of dignity does not mean that these five definitions will always cohere with one another. As we shall see, the definitions

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I would define Human dignity as follows: It is a concept comprising all those aspects of the human personality that arise from human intellectual and moral capacity; which in turn separate humans from the impersonality of nature, enables them to exercise their own judgment, to have self-awareness and a sense of self-worth, to exercise self-determination, to shape themselves and nature, to develop their personalities and to strive for self-fulfilment in their lives. I have modelled this on the classic German concept propounded by Prof Günter Dürig in the 1950's: 'Jeder Mensch ist Mensch kraft seines Geistes, der ihn abhet von der unpersönlichen Natur und ihn aus eigener Entscheidung dazu befähigt, seiner selbst bewußt zu werden, sich selbst zu bestimmen und sich und die Umwelt zu gestalten.' I have somewhat broadened his exposition by introducing the desire for self-fulfilment, in preference to the word 'happiness' . . . I have also added the individual's own sense of self-worth as an aspect of human personality; for when a person is dealt with in a demeaning way, . . . the observer can actually experience the impairment of the victim's sense of self-worth. Criticism of another provides a subtle example. No matter how justified, objectively, the content of criticism might be, if it is delivered in an insulting or demeaning way, it unjustly impairs the victim's legitimate *sense* of self-worth as a human being.

See LWH Ackermann 'The Significance of Human Dignity for Constitutional Jurisprudence' (Lecture, Stellenbosch Law Faculty, 15 August 2005)(Manuscript on file with author) § 4 quoting G Dürig 'Der Grundrechtssatz von der Menschenwürde' (1956) 81 *Archiv für öffentliches Recht* 117, 125 ('All humans are human by virtue of their intellectual capacity ("kraft seine Geistes") which serves to separate them from the impersonality of nature and enables them to exercise their own judgment, to have self-awareness, to exercise self-determination and to shape themselves and nature.' (Ackermann's translation).)

52 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)(*'Grootboom'*) at para 83 (Emphasis added).

sometimes pull in opposite directions and thereby generate significant doctrinal tension. I shall, in § 36.4, indicate where such conflicts occur and suggest, where possible, how such conflicts might be resolved.

### 36.3 Uses of dignity

The word 'dignity' is sprinkled about the text of the Final Constitution. It is a founding value: FC s 1(a). It acts as a cornerstone of both democracy and the Bill of Rights: FC s 7(1). It informs both our interpretation of the ambit of the specific substantive provisions of the Bill of Rights — FC s 39(1) — and our analysis of the justification of any limitation of a right or freedom — FC s 36. It governs the behaviour of our courts, other tribunals and state institutions supporting constitutional democracy: FC ss 165, 181, 196. It is, perhaps most importantly, the second substantive right identified in the Bill of Rights: FC s 10. That dignity operates as a first order rule, a second order rule, a correlative right, a value and a *grundnorm* — and sometimes all in a single case — is confirmed by Justice O'Regan's oft quoted dictum in *Dawood*:

Human . . . dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. . . . 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.<sup>53</sup>

So, just as dignity denotes at least five different, though often related, kinds of obligation, so too does dignity operate within our legal system in four sundry ways.

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#### (a) Dignity as a first order rule

Dignity is rarely a first order rule. That is, the right to dignity *alone* is rarely dispositive of a constitutional matter. The first rule of South African dignity jurisprudence is that where a court can identify the infringement of a more

specific right, FC s 10 will (ostensibly) not add to the enquiry.<sup>55</sup> That said, dignity has operated as a first order rule in a number of intimate association matters because the Constitutional Court could identify no other specific right that would protect the interests of the married couples or life partners in question.<sup>56</sup> High Courts have extended the protection that FC s 10 affords intimate associations beyond the

53 *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Dawood*') at para 35 (Emphasis added).

54 It is worth noting that even judges comfortable with the common law and quite uncomfortable with constitutional development of that body of law still recognize that the protection afforded individuals under FC s 10 — and elsewhere in the Final Constitution — is substantially broader than the notion of *dignitas* that animates the *actio injuriarum*. See, eg, *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) ('*Dendy*'). In *Dendy*, the High Court found no need to develop the common law in light of FC s 10 (first order rule) or FC s 39(2) (second order rule or value). The *Dendy* court simply noted, in passing, that in these circumstances dignity functions as a residual right (correlative right). *Ibid* at para 24.

confines of marriage or life partnerships to relationships between grandparents and grandchildren.<sup>57</sup> High Courts have also deployed dignity as an operational rule when no other right would protect the linguistic interests of a party before the court.<sup>58</sup>

### **(b) Dignity as second order rule**

Dignity often operates as a second order rule. That is, dignity determines how a first order rule disposes of a given matter.<sup>59</sup>

Dignity, as a second order rule, features most prominently in equality (FC s 9) cases.<sup>60</sup> It does so in two ways. First, an impairment of human dignity may

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determine whether mere differentiation amounts to actual discrimination. Second, when attempting to determine whether discrimination amounts to unfair discrimination, the Constitutional Court will ask to what extent the law or the conduct in question impairs the dignity of the complainant and whether the law or

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55 *Dawood* (supra) at para 35. What happens, then, when the Court finds that law or conduct has violated both FC s 10 and some other right in Chapter 2? As we note in the section on dignity as a correlative right, when dignity and another right are both violated, the content of that other right — at least in so far as the particular challenge is concerned — would appear to be a particular manifestation of the right to dignity at the same time as it is informed by the value of dignity.

56 *Ibid.* See also *Booyesen v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC) ('*Booyesen*'); *Daniels v Campbell* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC) (Moseneke J, in dissent, found that the statutory provisions and common law rules in question constituted an affront to the dignity of all persons married under Muslim law and, consistent with the finding in *Dawood*, undermined their capacity to enjoy the full benefits of their intimate association.)

57 See *Petersen v Maintenance Officer, Simon's Town* 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C) (High Court found that the common law's differentiation between children born in wedlock and children born out of wedlock, which only placed duty of support on paternal grandparents for children born in wedlock, violated the right to dignity, the right to equality and the best interests of the child.)

58 See *S v Pienaar* 2000 (7) BCLR 800 (NC) at para 10 (Failure to acknowledge difference in language, and to ignore the speaker, may violate speaker's right to dignity); *Advance Mining Hydraulics v Botes NO* 2000 (1) SA 815 (T), 2000 (2) BCLR 119, 127 (T) (Right to dignity requires, at the very least, that 'persons be treated as recipients of rights and not as objects subjected to statutory mechanisms without a say in the matter.' The presiding officer's failure to warn an examinee — in a s 415 inquiry — of his right to legal representation before compelling him to answer questions he did not understand constituted a 'blatant affront' to the examinee's dignity.)

59 In this regard — the disposal of specific disputes — dignity as a second order rule differs from dignity as a value. As we shall see in our discussion of the Court's equality cases, the effect of law or conduct on the dignity of the complainant determines, in part, whether differentiation counts as discrimination and whether discrimination amounts to unfair discrimination. See § 36.4(a) *infra*. The repeated invocation of the *Harksen* test by the Court in equality cases, and the *Harksen* test's appraisal of the impairment of the complainant's dignity as a second step in its calculus of unfair discrimination turns dignity into a second order rule. Similarly, where a punishment is so disproportionate to the crime as to turn a convict into a mere signal in a larger system of social control, the Court will find that the dignity of the convict is impaired. This impairment of the convict's dignity may then support a finding that the sentence imposed on the prisoner constitutes cruel, inhuman or degrading punishment. Again, the rule that disproportional punishment impairs the dignity of a person determines, in part, whether the court will find that a violation of FC s 12 has occurred.

60 See § 36.4(a) *infra*.

the conduct in question re-inscribes systemic patterns of disadvantage for — and thus impairs the dignity of — a specific class of persons.<sup>61</sup> Similarly, dignity, as a second order rule, determines: (a) whether punishments are disproportionate (FC s 12);<sup>62</sup> (b) whether the state has a duty of care with respect to the physical security of its citizens (FC ss 11 and 12);<sup>63</sup> (c) the extent of the state's interest in foetal life (FC s 11);<sup>64</sup> (d) the parameters of contractual autonomy (FC s 22);<sup>65</sup> (e) the circumstances under which an individual may legitimately claim that his or her home is an impregnable castle (FC s 14);<sup>66</sup> (f) when the conditions of existence amount to slavery (FC s 13);<sup>67</sup> and (g) when expressive conduct constitutes hate speech (FC s 16).<sup>68</sup>

### **(c) Dignity as a correlative right**

The Constitutional Court often deploys rights simultaneously in the service of its arguments. It likes to describe rights as interdependent and symbiotic. This talk of 'interdependence' is especially evident in challenges to law or to conduct grounded in the right to dignity. However, for my immediate purpose — to distinguish dignity as a correlative right from dignity as a first order rule, dignity as a second order rule or dignity as a value — I must show that dignity functions, in some respects, independently of other rights in constitutional challenges that rely upon multiple rights.

*S v Jordan* provides a paradigmatic example of dignity deployed as a correlative right. Justices O'Regan and Sachs note that although the rights to dignity, privacy, and freedom of the person intersect and overlap, the challenges brought in terms of each of these rights cannot be consolidated into a single challenge grounded in some 'unenumerated' right to autonomy. Each challenge based upon a specific right must, they say, be considered individually.<sup>69</sup>

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61 See *Moseneke & Others v The Master* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at paras 22 and 23 (Provision of Black Administration Act providing that Master of High Court had no power to handle intestate estates of black South Africans held to be both an unjustifiable impairment of FC s 9 — Equality — because it 'assails the dignity of those concerned' and an unjustifiable 'limitation of the right to dignity in [FC] s 10.')

62 See § 36.4(c)(iii) *infra*.

63 See § 36.4(c)(i) *infra*.

64 See § 36.4(c)(ii) *infra*.

65 See § 36.4(d) *infra*.

66 See § 36.4(g) *infra*.

67 See § 36.4(e) *infra*.

68 See § 36.4(h)(ii) *infra*.

69 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at paras 52-53.

The Court has adopted this multiple challenge approach in a wide variety of cases. In *Bhe*, customary law rules of primogeniture were found to violate both

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the right to equality and the right to dignity.<sup>70</sup> The *NCGLEI* Court, in finding that the common law criminalization of sodomy constituted a violation of the right to dignity, as well as a violation of the right to equality and a violation of the right to privacy, wrote '[i]t is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society'<sup>71</sup> and that 'the rights of equality and dignity are closely related, as are the rights of dignity and privacy.'<sup>72</sup>

The language in *NCGLE I* echoes Justice Ackermann's assertion in *Ferreira v Levin* that there exists a *strong correlation* between the right to dignity and individual freedom.<sup>73</sup> Dignity is not, however, just a correlate for negative liberty. It also buttresses the right to equality. As the Court writes in *Prinsloo v Van der Linde*: 'In our view unfair discrimination [the linchpin of equality analysis] . . . principally means treating people differently in a way which impairs their fundamental *dignity* as human beings, who are inherently equal in *dignity*.'<sup>74</sup> And if the correlation between the right to dignity, the right to equality and various freedoms in Chapter 2 is still not clear, the Court, in *President of the Republic of South Africa v Hugo* states:

[D]ignity is at the heart of *individual rights* in a free and democratic society. . .  
[E]quality . . . means nothing if it does not represent a commitment to each person's equal worth as a human being, regardless of their differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens.<sup>75</sup>

#### (d) Dignity as a value or a grundnorm

Although dignity clearly operates as a first order rule, a second order rule and as a correlative right, it is invoked most often as a value. Part of the reason for this preference for deploying dignity as a value flows from the courts' stated preference for 'developing' the law rather than making it.<sup>76</sup> The result of this preference,

70 *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('*Bhe*')

71 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('*NCGLE I*') at para 28.

72 *Ibid* at para 30.

73 *Ferreira v Levin* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 49.

74 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 31 (Emphasis added).

75 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) ('*Hugo*') at para 41 citing *Egan v Canada* (1995) 29 CRR (2d) 79, 104-5 (Emphasis added). For further analysis of the relationship between equality and dignity, see C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35.

76 See, eg, *Advance Mining Hydraulics (Pty) Ltd & Others v Botes & Others* 2000 (1) SA 815 (T), 2000 (2) BCLR 119 (T) (High Court holds that it is unnecessary to decide whether proceedings at issue violated the right to dignity when it could be decided by reference to FC s 39(2)'s injunction to

however, is a certain lack of precision. For example, in *S v Williams*, the Court writes that:

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The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that '... even the vilest criminal remains a human being possessed of common human dignity.'<sup>77</sup>

Dignity, in the previous paragraph, appears to operate as a value. In fact, juvenile whipping, in *Williams*, was challenged in terms of the right to equality, the right to dignity and the right to be free from cruel, inhuman and degrading treatment. The *Williams* Court held that juvenile whipping is a violation of the right to dignity (IC s 10) and the right to be free from cruel, inhuman and degrading treatment (IC 11(2)).

Whatever the reason for this particular instance of analytical confusion, as a matter of doctrine, the Constitutional Court is on record as having little time for the putative collapse of the rule/value distinction.<sup>78</sup> In *Minister of Home Affairs v National Institute for Crime Prevention*, Chaskalson CJ writes:

The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.<sup>79</sup>

Values are one thing, the *NICRO* Court appears to be saying, rules another. While it is certainly true that the fundamental values articulated in the Final Constitution will shape the rules expressed therein, and that the rules will have a reciprocal effect with respect to our understanding of those fundamental values, there remains a distinction with a difference. Rights give rise to rules and to enforceable claims. Values do not.

And so it is with dignity. FC s 10 — as a first order rule and as a correlative right — gives rise to enforceable claims. Dignity, where it appears as a value, does not.

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interpret all law in light of the spirit, purport and objects of the Bill of Rights — namely the creation of an open and democratic society based upon human dignity, equality and freedom — as well as the Final Constitution's founding provisions in FC s 1.)

77 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 77.

78 But see C Roederer 'Post-matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law' (2003) 19 *SAJHR* 57 (Argues, incorrectly, that the Final Constitution — in particular various operational provisions in Chapter 2 such as FC s 8 and FC s 39 — makes the distinction between rules and values unimportant for the purposes of constitutional interpretation.) For a critique of this position, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, Appendix.

79 *Minister of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) ('*NICRO*') at para 21.

The first reason that dignity is invoked more often as a value than as a rule is that FC s 39 states that the various substantive provisions in the Bill of Rights, and the Bill of Rights as a whole, must be interpreted so as to 'promote the values that underlie an open and democratic society based on *human dignity*, equality and freedom.' The second reason is that when a law is found to have infringed a

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fundamental right, the question raised, FC s 36 tells us, is whether the limitation in question 'is reasonable and justifiable in an open and democratic society based on *human dignity*, equality and freedom.' The third reason is that the ubiquity of dignity has led the Court to adhere to a relatively restrictive rule regarding the use of dignity as a first order rule: where a court can identify the infringement of a more specific right, FC s 10 should not be added to the enquiry. Because some rights are understood, immediately, to be expressions of the commitment to dignity — say, the prohibitions on torture (FC s 12), slavery, servitude or forced labour (FC s 13) — and many other rights, once refracted through the value of dignity, become expressions of the more basic (non-justiciable) commitment to dignity — say the right to equality and the right not to be subject to cruel, inhuman or degrading punishment — the need for dignity to function as a rule that disposes of cases directly is less pronounced than it might otherwise be.

In the first class of 'dignity as value' cases, dignity guides our interpretation of the right and, in so doing, shapes the ambit of a right. In *Coetzee v Comitis*, the Cape High Court finds that the restraint of trade provision at issue 'strips the player of his human dignity' and therefore constitutes an unjustifiable limitation of his freedom, under FC s 22, of trade, occupation and profession.<sup>80</sup> In *Khosa v Minister of Social Development*, the Constitutional Court's conclusion that 'the exclusion of permanent residents in need . . . [from] social-security programmes' has 'a serious impact on [their] *dignity*' supports a finding that the Social Assistance Act violates both the right to equality and the right to social security of permanent residents.<sup>81</sup>

In the second class of 'dignity as value' cases, dignity is used to justify a limitation on a right. In *Khumalo v Holomisa*, the Constitutional Court twins the privacy and the dignity rights that ground the interest in a good reputation to turn back a freedom of expression challenge to the constitutionality of the law of defamation.<sup>82</sup> In *De Reuck*, the Constitutional Court finds that the state's interest in protecting the dignity of all children justifies the limitation of the freedom of expression that the Films and Publications Act imposes upon the producers and the possessors of child pornography.<sup>83</sup> In *Christian Education*, the mutually reinforcing rights of religion and culture said to sanction corporal punishment in private schools were deemed subordinate to a constellation of rights that included dignity, equality, and freedom and security of the person.<sup>84</sup>

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80 2001 (1) SA 1254 (C), 2001 (4) BCLR 323 (C).

81 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) ('*Khosa*') at para 76 (Emphasis added).

82 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

83 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) ('*De Reuck*') at paras 62-63.

In the third class of 'dignity as value' cases, those cases in which the Bill of Rights does not apply directly, the Court will often speak of dignity as a value that informs the development of the common law or the interpretation of a statute. In *Carmichele v Minister of Safety and Security*, the Constitutional Court found that the value of dignity, as well as the values that animate freedom and security of the

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person, required that the duty of care imposed on the state in delictual actions be expanded so as to ensure that the state did not permit known and dangerous felons to imperil the lives of its citizens.<sup>85</sup> Similarly, in *NK v Minister of Safety and Security*, the Constitutional Court found that that these same values required a significant alteration in the common law understanding of vicarious liability and ensured that the state remained responsible for police officers, acting under the colour of law, who abused their authority and violated the physical integrity of the very people they are duty bound to protect.<sup>86</sup> In *Metrorail*, the Constitutional Court interpreted the Legal Succession of the South African Transport Act<sup>87</sup> in light of the values that animate the rights to dignity, life and freedom and security of the person and found that the Act, properly construed, required that the state actors responsible for rail travel take affirmative steps to ensure the safety of their commuters.<sup>88</sup>

## 36.4 Dignity's relationship to substantive provisions in the bill of rights

Dignity's presence — as a first order rule, a second order rule, a correlative right, a value and a grundnorm — in our jurisprudence ensures that dignity determines the extension of many of the substantive rights in Chapter 2. However, dignity's ubiquity guarantees that these same substantive rights will shape our understanding of dignity. The manner and the circumstances in which substantive rights recast our understanding of dignity may vary quite markedly: the relationship between dignity and the freedom of trade, occupation and profession will differ from the relationship between dignity and various socio-economic rights. Despite such differences, the reciprocal effect of dignity and various substantive provisions on one another promises that, however dignity is construed in a given matter, its meaning will never stray far from our core concern with the treatment of individuals as ends-in-themselves.

### (a) Equality<sup>89</sup>

Dignity is the linchpin for equality analysis under FC s 9. Indeed, whether unfair discrimination is deemed to have occurred in terms of FC ss 9(3) s 9(4) and 9(5) will

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84 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) at para 51.

85 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) ('*Carmichele*').

86 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC), [2005] JOL 14864 (CC)(CCT 52/04) ('*NK*').

87 Act 9 of 1989.

88 *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) ('*Metrorail*').

often turn on whether, and the extent to which, the complainant's dignity has been impaired. According to the *Harksen* Court, the question as to whether differentiation amounts to unfair discrimination has two parts:

Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then

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whether or not there is discrimination will depend upon whether, objectively, the ground is on attributes and characteristics which have the potential to impair the fundamental *human dignity* of persons as human beings or to affect them adversely in a comparably serious manner. If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of [FC s 9(3)].<sup>90</sup>

Dignity thus informs equality analysis at two stages. First, it enables us to distinguish mere differentiation from discrimination. Differentiation on a ground listed in FC s 9(3) amounts to discrimination because distinctions based upon such ascriptive characteristics are an affront to dignity (*Dignity 2*). Second, and more importantly perhaps, the extent to which a discriminatory measure impairs the complainant's dignity will determine whether discrimination found to be presumptively unfair on a listed ground in FC s 9(3), or merely discriminatory on an analogous ground, will *ultimately* be held to be unfair. As a general matter, the court asks three discrete questions before arriving at a final conclusion as to the unfairness of the discrimination:

- (1) Is the complainant a member of a class of persons subject to past patterns of systemic discrimination? (This question reflects the Court's well-founded belief that differential treatment of persons who are members of historically disadvantaged groups is more likely to impair their dignity (*Dignity 2*), and thus be unfair, than is the differential treatment of persons who are members of groups that have, historically, been relatively well-off.)<sup>91</sup>

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89 For more on FC s 9, see C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35. See also I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) Chapter 9.

90 *Harksen v Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) ('*Harksen*') at para 53. See also *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC).

91 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) ('*NCGLE II*'); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) ('*Satchwell I*'); *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC) ('*Satchwell II*'); *J & Another v Director General, Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC); *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC); *Minister of Home Affairs & Another v Fourie & Another*; *Lesbian and Gay Equality Project v Minister of Home Affairs* CCT 60/04; CCT 10/04 (unreported decision of 1 December 2005) ('*Fourie*'). See also *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1120 (SCA) (Where common law fails to recognize that same sex life partners owe same duty of care as married heterosexual partners it violates both FC s 9 and FC s 10.)

- (2) Does the discriminatory law or conduct in question impair the *dignity*, or some other fundamental right, of the complainant? (This question draws our attention to the actual circumstances of the complainant and requires that the complainant experience some demonstrable harm that prevents self-actualization (*Dignity 3*.)<sup>92</sup>
- (3) Is the discriminatory law or conduct in question designed to achieve an important societal goal and is the discriminatory law or conduct in question narrowly tailored to achieve this legitimate goal? (This question recognizes that our constitutional order serves ends other than equality and that such ends cannot always be reduced to or be squared with egalitarian concerns.<sup>93</sup> However, they can be described in terms of dignity interests in self-actualization and in self-governance (*Dignity 3* and *Dignity 4*.)

While we can characterize all three inquiries in terms of dignity, it is misleading to characterize all three inquiries solely in terms of the dignity interests of the complainant. For while the third question can be framed as an inquiry into the dignity of a class of persons who benefit from the discriminatory measure under scrutiny, it should not be understood as an elaboration of the restitutionary measures provision found in FC s 9(2).<sup>94</sup> The third prong of the test for unfairness is

primarily concerned with creating the requisite space for other constitutionally mandated goods. Various rights — to religion, to reproductive capacity, to privacy, to expression, to association, to assembly, to education, to property, to language, to form political parties, to form families and to raise children — will and *must* commit us to discriminatory arrangements. To fail to recognize that a constitutional order based upon human dignity, equality and freedom commits us to communitarian, egalitarian and utilitarian ends that pull in different directions is to be soft-headed

92 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) (Though persons living with HIV/AIDS are not necessarily part of an historically disadvantaged group, the social stigma that attaches to their illness often results in conduct that impairs their dignity. The Court found that the refusal to hire a person on the grounds of his HIV/AIDS status impairs his dignity by preventing him from living life 'to the full extent of its potential'. That impairment of his dignity justifies the ultimate finding of unfair discrimination.)

93 See *Taylor v Kurtstag* [2004] 4 All SA 317 (W) at para 38 (FC s 18 — freedom of association — 'guarantees an individual the right to choose his or her associates and a group of individuals the right to choose their associates.' The High Court recognizes that the right of the group to choose their associates in the pursuit of such constitutionally recognized objectives as the practice of religion by necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates and the right to exclude — and thus discriminate against — those who refuse to conform.) See also *Wittmann v Deutscher Schulverein, Pretoria & Others* 1998 (4) SA 423 (T), 451, 1999 (1) BCLR 92 (T) ('Section 17 of the [I]nterim Constitution and s 18 of the [Final] Constitution recognise the freedom of association. [IC] s 14(1) and [FC] s 15(1) respectively recognise the freedom of religion which includes the right to join others in worship, propagation of the faith etc. Freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules.') See, more generally on this point, S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, §§ 44.1(c), 44.3(c)(iii), 44.3(c)(viii).

94 See *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) ('*Van Heerden*'). The *Van Heerden* Court establishes FC s 9(2)'s provision for restitutionary measures as a complete defense:

about hard choices. It is, moreover, to be obtuse about easy choices. If, for example, we wish to have educational institutions that further and deepen our various religious faiths, then we must permit those educational institutions to discriminate, at a bare minimum, in terms of admissions policies that require matriculants to accept a religious curriculum consistent with the belief set of the particular denomination that supports the school.<sup>95</sup> For without such discrimination — which may offer no tangible benefits to historically disadvantaged persons — we will afford religious communities (or other tightly knit associations) no meaningful space within which to pursue their comprehensive vision of the good.<sup>96</sup> A state that rejects such discrimination may possess many virtues,

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but one of them will not be freedom of even the most desiccated sort.<sup>97</sup>

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OS 12-05, ch36-p30

## **(b) Association**

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The pivotal enquiry in this matter is not whether the Minister and the Fund discharged the presumption of unfairness under section 9(5), but whether the measure in issue passes muster under section 9(2). If a measure properly falls within the ambit of section 9(2) it does not constitute unfair discrimination. However, if the measure does not fall within section 9(2), and it constitutes discrimination on a prohibited ground, it will be necessary to resort to the *Harksen* test in order to ascertain whether the measures offend the anti-discrimination prohibition in section 9(3). . . . When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.

*Van Heerden* (supra) at paras 36–37. Justice Ackermann himself may be responsible for this misapprehension. He writes:

In determining whether a discriminatory provision has impacted unfairly on complainants various factors are to be considered, including the position of complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination under consideration is on a specified ground or not, and the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the dignity of the complainants, that is aimed at achieving a worthy and societal goal, such as, *for example, the furthering of equality for all*, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered an impairment to their dignity; the extent or degree to which the rights or interests of the complainants have been affected by the discrimination.

LWH Ackermann 'Equality under the 1996 South African Constitution' in Rüdiger Wolfrum (eds) *Gleichheit und Nichtdiskriminierung im Nationalen und Internationalen Menschenrechtsschutz* (2003) 547. Ackermann's suggestion that a discriminatory measure may have as its end the realization of a substantively more equal society does not mean that all discriminatory measures must have such an objective to warrant sufficient constitutional solicitude to overcome either a presumption (in terms of FC s 9(5)) or an allegation that the measure in question is unfair.

95 See S Woolman 'Admissions Policies and Discrimination: Rhetoric and Reality in the Equity Requirements for Public Schools and Independent Schools' Presentation before and Submission to the South African Human Rights Commission's Inquiry into Equality and Voluntary Association (12 June 2005)(Manuscript on file with author).

96 See *Fourie* (supra) at paras 60–61.

The Constitutional Court has, in two discrete lines of cases, made dignity the primary justification for the protection of intimate association. In the first line of cases, the Court has struck down a variety of laws that invidiously distinguished homosexual acts and relationships from heterosexual acts and relationships (*Dignity 2*). The Court has invalidated laws that criminalize sodomy,<sup>98</sup> that differentiate between heterosexual married couples and gay, lesbian, and trans-gendered partners in terms of immigration rights,<sup>99</sup> that deny benefits to the surviving same-sex life partner of a judge,<sup>100</sup> that bar same-sex life partners from adopting children,<sup>101</sup> that prevent same-sex life partners from asserting parental rights in instances of artificial insemination,<sup>102</sup> and that prevent same-sex life partners from securing public

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97 Because our history is one of radical inegalitarianism, equality is, understandably, often treated as the pre-eminent constitutional value. See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) ('*Hugo*') at para 41 ('[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 respect regardless of their membership in particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.') The assertion of such pre-eminence has led some courts and some commentators to characterize equality either as the value with which all other values must cohere or as the value before which all other values must fall. Two problems face this reification of equality. As a methodological matter, this emphasis on coherence, while attractive and powerful, locates the problem of legal interpretation in some kind of theory of established meaning which does not specifically address the normative role of law, and the possibility of radical transformation. 'Synchronization', as Drucilla Cornell notes, 'points us to the real problem':

How do we develop an institutional analysis which allows us not only to synchronize the competing rights of individuals, but also the conflicts between the individual and the community, and between different groups in society. The goal of a modern legal system is synchronization and not coherence. Synchronization recognizes that there are competing rights situations and real conflicts between the individual and the community which may not yield a coherent whole. The conflicts may be mediated and synchronized but not eradicated.

D Cornell 'Pragmatism, Recollective Imagination, and Transformative Legal Interpretation' (1993) *Transformations* 23, 35–36. Or to put the matter slightly differently, those who would make equality the measure of all things, and for whom equality as equal respect and full redress still falls short of some ideological ideal, err because they rely upon a notion of 'rational coherence' which, in turn, depends upon the community acting as a single speaker:

In reality, a complex, differentiated community can never be reduced to a single voice. Synchronization recognizes the inevitable complexity of the modern state and the imperfection of all our attempted solutions.

Ibid at 36. As a substantive matter, a requirement that certain social formations open themselves up to a wider potential membership because they control access to important social goods could be a compelling justification for interfering with an association's rules regarding entrance, voice and exit. However, it does not follow from such a commitment to equality as redress or equality as substantively equal opportunity that all individuals and all groups are always entitled to substantively equal treatment. The potential conflation of instrumental and ideological grounds for intervention — and the privileging of ideological egalitarianism over dignity-inspired egalitarianism — runs the risk of undermining the very institutions and social practices 'that actually make political pluralism, cultural diversity, individual autonomy and social empowerment possible.' S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, § 44.2. This distinction — between equality as ideology and equality as dignity — has real teeth both in our equality jurisprudence and in the equality jurisprudence of other jurisdictions. See, eg, *Fourie* (supra) at paras 60–61 ('Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour . . . [T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance

recognition of their life partnership as a marriage.<sup>103</sup> In the second line of cases, the Court has gone to great lengths to ensure that married couples could continue to cohabit within South Africa while a non-citizen partner seeks permanent residence,<sup>104</sup> that foreign-national spouses seeking work in

South Africa could remain in — country while their applications for work permits were processed<sup>105</sup> and that unwed fathers could secure access to their children.<sup>106</sup>

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of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a majoritarian norm.') See also *Hurly v Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 US 557 ('*Hurly*') (The Irish-American Gay, Lesbian and Bisexual Group of Boston ('GLIB') asked to be allowed to march in Boston's annual St Patrick's day parade. The US Supreme Court finessed the difficult issues raised by GLIB's egalitarian claims by analysing the alleged fit of GLIB's expressive conduct with the parade organizer's exclusionary practices. GLIB was the only such group excluded. A rightly decided *Hurley* might have held that where no link could be established between the association's purpose and its discriminatory practice, then the State might exercise a presumption in favour of intervention on the grounds of equal protection. However, were such a link to exist, then the State would bear the burden of demonstrating that its interest was sufficiently compelling to trump the expressive and associational interests of the group whose exclusionary conduct is being challenged.) These observations suggest that the *Dignity 3* and the *Dignity 4* interests of an association may trump the *Dignity 2* interests of an individual where: (a) the discriminatory conduct of the association serves legitimate objectives via means narrowly tailored to realize those objectives; and (b) the social goods, if any, made available through the association are accessible to the complainant through other institutions. Allan Wood suggests that Kant would reach a similar conclusion with regard to the dignity interests at stake when he writes

When a social order treats some people better and some worse in ways that they themselves regard as essential to their self-worth, there is a presumption, based upon [the notion of humanity as an end in itself], that this social order fails to respect the humanity of those who receive worse treatment . . . Any such egalitarian presumption might be rebutted, of course, by showing that greater equality in one area could be achieved only at the cost of more fundamental failures to respect humanity in other areas.

See AW Wood 'Humanity as an End in Itself' in P Guyer (ed) *Critical Essays on Kant's Groundwork of the Metaphysics of Morals* (1998) 165, 183.

- 98 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) (Sachs J) at para 127 ('It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.') See also *S v H* 1995 (1) SA 120 (C); *S v Kampher* 1997 (4) SA 460 (C), 1997 (9) BCLR 1283 (C) (Common-law or statutory offences which proscribe private homosexual acts between consenting adult males cannot survive constitutional scrutiny).
- 99 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC).
- 100 *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC); *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC).
- 101 *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC) ('*Du Toit*') (Court held that lesbian partners in a long-standing relationship had their right to dignity and right to equality impaired by various sections of the Child Care Act 74 of 1983 and the Guardianship Act 192 of 1993 that only provided for the joint adoption and guardianship of children by married persons.)

To the extent that these intimate associations take forms similar to those of traditional unions, the Court has demonstrated a willingness to embrace them.<sup>107</sup> The *Dawood* Court hints at the historical basis for deploying dignity as a first order rule in the second line of 'family' unit cases when it writes: 'The Constitution asserts dignity to contradict [a] past in which human dignity for black South Africans was routinely and cruelly denied.'<sup>108</sup> One of the most repugnant features of apartheid was the use of pass laws, denationalization, migrant labour, and work permits to wreak havoc on black South African families. In both lines of cases, the Court sets its face squarely against those rules of law that might impair one of the most important sources of meaning in our lives: our intimate associations (*Dignity 3*).<sup>109</sup>

### **(c) Freedom and Security of the Person**

Dignity, as refracted through the prism of freedom and security of the person, has revolutionized three bodies of law: (a) the common law of delict in the context of state liability for wrongful behaviour; (b) the state's regulation of abortion; and (c) punishment.

### **(i) Development of the common law of delict in the context of state liability**

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102 *J & Another v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC).

103 *Minister of Home Affairs v Fourie* CCT 10/04 (1 December 2005).

104 *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C), 2000 (3) BCLR 331 (C) ('*Dawood*').

105 See *Booyesen v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC) ('*Booyesen*').

106 See *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) (Court finds that unwed fathers in non-Christian marriages entitled to same rights of access as other fathers); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC), 2000 (7) BCLR 713 (CC).

107 But see *S v Jordan & Others (Sex Workers Education & Advocacy Task Force & Others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (2) SACR 499 (CC), 2002 (11) BCLR 1117 (CC) ('*Jordan*').

108 *Dawood* (supra) at para 35.

109 The *Dawood* Court says that it relies upon FC s 10 to protect intimate associations because 'it cannot be said that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relationships than the right to dignity in s 10.' *Dawood* (supra) at para 36. That conclusion seems rather odd given that the text expressly provides for freedom of association — FC s 18 — and that intimate associations are, as a matter of foreign law, routinely protected under such a right. The US Supreme Court is inclined to protect intimate family household structures against state intervention, but to permit state intervention where a household does not possess the requisite level of insularity and selectivity. Compare *Moore v City of Cleveland* (1976) 431 US 494 (Striking down zoning laws because they struck too deeply into well-protected sphere of domestic autonomy) with *Village of Belle Terre v Boraas* (1973) 416 US 1 (Upholding zoning laws because they were rationally related to a legitimate state interest and a household of college friends did not constitute an intimate arrangement deemed worthy of constitutional protection.)

In both *Carmichele v Minister of Safety and Security*<sup>110</sup> and *NK v Minister of Safety and Security*,<sup>111</sup> the Constitutional Court found that the right to dignity and the right to freedom and security of the person imposed positive duties on the state to

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prevent, where possible, violations of physical integrity (*Dignity 1*).<sup>112</sup> The violations in these cases were not simply assaults — they were rapes. The seriousness of the crime, and the complicity of the state, led the *Carmichele* Court to write:

In addressing these obligations 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. . . . 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.<sup>113</sup>

The rights implicated, including dignity, did not give rise to a new constitutional action or a new constitutional remedy. The rights did require that a court hearing such a delictual matter must cast 'the net of unlawfulness wider'.<sup>114</sup> Although the Constitutional Court did not itself develop the common law, it directed the High Court and the Supreme Court of Appeal to do so. To ameliorate the defect in the extant law of delict, the Constitutional Court suggested that the courts craft a new test that would impose a duty of care on state actors 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 where, in such circumstances, 'they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'<sup>115</sup>

In *NK*, the state was more than merely complicit in the rape at issue. The state was deemed vicariously liable for a rape carried out by three police officers acting under the colour of law. In rejecting the Supreme Court of Appeal's conclusion that the principles of vicarious liability did not cover the behaviour of policemen who had

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110 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) ('*Carmichele*').

111 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC), [2005] JOL 14864 (CC) (CCT 52/04) ('*NK*').

112 The interaction between FC s 12 and FC s 10 extends the Final Constitution's commitment to the bodily integrity and the physical security of women to all sexual assaults against women. See *S v Baloyi (Minister of Justice & Another Intervening)* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC) (State under positive duty in terms of FC 7(2) read with FC 12 (freedom and security of the person) and FC s 10 (dignity) to prevent private threats to personal security, generally, and domestic violence, in particular); *S v Chapman* 1997 (3) SA 341 (SCA), 1997 (2) SACR 3 (SCA) (Rights of dignity, privacy and freedom and security of the person, in the context of endemic sexual violence against women, means that convicted rapists will be shown no mercy.)

113 *Carmichele* (supra) at para 62.

114 *Ibid* at para 57.

115 Currie & De Waal (supra) at 305. Chastened by the Constitutional Court's reversal, Chetty J subsequently altered the common law in *Carmichele v Minister of Safety and Security*. 2003 (2) SA 656 (C), 2002 (10) BCLR 1100 (C). The Supreme Court of Appeal followed suit in *Minister of Safety and Security v Carmichele*. 2004 (3) SA 305 (SCA), 2004 (2) BCLR 133 (SCA).

used, quite consciously, the trappings of their office to commit this crime, the Constitutional Court wrote:

[T]he opportunity to commit the crime would not have arisen but for the trust the applicant placed in them because they were policemen, a trust which harmonises with the constitutional mandate of the police and the need to ensure that mandate is successfully fulfilled. When the policemen — on duty and in uniform — raped the applicant, they were simultaneously failing to perform their duties to protect the applicant. In committing the crime,

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the policemen not only did not protect the applicant, they infringed her rights to *dignity* and security of the person. In so doing, their employer's obligation (and theirs) to prevent crime was not met. There is an intimate connection between the delict committed by the policemen and the purposes of their employer. This close connection renders the respondent liable vicariously to the applicant for the wrongful conduct of the policemen.<sup>116</sup>

What ties both *Carmichele* and *NK* together, and what distinguishes them from other instances in which the state fails to discharge its responsibilities in terms of FC s 12, is the Court's concern with the dignity of women and the systemic violence to which they continue to be subjected. The Court recognizes that so long as the law permits women to be treated as objects, and in particular, allows the state itself to indulge in this kind of abuse, women will never be able to enjoy equal respect in a realm of ends (*Dignity 1, Dignity 2, and Dignity 5*). Moreover, the state's complicity with respect to this culture of rape demeans us all and is something for which we must accept collective responsibility (*Dignity 5*)(in the form of damages in a delictual action).

The Supreme Court of Appeal deployed both FC s 12 and FC s 10 to develop the law of delict in the context of an omission by state actors to divest of firearms a person known to be a danger to the community. In *Minister of Safety and Security v Van Duivenboden*, the court held that the state had had a duty, under s 11 of the Arms and Ammunition Act,<sup>117</sup> to deprive the person in question of firearms after he had entered into a gun battle with police in 1994.<sup>118</sup> The failure of the police to act on the obvious danger posed by this person led to, or was certainly a sufficiently proximate cause of, his shooting to death, a year later, his wife and his daughter. The negligence of the police — their failure to take the necessary action to avert a reasonably foreseeable set of events and their disregard for the dignity, life and bodily integrity of the people they are sworn to protect — justified the Supreme Court of Appeal's imposition of vicarious liability on the responsible Minister.<sup>119</sup>

## (ii) Reproductive rights

The Final Constitution's concern for the dignity of women takes a very specific form in FC s 12(a). FC s 12(a), unlike its predecessor in the Interim Constitution, embraces a women's right 'to make decisions concerning reproduction'.

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116 *NK* (supra) at para 57.

117 Act 75 of 1969.

118 2002 (6) SA 431 (SCA).

119 *Ibid* at paras 22–24.

Although the Constitutional Court has yet to expressly vindicate the right to an abortion, two High Courts have heard, and rebuffed, challenges to the statutory

expression of this right in the Choice on Termination of Pregnancy Act.<sup>120</sup> In *Christian Lawyers II*, Mojapelo J held that FC s 12(2)(a) and (b)<sup>121</sup> guarantees the right of every woman to determine the fate of her pregnancy.<sup>122</sup> He noted that while the state does have a legitimate interest in the protection of pre-natal life, such regulation may not amount to a denial of a woman's right to freedom and security of the person. The decision in *Christian Lawyers II* reflects something of an advance on *Christian Lawyers I* with respect to its treatment — or at the very least recognition — of the varying (and conflicting) kinds of dignity interests at stake when reproductive rights are pressed into service in the name of abortion. In *Christian Lawyers I*, McCreath J held that whatever the status of the foetus may have been under the common law, under the Final Constitution the foetus lacks legal personality.<sup>123</sup> As a result, McCreath J could uphold the defendant's exception that the plaintiff's particulars of claim did not disclose a cause of action in that 'a foetus is not a bearer of rights in terms of' FC s 11 and in that FC s 11 does not, therefore, 'preclude the termination of pregnancy in the circumstances and the manner contemplated by the [Termination of Pregnancy Act] and protected under [FC] ss 9, 10, 11, 12, 14, 15(1) and 27(1)(a).'<sup>124</sup> While *Christian Lawyers I* recognizes expressly the dignity rights of women (*Dignity 2* and *Dignity 3*), McCreath J ducks the more difficult question of whether the state possesses an interest in the dignity of life generally (*Dignity 5*), and thus the dignity of pre-natal life, in particular. It remains possible, as both *Christian Lawyers II* and the Termination of Pregnancy Act reflect, to take a state interest in dignity seriously (*Dignity 5*) without concomitantly undermining a women's right to dignity (*Dignity 2* and *Dignity 3*), and her ability to secure an abortion.<sup>125</sup>

### (iii) Punishment

Dignity and that subsection of freedom and security of the person that prohibits 'cruel, inhuman and degrading treatment or punishment' have worked a minor,

120 Act 92 of 1996.

121 FC s 12(2): 'Everyone has the right to bodily and psychological integrity which includes the right-(a) to make decisions concerning reproduction.' For more on the relationship between FC s 12, FC s 10 and abortion, see M O'Sullivan 'Reproductive Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 37.

122 *Christian Lawyers Association v National Minister of Health & Others* 2005 (1) SA 509, 526 (T), 2004 (10) BCLR 1086, 1103 (T) ('*Christian Lawyers II*').

123 *Christian Lawyers Association of South Africa & Others v Minister of Health & Others* 1998 (4) SA 1113 (T), 1998 (11) BCLR 1434 (T) ('*Christian Lawyers Association I*').

124 *Ibid* at 1443, 1437.

125 For more on how the courts might better characterize the complex relationship between the dignity interests that inform a woman's right to control her reproductive capacity (*Dignity 2* and *Dignity 3*) and her bodily integrity (*Dignity 1*) and the state's dignity interest in pre-natal 'life' (*Dignity 5*), see O'Sullivan (supra) at § 37.2.

and sometimes unpopular, revolution in the criminal law.<sup>126</sup> The revolution began with *S v Williams*.<sup>127</sup> In *Williams*, the Constitutional Court held unconstitutional those provisions of the Criminal Procedure Act that sanctioned the whipping of juveniles. In finding that whipping assailed the dignity of *all* individuals who participate in such a process and thus constituted cruel, inhuman or degrading punishment (*Dignity 1* and *Dignity 5*), the *Williams* Court wrote:

The Constitution clearly places a very high premium on human dignity and the protection against punishments that are cruel, inhuman or degrading; very stringent requirements would have to be met by the State before these rights can be limited. . . . [T]here is no place for brutal and dehumanising treatment and punishment. The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that . . . 'even the vilest criminal remains a human being possessed of common human dignity.'<sup>128</sup>

Dignity, in *Williams*, constitutes a second order rule that determines the application of a first order rule — the right not to be treated or punished in a cruel, inhuman or degrading way. That a juvenile whipping constitutes a violation of the right to dignity generates the attendant finding of a violation of the right not to be subjected to degrading punishment.

Dignity is deployed once again as a second order rule in the context of punishment in *S v Makwanyane*.<sup>129</sup> In *Makwanyane*, the Constitutional Court held the death penalty to be an unjustifiable abrogation of a panoply of constitutional protections — including the rights to life, dignity, equality, fair trials and humane punishment. While the eleven Justices differed as to the exact basis for this finding, dignity as a second order rule leads Chaskalson P to write:

The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three [of the Interim Constitution]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.<sup>130</sup>

The centrality of dignity for the South African constitutional project not only enables the right to be free from cruel, inhuman and degrading punishment to

126 For more on our jurisprudence of punishment, see D Van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49.

127 *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC).

128 *Ibid* at paras 76–77 quoting *Furman v Georgia* 408 US 238 (1972).

129 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) ('*Makwanyane*').

130 *Ibid* at para 144.

trump the various justifications for the death penalty offered by the state,<sup>131</sup> it also underwrites a more subtle distinction between punishments. In rejecting the Attorney-General's argument that no meaningful distinction exists between the death sentence and life imprisonment, because 'a prisoner does not lose all his or her rights on entering prison,' Chaskalson P does not rely on a rather arid formalism that equates the termination of life with a denial of dignity.<sup>132</sup> He invokes, instead, the particular meaning of the death penalty in South Africa. It was, for many years, a sword of Damocles hanging over the head of any black South African who might be inclined to challenge the authority and the legitimacy of the apartheid state.

Kant and Hegel, in their rather Manichean universe, could view equal respect as the entitlement of every citizen who recognized that identical status in others, and simultaneously demand that those who failed to accord others such respect, ie, by committing murder, should forfeit (in its entirety) the entitlement to that respect.<sup>133</sup> The *Makwanyane* Court refuses to endorse such a simple calculus: that kind of oversimplification seems more of a piece with the black and white ideology of apartheid than with the post-apartheid struggle to accord each individual equal concern and equal respect (*Dignity 2*). The power of the Court's analysis lies not in refusing to impose a capital sentence. The judgment's force flows from the Court's refusal, at least at the level of rhetoric, to use the law to treat individuals as mere means to achieve some (perceived) greater good (*Dignity 1*).<sup>134</sup>

This leitmotif — of refusing to turn away from suffering, and of not allowing individuals to simply disappear — recurs in a broad array of 'punishment' cases.

In *Coetzee v Government of the Republic of South Africa*, the Constitutional Court held that a provision of the Magistrates Court Act<sup>135</sup> that permitted incarceration without trial of a civil debtor constituted an unjustifiable infringement of the right to freedom and security of the person.<sup>136</sup> The *Coetzee* Court did away with these civil imprisonment provisions largely because incarceration for one's 'status' — and not a crime — is out of step with contemporary mores, and in particular, the

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131 *Makwanyane* (supra) at para 145.

132 *Ibid* at para 142.

133 See, eg, Kant *Metaphysics of Morals* (supra) at 140-143.

134 In a similar vein, the Constitutional Court refused, in *Mohamed v President of the Republic of South Africa*, to allow the state to ignore the applicant's rights to dignity, life, and freedom and security of the person in the service of some greater political good — say, the war on terror. 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC), 2001 (2) SACR 66 (CC).

135 Act 32 of 1944.

136 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) ('*Coetzee*').

constitutional commitment to human dignity.<sup>137</sup> To treat a human being as a marker for a debt — and to keep them alive as a mere physical reminder to others to beware their financially frivolous ways (*Dignity 1*) — is entirely at odds with a vision of South Africa as a realm of ends (*Dignity 5*). In *Dodo*, the Court struggles mightily with the law's inevitable use of individuals to send messages back to the community about the price of any given crime.<sup>138</sup> Ackermann J writes:

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 reformatory 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.<sup>139</sup>

One might be surprised, after such a strong pronouncement, that the *Dodo* Court would then go on to uphold *any* mandatory life sentence for *any* category of murder.<sup>140</sup> But the *Dodo* Court is not committed to the principle that any hint of a

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137 In *Coetzee*, Sachs J wrote:

The essence of civil imprisonment, even in its milder forms, has always been that the debtor pays with his or her body. The Afrikaans word *gyselaar* (hostage) comes from the contract recognised in Roman-Dutch law in terms of which a freeman pledged his person as suretyship for performance. . . . The broad question before us would be whether, in the open and democratic society contemplated by the Constitution, it could ever be appropriate to use imprisonment as a means of ensuring that creditors got paid in full, bearing in mind that the amount to be collected would often fall below the costs of collection, not to speak of the costs to the taxpayer of keeping the debtor in prison. It is evident from the statistical data presented to us that committal to prison is in reality mainly for relatively small amounts and largely for debt in respect of goods purchased, services rendered and money borrowed . . . The persons most vulnerable to committal orders would be precisely those who were unemployed, and thus could not be subject to emoluments orders, and those who did not have any property which could be attached. To penalise the workless and the poor so as to frighten those a little better-off would be exactly the kind of instrumentalising of human beings which the concept of fundamental rights was designed to rebut.

*Coetzee* (supra) at paras 66–67.

138 *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC), 2001 (1) SACR 594 (CC) ('*Dodo*').

139 *Ibid* at para 38.

140 Of course, this general statement must be viewed in terms of the actual context of the case before the Court and thus the term 'mandatory' must be read in the context of the section in question. Section 51(1) of the Criminal Law Amendment Act 'made it obligatory for a High Court to sentence an accused, convicted of offences specified in the Act, to imprisonment for life unless, under s 51(3)(a), the Court was satisfied that "substantial and compelling circumstances" existed which justified the imposition of a lesser sentence.' *Ibid* at para 2 referring to Act 105 of 1997. Moreover, the Court does go on to note that if the legislation had compelled a court to impose life imprisonment and that sentence were deemed grossly disproportionate to the crime, then the Court would be obliged to find the legislation unconstitutional. But that caveat simply supports the proposition in the text above.

utilitarian calculus in the law is an affront to dignity.<sup>141</sup> Rather, as *Williams*, *Makwanyane* and *Coetzee* make clear, dignity simply demands that we do not allow the consequentialist character of the law to exhaust law's moral content.<sup>142</sup> Dignity forces us to attend constantly to law's ultimate goal: not to control the ends of individuals, but to create a realm of ends (*Dignity 5*).<sup>143</sup>

The Constitutional Court's decision in *Christian Education South Africa v Minister of Education* confirms that this commitment to law *qua* realm of ends is not empty rhetoric. Nothing would have been simpler than acceding to the applicants' contention that the particular tenets of their faith — and the protection afforded by FC s 15 — permitted the use of corporal punishment in private religious schools. Instead, the Court recognizes that the state's interest in banning corporal punishment in schools is justified by reference to the inherent dignity of all children — regardless of their parents' religion — and that this commitment precludes the

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Justice Ackermann's position on mandatory life sentences is explored at somewhat greater length in his concurrence in *Makwanyane*. Justice Ackermann writes:

If the death penalty is to be abolished, as I believe it must, society is entitled to the assurance that the State will protect it from further harm from the convicted unreformed recidivist killer or rapist. If there is an individual right not to be put to death by the criminal justice system, there 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.

*Makwanyane* (supra) at para 171. But that obligation, Justice Ackermann notes, still 'demands a humane execution of the sentence.' Ibid at 172. Drawing on the jurisprudence of Germany's Federal Constitutional Court ('FCC'), he states that this means, at a minimum, that 'a law providing for life imprisonment must lay down objective criteria for the release of prisoners serving life sentences.' Ibid. In the words of the FCC:

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.

Ibid (Ackermann J's translation).

- 141 In *S v Chapman*, Chief Justice Mohamed made it clear that the courts would use criminal sanctions to send a message to rapists, potential rapists and the general community that sexual violence against women would not be tolerated and that our new constitutional ethos — and the rights of women to dignity, privacy and bodily integrity — dictates that those who engage in sexual violence be shown no mercy. 1997 (3) SA 341 (SCA), 1997 (2) SACR 3 (SCA).
- 142 See, eg, *S v Pennington* 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC), 1999 (2) SACR 329 (CC) ('*Pennington*') (An undue delay in appeals process could constitute an impairment of dignity if it turned out, in a particular case, that the delay visited extreme hardship; but delays are an inevitable part of the criminal justice system and they do not, per se, constitute an impairment of the right to a fair trial or the right to dignity.) But see *Johnson v Minister of Home Affairs* 1997 (2) SA 432 (C) (Failure to process immigration applications expeditiously — with detentions lasting over 14 months — violates IC s 11(1)'s prohibition on detention without trial and IC s 10's right to dignity.)
- 143 See *S v Thebus* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), 2003 (2) SACR 319 (CC) at paras 35–40 (Court rejects argument that the common purpose doctrine violates the right to dignity because it 'de-individualizes . . . [and] dehumanizes people by treating them in a general manner as nameless faceless parts of the group.' It upholds the doctrine on the grounds that 'effective prosecution is a legitimate, pressing social need' and that there is 'need for a strong deterrent to violent crime.' Thus, an individual may be convicted of a crime in terms of the common purpose doctrine even though individual culpability for the act in question cannot be established.)

use of violence to maintain order. Or, in other words, the Court forbade the use of (violence against) children as a means to enforce both discipline within the school and discipline within the broader religious community (*Dignity 1*).<sup>144</sup>

## (d) Religion, language and culture

### (i) Religion

Despite the obvious centrality of religion for collective identity — and thus for individual dignity (*Dignity 2* and *Dignity 3*) — religion and dignity as mutually reinforcing rights have not fared particularly well in the few cases to reach the Constitutional Court. In *Prince v President, Cape Law Society*, a sharply divided Constitutional Court held that although a Rastafarian's right to freedom of religion in terms of FC s 15(1) of the Final Constitution permitted him to engage in Rastafarian rituals, the state was justified in proscribing the ritual use of cannabis.<sup>145</sup> In reaching its conclusions, the majority relied heavily on the state's evidence that even limited dagga smoking could lead to broader drug use in the country and greater narcotics trafficking through the country. This finding turned, at least in

part, on an under-interrogated assumption that no meaningful exemption to existing laws could be carved out for ritual dagga use.<sup>146</sup>

When viewed through the lens of dignity analysis — which valourizes such constitutive attachments as marriage and the family (*Dignity 2* and *Dignity 3*) — the

144 The High Courts have, as a result of FC s 10's refusal to allow individuals to be treated as mere means, displayed increasingly greater empathy towards prisoners. In *Stanfield v Zyl* insisted that a terminally ill prisoner be given parole because his dignity (in terms of FC s 10) demanded no less:

Every sentenced prisoner is entitled to respect for and recognition of his equality, human dignity and freedom, in the sense of his right not to be treated or punished in a cruel, inhuman or degrading way. Section 35(2)(e) ensures that he has 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'. What will be 'consistent with human dignity' in any particular case will, of course, depend on the facts and circumstances of each such case.

*Stanfield v Minister of Correctional Services & Others* 2004 (4) SA 43 (C), 2003 (12) BCLR 1384 (C) at para 89. See also *S v Dube* 2000 (2) SA 583 (N), 2000 (6) BCLR 685 (N) (Entrapment and the seizing of property of an accused person by the state violates dignity.) The Supreme Court of Appeal has likewise held that the denial of important privileges, that normally attach to citizenship, to prisoners still awaiting trial and sentencing constitute a violation of the Final Constitution's commitment both to the rule of law and to human dignity. See *Minister of Correctional Services v Kwakwa & Another* 2002 (4) SA 455 (SCA).

The Constitutional Court and the Supreme Court of Appeal have also placed significant limits on the use of violence — and in particular, deadly force — with respect to the prevention of crimes that involve no violence themselves. The principle of proportionality, as we have seen in the punishment cases, demands that the state not employ means that are not narrowly tailored to meet a constitutionally legitimate objective. The use of deadly force, as contemplated by the Criminal Procedure Act, to apprehend a pick-pocket is the epitome of disproportionality. These powers, therefore, constitute unjustifiable limitations on the rights to dignity, to life and to freedom and security of the person. See *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA), 2001 (11) BCLR 1197 (SCA), 2001 (2) SACR 197 (SCA); *Ex Parte Minister of Safety and Security: In re S v Walters* 2002 (4) 613 (CC), 2002 (7) BCLR 663 (CC), 2002 (2) SACR 105 (CC).

145 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) ('*Prince*').

majority's cursory appraisal of the importance of this religious practice for an adherent is rather perplexing. The *Prince* Court's discourse permits a vague sense of danger to the commonweal to overwhelm the dignity interests of a marginal religious minority (*Dignity 2, Dignity 3, and Dignity 4*).<sup>147</sup>

The Constitutional Court's decision in *Christian Education South Africa v Minister of Education*, on the other hand, contains valuable language about how our dignity jurisprudence tolerates legal asymmetries.<sup>148</sup> The essence of dignity and equality under the South African Constitution, so says the judgment, is that it does not require that we treat everyone the same way, but that we treat everyone with equal concern and equal respect (*Dignity 2*).<sup>149</sup>

Unfortunately, the *Christian Education* Court does not really extend the benefit of this understanding of dignity to religious belief and practice. The judgment assumes, without argument, that s 10 of the South African Schools Act<sup>150</sup> limits

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146 In fairness to the majority in *Prince*, it must be noted that: (a) the constitutionality of the proscription of the use of cannabis by criminal sanction was never raised by *Prince*; (b) the religious use of cannabis may appear — to some — indistinguishable from the recreational use of it; and (c) had the religious use been more circumscribed, the majority stated its willingness to carve out an exception. Of course, even with these caveats, the majority's judgment still begs the question as to whether the lack of judicial solicitude turns entirely on the state's identification of some intoxicants as criminal — marijuana — and other equally powerful intoxicants — alcohol — as acceptable. The need for an exemption *could* turn on distinctions without meaningful differences.

147 The minority judgment offers some solace for those inclined to treat religious belief with greater dignity. Justice Ncgobo writes:

Apart from this, as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.

*Prince* (supra) at 813. Thus, the minority judgment recognizes: (1) how associations are constitutive of the beliefs and practices of individuals; and (2) how the fact of their being constitutive entitles them to constitutional protection. The judgment is remarkable in that it does not rely upon a model of rational moral agency to distinguish those beliefs that are entitled to judicial solicitude from those beliefs that are not. For a further discussion of the Constitutional Court's analysis in *Prince*, *Christian Education* and other religion cases, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44 and P Farlam 'Freedom of Religion, Conscience, Thought and Belief' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41.

148 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) ('*Christian Education*').

149 *Ibid* at para 42.

150 Act 84 of 1996.

FC ss 15 and 31. The Court then explains why the state is justified in barring corporal punishment in all schools and why it need not consider an exemption for such punishment when religious doctrine so dictates.

The problem with the judgment, as I have noted elsewhere, is not its result. It is perfectly reasonable to override religious dictates and to bar corporal punishment that impairs the dignity of children (*Dignity 1* and *Dignity 5*). The problem is with the distinction between the practice of religion in schools and the practice of religion elsewhere, i.e., the home. If children lack the capacity to decide for themselves whether religious practices will prove deleterious to their health — and it therefore becomes incumbent upon the state to intervene on their behalf to protect their dignity — then it would seem reasonable to conclude that barring religion sanctioned corporal punishment at home should be no different than barring religion sanctioned corporal punishment at school. But that is not what the Court concludes. Rather, it contends that the parents 'were not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They could do both simultaneously.'<sup>151</sup> That is, parents could follow their conscience at home — and beat their children — but still obey the law of the land by having their children attend school free from corporal punishment. The Court cannot have it both ways. Either a child's right to dignity (*Dignity 1*) is of such paramount importance that it precludes corporal punishment at home and at school, or the dignity interests of a religious community in practicing its faith (*Dignity 3* and *Dignity 4*) justify corporal punishment in school and at home. To say, as the Court does, that the crux of the matter is the use of a teacher as the instrument of religious discipline is pure sophistry. If the teacher was the parent or the school was at home, then the court's basis for enabling the parents' 'to do both simultaneously' would evaporate. The Court refusal to offer any justification for this distinction does its dignity analysis a disservice.<sup>152</sup>

If *Christian Education* and *Prince* represent low water marks with respect to the Court's treatment of conflicts between the dignity interests of religious groups (*Dignity 3* and *Dignity 4*) and the dignity interests of individuals (*Dignity 1*, *Dignity 2* and *Dignity 3*) or the polity as a whole (*Dignity 5*), then the Court's recent ruling in *Fourie* might be judged a marked improvement. In finding that the dignity interests (*Dignity 2*) of same-sex life partners were unjustifiably limited by rules of

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common law and statutory provisions that prevented them from entering civilly-sanctioned marriages, the *Fourie* Court went out of its way to note that religious prohibitions on gay and lesbian marriage did not constitute an unjustifiable infringement and that religious officials could legitimately refuse to consecrate a

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151 *Christian Education* (supra) at para 51.

152 For a further discussion of *Christian Education*, see Woolman 'Association' (supra) at § 44.3(c)(viii). Patrick Lenta has recently offered a similar analysis of *Christian Education*. See P Lenta 'Religious Liberty and Cultural Accommodation' (2005) 122 *SALJ* 352, 370 ('Is Sach's hinting, despite his refusal to rule on the question, that corporal punishment administered in the home should be constitutionally permissible. . . It is hard to see how this could be so. There is no necessary qualitative difference between the two locations.') Both Laurie Ackermann and Patrick Lenta suggest that pragmatic grounds might exist for the distinction: namely that we would not want *trivial* instances of family conflict caught up in the net of the criminal justice system. See Correspondence with Laurie Ackermann (26 January 2006)(On file with author); Lenta (supra) at 371. While the law is often too blunt a cudgel for matters of the heart, the law does not permit non-trivial violence in the home to remain a private matter.

marriage between members of a same-sex life partnership.<sup>153</sup> In other words, the Court recognized expressly constitutional goods — and, in particular, dignity interests — that had nothing to do with, and which might even be viewed as inimical to, egalitarian concerns.<sup>154</sup>

## (ii) Culture and Language

Conflicts over cultural practices often pit the dignity interests of the individual (*Dignity 2*) against the dignity interests of communities and associations (*Dignity 3* and *Dignity 4*).<sup>155</sup> Unlike the robust protection afforded religious practices under FC s 15, however, the Final Constitution makes it clear that cultural practices secure constitutional protection only where they do not interfere with the exercise of other fundamental rights.<sup>156</sup>

By granting communities the right to create schools based upon a common culture, language or religion, the Constitutional Court in *Gauteng School Education Bill* expressly recognized the importance of such attachments for individual dignity and group identity.<sup>157</sup> The Supreme Court of Appeal in *Mikro* gave this finding

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153 *Fourie* (supra) at paras 90–98. See also *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA), 2005 (3) BCLR 241 (SCA) at paras 36–37 (No religious denomination would be compelled to marry gay or lesbian couples.)

154 See Woolman 'Association' (supra) at § 44.3(c)(viii); *Taylor v Kurtstag* [2004] 4 All SA 317 (W); *Wittmann v Deutscher Schulverein, Pretoria, & Others* 1998 (4) SA 423, 451 (T), 1999 (1) BCLR 92 (T).

155 For a more detailed discussion of the relationship between customary law and the dictates of dignity, see § 36.5(c) infra. See also *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC); *Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C) at para 32 ('[These rules] provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*. These valuable aspects of customary law more than justify its protection by the Constitution. It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.')

156 FC s 31 reads as follows: '(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community — (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society; (2) The rights in ss (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.' FC s 31(2) could be construed to preclude all exclusionary and discriminatory policies. But that assumes that all such practices are inconsistent with various provisions in the Bill of Rights, in particular, equality and dignity. The Constitutional Court has made it quite clear that not all discrimination is unfair discrimination. See, eg, *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC).

157 *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)(Court held that IC s 32(c) permitted communities to create schools based upon common culture, language and religion. It further held that IC 32(c) provided a defensive right to persons who sought to establish such educational institutions and that it protected that right from invasion by the state. It did not, however, impose upon the state an obligation to establish such educational institutions.)

teeth by holding that FC s 29(2) — the right to receive education in an official language of choice at a public educational institution, where practicable — did not encompass the right to receive such education at each and every public school.<sup>158</sup> The *Mikro* Court further held that the state did not, as a general matter, have the power to substitute its judgment regarding appropriate language policy for that of the school governing body ('SGB'). *Dignity 3* and *Dignity 4* interests will not, therefore, always yield to *Dignity 2* interests. The High Court in *Laerskool Middelburg* correctly added the corollary that the right to single-medium public schools cannot automatically trump the right of all public school students to education in the official language of their choice where the provision of such instruction is 'reasonably practicable'.<sup>159</sup>

### (e) Privacy

The privacy jurisprudence of the Constitutional Court draws down on the first and third dimensions of dignity identified at the outset. The notion that dignity entitles the individual to be treated as an end-in-herself (*Dignity 1*) and to pursue some semblance of self-actualization (*Dignity 3*) has driven the Court to conclude that the individual is, consequently, entitled to a space within which to define

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herself without interference by the state or other members of society.<sup>160</sup> In finding that Section 2(1) of the Indecent or Obscene Photographic Matter Act 37 of 1967 violated the right to privacy by prohibiting the possession of 'indecent' or 'obscene' materials in one's own home, Didcott J, for a majority in *Case & Curtis*, wrote:

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158 *Western Cape Minister of Education v The Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA) ('*Mikro*').

159 *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys en Andere* 2003 (4) SA 160 (T). The Court was clearly troubled by the conflict between the right to a single-medium school and the right to be educated in the official language of one's choice. In deciding that the 'minority' students must be accommodated, the Court correctly concluded that the right to a single-medium public educational institution was clearly subordinate to the right of every South African child to education in a language they can comprehend. However, the High Court made two errors — one in law and one in analysis. First, according to the Supreme Court of Appeal in *Mikro*, the High Court in *Laerskool Middelburg* erred when it held that 'minority' students always have a right to an education in their preferred language. That right — said the *Mikro* Court — was constrained by the phrase 'reasonably practicable'. That meant, at a minimum, that learners who had access to another institution that already catered to their linguistic preference were obliged to attend that institution and could not use their linguistic preference to turn a single medium school into a dual medium school. Second, the High Court seems to be on shaky ground when it suggests that it is an open question as to whether facility in a given language was better served where other languages were excluded. Similarly, the High Court wrongly concluded that a claim to a single-medium institution was probably best defined as a mere claim to emotional, cultural, religious and social-psychological security. This trivializes the desire to maintain basic, constitutive attachments. The desire to sustain a given language and culture — especially a minority culture, as Afrikaner culture now is — is best served by single medium institutions that reinforce expressly the importance of sustaining the integrity of that community. As a result, the High Court must also be wrong, if not terribly confused, when it claims that the conversion of a single-medium public institution to a dual-medium school cannot *per se* diminish the force of linguistic (and cultural-linguistic) ties. That is, with respect, exactly what the conversion *per se* does. However, the *Laerskool Middelburg* High Court is correct to note that exclusion on the grounds of language and culture cannot serve as a proxy for exclusion on the grounds of race. See, eg, *Matukane & Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T) (Court found that discriminatory entrance policies ostensibly based upon language and culture, but which were really designed to exclude learners because of their race, violated the right to equality of the complainants and could not be justified on the grounds of cultural, minority or associational rights.)

What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the state. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which section 13 of the interim Constitution guarantees that I shall enjoy.<sup>161</sup>

But this understanding of privacy, dignity as self-actualization (*Dignity 3*), secured neither the full endorsement nor the long-term support of the Court. In her concurrence in *Case & Curtis*, Mokgoro J wrote:

I would, however, respectfully part company from Justice Didcott to the extent that any part of his opinion might be read to suggest that it is not in any circumstances the business of the state to regulate the kinds of expressive material an individual may consume in the privacy of her or his own home. It may be so that, as in England, a 'South African's home is his (or her) castle.' But I would hesitate to endorse the view that its walls are impregnable to the reach of governmental regulation affecting expressive materials.<sup>162</sup>

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The commitment to privacy grounded in individual autonomy would have to yield, as several other justices in *Case & Curtis* likewise noted, when the greater good so

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160 For the leading statement on privacy, see *Bernstein & Others v Bester NO & Others* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) ('*Bernstein*') at paras 67, 73, 79 (Ackermann J identifies 'privacy' with the 'inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community.' He quotes, with approval, the Council of Europe's gloss on the right to privacy:

[The right to privacy] consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially

Ackermann J then concludes that South African and foreign authorities are all inclined to limit 'the "right to privacy" . . . to the most personal aspects of a person's existence, and not to every aspect within his/her personal knowledge and experience.') See also *Pretoria Portland Cement & Another v Competition Commission & Others* 2003 (2) SA 385 (SCA) (Use of warrant to film premises, not approved in the warrant itself, constitutes grave violation of the right to privacy (FC s 14) and the right to dignity (FC s 10) of the applicant, as well as a denial of the applicant's right of access to court (FC s 34).) But see *Director of Public Prosecutions, Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) at paras 70-112 (Search and seizure provisions of Proceeds of Crime Act 76 of 1996 that permitted confiscation of ill-gotten goods in order to prevent their concealment or dissipation did not constitute an unjustifiable limitation of the rights to dignity, property, privacy or a fair trial); *S v Huma* 1996 (1) SA 232 (W), 1995 (2) SACR 411 (W) (Court holds that taking of fingerprints as part of criminal investigation does not constitute an impairment of the accused's dignity in terms of IC s 10 or any other right associated with a fair trial.)

161 *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) ('*Case & Curtis*') at para 91 citing with approval *Bernstein* (supra) at paras 67-69 (Right to privacy protects 'the inner sanctum of a person' that lies within 'the truly personal realm.') See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 18 (Right to privacy protects intimate space because such a space is a prerequisite for human dignity.)

162 *Case & Curtis* (supra) at para 65. See also *S v Dube* 2000 (2) SA 583 (N) (High Court holds that the right to privacy does not embrace the right not to be secretly photographed while engaging in criminal activity. Such an extravagant notion of privacy — a highly attenuated *Dignity 3* interest — even if constitutionally protected would have to yield before the overwhelmingly more important interests of the polity as a whole (*Dignity 5*)).

required.<sup>163</sup> Thus, while neither Mokgoro J nor Langa J were willing, in *Case & Curtis*, to contest the right of an individual to receive and to read some kinds of pornography in the comfort of their own home, they strongly intimated that other kinds of dignity concerns might warrant the limitation of that right.

In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*, Langa J identified at least one class of pornographic materials that no one in South Africa would be permitted to possess: child pornography.<sup>164</sup> Langa J acknowledged that the right to privacy was infringed by Section 27(1) of the Films and Publications Act 65 of 1996.<sup>165</sup> But that limitation was more than justified by the objectives of the Act, and the means required to realize them. What is worth remarking upon in this chapter are the putative grounds for the limitation. Langa J makes a point of trawling through the available evidence that child pornography is (a) 'harmful to children who are used in its production'; (b) 'potentially harmful because of the attitude to child sex that it fosters'; and (c) harmful because of 'the use to which it can be put in grooming children to engage in sexual conduct'.<sup>166</sup> Having been convinced by this body of evidence, Justice Langa makes it part of the justification for the limitation of the right to privacy. However, a close reading of *De Reuck* shows that these grounds are not a necessary condition for the Court's ultimate conclusion. The only real justification that matters is the Court's belief that the mere fact of child pornography impairs the dignity of all children (*Dignity 5*) and any society (*Dignity 5*) that condones it:

The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. Society has recognised that childhood is a special stage in life which is to be both treasured and guarded. The state must ensure that the lives of children are not disrupted by adults who objectify and sexualise them through the production and possession of child pornography. 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.<sup>167</sup>

Given that less restrictive means could have been employed — and, indeed, are employed in England and Germany — to realize the three 'empirical' justifications for the prohibition identified above, the only ground that justifies the

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163 See also *MEC for Health, Mpumalanga v M-Net* 2002 (6) SA 714 (T) (The privacy interests of a public hospital and public hospital staff (*Dignity 3*) fall before the freedom of expression interests of the general public (*Dignity 4* and *Dignity 5*) in viewing clandestinely filmed operations that demonstrate the patently negligent conduct of the hospital staff.)

164 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) (*'De Reuck'*).

165 *Ibid* at para 52.

166 *Ibid* at para 62.

167 *Ibid* at para 63.

continued validity of the provision of the Films and Publications Act at issue is dignity writ large (*Dignity 5*).<sup>168</sup> One might be inclined to characterize the conflict as one between dignity *qua* self-actualization (*Dignity 3*) and dignity *qua* individual-as-end-in-herself (*Dignity 1*). In *De Reuck*, however, dignity *qua* self-actualization (*Dignity 3*) actually succumbs to dignity *qua* good of the community (*Dignity 5*). For the real offence, according to the Court, is not to the class of actual individual children harmed. Were that the case, we could have expected the Court to require the state to create means narrowly tailored to protect that vulnerable class. Instead, the offence is to the dignity of the entire community (*Dignity 5*). For to say that all children have their dignity impaired by the mere fact of child pornography is to say that we have all had our dignity impaired — as children, as adults, and thus, and as a society as a whole — by the mere fact of (real, imitated or animated) child pornography. There is, quite clearly, a puritanical, and uninterrogated set of assumptions about the meaning of both childhood and sexuality at work here.<sup>169</sup> What is more significant, for my immediate purposes, is the recognition that dignity is used not to protect the individual ends of the realm, but to protect the realm itself.  
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### **(f) Freedom of trade, occupation and profession**

As we saw in such cases as *NCGLI I*, *Hugo*, and *Prinsloo*, the South African courts often emphasize the extent to which various dimensions of dignity — say self-actualization (*Dignity 3*) and self-governance (*Dignity 4*) — are necessary conditions for individual freedom. Given this link between dignity and freedom, it is hardly surprising that, as Cameron J explains in *Brisley v Drotsky*, contractual autonomy should now be informed by our constitutional commitment to dignity.<sup>171</sup> Moreover, Cameron argues, contractual freedom, shorn of its excesses, 'enhances rather than diminishes our self-respect and dignity.'<sup>172</sup>

The kind of enhancement contemplated by Cameron J is on full display in *Coetzee v Comitis*.<sup>173</sup> In *Comitis*, the Cape High Court assessed the constitutionality of National Soccer League ('NSL') employment conditions which provided that any person wishing to play professional football (1) had to register with the NSL; (2) had to obtain a clearance certificate from his former club before he could be registered by the NSL as a player of a new club; (3) had to ensure that after

168 For example, the three 'empirical' reasons for upholding the statute are irrelevant to the Court's apparent conclusion that animated porn may be legitimately proscribed. England and Germany, amongst other jurisdictions, take cognisance of the difference between actual and animated pornography. The laws on their books do not proscribe animated pornography and are, therefore, 'less restrictive means' of achieving the same legitimate state objective.

169 For a critique of the Court's 'sexuality' jurisprudence, see N Fritz 'Crossing Jordan: Constitutional Space for (Un)Civil Sex?' (2004) 20 *SAJHR* 230.

170 Here, in *De Reuck*, is one of the few instances where the Court expressly endorses a conservative, neo-romantic notion of a people over a heterogeneous realm of ends.

171 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA) ('*Brisley*') at paras 94 and 95.

172 *Brisley* (supra) at para 94 citing, with approval, the dicta of Davis J in *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C), 475, [2002] 2 All SA 515 (C).

173 2001 (1) SA 1254 (C), 2001 (4) BCLR 323 (C) ('*Comitis*').

conclusion of a contract with a new club, his former club was duly compensated; and (4) remained a registered player of the club with which he was last employed — should the clubs not be able to agree on an appropriate transfer fee — for a period of thirty months (only after this period would the former club no longer be entitled to compensation). Prior IC s 26, challenges to covenants in restraint of trade had foundered on the shoals of *dicta* set out in the pre-constitutional *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*.<sup>174</sup>

After noting that the jurisprudence generated under IC s 26 had 'been uniformly dismissive of a suggestion that the Interim Constitution necessitated a revision of the restraint of trade law',<sup>175</sup> Traverso J states that '[c]onsiderations of public policy cannot be constant [given that] [o]ur society is an ever-changing one' and that '[w]e have moved from a very dark past into a democracy where the Constitution is the supreme law, and public policy should be considered against the background of the Constitution and the Bill of Rights.'<sup>176</sup> Traverso J then holds that because the aforementioned employment conditions 'strip the player of his *human dignity*' by treating him as no more than 'goods and chattel . . . at the mercy of the employer', the NSL Rules cannot be squared with the dictates of FC s 7(1) or FC s 10.<sup>177</sup> The notion that the player is an end-in-himself — and no mere object — requires that the principle of the sanctity of contract yield to more basic considerations of human dignity (*Dignity 1*).<sup>178</sup>

But other courts — including the Constitutional Court and the Supreme Court of Appeal — seem disinclined to follow Traverso J's decision to deploy dignity in a manner that diminishes the deleterious consequences: (a) of contracts of adhesion; or (b) of criminal sanctions visited upon those who have no choice but to engage in morally reprehensible behaviour if they are to survive.

174 1984 (4) SA 874 (A) ('*Magna Alloys*') (Court held that a restraint of trade clause within a contract was *prima facie* valid and that whoever wished to prove the contrary bore the onus of showing that 'the restriction conflicted with the public interest.'). See, further, *Waltons Stationery Co. (Pty) Ltd v Fourie & Another* 1994 (4) SA 507 (O), 1994 (1) BCLR 50 (O); *Kotze en Genis (Edms) BPK v Potgieter* 1995 (3) SA 783 (C), 1995 (3) BCLR 349 (C); *AK Entertainment CC v Minister of Safety* 1995 (1) SA 783 (E), 1994 (4) BCLR 31 (E); *Knox D'Arcy (Ltd) & Another v Shaw & Another* 1996 (2) SA 651(W), 1995 (12) BCLR 1702 (W).

175 *Comitis* (supra) at para 30.

176 *Ibid* at para 32.

177 *Ibid* at paras 34 and 38 (Emphasis added).

178 For similar analysis, see *Santos Prof Football Club v Igesund* 2002 (5) SA 697 (C), 701 (Court finds that the most basic autonomy interests (*Dignity 1*) of the player militate against the enforcement — by specific performance — of the contract in question.) See also *Fidelity Guards Holdings (Pty) Ltd T/A Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE), 862 ('Insofar as . . . restraint [of trade clauses constitute] . . . a limitation of the rights entrenched in [FC] s 22, the common law as developed by the Courts, in my view, comply with the requirements laid down in [FC] s 36(1). Any party to any agreement where a restraint clause is regarded as material is free to agree to include such a clause in the main agreement and the common law in this regard is therefore of general application'); *Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE), 1997 (10) BCLR 1443 (SE).

In *Afrox Healthcare Bpk v Strydom*, an agreement was concluded between the appellant, the owner of a private hospital, and the respondent, a party seeking medical treatment.<sup>179</sup> After an operation at the hospital, negligent conduct by a

nurse led to complications that caused further injury to the respondent. The respondent argued that the negligent conduct of the nurse constituted a breach of contract by the appellant and instituted an action holding the appellant responsible for the damages suffered. The Supreme Court of Appeal rejected the respondent's various claims — including a constitutional challenge that relied upon an argument that values such as human dignity required the development of the common law on behalf of those persons who (a) do not possess the requisite capacity to understand fully the document they sign or (b) occupy substantially weaker bargaining positions. Instead, the SCA concluded that the exemption clause at issue legitimately immunized the appellant from claims for negligence and that the courts are duty bound to enforce such contractual terms unless the Final Constitution or the *boni mores* of the community clearly dictate otherwise. *Afrox* rests on the classically liberal fiction that the common law constitutes a neutral contractual backdrop for relations between fully autonomous individuals. Unlike the *Comitis* court, the *Afrox* court shows little interest in assessing whether the actual contractual conditions that obtain with respect to most hospital admissions forms 'strip the [patient] of his human dignity' and place him 'at the mercy' of the hospital and its staff. The question as to whether these forms — and the common law that backs them up — can be squared with the dictates of FC s 7(1), FC s 10 or FC s 39(2) never arose.

The Constitutional Court's decision in *Jordan* must, in light of both *Comitis* and *Brisley*, be viewed as doubly disappointing: it neither upholds contractual freedom in the service of dignity *qua* autonomy (*Dignity 3*) nor comes to the aid of those treated as chattel rather than as ends-in-themselves (*Dignity 1*). While one might be excused for thinking, after the decisions in *NCGLE I* and *NCGLE II*, that the Final Constitution's express commitment to dignity and equality would protect the sexual practices of a historically disadvantaged and marginal social group,<sup>180</sup> the *Jordan* Court rejected each and every constitutional challenge to the statutory proscriptions of prostitution.<sup>181</sup> With respect to the argument from dignity, the Court wrote:

Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body, which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that s 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body. . . . The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.<sup>182</sup>

179 2002 (6) SA 21 (SCA) ('*Afrox*').

180 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs & Others*, 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) ('*NCGLE II*'); *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('*NCGLE I*').

181 *S v Jordan & Others (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) ('*Jordan*').

182 *Ibid* at para 74.

The Court's assessment that the criminalization of prostitution could not be said to impair the right to dignity of the prostitute because 'the diminution arose from the character of prostitution itself' — the commodification of one's body — is difficult to understand in a liberal, market-based society such as ours.<sup>183</sup> As I have written elsewhere:

So much of what we do involves the commodification of our bodies. A day-labourer is entitled to some level of constitutional protection of his dignity despite the fact that he has chosen to sell his body for the wages needed to pay for food and shelter. A Constitutional Court judge, while commodifying her body in the natural course of listening to arguments and writing opinions, is likewise entitled to some level of constitutional solicitude. It cannot be that the commodification of one's body *per se* bothers the Court. All of us gainfully employed do just that. It must be a particular form of commodification — or the commodification of a particular body part — that provokes the Court. But when the offending commodification just happens to be a form of behaviour that attracts the censure of many South Africans, then it is hard not to conclude that the Court has confused commodification with moralization.<sup>184</sup>

It is, of course, no reply to argue that the South African constitutional framework not only permits but requires the legislature to enact laws which foster the dignity of all South Africans (*Dignity 5*).<sup>185</sup> The question that goes begging is whether the conception of dignity fostered in *Jordan* can be squared with prior constructions of the right, the value and the ideal of dignity. Given the objectification and the commodification that attend all forms of sexual congress, the Court can articulate no compelling dignity standard that might enable us to distinguish those historically suspect sexual acts, such as homosexual sodomy, that have now secured constitutional protection from those sexual acts, such as prostitution, that have not. Had the Court grounded its dignity analysis either in a *Brisley*-like defence of dignity as contractual freedom (*Dignity 3*) or a *Comitis*-like defence of dignity as emancipation (*Dignity 1*), the result in *Jordan* might well have been different.<sup>186</sup>

### (g) Slavery, servitude and forced labour

As I noted at § 36.3 above, '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.'<sup>187</sup> The *Dawood* dictum intimates that it is the infringement of FC s 13 (slavery) that establishes an infringement of FC s 10 (dignity) — and not the other way around. As we have already noted, this

183 *Jordan* (supra) at para 74.

184 See Woolman 'Association' (supra) at § 44.3(c)(x).

185 *Jordan* (supra) at para 105.

186 Most of the decisions handed down on FC s 22 read with FC s 10 have been equally deferential. In *Affordable Medicines Trust v Minister of Health*, the High Court held that the state is entitled to restrict the trade, occupation and practice of the complainants — including licenses to dispense medicine — if the restrictions are rational. 2004 (6) SA 387 (T). Moreover, the court found that if anyone's dignity was impaired it was that of the patients. That said, the mere inconvenience caused to the patients did not amount to an impairment of their dignity. *Ibid* at para 45.

relationship reflects the first rule of South African dignity jurisprudence: Where a court can identify the infringement of a more specific right, FC s 10 will not add to the enquiry.<sup>188</sup> But this rule does not reflect accurately the reciprocal effect between dignity and many, if not all, of the remaining rights in Chapter 2. Given that dignity demands that each individual be permitted to develop his or her unique talents optimally (*Dignity 3*), then dignity *qua* freedom from slavery underwrites the proscription of those practices where the exercise of 'entitlements of ownership' in one person by another 'impair substantially' the ability of a person to develop optimally her unique talents.<sup>189</sup> Moreover, it requires that those who make law exercise their imagination and retire those edicts that promote such practices.

*S v Jordan & Others*, as we have just seen, evinces such a failure of legal imagination in the context of freedom of trade, occupation and profession.<sup>190</sup> It does so once again in the context of slavery and, in particular, sexual slavery. The majority's very strong commitment to a form of metaphysical autonomy that makes all individuals morally and legally culpable for actions that issue ineluctably from their circumstances, fails dramatically the increasingly large number of prostitutes who are victims of sexual trafficking. Sexual trafficking is about the sale and exploitation of women and female children. *Jordan* has little if nothing to say about state complicity in a legal regime that condones institutionalised rape. Perhaps this characterization of *Jordan's* weltanschauung seems unfair. But the majority judgment speaks for itself:

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It was accepted that they have a choice but it was contended that the choice is limited or 'constrained'. Once it is accepted that [the criminalization of prostitution] is gender-neutral and that by engaging in commercial sex work prostitutes *knowingly* attract the stigma associated with prostitution, it can hardly be contended that female prostitutes are discriminated against.<sup>191</sup>

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187 *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Dawood*') at para 35. See also S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 64.

188 *Dawood* (supra) at para 35.

189 The method of analysis that informs the construction of the constitutional norm of dignity can assist us in discriminating between conditions of slavery and non-slavery. The Constitutional Court's dignity jurisprudence reflects five different perspectives on individual agency. The Court uses its variegated understanding of dignity to identify an ever-expanding list of practices that prevent us from acting as agents. It then augments this list of repugnant practices by identifying analogous practices that deny us our agency. So, for example, in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* the Constitutional Court held that statutory provisions that did not accord same-sex life partners the same set of entitlements as heterosexual life partners to permanent residence violate the right to dignity. 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC). In *Satchwell v President of the Republic of South Africa & Another*, the Constitutional Court found that statutory provisions withholding spousal survivor benefits to the survivors of same-sex relationships were deemed analogous to statutory provisions that did not accord same-sex partners the same set of entitlements to permanent residence. 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC). As a result, the refusal to grant spousal survival benefits to the survivors of same-sex relationships constitutes a violation of the right to dignity.

190 2002 (6) SA 642 (CC), 1997 (6) BCLR 759 (CC) ('*Jordan*').

191 See *Jordan* (supra) at para 16 (Emphasis added) (Why 'knowing' under conditions of duress and compulsion makes one culpable remains unclear.)

The Constitutional Court's recent judgment in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* hints at a way out of this autonomy bind.<sup>192</sup> In *Khosa*, the Constitutional Court found unconstitutional, as a violation of both FC s 9 and FC s 27(1), the exclusion of permanent residents from the class of persons entitled to a variety of social security grants. In *Khosa*, Mokgoro J writes:

The exclusion of permanent residents in need of social-security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa. . . . Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants.<sup>193</sup>

Mokgoro J could well have added that permanent residents are, as supplicants, not merely dependent on family members, but quite literally at their mercy. Many sex-slaves, and therefore a large number of prostitutes, would consider themselves fortunate to be supplicants. They are not just excluded from the protection of the law. Many sex-slaves do not speak the language, find themselves in wholly unfamiliar surroundings, and lack the resources to engage effectively corrupt immigration officials or to escape criminal syndicates. Many are enslaved by their own families. The point is not that sex-slaves are excluded from some particular benefit to which another class of persons is entitled. *Khosa* stands for the broader proposition that FC s 7(2) places the state under an obligation to protect and to fulfil the rights of all persons in South Africa. As the *Khosa* Court rightly recognizes, legal regimes that offer incentives to individuals to become members of the political community but then punish persons who cannot act, ultimately, on such incentives — by withholding benefits or by imposing incarceration — are perverse. These disincentives deny the affected person that minimum level of dignity that FC s 7(2) obliges the state to provide (*Dignity 1*). The *Khosa* Court indicates that where the autonomy of our most vulnerable compatriots is largely extinguished (*Dignity 1*), the state bears a much greater burden with respect to demonstrating that it has discharged its duty to provide them with the entitlements necessary to vouchsafe their dignity (*Dignity 3*). The current inability of most sex-slaves/prostitutes to manumit themselves is a problem that can be solved by the state with only the most limited amount of imagination: decriminalisation or regulation.<sup>194</sup>

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## (h) Expression

Freedom of expression, the first amongst equals in American constitutional law, can make no similar claim to status with regard to the South African Bill of Rights. Indeed, in head-to-head competition with dignity interests, in all their various manifestations, expressive interests invariably come up short. As Justice Kriegler notes in his analysis of the offence of scandalizing the court in *S v Mamabolo*:

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192 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) ('*Khosa*').

193 *Khosa* (supra) at para 76.

194 See S Woolman and M Bishop 'State as Pimp: Sexual Trafficking and Slavery in South Africa' (2006) 24 *Development SA* — (forthcoming).

The balance which our common law strikes between protection of an individual reputation and the right to freedom of expression differs fundamentally from the balance struck in the United States. The difference is even more marked under the two respective constitutional regimes. The United States constitution stands as a monument to the vision and the libertarian aspirations of the Founding Fathers; and the First Amendment in particular to the values endorsed by all who cherish freedom. But they paint eighteenth century revolutionary insights in broad, bold strokes. The language is simple, terse and direct, the injunctions unqualified and the style peremptory. Our Constitution is a wholly different kind of instrument. For present purposes it is sufficient to note that it is infinitely more explicit, more detailed, more balanced, more carefully phrased and counterpoised.<sup>195</sup>

The balance, the careful phrasing, the counterpoised concepts refer to what Justice Kriegler calls the 'three conjoined, reciprocal and covalent values . . . foundational to the Republic: human dignity, equality and freedom.'<sup>196</sup> One consequence of this conjoinment, reciprocity and covalence is that 'the right to freedom of expression cannot be said automatically to trump the right to human dignity.'<sup>197</sup> Another more immediate consequence is that the crime of scandalizing the court survives the freedom of expression challenge in *S v Mamabolo*. It survives because the administration of justice requires that the 'dignity' of the judiciary as a whole be protected from comments designed to bring the system into disrepute (*Dignity 5*).<sup>198</sup>

### (i) Pornography and child pornography

We have already noted, in the section on privacy, the Constitutional Court has, in emphasizing the different dimensions of dignity, arrived at different conclusions as to the level of constitutional solicitude that pornographic publications and their readers will be afforded.<sup>199</sup> In *Case & Curtis*, a majority of the Court declined the opportunity to decide whether the publication or the receipt of pornographic

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material was protected under IC s 15. It preferred instead to ground its finding, that the Indecent or Obscene Photographic Matter Act's criminal sanctions with respect to possession of pornography were constitutionally infirm, in the right to privacy.<sup>200</sup> In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*, the Court found that pornography, as a form of expression, is entitled to the protection afforded by FC s 16.<sup>201</sup> It then proceeded to hold, however, that the state's interest in the dignity of children generally justified the particular limitations that the Films

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195 *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) ('*Mamabolo*') at para 40.

196 *Ibid* at para 41.

197 *Ibid*.

198 However, the mere assertion by the State that the dignity of the community might be offended by some form of expression or behaviour, without argument or evidence, is insufficient to justify a limitation on expression. See *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC), 2003 (1) SACR 425 (CC).

199 On dignity interests and privacy, see § 36.4(e) *supra*.

200 *Case & Curtis* (*supra*) at paras 90-95.

and Publications Act imposed on both the producers and the possessors of pornography that features children. I suggested that whereas the majority in *Case & Curtis* might be inclined to characterize the conflict as one in which dignity *qua* self-actualization (*Dignity 3*) trumps dignity *qua* good of the community (*Dignity 5*), in *De Reuck*, dignity *qua* self-actualization (*Dignity 3*) is justifiably limited — at least in the Court's view — by dignity *qua* good of the community (*Dignity 5*).

## (ii) Hate speech

Dignity (*Dignity 2*) justifies our jurisprudence's most significant incursion into freedom of expression: hate speech is unprotected. The incursion is built-in to FC s 16 itself. FC s 16(2) reads, in relevant part, that the right to freedom of expression 'contained in subsection (1) does not extend to . . . (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.' In *Islamic Unity Convention v Independent Broadcasting Authority & Others*, Justice Langa explains the purpose of FC s 16(2)'s definitional limits on FC s 16(1) as follows:

Section 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend . . . Implicit in its provisions 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.<sup>202</sup>

It does not follow, of course, that any proscription placed on hate speech is consistent with FC s 16(2)(c)'s dictates and thus automatically justified by reference to an individual interest (*Dignity 2*), a group interest (*Dignity 2*), or a state interest in dignity (*Dignity 5*). Indeed, at issue in *Islamic Unity Convention* was a section of the Code of Conduct for Broadcasting Services that prohibited any broadcast 'likely to prejudice relations between sections of the population'. Given that any number of speech acts could be deemed likely to 'prejudice relations

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between sections of the population' without either (a) constituting 'advocacy of hatred based on race, ethnicity, gender or religion' or (b) constituting 'incitement to cause harm' based upon such advocacy, the code clearly swept into its overly broad ambit speech acts that were protected in terms of FC s 16. The *Islamic Unity Convention* Court concluded that the dignity interests at stake did not justify the Code's limits on expression. After articulating the grounds for its finding of invalidity, the Court, as a remedy, notionally severed the offending text and read the more limited incursion of FC s 16(2)'s hate speech clause into the Code.

Despite the finding in *Islamic Unity Convention*, FC s 16(2)(c) retains its teeth. In *Freedom Front v South African Human Rights Commission*, the South African Human Rights Commission found that the slogan 'Kill the farmer, kill the boer' constitutes

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201 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC).

202 *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) ('*Islamic Unity Convention*') at para 32 (emphasis added). Justice Langa further notes that: 'There is no doubt that the state has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building a non-racial and non-sexist society based on *human dignity* and the achievement of equality.' *Ibid* at para 33 (Emphasis added).

advocacy of hatred of Afrikaners and incitement to do them harm.<sup>203</sup> The SAHRC was able to reach this finding, as Iain Currie and Johann de Waal note, because it did not restrict 'harm' to the physical, but found the term to embrace both emotional harm and psychological harm.<sup>204</sup> The grounds for such an extension of the term can, Currie and De Waal suggest, be traced directly to the Canadian Supreme Court's decision in *R v Keegstra*.<sup>205</sup> In *Keegstra*, the Canadian Supreme Court wrote:

A person's sense of *human dignity* and belonging to a community is closely linked to the concern and respect accorded the groups to which he or she belongs. The derision, hostility and abuse encouraged by hate propaganda therefore have a severe impact on the individual's sense of self-worth and acceptance. This impact may cause target-group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with outsiders or adopting attitudes directed towards blending in with the majority. Such consequences bear heavily on a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.<sup>206</sup>

Thus, just as dignity grounds the *Keegstra* Court's finding that anti-semitic statements and holocaust denialism were not entitled to constitutional protection, so too does dignity (*Dignity 2*) ground the SAHRC's conclusion that that the slogan 'Kill the farmer, kill the boer' constitutes hate speech in terms of FC s 16(2)(c) and falls beyond the protections afforded speech by FC s 16(1).

The Broadcasting Complaints Commission of South Africa ('BCCSA') reached a similar conclusion in *South African Human Rights Commission v SABC*.<sup>207</sup> The BCCSA was asked to determine whether derogatory remarks about the South African Indian community that formed the primary riff in a well-known Zulu rap song constituted hate speech. The BCCSA concluded that because the song both advocated hatred with respect to members of the Indian community and caused

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harm that impaired the dignity of members of that community, the song qualified as hate speech for the purposes of FC s 16(2)(c).

In *South African Human Rights Commission v SABC*, as in *Freedom Front v South African Human Rights Commission*, the dignity-inflected demand for equal concern and equal respect (*Dignity 2*) outweighs the dignity interest in expression as a form of self-actualization (*Dignity 3*). The two tribunals have found that the prevention of genuine harm — physical or psychological — trumps the putative benefits of largely valueless forms of self-actualization because justice, in post-apartheid South Africa, first requires that all persons are treated with equal respect. Although this restatement begs any number of questions about harm and value, our constitutional order appears to be committed to the proposition that only once the formal

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203 2003 (11) BCLR 1283 (SAHRC).

204 I Currie & J de Waal 'Expression' *The Bill of Rights Handbook* (5th Edition, 2005) 358, 376.

205 Ibid at 376–377 citing *R v Keegstra* [1990] 3 SCR 697 ('*Keegstra*').

206 *Keegstra* (supra) at 227–228 (Emphasis added).

207 2003 (1) BCLR 92 (BCCSA).

conditions of equal respect (*Dignity 2*) have been secured are individuals free to pursue non-harmful forms of self-actualization (*Dignity 3*).

### (iii) Defamation

The law of defamation, as the *Khumalo* Court notes, 'lies at the intersection of the freedom of speech and the protection of human dignity.'<sup>208</sup> But at that intersection, the light is generally green for dignity and red for expression.

Currie and De Waal observe that the law of defamation in South Africa, prior to 1994, consistently undervalued freedom of speech, and in particular, 'freedom of the media'.<sup>209</sup> That devaluation was consistent with the suppression of all forms of expression by the state under apartheid.<sup>210</sup>

The ossification of the law of defamation under apartheid was finally addressed by the Supreme Court of Appeal in *National Media Ltd v Bogoshi*.<sup>211</sup> Although it declined to address directly the constitutional challenges to the existing law, the *Bogoshi* Court did decide that the imposition of strict liability on the media with respect to a finding of unlawfulness could no longer be maintained. It replaced the strict liability standard for the media with the ordinary standard of reasonableness.

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Advocates of more robust protections for freedom of expression and freedom of the media were not satisfied with this via media. In *Khumalo v Holomisa*, the defendants, on exception, asked the Constitutional Court to revisit *Bogoshi* in the light of the novel requirements of FC s 16(1)(a). Although the Constitutional Court agreed that FC s 16(1)(a) applied directly, it declined the invitation to alter the common law of defamation. Justice O'Regan, in support of her conclusion that 'the common law as currently developed' was consistent with the requirements of the Final Constitution, wrote:

In the context of the *actio injuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas*. *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

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208 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 26. See *Kausea v Minister of Home Affairs* 1995 (1) SA 51 (Nm), 67 (Utterances by police officer accusing entire command structure of racism constitute hate speech under statute and do not qualify as fair comment for purposes of defence against suit in defamation. 'Freedom of expression,' writes the court, 'cannot . . . be used to violate the dignity of a person.')

209 Currie & De Waal 'Expression' (supra) at 383.

210 Compare *Argus Printing & Publishing v Esselen's Estate* 1994 (2) SA 1 (A) (Appellate Division permits judge to sue for defamation in respect of criticism levelled at the judge in his official capacity) with *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) (Contempt may only be found if there is actual harm done to the administration of justice; otherwise freedom of expression allows for criticism of judges in their individual capacity.)

211 1998 (4) SA 1196 (SCA), 1999 (1) BCLR 1 (SCA) ('*Bogoshi*'). However, the reluctance of the Appellate Division, the Supreme Court of Appeal and the Constitutional Court to revisit this body of law in light of constitutional imperatives did not stop lower courts from taking up the challenge. In *Mandela v Falati*, the court stated that the new dispensation privileged speech over the reputations of politicians, that expression should be largely unrestrained, and that courts should allow neither prior restraints nor defamation actions to silence critical voices. 1995 (1) SA 251, 259-260 (W).

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. . . . The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity.<sup>212</sup>

Freedom of expression, described by the majority as a non-paramount value, yields to the dictates of dignity.<sup>213</sup> But should it?<sup>214</sup>

What if the dignity interest that informs freedom of expression had featured in the Court's analysis? Judge van der Westhuizen, in the court a quo, recognizes dignity interests on both sides. Dignity *qua* equal concern and equal respect

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buttresses arguments in support of the right to one's reputation (*Dignity 2*), while dignity *qua* self-governance (*Dignity 4*) values 'expression' for the 'central part' its plays in legislating for oneself, and for others, consistent with the dictates of reason.<sup>215</sup> Indeed, in *Sayed*, Judge Davis suggests that had the *Khumalo* Court taken dignity *qua* self-governance seriously, the outcome might have been different.<sup>216</sup> Davis J reasons that even on the most uncontroversial reading of recent South African history, 'democracy' ought to be understood as 'the fundamental objective of the Constitution'. As a result, the entire structure of the Final Constitution 'implies that [the] value of democracy needs to be given primacy of place [when] . . . we have to .

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212 *Khumalo* (supra) at paras 27–28. See also *Marais v Groenewald* 2001 (1) SA 634 (T)(Right to good name and reputation, underwritten by FC s 10, requires that defendant be held liable for statements that he could believe 'lawful' only because of his gross negligence and his refusal to take adequate steps to establish the truth.)

213 In asserting that the justifications for the law of defamation sound the central themes of our constitutional order, the Constitutional Court appears to echo Kant:

By defamation (*obtrectatio*) or backbiting I do not mean slander (*contumelia*), a false defamation to be taken before the court; I mean only the immediate inclination, with no particular aim in view, to bring into the open something prejudicial to respect for others. This is contrary to the respect owed to humanity as such; for every scandal given weakens that respect, on which the impulse to the morally good rests, and as far as possible makes people sceptical about it.

Kant *Metaphysics of Morals* (supra) at 258. However, Kant differs from the Court in two fundamental respects. First, he was writing of virtues that should not be enforced as a matter of right. Defamation for Kant engages primarily ethical considerations. Second, the Court, unlike Kant, will tolerate false statements so long as they are 'reasonably' made.

214 Signs of a more generous approach to expressive interests in the context of defamation are on display in *Hardaker v Phillips* 2005 (4) SA 515 (SCA)(Supreme Court of Appeal finds that a jibe, though false and potentially defamatory, constituted fair comment and that any dignity interest that the plaintiff might have had must yield to a more general public interest in free and robust expression.)

215 See *Holomisa v Khumalo & Others* 2002 (3) SA 38 (T).

216 See *Sayed v Editor, Cape Times* 2004 (1) SA 58 (C).

. . . balance[ ] . . . freedom of expression against [the interests of] those who seek public office or positions of prominence in our public life.'<sup>217</sup> Only a robust media, on Davis' account, is commensurate with the dictates of both democracy and dignity *qua* self-governance (*Dignity 4*).<sup>218</sup>

Two High Courts have recognized that, in a head-to-head contest between expression and privacy, the more important dignity interest might attach to expression. In *MEC for Health, Mpumalanga v M-Net*, the High Court was asked to grant an urgent interdict that would have prevented a broadcaster from airing a piece of investigative journalism that relied on clandestinely obtained footage of negligent medical practices.<sup>219</sup> Bertlesmann J rejected the request for the interdict. He held that the privacy interests of a public hospital and public hospital staff (*Dignity 2*) must fall before the freedom of expression interests (the right to receive information) of the general public (*Dignity 4* and *Dignity 5*). Only by having access to these clandestinely filmed operations that demonstrate the patently negligent conduct of the public hospital staff could: (a) the fourth estate discharge its responsibility to ensure government accountability (*Dignity 5*) and; (b) the general public meaningfully exercise its rights of self-governance (*Dignity 4*).<sup>220</sup> In *Van Zyl v Jonathan Ball Publishers*, the High Court denied an applicant's request for an interim interdict preventing dissemination, distribution, display or sale of a book that the applicant claimed to be defamatory.<sup>221</sup> It found, on balance, that the expressive

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interests of the respondent (and the public), as guaranteed by FC s 16 (*Dignity 4* and *Dignity 5*), outweighed the dignity interests of the applicants, as guaranteed by FC s 10 (*Dignity 2*). The *Jonathan Ball Publishers* Court went to some lengths, however, to point out that, although the requirements for an interim interdict were not satisfied, the outcome should not lead the media to conclude that they deserved or would receive 'exceptional treatment' in defamation cases.<sup>222</sup>

### (i) Socio-economic rights

In each of the four major socio-economic rights decisions handed down thus far, the Constitutional Court has taken great care to make its readers aware of the manner in

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217 Ibid at 62-63.

218 Although careful to stay within the limits established by *Bogoshi*, the Supreme Court of Appeal in *Mthembi-Mahanyele v Mail & Guardian* notes that 'some latitude must be allowed in order to allow [for] robust and frank comment in the interest of keeping members of society informed about what government does.' 2004 (6) SA 329 (SCA), 2004 (11) BCLR 1182 (SCA) at para 64. Moreover, in assessing whether a comment is reasonable, the court must take cognizance of the duty of accountability that the Final Constitution places on the state and the role that the media plays in holding the state accountable. Ibid at 66. Without announcing as much, the Supreme Court of Appeal, per Lewis J, appears to offer greater judicial solicitude for political speech. Indeed, the findings in favour of the respondents in both *Sayed* and *Mthembi-Mahanyele* suggest that the reasonableness requirement set out in *Bogoshi* may be sufficiently supple to accommodate a highly critical and confrontational press — so long as the press spends an 'appropriate' amount of time checking its facts.

219 2002 (6) SA 714 (T).

220 Ibid at paras 23-27.

221 1999 (4) SA 571 (W) ('*Jonathan Ball Publishers*').

which the commitment to human dignity — as rule, value or ideal — has shaped the disposition of the matter before it.<sup>223</sup> Even in *Soobramoney v Minister of Health, Kwa-Zulu-Natal*, where the Court denied Mr Soobramoney's claim that FC s 27(3)'s right to emergency medical treatment entitled him to access to the dialysis that he required for survival, the dismissal was justified in terms of much broader claims to dignity.<sup>224</sup> As Sachs J writes:

In all the open and democratic societies based upon *dignity*, freedom and equality with which I am familiar, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care.<sup>225</sup>

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Subsequent decisions in *Grootboom*, *TAC* and *Khosa* take progressively more seriously the dignity interests of the parties claiming relief under FC ss 26 or 27. In *Grootboom*, the Court reversed the spin placed on the dignity interests at stake in *Soobramoney*. Yacoob J writes:

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*. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to *human dignity*. In short, I emphasise that human beings are required to be treated as human beings.<sup>226</sup>

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222 *Jonathan Ball Publishers* (supra) at 595-596. Indeed, courts have found that while a publication may, initially, have been reasonable — and not an impairment of dignity — because the author or the publisher was not aware of the harm that the publication might cause, the continued publication of a book after the author and the publisher have been made aware of the injury does constitute an actionable offence. See *NM & Others v Smith & Others* [2005] 3 All SA 457 (W), [2005] JOL 14587 (W)(Court holds that continued publication of a book that identified three women with HIV by name and without their permission constituted a violation of their common-law rights to dignity and privacy and warranted imposition of damages.)

223 For an excellent restatement and reconceptualization of this area of the law upon which my analysis is parasitic, see S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1.

224 *Soobramoney v Minister of Health, Kwa-Zulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) ('*Soobramoney*').

225 *Ibid* at para 52 (emphasis added). Chaskalson P denied Mr Soobramoney's claim on the grounds that the rights enshrined in the Bill of Rights were not always the entitlements their language suggested:

The Constitution is forward-looking and guarantees to every citizen fundamental rights in such a manner that the ordinary person-in-the-street, who is aware of these guarantees, immediately claims them without further ado and assumes that every right so guaranteed is available to him or her on demand. Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for a future South Africa.

*Ibid* at 52. The dignity long denied the majority of South Africans was something that could not yet be recovered in full: it remained a 'promise'. For a recent critique of this promise, see K van Marle "'No Last Word": Reflections on the Imaginary Domain, Dignity and Intrinsic Worth' (2002) *Stellenbosch LR* 299, 305-307.

The demands of dignity, far from justifying a failure to deliver on various vague promises, become the measure of the State's efforts to discharge its positive duties to act. As Sandy Liebenberg has astutely observed, the dignity discourse of the Court suddenly shifts, in *Grootboom*, from the language of social exchange as a zero-sum game to the language of a social democratic state committed to 'positive social relationships which both respect autonomy and foster the conditions in which it can flourish'.<sup>227</sup>

Critics of the Court were quick to denigrate this commitment to social democratic principles by pointing to the failure of this more robust, relational notion of dignity to deliver actual houses or shelter to Mrs Grootboom and her fellow litigants.<sup>228</sup> However, in *Treatment Action Campaign*, the Constitutional Court did deliver the relief what it had said that dignity demands.<sup>229</sup> It rejected the government's claim that it could not, at this juncture in time, afford to extend its nevirapine treatment protocol in order to diminish the rates of mother to child transmission ('MTCT') of HIV. While noting that an order directing the government to provide even this relatively inexpensive anti-retroviral could have

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relatively significant budgetary implications, the Court found that the needs of the women and children effected were simply too pressing to be ignored. Put in Kantian terms, the Court decided, as Sandy Liebenberg writes, that 'for society to deny poor women and their newborns access to "a simple, cheap and potentially lifesaving medical intervention" would clearly indicate a lack of respect for their dignity as human beings entitled to be treated as worthy of respect and concern.'<sup>230</sup>

In *Khosa v Minister of Social Development*, the Court goes beyond dignity as minimal respect (*Dignity 1*), or dignity as equal concern (*Dignity 2*), and arrives at dignity as a collective concern (*Dignity 5*).<sup>231</sup> In finding that the State's express refusal, under the Social Assistance Act, to provide permanent residents with social

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226 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 83 (Emphasis added)(Court finds that state has failed to discharge its responsibilities in terms of FC s 26. It holds, in addition, that the general entitlements secured through socio-economic rights are essential components of a just political order because they are necessary for self-actualisation (*Dignity 3* and *Dignity 5*)).

227 Liebenberg (*supra*) at 11.

228 But see K Roach & G Budlender 'South African Law on Mandatory Relief and Supervisory Jurisdiction' (2005) 122 *SALJ* 325. Roach and Budlender note that a structural interdict was unnecessary in *Grootboom* because the government had agreed to provide alternative accommodation for the applicants. When the government failed to comply with the terms of this undertaking, the Court was obliged — at the request of the applicants — to issue an order 'putting the government on terms to provide certain rudimentary services'. *Ibid* at 329 quoting *Grootboom* (*supra*) at para 5, n 17. Despite such evidence of bad faith, Roach and Budlender counsel caution with respect to the use of supervisory jurisdiction and structural interdicts to ensure that the government follows through on settlements or court orders. *Ibid* at 345–351. Not only are courts ill-equipped to manage polycentric conflicts over time, the risk of contempt by government officials poses a genuine risk to the long-term credibility and legitimacy of the judiciary.

229 *Minister of Health v Treatment Action Campaign (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 ('TAC').

230 Liebenberg (*supra*) at 13 citing *TAC* (*supra*) at para 73.

welfare benefits constituted a violation of the right to social security under FC s 27, Mokgoro J writes:

Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.<sup>232</sup>

The trajectory of the Court's dignity jurisprudence over these four cases is breathtaking. By committing us to the dual proposition that 'we are diminished as a society' to the extent that any of our members are deprived of the opportunities to develop their basic capabilities to function as individual and social beings, and that 'claims on social resources are strongly justified when people lack the basic material necessities of life to enable them to survive',<sup>233</sup> the Court takes seriously

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the sense of urgency rooted in the manifold demands of dignity.<sup>234</sup>

What is truly remarkable about the Court's language in *Khosa* is the manner in which it sweeps up and engages all five primary definitions of dignity. The Court first notes that socio-economic rights, like that of social security in FC s 27, invariably engage the 'founding values of human dignity, equality and freedom'.<sup>235</sup> It then

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231 See *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) ('*Khosa*'). The Constitutional Court has discussed dignity as a collective responsibility in a number of its unfair discrimination decisions. See, eg, *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 43 ('The interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination.') The Constitutional Court has written about dignity *qua* collective responsibility in the context of evictions and claims asserted under FC s 26. (*Dignity 5*). See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at para 18 ('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.' (Emphasis added).) However, dignity *qua* collective responsibility does not mean that the right to dignity can be successfully invoked against the state whenever the exercise of or entitlement to a socio-economic right is threatened. So, for example, in *Hartzenberg v Nelson Mandela Metropolitan Municipal (Despatch Administrative Unit)* 2003 (3) SA 633 (SE), the High Court held, correctly, that FC s 10 and FC s 12 had nothing to say about the disconnection of electrical services for failure to pay the arrears on water bills. That the state was not entitled to disconnect the electricity was a statutory matter for which the state lacked the requisite authority.

232 *Khosa* (supra) at para 74.

233 *Liebenberg* (supra) at 12.

234 On the relevance of urgency to an assessment of reasonableness, see D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2002) 118 *SALJ* 484, 490-1. See also M Nussbaum *Women and Human Development* (1999) 56 ('Programs aimed at raising general or average well-being do not improve the situation of the least well-off, unless they go to work directly to improve the quality of those people's lives. If we combine this observation with the thought . . . that each person is valuable and worthy of respect as an end, we must conclude that we should look not just to the total or the average, but to the functioning of each and every person. We may call this the principle of each person as an end.')

235 *Khosa* (supra) at para 40.

teases out human dignity from these three covalent values, and invokes *Dawood* in support of the proposition that '[h]uman dignity . . . informs the interpretation of many, possibly all, other rights.'<sup>236</sup> The three rights that dignity informs in the instant matter are life, equality and social security.<sup>237</sup> From this doctrinal foundation, the *Khosa* Court commits itself, in short order, to the following propositions:

- the Final Constitution recognizes 'everyone' as deserving of equal concern and equal respect (*Dignity 2*), whether it be in terms of differentiation by law in terms of FC s 9(1), or the receipt of benefits in terms of FC s 27;<sup>238</sup>
- persons who 'are already settled permanent residents and part of South African society' cannot be abandoned 'to destitution if they fall upon hard times' simply because immigration officials see 'some [pecuniary] advantage to the state in doing so':<sup>239</sup> that is, members of our community cannot be treated as mere means for the advancement of the greater good (*Dignity 1*);
- 'the exclusion of permanent residents from the [social security] scheme' denies them the capacity 'to sustain themselves', and casts them in the role of supplicants:<sup>240</sup> by definition, a supplicant does not govern himself, but remains dependent upon the largesse of those around him; such a state of affairs constitutes the abnegation of dignity (*Dignity 4*);
- '[t]he denial of access to social assistance' relegates many permanent residents to the 'margins of society' and deprives them of those essential goods that are necessary for them 'to enjoy other rights vested in them under the Constitution';<sup>241</sup> the denial of these goods and rights functions as an absolute bar to the development of the 'unique talents' of each individual permanent resident (*Dignity 3*);

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- this failure to recognize permanent residents as more than means, as persons worthy of equal respect, as individuals capable of self-actualization and self-governance leads the Court to conclude that adequate redress can only occur when we come to understand that our own dignity is linked inextricably to the 'well-being of the poor . . . and the well-being of the community as a whole.'<sup>242</sup> (*Dignity 5*)

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236 Ibid at para 41.

237 Ibid at paras 41-43.

238 Ibid at para 53.

239 Ibid at para 65.

240 Ibid at para 80.

241 Ibid at para 81.

242 *Khosa* (supra) at para 81.

Each of Justice Mokgoro's arguments regarding the constitutionality of the exclusion of permanent residents from the social security scheme at issue turns on one of the five definitions of dignity. These arguments from dignity reinforce one another and build toward a conclusion in which Justice Mokgoro appears to claim that the goal of the Final Constitution is 'a realm of ends', a community in which each of us identifies our own well-being, our own status as ends, with the identification of all other members of our community as ends-in-themselves.

## 36.5 Dignity's possibilities

### (a) Dignity and transformation

#### (i) Dignity as a regulative ideal

In the last section, we saw how the five definitions of dignity — and the rules of law they generate — inform the Constitutional Court's jurisprudence in domains as varied as unfair discrimination, intimate association, pornography, abortion, social assistance, restraint of trade clauses, whipping, hate speech and defamation. In this section, I want to move beyond a discussion of dignity as a set of rules that disposes of specific disputes in a court of law to dignity as a philosophical concern that informs the content of the rules we deploy. To that end, this section endeavours to distinguish dignity as a rule from dignity as a regulative ideal.<sup>243</sup>

For Kant, dignity operates as a regulative ideal when we come to view ourselves and others as rational beings capable — through an appeal to various shared ideals — of arriving at a universalizable moral law.<sup>244</sup> In somewhat more

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common parlance, what Kant means is that human beings can adopt a position in which we attribute to ourselves and to others the capacity to imagine a political community in which each of us could legislate for himself or herself those maxims by which each and every member of our community could live.<sup>245</sup> As the word 'imagine' suggests, the ideals to which we appeal do not (yet) constitute who we are. They remain aspirations. That is, regulative ideals, such as dignity, inform our judgments. But these ideals do not operate as part of a chain of propositions from which we can

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243 But see SJ Cowan 'Can Dignity Guide South Africa's Equality Jurisprudence' (2001) 17 *SAJHR* 34 (Cowan discusses dignity as a value or a rule even where it seems she wishes to defend it as a regulative ideal.)

244 See I Kant *Critique of Practical Reason* (trans W Pluhar, 2002) 101. On the notion of regulative ideals, Kant writes:

For rational beings all stand under the law that each of them should treat himself and all others never merely as a means but always at the same time as an end in himself. But by so doing there arises a systematic union of rational beings under common objective laws that is a kingdom. Since these laws are directed precisely to the relation of such beings as one another as ends and means this kingdom can be called a kingdom of ends which is admittedly only an *ideal*. *Ibid* (Emphasis added).

See, in addition, D Cornell 'A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity and Reconciliation' (2004) 19 *SAPR/PL* 666–667.

245 See D Cornell *The Imaginary Domain* 4–5, 8; D Cornell *At the Heart of Freedom* (1998) 8, 15, 18–19.

simply deduce a rational response to a particular problem the world has set for us.

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And what, if anything, do these abstract observations about apodeictic uses of reason have to do with the daily grind of determining the meaning of dignity in a court of law? Only by recognizing dignity as a regulative ideal that operates outside the rather instrumental domain of our black letter law will our political community begin to approximate a realm of ends.<sup>247</sup> This realm of ends will not

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arise by the mere logical application of an established set of rules. It might, however, happen if we can 'hear the music' of the basic law's variations on the

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- 246 Dignity as a regulative ideal operates, in some respects, *against law*. The concern, as Van Marle notes, is that if law purports to specify all that dignity — or freedom — requires, then the actual space for self-actualization and self-governance will be exhausted by the law. See K van Marle 'No Last Word: Reflections on the Imaginary Domain, Dignity and Intrinsic Worth' (2002) 13 *Stellenbosch LR* 299.

Kant's distinction between the apodeictic use of reason and the hypothetical use of reason may help us to better understand the difference between dignity as a regulative ideal and dignity as a rule. See Kant *Critique of Pure Reason* (supra) at 621 ('If reason is a power to drive the particular from the universal then there are two alternatives. Either, first, the universal is already certain in itself and given. On this alternative, only the power of judgment is required for subsumption. And by this subsumption the particular is determined necessarily. I shall call this the apodeictic use of reason.') With regard to the hypothetical use of reason, the universal can only be assumed. If, in terms of the hypothetical use of reason, it seems that all particular cases follow a rule, then we *infer* from this regularity the rule's universality. Whereas the apodeictic use of reason assumes that the truth is constitutive of the universe, the hypothetical use of reason does not rest on such an assumption. The particular — no matter how many examples we offer — cannot prove the universal. The sceptics challenge to the (hypothetical) rule will always remain. S Kripke *Wittgenstein on Rules and Private Language* (1982). How exactly does the apodeictic use of dignity relate then to what might be called the hypothetical use of dignity? Like this: the apodeictic use of dignity is meant to shake us free from the strictures of rule-following in an attempt to bring us closer to the truth. See Kant *Critique of Pure Reason* (supra) at 621. This abbreviated account warrants the disclaimer that Kant's views on this aspect of moral reasoning cannot be adequately captured in a footnote.

- 247 Dignity as a regulative ideal goes beyond dominant notions of legitimacy in modern legal systems because it forces us to attend to the ethical dimensions of action. Roger Berkowitz writes that we often do not notice the extent to which 'justice has fled our world', because 'law has taken its place'. He further writes:

The CEO of a Fortune 500 company who pays a fine so that his company can dump toxic waste into a reservoir, or moves its corporate address to the Bahamas with the intent of avoiding taxes, does not say: 'I am acting legally if also unjustly.' On the contrary, the very legality of the act is seen as proof of its justness. The divorce of law from justice informs our modern condition. Lawfulness, in other words, has replaced justice as the measure of ethical action.

R Berkowitz *The Gift of Science: Leibniz and the Modern Legal Tradition* (2005) ii. The modern emphasis on law as a set of rules often causes us, as Berkowitz suggests, to lose sight of the ultimate purpose of law: justice. Moreover, he notes, legal positivism turns us into instruments — as opposed to agents — and causes us to lose sight of how human beings find their commonality in ethical interactions. Dignity as a regulative ideal — and not a set of rules that we must simply obey — turns us back into the authors of our actions and forces us to take responsibility for the justice or injustice that we find in the world. Dignity, as expressed in any of Kant's four variations of the categorical imperative, asks us to lay down for ourselves a law that embraces every other individual in a manner that extends beyond the interests of our more parochial selves. Dignity as a regulative ideal thereby reminds us of our highest calling as human beings — doing the right thing. See D Cornell 'A Call for a Nuanced Constitutional Jurisprudence' (supra) at 668.

theme of dignity.<sup>248</sup> The preceding analysis of the Constitutional Court's dignity jurisprudence suggests that the Court has already 'heard the music'.

My reconstruction of the Court's dignity jurisprudence — the teasing out of five definitions and four uses — stands then as something of an answer to Dennis Davis' realist critique. Davis suggests that this music is not a symphony, but rather a cacophony of disparate themes, each distinct theme played to suit the particular mood of the Court.<sup>249</sup> I hope to have shown that a dignity jurisprudence that begins with the simple proposition that one may never treat another human being solely as a means, can, along with other variations on the categorical imperative, be used to develop an account of what it means to treat another as an object of equal concern and equal respect. I then suggested how the refusal to turn away and the principle of equal concern and equal respect have been leveraged, by the Court, to generate defensible theses about dignity *qua* self-actualization and dignity *qua* self-governance as constitutive features of a just society. Finally, this cluster of definitions, all rooted in related notions of individual agency, ground the more radical claim that dignity actually requires all citizens to assume responsibility for the manner in which all other citizens live.<sup>250</sup> These definitions of dignity, when married to appeals to the regulative ideal of dignity, provide a reliable guide for understanding what dignity in the Final Constitution is designed to do.<sup>251</sup>

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Some readers might be puzzled by my insistence on dignity as a regulative ideal when it has been so clearly enshrined in FC s 10 as a rule and in FC ss 1, 36, 39 as a value. One reason for this insistence is the belief that dignity must still be treated as

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248 Rawls uses this felicitous phrase when describing how one comes to understand Kant's four formulations of the categorical imperative. See Rawls *Lectures* (supra) at 203. Pogge writes that another reason for the proliferation of formulae is that 'through them the categorical imperative can "be brought closer to intuition and thus to feeling".' TW Pogge 'The Categorical Imperative' in P Guyer (ed) *Critical Essays on Kant's Groundwork of the Metaphysics of Morals* (1998) 189, 208. The same logic holds true for the multiple definitions of dignity. Each definition captures a critical aspect of individual agency. Together, the multiple definitions describe, almost in full, a human being who lives up to her highest calling — doing the right thing — and who, at the same time, flourishes. Indeed, both Kant's project and the Constitutional Court's project is animated by the desire to get us to understand that living up to such a calling is, in fact, a large part of flourishing.

249 See D Davis 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 *SALJ* 398. Dennis Davis writes that: 'The court has given dignity both the content and scope that make for a piece of jurisprudential Lego-Land to be used in whatever form and shape is required by the demands of the judicial designer.' Ibid at 413. Even if I disagree with that indictment of our current dignity jurisprudence, Davis had good grounds — at the time of writing — for critiquing the Court's nascent dignity and equality jurisprudence for being grounded in a predominantly 'individualistic framework'. Ibid at 412. See also SJ Cowan 'Can Dignity Guide Our Equality Jurisprudence?' (2001) 17 *SAJHR* 34, 39. For the articulation of similar concerns with respect to German jurisprudence, see D Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 300-301, 312-313 ('Kommers')(The anteriority of the right — to dignity — to the state complicates judicial control of the concept); S Wermiel 'Law and Human Dignity: The Judicial Soul of Justice Brennan' (1998) 7 *William and Mary Bill of Rights LJ* 223.

250 See D Cornell *Defending Ideals* (2004) 75-76.

251 That the case law does, in fact, reflect a certain level of rigour can be seen in the way the various definitions of dignity track various formulations of the categorical imperative and the manner in which those definitions all sound a similar concern with the treatment of all individuals as ends-in-themselves. But again I wish to stress that this account of how these definitions build upon one another and yield, in a non-linear and cumulative fashion, a commitment to a realm of ends is *my* speculative exercise.

a touchstone of day-to-day life in South Africa at the same time as it is doubly institutionalised through legislation and judicial interpretation. The appeal to dignity as a regulative ideal in our strictly moral transactions cannot but then inform the manner in which legislatures and courts shape dignity as rule and value. In a heterogeneous society such as ours, where the right and the good are not coextensive, the re-inscription of dignity as a legal rule will have the reciprocal effect of deepening our understanding of dignity as an ethical norm.<sup>252</sup>

How does this reciprocal effect — of ethical ideals and justiciable rules — work in practice? Once again, the evolution of the Court's jurisprudence of dignity provides the most publicly accessible, and compelling, account.

## (ii) Dignity and the politics of capability

We have, over the Court's first ten years, heard its various members explain the presence of dignity in our Final Constitution by reference to the denial of dignity under apartheid. As Justice O'Regan writes:

The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.<sup>253</sup>

The Constitutional Court reacts to the particular ways in which dignity was denied under apartheid (the imposition of the death penalty to blunt political opposition, the implementation of pass laws to control both the intimate and economic lives of black South Africans, the use of corporal punishment as a form of social control) by finding unconstitutional those laws that continue to re-inscribe these affronts to dignity.

But as Justice O'Regan observes above, and Justice Ackermann has written elsewhere, the Final Constitution does not simply ask us to react to, and to reverse, past indignities. It demands that we transform our society into one that will ultimately recognise the intrinsic worth of each individual.<sup>254</sup>

We can trace that process of transformation in the equality jurisprudence on sexual orientation. Our courts begin slowly, dispatching laws proscribing sodomy as a violation of intimate or private space. The courts go on to reject laws that impair the ability of same-sex partners to live — private lives — within South Africa. They then abolish laws that refuse to extend 'public' benefits to the

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surviving same-sex life partner of a judicial officer. Ultimately, the dignity of same-sex partners is understood to be as important a public matter as it is private, and the public institution of marriage sanctions heterosexual and homosexual unions alike.<sup>255</sup>

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252 HLA Hart *The Concept of Law* (1961) 77-96.

253 *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('Dawood') at para 35.

254 See D Cornell 'Laurie Ackermann: Bridging the Span toward Justice: The Ongoing Architectonic of Dignity Jurisprudence' (2008) *Acta Juridica* (Forthcoming).

255 See *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) ('Fourie').

The public recognition of same-sex life partnerships as marriages takes dignity beyond the merely restitutive, and articulates an understanding of dignity that is fundamentally transformative of our politics. That this recent holding is fundamentally transformative, and not merely reactive, is reflected in the state's response to the various challenges mounted against anti-gay and anti-lesbian enactments. The early challenges to sodomy laws and immigration laws met with little resistance. However, as the challenges to the law required public recognition of the equality of gays and lesbians — as opposed to mere sufferance of the homosexuals in our midst — the state's resistance stiffened. In both *Satchwell I* and *II*, Parliament balked at providing spousal benefits to the survivors of same-sex life partnerships. In *Satchwell II*, the Constitutional Court had to take the unusual and uncomfortable step of invalidating a piece of legislation virtually identical to the legislation that it had found unconstitutional in *Satchwell I*. It is hard to read Parliament's response to *Satchwell I* as anything but a refusal to recognize that same-sex partnerships are entitled to equal concern and equal respect. In *Fourie*, the state actively sought to block the recognition of same-sex unions as marriages. Again, it is hard to read the state's response as anything other than a refusal to accord same-sex life partnerships the same public recognition as opposite-sex life partnerships. The Constitutional Court and the Supreme Court of Appeal have reached beyond mere restitutive forms of justice to a vision of dignity that forces all South Africans to reconsider their previous understandings of marriage. This new vision of dignity compels all South Africans to acknowledge publicly the variety of legitimate and valuable life partnerships within our society.

It seems reasonable to ask, at this juncture, whether the Court's jurisprudence on equality and sexual orientation reflects a genuine transformation or the mere logical extension of the Court's liberal commitment to state non-intervention and the overt and explicit pressures of the written text. The question arises because some critics of the Court's early dignity jurisprudence have, correctly, suggested that the Constitutional Court permitted a Berlinian understanding of negative liberty to slip into the Court's equality jurisprudence through the backdoor of dignity. The *Ferreira* Court rejected Justice Ackermann's view that IC s 11(1) and FC s 12(1) required that 'freedom' and 'security of the person' should be read disjunctively and that IC s 11(1) and FC s 12(1) contained a robust freedom right. However, in a number of cases decided shortly after *Ferreira*, the Court appeared to accept Justice Ackermann's contention that there exists an inextricable link between dignity and the need for individual freedom from state intervention. In

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*Hugo*, the Court places 'dignity . . . at the heart of individual rights in a free and democratic society.'<sup>256</sup> In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Court states that 'it is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society.'<sup>257</sup> Thus, over the course of several cases and the space of a couple of years, individual freedom *qua* negative liberty becomes the foundation for dignity, and dignity, in turn, becomes the basis for equality.

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256 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41.

257 *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 28.

One can accept the truth of the proposition that the Constitutional Court accepted the link between dignity and the need for individual freedom from state intervention without accepting the proposition that dignity is *only* about the need for individual freedom from state intervention. For example, Amartya Sen ties his notion of 'development as freedom' to the provision of a basic basket of goods — both real and figurative — that enable human beings to develop those 'capabilities' necessary for each individual to achieve those ends that each has reason to value.<sup>258</sup> Sen contends that dignity and freedom and equality, rightly understood, are meant neither to achieve definitive outcomes nor to prescribe a univocal understanding of the good.<sup>259</sup> What these covalent values do require is a

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258 See A Sen *Development as Freedom* (1999) ('Sen *Development*'); A Sen *Inequality Re-examined* (1992).

259 Sen's relationship to classical schools of political philosophy is far too subtle and complicated to be explicated meaningfully here. However, a précis of his position may suggest why Sen, of all contemporary theorists, offers an account of dignity, equality and freedom that provides the best fit with my own take on these 'three conjoined, reciprocal and covalent values'. *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) at para 41. Sen rejects Rawls' contention in *A Theory of Justice* (1972) — and to a lesser degree in *Political Liberalism* (1993) — that there are certain primary goods — civil liberties such as expression, assembly, the franchise — 'that cannot be compromised in any way.' Sen *Development* (supra) at 64. Sen has even less time for utilitarian frameworks that make the greatest good for the greatest number the sole measure of justice. In addition to offering the standard criticisms of utilitarians — their inability to arrive at an acceptable metric for interpersonal comparisons of happiness, their general indifference to radical inequality in the distribution of happiness, and their neglect of rights, freedoms and other non-utility concerns — Sen inveighs against the general inclination to measure utility or happiness in terms of wealth (eg, GNP) and wealth in terms of income (per capita). Neither wealth nor income provide adequate information about the well-being and the substantive freedom of individuals. Both liberals and utilitarians — as we have just described them — fail to take account of how individual differences — in physical ability or disability, in environment, in social practices, in family structure — create significant asymmetries in the manner in which primary goods and incomes can be exploited. *Ibid* at 73.

Sen asks us to take account, in his theory of distributive justice, of how the heterogeneity amongst individuals (both within societies and across societies) shapes the meaning of primary goods *and* incomes. For example, the meaning of a primary political good like freedom of assembly will have demonstrably different meanings for a person who is ambulatory and for a person who is not ambulatory, but housebound. Similarly, the utility of an income of R200 000 will have demonstrably different value for a person who is ambulatory and for a person who is not ambulatory, but housebound. At a minimum, says Sen, quoting Adam Smith, our primary concern ought to be providing individuals with those necessities of life that will, in fact, give them "the ability to appear in public without shame".<sup>1</sup> *Ibid* at 73 quoting A Smith *The Wealth of Nations* (1776) (ed RH Campbell and AS Skinner 1976) 469–471 (By "necessities", Smith means 'not only the commodities which are indispensably necessary for the support of life, but whatever the customs of the country renders it indecent for creditable people, even the lowest order, to be without.'). That sounds very much like South African dignity discourse.

Sen thus shifts our focus to the actual 'freedom generated by commodities', and away from 'commodities seen on their own'; he attends to the actual freedom generated by civil liberties, and away from formal constitutional rights viewed in the abstract. *Ibid* at 74. Sen argues that the best measure of equality or freedom or dignity is the ability of individuals to *convert* such primary goods as *income* or *civil liberties* into the capability 'to choose a life one has reason to value' — or in simpler terms, the ability to pursue one's own ends. *Ibid* at 75. The virtue of Sen's approach is that it recognizes (a) the heterogeneity of capacity that people possess by virtue of biology, custom, or class; (b) the heterogeneity of critical functions — from nourishment to civic participation — that may be required to live a life one has reason to value; and (c) the heterogeneity of capabilities that people possess — different combinations of more basic functions — which, in turn, enable them to pursue different 'lifestyles' or different visions of the good. Because Sen refuses to reduce 'freedom' to a single basic unit — a utility or a liberty — he is, inevitably, quite pluralistic about the kinds of goods which individuals ought to be free to pursue.

level of material support (eg, food) and immaterial support (eg, civil liberties) that enable individuals to pursue a meaningful and comprehensive vision of the good life — as they understand it.<sup>260</sup>

I have suggested, in this chapter's analysis of the case law, that the Court has moved beyond a minimalist understanding of dignity, and a negative conception of freedom, to something richer and more substantial. In *Grootboom* the Constitutional Court announced: 'A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on dignity, equality, and freedom.'<sup>261</sup> In *Khosa v Minister of Social Development*, the Court commits the state to the provision of actual resources, social assistance, to an identifiable class of persons — permanent residents. In so doing, the Court moves well beyond dignity as negative liberty to a vision of dignity in which 'wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.'<sup>262</sup>

Dignity *qua* collective responsibility for material agency moves us towards a Sen-like capabilities model. Moreover, it does so without being susceptible to the critique of dignity *qua* negative liberty leveled by exponents of substantive equality. The capabilities model defines equal treatment as the provision of differently situated persons with the material and immaterial means that these individuals, in particular, require to pursue some specific vision of the good.<sup>263</sup> So, for example, Sen argues that pregnant women need more nutrition than non-pregnant women and men and that any basic food program is obliged to recognize this difference in a basic nutritional package.<sup>264</sup>

Dignity *qua* collective responsibility based upon a Sen-like capabilities model also appears to answer the charge that a commitment to substantive equality —

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or what I have described elsewhere as substantive autonomy<sup>265</sup> — reinscribes the disadvantage of those who find themselves in a 'state of injury'.<sup>266</sup> A capabilities model does not underscore the lack of freedom of our fellow citizens, nor call undue attention to their injury, so much as it demands that we recognize that all of us require a certain basket of goods in order to pursue our preferred way of being in the world.<sup>267</sup>

Dignity *qua* collective responsibility based upon a Sen-like capabilities model also meets the challenge of those theorists such as Steven Feldman who contend that if we give 'dignity' too much content, then we ultimately put 'freedom' itself at risk. Feldman writes:

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260 *Sen Development* (supra) at 75.

261 K van Marle 'No Last Word: Reflections on the Imaginary Domain, Dignity and Intrinsic Worth' (2002) 13 *Stellenbosch LR* 299 ('No Last Word') 306.

262 *Khosa* (supra) at para 74.

263 See D Cornell *Defending Ideals: War, Democracy, and Political Struggles* (2004).

264 See *Sen Development* (supra) at 189-203.

[W]e must not assume that the idea of dignity is inextricably linked to a liberal-individualist view of human beings as people whose life-choices deserve respect. If the state takes a particular view on what is required for people to live dignified lives, it may introduce regulations to restrict the freedom which people have to make choices, which, in the state's view, interfere with the dignity of the individual, a social group or the human race as a whole? The quest for human dignity may subvert rather than enhance choice, and in some circumstances may limit rather than extend the scope of the traditional 'first generation' human rights and fundamental freedoms. Once it becomes a tool in the hands of law-makers and judges, the concept of human dignity is a two-edged sword.<sup>268</sup>

Feldman, however, conflates 'dignity' with 'dignified'.<sup>269</sup> 'Dignity', on my account, rests on objective characteristics of a person. Material goods flow to an individual — or a group — because of these objective characteristics. (So, again, pregnant women would receive a better nutritional package because they require better nutrition than non-pregnant women or men.) The term 'dignified', on the other hand, concerns itself with a subjective judgment about the 'value' of the lives

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being led. So, for example, feminists often conflate 'dignity' and 'dignified' when they attribute false consciousness to women in traditional communities who have chosen lives which seem undignified because these communities embrace practices that appear to deny women their agency. As Drucilla Cornell notes, while we must recognize that material and legal conditions exist that impair the ability of women to shape their preferred way of being in the world, and that such obstacles to agency

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265 S Woolman & D Davis 'The Last Laugh: Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions' (1996) 12 *SAJHR* 361, 362-363 ('Unlike the notion of formal autonomy which animates classical liberalism, creole liberalism relies upon a notion of *substantive autonomy*. Substantive autonomy recognizes simultaneously the socially constructed, contingent and dependent nature of the individual and the legitimate nature of demands for freedom from social and political coercion. Both creole liberalism and the notion of substantive autonomy rest upon the premise that real individual autonomy can only occur within the many and competing . . . associations into which an individual is born and within which she 'chooses' to remain a part. On this view, the state has an essential role to play in determining the contours of those 'private' relationships which so fundamentally shape individual identity and in making possible a variety of life choices through support for those associations and organizations which make up society writ large. Creole liberalism envisages a state which does not exhaust the possibilities of individual lives, but helps to make real those possibilities. In addition, creole liberalism requires that the state occupy a crucial, if not always central, place in the debate about and construction of values at the same time as it supports a variety of different ways of being in the world. Put slightly differently, such a state bears the dual responsibility of ruling out ways of being which threaten the core values of our polity (tolerance, dignity, rough equality, the real possibility of democratic participation) and of providing a framework within which competing notions of the good life can coexist — if inevitably uncomfortably.') See also Sen *Development* (supra) at 24 (Describes this same set of normative commitments as *substantive freedom*.)

266 See W Brown *States of Injury: Power and Freedom in Late Modernity* (1995).

267 See D Cornell *Just Cause: Freedom, Identity and Rights* (2000) ('*Just Cause*').

268 Cowan (supra) at 52-53.

269 See D Cornell 'A Call for a Nuanced Constitutional Jurisprudence' (supra) at 668 and D Cornell *Defending Ideals* (supra) at 63-83.

ought to be removed,<sup>270</sup> we should be quite chary of the argument that to live life within the frame of a traditional community makes a woman's life undignified.<sup>271</sup>

## (b) Dignity and the imaginary domain

This last insight into the lived experience of many women in a patriarchal society underwrites a more general claim to protection of what Drucilla Cornell has described as 'the imaginary domain'.<sup>272</sup> It is in this imaginary domain that each of us can explore — or at the very least come to terms with — who we really are.

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This imaginary domain maps on to the space I have identified with dignity because it requires that we agree to coordinate our actions with others so as to maximize our freedom, and yet do so only in so far as that freedom is consistent with the freedom of others.

Moreover, this reconceptualization of dignity stands as a rebuttal, of sorts, to Dennis Davis' somewhat disparaging description of the Constitutional Court's equality and dignity jurisprudence as a mere 'Lego-land'. When viewed from the perspective offered by the imaginary domain, *Booyesen*, *Dawood*, *National Coalition of Gay and Lesbian Equality*, *Comitis*, and *Khosa* can be understood as attempts by our courts to create the requisite space within which the individual — in a marriage

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270 See S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 64. See also A Sen 'More Than 100 Million Women Are Missing' *The New York Review of Books* (20 December 1990)(Analysis of obstacles to women's agency — infanticide, denial of property rights, limited education, lack of access to health care, malnutrition — that lead to substantially higher rates of mortality in Asia, Africa and South America.)

271 For a more detailed discussion of the relationship between women's agency, customary law and the dictates of dignity, see § 36.5(c) *infra*. See also D Cornell *Just Cause* (*supra*); *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).

272 Drucilla Cornell's 'imaginary domain' is an intuition pump that — unlike Kant's categorical imperative or Rawls' original position, does not frame ethical decisions in terms of an abstract, ostensibly universalizable, community of 'rational' individuals. See D Cornell *The Imaginary Domain* (1995); D Cornell *At the Heart of Freedom* (1998). The imaginary domain takes the radical givenness of individuals — and their desires — seriously as the departure point for ethical inquiry. Van Marle offers the following description of the imaginary domain:

The imaginary domain means that psychic or moral space in which we are sexed creatures who care deeply about matters of the heart, are allowed to evaluate and represent who we are. Cornell argues that the right to the imaginary domain takes us beyond hierarchical definitions of the self. Integral to the imaginary is the notion that the person can never be assumed as a given, but is always part of a project of becoming. A person is understood as a possibility, an aspiration. . . . [S]he argues that the freedom to become a person is dependent upon the minimum conditions of individuation. . . . The freedom that a person must have to become a person demands the space for the renewal of the imagination and concomitant re-imagining of who one is and who one seeks to become.

K van Marle 'No Last Word' (*supra*) at 301. Cornell identifies three necessary preconditions for the imaginary domain: (1) physical security of the person; (2) the ability to engage in sufficiently complex symbolic analysis to permit individuation of the self; (3) a commitment to the protection of the imaginary domain. Those conditions bear some similarity to the conditions that the Constitutional Court has identified with dignity: from not permitting physical violations of the self that make selfhood impossible (*Dignity 1*), to those material conditions without which no meaningful individuation can occur (*Dignity 5*), to the provision of some of the formal conditions required for self-actualization (*Dignity 3*). The three preconditions for the imaginary domain are, like the five faces of dignity, constitutive features of a realm of ends.

to a South African citizen, in a same-sex life partnership, in a professional football league or living life as a permanent resident — can reflect upon, and, if necessary, alter the fundamental meaning of her being. What the courts, in each of these cases, have done, is require us to take seriously non-dominant ways of being in the world by forcing us to attend to the centrality of a particular kind of relationship, practice or ascriptive characteristic for the self-representation of a given individual (or group). Dignity *qua* imaginary domain also offers an implicit critique of those Constitutional Court judgments which have failed to recognize adequately the practice of a non-dominant group as essential to that group's self-understanding and have, as a consequence, refused to accord the practice at issue the level of respect that it deserves.

### (c) Dignity and trans-cultural jurisprudence

Dignity *qua* regulative ideal and dignity *qua* imaginary domain also point up the possibilities for overcoming the divide between European and African conceptions of justice. Just as dignity *qua* regulative ideal asks us to take seriously the material requirements of others and dignity *qua* imaginary domain asks us to take seriously their unchosen conditions of being, I believe that our dignity jurisprudence could offer some assistance in the development of a conception of justice that takes seriously the traditional norms of African culture that ground the lives of many South Africans.

The Constitutional Court's decisions reflect demonstrable sympathy for the many vulnerable minorities that have sought one form of judicial solicitude or another. At the same time, the Court's current body of jurisprudence demonstrates the challenges that adhere to any attempt to accommodate subordinate bodies of law, be they sacred or profane, with that law — the Final Constitution — from which all other law must derive its force.

As we have already noted, the Final Constitution makes it clear that a community's cultural or linguistic practices secure constitutional protection only where they do not interfere with the exercise of other fundamental rights.<sup>273</sup> This formally

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correct articulation of the relationship between FC s 31 and the rest of the Bill of Rights is often assumed to imply that the other substantive rights — including dignity — trump collective cultural concerns because dignity and other substantive rights do not protect such concerns. That, however, is untrue. For example, the Constitutional Court in *Gauteng School Education Bill* recognized the importance for individual dignity, and collective claims for equal respect, of granting communities the right to create schools based upon a common culture, language or religion.<sup>274</sup>

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273 FC s 31(2) could be construed to preclude all discriminatory policies. But that assumes that all such practices are inconsistent with various provisions in the Bill of Rights, in particular, equality and dignity. The Constitutional Court has made it quite clear that not all discrimination is unfair discrimination. See, eg, *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC).

274 *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)(Court held that IC s 32(c) permitted communities to create schools based upon common culture, language and religion.)

Moreover, the courts often mediate conflicts that arise from cultural practices that pit the dignity interests of the individual against the dignity interests of the community. In *Christian Education*, the Constitutional Court had to assess the relative virtues of arguments that (a) justified corporal punishment of children in terms of the understanding of dignity refracted through the tenets of a specific religious faith, and that (b) called for bans on such punishment because it turned the children of religious parents into mere instruments for the articulation of a community's beliefs. The difficulty in determining where exactly the polity's interest in dignity lies — or which kind of dignity interest deserves primacy of place — ultimately led the *Christian Education* Court to fudge the issue by declaring that the dignity of children was impaired by corporal punishment meted out in religious schools, but that the same child's dignity was not necessarily so impaired by corporal punishment meted out in religious homes.<sup>275</sup>

The courts have had somewhat greater success in mediating the dignity interests at stake in a number of recent challenges to rules of customary law. In *Bhe v Magistrate, Khayelitsha & Others*, the Constitutional Court found that the customary law rule of male primogeniture — and several statutory provisions that reinforced the rule — impaired the dignity of and unfairly discriminated against the deceased's two female children because the rule and the other impugned provisions prevented the children from inheriting the deceased's estate.<sup>276</sup> However, it is the manner in which the *Bhe* Court negotiates two different kinds of claims for equal respect that is most instructive for our current purposes.

The *Bhe* Court begins with the following bromide: while customary law provides a comprehensive vision of the good life for many South African

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communities and receives some level of constitutional solicitude,<sup>277</sup> this new-found constitutional respect for traditional practices does not immunize them from constitutional review.<sup>278</sup> The *Bhe* Court must locate any justification of extant customary law in the provisions of the Final Constitution.

The *Bhe* Court then characterizes the customary law of succession in terms that validate its spirit without necessitating that the Court be beholden to its letter. The customary law of succession is, according to the Court, a set of rules

. . . designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community. . . . The heir did not merely succeed to the assets of

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275 *Christian Education of South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) ('*Christian Education*') at para 25 ('It might well be that in the envisaged pluralistic society members of large groups can more easily rely on the legislative process than can those belonging to smaller ones, so that the latter might be specially reliant on constitutional protection, particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening. Nevertheless, the interest protected by section 31 is not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity.') For criticism of *Christian Education*, see 36.4(c)(iii) supra. See also S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, § 44.3(c)(viii); P Lenta 'Religious Liberty and Cultural Accommodation' (2005) 122 *SALJ* 352.

276 See *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('*Bhe*').

277 See, eg, FC s 39(3): 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.<sup>279</sup>

By recasting the justification for customary rules of succession in terms of family and community stability, rather than patriarchy and property, the *Bhe* Court is able to soften its critique. It then notes that the conditions of family and community that gave rise to the challenged rules no longer obtain. The *Bhe* Court writes:

Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession . . . determine succession to the deceased's estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the

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deceased's responsibilities. In the changed circumstances, therefore, the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependants of the deceased.<sup>280</sup>

Customary law has not, the *Bhe* Court ruefully observes, evolved to meet the changing needs of the community. It fails African widows because: '(a) . . . social conditions frequently do not make living with the heir a realistic or even a tolerable proposition; (b) . . . the African woman does not have a right of ownership; and (c) the prerequisite of a good working relationship with the heir for the effectiveness of the widow's right to maintenance', as a general matter, no longer exists.<sup>281</sup> Again the Court takes care to note that the fault for this arrested development lies outside traditional communities. Ruptures within traditional ways of life — caused by both apartheid, the hegemony of western culture and capitalism — have prevented the

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278 *Bhe* (supra) at paras 42–46 ('At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution. This status of customary law has been acknowledged and endorsed by this Court.') See also *Alexkor Ltd & Another v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) ('*Richtersveld*') at para 51 ('While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution'); *Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C) ('*Mabuza*') at para 32 ('It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.')

279 *Bhe* (supra) at para 75.

280 *Bhe* (supra) at para 80.

law's evolution.<sup>282</sup> This aside sets the stage for the delivery of the *Bhe* Court's coup de grace: that 'the official rules of customary law of succession are no longer universally observed.'<sup>283</sup> The trend within traditional communities is toward new norms that 'sustain the surviving family unit' rather than re-inscribe male primogeniture.

By having shown that the spirit of succession lies in its commitment to family cohesion, that the traditional family no longer coheres as it once did, and that 'distorted' rules of customary law 'emphasise . . . patriarchal features and minimise its communitarian ones,' the *Bhe* Court closes the gap between constitutional imperative and customary obligation.<sup>284</sup> Had customary law been permitted to develop in an 'active and dynamic manner', it would have already reflected the *Bhe* Court's conclusion that 'the exclusion of women from inheritance on the grounds of gender is a clear violation of . . . [FC s] 9(3).'285 Had customary law not been allowed to ossify, traditional communities would have noted how male primogeniture entrenched 'past patterns of disadvantage among a vulnerable group' and endorsed the *Bhe* Court's re-working of customary understandings of the competence 'to own and administer property' in a manner that vindicates a woman's right to dignity under FC s 10.<sup>286</sup> The *Bhe* Court is able, therefore, to assert that traditional communities have conceptions of dignity worth protecting without being obliged to endorse a rule that quite clearly offends the dignity

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interests of many women and female children within those communities.<sup>287</sup>

Of course, the *Bhe* Court could have taken a different view of the dignity interests at stake — a view that could, arguably, be said to take somewhat more seriously the

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281 See South African Law Reform Commission *The Harmonisation of the Common Law and the Indigenous Law: Succession in Customary Law* Issue Paper 12, Project 90 (April 1998) 6-9. See also TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1997) 126-7.

282 See, eg, *Richtersveld Community & Others v Alexkor Ltd & Another* 2003 (6) SA 104 (SCA), 2003 (6) BCLR 583 (SCA) at paras 85-105.

283 *Bhe* (supra) at para 84.

284 *Ibid* at para 89.

285 *Ibid* at para 83.

286 *Ibid* at para 84.

287 Judge Hlophe employs a similar disabling strategy in *Mabuza*. He recognizes the supremacy of the Final Constitution at the same time as he asserts that the protean nature of customary law should enable it to conform, as necessary, to the dictates of the Bill of Rights. His nuanced assessment of the role of *ukumekeza* reconfigures siSwati marriage conventions in a manner that (a) refuses to allow *ukumekeza* to be used by the groom's family as a means of control over the bride and (b) consciously places the husband and wife on an equal footing with respect to subsequent determinations of whether a valid marriage under siSwati customary law has taken place. See, further, S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 64.

claim that apartheid had ravaged African societies. Justice Ncgobo, in dissent, suggests that if the *Bhe* Court had been truly serious about rectifying the wrongs done to African communities under apartheid, the Court would not have, as it did, subordinate customary law to more general constitutional dictates and statutory enactments. Had the majority taken seriously its own interim conclusion that customary law under apartheid reflected a system of colonial control rather than an authentic expression of law, then it might have placed greater weight on recent trends in indigenous law which suggested that women were increasingly being allowed to take up positions in the family to which they had, heretofore, been barred. The majority, in Justice Ncgobo's view, failed to acknowledge the multiplex kinship relationships that primogeniture was meant to protect and that traditional communities continued to support. Ncgobo J then articulates a response to the problem of primogeniture that — he believes — would have allowed indigenous law the requisite space in which to generate a remedy that honoured both the dignity of women and the dignity of the communities of which these women remain a part.<sup>288</sup> For Justice Ncgobo, equal concern and equal respect for the dignity of indigenous law requires that it be accorded a status equal to ostensibly more atomized notions of dignity found in European conceptions of justice.<sup>289</sup> The challenge of trans-cultural jurisprudence now facing the Constitutional Court, in particular, and South Africa, in general, is how to contrive an ethic that refuses to privilege reflexively the language of the western legal tradition over the language of indigenous law. If the discourse of dignity is, ultimately, to be privileged over talk of ubuntu, then, Justice Ncgobo suggests, such privileges must be earned and not merely assumed.

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288 See *Bhe* (supra) at para 148, where Justice Ncgobo writes:

Our Constitution recognises indigenous law as part of our law. Thus section 211(3) enjoins courts to 'apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.' The Constitution accords it the same status that other laws enjoy under it. In addition, courts are required to develop indigenous law so as to bring it in line with the rights in the Bills of Rights. While in the past indigenous law was seen through the common law lens, it must now be seen as part of our law and must be considered on its own terms and 'not through the prism of common law.' Like all laws, indigenous law now derives its force from the Constitution. Its validity must now be determined by reference not to common law but to the Constitution.

289 See, especially, M Pieterse "'It's a Black Thing': Upholding Culture and Customary Law in a Society Founded on Non-Racialism' (2001) 17 *SAJHR* 364. (Pieterse engages in a thorough analysis — conceptual and practical — of the manner in which the current 'dualism' of western and customary law might be overcome.) See also D Cornell & K van Marle 'Interpreting Ubuntu: Possibilities for Freedom in the New South Africa' (2006) 6 *African Human Rights LJ* (forthcoming); D Cornell 'A Call for a Nuanced Jurisprudence' (2004) 19 *SA Public Law* 661.