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### Abstract

The concept of human dignity is relatively new in international and domestic constitutional law. Dignity is protected as a value or a right, or both, in international law and many domestic jurisdictions. It is difficult to define human dignity in a legal context, as the concept is not defined in the first international document which recognizes inherent human dignity and the protection thereof, the *Universal Declaration of Human Rights* (1946) and many international (and national) documents enacted thereafter. Despite dissensus regarding the widespread use of the concept, dignity has come to display three elements in constitutional adjudication post World War Two: the ontological element which entails that human beings have equal inherent human dignity that cannot be waived or diminished; the second element being the claim that inherent human dignity has to be recognised and respected; and the limited-state claim as the third element which entails that states have a positive obligation to progressively realise human dignity through the mechanism of socio-economic rights. It is widely accepted that these elements root in Kantian moral ethics which holds that man's autonomy is based upon universal dignity, as a result of which man should never be used as a means to an end, but only as a means in himself. Kant expressed this idea through formulation of a categorical imperative, namely that everyone's inherent human dignity has to be respected and protected universally. The preamble of the *Universal Declaration of Human Rights* (1946), article 1(1) of the German *Basic Law* and section 10 of the *Constitution of the Republic of South Africa*, 1996 embody the elements of Kant's categorical imperative. As a result, the three elements are applied as a definitional term of human dignity in German and South African constitutional adjudication. Based on these elements, it can be argued that the current idea of universal inherent dignity, at least in German and South African law, comports with Kant's ideal that man should never be used as a means to an end.

### Keywords

human dignity; human rights; supra-positive values; Kant; categorical imperative; inherent human dignity; moral ethics; post-war rights protecting paradigm; constitutional rights; constitutional values; cruel and unusual punishment; socio-economic rights; assisted suicide.

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## 1 Introduction

Law, and more specifically public law, lacks a principled definition of human dignity. The modern legal notion of dignity displays a complex character between an illustrative quality and a prescriptive concept, the so-called is-ought dilemma in law, a legal phenomenon which was described by Habermas<sup>1</sup> as a "fusion of moral content with coercive law". Dignity represents a "wide moral view";<sup>2</sup> a metaphysical notion which implies an objective moral principle on the one hand and on the other hand legal recognition of equal human rights. As a moral view, dignity represents the essence of what it means to be a human being; as a recognition of a human right, it legalises the notion that the essence of humanity must be recognised and respected in equal *quantum*.

Notwithstanding their differences in legal culture and historic, social and religious backgrounds, countries worldwide have given prominence to human dignity in their constitutional systems. The sources of human dignity in modern constitutionalism, the *Universal Declaration of Human Rights* (1948) (*Universal Declaration*) and the *International Charter of Human Rights* (1948) (*Charter*), accede to a preconception of dignity as a basis for human rights,<sup>3</sup> but refrain from a definition of and a theoretical basis for human dignity.

However, the difficulties experienced in defining the term have raised concerns regarding the degree of judicial discretion proper in the application of human dignity, as well as the extent of the ideological manipulation which the concept could be subject to.<sup>4</sup> Consequently, dignity has been described as "a loose cannon, open to abuse and misinterpretation".<sup>5</sup> The Constitutional Court of South Africa refers to dignity as "a notoriously difficult

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<sup>1</sup> Habermas 2010 *Metaphilosophy* 470.

<sup>2</sup> Shultziner "Human Dignity" 85.

<sup>3</sup> Henkin states that "We are not told what theory justifies 'human dignity' as the source of rights, or how the needs of human dignity are determined. We are not told what conception of justice is reflected in human rights, or how preserving human rights will promote peace in the world". See Henkin "International Human Rights" 33.

<sup>4</sup> Carozza "Human Dignity" 459. Also see the claim of Kretzmer with regard to the Israeli Supreme Court: "It is hoped that the Court will now start refining the concept so as to prevent its use as a catch-all phrase, which, if it means anything, may also mean nothing." Kretzmer "Human Dignity" 174-175.

<sup>5</sup> Gearty *Principles of Human Rights Adjudication* 85.

concept ... It needs precision and elaboration".<sup>6</sup> Two judges of the European Court of Human Rights, in dissent, refer to dignity as a "dangerous concept".<sup>7</sup> The Canadian Supreme Court in *R v Kapp*<sup>8</sup> held that the concept is too subjective and abstract to be applied as a legal test, and that

it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.<sup>9</sup>

In the South African context, Davis J warned that the 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.<sup>10</sup>

In current law, dignity functions as a legal principle,<sup>11</sup> a so-called universal and utilitarian ideal. Dignity's universality as a moral law contributes to a common understanding of what it means to be treated with dignity, notwithstanding *dissensus* regarding a definition of the concept. This article canvasses the idea of a universal minimum content of dignity in order to conceptualise a possible definition of the concept. It evaluates the application thereof in the constitutional systems of Germany and South Africa to determine the validity of dignity's core meaning. In section two the difficulty of defining human dignity is addressed, followed by a discussion regarding the basic elements of dignity, and finally a definition of dignity is proposed based on the minimum core content of the concept.

## 2 To define human dignity is problematic

The right to human dignity, like other human rights, displays a "suprapositive aspect"<sup>12</sup> (contrary to the norms enacted in treaties and constitutions) that derives legitimacy from an extra-legal source – "a normative force independent of [its] embodiment in law" such as natural law, religion,

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<sup>6</sup> *Harksen v Lane* 1998 1 SA 300 (CC) para 50, quoting the Canadian Court in *Egan v Canada* 1995 29 CRR (2d) 79 106.

<sup>7</sup> *Vereinigung Bildender Künstler v Austria* case number 68354/01, ECHR 2007-II, as quoted by Carozza "Human Dignity" 459.

<sup>8</sup> *R v Kapp* 2008 SCC 41 para 22, as quoted by McCrudden 2008 *EJIL* 679.

<sup>9</sup> *R v Kapp* 2008 SCC 41 para 22.

<sup>10</sup> As quoted by Botha 2009 *Stan L Rev* 172 fn 5.

<sup>11</sup> This is irrespective of whether dignity is expressly enacted in constitutions or not, as in the US and French Constitutions and the *European Convention of Human Rights* (1950). See Habermas 2010 *Metaphilosophy* 464.

<sup>12</sup> Neuman explains that: "In referring to these principles as suprapositive, I do not mean to assert that they apply of their own force *within* the legal system to trump positive law, but rather that they supply an external standard of normative evaluation, which the legal system fully or partially internalizes as a positive fundamental right." Neuman 2003 *Stan L Rev* 1868 fn 10.

universal morality or the underlying ethical values of a particular culture.<sup>13</sup> Therefore, human rights are regarded as universal and transcend culture, politics and society.<sup>14</sup> These rights are simultaneously contingent on social context, thus culturally relativistic,<sup>15</sup> and provide a uniform standard for the adjudication of infringements of rights. Human dignity legitimises the relative and universal characteristics of human rights.

Dignity, however, displays different functions in comparable concrete cases, namely as a right, a principle and/or a legal value. This led Beyleveld and Brownsword<sup>16</sup> to state that

[d]ignity appears in various guises, sometimes as the source of human rights, at other times as itself a species of human right (particularly concerned with the conditions of self-respect); sometimes defining the subjects of human rights, at other times defining the objects to be protected; and sometimes reinforcing, at other times limiting, rights of individual autonomy and self-determination.

Dignity's multiple meanings are rooted in the diverse sources of the idea. In the ancient Roman context *dignitas* refers to the hierarchical conception of a person's status in society, whilst *dignitas hominis* refers to the Stoic account of man's elevated standing in the universe because of his ability to reason.<sup>17</sup> The Judaeo-Christian account of dignity derives from the notion that man is made in the image of God, and therefore people deserve to respect one another equally. Kant, the most influential philosopher of the Enlightenment, formulated an understanding of dignity based on man's ability to reason autonomously and to make his own decisions, but at the same time being bound to obey duties imposed by moral law.<sup>18</sup> For Kant, individual autonomy lies in man's dignity, which ultimately entails that nobody should be treated as a means to an end.<sup>19</sup> Dworkin, a contemporary

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<sup>13</sup> Neuman 2003 *Stan L Rev* 1868.

<sup>14</sup> Human rights are inherent in each person by virtue of being human, which rights are not granted by the state nor can they be taken away by the state. Since most states have ratified international human rights instruments and have agreed to be legally bound by them, human rights standards are universal. Binder 1999 *Buff Hum Rts L Rev* 213.

<sup>15</sup> Rights are regarded as the product of values resourced from social norms and cultural perspectives, which cannot operate in isolation from their human roots. Rights have a culturally relative character, irrespective of whether they are sourced from humans by virtue of their humanity or because of their societal relations. Binder 1999 *Buff Hum Rts L Rev* 213 and further.

<sup>16</sup> Beyleveld and Brownsword 1998 *MLR* 661-662.

<sup>17</sup> Cancik "Dignity of Man" 22.

<sup>18</sup> Englard 1999-2000 *Cardozo L Rev* 1918.

<sup>19</sup> Eckert "Legal Roots" 46. Mahlmann argues that the German Constitutional Court's decision to strike down anti-terrorism laws that allow the air force to shoot down hijacked aircraft because the dignity of the passengers and crew require that they not be objectified and sacrifice their lives in favour of a greater ideal is the most representative adjudication of the Kantian version of human dignity as demanding that

liberal philosopher, argues that human beings have rights because of their dignity, but admits that the concept is ambiguous.<sup>20</sup>

The fundamental diversity in dignity's origins illustrates the significant variation in constitutional use by different courts, when the abstract and broad principle is applied. Venter<sup>21</sup> encapsulates the multiple meanings and applications of human dignity within the framework of its historical development as follows:

[a]gainst this background it is clear that one should not in this world of pluralistic life views expect that the constitutional recognition and elevation of human dignity would ensure the emergence of a monolithic notion of human dignity.

Despite these difficulties, dignity worldwide is invoked in the constitutional context, *inter alia* as the basis for an individual's entitlement to rights,<sup>22</sup> and to curtail interference in the exercising of rights.<sup>23</sup> Furthermore, transnational borrowing and references to dignitarian jurisprudence are common (most notably with regard to cruel and unusual punishment, such as the death penalty.<sup>24</sup>) It is important to conceptualise the concept of dignity in concrete cases in order to establish whether certain conduct causes the infringement of dignity. The establishment of at least minimum elements of dignity would lessen criticism against the use of the concept and aid judges in the interpretation of fundamental rights issues. The universal elements of dignity as applied in German and South African law (based on Kant's categorical imperative) are identified and discussed next, in an attempt to begin to grasp the concept of human dignity.

### 3 The basic elements of human dignity

Human dignity in its most basic form is an attribute of humanity. Weisstub<sup>25</sup> explains that

[a]lbeit ambiguous, dignity is signalling a term that goes to the heart of what constitutes the quality of humanness.

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a person not be treated as a means to an end. See in general Mahlmann 2010 *GLJ* 6-32.

<sup>20</sup> Dworkin *Taking Rights Seriously* 198.

<sup>21</sup> Venter "Human Dignity" 348.

<sup>22</sup> Clapham *Human Rights* 148-149; Wood 2008 *Acta Juridica* 47.

<sup>23</sup> Botha 2009 *Stan L Rev* 171.

<sup>24</sup> Carozza 2003 *Tex L Rev* 1082: "... the tendency of courts in death penalty cases ... to consistently place their appeal to foreign sources on the level of the shared premise of the fundamental value of human dignity is a paradigmatic example of naturalist examples at work. Despite differences in positive law, in historical and political context, in religious and cultural heritage, there is the common recognition of the worth of the human person as a fundamental principle to which positive law should be accountable".

<sup>25</sup> Weisstub "Honor, Dignity and the Framing of Multiculturalist Values" 269.

Despite the lack of consensus on the theoretical foundations of dignity, scholars such as Schachter,<sup>26</sup> Neuman<sup>27</sup> and Feldman<sup>28</sup> identified the fact that dignity has come to display three basic elements in adjudicating individual rights claims.<sup>29</sup> They are part and parcel of the generic concept of human dignity, even if the notion is disapproved of or if a particular community's concept of the basic elements differs.<sup>30</sup> Dignity is an ideal to aspire to – to have universal meaning, devoid of ideological and political influences.<sup>31</sup>

The basic elements are:

- The ontological<sup>32</sup> claim, which refers to man's unique qualities that are priceless and irreplaceable and constitute every individual's inherent dignity.
- Recognition and respect for inherent dignity relates to types of treatment that are inconsistent with inherent dignity, as proscribed by international and national law texts.<sup>33</sup> McCrudden<sup>34</sup> refers to the second element as the "relational claim". In other words, it emphasises the relationship and expectations of the individual *vis-à-vis* the perceptions of his community – the so-called dignity of recognition, being the social dimension of dignity.
- Building on the relational claim, the third common element as the "limited-state claim",<sup>35</sup> embodies the Kantian idea that the state should exist for the sake of the individual, and not *vice versa*. To

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<sup>26</sup> Schachter 1983 *AJIL* 849-854.

<sup>27</sup> Neuman "Human Dignity" 241, 271. Also see Beyleveld and Brownsword *Human Dignity* 28-29, 63-66.

<sup>28</sup> Feldman 1999 *Public Law* 684.

<sup>29</sup> Also see McCrudden 2008 *EJIL* 679; Botha 2009 *Stan L Rev* 189-190; Rao 2011 *Notre Dame L Rev* 187-189 (who views these elements as inherent dignity, communitarian dignity and dignity as recognition); Botha 2009 *Stan L Rev* 189; Barroso 2012 *BC Int'l & Comp L Rev* 360 (who sees these elements as intrinsic value, autonomy and community value).

<sup>30</sup> McCrudden 2008 *EJIL* 679; Rao 2011 *Notre Dame L Rev* 187.

<sup>31</sup> Neuman "Human Dignity" 250. He argues that dignity thus defined may be contrasted against "organic theories of nationalism that submerge the individual with authoritarian political doctrines that condemn human nature as degraded by sin, with racist doctrines of biological inferiority and with aristocratic doctrines of national hierarchy".

<sup>32</sup> In philosophy, ontology refers to a branch of metaphysics that studies the fundamental characteristics of things and subjects, including their basic composition and that without which they cannot consist. It also relates to questions regarding the existence and arrangement of reality.

<sup>33</sup> Beyleveld and Brownsword *Human Dignity* 11.

<sup>34</sup> McCrudden 2008 *EJIL* 679.

<sup>35</sup> McCrudden 2008 *EJIL* 679.

acknowledge inherent human dignity, the state is progressively required to provide existential minimum living conditions which are embodied in the second-generation social and economic human rights.

It is submitted that these elements are rooted in the preamble of the *Universal Declaration*, specifically the first and fifth paragraphs (author's emphasis):

Whereas *recognition of the inherent dignity* and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

And

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, *in the dignity and worth of the human person* and in *the equal rights of men and women* and have determined to *promote social progress and better standards of life in larger freedom*.

Beyleveld and Brownsword<sup>36</sup> refer to the first and second elements as "human dignity as empowerment" and "human dignity as constraint" on free choice. The former typically plays a background role in international human rights instruments, and the latter plays a foreground role assigned in these instruments, when competing elements of other social values (such as the interests of the individual against that of the community) are weighed against each other. They state that intrinsic dignity is

... a seminal idea that acts as the source of the fundamental freedoms to which all humans (*qua* human) are entitled. In this context, human dignity as empowerment (specifically the empowerment that comes with the right to respect for one's dignity as a human, and the right to the conditions in which human dignity can flourish) is the ruling conception.<sup>37</sup>

In constitutional use, these three elements frequently overlap and can be conflated by courts.<sup>38</sup> From jurisdiction to jurisdiction, concepts regarding the ontological claim may differ, and following this divergence, courts may not agree in their understanding as to what treatment is inconsistent with inherent dignity.<sup>39</sup> These perspectives in turn influence perceptions of the legislature regarding the role of the state in the practical enforcement of human dignity.<sup>40</sup> Different jurisdictions may support opposite conclusions.

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<sup>36</sup> Beyleveld and Brownsword *Human Dignity* 11.

<sup>37</sup> Beyleveld and Brownsword *Human Dignity* 11.

<sup>38</sup> McCrudden 2008 *EJIL* 680.

<sup>39</sup> McCrudden 2008 *EJIL* 680.

<sup>40</sup> McCrudden 2008 *EJIL* 680.

In this respect, McCrudden<sup>41</sup> argues that the basic elements of dignity, although widely referred to and applied by judges transnationally, represent an "empty shell" as a result of divergent and context-specific judicial norms in different jurisdictions, specifically in cases such as abortion, euthanasia, hate speech and socio-economic rights.

The judges of both the Bundesverfassungsgericht (*Federal Constitutional Court of Germany*, hereafter the BVerfG) and the South African Constitutional Court have not specifically formulated basic elements of the notion of human dignity in their judgments, but they have consistently applied these common elements to ascertain if dignity was infringed. Can it be said that there is an "overlapping consensus",<sup>42</sup> or a shared commonality, regarding universal elements of human dignity in the German and South African jurisdictions?

### **3.1 Human dignity's fusion of moral law with legal theory**

The theoretical basis for the three elements of dignity can be linked to Kant's moral and legal theories, which provide a legal framework to constitute human dignity as an *a priori* constitutional value and as the basis for human rights. Kant's claim of equal inherent dignity is regarded as the basis of human rights.<sup>43</sup> His notion of moral ethics was first published in *Grundlegung zur Metaphysik der Sitten*<sup>44</sup> in 1785, in which he argued that human reason, as the distinctive feature of humanity, induces people to act out of respect for universalised law-like conduct of themselves and others.<sup>45</sup> To act because of reason is to act exclusively out of a moral duty. This notion of duty is connected to respect for the human dignity of ourselves and others – dignity is ultimately the supreme value to be respected as an end in itself, so that humanity should never be treated as a means only (the categorical imperative).<sup>46</sup> Kant's moral system requires internal compliance, whereas a legal system demands external compliance.<sup>47</sup> In addition, the moral system exclusively accentuates the fulfilment of duties, whereas the

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<sup>41</sup> McCrudden 2008 *EJIL* 698. He explains furthermore that "when the concept comes to be applied the appearance of commonality disappears, and human dignity (and with it human rights) is exposed as culturally relative, deeply contingent on local politics and values, resulting in significantly diverging, even conflicting, conceptions". A discussion on a common meaning of human dignity beyond the three elements is hugely contested terrain and falls outside the scope of this article.

<sup>42</sup> Barroso 2012 *BC Int'l & Comp L Rev* 374, referring to the term coined by John Rawls, which "identifies basic ideas of justice that can be shared by supporters of different religious, political and moral comprehensive doctrines".

<sup>43</sup> Beyleveld and Brownsword *Human Dignity* 53.

<sup>44</sup> Translated in English as *Groundwork of the Metaphysics of Morals*.

<sup>45</sup> Engard 1999-2000 *Cardozo L Rev* 1918.

<sup>46</sup> Engard 1999-2000 *Cardozo L Rev* 1918.

<sup>47</sup> Fletcher 1984 *UWO L Rev* 175.



legal system expands on the notions of objective rights and enforceable personal rights.<sup>48</sup> Article 1(1) of the *Grundgesetz*<sup>49</sup> of Germany (*Basic Law*) is rooted in the Kantian notion of a reciprocal duty to rights (author's emphasis):<sup>50</sup>

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

The *Basic Law* was the first post-Second World War constitution to protect individual rights and supra-positive constitutional values. Weinrib<sup>51</sup> refers to this development as the "post-war rights-protecting paradigm". Respect for human dignity is central to the post-war constitutional tradition from the perspective of violations of dignity, which cannot be justified by any nation's perceptions of a particular cultural, religious or political practice, or in the name of majoritarian politics.<sup>52</sup> Rights coupled with state duties such as the protection of socio-economic rights are common in European constitutional systems and reflect a value-ordered system, as opposed to the *US Constitution*, which does not contain textual reference to constitutional values.<sup>53</sup>

Section 7(2) of the *Constitution of the Republic of South Africa, 1996 (Constitution)* resembles the Kantian injunction of rights and their corresponding duties: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights." This instruction was confirmed in *Carmichele v Minister of Safety and Security (Carmichele)*<sup>54</sup> regarding the horizontal operation of the *Bill of Rights*.

### 3.2.1 *Every human being has inherent human dignity*

Dignity, broadly speaking and at a minimum, encompasses the inalienable, inherent and intrinsic worth<sup>55</sup> or values of each individual – in the Kantian sense,

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<sup>48</sup> Fletcher 1984 *UWO L Rev* 175, 176.

<sup>49</sup> *Grundgesetz für die Bundesrepublik Deutschland*, 1949.

<sup>50</sup> Fletcher 1984 *UWO L Rev* 178.

<sup>51</sup> Weinrib 2005 *NJCL* 333.

<sup>52</sup> Weinrib "Constitutional Conceptions" 17.

<sup>53</sup> Eberle 2008 *Or Rev Int'l L* 5.

<sup>54</sup> *Carmichele v Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 4 SA 938 (CC).

<sup>55</sup> Human dignity and human worth are, in Kantian terms, synonymous, and reference throughout this article to the one will also imply the other. Also, the French translation for *dignitas* is *valeur*, meaning intrinsic worth. The reference in the preamble of the *Charter* to the "dignity and worth" of the human person is tautologous, as the terms are synonyms. Thus, references to "intrinsic worth" may be used interchangeably with references to "inherent dignity".

the worth of a person has no price, admits of no substitute, cannot be traded off for anything in the world.<sup>56</sup>

Ackermann<sup>57</sup> explains Kant's theory regarding intrinsic worth by quoting Henkin:

[o]n the highest level, dignity is a quality of worth or excellence, and when used in the compound term "human dignity", it suggests all that for Kant is inherent in the human "personhood" of every human being.

In a similar vein, Judge Sachs confirmed this idea in *S v Lawrence*.<sup>58</sup>

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

Inherent dignity comprises the totality of the uniqueness of a human being's nature; his intelligence and his sensibilities. For inherent dignity is by definition the very antithesis of the ancient hierarchical *dignitas* as well as the differential claim of private law *dignitas*. It resonates with the Ciceronian Stoic claim that man's dignity is rooted in his ability to reason and his self-actualisation, in contrast with the rest of nature, and also with the Judeo-Christian tradition which emphasises man's nature as a creation in the image of God. Incidentally, today Catholic thought reverts to inherent dignity to protect fetuses from abortion and to oppose the death penalty.<sup>59</sup> The ontology of inherent dignity then refers to the universal, egalitarian and secular character of humanity, and exists independent of any political or religious system. Réaume<sup>60</sup> aptly describes this element of dignity as:

[t]o ascribe human dignity to human beings not as empirical matter, but as a moral matter – that is, to treat it as an inherent aspect of humanity – is to treat human beings as creatures of intrinsic, incomparable, and indelible worth, simply as human beings; no further qualifications are necessary. In this basic sense, dignity is ascribed to human beings independently of their particular accomplishments or merits of praiseworthiness. It refers to a kind of worth that is not contingent on being useful, or attractive, or pleasant or otherwise serving the ends of others.

For Habermas, the universalistic element of inherent dignity represents the fabric that binds together the human family.<sup>61</sup> The *dictum* of the Constitutional Court of South Africa in *Minister of Home Affairs v Watchenuka*<sup>62</sup> illustrates this point:

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<sup>56</sup> Waldron 2008 *Acta Juridica* 4.

<sup>57</sup> Ackermann 2004 *NZ L Rev* 649.

<sup>58</sup> *S v Lawrence* 1997 4 SA 1176 (CC) para 168.

<sup>59</sup> Botha refers to Hofmann, who criticises this thought as having "conflated" dignity with biological human life. See Botha 2009 *Stan L Rev* 189.

<sup>60</sup> Réaume 2003 *La L Rev* 31.

<sup>61</sup> Habermas 2010 *Metaphilosophy* 469-470.

<sup>62</sup> *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA) para 24.

[h]uman dignity has no nationality. It is inherent in all people, citizens and non-citizens alike – simply because they are human.

Implicit in the inherent claim of dignity is the acknowledgement and acceptance of diversity and differences in human beings and cultures. When dignities compete, the abstract idea of human dignity is too general to function on its own, but the social, historical and cultural factors that shape a nation will indicate the weight to be allocated to whichever right.<sup>63</sup> According to Carozza<sup>64</sup> the inconsistencies and controversies in constitutional adjudication of human dignity across jurisdictions rarely arise from the common understanding of inherent dignity. Where the requirements and ambit of dignity are uncertain it is the social, political and cultural context that contributes to an amplification of the broad understanding of dignity.<sup>65</sup>

Botha<sup>66</sup> argues that the theological and metaphysical foundations of this claim are considered to be problematic in an era which is characterised by the fragmentation and pluralisation of belief systems. Furthermore, the equal allocation of dignity in instances of the conflict of competing rights will result in courts employing cultural and other values, so that inherent dignity will seem to be pluralistic. This leads Feldman<sup>67</sup> to explain that

[t]he nature of dignity, culturally and contextually specific as it is, and dependent as much on the viewpoint of the observer as on the aspirations of the protagonists, may sometimes need to be treated with cautious awareness of its limitations, as well as its strengths.

Eberle<sup>68</sup> traces inherent dignity to Kant's ethical theory resulting from man's rationality and autonomy.<sup>69</sup> This theory holds that, because a human being is regarded as a person, he is elevated above any price or value and therefore not to be valued "merely as a means to the ends of other people or even to his own ends, but as an end in himself".<sup>70</sup> Everything in the

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<sup>63</sup> Weisstub "Honor, Dignity and the Framing of Multiculturalist Values" 265.

<sup>64</sup> Carozza "Human Dignity" 460.

<sup>65</sup> Carozza claims that: "[I]n those cases, the commonality of understanding across jurisdictions quickly dissipates and the meaning of dignity becomes 'elusive' and 'amorphous' (quoting Rao 2008 *CJIL* 203), even to the point of being arguably just an 'empty shell' (quoting McCrudden 2008 *EJIL* 698.)" See Carozza "Human Dignity" 460.

<sup>66</sup> Botha 2009 *Stan L Rev* 189.

<sup>67</sup> Feldman *Civil Liberties* 133.

<sup>68</sup> Eberle 2008 *Or Rev Int'l L* 18.

<sup>69</sup> However, McCrudden states that Kant's idea of dignity is "notoriously contested territory." See McCrudden 2008 *EJIL* 659.

<sup>70</sup> The Kantian influence resonates in the Court's *dictum* in *Dodo v The State* 2001 3 SA 382 (CC) 423 para 38: "To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to

universe either has a price or is priceless: something that cannot be replaced by an equivalent item is priceless and has dignity.<sup>71</sup> Man can only claim autonomy, and consequently dignity, if he respects other human beings, which obligation is imposed upon him by his own moral laws (which in the Kantian sense will become a universal law) and guided by the categorical imperative:

[a]ct only according to that maxim by which you can at the same time will that it should become a universal law.<sup>72</sup>

and:

every rational being must act as if he, by his maxims, were at all times a legislative member in the universal realm of ends.<sup>73</sup>

This is the central tenet that roots law in moral freedom: a system of supra-positive, *a priori* abstract reasoning, based on moral principles<sup>74</sup> to establish the legal basis for the protection of human dignity. The protection of inherent human dignity in the *Basic Law* as an *a priori* principle (*Grundwert*) is based on Kant's universal law.<sup>75</sup> As the BVerfG emphasised in BVerfGE 45, 187 (1977),<sup>76</sup> (*Life Imprisonment*):

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

A myriad of international, regional and national human rights documents refer to the equal inherent dignity of every human being.<sup>77</sup> Dicke points out

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which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as an end in themselves, never merely as means to an end."

<sup>71</sup> Barroso 2012 *BC Int'l & Comp L Rev* 360.

<sup>72</sup> Kant *Foundations* 39-41, as quoted by Eberle 2008 *Or Rev Int'l L* 18.

<sup>73</sup> Kant *Foundations* 39-41, as quoted by Eberle 2008 *Or Rev Int'l L* 18.

<sup>74</sup> Eberle 2008 *Or Rev Int'l L* 20.

<sup>75</sup> Eberle 2008 *Or Rev Int'l L* 20, 21.

<sup>76</sup> BVerfGE 45 187, 227-228 (1977), as quoted by Eberle 2008 *Or Rev Int'l L* 12.

<sup>77</sup> For example, the preamble to the *Universal Declaration of Human Rights* (1948) affirms: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The second paras of the preambles of both the *International Covenant on Civil and Political Rights* (1976) and the *International Covenant on Economic, Social and Cultural Rights* (1976) proclaim that "these rights derive from the inherent dignity of the human person". Principle VII para 2 of the *Helsinki Final Act* (1975) asserts that states "will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights all which derive from the inherent dignity of the human person and are essential for his free and full development". The *African Charter on Human Rights and Peoples' Rights* (1981) guarantees respect for every human being's inherent dignity (art 5). Art 3(1) ("Right to Dignity") of the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (2000) stipulates that "Every woman shall have the right to dignity inherent in a human

that the UN General Assembly determined in 1986 that new human rights instruments should "derive from the inherent dignity and worth of the human person".<sup>78</sup> Consequently, inherent dignity was enacted in the major conventions on the *Rights of Children* (1989), the *Rights of Migrant Workers* (1990), *Protection against Forced Disappearance*, and the *Rights of Disabled Persons* (2007).<sup>79</sup> In 1993, delegates from 170 governments who convened at the Vienna Second World Conference chose inherent dignity as central to the protection and development of human rights.<sup>80</sup> Although the *European Convention on Human Rights* (1950) refers only to human rights and freedoms, the concept of inherent human dignity is applied by the European Court of Human Rights in a variety of cases, more specifically regarding torture, the rights of prisoners, and sexual identity.<sup>81</sup>

There is a strong link between the principled application by the BVerfG of the *raison d'être* for the protection of human dignity and the first component of section 10 of the *Constitution*, which is posited as a categorical imperative: "[e]veryone has inherent dignity".<sup>82</sup> *A priori* status is given to the inherent dignity paradigm in that "expression was given of what was presumed by implication to exist".<sup>83</sup> As the first component is enacted as an imperative, it cannot be subject to limitation and proportionality analysis in terms of section 36 of the *Constitution* (in instances of conflicts with other values and rights), as only rights can be limited.<sup>84</sup> This approach comports with the inviolable character of human dignity in article 1(1) of the *Basic Law*, as a result of which infringement of dignity is absolute and cannot be subject to limitation. The Court indeed referred to this common aspect of dignity as a value, albeit in a footnote in *Mohamed v President of the Republic of South*

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being". The preamble of the *American Declaration on the Rights and Duties of Man* (1948) declares that "All men are born free and equal in dignity and in rights".

<sup>78</sup> Dicke "Founding Function of Human Dignity" 119.

<sup>79</sup> McCrudden 2008 *EJIL* 669.

<sup>80</sup> The second para of the preamble to the *Vienna Declaration and Programme of Action* (1993) declares that "all human rights derive from the dignity and worth inherent in the human person and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms". Incidentally, it was after the inception of this Declaration that human dignity was constitutionally protected in a number of national constitutions in the period after the establishment of the *Basic Law*.

<sup>81</sup> Frowein "Human Dignity" 124-131.

<sup>82</sup> Also see Ackermann 2004 *NZ L Rev* 647. The Court's *dictum* in *S v Dodo* 2001 3 SA 382 (CC) para 35 confirms this principle: "The human dignity of all persons is independently recognized as both an attribute and a right in section 10 of the *Constitution*..."

<sup>83</sup> Venter "Human Dignity" 340; Botha 2009 *Stan L Rev* 197.

<sup>84</sup> For an opposite view, see Barak "Human Dignity" 247.

*Africa*,<sup>85</sup> by citing a *dictum* from the German Administrative Court in the *Peep Show*<sup>86</sup> decision to the effect that dignity is an "objective, indisponible value, the respect of which the individual cannot waive validly".

The Constitutional Court applies the inherent dignity paradigm to prohibit the infringement of human dignity. For example, dignity as empowerment was utilised in order to realise substantive equality as instructed by section 9 of the *Constitution*, specifically to redress the *sequelae* of the apartheid legacy. Ackermann J,<sup>87</sup> writing extra-judicially, informs that

[b]lack people were treated as a means to an end and hardly ever as an end in themselves; an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.

O'Regan J applied this notion in her concurring judgment in *S v Makwanyane*<sup>88</sup> (*Makwanyane*):

[t]he new Constitution rejects this [apartheid] past and affirms the equal worth of all South Africans.

The Court connected past discrimination and differential treatment, which denied black South Africans their inherent dignity, in order to give effect to the instruction of section 10 of the *Constitution*. In *Prinsloo v Van der Linde*<sup>89</sup> the Court explained:

[w]e are emerging from a period in our history during which the humanity of the majority of our inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.

And:

unfair discrimination, when used in this second form in s 8(2) [of the interim *Constitution*] in the context of s 8 [of the interim *Constitution*] as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.<sup>90</sup>

A person's right to exercise his sexual preferences (his right to equality) is often expressed through inherent dignity as empowerment. The Constitutional Court found in *Minister of Home Affairs v Fourie*<sup>91</sup>

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<sup>85</sup> *Mohamed v President of the Republic of South Africa* 2001 3 SA 893 (CC) para 62 fn 55.

<sup>86</sup> BVerfGE 64, 274 (1981) quoted by the Court from the English translation by Michalowski and Woods *German Constitutional Law* 105.

<sup>87</sup> Ackermann 2004 *NZ L Rev* 650.

<sup>88</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 329.

<sup>89</sup> *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 32.

<sup>90</sup> *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 33.

<sup>91</sup> *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 50.

[Discrimination] denied to gays and lesbians that which was foundational to our Constitution and the concepts of equality and dignity, which at that point were closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be.

The object formulation or *Objektformel* of dignity (based on Kant's categorical imperative) as formulated by German law in *Life Imprisonment*<sup>92</sup> corresponds to the claim of universal inherent dignity. A further example of the application of the object formulation is to be found in the *Peep Show*<sup>93</sup> judgment. In 1981 the German Federal Administrative Court held that the dignity of women performing striptease in front of peep holes for "unseen men" who had paid for the show by the insertion of a coin in a machine was impaired, although they had acted voluntarily and despite having willingly commercialised their bodies. In the famous *Wackenheim v France Conseil d'État Asemblée*<sup>94</sup> (the "dwarf tossing" case) in 1995 in France, the Council of State as well as the United Nations Human Rights Committee applied similar reasoning by confirming a ban on the traditional public throwing of dwarves (for compensation, and wearing protective gear) for short distances by customers. Incidentally, earlier, in 1992 in Germany, the Administrative Courts prohibited these performances on the ground that the dwarves were reduced to "projectiles", or objects, within the context of the violation of their dignity.<sup>95</sup> Although the courts' reasoning implies a serious interference in personal autonomy and raises questions about the limits of state interference in constitutional values, these decisions confirm that inherent dignity cannot be gained or waived in any circumstances.<sup>96</sup> In contradistinction, the Court found in the much criticised decision of *S v Jordan*<sup>97</sup> that a prostitute's dignity is diminished as a result of her own conduct that commercialises her body, rather than as a result of a law which criminalises the conduct of the prostitute but not that of her patron. Writing for the minority, O' Regan and Sachs JJ held that:

[t]he very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.<sup>98</sup>

The Court employed the inherent dignity paradigm to protect dignity in cases of cruel and unusual punishment and to prevent the treatment of the

<sup>92</sup> BVerfGE 45, 187 (1977) 227-228. See also fn 73 above.

<sup>93</sup> BVerfGE 64, 274 (1981) 277-280, as quoted by Botha 2009 *Stan L Rev* 184.

<sup>94</sup> As quoted by Barroso 2012 *BC Int'l & Comp L Rev* 376 and Rao 2011 *Notre Dame L Rev* 226.

<sup>95</sup> Klein "Human Dignity" 158.

<sup>96</sup> Botha 2009 *Stan L Rev* 203.

<sup>97</sup> *S v Jordan* 2002 6 SA 642 (CC).

<sup>98</sup> *S v Jordan* 2002 6 SA 642 (CC) para 74.

convicted person as an object when criminally punished. In *Makwanyane*<sup>99</sup> the Court held that

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

In a similar vein, the Court held in *Stanfield v Minister of Correctional Services*<sup>100</sup> that to deny a terminally ill prisoner the right to die at home amounts to an infringement of section 10:

[f]rom this it is clear that the third respondent has failed to accord the applicant the dignity inherently forthcoming to him.

In *Makwanyane* the Court contrasted the state's duty to guarantee life with the imperative of section 10. In a similar vein, Fabricius J based his decision to allow a terminally ill patient to die via assisted suicide on the inherent dignity of the applicant in the ground-breaking and brave judgment in *Robert James Stransham-Ford v Minister of Justice and Correctional Services (Stransham-Ford)*.<sup>101</sup> More weight was given to the right to dignity than to the right of life. It follows that dignity as the basis of fundamental rights is mutually supportive of the right to life, and not mutually exclusive. In this respect Fabricius J referred to the *dictum* of O'Regan J in *Makwanyane*.<sup>102</sup>

[t]he right to life, thus understood, incorporates the right to dignity. So the rights to dignity and to life are intertwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.

The infringement of human dignity relates to "conduct and ideas that directly offend or denigrate the dignity and worth of individuals", in Schachter's<sup>103</sup> words. Fabricius J conceptualised this notion of undignified suffering in *Stransham-Ford*<sup>104</sup> by stating that there is no dignity in:

- 15.1 having severe pain all over one's body;
- 15.2 being dulled with opioid medication;
- 15.3 being unaware of your surroundings and loved ones;
- 15.4 being confused and dissociative;

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<sup>99</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 26 per Chaskalson J.

<sup>100</sup> *Stanfield v Minister of Correctional Services* 2004 4 SA 43 (C) para 129.

<sup>101</sup> *Robert James Stransham-Ford v Minister of Justice and Correctional Services* (GNP) (unreported) case number 27401/15 of 4 May 2015 para 12.

<sup>102</sup> *Robert James Stransham-Ford v Minister of Justice and Correctional Services* (GNP) (unreported) case number 27401/15 of 4 May 2015 para 12.

<sup>103</sup> Schachter 1983 *AJIL* 851. For example, in *Advance Mining Hydraulics v Botes* 2000 2 BCLR 119 (T) the Court ruled that an omission to warn an examinee of his right to legal representation before compelling him to answer questions that he did not comprehend resulted in a "blatant affront" to his dignity (para 127B).

<sup>104</sup> *Robert James Stransham-Ford v Minister of Justice and Correctional Services* (GNP) (unreported) case number 27401/15 of 4 May 2015 para 15.



- 15.5 being unable to care for one's own hygiene;
- 15.6 dying in a hospital or hospice away from the familiarity of one's own home;
- 15.7 dying, at any moment, in a dissociative state unaware of one's loved ones being there to say goodbye.

This conceptualisation of the effects of unbearable and interminable suffering that infringes on the categorical imperative of section 10 constitutes a possible legal development in South African law, in order to revise the common law sanction against assisted suicide in line with the values and principles of the new constitutional dispensation.

### 3.2.2 *Others must recognise and respect every human being's inherent human dignity*

Samuel Pufendorf,<sup>105</sup> writing in the natural law tradition in the eighteenth century, claimed that natural rights are derived from human dignity or *dignatio* (his word choice) as conceptualised by the Stoics<sup>106</sup> and not from state authority (and thus cannot be taken away by state authority). It follows from this concept that dignity is of particular importance to the idea of human rights as it carries with it the claim that each human being is the bearer of these rights.<sup>107</sup> Human rights provide a guarantee that basic rights are to be respected, at least by the state.<sup>108</sup> These rights are regarded as special entitlements, or in Dworkin's words, "trumps" that give rise to a claim of respect and equal treatment against the state and private persons.<sup>109</sup> It is widely accepted that Kant's formulation of dignity as a moral aspiration that man should be treated as an end-in-himself provides the basis for the proposition that people are to be treated with respect and dignity.<sup>110</sup>

Human rights law is the legal mechanism which embodies the claim for respect for and the protection of rights.<sup>111</sup> Article 55 of the *Charter* pledges to create conditions between nations to promote "respect for, and observance of, human rights and fundamental freedoms", whilst article 55(c) promotes "universal respect for the observance of human rights and fundamental freedoms". In terms of article 2 of the *Universal Declaration*,

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<sup>105</sup> Eckert "Legal Roots" 44.

<sup>106</sup> Cancik "Dignity of Man" 31, 32.

<sup>107</sup> See, *inter alia*, art 1 para 2 of the *Basic Law*, s 10 of the *Constitution* and article 6 of the *Universal Declaration*: "Everyone has the right to recognition everywhere as a person before the law."

<sup>108</sup> Chaskalson, arguing in the natural law tradition, states that respect for human dignity, and all that flows from it, is an attribute of life itself and not a privilege granted by the state. See Chaskalson 2000 *SAJHR* 196.

<sup>109</sup> Dworkin *Taking Rights Seriously* 22.

<sup>110</sup> Fletcher 1984 *UWO L Rev* 178.

<sup>111</sup> Rao 2011 *Notre Dame L Rev* 243.

everyone is regarded as the bearer of these rights, which rights are enumerated in the articles following. Similarly, the *International Covenant on Civil and Political Rights* (1967), the *International Covenant on Economic, Cultural and Social Rights* (1967) and other Conventions proclaim that human rights, which derive from the inherent dignity of the person, must be respected and enforced.

Implementation of the relational aspect of dignity (or dignity as constraint) demands that state policies may weaken individual liberty and autonomy, and that could trump inherent dignity.<sup>112</sup> Representing this claim for the recognition of dignity are the third-generation solidarity rights, which create a political demand for the state and individuals to respect and give legal effect to human beings' personal choices.<sup>113</sup> The individual's freedom can be limited in favour of the dignity of his community in concrete cases. But the recognition of dignity goes further than the mere protection of individualism, in that there is a constant shift of and eventual balancing between the (sometimes conflicting) interests of the individual and his society. Yet the paradox in this relational concept of dignity is explained by the exclusion of

both a radical, abstract individualism and a 'thick' form of communitarianism in which the collective takes precedence over the individual.<sup>114</sup>

Dignity in this respect is not inherent and universal, but is socially constructed and can often conflict with inherent dignity.<sup>115</sup> For example, in France the Constitutional Council upheld a law making it illegal for Muslim women to wear the burqa or full veil in public on the grounds that it demeans the women's human dignity and does not reflect French values.<sup>116</sup> Conversely, in South Africa the Constitutional Court found in *MEC for Education: KwaZulu-Natal v Pillay*<sup>117</sup> that human dignity encompasses the "unique set of ends" of each individual, so that a Hindu female learner may wear a nose stud in school as an expression of her South Indian Tamil Hindu

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<sup>112</sup> Rao 2011 *Notre Dame L Rev* 249. Prohibition against hate speech, freedom of speech and defamation are examples of the second element of dignity. In *Khumalo v Holomisa* 2002 5 SA 401 (CC) the Constitutional Court held that human dignity trumps freedom of speech to protect the dignity of individuals and group.

<sup>113</sup> Rao 2011 *Notre Dame L Rev* 243.

<sup>114</sup> Botha 2009 *Stan L Rev* 219.

<sup>115</sup> Rao 2011 *Notre Dame L Rev* 221.

<sup>116</sup> Conseil Constitutionnel [CC] Decision No 2010–613DC, 7 October 2010, JO 18345 (Fr).

<sup>117</sup> *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) para 64. In a similar vein, Ngcobo J gave recognition to the idea of diversity among peoples with regard to religious freedom in *Prince v President of the Law Society Cape of Good Hope* 2001 2 SA 388 (CC) para 49: "The protection of diversity is the hallmark of a free and open society. It is the recognition of the inherent dignity of all human beings."

culture. Former Chief Justice Pius Langa connected the recognition of the individual's dignity respect for his community:

[d]ignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity. Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement.<sup>118</sup>

The recognition of dignity focuses on a process of self-actualisation and identity building, rather than being rooted in a metaphysical or theological claim.<sup>119</sup> For Schachter,<sup>120</sup> the concept of respect for dignity is embodied in the idea of the freedom of choice of an individual, groups or communities, which in turn is manifested by a "strong emphasis on the will and consent of the governed." In other words,

respect for the intrinsic worth of a person requires that the person is entitled to have his or her own beliefs, attitudes, ideas and feelings.<sup>121</sup>

In a similar vein, Justice Chaskalson,<sup>122</sup> former president of the Constitutional Court, writing extrajudicially, points out that

In a broad and general sense, respect for dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.

Fabricius J gave effect to personal autonomy in *Stransham-Ford*. He held that a person's decision on when to end life is a manifestation of their own sense of dignity and personal integrity:

[t]he author of the Opposing Affidavit of the Third Respondent obviously did not keep in mind that a decision of a person on how to cease life was in many instances a decision very important to their own sense of dignity and personal integrity, and that was consistent with their lifelong values that reflected their life's experience.<sup>123</sup>

In the context of giving effect to a person's autonomy to choose his own sexual orientation, the Constitutional Court held in *Hoffman v South African Airways*<sup>124</sup> that

the interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination.

In German law, an individual's choice of sexual preference is embodied in personality rights which allow free development of the personality and

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<sup>118</sup> *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) para 53.

<sup>119</sup> Botha 2009 *Stan L Rev* 189.

<sup>120</sup> Schachter 1983 *AJIL* 850.

<sup>121</sup> Schachter 1983 *AJIL* 850.

<sup>122</sup> Chaskalson "Human Dignity" 134.

<sup>123</sup> *Robert James Stransham-Ford v Minister of Justice and Correctional Services* (GNP) (unreported) case number 27401/15 of 4 May 2015 para 18.

<sup>124</sup> *Hoffman v South African Airways* 2001 1 SA 1 (CC) para 43.

require that society respect these choices. The BVerfG held in the *Transsexual Case*<sup>125</sup> that

[h]uman dignity and the constitutional rights to the free development of personality demand, therefore, that one's civil status be governed by the sex with which [a person] is psychologically and physically identified.

The second component of article 1(1) of the *Basic Law* posits that (author's emphasis): "To *respect and protect it shall be the duty of all state authority*".

The BVerfG explained the application of this element in *Life Imprisonment*.<sup>126</sup>

[t]he constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free human person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself.

The relational element of human dignity in German law embodies an objective and subjective dimension. The subjective element<sup>127</sup> provides negative liberty against the state, while the objective element, which is an individual basic right, imposes not only duties on the state to realise a dignified existence<sup>128</sup> but also requires individuals to respect each other's dignity. On a deeper level, the German concept of the state's duty to protect human dignity is not unlimited, even if the threat does not emanate from the state itself or from an omission to act, but by extension through an offender whose competing dignity may be at stake. The *Second Abortion*<sup>129</sup> case demonstrates that the state's duty to protect has limits set by the periphery of the rights to dignity, life and bodily integrity of the woman.<sup>130</sup> While the concept of human dignity is inviolable and thus not subject to proportionality, preference should be given to the duty to respect when infringements on basic rights by the state come to the fore.<sup>131</sup>

Section 7(2) of the *Constitution*, which requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights" places South African constitutional law firmly in the footsteps of the post-war rights-protecting

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<sup>125</sup> BVerfGE 49, 286 (1979) as quoted in Rao 2011 *Notre Dame L Rev* 262.

<sup>126</sup> BVerfGE 45, 187 (1977) 227, as quoted by Eberle 1997 *Utah L Rev* 973.

<sup>127</sup> The Constitutional Court in *Carmichele v Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 4 SA 938 (CC) para 54 categorised the individual's rights under the Bill of Rights as "subjective rights", thereby aligning itself with German jurisprudence. See Ackermann *Human Dignity* 97.

<sup>128</sup> Weinrib 2005 *NJCL* 340.

<sup>129</sup> BVerfGE 88, 203 (1993) 254.

<sup>130</sup> Ackermann *Human Dignity* 124.

<sup>131</sup> Ackermann *Human Dignity* 124.

paradigm.<sup>132</sup> It is significant to note that the second component of section 10 of the *Constitution*, which posits that [everyone has] "the right to have their dignity respected and protected", employs the exact same words as does article 1(1) of the *Basic Law*, namely "respect" and "protect".<sup>133</sup> This instruction is echoed by the *dictum* of the Court in *Minister of Home Affairs v Watchenuka*<sup>134</sup>

[t]he new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection is the touchstone of the new political order and is fundamental to the new Constitution.

The instruction in section 7(2) (in addition to that of the second component of section 10) runs parallel with the instruction in section 39(2) that courts must develop the common law to conform with the values of human dignity, equality and freedom (section 39(1)(a)).<sup>135</sup> This directive inevitably results in generating rights for the individual. In *Stransham-Ford*,<sup>136</sup> Fabricius J did give effect to a "once-off" development of the common law in the absence of legislation that regulates euthanasia (the order to allow euthanasia pertained only to the applicant) to reflect the principles and values of the *Constitution*. This decision is in accordance with the maxim *iudicis est ius dicere non dare*.

The contingent and cultural-specific nature of dignity as recognition is illustrated by the paternalistic judgment of the Court in *S v Jordan*,<sup>137</sup> in contrast with the strong emphasis on equality in the gay rights cases. This is a classic case of "dignity as constraint", where individual autonomy must give way in favour of collective interests.

In cases regarding artistic freedom, the dignity of groups can trump autonomy. The Constitutional Court found in *De Reuck v Director of Public Prosecutions*<sup>138</sup> that laws condemning child pornography are constitutional, because

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<sup>132</sup> The court held in *Carmichele v Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 4 SA 938 (CC) para 62 that the state must employ positive action to protect individual rights.

<sup>133</sup> Ackermann *Human Dignity* 107.

<sup>134</sup> *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA) para 24.

<sup>135</sup> *Carmichele v Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 4 SA 938 (CC).

<sup>136</sup> *Robert James Stransham-Ford v Minister of Justice and Correctional Services* (GNP) (unreported) case number 27401/15 of 4 May 2015.

<sup>137</sup> *S v Jordan* 2002 6 SA 642 (CC). The judgment is regarded as "paternalistic" as it is based on the (debatable) presumption that the Court can place itself in the role of a father of the citizenry by judging what is morally best for them, or *in casu*, act in the interests of the individual.

<sup>138</sup> *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC).

[c]hild pornography is universally condemned for good reason. It strikes at the dignity of children.<sup>139</sup>

Justice Langa explained that

[c]hildren's rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth.<sup>140</sup>

The common law crime of sodomy was decriminalised in *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>141</sup> on the grounds of unconstitutionality pursuant to discrimination against and the unequal treatment of gay men. According to Ackermann J<sup>142</sup>

[t]here can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.

### 3.3.3 *The state should recognise the inherent dignity of every human being*

The third element of human dignity, which constitutes the limited-state claim and holds that dignified existential conditions are to be recognised and realised by governments through the provision of adequate living circumstances, is an expansion of the second essential element of human dignity. The emphasis here is on the state's obligation to realise inherent dignity through the recognition of socio-economic rights. Connecting rights such as socio-economic rights with state duties reflects a value-ordered constitution.<sup>143</sup>

Substantial equality in the sense of equal human dignity can be attained only through the provision of *existentially minimum*<sup>144</sup> living conditions, namely second-generation socio-economic rights. Chaskalson<sup>145</sup> explains that socio-economic rights are

rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or, in the case of people unable to look after themselves, without appropriate assistance?

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<sup>139</sup> *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC) para 61.

<sup>140</sup> *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC) para 63.

<sup>141</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC).

<sup>142</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28.

<sup>143</sup> Eberle 2008 *Or Rev Int'l L* 5.

<sup>144</sup> This terminology is the literal translation of the concept employed by German authors and courts, namely *Existenzminimum*. See Barroso 2012 *BC Int'l & Comp L Rev* 371 fn 315.

<sup>145</sup> Chaskalson 2000 *SAJHR* 204.

Schachter,<sup>146</sup> in reference to the objective aspect of human dignity, argues that governments have an obligation to recognise a "minimal concept of distributive justice that would require satisfaction of the essential needs of everyone". Article 22 of the *Universal Declaration* echoes this instruction:

[e]veryone as a member of society has the rights to social security and is entitled to realisation through national effort and international cooperation and in accordance with the organisation and resources of each state of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

This principle is echoed by the *dictum* of Zondo J in his dissenting judgment in *Malan v City of Cape Town*:<sup>147</sup> "[h]aving a home is very important to the dignity of any person", in the context of a state organ's duty to take all reasonable steps to enable a lessee to rectify a breach in a lease agreement before applying for an eviction order. Accordingly, South African<sup>148</sup> constitutional law has confirmed that socio-economic rights can be protected by courts even though they may not entirely be conditional on legislation.<sup>149</sup>

In accordance with the post-war rights-protecting paradigm, section 10 of the *Constitution* mandates the state to "respect, protect and fulfil the rights in the Bill of Rights" to the extent that the state is obliged to employ both positive and negative actions<sup>150</sup> to protect these individual rights, inclusive of socio-economic rights.<sup>151</sup> This means that the state is required to take reasonable legislative steps,<sup>152</sup> within its available resources, to progressively realise these rights. As the Court explained in *Government of*

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<sup>146</sup> Schachter 1983 *AJIL* 851. In referring to a list of behaviours that "denigrate the worth and dignity of an individual", he lists "[d]egrading living conditions and deprivation of basic needs" at 852. Also see fn 103 above.

<sup>147</sup> *Malan v City of Cape Town* 2014 6 SA 315 (CC) para 127.

<sup>148</sup> These include the rights of access to land (s 25 of the *Constitution*), housing (s 26) health care, food, water, social security (s 27) and education (s 29).

<sup>149</sup> See Barroso 2012 *BC Int'l & Comp L Rev* 371. In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 44 the Court held that dignity is foundational to these rights; that they are justiciable and that the state is under a positive obligation to take reasonable action to realise these rights.

<sup>150</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

<sup>151</sup> *Carmichele v Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 4 SA 938 (CC) para 62.

<sup>152</sup> This provision is mandated by s 2 of the *International Covenant on Economic, Social and Cultural Rights* (1967): "Each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

*the Republic of South Africa v Grootboom*,<sup>153</sup> the specification of reasonableness is directly related to the human dignity of the applicants:

[i]t is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent human dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.<sup>154</sup>

Although the *Basic Law* does not incorporate socio-economic rights, the BVerfG held that the state should secure "the minimum requirements for an existence compatible with human dignity".<sup>155</sup> The BVerfG has specifically linked state action to human dignity.<sup>156</sup>

#### 4 Conclusion

Kant's claim that human beings should never be used as a means to achieve an end contains three elements that are expressed through his categorical imperative: everyone has equal human dignity which has to be recognised and protected in a legal context. The *Universal Declaration* was the first international document to enact Kant's categorical imperative. Thereafter the elements of the categorical imperative were shaped by the *Basic Law* as the first constitution after the Second World War to construct the post-war rights-protecting paradigm. It can be said that German constitutionalism concretely applied the principles embodied in the preamble of the *Universal Declaration*, interpreted them in terms of Kantian moral ethics, and legalised the recognition and protection of human dignity in the process. South African constitutionalism has followed in the footsteps of German law by applying the basic elements of human dignity as a definitional term in constitutional adjudication.

The adjudication of dignity in South African and German law has a shared commonality based on the three elements, a fact which contributes to the universality and legality of the notion. In this context human dignity can be defined in terms of its minimum and universal elements as endorsed by article 1(1) of the *Basic Law* and section 10 of the *Constitution*: human dignity is an attribute inherent in every human being, and has to be recognised and respected by the state and fellow men alike.

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<sup>153</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

<sup>154</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83.

<sup>155</sup> BVerfGE 40, 121 (1975) as quoted by Ackermann *Human Dignity* 155.

<sup>156</sup> Liebenberg *Socio-economic Rights Adjudication* 127; De Wet 1995 *AJHR* 34.



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### **List of Abbreviations**

AJHR	African Journal of Human Rights
AJIL	American Journal of International Law
BC Int'l & Comp L Rev	Boston College International and Comparative Law Review
Buff Hum Rts L Rev	Buffalo Human Rights Law Review
Cardozo L Rev	Cardozo Law Review
EJIL	European Journal of International Law
GLJ	German Law Journal
La L Rev	Louisiana Law Review
MLR	Modern Law Review
Notre Dame L Rev	Notre Dame Law Review

NJCL	National Journal of Constitutional Law
NZ L Rev	New Zealand Law Review
Or Rev Int'l L	Oregon Review of International Law
SAJHR	South African Journal of Human Rights
Stan L Rev	Stanford Law Review
Tex L Rev	Texas Law Review
Utah L Rev	Utah Law Review
UWO L Rev	University of Western Ontario Law Review