

# HUMAN DIGNITY IN COMPARATIVE PERSPECTIVE

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## 1 Introduction

“Human dignity” has become an integral part of the vocabulary of comparative constitutionalism. Not only is the right to dignity proclaimed in national constitutions and international human rights instruments, but it is asserted with increasing frequency that dignity is the basis of all human rights and should be used as a guide to their interpretation.<sup>1</sup> Dignity is invoked as a supreme value, an interpretive *Leitmotiv*, a basis for the limitation of rights and freedoms, and a guide to the principled resolution of constitutional value conflicts. In the view of some authors, dignity provides judicial review with a secure and legitimate basis. Consider, for instance, the claim made by a German law professor that dignity is the only absolute value in a world of relative values – a fixed star which provides orientation amidst life’s uncertainties.<sup>2</sup> Consider, too, the contention of a judge of South Africa’s Constitutional Court that dignity “is an indispensable constituent in neutrally principled and correct adjudication on issues of unfair discrimination”.<sup>3</sup>

And yet, dignity is a contested concept. Sometimes, the transnational consensus on the importance of dignity appears to be a function of the high level of generality at which it is formulated. Behind the agreement on abstract notions of the inviolability of the dignity and worth of the human person lurks disagreement over the scope and meaning of dignity, its philosophical foundations, and its capacity to guide the interpretation of human rights and to constrain judicial decision-making. Alongside the conviction that dignity places constitutional interpretation on a secure footing exists the opposite view – that a dignity-based jurisprudence is the antithesis of principled decision-making, because it allows judges to resort to (subjective) values rather than

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<sup>1</sup> See the references under 2 below. See also Weinrib “Constitutional Conceptions and Constitutional Comparativism” in Jackson & Tushnet (eds) *Defining the Field of Comparative Constitutional Law* (2002) 3 on the primacy of human dignity in the “postwar constitutional conception”.

<sup>2</sup> Isensee “Menschenwürde: die säkulare Gesellschaft auf der Suche nach dem Absoluten” 2006 *AöR* 173 175, 217.

<sup>3</sup> Ackermann “Equality and the South African Constitution: the Role of Dignity” 2000 *Heidelberg Journal of International Law* 537 556.

(objective) rules,<sup>4</sup> or because “dignity” has such a wide range of meanings that it can be invoked in defence of multiple, often directly conflicting, outcomes and presuppositions.<sup>5</sup>

South Africa is one of the countries which have recently embraced dignity as a constitutional right, a supreme value and a guide to constitutional interpretation. The dignity-based jurisprudence of South Africa’s Constitutional Court has sparked a lively debate on dignity’s relationship to other values (particularly equality) and the capacity of dignity to constrain constitutional decision-making. Implicit in these debates are also questions about the various dimensions of dignity, its scope and meaning, and its role in balancing and proportionality analysis.

What is missing from the South African literature on dignity is a sustained engagement with comparative constitutional law. So far, South African constitutional scholars have largely failed to situate their analyses and critiques of the Court’s dignity-based jurisprudence within the broader context of a transnational constitutional discourse on human dignity. This is surprising for a number of reasons. First, human dignity is central to the constitutions of many countries which have, over the past 60 years, emerged from dictatorship, oppression, totalitarianism, fascism, colonialism and discrimination. Secondly, section 10 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), which enshrines the right to human dignity, closely resembles the provisions of some of these constitutions. Thirdly, it is highly likely that the Constitutional Court’s understanding of dignity as the most fundamental norm contained in the Constitution has been shaped, at least to some extent, by comparative case law and literature.<sup>6</sup> And fourthly, foreign case law and academic literature offer rich resources for the conceptualization, analysis and critique of a dignity-based approach.

From the perspective of South African constitutional law, a comparative study of constitutional dignity clauses and of their judicial elaboration offers a number of advantages.<sup>7</sup> First, it is likely to give us a better sense not only

<sup>4</sup> In the words of Judge Easterbrook of the United States Seventh Circuit Court of Appeals: “[w]hen we observe that the Constitution stands for ‘human dignity’ but not rules, we have destroyed the basis for judicial review” (“Approaches to Judicial Review” in *Politics and the Constitution: the Nature and Extent of Interpretation* (1990) 29, cited by Berger “Justice Brennan, ‘Human Dignity’, and Constitutional Interpretation” in Meyer & Parent *The Constitution of Rights: Human Dignity and American Values* (1992) 130 n 2).

<sup>5</sup> Cf the remark made by Dennis Davis, a South African law professor and judge, that South Africa’s Constitutional Court “has given dignity both a content and a scope that make for a piece of jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer” (“Equality: The Majesty of Legoland Jurisprudence” 1999 *SALJ* 398 413).

<sup>6</sup> On the use made by the Constitutional Court of comparative materials, see Ackermann “Constitutional Comparativism in South Africa: a Response to Sir Basil Markesinis and Jörg Fedtke” 2005 (80) *Tulane LR* 169; Botha “Comparative Law and Constitutional Adjudication: a South African Perspective” 2007 *Jahrbuch des öffentlichen Rechts der Gegenwart* 569.

<sup>7</sup> On the possibilities of constitutional comparativism within a South African context, see Ackermann 2000 *Heidelberg Journal of International Law* 556; Botha 2007 *Jahrbuch des öffentlichen Rechts der Gegenwart* 578-587; Van der Walt *Constitutional Property Clauses: a Comparative Analysis* (1999) 1-8.

of the similarities between South Africa's dignity jurisprudence and that of foreign jurisdictions, but also of the paths not taken: the textual formulations and interpretations that have – whether consciously or not – been avoided by the Constitutional Assembly and/or judiciary. Secondly, a comparative study should alert us to the historical contingency of the constitutional choices that have been made, and to the existence of other interpretive possibilities which may or may not make better sense of the commitments enshrined in the Constitution. Thirdly, a comparative approach should give us a better idea of the extent to which problems associated with a dignity-based approach are inherent in the notion of dignity, or are the result of a particular textual formulation or judicial interpretation.

This article analyses and compares the role of dignity in the interpretation of the fundamental rights provisions in the constitutions of Germany and South Africa respectively. The choice of Germany for the purpose of comparison should come as no surprise. The scope and sophistication of the dignity jurisprudence of German courts – in particular the Federal Constitutional Court – and the depth of academic comment by German constitutional law scholars on the concept and uses of dignity are unparalleled in any other country. In addition, South Africa's Constitutional Court has acknowledged the relevance of German jurisprudence to the interpretation of the “core values of human dignity, equality and freedom”. In the words of Ackermann J in a concurring judgment in *Du Plessis v De Klerk*:<sup>8</sup>

“I do believe that the German Basic Law was conceived in dire circumstances bearing sufficient resemblance to our own to make critical study and cautious application of its lessons to our situation and Constitution warranted. The GBL was no less powerful a response to totalitarianism, the degradation of human dignity and the denial of freedom and equality than our Constitution. Few things make this clearer than Art 1(1) of the GBL, particularly when it is borne in mind that the principles laid down in Art 1 are entrenched against amendment of any kind by Art 79(3).”<sup>9</sup>

Section 2 situates the comparison of the dignity jurisprudence of German and South African courts within a broader analysis of the role of dignity in international human rights instruments and national constitutions. The position in Germany is dealt with in section 3. The focus then shifts to South Africa in section 4. Section 5 contains some theoretical conclusions about the possibilities and limits of a dignity-based constitutional jurisprudence. It is suggested that it is precisely the paradoxical nature of human dignity which enables it to guide and structure constitutional discourse.

<sup>8</sup> 1996 3 SA 850 (CC).

<sup>9</sup> Para 92. While it is safe to assume that the dignity-based jurisprudence of South Africa's Constitutional Court has, at least in part, been inspired and influenced by German constitutional jurisprudence, it is not clear from the Court's judgments exactly what it takes the relevant textual, contextual, cultural and historical similarities and differences between Germany and South Africa to be. It is also not immediately apparent to what extent the Court understands its dignity-based interpretation of specific rights such as the right to equality, or its use of dignity in assessments based on balancing and proportionality to have been modelled on German constitutional law, or as a new departure. It is only through careful textual exegesis and a juxtaposition of the German and South African literature that the comparativist can arrive at some tentative conclusions.

## 2 International and comparative law

### 2 1 International human rights instruments

The inherent dignity of every human person, the trauma caused by past massive violations of human dignity and the wish to prevent the reoccurrence of such violations are recurring themes in international human rights instruments.<sup>10</sup> The preamble to the Charter of the United Nations (1945) declares the determination of the international community “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person [and] in the equal rights of men and women”. The Universal Declaration of Human Rights (1948) states in its preamble that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”, and declares in Article 1 that “[a]ll human beings are born free and equal in dignity and rights.” Moreover, both the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) proclaim in their preambles that human rights “derive from the inherent dignity of the human person”.

Dignity is sometimes formulated as an individual right.<sup>11</sup> On other occasions, it features as a founding value which underlies and legitimates the international protection of human rights.<sup>12</sup> Dignity is frequently referred to in conjunction with other values, such as equality and freedom. For instance, the Charter of Fundamental Rights of the European Union (2000) declares in its preamble that “the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity”. It is also invoked within the context of socio-economic rights, grounding the notion that the state is obliged to ensure conditions which are consistent with basic human dignity.<sup>13</sup>

References to dignity are also common in treaties proscribing discrimination and/or seeking to protect vulnerable groups.<sup>14</sup> The United Nations Declaration on the Elimination of All Forms of Racial Discrimination (1963)

<sup>10</sup> The obligation to respect human dignity is also entrenched in international humanitarian law. Art 3(1)(c), which is common to all four Geneva Conventions of 1949, prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment” (see eg the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field).

<sup>11</sup> Art 5 of the African Charter on Human and Peoples’ Rights (1981) provides: “[e]very individual shall have the right to the respect of the dignity inherent in a human being.” Cf also Art 10(1) of the International Covenant on Civil and Political Rights (“[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”); Art 13(1) of the International Covenant on Economic, Social and Cultural Rights (the right to an education that is “directed to the full development of the human personality and the sense of its dignity”); Art 31(1) of the Charter of Fundamental Rights of the European Union (2000) (“[e]very worker has the right to working conditions which respect his or her health, safety and dignity”).

<sup>12</sup> Cf the references in the main text above to the preambles of the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). See also Dicke “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer & Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 111.

<sup>13</sup> Eg Art 22 of the Universal Declaration of Human Rights states that everyone is entitled to the realization of the economic, social and cultural rights “indispensable for his dignity and the free development of his personality”, while Art 23(3) recognizes the right to remuneration which ensures “an existence worthy of human dignity”.

<sup>14</sup> See also Principle 2 of the Declaration of the Rights of the Child (1959).

states in Article 1 that “[d]iscrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity”. Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women (1979) recalls in its preface that “discrimination against women violates the principles of equality of rights and respect for human dignity”. Article 3 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003) goes even further in recognizing the link between human dignity and gender equality. It provides:

- “1. Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights;
2. Every woman shall have the right to respect as a person and to the free development of her personality;
3. States parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women;
4. States parties shall adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.”

International courts and tribunals have also relied on dignity in their interpretation of human rights instruments. Even though the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) contains no express reference to dignity, the European Court of Human Rights and the Commission of Human Rights have invoked the dignity of the human person in a variety of contexts, including torture, the rights of prisoners, and sexual orientation.<sup>15</sup>

## 2.2 Comparative constitutional dignity clauses

Human dignity is central to many of the national constitutions adopted over the past sixty years.<sup>16</sup> This is particularly the case in countries emerging from authoritarian, oppressive, colonial and/or racist pasts. The German Basic Law of 1949 (“the Basic Law”), and the Constitutions of Greece (1975), Portugal (1976), Spain (1978), Namibia (1990), the Russian Federation (1993), South Africa (1993 and 1996) and Poland (1997) all invoke the fundamental dignity of the human person in signalling a break with the past and in seeking to prevent a reoccurrence of past horrors.<sup>17</sup> In many constitutions, dignity is entrenched as an individual right.<sup>18</sup> The formulation of Article 1(1) of the

<sup>15</sup> See Frowein “Human Dignity in International Law” in Kretzmer & Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 121.

<sup>16</sup> See generally Häberle “Die Menschenwürde als Grundlage der staatlichen Gemeinschaft” in Insensee & Kirchhof (eds) *Handbuch des Staatsrechts* 3 ed (2004) 317–323. Interesting developments have also taken place at the sub-national level. See Häberle’s discussion of the dignity jurisprudence of the constitutional courts in Bavaria and Hesse (328–331). See also Jackson “Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse” 2004 *Montana LR* 15 for a discussion of the dignity clauses contained in the state constitutions of Montana and Puerto Rico.

<sup>17</sup> However, not all constitutional dignity clauses are a direct response to past trauma – see eg Art 7 of the Federal Constitution of the Swiss Confederation (1999).

<sup>18</sup> See eg Art 8 of the Namibian Constitution (1990), Arts 2 and 4 of Israel’s Basic Law: Human Dignity and Liberty (1992), Art 21 of the Russian Constitution (1993), Art 24 of the Constitution of Ethiopia (1994), s 10 of the South African Constitution, Art 7 of the Swiss Constitution (1999), Art 21 of the Constitution of Colombia (1991), and Art 30 of the Polish Constitution (1997).

German Basic Law has proved to be particularly influential, and many of these provisions entrench dignity as inviolable,<sup>19</sup> and/or impose an obligation on the state to respect and protect the dignity of the person.<sup>20</sup> Dignity also features frequently as a founding value.<sup>21</sup> Sometimes, dignity is invoked as the basis of other human rights<sup>22</sup> or as a guide to their interpretation.<sup>23</sup> In particular, it is often referred to in conjunction with the values of freedom (or the free development of the person),<sup>24</sup> equality<sup>25</sup> and solidarity.<sup>26</sup> Sometimes, it is also related to the concept of the social state,<sup>27</sup> or used to ground the right to social assistance and security.<sup>28</sup>

However, it would be a mistake to restrict the significance of the ideal of human dignity to those constitutional provisions which expressly refer to it. The idea of the inherent worth and dignity of the person and of individual autonomy is so basic to current understandings of human rights, that it is almost inevitable that they will inform rights discourse – whether in the course of pronouncements on the meaning of the rights to life and liberty, or in the context of procedural guarantees or the right not to be subjected to cruel or unusual punishment. Even in the absence of any reference in the Constitution to human dignity, the United States Supreme Court has, on occasion, invoked the language of dignity. The late Justice Brennan, in particular, sought to establish a dignity-based jurisprudence and insisted, in the face of opposition by the majority of the Court, that the death penalty constituted a brutal assault on the dignity of the individual,

<sup>19</sup> See Art 8(1) of the Namibian Constitution (1990) and Art 30 of the Polish Constitution (1997).

<sup>20</sup> See Art 2 of the Greek Constitution (1975), Art 10 of the South African Constitution, Art 30 of the Polish Constitution (1997) and Art 10 of the Swiss Constitution (1999).

<sup>21</sup> See eg Art 1(2) of the German Basic Law (1949); Art 1 of the Constitution of Portugal (1976); Art 10 of the Constitution of Spain (1978) (“[t]he dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and social peace”); the preface to the Namibian Constitution (1990) (“recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace”); Art 10(1) of the Colombian Constitution (1991); the preface to the Polish Constitution (1997) (“[w]e call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person ...”).

<sup>22</sup> See eg Art 1(1) of the German Basic Law (1949); Art 30 of the Polish Constitution (1997) (“[t]he inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens”); s 1 of Israel’s Basic Law: Human Dignity and Liberty (1992) (“[b]asic human rights in Israel are based on the recognition of the value of the human being, and the sanctity of his life and his freedom”).

<sup>23</sup> See eg s 39(1) of the South African Constitution and the preface to the Polish Constitution (1997).

<sup>24</sup> See Art 1 of the Portuguese Constitution (1976), Art 10(1) of the Spanish Constitution (1978), Art 24 of the Ethiopian Constitution (1994), and the preface to the Polish Constitution (1997).

<sup>25</sup> See Art 13(1) of the Portuguese Constitution (1996) (“[a]ll citizens have the same social dignity and are equal before the law”) and Art 3 of the Italian Constitution (“[a]ll citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions”).

<sup>26</sup> See Art 1 of the Portuguese Constitution (1976) and the preface to the Polish Constitution (1997).

<sup>27</sup> See Art 7 of the Russian Constitution (1993).

<sup>28</sup> Art 12 of the Swiss Constitution (1999) (“[w]hoever is in distress without the ability to take care of him- or herself has the right to help and assistance and to the means indispensable for a life led in human dignity”); s 19(1) of the Constitution of Finland (2000) (“[t]hose who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care”). Cf also Art 151(1) of the Weimar Constitution of 1919 (referred to under 3 1 below).

and thus violated the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>29</sup>

### 2.3 Concluding remarks

Far from being simply a preoccupation of South African constitutional drafters and judges, human dignity is part and parcel of a shared constitutional vocabulary which cuts across national boundaries. Moreover, it is closely bound up with other rights and values (freedom, equality and the like) that are just as integral to current constitutional understandings.

Reliance on human dignity serves a number of functions. In the first place, it often signals a break with a history of oppression, totalitarianism, colonialism and discrimination, and the wish to establish a new national or supranational order based on respect for human rights. Secondly, by invoking the inherent dignity and worth of the human person, the architects of a constitutional order or supranational human rights regime appeal to a higher law or transnational legal consensus, and thus seek to ground the protection of human rights in something more enduring than public opinion, which is seen as constantly shifting and sometimes fickle. Thirdly, in addition to the symbolic and foundational functions referred to above, constitutional appeals to human dignity have a legal significance which extends beyond the merely aspirational. Dignity is often entrenched as an individual right. It also has the status of an objective legal norm which serves as a guideline to the interpretation of ordinary law. Finally, to the extent that dignity is perceived to be at the centre of the constitutional value order and because dignity is closely related to other rights and values, such as freedom, equality and social solidarity, it is seen as a mechanism for the resolution of or mediation between conflicting constitutional values. Accordingly, dignity sometimes plays an important role in determining the proper boundaries of constitutionally protected rights and interests and in the balancing of conflicting interests.

And yet, we should not jump to conclusions too hastily. It is one thing to note the pervasiveness of dignity in human rights discourse, and another to conclude that dignity is *the* central constitutional norm of our time which should guide the interpretation of *all* human rights and which is capable of mediating constitutional value conflicts in a principled manner. The growing transnational consensus on the importance of human dignity, as it finds expression in the constitutional and treaty provisions referred to above, has been formulated at such a high level of generality that these conclusions

<sup>29</sup> As Brennan J remarked in a concurring judgment in *Furman v Georgia* 408 US 238 (1972):

“The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is ‘cruel and unusual,’ therefore, if it does not comport with human dignity.” (270)

See also the remark of Warren CJ in *Trop v Dulles* 356 US 86 (1958): “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man” (100). It must, however, be pointed out that there is considerable resistance among judges in the United States to a dignity-based jurisprudence, and that the dignity-based jurisprudence of the German Constitutional Court is often contrasted in the academic literature with the liberty-based jurisprudence of the US Supreme Court. See generally Meyer & Parent *The Constitution of Rights: Human Dignity and American Values* (1992); Eberle *Dignity and Liberty: Constitutional Visions in Germany and the United States* (2002).

simply do not follow.<sup>30</sup> To be able to evaluate such claims, we need a better understanding of the ways in which dignity is concretized in particular constitutional systems. We also need to move beyond platitudes about the “interrelatedness” of dignity and other values and rights, and study the ways in which the overlaps, intersections and conflicts between dignity and other constitutional values are conceptualized in foreign jurisprudence. Hence the attempt in the next section to come to terms with the German literature on human dignity.

### 3 Dignity in German constitutional law

#### 3 1 Textual and historical setting

Article 1 of the Basic Law provides:

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

That human dignity is a fundamental constitutional value is evident not only from its entrenchment in the very first provision of the Basic Law, but also from the way in which “inviolable and inalienable human rights” are made to flow from the inviolability of human dignity. Also noticeable are the absolute terms in which dignity is asserted. Dignity is said to be “inviolable”, and no provision is made for its limitation by, or in terms of, legislation.<sup>31</sup> But dignity is not only shielded from ordinary legislative incursions. The principles laid down in Article 1 are also shielded from constitutional amendment by Article 79(3). Dignity thus belongs, alongside democracy, federalism and the social state, to an unalterable core of constitutional values and principles.

The prominence accorded to human dignity was a direct response to the terrors of National Socialism. The drafters of the Basic Law wished to stress that the dignity of the human person and not the “dignity of the state” – a notion which was central to National-Socialist attacks on the Weimar Constitution of

<sup>30</sup> A single example should suffice. Even though a link between gender equality and human dignity is – quite rightly – established in international human rights conventions and some national constitutions, it does not follow from this that gender equality can be equated with the restoration of women’s dignity at either the conceptual or remedial level. Whether or not diverse social aims such as the advancement of women in political and public life (Art 7 of CEDAW), the elimination of discrimination against women in the fields of employment (Art 11) and health care (Art 12), and the advancement of women in rural areas (Art 14) can all be achieved through a dignity-centred approach, are vexed questions which cannot simply be answered on the basis of a superficial textual analysis of the relevant human rights documents. For a political-theoretical debate on the question whether gender discrimination can be adequately redressed through a politics of recognition or whether, in addition, redistributive strategies are needed which are not reducible to a recognition-based politics, see Fraser & Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003).

<sup>31</sup> See 3 5 below. Because dignity may be balanced neither with other fundamental rights nor with the public interest, it is often given a restrictive interpretation. See 3 3 1 below.

1919 – was the foundation of the new constitutional order.<sup>32</sup> Although the members of the Parliamentary Council, the body responsible for the adoption and ratification of the Basic Law, were agreed on the importance of human dignity as cornerstone for the protection of fundamental rights, they found it far more difficult to reach consensus on the formulation of Article 1. This was mainly due to ideological and philosophical differences relating to the sources of human dignity. The idea of human dignity has a rich and varied history, and has roots in ancient philosophy (Stoicism), religions such as Judaism and Christianity (man as *imago dei*), humanism, Kantianism and the like.<sup>33</sup> Whether dignity should be understood in say, a Christian or Kantian sense, and whether Article 1 should include a reference to God – or natural law – as the source of human rights, gave rise to much controversy.<sup>34</sup> Ultimately, a formulation was chosen which seemed compatible with a wide range of philosophical perspectives.

The idea of dignity as a constitutional precept was not an invention of the Basic Law. The drafters of the Basic Law of 1949 had some historical precedents which they could draw on. The Weimar Constitution of 1919 already linked human dignity to the idea of the social state by providing in Article 151(1) that the ordering of economic life must be in accordance with the principles of justice, with the purpose of ensuring a dignified existence for all. The constitutions of three *Bundesländer* (Bavaria (1946), Hessen (1946) and Bremen (1947)) also preceded the Basic Law in their demand that the state respect human dignity.<sup>35</sup>

### 3 2 Dignity as a right, a norm, and a value

Article 1(1) imposes a duty on all state authority to respect and protect human dignity.<sup>36</sup> The duty to respect is a negative one: the state must refrain from performing any action that infringes human dignity. For example, the

<sup>32</sup> Art 1 of the draft constitutional text produced by the Herrenchiemsee Convention, which was influential in the framing of Art 1 of the Basic Law, proclaimed *inter alia* that the state exists for the sake of the individual, and that the individual does not exist for the sake of the state. The Herrenchiemsee Convention was a meeting of experts on constitutional law which produced a draft constitution in August 1948. It preceded the meeting of the Parliamentary Council, which was entrusted with the drafting of the Basic Law.

<sup>33</sup> See Dreier *Grundgesetz Kommentar Bd I 2* ed (2004) 143-151. Dreier is justifiably critical of a tendency in the academic literature to overlook the vast differences and discontinuities among ancient, medieval and modern conceptions of dignity. He points out that for stoic thinkers such as Cicero, human dignity was more of a duty than a right. He further argues that the Christian notion of man as *imago dei* is closely bound up with the doctrine of original sin. For centuries, it was not viewed as an impediment to the institutionalization of grossly unequal social relations such as that between master and slave. Similarly, for a long time the commonality of the human species had to play second fiddle to the distinction between Christians, non-Christians and heretics. While Dreier does not deny the role of Christianity in the evolution of the idea of human dignity, he points out that Christian doctrine has by no means played an exclusive role in the institutionalization of dignity within the legal-political sphere, and that it has often impeded its realization.

<sup>34</sup> See Dreier *Grundgesetz Kommentar Bd I* 153-155; Stern *Das Staatsrecht der Bundesrepublik Deutschland Bd IV/1* (2006) 13-14.

<sup>35</sup> See Dreier *Grundgesetz Kommentar Bd I* 151-153 for a discussion of some other historical precedents.

<sup>36</sup> See Dreier *Grundgesetz Kommentar Bd I* 213-225; Häberle "Menschenwürde als Grundlage" in *Handbuch des Staatsrechts* 354-355; Herdegen "Art. 1 Abs. 1" in Maunz & Dürig *Grundgesetz Kommentar* (2003/2005) 1 46-48.

state may not engage in torture, impose cruel or inhuman punishment, or perform any action which reduces the individual to a mere object. By contrast, the injunction to protect imposes a positive duty on the state to create a legal order which protects the individual from infringements by third parties. Here, the legislature is given a wide discretion in its choice of means. For instance, the legislature usually has a choice whether or not to criminalise a particular infringement of dignity.<sup>37</sup> However, this discretion is limited by the principle of proportionality. The legislature would, for example, neglect its duty to protect if it failed to criminalise rape or sexual assault.<sup>38</sup> In addition, the state's obligation to ensure the conditions of a dignified existence is based upon the duty to respect dignity, read together with the principle of the social state. Finally, the indirect horizontal application (*mittelbare Drittwirkung*) of Article 1(1) and its radiating effect on private-law relations are also grounded in the state's duty to protect.<sup>39</sup>

A second distinction, which is closely related – though not identical – to the distinction between the duty to respect and protect, is that between dignity as a subjective right and dignity as an objective norm. Whether dignity constitutes a subjective individual right, in addition to being an objective norm of constitutional law, remains the subject of contention. The text of the Basic Law is ambiguous. On the one hand, the dignity guarantee features as the first provision under the chapter on fundamental rights. On the other hand, Article 1(3) refers to “the following basic rights” which “bind the legislature, the executive and the judiciary”, thus creating the impression that dignity itself is not a fundamental right. Today, the majority opinion seems to be that dignity constitutes a subjective right. Proponents of this view argue, *inter alia*, that Article 1(1) seeks to protect the dignity and worth of the individual in her concrete circumstances, and that it is not simply concerned with the dignity of “humanity” in the abstract.<sup>40</sup> However, other commentators argue that Article 1(1) is fundamentally different from any of the rights enshrined in the Basic Law: not only does it extend to all spheres of life (other than, say, the freedom rights, which each cover a particular area of human activity), but it is absolute in nature and not subject to limitation or to balancing with countervailing rights. Treating dignity as a right could easily lead to its relativization. In this view, little is lost by denying dignity the status of a right, as dignity informs the interpretation of all rights, and as it is almost always used in conjunction with other rights, such as freedom or equality.<sup>41</sup>

Whether or not dignity is regarded as a fundamental right, it is generally accepted that it is a fundamental principle of constitutional law. Far from

<sup>37</sup> Cf the Constitutional Court's finding in BVerfGE 39, 1 45-51 (1975) (the *First Abortion* case) that the state's duty to protect unborn life against abortion, as derived from Arts 1(1) and 2(2), may include the use of criminal law.

<sup>38</sup> Dreier *Grundgesetz Kommentar Bd I* 218.

<sup>39</sup> Häberle “Menschenwürde als Grundlage” in *Handbuch des Staatsrechts* 349; Stern *Staatsrecht Deutschlands Bd IV/1* 66.

<sup>40</sup> Herdegen “Art. 1 Abs. 1” in *Grundgesetz Kommentar* 18-20. See also Stern *Staatsrecht Deutschlands Bd IV/1* 61-64.

<sup>41</sup> Dürig “Der Grundrechtssatz von der Menschenwürde” 1956 *AöR* 117 118-120; Dreier *Grundgesetz Kommentar Bd I* 207-209; Isensee 2006 *AöR* 209-210.

representing simply a moral value or programmatic statement, dignity is an objective legal norm which directly binds all state authority. A number of metaphors have been used to highlight the special place of dignity in the constitutional scheme. Dignity has been described as the highest constitutional value,<sup>42</sup> as being at the very top of the value order established by the Basic Law,<sup>43</sup> and as the focal point of such value order.<sup>44</sup> Or, as the Constitutional Court famously pronounced in its *Lüth* judgment,<sup>45</sup> the Basic Law has erected an objective value order which revolves around the free development of the personality and human dignity. All spheres of law (legislation, the administration and the judiciary) must be guided by this value order. It thus also influences private law: no private law norm may be inconsistent with it, and all norms must be interpreted in line with its spirit.

The idea of dignity as an objective legal norm manifests itself in a variety of ways. In the first place, dignity is viewed as the highest constitutional value and one of the leading constitutional principles, which guides the interpretation of the Constitution in general and of the fundamental rights enshrined in the Constitution, in particular.<sup>46</sup> Secondly, the state's duty to protect rights closely associated with dignity arises from dignity's centrality to the objective constitutional value order. For instance, the state's obligation to protect the life of the unborn is derived from the objective dimension of the constitutional guarantees of life and dignity.<sup>47</sup> Thirdly, the horizontal application of fundamental rights and their radiating effect on private law relations likewise flow from the idea of an objective value order which influences all spheres of law, including private law.

As noted above, dignity stands in a close relationship to other provisions in the chapter on fundamental rights. This is clear from Article 1(2) of the Basic Law which, immediately following the dignity guarantee, proclaims:

"The German people *therefore* uphold human rights as inviolable and inalienable and as the basis of every community, of peace and justice in the world."<sup>48</sup>

Dignity is thus seen as foundational to human rights. This does not mean that the whole catalogue of fundamental rights arises from the dignity guarantee and is therefore shielded from constitutional amendment.<sup>49</sup> Moreover, in contradistinction to the right of every person to the free development of her personality (Article 2(1)) which is taken to guarantee freedoms not expressly mentioned in the specific freedom guarantees, dignity is not a catch-all right, as it is feared that such a role would lead to its trivialisation.<sup>50</sup> However, dignity is seen as a guide to the interpretation of fundamental rights and is often used in conjunction with specific rights guarantees. It is said to stand

<sup>42</sup> BVerfGE 45, 187 227 (1977); BVerfGE 6, 32 41 (1957).

<sup>43</sup> BVerfGE 27, 1 6 (1969).

<sup>44</sup> BVerfGE 65, 1 41 (1983).

<sup>45</sup> BVerfGE 7, 198 205 (1958).

<sup>46</sup> BVerfGE 27, 1 6 (1969).

<sup>47</sup> Cf BVerfGE 39, 1 41-42 (1975) (*First Abortion case*).

<sup>48</sup> Emphasis added.

<sup>49</sup> Dreier *Grundgesetz Kommentar Bd I* 226.

<sup>50</sup> Dreier *Grundgesetz Kommentar Bd I* 226; Stern *Staatsrecht Deutschlands Bd IV/1* 74.

in a particularly close relationship with the rights to life, bodily integrity and personal freedom. Other rights, such as freedom of religion, equality, procedural rights (eg the right to participate in one's own trial) and the right to vote are also believed to contain a significant core of human dignity.<sup>51</sup> The interpretation of these and other rights is informed by the dignity guarantee.<sup>52</sup> Dignity is sometimes also used in conjunction with other constitutional principles, such as those of the social state and democracy.

The recognition of the duties to respect and protect, and of the subjective and objective dimensions of human dignity, has yielded a rich constitutional jurisprudence, which guards against public and private violations of dignity and which is attentive to the intersections, overlaps and tensions between dignity and other rights and values. However, this jurisprudence is not without problems. Sometimes, the duty to protect is used to restrict personal autonomy and individual choice, thus raising questions about the relationship between the subjective and objective dimensions of dignity. For instance, the Federal Administrative Court relied on the objective dimension of dignity in finding that a peep show violated Article 1(1), even though the women who participated acted voluntarily.<sup>53</sup> The way in which this judgment invoked dignity to curtail the freedom of participants and thus to deny their autonomy – a key ingredient of dignity – has been vehemently criticised.<sup>54</sup> Moreover, the inter-relatedness of dignity and other rights and values raises difficult questions about the capacity of the legislature to limit rights which are closely related to human dignity, or to amend constitutional provisions which stand in close proximity to it.<sup>55</sup>

### 3 3 The scope and meaning of dignity

#### 3 3 1 *Interpretive difficulties*

Dignity is notoriously difficult to define. Some constitutional lawyers have given up on this quest, declaring that the meaning of dignity can only be determined on a case-by-case basis, or that dignity can only be defined negatively, with reference to past instances of its violation.<sup>56</sup> The trouble with this strategy, as Dreier rightly points out, is that it relies on a consensus about what constitutes an impairment of human dignity, and that this consensus runs out as soon as we leave behind obvious incursions of dignity, such as torture and humiliation, and concern ourselves with new, often more subtle threats or potential threats.<sup>57</sup>

<sup>51</sup> See Herdegen "Art. 1 Abs. 1" in *Grundgesetz Kommentar* 14-17; Stern *Staatsrecht Deutschlands Bd IV/1* 74-85.

<sup>52</sup> It is perhaps more accurate to describe the relationship between dignity and specific rights provisions as one of mutual influence. Not only does the dignity guarantee inform the interpretation of specific rights, but such rights also help to shape understandings of dignity. See Häberle "Menschenwürde als Grundlage" in *Handbuch des Staatsrechts* 349; Herdegen "Art. 1 Abs. 1" in *Grundgesetz Kommentar* 15.

<sup>53</sup> BVerwGE 64, 274 279-280. See also 3 3 2 below.

<sup>54</sup> See Dreier *Grundgesetz Kommentar Bd I* 218-220.

<sup>55</sup> See 3 5 below.

<sup>56</sup> For references to the relevant literature, see Dreier *Grundgesetz Kommentar Bd I* 166-167.

<sup>57</sup> 167.

Attempts to determine the scope and meaning of dignity are further complicated by the special place of Article 1(1) within the Basic Law. As noted above, dignity is viewed as the highest constitutional value and one of the leading constitutional principles. Moreover, the dignity guarantee is absolute – it is insulated both from limitation by, or in terms of, legislation and from constitutional amendment. For these reasons, it is often stated that the meaning of dignity should not be trivialised or inflated.<sup>58</sup> According to dignity a too extensive meaning would either paralyse government or detract from the absolute nature of Article 1(1).<sup>59</sup>

Some authors also warn against the use of dignity as a “magic wand” which is supposed to solve highly complex ethical questions such as those raised by new advances within the fields of biotechnology and human genetics.<sup>60</sup> Concerns about the instrumentalisation and objectification of human embryos or persons in the areas of assisted reproduction, pre-implantation diagnostics, research on superfluous embryos, stem cell research, genetic therapy and cloning are, admittedly, often real, and it is understandable that dignity is invoked in these contexts. There is nevertheless a danger that the – absolute and eternal – guarantee of human dignity could be used to forestall democratic debate on issues that are the subject of widespread and reasonable disagreement. The same goes for abortion, an area in which the Federal Constitutional Court on two occasions found that existing legislation did not go far enough in protecting the life and dignity of the unborn.<sup>61</sup>

### 3 3 2 *The object formulation*

By far the most influential definition of dignity has been the so-called “object formula”. This definition, which found its first systematic elaboration in the work of Günter Dürig, rests on Kant’s categorical imperative in terms of which a human being is an end in itself and not simply a means to an end. According to Dürig, the dignity guarantee is rooted in the idea that man is distinct from impersonal nature by virtue of his mind, which enables him to become conscious of himself, to determine himself and to shape his own environment.<sup>62</sup> To treat human beings as objects is to deny their capacity to shape themselves and their environment. In Dürig’s formulation:

“Human dignity as such is affected when a concrete human being is reduced to an object, to a mere means, to a dispensable quantity. [Violations of dignity involve] the degradation of the person to a thing, which can, in its entirety, be grasped, disposed of, registered, brainwashed, replaced, used and expelled”.<sup>63</sup>

<sup>58</sup> In the words of Dürig 1956 *AöR* 124: “Art. 1 I ist keine ‘kleine Münze’”. In his view, dignity is trivialised by attempts to use it to expand the protection of personal honour or to preserve common decency (127). See also Dreier *Grundgesetz Kommentar Bd I* 164-165.

<sup>59</sup> An example of an alleged incursion which was found to be too trivial was the spelling of a name in a telephone invoice, which was processed electronically, by “oe” instead of “ö” (BVerwGE 31, 236 (1969)).

<sup>60</sup> See Dreier *Grundgesetz Kommentar Bd I* 165-166.

<sup>61</sup> BVerfGE 39, 1 (1975); BVerfGE 88, 203 (1993). On the question whether these medical and research procedures impair human dignity, see Dreier *Grundgesetz Kommentar Bd I* 173-176, 179-202; Häberle “Menschenwürde als Grundlage” in *Handbuch des Staatsrechts* 359-362; Herdegen “Art. 1 Abs. 1” in *Grundgesetz Kommentar* 57-65; Stern *Staatsrecht Deutschlands Bd IV/1* 27-47.

<sup>62</sup> Dürig 1956 *AöR* 125.

<sup>63</sup> 127 (my translation).

This formulation has found favour with the courts. For instance, the Federal Constitutional Court stated in the *Microcensus* case<sup>64</sup> that a requirement that a person must record and register all aspects of his personality would amount to treating him as a mere object. The dignity guarantee, in the view of the Court, requires the state to treat the individual as a subject capable of self-determination – the state “must leave the individual with an inner space for the purpose of the free and responsible development of his personality”.<sup>65</sup> However, since the information required in the *Microcensus* case did not concern intimate details which are usually withheld from the outside world, it was held that the legislation in question violated neither human dignity nor the right of the person to the free development of his personality. In the *Life Imprisonment* case,<sup>66</sup> the Court similarly held that the state may not “turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect”.<sup>67</sup> The Federal Administrative Court also found that “peep shows” resulted in the objectification of the women concerned, thereby violating their dignity, and that the prohibition of such shows was, accordingly, constitutional.<sup>68</sup> However, in the *Second Abortion* case<sup>69</sup> the Constitutional Court found that a pregnant woman who is required to participate in a counselling procedure is not treated as a mere object, as the law recognises her autonomy and responsibility, and views her as a partner.<sup>70</sup>

The object formulation has much intuitive appeal. It corresponds to some of our most basic intuitions about injustice and is rooted in notions of individual autonomy and self-determination, yet accords dignity to all human beings including those who lack the capacity for self-determination due to mental instability or illness.<sup>71</sup> However, doubts exist over the capacity of the object formula to constrain judicial decision-making. Critics aver that the object formula is hopelessly vague and indeterminate and fails to provide a principled basis for the adjudication of concrete cases. Put differently, the object formula is over-inclusive, as there are many instances of objectifying treatment which do not and cannot constitute a violation of the constitutional guarantee of dignity. After all, we have countless dealings (eg commercial dealings) with other persons whom we view as mere means to an end and whose personhood is of little or no interest to us.<sup>72</sup>

Two examples should suffice to illustrate the problems with the object formula. The first is the death penalty. According to a number of authors, the death penalty, which is prohibited by Article 102 of the Basic Law, would not

<sup>64</sup> BVerfGE 27, 1 (1969).

<sup>65</sup> 6. The translation is that of Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 2 ed (1997) 299. See also BVerfGE 65, 1 (1983).

<sup>66</sup> BVerfGE 45, 187 (1977).

<sup>67</sup> 228 (translation by Kommers *Constitutional Jurisprudence of Germany* 308).

<sup>68</sup> BVerwGE 64, 274 277-280 (1981). See also BVerwGE 84, 314 317ff (1990).

<sup>69</sup> BVerfGE 88, 203 (1993).

<sup>70</sup> 281.

<sup>71</sup> See Dürig 1956 *AöR* 125.

<sup>72</sup> See for criticisms of the object formula, Dreier *Grundgesetz Kommentar Bd I* 167-168; Herdegen “Art. 1 Abs. 1” in *Grundgesetz Kommentar* 23; Hofmann “Die versprochene Menschenwürde” 1993 *AöR* 353 360; Stern *Staatsrecht Deutschlands Bd IV/1* 18-19.

*per se* constitute an impairment of dignity.<sup>73</sup> Indeed, it could be argued that rather than reducing the convicted person to a mere object of the criminal process, the death penalty treats her as an autonomous person who must take responsibility for her deeds. On the other hand, it could be argued that the death penalty is the ultimate form of objectification which treats the person as a disposable quantity, reduces her to the object of a cold-blooded and deeply dehumanising process and negates her capacity for self-renewal.<sup>74</sup> The peep show judgement similarly reveals the difficulties associated with the object formulation. The finding that the naked woman who is being watched by men in private cabins is made the object of their commercially exploited lust makes eminent sense, particularly in view of the fact that she cannot see them but that they are able, once they have inserted a coin into a machine, to watch her through a window and, while doing so, masturbate in the isolation of their cabins. And yet, despite the voyeurism, the commercial exploitation and the mechanised, automated quality of the transaction, the question remains whether respect for the woman as an autonomous subject does not preclude attempts to protect her dignity in the name of a morality she may not share. In this case, as in the case of the death penalty, the object formula is inconclusive and can be used either to protect a sphere of personal autonomy or to justify restrictions on the life and liberty of the individual in the name of a more communitarian conception of duty and personhood.

Despite these difficulties, there is a sense among scholars that the dilution of the object formula carries some very real risks. This is nowhere more evident than in the Constitutional Court's judgment dealing with the interception of private communications and the tapping of telephones, and the almost universal scholarly condemnation thereof.<sup>75</sup> The case involved a constitutional amendment dealing with restrictions on the privacy of correspondence, posts and telecommunications. It provided that the law authorising such restrictions may, in the interest of the protection of the free democratic order or the existence or security of the federation or of a *Land*, provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies appointed by the legislature. It was argued that the constitutional amendment reduced citizens to mere objects of state conduct to the extent that it authorised serious incursions into their

<sup>73</sup> Dreier *Grundgesetz Kommentar Bd I* 215-216; Herdegen "Art. 1 Abs. 1" in *Grundgesetz Kommentar* 57. But see also Podlech "Art. 1 Abs. 1" in Denninger, Hofmann-Riem, Schneider & Stein (eds) *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland Bd 1* 3 ed (2001) 17.

<sup>74</sup> Consider also the *Life Imprisonment* case (BVerfGE 45, 187 (1977)) referred to above. In that case, the Court found that lifelong imprisonment, as practised in the Federal Republic of Germany, does not violate human dignity, as prisoners have the chance to be reintegrated into society and as they are in most cases released after having served fifteen to 25 years of their sentence. The Court held that, even in those cases where a person continues to be dangerous and is not released, that does not constitute a violation of dignity as long as there is compliance with the principle of proportionality. Again, one could argue in support of the Court's finding, that there is no impairment of the autonomy and worth of the person as long as the door is not closed altogether on the possibility of her rehabilitation and reintegration into society. However, it is hard not to be cynical about the conclusion that such a person is not reduced to a mere object of crime prevention. It would perhaps be more honest to concede that such a person's dignity is infringed, but to hold that such infringement is necessitated by the need to protect the life and safety of others. Of course, this line of reasoning would fly in the face of the idea that dignity is protected absolutely.

<sup>75</sup> BVerfGE 30, 1 (1970).

private sphere under conditions of absolute secrecy, that it violated Article 1(1) of the Basic Law, and that the amendment was thus not permitted in terms of Article 79(3). The Court rejected this argument. It questioned the capacity of general formulas, such as the object formula, to determine whether a violation of dignity has occurred in a concrete case. It then continued:

“The human person is often the mere object of relationships and of societal development, as well as of the law... That on its own does not constitute a violation of human dignity. In addition, the person must be subjected to treatment which, in principle, casts doubt on his quality as a subject or which, in the concrete case, shows arbitrary disregard for his dignity. To violate human dignity, the treatment of a person at the hand of a public authority must thus be an expression of contempt for the value which accrues to every human being by virtue of the fact that he is a person.”<sup>76</sup>

In the Court’s view, non-notification is not an expression of contempt for the human person whose privacy is infringed, but a burden imposed on the citizen by virtue of the need to protect the existence of the state and the free democratic order. Moreover it found that, even though respect for the quality of the person as a subject normally presupposes the right to enforce one’s rights in a court of law, the exclusion of judicial avenues is not in this case motivated by contempt for the human person, nor is the individual exposed to arbitrary treatment, as other (non-judicial) forms of control are provided.<sup>77</sup>

The judgment has been criticised for its dilution of the dignity guarantee and its willingness to sacrifice dignity in the name of state security.<sup>78</sup> The criteria employed by the Court ultimately render individuals – including individuals who are not themselves suspected of activities which may endanger state security or the free democratic order, but who have contact with such persons – powerless objects of state surveillance who are oblivious of the true state of affairs and who are precluded from challenging the state’s actions. While the Court is correct that the object formula is often inconclusive, the attempt to supplement it with reference to the notion of “contemptuous treatment” is problematic. In the first place, “contemptuous treatment” places the threshold too high and reduces Article 1(1) to the prohibition of a narrow category of utterly humiliating treatment.<sup>79</sup> Secondly, it seems arbitrary to require a subjective intention to devalue a person, as violations of dignity can also result from measures taken in good faith and which are aimed at achieving legitimate objectives.

### 3 3 3 Individual and community

The Federal Constitutional Court has stressed that the Basic Law does not entrench the image of an atomistic individual, but recognises that citizens

<sup>76</sup> 25-26 (my translation).

<sup>77</sup> 26-27.

<sup>78</sup> See the dissenting judgment at 39-43, as well as Dreier *Grundgesetz Kommentar Bd I* 168; Häberle *Kommentierte Verfassungsrechtsprechung* (1979) 107-109; Hofmann 1993 *AöR* 360; and Stern *Staatsrecht Deutschlands Bd IV/1* 20 for criticisms of the majority judgment.

<sup>79</sup> The dissenting judgment points out that it tends to reduce Art 1(1) to the prohibition of the reintroduction of torture, pillory and the methods of the Third Reich (39).

are members of and bound to the community.<sup>80</sup> As the Court held in an early judgment:<sup>81</sup>

“The image of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person’s dependence on and commitment to the community, without infringing upon a person’s individual value.”<sup>82</sup>

Human dignity, too, is taken to vest not in individuals who exist prior to and in abstraction of the society in which they live, but in persons who are constituted through intimate and familial relationships, communication and participation in the life of the community.

Sometimes, the idea that the individual is bound to the community is used to justify the limitation of individual rights and freedoms. Individuals have a duty to respect the dignity of others, and this duty sets limits to their own freedom. It has also been suggested that individual rights are limited by the obligation to respect the right of future generations to a dignified existence.<sup>83</sup>

The idea that the Basic Law is informed by a particular image of the human person is controversial. It has been pointed out that there is scant textual support for this contention. More fundamentally, it is sometimes objected that the idea of a unitary “image of man” which is taken to be constitutionally entrenched, is highly problematic in a modern, pluralistic society which is characterised by a plurality of self-understandings and ways of being in the world. What makes this notion even more dangerous is the fact that it is frequently invoked as the basis of individual duties and fundamental-rights limitations.<sup>84</sup>

On the other hand, Häberle points out that the image of man which is said to inform the Basic Law is flexible – and contradictory – enough to accommodate a plurality of vastly different self-understandings.<sup>85</sup> It encompasses both the autonomy of the individual and her membership of and boundedness to the community. It serves not only to ground individual duties, which may result in restrictions to individual freedoms, but also to strengthen and to expand the sphere of personal freedom.<sup>86</sup> It encompasses both the ideal of the active citizen who participates in the political life of the community, and the right to withdraw into the private sphere or a life of contemplation.<sup>87</sup> In his view, the so-called constitutional image of man does not carry in itself the seeds of totalitarianism. On the contrary, it is fragmentary and open to a plurality of worldviews. What it does, is to provide the constitutional interpreter with a framework of possibilities. Excluded from this framework are the extremes: an image of the self that is unencumbered by social relationships and communal ties, and a constitutional understanding which subordinates individual

<sup>80</sup> See BVerfGE 27, 344-351 (1970).

<sup>81</sup> BVerfGE 4, 7 (1954).

<sup>82</sup> 15-16 (translation by Kommers *Constitutional Jurisprudence of Germany* 305).

<sup>83</sup> Häberle “Menschenwürde als Grundlage” in *Handbuch des Staatsrechts* 347-348.

<sup>84</sup> Dreier *Grundgesetz Kommentar Bd 1* 229-230.

<sup>85</sup> Häberle *Das Menschenbild im Verfassungsstaat* 3 ed (2005) 37, 60-63.

<sup>86</sup> 47-50.

<sup>87</sup> 50-52.

autonomy to the common good, or views the individual as a mere means to its achievement. Between these two extremes, however, lie a wide range of possibilities, leaving the legislature a margin of discretion as to how best to harmonise or articulate freedom with solidarity, and individual autonomy with the public interest.

The idea of the constitutional “image of man” has thus helped the Federal Constitutional Court to avoid a strict dichotomy between individual autonomy and the public interest.<sup>88</sup> It also constrains constitutional decision-making to the extent that it rules out certain interpretive options. However, it neither provides us with an account of the various ways in which human dignity and the public interest intersect, overlap and clash, nor tells us where to draw the boundary, in concrete cases, between individual autonomy and the public interest.<sup>89</sup> What is needed is a better theoretical understanding of the concept of human dignity, its various meanings and manifestations, and its relationship to other constitutional values.

### 3 3 4 Manifestations and theoretical orientations

The constitutional commitment to human dignity is manifested in seven broad principles.<sup>90</sup> First, dignity implies the equality of all persons. Any form of systematic discrimination or humiliation violates the dignity of the person, as does the treatment of a particular group as “second-class”. Secondly, dignity demands respect for the individuality, identity, moral integrity and free self-determination of every person. This entails, *inter alia*, the prohibition of attempts to defeat a person’s will or conquer her identity (for example, through the use of truth serum or lie detectors), respect for the individual’s sexual self-determination, and protection of the intimate sphere. Thirdly, dignity requires the protection of the bodily and psychological integrity of the person. The prohibition of torture and other degrading treatment and punishment flows directly from this commitment. Fourthly, the decision to have children is seen as an aspect of human dignity and personal self-determination. At the same time, however, dignity sets limits to the use of reproductive technology which is seen as objectifying and degrading. Fifthly, the prohibition of the use of

<sup>88</sup> This is probably what the Federal Constitutional Court had in mind when it stated in BVerfGE 65, 1 (1983) (the *Census Act* case) that “[t]he Basic Law has resolved the tension between the individual and society by postulating a community-related and community-bound individual” (44; translation by Kommers *Constitutional Jurisprudence of Germany* 325). The Court does not view the relationship between the individual and community in terms of a stark opposition, but is able to appreciate the affinity, in a constitutional democracy, between the common good and the equal recognition of all individuals. Nevertheless, its choice of words is unfortunate. While the common good often intersects and overlaps with individual rights, this does not alter the basic fact that individual claims to autonomy and equal recognition often clash with the perceived common good. No constitutional conception of personhood or image of man can resolve this tension – unless it appeals, in Rousseauian fashion, to an understanding of the general will which labels all social dissent as misconceived and illegitimate.

<sup>89</sup> Cf the criticism of Dreier *Grundgesetz Kommentar Bd I* 230 that the Federal Administrative Court has used the idea of the constitutional image of man in an arbitrary fashion. Sometimes it is used to limit fundamental rights, while at other times it serves to strengthen them. According to Dreier, the constitutional image of man provides no principled orientation for the decision of cases.

<sup>90</sup> See Dreier *Grundgesetz Kommentar Bd I* 170-171; Häberle “Menschenwürde als Grundlage” in *Handbuch des Staatsrechts* 343; Herdegen “Art. 1 Abs. 1” in *Grundgesetz Kommentar* 49-68; Stern *Staatsrecht Deutschlands Bd IV/1* 17-60.

excessive force by the state is related to the dignity guarantee, at least to the extent that the use of such force denies the equal worth and autonomy of the individual. Examples include the principles of proportionality and *nulla poena sine lege*. In the sixth place, every person has the right to social recognition. The right to the protection of one's honour is believed to have some basis in the dignity guarantee. Similarly, a condemned criminal must be given at least some chance of reintegration into society. Finally, the constitutional norm of human dignity requires the state to provide certain minimum material guarantees, which must ensure a dignified existence for all.

Despite the existence of a broad consensus on the various dimensions of dignity, disagreement is rife in cases of potential infringements of, or threats to, dignity which are more subtle, and in areas marked by widespread political and ideological differences. These areas of contention highlight the lack of agreement on the theoretical foundations of human dignity. Three main theoretical orientations present themselves for consideration.<sup>91</sup>

The first theoretical orientation derives from Christian and natural-law thinking, and stresses the inherent value of each human being. Here dignity is grounded either in the idea that man was created in the image of God, or in human reason and the capacity for self-determination and ethical autonomy. These theories are said to vest dignity in all human beings, regardless of their ability or potential. However, Hofmann notes that in the Christian conception, dignity tends to be conflated with biological human life, while supporters of the idealistic natural law variety have to resort to strained notions, such as the potential reasoning capacity of a person or the abilities of the human species, to extend dignity to those who lack the mental capacity for reason and self-determination.<sup>92</sup> The theological and metaphysical foundations of this orientation are also considered problematic in an age characterised by the fragmentation and pluralisation of belief systems.

The second theory views dignity as something to be achieved through a process of identity-building and self-actualisation, rather than as something already given and inherent in every human being.<sup>93</sup> On the positive side, this theory is said to be free from metaphysical and theological baggage, and emphasises the affinity between dignity, autonomy, identity, and the structural and institutional framework (for example the social state) within which these goods are to be safeguarded. On the negative side, it detracts from the unconditional nature of human dignity, and excludes those who lack the capacity for reason and self-determination from its protective scope.

The third theory, known as the communicative theory, grounds dignity not in the qualities, capacities, potential or achievements of the individual human subject, but in social recognition. Dignity is conceived as a relational and communicative concept which can only be realised through the positive valuation, within a concrete community, of claims for recognition. The basis

<sup>91</sup> See generally Dreier *Grundgesetz Kommentar Bd I* 169-170; Häberle "Menschenwürde als Grundlage" in *Handbuch des Staatsrechts* 341, 343; and Hofmann 1993 *AöR* 353.

<sup>92</sup> Hofmann 1993 *AöR* 361.

<sup>93</sup> See Luhmann *Grundrechte als Institution: ein Beitrag zur politischen Soziologie* 4 ed (1999) 61ff.

of such recognition, and thus of dignity, lies in human solidarity and not in a specific human quality or achievement.<sup>94</sup> This theory is attractive for a number of reasons. Because it grounds dignity in human intersubjectivity, rather than in some pre-existing human quality or in notions of individual sovereignty, it avoids reliance on timeless truths or essentialist understandings of the self. Moreover, because it appeals to solidarity as the basis of dignity, it has no problem recognising the dignity of those who lack the capacity for reason and ethical self-determination – and it does so without conflating dignity with biological human life.<sup>95</sup> Finally, to the extent that it situates dignity within a particular (national) community, the communicative theory is better able to account for the boundaries against which claims for the recognition of dignity inevitably come up.

The last point is in need of clarification. The communicative theory starts from the paradox that the universal idea of dignity can only be realised within a concrete – and therefore particular – community based on mutual recognition. In such a community, dignity performs a constitutive role. The dignity clause in the German Basic Law does more than merely proclaiming a right, a principle or a value. It constitutes an act by means of which a national community is founded.<sup>96</sup>

Naturally, such a community is bounded, and it is not obliged to honour the dignity claims of those who find themselves beyond its confines. Hofmann illustrates this by means of two examples.<sup>97</sup> First, a German consulate in Somalia is under no constitutional or legal obligation to provide food to starving local inhabitants. Secondly, the Federal Republic of Germany is not duty-bound to respond positively to the pleas of asylum-seekers who can demonstrate that, due to restrictions in their home country on basic economic and other liberties, they live under conditions that would not be regarded in Germany as a dignified existence – at least as long as they are not subjected to more serious violations of their dignity than the general populace. According to Hofmann, the communicative theory is able to account for these limits because it emphasises the role of dignity in the founding of the state and grounds dignity in the communicative actions of a bounded community. Dignity, in his view, is rooted in a promise: in founding the state, the people promise to recognise each other's autonomy, equality and individuality. This promise lies closer to the oath sworn by members of a medieval free city than to the hands-off dealings characterising the liberal social contract, with its abstract-individualist underpinnings. It signals solidarity with and openness to the other (including aliens finding themselves within the national territory), and a willingness to recognise the other as a singular human being. At the

<sup>94</sup> Hofmann 1993 *AöR* 363-364.

<sup>95</sup> Proponents of the communicative theory generally reject reliance on dignity in the areas of abortion and human reproduction. See Dreier *Grundgesetz Kommentar Bd I* 173-176, 179-202; Hofmann 1993 *AöR* 376.

<sup>96</sup> See also Häberle "Menschenwürde als Grundlage" in *Handbuch des Staatsrechts* 351-352 on the interplay between dignity and popular sovereignty, and the role of dignity in founding a democratic constitutional state.

<sup>97</sup> Hofmann 1993 *AöR* 353.

same time, however, this promise underlies a republic comprising German nationals, not a cosmopolitan society without boundaries.<sup>98</sup>

Despite the normative appeal and the realism of this theory, it must nevertheless be asked whether it does not effectively reduce dignity to the protection afforded to it within a particular nation-state.<sup>99</sup> While it is true that every act of state-founding implies a demarcation from the outside world and thus constitutes an act of self-enclosure and exclusion, and while there are limits to the state's capacity to honour the dignity claims of those finding themselves outside the national territory, much would be lost if dignity were simply to be reduced to the contours given to it within a positive legal order.

### 3 3 5 *Bearers of dignity*

It is uncontroversial that dignity vests in every born human person, regardless of a person's bodily or mental capacity. Dignity cannot be lost through criminal or undignified behaviour. Also included within the scope of Article 1(1) are aliens finding themselves within the national territory, regardless of whether their stay in Germany is legal or illegal. However, juristic persons are not protected.

The Federal Constitutional Court has held on two occasions that the unborn foetus is a bearer of human dignity in terms of Article 1(1). The Court held in its *First Abortion* judgment.<sup>100</sup>

"Wherever human life exists, it merits human dignity; whether the subject of this dignity is conscious of it and knows how to safeguard it is not of decisive moment. The potential capabilities inherent in human existence from its inception are adequate to establish human dignity."<sup>101</sup>

In the *Second Abortion* judgment, it likewise stated.<sup>102</sup>

"Unborn human life possesses human dignity; [dignity] is not merely an attribute of a fully developed personality or a human being after birth".<sup>103</sup>

In both judgments, the question whether a foetus is the bearer of human dignity is made to turn on the question whether it constitutes human life. This equation of dignity with biological life has been criticised.<sup>104</sup> Critics have also argued that the idea that unborn human life is entitled to dignity is irreconcilable with the Court's findings that abortions are constitutionally permissible under certain circumstances (for instance, when it would place an unreasonable social or psychological burden on the mother to require her to carry her foetus to term) and that non-indicated abortions in the first twelve weeks of pregnancy, while illegal, need not be punished. These findings are said to detract from the absolute nature of the dignity guarantee, as

<sup>98</sup> 365-373.

<sup>99</sup> Cf the criticisms of Isensee 2006 *AöR* 196-197, 215 (arguing that in the communicative theory, dignity is no longer seen as absolute and that nothing prevents a community from withdrawing its recognition of certain persons).

<sup>100</sup> BVerfGE 39, 1 (1975).

<sup>101</sup> 41 (translation by Kommers *Constitutional Jurisprudence of Germany* 338).

<sup>102</sup> BVerfGE 88, 203 (1993).

<sup>103</sup> 251 (translation by Kommers *Constitutional Jurisprudence of Germany* 351).

<sup>104</sup> Dreier *Grundgesetz Kommentar Bd I* 173-174; Herdegen "Art. 1 Abs. 1" in *Grundgesetz Kommentar* 40. See also 3 5 below.

they subject dignity to balancing with countervailing rights. In the view of some commentators, these findings would make more sense if the Court had decoupled the right to life from the dignity guarantee and based its decision solely upon the former.<sup>105</sup> However, other authors argue that the coupling of unborn life and dignity makes good constitutional sense. On the one hand, it “helps to define the life of the unborn child as a life distinguished from that of the mother”.<sup>106</sup> On the other, it places the duty to protect life on a more secure basis, as it is not yet generally accepted that the duty to protect is implied in all fundamental rights.<sup>107</sup>

The protection afforded in terms of Article 1(1) also extends to the deceased. The body of the deceased person may not be reduced to the mere object of medical research or to a source of organ harvesting. Personality rights likewise enjoy posthumous protection. In the *Mephisto* case,<sup>108</sup> the Federal Constitutional Court upheld the decision of the court a quo in terms of which the right to publish a novel which dishonoured the memory of a deceased person found its limits in the dignity of the deceased person. However, the protection afforded to the personality rights of the deceased is temporally bound. This is best explained in terms of the communicative theory with its emphasis on the mutual recognition of identity and self-worth. As time goes by, the memory of the deceased fades, and the protection of a person’s dignity diminishes accordingly.<sup>109</sup>

A controversial issue is whether dignity attaches only to concrete individuals or whether it can also be used to protect the dignity of humanity in the abstract. This is particularly topical in debates about bio-ethical questions relating to pre-implantation diagnostics or cloning. Because it is often difficult to find a violation of the dignity of an individual, it is argued that such practices impair the dignity of humanity, the human species, or those members of society who see in them something deeply dehumanising. Such recourse to collective notions of dignity has been criticised. It is argued that these notions are essentialist; that they are inconsistent with the plurality characterising modern polities; that they are invoked to preclude debate about contentious social issues by relying upon a constitutional norm which is shielded even from constitutional amendment; and that they are often used in conjunction with arguments that are speculative and border on the hysterical.<sup>110</sup>

### 3 4 Dignity and democracy

Dignity and popular sovereignty are viewed as the foundations of the German constitutional state. However, as Häberle points out, these two concepts are usually separated in constitutional thought.<sup>111</sup> Of course, it is not

<sup>105</sup> Dreier *Grundgesetz Kommentar Bd I* 174-176.

<sup>106</sup> Klein “Human Dignity in German Law” in Kretzmer & Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 154.

<sup>107</sup> 154.

<sup>108</sup> BVerfGE 30, 173 196 (1971).

<sup>109</sup> Dreier *Grundgesetz Kommentar Bd I* 178-179; Hofmann 1993 *AöR* 375-376.

<sup>110</sup> Dreier *Grundgesetz Kommentar Bd I* 203-205.

<sup>111</sup> Häberle “Menschenwürde als Grundlage” in *Handbuch des Staatsrechts* 350.

difficult to see why dignity is seen to stand in an uneasy relationship with popular sovereignty. Not only is dignity regarded as the basis of human rights (Article 1(2)) which bind the democratically elected legislature, but dignity itself is constitutionally entrenched as absolute and beyond even the legislature's authority to revise the Basic Law. Dignity thus sets definite limits to the sovereignty of the people. And traditionally, popular sovereignty is conceived, in the tradition of Rousseau, as absolute and indivisible.<sup>112</sup>

However, a few authors have insisted upon a connection between dignity and democracy. On the one hand, they claim that dignity is not merely a subjective right or individualistic entitlement, but is constitutive of a political community of equals.<sup>113</sup> On the other hand, they maintain that the constitutional commitment to popular sovereignty must be reconceived in view of the constitutional commitment to human dignity. Häberle argues convincingly that "the people" should not be understood as a natural or mystical pre-given, but as a pluralistic entity which consists of citizens who are each vested with their own dignity and worth.<sup>114</sup> Read together, the constitutional principles of dignity and democracy presuppose a polity which embraces the worth of each concrete individual. Accordingly, plurality and difference are regarded as democracy-enhancing, rather than as something to be overcome in the name of the general will.

In this view, dignity implies equal citizenship, and thus the right of the individual to participate in processes of collective deliberation and decision-making. The norm of dignity does not in itself dictate a particular form of democracy; it is, for instance, compatible both with representative and plebiscitary forms of democracy. However, it is violated where a particular group of citizens are excluded from the right to vote, or are denied basic freedoms (eg freedom of expression, assembly or demonstration) which are fundamental to democratic processes of deliberation and will-formation. In these cases, individuals are reduced to objects of the political process, instead of being treated as citizens who are capable of self-determination. Moreover, they are excluded from a political community based on mutual recognition, and thus denied the right to exercise their autonomy and to shape their own identities in communication with others.<sup>115</sup>

Underlying Häberle's account of the link between dignity and democracy is the understanding that dignity is not exclusively concerned with private autonomy. In this vision, public and private autonomy are closely interlinked.

<sup>112</sup> The idea that dignity is at odds with democracy is strengthened by judgments in which freedom of expression, which is so vital to the democratic process, was construed narrowly in relation to the rights to honour and reputation. The *Mephisto* judgment (BVerfGE 30, 173 (1971)), in which the Court upheld the banning of a satirical novel on the ground that it dishonoured the good name and memory of a deceased actor upon whose life the main character was based, is open to this criticism. However, the judgment in *Lüth* (BVerfGE 7, 198 (1958)) shows that a dignity-based constitutional jurisprudence need not result in a dilution of democratic freedoms. In *Lüth*, the Court held that dignity is at the centre of the constitutional value order (205), but at the same time made it clear that, as far as the formation of public opinion relating to questions that are central to the public good is concerned, private and individual economic interests must recede into the background (219).

<sup>113</sup> See the discussion of the communicative theory under 3 3 4 above.

<sup>114</sup> Häberle "Menschenwürde als Grundlage" in *Handbuch des Staatsrechts* 351-352.

<sup>115</sup> 353.

Private rights are best secured through a pluralistic public sphere which is characterised by tolerance of cultural and religious differences and the free exchange of multiple and conflicting viewpoints. At the same time, however, such a public sphere presupposes respect for private freedoms and a protected sphere of intimacy.

### 3 5 Limitation

Dignity, as noted above, is given absolute protection under the Basic Law. According to Article 1(1), dignity shall be “inviolable”. This has been taken to mean that no person’s inherent human dignity can be taken away: paradoxically, even where a person’s human dignity is violated by means of torture or ostracism, she does not thereby lose her dignity.<sup>116</sup> Moreover, a person can neither waive her dignity, nor forfeit it through undignified behavior.

Significantly, no provision is made for the limitation of dignity by or in terms of legislation. Consequently, dignity may not be weighed up with other constitutional rights or with the public interest.<sup>117</sup> Unlike other constitutional rights which contain limiting provisos, dignity is viewed as absolute – a finding that someone’s dignity has been infringed is conclusive of the matter, as such a violation cannot be justified on the basis that it is proportionate to the achievement of an important government objective, or that such person’s dignity is outweighed by other, more pressing considerations.<sup>118</sup>

The notion that dignity is not subject to balancing has, however, come under pressure. Because dignity is seen as the basis of human rights and because it is so often used in conjunction with more specific rights, dignity sometimes features on both sides of a dispute. In cases where dignity conflicts with dignity, a court has no choice but to engage in balancing. In the abortion cases, the Federal Constitutional Court weighed up the life and dignity of the foetus against the self-determination and dignity of the mother.<sup>119</sup> Similar conflicts occur where a person consents to treatment (for example, in the case of “peep shows” and “dwarf tossing”) which is considered to be objectifying and

<sup>116</sup> The Federal Constitutional Court distinguishes between the claim to basic social respect, which may be violated, and the inherent dignity of the person, which cannot be lost. BVerfGE 87, 209 228 (1992).

<sup>117</sup> Fundamental rights may only be limited by, or in terms of, legislation, to the extent that the legislature is granted such power by the Basic Law itself. Many of the fundamental rights provisions contain such limiting provisos (*Gesetzesvorbehalte* or statutory reservations). For instance, the rights to life, bodily integrity and personal freedom may be limited in terms of legislation, while freedom of expression may be limited by a law of general application (Art 5(2)). Sometimes, the Basic Law spells out the conditions under which a right may be limited – see eg Art 11(2). In so far as a fundamental right provision authorizes limitations by or in terms of legislation, the provisions of Arts 19(1) and (2) must be complied with. Art 19(1) provides that the legislation must apply generally and not to an individual case only. It must also mention the fundamental right provision which is limited. In terms of Art 19(2), the essential content of a right may not be infringed. The Constitutional Court has used this provision to develop a test based on proportionality and balancing. See generally Häberle *Die Wesensgehaltgarantie des Art. 19 Abs. 2 Grundgesetz* 3 ed (1983); Hesse *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* 20 ed (1999) 139-144, 147-150.

<sup>118</sup> In the case of other rights, the fundamental rights inquiry proceeds in two stages: first, the court inquires into the scope and meaning of the right and second, it determines whether the limitation of the right, if any, is constitutional. In the case of dignity, however, only the first inquiry may take place. Thus, Dreier notes that dignity’s scope of protection is identical to its outer limits. *Grundgesetz Kommentar Bd I* 1210.

<sup>119</sup> BVerfGE 39, 1 (1975); BVerfGE 88, 203 (1993).

degrading. Here the state's duty to protect dignity – if needs be, even against self-degradation – conflicts with the autonomy and right of the individual to self-determination.<sup>120</sup> While some commentators regard these conflicts as exceptional,<sup>121</sup> others believe that they are far more common than previously imagined. It has even been argued that the right not to be tortured – always considered to be at the heart of the dignity guarantee – is not absolute, that there are circumstances in which it is outweighed by the dignity of others, and that in such cases the state is under an obligation to torture a person in order to save the lives of innocent persons.<sup>122</sup>

In a recent case,<sup>123</sup> the Federal Constitutional Court had to decide the constitutionality of legislation which, as a direct consequence of the 9/11 attacks in the United States, authorized the security forces to shoot down an aircraft which was to be used to destroy human life. The Court held that the legislation was unconstitutional to the extent that it authorized the killing of innocent victims (cabin crew and passengers), as it reduced them to helpless objects of the state's attempts to protect others and thus disregarded their quality as subjects. The Court refused to balance the dignity of the victims against the lives of others who may be saved in the process. However, it found that the shooting down of an aircraft with only terrorists on board would not violate the terrorists' dignity, and that the infringement of their right to life was proportionate to the protection of innocent lives.<sup>124</sup>

Despite the Court's refusal in the air safety case to relativize dignity, the question remains whether it is tenable to cling to an absolute conception of dignity. According to one commentator, the ever more frequent collisions of dignity against dignity and the increasing use of dignity to gain the upper hand in political and ideological battles mark the end of interpretive innocence and endanger the idea of dignity as something absolute.<sup>125</sup> A number of interpretive strategies have been employed in trying to come to terms with the perceived threats to dignity's normative status. One is to economize on the use of dignity in an attempt to restore it to its role as the centre of the constitutional value order and as the foundation of all human rights, rather than as a subjective right to be weighed up against other rights and interests.<sup>126</sup> The problem with this strategy is that it cannot avoid collisions between dignity and dignity. It can try to minimize such collisions by giving dignity a restrictive interpretation, but this carries the risk of reducing dignity to a too narrow category. A second strategy is to avoid relying on dignity in areas such as abortion, reproductive technology and stem cell research, which are characterized by deep and widespread social disagreement.<sup>127</sup> This strategy seeks to withdraw dignity from a

<sup>120</sup> See the references to BVerfGE 64, 274 (1981) at 3 2 and 3 3 2 above.

<sup>121</sup> Dreier *Grundgesetz Kommentar Bd I* 1210.

<sup>122</sup> Brugger "Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?" 2000 *JuristenZeitung* 165.

<sup>123</sup> BVerfGE 115, 118 (2006).

<sup>124</sup> 151-165.

<sup>125</sup> Isensee 2006 *AöR* 194-199.

<sup>126</sup> See the discussion and references to literature under 3 2 above.

<sup>127</sup> See the discussion and references to literature under 3 3 1 above.

number of intractable value conflicts; however, other areas of deep-seated social disagreement (eg conflicts between cultural and religious freedom, on the one hand, and individual autonomy and equality, on the other) remain from which dignity can hardly be extracted. Moreover, the attempt to withdraw dignity from such debates raises questions about its capacity to provide orientation on some of the most vexing legal-ethical questions facing contemporary society, and is open to the objection that it is itself informed by a particular political and ideological agenda.

Other authors have given up on the idea of dignity as absolute, and distinguish instead between a core of human dignity which is absolute and unlimited, and a periphery which is open to balancing.<sup>128</sup> While this approach appears to be more realistic than attempts to insulate dignity altogether from balancing, it is itself riddled with difficulties. The difficulty of defining the core and distinguishing it from the periphery, and the danger of subjecting vital aspects of a person's dignity to balancing explain the resistance which this approach still encounters.

## 4 Dignity in South African constitutional law

### 4 1 Textual and historical setting

Section 10 of the Constitution of the Republic of South Africa Act 200 of 1993 (“the interim Constitution”) provides that “[e]very person shall have the right to respect for and protection of his or her dignity.” This provision borrows from German law the notion that dignity must both be respected and protected. However, it does not, on the face of it, emulate Article 1(1) of the German Basic Law in placing dignity in a privileged position *vis-à-vis* other rights and values. Unlike Article 1(1), section 10 is not the first provision dealing with fundamental rights; other rights provisions are not said to flow from it; nothing is said about the inviolability of dignity; it is subject to limitation; and, like the rest of the Constitution, can be amended with a two thirds majority of the members of the National Assembly and Senate, sitting jointly.<sup>129</sup> It may therefore appear as if dignity is just one right among many protected in the interim Constitution. There are, however, textual and structural features which resist this reading. First of all, dignity is closely related to a number of other rights entrenched in the interim Constitution, such as equality, life, freedom and security of the person, the right not to be tortured and not to be subject to cruel, inhuman or degrading treatment or punishment, privacy and freedom of religion. Secondly, even though section 33, the general limitation clause, applies to all constitutionally entrenched rights, limitations of dignity and a number of the rights closely associated with it have to comply with a stricter standard: in addition to being reasonable and justifiable in an open and democratic society based on freedom and equality, such limitations also

<sup>128</sup> See Herdegen “Art. 1 Abs. 1” in *Grundgesetz Kommentar* 27-34.

<sup>129</sup> S 62(1).

need to be necessary.<sup>130</sup> Thirdly, dignity and a number of the rights closely associated with it may not be suspended during a state of emergency.<sup>131</sup>

That the Constitutional Court did not regard section 10 of the interim Constitution as expressing just one right among many was already clear in *S v Makwanyane*,<sup>132</sup> in which the Court described dignity, together with the right to life, as “the most important of all human rights, and the source of all other personal rights” in the Bill of Rights.<sup>133</sup> Drawing on comparative case law to illuminate the affinity between dignity and other rights, the Court soon employed dignity as a guide to the interpretation of many of the rights enshrined in the interim Constitution.<sup>134</sup> Underpinning this vision of dignity as a supreme value and interpretive *Leitmotiv* were a variety of considerations. These include the role of dignity in international and comparative constitutional law,<sup>135</sup> the affinity between human dignity and the indigenous concept of *ubuntu*,<sup>136</sup> and the idea that dignity provides a neutral, principled basis for the mediation of conflicts between equality and freedom.<sup>137</sup> Another factor which seems to have weighed particularly heavily with the Court was its understanding that the evil of apartheid consisted first and foremost in the systematic denial of the inherent dignity and worth of the majority of the population. As O’Regan J stated in an oft-quoted passage in *S v Makwanyane*:<sup>138</sup>

“Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.”<sup>139</sup>

The final Constitution embraces this vision and lends further textual support to the idea that dignity occupies a special place in the new constitutional order. The new section 10 provides that “[everyone] has inherent dignity and the right to have their dignity respected and protected.” By recognising the inherent dignity of every person, the section puts it beyond any doubt that dignity accrues to all persons, that it is not dependent on particular characteristics, and that it can neither be waived nor lost through undignified behaviour. It could even be argued that the reference to the “inherent dignity” of every

<sup>130</sup> S 33(1)(b)(aa). These include the right to freedom and security of the person (s 11(1)); the right not to be tortured and the right not to be subject to cruel, inhuman or degrading treatment or punishment (s 11(2)); the right not to be subject to servitude and forced labour (s 12); the right to freedom of religion, belief and opinion (s 14(1)); and the rights of detained, arrested and accused persons (s 25).

<sup>131</sup> S 34(5)(c).

<sup>132</sup> 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC).

<sup>133</sup> Para 144.

<sup>134</sup> See 4 2 below.

<sup>135</sup> Ackermann 2000 *Heidelberg Journal of International Law* 537 539-540 n 4; Chaskalson “The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order” 2000 *SAJHR* 193 196-198.

<sup>136</sup> *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) paras 224-225, 307-313. See also Cornell “A Call for a Nuanced Constitutional Jurisprudence: *Ubuntu*, Dignity, and Reconciliation” 2004 *SA Public Law* 666.

<sup>137</sup> Ackermann 2000 *Heidelberg Journal of International Law* 554-556.

<sup>138</sup> 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC).

<sup>139</sup> Para 329. See also *Dawood; Shalabi; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC), 2000 8 BCLR 837 (CC) para 35; Ackermann 2000 *Heidelberg Journal of International Law* 540-542.

person has a similar meaning to the declaration in the German Basic Law that dignity is “inviolable”, and that it serves to give absolute protection to an inner core of dignity. On this interpretation, section 10 does not simply confer a subjective right which, like all rights, is subject to limitation. In addition to conferring a right, it also declares the belief of the founders of the Constitution that the dignity of the person exists prior to its recognition in a constitution and that, accordingly, the negation of the inherent dignity of the person – in distinction to limitations of the right to have one’s dignity respected and protected – cannot be justified in the name of countervailing interests.<sup>140</sup>

Dignity also features prominently in other constitutional provisions. Section 1(a) proclaims that the Republic of South Africa is founded, *inter alia*, on the values of “human dignity, the achievement of equality and the advancements of human rights and freedoms”. Although not completely shielded from constitutional amendment, section 1 is more strongly entrenched than the rest of the Constitution, requiring the assent of 75% of the members of the National Assembly and six of the nine provinces in the National Council of Provinces.<sup>141</sup> A constitutional amendment which violates the value of human dignity would thus be subject to this heightened majority. Section 7(1) states that the Bill of Rights “affirms the democratic values of human dignity, equality and freedom”; section 36(1) states that fundamental rights may only be limited to the extent that the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”; and section 39(1) enjoins the interpreters of the Bill of Rights to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. In addition, section 35(2)(e) recognises the right of every detained person to “conditions of detention that are consistent with human dignity”.

#### 4 2 Dignity as a right, a value, and a guide to interpretation

Unlike Article 1 of the German Basic Law, section 10 of the South African Constitution expressly confers a justiciable and enforceable right to human dignity.<sup>142</sup> However, the Constitutional Court has made it clear that a breach of the right to dignity will not be found in every case in which the value of dignity is offended. Where “the primary constitutional breach” is of a “more specific right”,<sup>143</sup> the Court will generally focus on that right. Dignity thus assumes the role of a residual right which is used to interpret and give shape to more specific rights, and which is relied upon directly only in cases in which no more specific right is available.<sup>144</sup> The Court has, however, not been entirely consistent in this

<sup>140</sup> See Venter “Human Dignity as a Constitutional Value: a South African Perspective” in Ipsen (ed) *Recht, Staat, Gemeinwohl: Festschrift für Dietrich Rauschning* (2001) 335 (arguing that s 10 does not establish a right to human dignity, but recognizes dignity as “an inalienable, inborn characteristic of each individual person” (340)).

<sup>141</sup> S 74(1).

<sup>142</sup> *Dawood; Shalabi; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC), 2000 8 BCLR 837 (CC) para 35.

<sup>143</sup> Para 36.

<sup>144</sup> See Woolman “Dignity” in Woolman, Roux, Klaaren, Stein & Chaskalson (eds) *Constitutional Law of South Africa* 2 ed (2005) 36-19–36-25 for an analysis of the various ways in which dignity has been used by the courts.

regard. Sometimes, it relies on dignity as a *value* which informs the interpretation of more specific rights, without engaging the right to dignity. At other times, it invokes the *right* to dignity along with other rights. In some of these cases, an independent finding of a violation of the right to dignity, in addition to other rights, is made.<sup>145</sup> In others, the right to dignity is invoked to strengthen some other right, which is treated as the primary right.<sup>146</sup> Here, the intersection of different rights is used to mark out areas in which a particularly cogent justification would be needed for their limitation.<sup>147</sup>

The Constitutional Court has described dignity as the “cornerstone of human rights”<sup>148</sup> and as “a value that informs the interpretation of many, possibly all, other rights”.<sup>149</sup> Among the rights that have been interpreted in view of the value of human dignity are equality,<sup>150</sup> the guarantee against cruel, inhuman or degrading punishment,<sup>151</sup> personal freedom,<sup>152</sup> privacy,<sup>153</sup> freedom of religion,<sup>154</sup> freedom of expression,<sup>155</sup> the right to vote,<sup>156</sup> freedom of

<sup>145</sup> The Court often finds a violation of both ss 9 (equality and non-discrimination) and 10. See eg *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC), 1998 12 BCLR 1517 (CC); *Bhe v Magistrate Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA* 2005 1 SA 563 (CC), 2005 1 BCLR 1 (CC); *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355 (CC), 2006 1 SA 524 (CC).

<sup>146</sup> In the majority judgment in *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC), Chaskalson P relied on the rights to life, equality and dignity to support his finding that the death penalty violates the right not to be subjected to cruel, inhuman or degrading punishment. However, he found it unnecessary to decide whether the death penalty directly infringed these rights. In *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC), 2004 6 BCLR 569 (CC), Mokgoro J held that the rights to life and dignity were implicated in the exclusion of permanent residents from social security benefits. Despite using the language of rights rather than values, she still appeared to treat the right of access to social security as the primary right which must be interpreted in view of the rights to life and dignity (para 44). Having found a breach of s 27(1)(c), she then proceeded to find that the breach also constituted unfair discrimination.

<sup>147</sup> *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC), 2004 6 BCLR 569 (CC) para 41 (different rights often “reinforce one another at the point of intersection”).

<sup>148</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC), 2000 10 BCLR 1051 (CC) para 36.

<sup>149</sup> *Dawood*; *Shalabi*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC), 2000 8 BCLR 837 (CC) para 35.

<sup>150</sup> *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC), 1997 6 BCLR 759 (CC) paras 31-33; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC), 1997 6 BCLR 708 (CC) para 41; *Harksen v Lane NO* 1998 1 SA 300 (CC), 1997 11 BCLR 1489 (CC) paras 46, 50, 51, 53, 91, 92.

<sup>151</sup> *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC); *S v Williams* 1995 3 SA 632 (CC), 1995 7 BCLR 861 (CC); *S v Dodo* 2001 3 SA 382 (CC), 2001 5 BCLR 423 (CC) para 35.

<sup>152</sup> *Ferreira v Levin NO and Vryenhoek v Powell NO* 1996 1 SA 984 (CC), 1996 1 BCLR 1 (CC) para 49 (per Ackermann J).

<sup>153</sup> *Bernstein v Bester NO* 1996 2 SA 751 (CC), 1996 4 BCLR 449 (CC) paras 65-67; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC), 1998 12 BCLR 1517 (CC) paras 30, 120; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2000 10 BCLR 1079 (CC) para 18; *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC), 2007 7 BCLR 751 (CC) paras 131-132.

<sup>154</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC), 2000 10 BCLR 1051 (CC) para 36; *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC), 2002 3 BCLR 231 (CC) paras 48-51; *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC), 2006 3 BCLR 355 (CC) para 89.

<sup>155</sup> *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC), 1999 6 BCLR 615 (CC) paras 7, 8; *Khumalo v Holomisa* 2002 5 SA 401 (CC), 2002 8 BCLR 771 (CC) para 21; *South African Broadcasting Corporation v National Director of Public Prosecutions* 2007 2 BCLR 167 (CC) para 120; *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC), 2007 7 BCLR 751 (CC) para 145.

<sup>156</sup> *August v Electoral Commission* 1999 3 SA 1 (CC), 1999 4 BCLR 363 (CC) para 17.

occupation,<sup>157</sup> property,<sup>158</sup> socio-economic rights such as access to adequate housing and social security,<sup>159</sup> cultural life,<sup>160</sup> the right to a fair trial,<sup>161</sup> and the presumption of innocence.<sup>162</sup>

Dignity has also been invoked as a guide to the interpretation of legislation<sup>163</sup> and the development of the common law. The Constitutional Court held in *Carmichele v Minister of Safety and Security*<sup>164</sup> that the Constitution, like the German Basic Law, embodies “an objective, normative value system” which must guide the development of all areas of law.<sup>165</sup> Rejecting the argument that the Bill of Rights only requires the state to refrain from infringing the rights entrenched in it, the Court held that in appropriate circumstances, the state has a positive duty to protect the rights to life, dignity, and freedom and security of the person.<sup>166</sup> Both the High Court and Supreme Court of Appeal had failed to consider the impact of the Constitution on the common-law test for determining the wrongfulness of omissions on the part of the state. The matter was then referred back to the High Court to determine whether and how the common law should be developed. This set in motion a train of legal developments which gave rise to the delictual liability of the state for failures by prosecutors and police to take reasonable steps to protect the safety of citizens.<sup>167</sup>

### 4 3 The scope and meaning of dignity

#### 4 3 1 Interpretive difficulties

Human dignity has presented constitutional interpreters in South Africa with a means of negotiating some of the contradictions lying at the heart of the constitutional order. The notion of inherent human dignity invokes a universal ideal which transcends national boundaries, yet resonates closely

<sup>157</sup> *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA), 2004 2 BCLR 120 (SCA) paras 27, 32. The respondents, who were asylum seekers, could not rely directly on s 22, which reserves the right to freedom of occupation to South African citizens. The Court nevertheless held that their right to human dignity was violated in cases where they had no other sources of income or support.

<sup>158</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), 2004 12 BCLR 1268 (CC) para 15.

<sup>159</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC) paras 23, 44, 83; *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 21; *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC), 2004 6 BCLR 569 (CC) paras 41, 44.

<sup>160</sup> *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC), 2008 2 BCLR 99 (CC) paras 53, 62-66, 150, 155-157, 177.

<sup>161</sup> *Jaipal v S* 2005 4 SA 581 (CC), 2005 5 BCLR 423 (CC) para 26.

<sup>162</sup> *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC), 2000 5 BCLR 491 (CC) para 40.

<sup>163</sup> *Daniels v Campbell NO* 2004 5 SA 331 (CC), 2004 7 BCLR 735 (CC) para 54.

<sup>164</sup> 2001 4 SA 938 (CC), 2001 10 BCLR 995 (CC).

<sup>165</sup> Para 54, with reference to BVerfGE 39, 1 41 (1975).

<sup>166</sup> Para 44.

<sup>167</sup> *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C), 2002 10 BCLR 1100 (C) para 31; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA). See also *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC), 2005 4 BCLR 301 (CC) (recognising the positive duty of the responsible organ of state to take reasonable measures to provide for the security of rail commuters).

with the anti-apartheid struggle. Its entrenchment as an individual right and a founding value signals a decisive break with South Africa's racist, sexist and authoritarian past, yet establishes a measure of continuity with the protection afforded at common law to the individual's reputation and *dignitas*. In addition, dignity's proximity to a range of rights and values – equality and freedom, sameness and difference, individuality and community, and so forth – suggests the possibility of a reasoned dialogue over seemingly intractable value conflicts.<sup>168</sup> Dignity, it seems, provides a shared vocabulary which links the universality of human rights to local historical struggles, spans the divide between the old and the new legal order, and enables the mediation of conflicting constitutional values.

There are, however, dangers in using dignity as a device for the negotiation of constitutional conflicts. First, dignity could be used as the centrepiece of a narrative which *overemphasises* the break between the old and the new, which legitimates continuing inequality and degradation in the name of the Constitution's promise of universal human dignity.<sup>169</sup> Secondly, the apparent affinity between the constitutional language of human dignity and the common law concepts of reputation and *dignitas* could easily result in a constitutional jurisprudence which *underestimates* the break between the old and the new. Constitutional dignity may be uncritically conflated with individual honour; personality rights may be privileged over countervailing interests like freedom of expression, which are just as vital to the dignity and autonomy of the human person; and classical-liberal assumptions about individual choice and consent may find their way back into the deliberations of a Court which has publicly disavowed these beliefs.<sup>170</sup> And thirdly, dignity may become so saturated with meaning that it would simply replicate the tensions it is supposed to mediate. It may thus turn into a mechanism for leafing over, rather than engaging constitutional value conflicts.

Dignity is a remarkably rich and evocative concept. Its plasticity, proximity to a range of constitutional rights and values, and affinity with a variety of legal and philosophical traditions makes it a powerful tool of constitutional analysis, consensus building and transformation. It is these very same qualities, however, which raise doubts over its capacity to constrain legal meaning and explain constitutional judgments. The remainder of this section focuses on the interpretations given to dignity by South African courts and the ways in which these interpretations navigate a variety of tensions – between the objective and subjective dimensions of dignity, between the individual and the community, and between different theoretical perspectives on the scope and meaning of dignity.

<sup>168</sup> Cf Ackermann 2000 *Heidelberg Journal of International Law* 540-542 and the comments of O'Regan J in *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC), 2008 2 BCLR 99 (CC) para 156 (invoking the value of dignity as the "lodestar" which should guide us in our negotiation of cultural diversity).

<sup>169</sup> See Botha "Equality, Plurality, and Structural Power" 2009 *SAJHR* (forthcoming).

<sup>170</sup> See Barrett "*Dignatio* and the Human Body" 2005 *SAJHR* 525.

### 4 3 2 *Mere objects and autonomous subjects*

As in Germany, the idea that human dignity precludes treating individuals as mere objects or means to an end has found favour with the courts.<sup>171</sup> In *Makwanyane*, it was found that the death penalty places the offender “beyond the pale of humanity”.<sup>172</sup> It erases the possibility of rehabilitation and self-improvement, “instrumentalises the offender for the objectives of State policy”,<sup>173</sup> and “dehumanises the person and objectifies him or her as a tool for crime control”.<sup>174</sup> Similarly, the Court stated in *Dodo*<sup>175</sup> that the imposition of a disproportionately severe sentence would amount to treating the offender as a means to an end. This would be

“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.”<sup>176</sup>

The object formulation has also been applied outside the context of judicial sentencing.<sup>177</sup> It has been held that an accused person should, as far as possible, “be viewed by the court not as a criminal, a dangerous character, or a threat, but as a person whose guilt must be proved beyond reasonable doubt”.<sup>178</sup> In *Coetzee v Comitis*<sup>179</sup> the regulations of the National Soccer League, in terms of which a player is not allowed to transfer to another club upon the termination of his contract unless a transfer fee is paid, were also found to infringe the player’s human dignity. The Court pointed out that the player was treated as an object: he did not have any say in respect of the transfer fee, and was ultimately “at the mercy of an arbitrator who determines the compensation payable according to a formula for which there is no rational basis”.<sup>180</sup>

Sexual exploitation and degradation are also areas in which the object formulation has found application. It has been held, for instance, that children

<sup>171</sup> Although reference has been made in this context to the jurisprudence of the German Constitutional Court (see the reference in *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) para 59 to BVerfGE 45, 187 228 (1977)), North American case law seems to have exerted a more direct influence. Justice William Brennan’s – and some other judges’ – resort to the object formulation in interpreting the prohibition of cruel and unusual punishment contained in the Eighth and Fourteenth Amendments to the United States Constitution has been particularly influential. See *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) paras 57-58, 178, 271; *S v Williams* 1995 3 SA 632 (CC), 1995 7 BCLR 861 (CC) para 28. Reference has also been made to Canadian case law – see *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) para 60.

<sup>172</sup> *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) para 271.

<sup>173</sup> Para 313.

<sup>174</sup> Para 316.

<sup>175</sup> *S v Dodo* 2001 3 SA 382 (CC), 2001 5 BCLR 423 (CC).

<sup>176</sup> Para 38.

<sup>177</sup> In relation to sentencing, see also *S v Dodo* 2001 3 BCLR 279 (E) (mandatory minimum life sentence amounts to “de-individualisation” of offenders and negates the “capacity of the individual for self-improvement and redemption” 299G-H); *S v Tcoeb* 1996 7 BCLR 996 (NmS) (Namibian Supreme Court holding that a sentence of life imprisonment would not be constitutional if it amounted to “an order throwing the prisoner into a cell for the rest of the prisoner’s natural life as if he was a ‘thing’ instead of a person without any continuing duty to respect his dignity” 1005G-H).

<sup>178</sup> *S v Phiri* 2005 2 SACR 476 (T) para 15. The Court set aside the proceedings in the lower court where the accused had pleaded while in leg irons.

<sup>179</sup> 2001 1 SA 1254 (C), 2001 4 BCLR 323 (C).

<sup>180</sup> Para 34.

are objectified and degraded by child pornography;<sup>181</sup> that the possession by a newspaper of photographs of persons involved in intimate sexual acts leaves them “at the mercy of another” and violates their dignity and privacy;<sup>182</sup> and, in *Jordan v S*,<sup>183</sup> that the human body is devalued as a result of its commodification through prostitution.<sup>184</sup> This is, however, treacherous terrain. The finding in *Jordan* that the diminution of the prostitute’s dignity arises from her own conduct, rather than from a law which criminalises the conduct of the prostitute but not that of the patron, has been particularly controversial. This judgment raises important questions about autonomy, choice, the right of the individual to deviate from widely shared sexual mores, and the role of the law in sustaining systemic disadvantage.<sup>185</sup> The same goes for the claim made in a judgment of the High Court that bestiality is “so repugnant to and in conflict with human dignity as to amount to perversion of the natural order” and that the state is under an obligation to “prevent any individual or group from descending to the level of the beast”.<sup>186</sup> The reliance here on dignity – understood objectively – as the basis for the justification of the criminalisation of bestiality, risks reducing the scope of personal and sexual autonomy and conflating dignity with dignified behaviour. Moreover, the link made between dignity and the “natural order” is particularly unfortunate, as it tends to naturalise dominant assumptions about what constitutes “normal” sexual behaviour.

The idea that no one is to be treated as a mere object shades naturally and almost imperceptibly into the notion of equal dignity. Women are not to be treated as perpetual minors on account of their gender,<sup>187</sup> gays and lesbians are not to be treated as second-class citizens or as being incapable of forming meaningful intimate relationships,<sup>188</sup> non-citizens are not to be reduced to the role of supplicants,<sup>189</sup> and no-one is to be treated as incapable of autonomous choice or of administering their own affairs by virtue of irrelevant characteristics like race, religion or marital status.

The idea of each individual as an end in herself who has inherent human worth also extends to “respect for the unique set of ends” of each individual.<sup>190</sup> This requires more than the prohibition of objectifying treatment or the notion of equal dignity. It also demands the creation of a space within which individuals are free to forge their own autonomous

<sup>181</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC), 2003 12 BCLR 1333 (CC) para 63.

<sup>182</sup> *Prinsloo v RCP Media Ltd t/a Rapport* 2003 4 SA 456 (T) 468E-I.

<sup>183</sup> 2002 6 SA 642 (CC), 2002 11 BCLR 1117 (CC).

<sup>184</sup> Para 74.

<sup>185</sup> See Botha “Equality, Dignity, and the Politics of Interpretation” 2004 *SA Public Law* 724 725-728, 746.

<sup>186</sup> Per Heher J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 6 BCLR 726 (W) 751B-D; endorsed in *S v M* 2004 1 BCLR 97 (O) paras 15, 24.

<sup>187</sup> *Bhe v Magistrate Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA* 2005 1 SA 563 (CC), 2005 1 BCLR 1 (CC) para 92.

<sup>188</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC), 1998 12 BCLR 1517 (CC) paras 127-129, 134; *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC), 2006 3 BCLR 355 (CC) paras 15, 17, 60, 71.

<sup>189</sup> *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC), 2004 6 BCLR 569 (CC) para 76.

<sup>190</sup> *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC), 2008 2 BCLR 99 (CC) para 64.

identities. Sometimes this may require differential treatment when a general legal rule places undue restrictions on the capacity of the individual to realise her own ends.

Not every restriction on the autonomy of the individual amounts to an impermissible limitation of her dignity. In *Minister of Home Affairs v Watchenuka*,<sup>191</sup> the Supreme Court of Appeal distinguished between a restriction upon the asylum seeker's "capacity for self-fulfilment" and a restriction upon her ability to live "without positive humiliation and degradation".<sup>192</sup> Restricting the right to self-fulfilment of an asylum seeker who is capable of supporting herself is, in the Court's opinion, not unreasonable and unjustifiable. However, where a person is destitute, the effect of the prohibition would be to degrade her by forcing her to beg or steal. Such an invasion of her inherent dignity can hardly be justified.

Dignity, then, presupposes a sphere of personal autonomy, yet is not synonymous with individual freedom and self-fulfilment. Whether an invasion of human dignity will be found in a given instance will depend on a number of factors. These include, most crucially, whether the restrictive measure objectifies or degrades the human person and whether and to what extent it inhibits the capacity of the individual to forge an autonomous identity and to form intimate relationships. Here, spatial metaphors are used to define a core of personal autonomy, the invasion of which goes to the very heart of human dignity, and areas of individual freedom and self-fulfilment which are further removed from a core of individual autonomy, identity and self-worth, and thus more open to legitimate limitations.<sup>193</sup>

#### 4 3 3 *Individual and community*

The South African Constitutional Court, like its German counterpart, has disavowed the idea of dignity as attaching to atomic individuals. In the view of the Court:

"community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society".<sup>194</sup>

The Court has recognised the importance of the family to individual dignity and wellbeing,<sup>195</sup> and acknowledged the centrality of religion and culture to the identity and dignity of the person.<sup>196</sup> It has also tied dignity to the indigenous African concept of *ubuntu*, which refers to broad notions

<sup>191</sup> 2004 4 SA 326 (SCA), 2004 2 BCLR 120 (SCA).

<sup>192</sup> Para 32.

<sup>193</sup> See 4 5 below.

<sup>194</sup> *Bernstein v Bester NO* 1996 2 SA 751 (CC), 1996 4 BCLR 449 (CC) para 67.

<sup>195</sup> *Dawood; Shalabi; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC), 2000 8 BCLR 837 (CC) para 30, 37; *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC), 2006 3 BCLR 355 (CC).

<sup>196</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC), 2000 10 BCLR 1051 (CC) para 36; *Bhe v Magistrate Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2005 1 SA 563 (CC), 2005 1 BCLR 1 (CC).

of human solidarity, respect and interdependence.<sup>197</sup> These attempts to tie dignity to communitarian and solidaristic notions of interdependence and mutual respect have been controversial. The Court's reliance on *ubuntu* has been criticised, *inter alia*, for romanticising traditional African values, uncritically conflating them with contemporary constitutional norms, and negating the conflict inherent in a pluralistic society. It is feared that *ubuntu*, with its appeal to broad notions of interdependence and societal harmony, might be used to obscure disagreement and difference and to induce conformity to dominant mindsets.<sup>198</sup>

It could be argued, however, that *ubuntu* need not foster a form of collectivism which stifles individual autonomy and difference, but can help to resist what Justice Sachs has called the "hydraulic insistence on conformity" to dominant cultural and religious norms.<sup>199</sup> The work of Drucilla Cornell and others on *ubuntu* suggests that it could open up a rich reservoir of alternative understandings which, rather than suppressing difference, could be used to challenge dominant conceptions of the self and community.<sup>200</sup> Because these dominant conceptions are widely identified with Western notions of "individualism", they tend to be taken for granted in a constitutional democracy in which the equality and autonomy of the individual take centre stage. Obscured from view, however, is the fact that these understandings are often used to induce conformity to a set of normative expectations that are rooted in a dominant – yet contingent – worldview and culture. As Patricia Williams argues, these dominant understandings of the self and community tend to impose a "corporate group identity" which stifles autonomy, difference and individual experimentation.<sup>201</sup>

Recognising the constitutive role of culture, religion and community in the formation of individual identity can thus enhance equality and freedom by providing greater space for marginal cultures, religions and worldviews; by challenging the privileged position of a particular understanding of the self and of its place in the universe; and by expanding the scope for individual experimentation. It is therefore perfectly consistent with the inherent dignity of the person. The Court's dignity-based interpretation of fundamental rights and freedoms is, however, far less accommodating of strong claims for group autonomy which rest upon a thick conception of group identity, and which

<sup>197</sup> See *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) paras 223-225, 307-308; *Hoffmann v South African Airways* 2000 11 BCLR 1211 (CC) para 38; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), 2004 12 BCLR 1268 (CC) para 37; *Dikoko v Mokhatla* 2006 6 SA 235 (CC), 2007 1 BCLR 1 (CC) paras 68-69, 112-120; *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC), 2007 4 BCLR 339 (CC) 382D-H.

<sup>198</sup> See English "Ubuntu: The Quest for an Indigenous Jurisprudence" 1996 *SAJHR* 641; Van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005) 109-115.

<sup>199</sup> *Prince v President of the Law Society of the Cape of Good Hope* 2001 2 SA 388 (CC), 2001 2 BCLR 133 (CC) para 156.

<sup>200</sup> See eg Cornell 2004 *SA Public Law* 666; Bohler-Muller "The Story of an African Value" 2005 *SA Public Law* 266.

<sup>201</sup> "Metro Broadcasting, Inc v FCC: Regrouping in Singular Times" in Crenshaw, Gotanda, Peller & Thomas (eds) *Critical Race Theory: The Key Writings that formed the Movement* (1995) 191-194.

assert the precedence of collective identities over individual rights.<sup>202</sup> Such claims tend to frustrate challenges from within the group to dominant constructions of communal norms, deny the capacity of cultures to transform themselves, and lock their members into a particular way of life. They are also likely to entrench the material disadvantage and inferior social status of vulnerable subgroups and stifle individual autonomy and experimentation.<sup>203</sup>

A recent judgment of South Africa's Constitutional Court dealing with religious and cultural diversity illustrates the Court's use of dignity to avoid both the radical individualist conception of a self that is unencumbered by social ties and relations, and a thick, essentialist view of a self that is incapable of escaping the strictures imposed by attributes like culture and religion. *MEC for Education: KwaZulu-Natal v Pillay*<sup>204</sup> concerned a school rule prohibiting the wearing of jewellery. The Constitutional Court dismissed an appeal against the finding of the High Court that the school's failure to permit a learner to wear a nose stud constituted unfair discrimination. The learner in question wore the nose stud as an expression of her South Indian Tamil Hindu culture. In his judgment, Langa CJ noted the "importance of community to individual identity and hence to human dignity".<sup>205</sup> He was, however, quick to point out that, far from being monolithic, cultures are

"living and contested formations. The protection of the Constitution extends to all those for whom culture gives meaning, not only to those who happen to speak with the most powerful voice in the present cultural conversation."<sup>206</sup>

He rejected, moreover, the argument that a learner could not claim an exemption based on voluntary, as opposed to mandatory, cultural and religious practices. Having pointed out that dignity demands respect for the unique set of ends of every individual, he stated:

"That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity."<sup>207</sup>

<sup>202</sup> See eg *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC), 2000 10 BCLR 1051 (CC) (ban on corporal punishments in independent schools found not to constitute an impermissible limitation on freedom of religion); *Bhe v Magistrate Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA*, 2005 1 SA 563 (CC), 2005 1 BCLR 1 (CC) (customary law rule of male primogeniture found to violate constitutional rights of equality and dignity). See also *NM v Smith* 2007 5 SA 250 (CC), 2007 7 BCLR 751 (CC):

"Underlying our Constitution is a recognition that, although as human beings we live in a community and are in a real sense both constituted by and constitutive of that community, we are nevertheless entitled to a personal sphere from which we may and do exclude that community" (para 130).

<sup>203</sup> See Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation" in Fraser & Honneth (eds) *Redistribution or Recognition?* (2003) 76.

<sup>204</sup> 2008 1 SA 474 (CC), 2008 2 BCLR 99 (CC).

<sup>205</sup> Para 53.

<sup>206</sup> Para 54. In her dissenting judgment, O'Regan J rejected the majority's approach as too individualised and subjective. In her view, it is not enough to establish whether a particular belief is held sincerely. Since cultures are associative, it needs to be asked "what the cultural community considers to be a cultural practice" (para 154 and see also paras 152-153). She did, however, add that cultures "are not generally unified and coherent but are dynamic and often contested" (para 154). Although her approach insists on the need for a shared understanding that a particular practice is a cultural practice and not merely a personal habit, it is not premised on the idea of a single authoritative interpretation of any given culture.

<sup>207</sup> Para 64.

The judgment, while recognising the centrality of culture and belief to the dignity and identity of the human person, thus refuses to block out the voices of individual members in favour of a single, supposedly authoritative interpretation of cultural practices and religious beliefs.

#### 4 3 4 *Theoretical orientations*

The philosophical foundations of human dignity are not as fiercely contested in the South African as in the German constitutional literature, and theoretical differences are less pronounced. Different theoretical orientations can nevertheless be identified. These orientations are generally presented as mutually reinforcing, rather than mutually exclusive.

The influence of Kant's categorical imperative, in terms of which persons must always be treated as ends in themselves rather than as a means to an end, is evident from the courts' use of the object formulation and from judgments which stress the right of the individual freely to choose her own ends.<sup>208</sup> Woolman reads the Constitutional Court's dignity jurisprudence as an elaboration on a few basic Kantian themes. He distils five definitions of dignity from the Court's jurisprudence, each of which corresponds to different strands of Kantian moral thought. First, the individual should always be treated as an end in herself which should not be objectified or instrumentalised. Secondly, all individuals are entitled to equal concern and equal respect. Thirdly, individuals have the right to a space for self-actualisation. Fourthly, individuals are entitled to self-governance and have the right to participate in collective decision-making processes. And fifthly, dignity requires collective responsibility for the material conditions of individual agency.<sup>209</sup>

Although Kant's moral thought provides the basic philosophical orientation for conceptualising dignity, other philosophies and outlooks are also influential. The Constitutional Court has found on a number of occasions that laws or conduct which contribute to the stigmatisation of particular social groups, are based on demeaning stereotypes or deny the social citizenship of certain categories of people, constitute a violation of their dignity and equality. For instance, a criminal ban on gay sodomy was found to stigmatise, degrade and devalue gay men, and to build insecurity and vulnerability into their daily lives.<sup>210</sup> This amounted to a denial of the recognition of the equal and inherent worth of gay men, which was harmful to their personal confidence and self-esteem and effectively conditioned their participation in public life on the suppression of a vital aspect of their identity. In the words of Sachs J:

"In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. 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

<sup>208</sup> See 4 3 2 above and 4 4 1 below. See also Ackermann 2000 *Heidelberg Journal of International Law* 540-542; Cornell 2004 *SA Public Law* 666-668.

<sup>209</sup> Woolman "Dignity" in *Constitutional Law of SA* 36-6-36-19.

<sup>210</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC), 1998 12 BCLR 1517 (CC) paras 23-28.

of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.”<sup>211</sup>

Consider also *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*,<sup>212</sup> which held that the exclusion of same-sex unions from the definition of marriage violated the dignity and equality of gays and lesbians. The exclusion of same-sex couples from the right to marry stigmatised gays and lesbians as less capable of forming enduring and meaningful intimate relationships and of assuming the responsibilities of marriage. At issue, in the view of the Court, was not simply the right of gays and lesbians to be left alone, but the right to equal public recognition of their identities and relationships<sup>213</sup> and the fostering of an active citizenship which is based upon respect for difference.<sup>214</sup>

While these judgments resonate with a Kantian understanding of the inherent dignity and worth of autonomous human beings, they also introduce a different dimension. Recognising that our personhood is grounded in mutual recognition, they demand a space in which individuals are free to forge their identities and a public sphere characterised by a plurality of perspectives and subject positions. Members of marginal and vulnerable groups need to be protected against officially sanctioned stigma and prejudice, which diminish their sense of self-worth and thus impede their capacity for self-realisation. Because a person’s agency and sense of self-worth are intimately bound up with recognition of her status as a free and equal member of society,<sup>215</sup> dignity, in this view, precludes laws and official conduct which perpetuate harmful stereotypes about a particular group or category of persons.<sup>216</sup> Dignity is violated where the law endorses cultural beliefs and social stereotypes which are premised on the inferiority of blacks, gays, women and other vulnerable groups. Such laws are harmful to the confidence and self-esteem of members of the stigmatised groups, and inhibit them in their roles as citizens, lovers, spouses, parents, workers, entrepreneurs, and so forth. Dignity, in short, is identified with the politics of recognition – giving the basic Kantian philosophical orientation a distinctly Hegelian twist.<sup>217</sup>

<sup>211</sup> Para 127.

<sup>212</sup> 2006 1 SA 524 (CC), 2006 3 BCLR 355 (CC).

<sup>213</sup> Para 78.

<sup>214</sup> Para 60.

<sup>215</sup> *Khumalo v Holomisa* 2002 5 SA 401 (CC), 2002 8 BCLR 771 (CC) para 27 (human dignity includes both the “individual’s sense of self-worth” and “the public’s estimation of the worth or value of an individual”).

<sup>216</sup> *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC), 2004 11 BCLR 1125 (CC) para 116.

<sup>217</sup> Drawing on the philosophy of Hegel and on insights gained from psychological studies, Axel Honneth identifies three independent modes of recognition which correspond to three distinct types of moral harm. The first relates to the recognition of an individual’s needs and desires and finds expression in an intimate sphere of love and care. The second consists of the moral respect and equal treatment which is due to every person as a morally accountable human being. The third relates to social esteem and, in capitalist societies, is closely tied up with assessments of individual achievement and merit within a system of capitalist production. Honneth “Redistribution as Recognition: A Response to Nancy Fraser” in Fraser and Honneth (eds) *Redistribution or Recognition?* (2003) 110 138-150; Honneth *Disrespect: the Normative Foundations of Critical Theory* (2007) 129-143. See also Taylor “The Politics of Recognition” in Gutmann (ed) *Multiculturalism: Examining the Politics of Recognition* (1994) 25.

A third approach draws upon the works of Martha Nussbaum and Amartya Sen to argue that respect for dignity requires society to create the material conditions needed to enable persons to develop and exercise their capabilities.<sup>218</sup> This approach makes sense of the link made by the Constitutional Court in *Grootboom* and other cases between the deprivation of basic material needs and the impairment of a person's human dignity.<sup>219</sup> It also resonates with Kantian moral philosophy, as it is presumably far easier for individuals who lack support for the development of human capabilities to be reduced to instruments of the will of others. The capabilities approach has, however, been criticised for its tendency to suggest that persons who are denied certain conditions lack human dignity.<sup>220</sup>

#### 4 3 5 *Bearers of dignity*

Dignity vests in every person and cannot be lost through crime or undignified behaviour.<sup>221</sup> It extends to everyone within the national territory, and is not confined to citizens.<sup>222</sup> While juristic persons are not bearers of dignity, they can claim certain rights closely connected to it, such as privacy. However, their privacy rights are not as intense as those of human beings.<sup>223</sup>

The dignity and right to life of the unborn foetus is not recognised in South African law. In *Christian Lawyers Association of SA v Minister of Health*,<sup>224</sup> it was held that the foetus is not a legal *persona* under the Constitution and that it does not enjoy the right to life. McCreath J pointed out that the Constitution makes no express provision for the rights of the unborn child. Moreover, the right conferred by section 12(2) to make decisions concerning reproduction and to security in and control over one's body is textually unqualified. Although he referred to the two abortion judgments of the German Federal Constitutional Court, he presented them as products of Germany's unique history, reflecting "the reaction against the contempt for individual life displayed

<sup>218</sup> Liebenberg "The Value of Human Dignity in Interpreting Socio-Economic Rights" 2005 *SAJHR* 1; Woolman "Dignity" in *Constitutional Law of SA* 36-16-36-17, 36-65-36-70.

<sup>219</sup> See eg *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC) paras 23, 44, 83.

<sup>220</sup> Cornell 2004 *SA Public Law* 667-668. Cornell is critical of attempts to justify socio-economic rights with reference to the Kantian notion of human dignity. See also Van Marle "The Capabilities Approach", 'the Imaginary Domain', and 'Asymmetrical Reciprocity': Feminist Perspectives on Equality and Justice" 2003 *Feminist Legal Studies* 255.

<sup>221</sup> *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) paras 137 (dignity vests in "every person, including criminals convicted of vile crimes"), 142-143; *August v Electoral Commission* 1999 3 SA 1 (CC), 1999 4 BCLR 363 (CC) para 18 (prisoners are not stripped of their dignity); *Jordan v S* 2002 6 SA 642 (CC), 2002 11 BCLR 1117 (CC) para 74 (despite finding that invasion of prostitutes' dignity is a result of their own conduct, rather than of the impugned law, held that they must be treated with dignity by the police and their customers).

<sup>222</sup> *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA), 2004 2 BCLR 120 (SCA) para 25:

"Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human."

<sup>223</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 10 BCLR 1079 (CC) para 18.

<sup>224</sup> 1998 4 SA 113 (T), 1998 11 BCLR 1434 (T).

in the Nazi period” and the influence of Catholic natural law in the constitution-making process.<sup>225</sup> While this judgment makes sense of the prominence afforded in the 1996 Constitution to reproductive freedom,<sup>226</sup> it can be faulted for its formalism and its refusal to engage fundamental ethical issues raised by the legalisation of abortion.

It is uncertain whether dignity extends to the deceased. In *Nkosi v Bührmann*,<sup>227</sup> a case in which occupiers of land claimed the right to bury their dead on the land without the owner’s consent, the Supreme Court of Appeal mooted the possibility that the appellants could rely on the dignity of the deceased. The Court stated that “[funeral] and burial rituals, after all, serve to express final acknowledgment by the bereaved of the human dignity of the deceased.”<sup>228</sup> Despite finding that the dignity of the deceased does not grant a right to burial without the owner’s consent, this judgment nevertheless seems to suggest that there are instances in which a person’s dignity might receive posthumous protection.<sup>229</sup>

Although the individual person is the bearer of human dignity, the Constitutional Court has on a few occasions invoked the dignity of the broader community. In *Makwanyane* the idea was mooted that it is not only the dignity of the person to be executed which is violated, but that the dignity of everyone in society may be invaded by the deliberate killing of a human being.<sup>230</sup> In *Port Elizabeth Municipality* it was similarly argued that “society as a whole is demeaned” when government action denies the basic needs of the desperately poor.<sup>231</sup> These judgments tie the dignity of poor and marginalised sections of the population to the dignity of everyone in society. This does not amount to the subordination of the inherent worth and dignity of the individual to notions of “collective” dignity, but rests instead upon the identification of the dignity of the individual with a Kantian “realm of ends” in which everyone’s dignity is recognised.<sup>232</sup>

<sup>225</sup> 1445I-1146A.

<sup>226</sup> See also *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (T), 2004 10 BCLR 1086 (T) (upholding constitutionality of provisions in the Choice on Termination of Pregnancy Act 92 of 1996 which allow women under the age of eighteen to have their pregnancies terminated without parental consent or control).

<sup>227</sup> 2002 1 SA 372 (SCA), 2002 6 BCLR 574 (SCA).

<sup>228</sup> Para 55.

<sup>229</sup> But see *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) para 26 (death “puts an end not only to the right of life itself, but to all other personal rights which had vested in the deceased” under the Bill of Rights); *S v Walters* 2001 2 SACR 471 (Tk), 2001 10 BCLR 1088 (Tk) para 27 (while the deceased may be entitled to “the integrity and dignity of the dead”, such rights are not constitutional in nature); *Minister of Education v Syfrets Trust Ltd* NO 2006 4 SA 205 (C), 2006 10 BCLR 1214 (C) para 41 (leaving open the question whether the rights to human dignity and freedom can be invoked on behalf of the testator, who was dead). See also *Stanfield v Minister of Correctional Services* 2004 4 SA 43 (C), 2003 12 BCLR 1384 (C) para 128 (right to a humane and dignified death).

<sup>230</sup> *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) para 272.

<sup>231</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), 2004 12 BCLR 1268 (CC) para 18. Cf also *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC), 2004 6 BCLR 569 (CC) para 74:

“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”.

<sup>232</sup> See Woolman “Dignity” in *Constitutional Law of SA* 36-16.

## 4 4 Dignity in relation to other values

### 4 4 1 Freedom

South African courts have struggled to come to terms with dignity's paradoxical relationship to freedom. Whether dignity should, in a particular case, be used to enhance or restrict freedom has been the subject of much controversy. In the early case of *Ferreira v Levin NO and Vryenhoek v Powell NO*,<sup>233</sup> the Constitutional Court split on the interpretation of the right to freedom and security of the person in terms of section 11(1) of the interim Constitution. Ackermann J found that the constitutional right to freedom and security of the person should be given a wide meaning to embrace the right of every person "not to have 'obstacles to possible choices and activities' placed in their way by ... the State".<sup>234</sup> He grounded his extensive interpretation of the right to freedom not only in freedom's "intrinsic constitutional value", but also in its proximity to the founding value of human dignity:

"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>235</sup>

The majority opted instead for a narrower interpretation of the right. Its construction of section 11(1) rested *inter alia* on the fact that limitations of this right were required to be necessary, in addition to being reasonable. If the section were to be given a too extensive interpretation, courts would have to invalidate all regulatory laws which could not be justified as being necessary in an open and democratic society. They would thus be required to sit in judgment on "what are essentially political decisions"<sup>236</sup> and intrude into the functional sphere of the legislature. In this view, "human dignity can and will flourish without such an extensive interpretation being given to section 11(1)".<sup>237</sup>

In South Africa, as in Germany, dignity's paradoxical relationship to freedom has come to the fore in cases in which individuals willingly participate in sexual acts which are viewed as degrading, demeaning or unnatural. Reference has been made above to cases in which dignity was invoked to justify restrictions on prostitution, bestiality and the possession of pornography. These cases illustrate the dangers of relying on dignity to legitimate restrictions on sexual autonomy and choice.<sup>238</sup>

Contract is another area in which respect for individuals' autonomous choices comes into conflict with the need to limit freedom in the interests of dignity and equality. South African courts tend to cling to an almost absolute conception of contractual freedom. Although it is accepted that a term in a

<sup>233</sup> 1996 1 SA 984 (CC), 1996 1 BCLR 1 (CC).

<sup>234</sup> Para 54.

<sup>235</sup> Para 49.

<sup>236</sup> Para 174.

<sup>237</sup> Para 173.

<sup>238</sup> See 4 3 2 above.

contract can be voided if it is against public policy, this has made no significant dent in the prevailing judicial ideology, which privileges the principles of contractual autonomy and *pacta sunt servanda* over considerations of equity and fairness. Hopes that the constitutional values of dignity and equality might be used to set limits to contractual freedom have so far proved largely illusory. In fact, the Supreme Court of Appeal has invoked dignity to bolster the claims of contractual autonomy.<sup>239</sup> And while it has been conceded that dignity and equality may have a role to play in trimming the excesses of contractual freedom<sup>240</sup> – for instance, in cases of unequal bargaining power<sup>241</sup> – the courts’ actual decisions show that the exercise of this power will be confined to such extreme cases that it is likely to have a minimal effect in combating inequality and protecting consumers.<sup>242</sup>

What is missing in these cases is a critical engagement with the social context. Rather than situating their analysis within the context of vast inequalities of power and resources, South African courts have embraced a libertarian approach to contract which rests upon metaphysical notions of freedom. Human dignity, equality and freedom have been grounded in abstract notions which seem more at home in a nineteenth-century treatise than in a society trying to come to terms with a history of institutionalised inequality and deprivation. The courts have thus missed a critical opportunity to situate their dignity analysis within the lived reality of ordinary South Africans.<sup>243</sup>

#### 4 4 2 Equality

The Constitutional Court has placed dignity at the centre of the right to equality. Whether or not a particular law or conduct constitutes unfair discrimination is made to turn largely on the question whether it violates the complainants’ human dignity.<sup>244</sup> Justifications for the dignity-based

<sup>239</sup> *Brisley v Drotosky* 2002 4 SA 1 (SCA), 2002 12 BCLR 1229 (SCA) para 94 (“contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity”); *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 23.

<sup>240</sup> The best statement of this view is that of Davis J in *Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C). In his view, the values of equality and human dignity require “[parties] to a contract [to] adhere to a minimum threshold of mutual respect in which “the unreasonable and one-sided promotion of one’s own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts” (475).

<sup>241</sup> *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Napier v Barkhuizen* 2006 4 SA 1 (SCA), 2006 9 BCLR 1011 (SCA) para 14.

<sup>242</sup> In *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA), a clause indemnifying a hospital against liability for the negligence of its staff was held not to be against public policy.

<sup>243</sup> See the dissenting judgments of Moseneke DCJ and Sachs J in *Barkhuizen v Napier* 2007 5 SA 323 (CC), 2007 7 BCLR 691 (CC) for examples of an approach which is far more alive to the South African context of unequal power relations. See also Bhana & Pieterse “Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited” 2005 *SALJ* 865; Sutherland “Ensuring Contractual Fairness in Consumer Contracts After *Barkhuizen v Napier* 2007 5 SA 323 (CC)” 2008 *Stell LR* 390; 2009 *Stell LR* 50.

<sup>244</sup> Goldstone J proclaimed in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC), 1997 6 BCLR 708 (CC):

“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups” (para 41).

See also *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC), 1997 6 BCLR 759 (CC) paras 31-33; *Harksen v Lane NO* 1998 1 SA 300 (CC), 1997 11 BCLR 1489 (CC) paras 46, 50, 51, 53, 91-92.

interpretation of the right to equality include the Court's understanding that the evil of apartheid consisted first and foremost in a denial of the dignity of the majority of the population,<sup>245</sup> the idea that equality is a comparative concept which has no substantive meaning on its own,<sup>246</sup> and the idea that dignity provides a neutrally principled basis for the negotiation of conflicting constitutional goods, like equality and freedom.<sup>247</sup>

The Court's dignity-based approach initially attracted considerable criticism. Some commentators argued that dignity is too individualistic to capture the groups-based nature of unfair discrimination, and proposed an alternative approach focusing on material disadvantage and structural discrimination.<sup>248</sup> Others claimed that dignity is indeterminate and can be manipulated to reach almost any outcome.<sup>249</sup> However, these criticisms were subsequently toned down as a result of a number of developments. First, the Court's dignity-based approach soon proved to be a powerful weapon in the struggles of gays, non-citizens, religious minorities and other vulnerable groups against their continued marginalisation. Gays and lesbians, in particular, scored important victories, including the recognition of same-sex marriage.<sup>250</sup> Secondly, the Court's dignity-based approach came to be identified with a judicial philosophy which celebrates difference. Respect for dignity, in this view, demands respect for the multiple and divergent cultures, religions, sexual orientations, family formations, worldviews and narratives which constitute each individual as unique, and precludes the conflation of equality with the homogenisation of beliefs and behaviour.<sup>251</sup> Thirdly, the alliance between dignity and equality proved capable of challenging at least some forms of material disadvantage, as is evident, *inter alia*, from cases in which the exclusion of certain groups or categories of persons from welfare programmes, housing plans and statutory benefits was successfully challenged.<sup>252</sup>

Today, most commentators agree that the dignity-based approach has, on balance, generated a perceptive form of equality analysis that is sensitive to context and has resulted in important advances for equality. There are, however, judgments in which the Constitutional Court has been insufficiently attentive to structural disadvantage; has relied on conservative assumptions about choice, consent, marriage and the family; or has failed to have proper

<sup>245</sup> Ackermann 2000 *Heidelberg Journal of International Law* 540-542.

<sup>246</sup> Ackermann "Equality and Non-Discrimination: some Analytical Thoughts" 2006 *SAJHR* 597; Cowen "Can 'Dignity' guide South Africa's Equality Jurisprudence?" 2001 *SAJHR* 34-48.

<sup>247</sup> Ackermann 2000 *Heidelberg Journal of International Law* 554-556.

<sup>248</sup> Albertyn & Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 *SAJHR* 248.

<sup>249</sup> Davis 1999 *SALJ* 398.

<sup>250</sup> *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355 (CC), 2006 1 SA 524 (CC).

<sup>251</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC), 1998 12 BCLR 1517 (CC) paras 22, 134; *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355 (CC), 2006 1 SA 524 (CC) paras 60, 61; *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC), 2008 2 BCLR 99 (CC) paras 65.

<sup>252</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC) (state's failure to provide for housing needs of those in desperate need found to be unreasonable); *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC), 2004 6 BCLR 569 (CC) (exclusion of permanent residents from social security benefits found unconstitutional).

regard to plurality and difference.<sup>253</sup> Even some of its more progressive equality judgments seem to have modelled citizenship and difference on an idealised vision of the outsider who, in the end, is made to bear an uncanny resemblance to ourselves.<sup>254</sup> These judgments have sparked debates over the possibilities and limits of dignity-based equality analysis. It has been suggested that there may be subtle forms of discrimination which are not easily captured in the language of dignity, particularly in cases where such discrimination results from the interplay between supposedly neutral legal norms, material deprivation and societal prejudice. The debate, it seems, no longer focuses on the question whether or not to rely on dignity, but rather on the contexts in which different modes of analysis work best, and on the complex interplay between recognition and redistribution, between dignity and systemic discrimination, and between equality, diversity and participation.<sup>255</sup>

#### 4 4 3 Democracy

Relying on the value of human dignity, the Constitutional Court has, in some cases, articulated an understanding of democracy which embraces the right of citizens, including minorities, to participate in decision-making processes which affect them. At the same time, the Court's understanding of dignity has been infused with the democratic values of citizenship, diversity and participation. The Court struck down the disenfranchisement of prisoners on two separate occasions. Insisting that "the vote of each and every citizen is a badge of dignity and of personhood",<sup>256</sup> it affirmed the connection between dignity and our membership of the political community. It is, however, clear that citizenship is not understood in a strictly formal sense. The Court has invalidated a number of measures which denied the moral or social citizenship of gays, lesbians and other vulnerable categories of persons. The Constitution, in its view, not only regards formal restrictions on citizenship and the right to vote with the utmost suspicion, but also requires close scrutiny of measures which unduly inhibit the participation of vulnerable groups in public life.<sup>257</sup>

In the view of the Court, respect for everyone's dignity and moral citizenship also requires consultative and participatory processes in which those affected are given the opportunity to voice their concerns and to participate in the search for an accommodation of conflicting rights and interests. The Court has, for instance, required the state to engage meaningfully with occupiers

<sup>253</sup> Some of the most controversial judgments include *Harksen v Lane NO* 1998 1 SA 300 (CC), 1997 11 BCLR 1489 (CC); *Jordan v S* 2002 6 SA 642 (CC), 2002 11 BCLR 1117 (CC); *Volks NO v Robinson* 2005 5 BCLR 446 (CC); and *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC), 2007 4 BCLR 339 (CC).

<sup>254</sup> See Robson "Sexual Democracy" 2007 *SAJHR* 409; De Vos "The 'Inevitability' of Same-Sex Marriage in South Africa's Post-Apartheid State" 2007 *SAJHR* 432.

<sup>255</sup> See Botha "Equality, Dignity, and the Politics of Interpretation" 2004 *SA Public Law* 724; Albertyn "Substantive Equality and Transformation in South Africa" 2007 *SAJHR* 253; Van Marle "Haunting (In)Equalities" in Hunter (ed) *Rethinking Equality Projects in Law: Feminist Challenges* (2008); Botha "Equality, Plurality, and Structural Power" 2008 *SAJHR* (forthcoming).

<sup>256</sup> *August v Electoral Commission* 1999 3 SA 1 (CC), 1999 4 BCLR 363 (CC) para 17; *Minister of Home Affairs v NICRO* 2004 5 BCLR 445 (CC) para 28.

<sup>257</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC), 1998 12 BCLR 1517 (CC) para 127.

against whom an eviction order is sought, stating that the occupiers must be treated as “individual [bearers] of rights entitled to respect for [their] dignity”, rather than as “faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances”.<sup>258</sup> It has also emphasised the importance of consultation and dialogue in mediating and accommodating religious and cultural difference. Parties to a dispute are required to engage in a “reasonable accommodation of interests”. This presupposes mutual recognition, a willingness to engage in dialogue, the right of religious and cultural minorities to participate in decision-making processes, and the responsibility of the courts to intervene in cases in which public authorities have not gone far enough in accommodating minority viewpoints and practices.<sup>259</sup>

#### 4 5 Limitation

Dignity has emerged as the primary mechanism by means of which the Court has attempted to mediate value conflicts. The notion of dignity is central to the proportionality inquiry and balancing undertaken by the Court in terms of the general limitation clause. Guided by the value of human dignity, the Court has, for instance, construed the right to privacy in terms of three core areas: personal space, intimate personal relations and the right to an autonomous identity. The closer a limitation of privacy comes to the core of a person’s fundamental human dignity, the more persuasive the justification of the limitation is required to be. Conversely, more leeway is given to the legislature to limit privacy in areas which are further removed from the core of dignity, autonomy and identity.<sup>260</sup> Rather than positing a categorical ban on the limitation of dignity, this approach is sensitive to differences of degree. Limitations which go to the heart of the individual’s inherent dignity and worth would seldom pass constitutional muster, while limitations are allowed more readily in the case of marginal infringements.

The idea of dignity as a device which enables the principled mediation of conflicting constitutional values is not without problems.<sup>261</sup> The first difficulty is that of distinguishing between a core of human dignity, the limitation of which must meet the most stringent standards of justification, and penumbral

<sup>258</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), 2004 12 BCLR 1268 (CC) para 41. See also paras 39-47 (extolling the virtues of compulsory mediation in trying to resolve disputes about evictions); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC) paras 83-84, 88; *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 5 BCLR 475 (CC) paras 9-23 (giving reasons for the Court’s earlier interim order which required that the parties first engage with each other and report back to the Court on the outcome of their engagement, and insisting that the absence of meaningful engagement would ordinarily weigh heavily against granting an ejection order).

<sup>259</sup> See *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC), 2002 3 BCLR 231 (CC) paras 146-149, 155-156, 162, 170; *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC), 2008 2 BCLR 99 (CC) paras 71-83, 174, 177, 182.

<sup>260</sup> *Bernstein v Bester* 1996 2 SA 751 (CC), 1996 4 BCLR 449 (CC) paras 65-67, 77, 79-80, 85, 90; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 10 BCLR 1079 (CC) para 18; *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC), 2007 7 BCLR 751 (CC) para 136.

<sup>261</sup> See Woolman & Botha “Limitations” in Woolman, Roux, Klaaren, Stein & Chaskalson (eds) *Constitutional Law of South Africa* 2 ed (2006) 34-116-34-121 for a critical analysis of the Court’s use of dignity in its proportionality analysis.

areas where the individual's rights might more easily yield to countervailing interests. Although certain general guidelines can be laid down (for instance, it appears as if the right not to be reduced to a mere object belongs to the very heart of the dignity guarantee, whereas the right to personal reputation is further removed from the core of human dignity and is therefore more open to balancing), they must of necessity remain rather vague, and much depends on the court's characterisation of the interests at stake.

A second problem has been that the distinction between core and peripheral areas lends itself to conservative assumptions about choice, marriage and sexual intimacy. It has, for instance, been held that the stigma suffered by prostitutes is a result of their own choice, rather than being directly related to the role of the law in reinforcing structural disadvantage and harmful stereotypes.<sup>262</sup> The diminished protection granted to intimate relations that do not conform to an idealised model of heterosexual marriage also falls into this category.<sup>263</sup>

A third problem is that there are certain intractable conflicts in which dignity appears on both sides of the dispute, in which it is by no means obvious that the one side's dignity interest is relatively stronger than that of the other. For instance, associative practices which are constitutive of the identity and self-understanding of members of religious or cultural communities may clash with the claims to equal respect of insiders (eg women) who claim that these practices impair their autonomy and equality. In such cases, dignity seems to be incapable of providing a neutrally principled basis for balancing equality and freedom. These cases also point to the limits of the idea of a reasonable accommodation of interests – sometimes one constitutionally protected interest must simply give way to another.<sup>264</sup>

Finally, even a severe limitation which goes to the heart of human dignity can, in principle, be justified in terms of pressing social needs. For instance, despite the Court's finding in *S v Makwanyane*<sup>265</sup> that capital punishment annihilates human dignity, the finding of unconstitutionality ultimately turned on the state's failure to demonstrate that the death penalty deters violent crime. A different outcome might have been reached if only the state successfully crossed that hurdle. While making it more difficult to justify serious violations of dignity, this approach does not provide an absolute shield against justifying violations of core areas of human dignity in the name of utilitarian considerations.<sup>266</sup>

<sup>262</sup> *Jordan v S* 2002 6 SA 642 (CC), 2002 11 BCLR 1117 (CC) paras 16, 74.

<sup>263</sup> *Volks NO v Robinson* 2005 5 BCLR 446 (CC) (exclusion of permanent life partners from benefits under the Maintenance of Surviving Spouses Act 27 of 1990 held not to infringe their rights to equality and dignity).

<sup>264</sup> Eg in *Bhe v Magistrate Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2005 1 SA 563 (CC), 2005 1 BCLR 1 (CC) the majority declined to develop customary law in line with the spirit, purport and objects of the Bill of Rights and simply invalidated the customary-law rule of male primogeniture. But see also the dissent of Ngcobo J paras 212-222.

<sup>265</sup> 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC).

<sup>266</sup> See Van der Walt *Law and Sacrifice* 106-109 (criticizing the Court in *Makwanyane* for its consequentialist reasoning).

## 5 Concluding remarks

This article started by noting that dignity is often invoked as a supreme value, an interpretive *Leitmotiv*, a basis for the limitation of rights and freedoms, and a guide to the principled resolution of constitutional value conflicts. This is not only the case in South Africa, but also in other national jurisdictions. However, the idea of dignity as a commanding constitutional norm and value which enables us to negotiate fundamental value conflicts in a principled manner is, at least in the view of some scholars, rendered problematic by the elusiveness of the term. Dignity is notoriously difficult to define. It is a rich and complex concept which is closely connected to the ideals of human worth, autonomy, agency, equality, solidarity and difference. It has a rich and varied history, and our understanding of it is shaped as much by the history of multiple, horrific violations of the inherent dignity of the human person, as by the complex intellectual history of the idea. It is a norm which elicits almost universal consent, and yet attempts to define it with any degree of precision are bound to be frustrated by the indeterminacy of the concept and by philosophical and ideological disagreement. The disparate intellectual traditions that have helped shape contemporary notions of dignity, the remarkable plasticity of the concept, and the difficulty of having to apply the abstract philosophical idea of dignity in concrete legal settings, raise questions over its capacity to guide and constrain constitutional argument.

One way of making sense of the primacy of dignity is by turning the debate on its head. Instead of asking whether the concept of dignity is stable enough to guide legal decision making, one might ask how our inability to come up with a single, comprehensive definition of dignity<sup>267</sup> could facilitate reasoned constitutional debate over controversial social issues. Such an approach would avoid the kind of dichotomised thinking which assumes that legal meaning is either predetermined by legal materials, or is wholly unconstrained.<sup>268</sup> Holding open the possibility that dignity's capacity to guide and constrain constitutional interpretation might be a function of its ambiguity or its paradoxical nature, it could assist us in arriving at a more realistic assessment of the possibilities and limits of a dignity-based jurisprudence.

My analyses of the German and South African dignity jurisprudence point to a number of paradoxes which are inherent in the notion of dignity. In the first place, human dignity implies something inviolable; something which commands our highest respect regardless of the consequences; something which can neither be forfeited nor waived nor weighed up against clashing considerations. And yet, precisely because it is such a pervasive value which underlies a variety of rights, dignity cannot escape being subjected to balancing, thus subverting its claim to an absolute status.

<sup>267</sup> The late Justice William J Brennan of the United States Supreme Court described attempts to devise a comprehensive definition of dignity as an "eternal quest", thus suggesting that there is something about dignity which resists definitional closure. Brennan "The Constitution of the United States: Contemporary Ratification" 1985 *Univ California Davis LR* 8 12.

<sup>268</sup> Botha "Freedom and Constraint in Constitutional Adjudication" 2004 *SAJHR* 249.

The German Basic Law and the South African Constitution represent different ways of coming to terms with this paradox. The Basic Law protects dignity as something inviolable which is shielded absolutely from legislative incursion and constitutional amendment. The notion that dignity is not subject to balancing has, however, come under pressure and has in certain cases resulted in an overly restrictive interpretation of dignity. It has also raised fears that dignity might be used to forestall democratic debate on issues characterized by widespread and reasonable disagreement. The South African Constitution, on the other hand, does not insulate dignity from limitation. While this approach leads to fewer problems of categorisation and definition, there is a risk that dignity might become just one constitutional right and value among many, and that the inherent dignity and worth of the human person could be sacrificed in the name of countervailing interests.

The second paradox is closely related to the first. Dignity is seen as a matter of cosmopolitan right; something which is inherent in all human beings and transcends cultural barriers and national boundaries. And yet its protection depends, for the most part, on the nation state, and its precise meaning and contours are culturally mediated. This is true not only in the sense that there are severe forms of degradation which fall through the cracks separating national and international law,<sup>269</sup> but it is also evident from the divergent approaches taken to dignity in different national systems. Consider, for instance, the articulation in Germany of the values of life and dignity, the protection given to the unborn and the prohibition of the instrumentalisation of human embryos. By contrast, the early link made in the South African context between life and dignity has remained wholly underdeveloped,<sup>270</sup> and the recognition in Germany of the dignity of the unborn is often explained by South African lawyers as a uniquely German preoccupation which is rooted in Germany's particular history. In South Africa, the most innovative uses of dignity have come from an exploration of the intersections of dignity, equality and difference. This serves once again to confirm the influence of contingent historical factors on the shape and content given to dignity within a particular legal system.

It is important to keep these tensions alive. We can never simply step outside the confines of the positive legal ordering or transcend the cultural and historical schemata through which our understandings of dignity are invariably filtered. At the same time, we need to remain open to the utopian possibilities inherent in the notion of an absolute and limitless human dignity. Only thus can we hope to push against the boundaries – whether geographical, cultural or ideological – which tend to legitimate and normalise degradation and inequality.

The third paradox concerns the idea of human dignity as something inherent in every human being. Dignity accrues to every human person, regardless of her material conditions or social standing. And yet, the equal respect and autonomy to which every person is entitled is contingent on mutual

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<sup>269</sup> Cf Hofmann's two examples cited in 3 3 4 above.

<sup>270</sup> *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC).

recognition within a community of equals<sup>271</sup> and on the material conditions needed to enable individuals to develop their capabilities.<sup>272</sup> While dignity requires us to challenge misrecognition and material deprivation, it is vital to avoid the conflation of human dignity with dignified economic conditions or social respect.<sup>273</sup>

The fourth paradox can be stated as follows: dignity demands respect for the familial ties, communal attachments, cultural meanings, religious beliefs and discursive practices through which we make sense of our world and forge our individual identities. It rejects the notion of the unencumbered self and recognises the formative role of – contingent – cultural value patterns and institutional arrangements on our sense of self. At the same time, however, respect for someone's inherent dignity requires recognition of the person's capacity to transcend the strictures of her social background and to forge an autonomous identity. I have attempted to show that, both in Germany and South Africa, the inherent dignity of each individual has been invoked to exclude both a radical, abstract individualism and a "thick" form of communitarianism in which the collective takes precedence over the individual. Precisely because it values both the centrality of cultural practices, religious beliefs and communal ties to individual dignity and identity, and celebrates the capacity of the individual to transcend the strictures of her own background, dignity can be used to negotiate conflicts between the individual and community in a way which neither obliterates diversity nor stultifies the dynamic processes through which community norms are generated and contested.<sup>274</sup>

The fifth paradox, like the fourth, concerns the relationship between dignity, the individual and community. Dignity is closely related to personal freedom and presupposes the right of the individual freely to choose her own ends. At the same time, however, respect for dignity requires us to set limits to freedom – particularly in an age characterised by pervasive private power, excessive consumerism and deepening inequality.

Finally, dignity demands an impossible and unlimited responsibility to respect and protect everyone's inherent dignity, regardless of national boundaries and countervailing rights and interests. At the same time, however, dignity requires meticulous attention to particular, local contexts. An understanding of dignity as something abstract and formal – like that informing South Africa's law of contract – inevitably ends up as a caricature. It is only through careful attention to the particularity of human lives that we can keep interrogating concepts, rules and institutions – state sovereignty, the market, the public/private distinction, cultural value patterns, and so forth – which render degradation and abuse invisible and lend them an air of inevitability.

Perhaps, then, the capacity of dignity to guide and structure constitutional discourse lies in the way in which it suspends legal decision making between the universal and the particular, between the transcendental and the contingent.

<sup>271</sup> Cf the discussion of the communicative theory under 3 3 4, and of a recognition-based approach under 4 3 4 above.

<sup>272</sup> Cf the discussion of the capabilities approach under 4 3 4 above.

<sup>273</sup> See Cornell 2004 *SA Public Law* 667-668.

<sup>274</sup> See 3 3 3 and 4 3 3 above.

Dignity demands unwavering commitment to the inviolability of each human person. And yet, it can only be honoured through careful engagement with the particularity of local contexts. Dignity requires respect for the constitutive role of culture, religion, family and community. At the same time, however, it insists on the capacity of individuals to transcend the strictures of their own background and helps facilitate the infusion of egalitarian norms into these spheres. Our understanding of dignity is inevitably filtered through contingent historical struggles and cultural understandings. And yet, the ideal of dignity demands openness to the human capacity for new beginnings and to an enlargement of our understanding of the meanings and bearers of dignity. Finally, dignity constrains legal meaning by excluding a range of interpretations which are incompatible with the inherent worth of the human person. At the same time, it institutes uncertainty by recognising each individual as a unique, self-legislating human being, who has the moral right to question received interpretations and to challenge the normative closure into which political communities invariably lapse.

### SUMMARY

This article compares the role of human dignity in constitutional interpretation in Germany and South Africa. Both countries have embraced dignity as a direct response to a troubled and totalitarian past. Nowadays dignity features as a supreme value, an interpretive *Leitmotiv*, a justiciable right, an objective constitutional norm, and a guide to the resolution of value conflicts. There are, however, important differences in the way dignity has shaped these countries' constitutional jurisprudence. A study of the relevant similarities and differences provides an important occasion for critical reflection on the possibilities and limits of a dignity-based jurisprudence. The article concludes with tentative observations on the capacity of dignity to guide constitutional decision-making.