Human Dignity and other Relevant Concepts in International and South African Human Rights Law: A Search for Content

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Abstract

As a result of the human rights atrocities committed during the Second World War, the human dignity of individuals has become the central concern in many international and regional instruments and domestic constitutions. The Constitution of the Republic of South Africa, 1996 is no exception and places a particular emphasis on the concept of human dignity. In view of the continuing popularisation of the concept, this contribution discusses the current application of human dignity and related concepts within international, regional and South African human rights law in an attempt to get a clearer grasp of its contents. Although human dignity is not explicitly protected in all international and regional instruments and domestic constitutions, its protection is either implicit in the protection of other specific human rights, or explicitly forms part of the protection of such rights. It therefore seems that every individual human right protects some aspect of human dignity. Furthermore, the application of the concept of human dignity seems to relate to other existing concepts in both international and South African law. First, the question as to whether the protection of human dignity in international law may be equated with concepts such as *jus cogens* and non-derogable rights is analysed. Second, the issues regarding the relation between human dignity and the concepts of ubuntu, *boni mores* and the public interest are discussed. It is concluded that human dignity is a fluid, vague and ever-changing concept and that as a result of cultural and religious differences it would be virtually impossible to formulate a generic (one-size-fits-all) definition of human dignity that would be acceptable to all cultural and religious groups. It is therefore suggested that the application of human dignity by the courts should be limited to that of a constitutional value that underpins all fundamental rights, rather than elevating it to an all-encompassing right that functions, in practice, independent from all other fundamental rights. The latter would result in an attenuation of the human rights regime in international, regional and domestic law.

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INTRODUCTION

It is well known that the current discourse in the world on the promotion and protection of human rights has gained momentum since the inhuman and undignified treatment of the Jewish people by the Nazi regime during the Second World War. In reaction to those atrocities the protection of the human dignity of individuals has been established as the central concern in many international and regional instruments and state constitutions.

Against this background it was to be expected that the establishment of the current constitutional dispensation in South Africa on 27 April 1994, in reaction to a past characterised by the inhuman and undignified treatment of the majority of the population under apartheid, placed a particular emphasis on the concept of human dignity. This is evident from the provisions of both the 1993 Interim Constitution[1] and the 1996 Constitution, and from the decisions of the South African courts concerning the interpretation of these provisions. Notwithstanding the emphasis on human dignity in the 1996 Constitution, no guidance is supplied as to the meaning that should be attached to this key concept in the South African constitutional dispensation. In a cultural and religious homogenous society this need not be an insurmountable problem. However, in a pluralistic society like South Africa the issue becomes much more acute as a result of cultural and religious differences between sections of the population. In South Africa, the Bill of Rights guarantees and protects not only the human dignity of individuals but also their cultural and religious beliefs and practices. This immediately suggests tension between the fundamental right to human dignity, on the one hand, and the right to cultural and religious practices, on the other hand, insofar as it involves the meaning of the concept of human dignity.

Erin Daly dealt with the issue of human dignity in her book on so-called dignity rights. In the introduction to her exposition she poses the following very relevant questions relating to the important role that human dignity currently fulfils in many constitutional dispensations:[2] 'Why have constitution drafters and interpreters come to rely so heavily on the right to human dignity? Why, particularly given that in almost all cases the right is superfluous? ... Has dignity become too exalted or elastic to be effective? Has it become too common to be meaningful? Does the term (human dignity) have independent content? Does it mean the same thing in different factual contexts?'[3] The fact that human dignity has become a kind

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1 See, eg, s 10 of The Constitution of the Republic of South Africa 200 of 1993 (Interim Constitution). For purposes of this contribution, the Constitution of the Republic of South Africa, 1996 will be the main focus. Reference will only be made to the 1993 Interim Constitution where it is required by the context of the discussion.

2 Erin Daly, *Dignity Rights: Courts, Constitutions and the Worth of the Human Person* (University of Pennsylvania Press 2013) 1–10.

3 ibid 3–4.

of a buzzword even in the jurisprudence of constitutional jurisdictions such as the United States of America (USA) where no mention is made of the concept in its constitution, accentuates its increasing popularisation in the protection of fundamental rights. Because it would be impossible to answer all the questions posed by Daly within the scope of this contribution, the focus will primarily be on the question as to the content of human dignity on the international and domestic (South African) levels. In an attempt to answer this question, concepts in international law and South African law that relate to human dignity are analysed. These include in international law *jus cogens* and non-derogable rights and in South African law ubuntu, *boni mores* and public interest. It must be emphasised that it is not the primary aim of this contribution to find a definitive definition of human dignity, but rather to establish to what extent existing related legal concepts may be used in order to form a better understanding of the contents of human dignity.

HUMAN DIGNITY IN INTERNATIONAL AND REGIONAL LAW

Human Dignity as the Foundation of International Human Rights

Several international and regional instruments contain a specific right to human dignity. The Preamble of the Charter of the United Nations, 1945 (UN Charter) reaffirmed faith, not only in human rights in general, but specifically 'in the dignity and worth of the human person'. Subsequent international instruments, particularly the International Bill of Rights, are also explicitly protective of human dignity. In Article 1 of the Universal Declaration of Human Rights, 1948 (UDHR) it is stated that 'all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' In addition, the UDHR links the right to social security in Article 22 and the right to a just and favourable remuneration in Article 23 to a person's dignity. The International Covenant on Civil and Political Rights, 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) echo the same sentiments by recognising in their respective Preambles 'the inherent dignity and ... the equal and inalienable rights of all the members of the human family' and furthermore confirming that 'these rights derive from the inherent dignity of the human person.'

The protection of human dignity on the international level is particularly evident in those instruments prohibiting international crimes such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT). The Preamble to this document explicitly refers to the recognition of the equal and inalienable rights of all members of the human family and recognises that these rights derive from the inherent dignity of the human person. Even those international crimes that are aimed at a specific group of people, such as genocide, are clearly underpinned by the need to protect the human dignity of individuals. It

would be impossible to deny the fact that this is implicit in the list of actions specified as genocide in the definition in Article II of the CAT. These actions include the killing of the members of a group, causing serious bodily or mental harm to the members of a group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of one group to another group.

A particular right contained in many international and regional instruments that can almost be fully equated with the right to human dignity is the right not to be subjected to cruel, inhuman or degrading treatment or punishment. In many respects the latter is simply a negative formulation of the positive right to human dignity.[4] The use of the term 'treatment' in these instruments can be interpreted widely to include any action that constitutes a violation of the human dignity of a person.

On a regional level, specifically that of the African Union (AU), the concept of human dignity is incorporated into Article 5 of the African Charter on Human and Peoples' Rights, 1981 (ACHPR). It provides as follows:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

In the American Convention on Human Rights, 1970 (ACHR) Article 5 deals with the right to humane treatment and explicitly provides that all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. In the same vein Article 6, prohibiting slavery, stipulates that forced labour shall not adversely affect the dignity of a prisoner.

The European Union Charter of Fundamental Rights, 2000 (EU Charter) contains an explicit provision in terms of which human dignity is extensively protected. Article 1 of the EU Charter determines that 'human dignity is inviolable. It must be respected and protected.' This is fully in line with the EU's undertaking in the EU Charter's Preamble in terms of which 'it places the individual at the heart of its activities.'[5]

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[4] See, eg, Art 5 of the Universal Declaration of Human Rights (1948) and Art 5 of the African Charter on Human and Peoples' Rights (1981).

[5] Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart Publishing 2015) 3–5 makes the very valid point that although this provision embodies a strong commitment to the protection of human dignity in the European Union, its precise meaning remains to be clarified. She suggests that in order to achieve this aim, a global perspective on human dignity (its universalistic nature) as well as its local and cultural specificity should be taken into account.

It is evident that where human dignity is not explicitly protected as a separate, independent human right in some international and regional instruments, its protection is either implicit in the protection of other specific rights, or explicitly forms part of the protection of such rights. In fact, as Weatherall[6] points out

> the provisions of universal [human rights] instruments of international law derive from human dignity as a general principle of law. It is uncontroversial that human rights, especially those most basic rights enshrined in universal legal instruments, represent expressions of the dignity of man. Indeed, it is easily argued that there are no human rights *not* connected to human dignity.

In the same vein, Dupré unequivocally states that 'human dignity is the basis of human rights'[7] and that it can be described as 'the source of all other constitutional rights'. She also refers to other descriptions of human dignity such as 'the right to have rights', a 'kind of mother right' and 'a matrix principle' aimed at the 'continuous protection of constitutional rights'.[8] She describes the implications of these viewpoints as follows:[9]

> These images express the fact ... that human dignity can 'give birth' to new rights, for instance rights that were not codified in a constitution at the time of drafting because they had not been formalised as such. What is important to note ... is that human dignity is thus the normative and theoretical source of all types of rights, regardless of their belonging to so-called 'generations', thus promoting a holistic protection of humanity.

Seen against the background of the role of human dignity in European constitutionalism, Dupré eventually argues that 'European constitutionalism can therefore be understood as a new form of humanism.'[10]

The foundational role of human dignity in the human rights dispensation has finally been confirmed in the Vienna Declaration and Programme of Action (Vienna Declaration) adopted in June 1993 at the second World Conference on Human Rights. In its Preamble the Vienna Declaration states as follows:

> **Recognizing and affirming** 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

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6 Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge University Press 2015) 51.
7 Dupré (n 5) 70.
8 ibid 71.
9 ibid.
10 ibid 173.

> be the principal beneficiary and should participate actively in the realization of these rights and freedoms ...[11]

It would then seem correct to state that every human right protects some aspect of human dignity. This implies the weighing of two conflicting human rights to establish which aspect of human dignity should receive preference in a particular instance. Luis Barroso[12] suggests that in such circumstances cultural and political background may influence a court's reasoning. The content of human dignity may therefore vary from cultural group to cultural group. However, the mere fact that dignity is an inherent aspect of being human, means that human dignity displays certain features common to the various understandings of the concept.

Ari Kohen[13] identifies two requirements to justify the idea of human rights, namely inclusivity and persuasiveness. By this he means that 'a compelling foundation for the idea of human rights needs to speak to the largest possible number of people from the greatest number of different traditions and must also provide reasons for its account that are persuasive to those people.' Many find the required justification in the major religions of the world[14] (and it can convincingly be argued that religious convictions in this sense are part and parcel of the culture of a particular group) while others, like Kohen, suggest that it should preferably be found in a secular document, particularly the Universal Declaration of Human Rights in which it is stated that all persons are equal in dignity.[15] In both instances referred to by Kohen, human dignity appears to be a common denominating factor.

Human Dignity and *Jus Cogens*

The existence of a hierarchy of public international law norms with *jus cogens* at the top, is a fairly modern phenomenon but one which is not

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[11] See in this regard, Jack Donnelly, 'The Social Construction of International Human Rights' in Tim Dunne and Nicholas J Wheeler (eds), *Human Rights in Global Politics* (Cambridge University Press 1999) 80–82.

[12] Luís Barroso, 'Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse' (2012) 35 Boston College International and Comparative LR 331, 357.

[13] Ari Kohen, 'A Non-religious Basis for the Idea of Human Rights: The Universal Declaration of Human Rights as Overlapping Consensus' in Thomas Cushman (ed), *Handbook of Human Rights* (Routledge 2012) 267.

[14] ibid 266.

[15] Article 1.

seriously disputed.[16] *Jus cogens* is generally described as peremptory norms from which no derogation is permitted. Although the Vienna Convention on the Law of Treaties, 1969 (VCLT) avoids the term *jus cogens* and only refers to peremptory norms, its definition of the latter is accepted as a definition also of the former. *Jus cogens* can thus in terms of Article 53 of the VCLT be defined as follows:

> [A] peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Jus cogens is not dependent on the consent of states. *Per* definition it is peremptory in nature and no derogation is allowed. States therefore may not elect to disregard norms with the status of *jus cogens*. Establishing whether a customary international law norm has obtained the status of *jus cogens* is at times a difficult task, as clarity does not exist with regard to the norms that qualify for this status.[17] However, the international community of states as a whole accepts and recognises that at least the following nine prohibitions in international law display a peremptory character: the prohibitions on piracy, slavery, war crimes, crimes against humanity, aggression, genocide, torture, apartheid and terrorism.[18]

Ian Seiderman,[19] in his discussion of *jus cogens* norms, touches on the question whether a hierarchy of norms relating to the various areas of human rights should be recognised. In explaining his viewpoint, he explicitly

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16 Ari Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006) 8. Ian Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (Intersentia 2001) 284, confirms this position as follows: 'As an operative category of international law, *jus cogens* is now generally accepted by most of the central international players, including almost all states, the International Court of Justice, the existing international criminal tribunals, the International Law Commission, various domestic judiciaries and most scholarly experts. Indeed, a modicum of consensus seems to have emerged in support of the proposition that *jus cogens* is not simply a device relevant to the law of treaties, but that it also governs and limits the formation of customary law and the expression of unilateral or collective state behaviour. Thus, respect for a *jus cogens* norm must always take precedence over ... an ordinary norm, whatever form the state conduct may take.'

17 See, eg, Anthony D'Amato, 'It's a Bird, it's a Plane, it's Jus Cogens' (1990) 6 Connecticut J IL 1–6, who almost thirty years ago strongly challenged the very existence of the notion of *jus cogens* norms. However, the current viewpoint on *jus cogens* is expressed as follows by Aniel de Beer and Dire Tladi, 'The Prohibition of Terrorism as a *Jus Cogens* Norm' 2017 (42) South African YB Intl L 11: 'Today the concept of *jus cogens* is widely recognised by international publicists. It has further been discussed with approval by international and municipal courts. Notwithstanding this, the precise nature of *jus cogens*, which norms qualify as *jus cogens* and the consequences of *jus cogens* in international law, is still a subject of debate.'

18 Weatherall (n 6) 443.

19 Seiderman (n 16) 293–294.

links a hierarchy of human rights to human dignity. Seiderman finds a hierarchy of human rights norms problematic, due to the priority given to the protection of civil and political rights, or to rules of humanitarian law. This is done at the expense of economic, social and cultural rights, which 'are no less essential to human dignity than are the fundamental civil and political rights.' Despite consensus that economic, social and cultural rights constitute 'real' law, Seiderman points out that the reluctance of many states to respect these rights has undermined the legitimacy of these norms. He therefore concludes that '[i]f it is appropriate to prioritize among rights, it is wholly objectionable to do so by positioning the most important economic, social and cultural rights in inferior relation to their civil and political rights counterparts.'[20]

Thomas Weatherall[21] links the concept of *jus cogens* to the (overarching) right[22] of human dignity by specifically referring to the prohibition on torture. He argues as follows:

> The 'peremptory' legal effects of *jus cogens*—non-derogability and universality—may be understood with reference to the morality underlying the doctrine of *jus cogens*. In principle, the peremptory character of *jus cogens* follows logically from the operative conceptualization of morality oriented in human dignity, which holds that fundamental rights can be realized only through duties of universal application. In the previous section,[23] morality was defined as a *social* idea with an outward oriented focus that prescribes standards of conduct that, in effect, define obligations owed to others. Respect, in this sense, is the basis of human dignity, and only when human dignity is respected by an entire community is it actualized by its individual members. The same relation can be seen in the legal precepts derived from human dignity. In the context of *jus cogens*, this would suggest that only when its normative expressions are respected by the international community of States as a whole can these protections of human dignity be realized by mankind. To this end, it follows that peremptory norms are regarded as non-derogable rules of a public order character, inviolable by contrary rules of positive international law, and universal in application. In practice, peremptory norms are conceived by contemporary international law to have precisely these legal effects.

He reaches an even more express conclusion in view of his analysis of domestic and international jurisprudence, by stating that despite human dignity not always being identified as a general legal principle, 'there is substantial legal jurisprudence in support of the proposition that respect for

20 ibid.
21 Weatherall (n 6) 84–94.
22 Overarching right in the sense that human dignity forms the basis of all other human rights.
23 Weatherall (n 6) 67–83.

the intrinsic worth of the human person is, in practice, the basis of the higher interests of the international community which give rise to *jus cogens.*'[24]

Weatherall cautions[25] that the role of morality should not be overstated. It only explains why particular legal effects are associated with *jus cogens*. He emphasises that human dignity, which contains moral considerations,[26] is the source of peremptory norms and reflects the higher interests of the international community as a whole. As such it informs the content of *jus cogens*. In this regard reference must be made to the viewpoint expressed by judge Dugard in a separate opinion in *Armed Activities on the Territory of the Congo.*[27] In his judgment he described *jus cogens* as 'a blend of principle and policy'.[28] According to him these norms on the one hand affirm the high principles of international law and on the other hand give legal form to the most fundamental policies or goals of the international community. For this reason, *jus cogens* norms enjoy a hierarchical superiority to other norms in the international legal order.

Although *jus cogens* is a phenomenon of international law, it is evident that the individual occupies a central position in the application of the concept. Weatherall makes it clear that

> [e]very peremptory norm ... constitutes a protection of the basic dignity of the human person, directly or as a member of some (e.g. ethnic, political, or racial) group, which has emerged in response to egregious acts contrary to the interests of the international community.[29]

Weatherall[30] uses the concept of the social contract to link the individual-orientated *jus cogens* (and particularly the dignity of the individual) with a state-based legal order. He describes his viewpoint as follows:

> Contractarianism identifies 'parties' to the social contract to define the relation between individuals and society as well as its governance structures; just such a relation is defined in practice in the context of *jus cogens*. Practice reveals the relationship between the individual and the State through *the*

24 ibid 54–66. Weatherall refers for example to the Italian Court of Cassation's decisions in *Germany v Milde*, Court of Cassation (First Criminal Section) (Italy), No 1072/2009, ILDC 1224 (2009); and *Ferrini v Germany*, Court of Cassation (Civil Section) (Italy), No 5044/2004 (2004) 19 ILDC; as well as the advisory opinions of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 1996 ICJ Reports 226 paras 79 and 95; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 2004 ICJ Reports 136 para 157.

25 ibid Weatherall 93.

26 ibid 84.

27 *Armed Activities on the Territory of the Congo (New Application: 2002) (Congo v Rwanda)* [2006] ICJ Reports 3 para 64.

28 See 86 para 10.

29 Weatherall (n 6) 339.

30 ibid 452–453.

> *international community of States as a whole*, according to which the social need of mankind (*opinio juris sive necessitatis*) is expressed through the practice of States acting as organs of the international community. The construct of *the international community of States as a whole* thereby reflects a particular relation between the individual and the State by which the purpose of political organization is to safeguard the basic dignity of the human person.

The link between *jus cogens* and the dignity of the individual has also been highlighted by the Inter-American Court of Human Rights in an advisory opinion in 2003.[31] The court found the prohibition on discrimination to be *jus cogens* because it is 'intrinsically related to the right to equal protection before the law, which, in turn, derives "directly from the oneness of the human family and is linked to the essential dignity of the individual".' According to the court the whole legal structure of the national and international public order rests on it and it is a fundamental principle that permeates all laws.[32]

Human Dignity, *Jus Cogens* and other Related Concepts in Public International Law

In the preceding paragraphs the link between the right to human dignity and *jus cogens* has been illustrated. *Jus cogens*, and also the right to human dignity, are sometimes equated with concepts such as non-derogability, core human rights and obligations *erga omnes*.[33] Without attempting to exhaustively discuss these issues within the limited space available, the few remarks that follow seem to be relevant.

The non-derogability of *jus cogens* and the right to human dignity is undisputed, especially within the context of states of emergency.[34] *Jus cogens* (peremptory norms) *per* definition embodies non-derogable rights in terms of Article 53 of the VCLT. The ICCPR in Article 4, the ACHR in Article 27, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (European Convention) in Article 15, commonly prohibit state parties to derogate from a number of rights

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31 *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, OC-18/03 Ser A, No 18 (17 September 2003) para 100.

32 ibid. See also in this regard Dinah Shelton, 'International Law and "Relative Normativity"' in Malcolm D Evans (ed), *International Law* (4 edn, Oxford University Press 2010) 147.

33 See in this regard Dinah Shelton, 'Report: Are There Differentiations Among Human Rights? Jus Cogens, Core Human Rights, Obligations Erga Omnes and Non-derogability' (UNIDEM Seminar Coimbra Portugal 7–8 Oct 2005) 2, where she observes as follows: 'Debate has included discussion of the importance and impact of doctrines of norms *jus cogens* and obligations *erga omnes* as well as labelling certain human rights core or non-derogable.'

34 See in this regard Leon Wessels, 'Derogation of Human Rights: International Law Standards – A Comparative Study' (LLD Dissertation, Rand Afrikaans University 2001) 9, where he observes in general terms that 'the derogation of human rights is normally associated with legally proclaimed states of emergency.' See also at 44–45 his remarks on the uncertainty surrounding the content of *jus cogens* and peremptory norms.

including the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right to be free from slavery and the right to be free from retroactive criminal laws. Although the right to human dignity is not specifically listed as an independent non-derogable right in these instruments, the protection of the human dignity of all individuals is very clearly underpinning the non-derogable rights common to the instruments referred to above.

Shelton's analysis of non-derogable rights leads her to conclude that the non-derogable rights common to the ICCPR, ACHR and the European Convention 'come close to being absolute in nature and thus can be seen as the pinnacle of positive human rights law.'[35]

Teraya Koji[36] argues very strongly that *jus cogens* norms should not automatically be equated with non-derogable rights within the field of international law. The author identifies three approaches towards the question whether non-derogable rights constitute a hierarchy of rights. Two of these approaches (the value-orientated approach and the function-orientated approach)[37] relate to the substantive aspect of non-derogable rights, while the third approach (the consent-orientated approach)[38] is described by Koji as reflecting a procedural aspect. A value-orientated approach simply means that the more important human rights deserve more protection and is thus primarily aimed at the protection of the individual, while a function-orientated approach is inter alia aimed at identifying those rights that to a specified extent can be derogated from for purposes of recovering social order during states of emergency. In this instance the interests of the state are protected rather than the rights of the individual. The consent-orientated approach mainly deals with procedural issues and does not assist in drawing a distinction between *jus cogens* and non-derogable rights. Koji argues that in terms of the value-orientated approach the conclusion is inevitable that non-derogable rights are similar to *jus cogens* norms. However, from the perspective of a function-orientated approach it is not possible to equate the two concepts. It must also be kept in mind that no general agreement exists regarding those human rights that qualify for non-derogable status. International instruments and state constitutions display a variety of rights that are identified as non-derogable and do not agree on the extent of non-derogability. It would seem that, at most, one could say that *per* definition all *jus cogens* norms are also non-derogable norms, whereas all non-derogable rights do not necessarily qualify for *jus cogens* status.

In view of the colonial past of African states and the accompanying undignified treatment of Africans, it is significant that the ACHPR does not

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35 Shelton (n 33) 21.

36 Teraya Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' (2001) European J Intl L 917.

37 ibid 921–924.

38 ibid 924.

contain a provision regulating any possible derogation from the rights in the Charter. However, this does not imply that any derogation from the right to human dignity in the Charter is allowed. The African Commission seems to hold the viewpoint that the absence of a derogation clause simply implies that all rights in the Charter are equally protected against any derogation.[39] In one of its decisions the Commission stated unequivocally that the ACHPR, unlike other human rights instruments, does not make provision for state parties to derogate from their treaty obligations during emergency situations, including a civil war.[40]

At international and regional and even municipal levels, attempts have been made to identify so-called core human rights.[41] Core human rights should not be equated with *jus cogens* norms because they need not be peremptory.[42] According to one approach the right to equality could be identified as a core human right in many international instruments. The entitlement to human rights without discrimination on grounds such as race, sex, language, and religion forms part of many human rights treaties, such as the UN Charter in Article 55*(c)*. Another approach is to regard as core rights those human rights which, if violated, constitute an international crime. The identification of international crimes is based on the international community of states' unequivocal condemnation of these actions as reprehensible to such an extent that it shocks the conscience of humankind.[43] The authors of this contribution would venture to suggest that both these approaches involve the protection of the core value of human dignity. It is undisputable that the right to equality is essentially aimed at protecting the human dignity of the individual, whereas the prohibition of international crimes has as its purpose the prevention of the violation of the human dignity of the individual. Even where the value of human dignity is not explicitly mentioned it is implied because its existence is not dependent on recognition in international instruments. It is inherently part and parcel of being human. What seems to be the correct point of departure is to accept that human dignity, as such, has no core, but that it is in itself the core of all other human rights. Barroso seems to hold a different view on whether human dignity itself has a core meaning by stating that 'the core meaning of human dignity requires a ban on torture, even in a legal system with no particular rules prohibiting such conduct.'[44] He bases his argument on one of the roles of human dignity as a principle, namely to serve as a source

39 See Shelton (n 33) 18–21, for an analysis of non-derogable rights.

40 See the English version of 74/92 *Commission Nationale des Droits de l'Homme et des Libertés / Chad* (11 October 1995) para 21.

41 See the discussion by Shelton (n 32) 12–16.

42 ibid 12.

43 See John Dugard, *International Law: A South African Perspective* (Juta 2011) 154–165; Shelton (n 32) 15.

44 Barroso (n 12) 356.

of rights. Human dignity also serves as an interpretive principle insofar as it informs the content of all human rights. Barroso therefore views human dignity as 'part of the core content of fundamental rights'.[45]

Jus cogens and so-called obligations *erga omnes* are in many respects the two sides of the same coin. Whereas *jus cogens* puts the emphasis on the peremptory nature of certain rights from which no derogation by any state is permitted, obligations *erga omnes* views the same phenomenon from the opposite perspective of obligations that are owed to the international community of states as a whole and which may consequently be enforced by any member of the international community of states.[46] Although the distinction between these two concepts is not entirely clear it can be accepted that they at least overlap to some degree with obligations *erga omnes* the wider concept of the two.[47] On the question whether obligations *erga omnes* represent, like *jus cogens*, a hierarchy of rights, Shelton[48] argues that according to *Barcelona Traction* obligations *erga omnes* owe their existence to the importance of the rights involved. The link that is thus provided with *jus cogens* norms suggest that no state could opt out of obligations *erga omnes*. After all, every state has an interest in compliance with such obligations by all other states. She furthermore points out[49] that obligations *erga omnes* are crucially important when it comes to unilateral obligations accepted by states. The breach of a unilateral obligation will most probably not result in any material damage to other states. The prime example of unilateral obligations is human rights obligations. If obligations *erga omnes* represent a hierarchy of obligations as has been argued by Shelton, it is suggested by the authors that the obligation to respect the human dignity of the individual is at the pinnacle of these obligations.

Against the background of the human rights dispensation and constitutionalism in Europe, Catherine Dupré[50] approaches human dignity as 'a good belonging to all, shaped by all, and for all', thus viewing human dignity as '*res publica* in a substantive perspective'. By labelling human dignity as *res publica*, Dupré has in mind the indivisibility of human rights and the

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45 ibid.

46 Weatherall (n 6) 351, explains the relation between the two concepts as follows: 'The legal effects of *jus cogens* are actualized through obligations arising from peremptory norms – obligations *erga omnes* – through which a civil society function is conceived in international law. While *jus cogens* contains norms directed towards the individual, obligations *erga omnes* specifically concern the enforcement of those norms by the State.' See also the corresponding observations of the ICTY in *Prosecutor v Furundzija*, Judgment IT-95-17/1-T (1998) para 153.

47 Jure Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012) 23–24.

48 Shelton (n 33) 17.

49 ibid 16.

50 Dupré (n 5) 21–23.

inclusion of all human beings within its protective scope, including non-citizens. In fact, it extends to all humanity, including future generations.[51]

HUMAN DIGNITY IN SOUTH AFRICAN LAW

The Nature of Human Dignity in the South African Constitutional Dispensation

Much has been written on the role of the concept of human dignity in the interpretation and application of the South African Bill of Rights. From the provisions of the Constitution, judicial decisions and discussions in academic journals, the following characteristics of human dignity can be identified:

First, human dignity is, in terms of sections 1, 7(1), 36(1) and 39(1) of the 1996 Constitution, a democratic constitutional value. It is described in section 1 as one of the values on which the Republic of South Africa is founded. Section 7(1) determines that the Bill of Rights affirms the value of human dignity. According to section 36(1) human dignity functions as a factor that must be taken into account when the constitutionality of a limitation on any fundamental right is considered. In section 39(1) it is required that the value of human dignity must be promoted through the interpretation of the Bill of Rights. It thus functions as a guiding principle in the interpretation of the Bill of Rights.

Second, human dignity is not only a democratic constitutional value but is also, according to section 10 of the Constitution, embodied in a specific fundamental right insofar as it is provided that everyone has inherent dignity and the right to have his or her dignity respected and protected[52] (for the sake of convenience this right is subsequently referred to as the right to dignity). It is evident from section 10 that human dignity is not granted to individuals by the Constitution but is inherent in every human being. In terms of section 37 of the Constitution, human dignity contained in section 10 is classified as a right from which no derogation whatsoever is permitted under a state of emergency. The relationship between human dignity as a value and human dignity as a fundamental right is embodied in the fact that the former determines the content of the latter.

The distinction between dignity as a constitutional value, on the one hand, and a constitutional right on the other, is reflected in the universal and particular aspects respectively of the concept.[53] Dignity as a value (that is, its universal aspect) can, in the words of Daly, be described as 'the essence of what it means to be human', while the right to dignity (that is, its particular aspect) denotes 'what legal claims people can assert to insist that

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51 ibid 22.

52 See Pierre de Vos and Warren Freedman (eds), *South African Constitutional Law in Context* (Oxford University Press 2014) 458–461.

53 Daly (n 2) 19–20.

their humanity be recognised.'[54] The universal aspect of dignity is closely related to the communal dimension of ubuntu[55] with which the value of dignity is often equated in South Africa.[56] The particular aspect of dignity in turn seems to relate to what Daly refers to as individuation, an attribute of dignity that makes a person unique in the world.[57] As an example she cites an individual's right to change his or her name because the particular name is obscene or invokes painful memories or is associated with notorious people in history. Under these circumstances the state must allow the changing of names 'because to restrict the choice would diminish the individual's dignity vis-à-vis others (sometimes referred to the public face of dignity).' Although Daly does not make any mention of it, we would venture to suggest that the individual's right to choose the culture and religion with which he or she wants to associate himself or herself would also be an important example of individuation which illustrates the particular aspect of dignity. The practising of a specific religion and culture in conjunction (within a particular community) with others, is a confirmation of the communal aspect of dignity. On a larger scale (internationally) one can refer to the universal aspect of dignity insofar as dignity as a value includes in a general sense the right to freely choose and practise one's religion and culture. Indeed, as Daly postulates: 'Although dignity is inherent in each of us individually, its import is also felt when we are in community with others.'[58]

Dignity, according to Daly,[59] in both its individual and communal dimensions, is an important factor in the limitation of state authority. The importance of this aspect of dignity is underscored by the fact that some constitutions, such as South Africa's, prohibits any derogation whatsoever of the right to dignity in states of emergency. The South African Constitution in section 37 explicitly provides that no Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of such a declaration, may permit or authorise any derogation whatsoever from the right to dignity. The Constitution thus

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54 ibid 20.

55 The concept of ubuntu is discussed in more detail here below.

56 See Daly (n 2) 111, where she specifically refers to ubuntu which she defines as an African tradition in terms of which 'people are defined by *other people*'. She explicitly links ubuntu to a culture which reflects a strong communal basis and observes as follows: 'For cultures that have a strong social basis, the shift from community to individuality is not a sign of progress but a questionable departure from a preferred norm.' At 117 she makes the following general observation concerning case law dealing with dignity: 'In much of the dignity jurisprudence, courts define humans as both individual and communal creatures interconnected with others. Some of the cases, such as ... cases concerning culture, explicitly concern associational interests.' See also 120–121 where she echoes the same viewpoint.

57 ibid 32–34.

58 ibid 105.

59 ibid 127. At 134–135 she links participatory democracy to the promotion of human dignity, both individually and collectively. At 138 she refers in this regard to 'civic dignity' which serves both individual and collective values.

aims to protect the right to dignity in its entirety, even during a state of emergency.

Within the South African context, Wessels argues as follows with reference to the non-derogability of the rights to human dignity and life during a state of emergency:[60]

> The non-derogable rights may be considered to be superior rights. These rights are non-derogable rights because the nature of the right is such that it should not be impaired. The other rights lend themselves to suspension during states of emergency.

This viewpoint warrants a few comments. If one accepts that human dignity forms the bedrock of all human rights insofar as all human rights reflect some aspect of human dignity (and that seems to be a widely held opinion), it is difficult to understand why human dignity as a separate, independent right may not be derogated from in any way, while other human rights protecting a specific aspect of human dignity may be substantially limited under prescribed circumstances. In this respect the South African Constitution seems to contradict itself. If derogation from certain aspects of human dignity (albeit indirectly) is constitutionally allowed, it is not logical to simultaneously provide that the right to human dignity in its totality may not be derogated from during a state of emergency. Against this background it is suggested that a constitution should rather not contain a right to human dignity,[61] but should only recognise human dignity as a value. To provide for the right to have one's dignity respected like the South African Constitution does, may create the impression (rightly or wrongly) that dignity is conferred by the Constitution. It would therefore, for the sake of clarity and legal certainty, be the best option to remove dignity from the realm of fundamental rights and to limit its constitutional use to the area of values. Dignity and the right to have it protected is after all an inherent characteristic of all human beings and is for its realisation not dependent on constitutional provisions to that effect.

Barroso argues that human dignity should be viewed as a value and as a principle, but not an absolute value or an absolute principle.[62] He nevertheless accepts that human dignity, both as a value and as a principle, should take precedence in most situations. His suggestion that human dignity should not be recognised as a 'freestanding constitutional right', because such an approach would imply that the right to dignity 'would need to be balanced against other constitutional rights, placing it in a weaker position than if it were to be used as an external parameter for permissible solutions when

60 Wessels (n 34) 400.
61 Barroso (n 12) 357.
62 ibid.

rights clash.'[63] To further strengthen his argument that human dignity should not be treated as a separate, independent constitutional right, Barroso emphasises that human dignity is the foundation of all fundamental rights and the source of at least part of their core content.[64]

Third, in *S v Makwanyane*,[65] decided in terms of the 1993 Interim Constitution, the right to human dignity, together with the right to life, was treated as the most important of all the rights in the Bill of Rights because all other personal rights derive from them.[66] Venter[67] argues that the importance of human dignity can be deduced from the structure of certain provisions in the Constitution itself. In his analysis of, inter alia, sections 1, 7(1) and 36(1), he concludes that human dignity can be described as the 'primary nuclear value' of the Constitution.

Fourth, human dignity is also a guiding principle in the functioning of the public administration. Section 195 stipulates that the public administration must be governed by the democratic values enshrined in the Constitution. This, implicitly, includes the constitutional value of human dignity. In this regard the public administration has accepted the so-called *Batho Pele* ('people first') principles as a policy and legislative framework to enhance service delivery in South Africa. These principles to a large extent revolve around the dignity of the individual and include the following eight principles: consultation with the users of services; setting of measurable service standards; increasing access to services; ensuring courtesy by service providers towards the users of their services; providing information about available services; maintaining openness and transparency; providing redress where services are falling below standards; and providing value for their money to the users of services.[68]

The almost extraordinary constitutional emphasis on human dignity is a confirmation of the fact that the founding fathers of the current South African constitutional dispensation deliberately placed the individual and his or her dignity right in the centre of the constitutional evaluation of the actions of the state and individuals alike. This approach resonates with the view that the South African Bill of Rights protects individual rights and not

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63 ibid.

64 ibid.

65 *S v Makwanyane* 1995 3 SA 391 (CC).

66 See paras 144 and 328. Paulo Carbonari, 'Human Dignity as a Basic Concept of Ethics and Human Rights' in Berma Goldewijk, Adalid Baspineiro and Paulo Carbonari (eds), *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (2002) 35 and 39 respectively refers to human dignity as 'a cornerstone of human rights' and a 'core concept of ethics and human rights'.

67 Francois Venter, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (2000) 141–144.

68 The Department of Public Service and Administration developed these principles and it can be found at <http://www.dpsa.gov.za/documents/Abridged%20BP%20programme%20July2014.pdf> accessed 17 March 2017.

minority group rights. Even cultural, religious and linguistic rights which can only effectively be exercised in a communal setting, are considered to be individual rights.[69]

HUMAN DIGNITY AS A SO-CALLED OVERARCHING RIGHT IN SOUTH AFRICAN DOMESTIC LAW

Currie and De Waal[70] describe the right to human dignity in the following terms:

> As a fundamental right it has a residual function. It applies where many of the more specific rights that give effect to the value of human dignity, do not.

However, they warn that this should not be taken to imply that all human rights cases could simply be decided in terms of only the overarching right to dignity without any reference to the more specific fundamental rights that were simultaneously violated in the particular case. As motivation for their argument they refer to the principle of subsidiarity. Subsidiarity requires that 'norms of greater specificity should be applied to the resolution of disputes before resorting to norms of greater abstraction.'[71] Human dignity as a fundamental right will thus only infrequently be decisively applied. This approach is in the interest of a balanced and all-encompassing development of jurisprudence relating to the Bill of Rights. If courts were to decide the majority of fundamental rights cases on the basis of a violation of the right to dignity, a distorted picture of the application of the Bill of Rights will undoubtedly be the result. Barak[72] explicitly warns that the right to dignity should not be viewed as a residual right in an instance where there is a complementary overlap between this right and any other right in the Bill of Rights because such an approach

> would be at odds with the centrality of the value and the right to human dignity in the constitution. It is inappropriate from a methodological standpoint. The particular right does not detract from the general right to human dignity.

When assessing the constitutionality of the limitation of the right to human dignity and the right with which it overlaps, a court should separately

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69 See the discussion by Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6 edn, Juta 2013) 626–627 with regard to the protection of cultural, religious and linguistic communities in s 31 of the Constitution.

70 ibid 253.

71 ibid.

72 Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* trans from the Hebrew by Daniel Kayros (Cambridge University Press 2015) 182.

examine the constitutional position from the viewpoint of both rights because different proportionality requirements may apply.[73]

Erin Daly[74] makes the following statement that illustrates the approach of many national jurisdictions towards the overarching nature of the right to human dignity:

> It is clear that courts find dignity rights to be relevant even in cases where they are not necessary for the disposition of the case. This is evident from the number of cases that involve claims grounded in other provisions of a nation's constitution, such as the right to work or the right to life, but where a court nonetheless rules on the basis of or with emphatic reference to the right to dignity. This is true both where the right to dignity is itself actionable, as in Germany and many Latin American countries, and where it is not, as in India and Canada. It is also striking how often the dignity claim is vindicated: when dignity is raised, courts are very often sympathetic. And this is true even where courts might otherwise be reluctant to get involved: courts often desist from finding violations of the right to health, for instance, if they would have to order wide-ranging changes in health policy with broad financial implications, but where the right is converted into a violation of the right to dignity, courts are likely to intervene on the claimant's behalf.

THE POPULARISATION OF HUMAN DIGNITY IN DOMESTIC LEGAL SYSTEMS

As an illustration of the ever-increasing popularisation of human dignity in domestic legal systems, recent developments in American law may briefly be referred to. Although the American constitution does not mention the concept of human dignity at all, American jurisprudence in the past number of years has increasingly invoked the notion of a right to dignity.[75] In a thought-provoking article on the role of the right to human dignity within the American framework of legal rules, Glensy[76] identifies four possible approaches to so-called dignity rights. The first is the positive rights approach. This approach regards the right to dignity 'as a separate independent right, upon which individuals could assert a private action against both the government and other private parties, and which would require the government to provide a minimum set of standards to ensure that each person's human dignity is protected.' This implies that the state must take positive (legal) steps to protect the dignity of individuals.[77]

The second is the negative rights approach. This approach entails the opposite of the positive rights approach insofar as it expects from the state

73 ibid.
74 Daly (n 2) 6.
75 Rex Glensy, 'The Right to Dignity' (2011) 43 Columbia Human Rights LR 66–72.
76 ibid 107–140.
77 ibid 111.

to simply refrain from taking any action that might violate the dignity of individuals rather than taking positive steps to protect their dignity.[78] The consequences of this approach are explained as follows by Glensy:[79]

> A negative rights approach to the right to dignity would add dignitary interests to those rights that the state would be unable to impinge. The right to dignity would become a *de facto* background norm and an independent consideration to contend with when a claimant alleges a violation that would impact human dignity.

The third is the proxy approach according to which human dignity serves as a heuristic. This approach amounts to 'an affinity between human dignity and other rights that are associated with valuing personhood'[80] such as the rights to equality and liberty. Human dignity, therefore, is not protected either positively or negatively, but its protection is inherently or implicitly part of the protection of those rights that are closely related to the person of the individual. It is left to the discretion of the courts to identify the rights to which human dignity may be linked.

The fourth is the expressive approach. In this instance human dignity

> is said to function as an all-encompassing pervasive value that forms the fabric of modern democracy, even though the practical meaning of this is not always explained. In this framework, the right to dignity is widely invoked as both a legal ground and a moral basis for redress of certain violations by the government or by private individuals.

This means that the right to human dignity fulfils the function of an overarching right, a kind of residual right on which the individual could base his or her claim where no other right has clearly been violated. The expressive approach often employs hortatory language in the formulation of the right to dignity which allows the exhortation of dignity as the essence of being human.

Without explicitly referring to human dignity as a constitutional value and/or a fundamental right, it nevertheless seems as if American law and South African law follow a similar broad approach to human dignity. Comparing the characteristics of human dignity within the South African constitutional dispensation, referred to above, with the four approaches towards human dignity identified by Glensy, it would seem fair to say that traces of all four approaches can be found in the employment of the concept of human dignity in South African law.

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[78] ibid 120–121.
[79] ibid 121.
[80] ibid 127.

The application of the concept of dignity has even been extended on cultural and religious grounds to non-human entities. A recent example of this is the passing into law by the New Zealand Parliament of the Te Awa Tupua Bill. On 15 March 2017, after a struggle lasting more than a century-and-a-half, the very special relationship between the Maori (Whanganui Iwi) and the Whanganui River has been legally recognised. The adopted Act grants the River legal personality and standing in its own right and protects its rights and innate values.[81] Whanganui Iwi views the Whanganui River as an indivisible and living whole which includes all its physical and spiritual elements. The relationship between the River and the Whanganui Iwi is contained in the saying 'I am the River and the River is me'. The government and Whanganui Iwi will jointly appoint two persons to the role of Te Pou Tupua, that is the protection of the river's interests, health and well-being. Although the New Zealand Human Rights Act (1990) does not make any reference to human dignity, in terms of general human rights law, the legal recognition of this cultural belief and practice seemingly grants the River a certain degree of dignity to be legally protected on its and the particular cultural community's behalf. After all, should the health and well-being of the River be affected, it would in the eyes of Whanganui Iwi at least be a violation of the River's and the Whanganui Iwi's dignity. The fact that it was deemed necessary to effect this particular legal arrangement concerning the the Whanganui River suggests that something more than only the environmental protection of the River was involved. Could this 'something more' be the dignity of the River?

As will be discussed in the section that follows, also in South Africa the application of dignity has been linked to cultural concepts, specifically that of ubuntu. In this instance, however, it is limited to the dignity of persons.

HUMAN DIGNITY AND OTHER RELATED CONCEPTS IN SOUTH AFRICAN CONSTITUTIONAL LAW

Human dignity has been linked to the concepts of ubuntu and the common good. Hughes[82] explicitly states that '*ubuntu* recognises the dignity of the individual in the context of the common good.' The common good in turn seems to relate to concepts such as public interest and *boni mores*. The logical question that arises is whether and to what extent these concepts

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[81] See Chairperson of Nga Tangata Tiaki o Whanganui, 'Press Release' (15 March 2017) <www.scoop.co.nz/stories/P01703/S00187/te-awa-tupua-passes-in-to-law.htm> accessed 17 March 2017.

[82] Anne Hughes, 'Democracy in Crisis: Equality and Human Dignity in South Africa and Ireland' Working Paper 6 <http://ciisn.files.wordpress.com/2011/01/democracy-equality-dignity-sa-irl-ah-1-4-2011.pdf> accessed 17 March 2017.

may directly or indirectly be used to give content to the value of human dignity as enshrined in the South African Constitution.[83]

The concepts of the common good and the common interest are often used in connection with the international community of states.[84] With reference to international environmental law, Voigt[85] points out that fundamentally only one overarching common interest can be identified, namely 'the interest of ensuring the long-term survival of humankind as expressed in the principle of sustainable development, based on equity, *dignity* [our emphasis], and the rule of law.' Common interests can eventually lead to common concerns of the international community.[86] In the case of international environmental law the latter is ultimately the survival of humankind,[87] which in turn implies the protection of human dignity.

In contrast with the Interim Constitution that included the concept of ubuntu,[88] it is not explicitly mentioned in the final Constitution of 1996. The content of the concept of ubuntu was first dealt with in *S v Makwanyane*[89] by Langa J in the context of respect for life and dignity. In this context Langa J articulated ubuntu to mean that another person's life is at least as valuable as one's own.[90] Mokgoro J in the same case[91] also employed the concept of ubuntu insofar as she explained that, generally speaking, '*ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality.*' According to her it furthermore describes 'the significance of group solidarity on survival issues so central to the survival of communities.'[92]

By identifying twelve common values between African and Western cultures, Metz attempts to develop a generic moral theory of ubuntu

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83 Arthur Chaskalson, 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 South African J of Human Rights 204, in the context of socio-economic rights points out that the dignity of the individual at times may have to be limited in the general interests of the community: 'In formulating ... policies the government has to consider not only the rights of individuals to live with dignity, but also the general interests of the community concerning the application of resources. Individualised justice may have to give way here to the general interests of the community.'

84 See, eg, Wolfgang Benedek, Koen de Feyter, Mattias Kettemann and others, 'Introduction' in Wolfgang Benedek, Koen de Feyter, Mattias Kettemann and others (eds), *The Common Interest in International Law* (Intersentia 2014) 1–5.

85 Christina Voigt, 'Delineating the Common Interest in International Law' in Benedek, De Feyter and Ketteman (eds) (n 84) 11.

86 ibid 18–20.

87 ibid 18.

88 Under the heading National Unity and Reconciliation 'a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation' is expressed.

89 1995 3 SA 391 (CC).

90 See para 225.

91 See para 307.

92 See the discussion of Chuma Himonga, Max Taylor and Anne Pope, 'Reflections on Judicial Views of *Ubuntu*' (2013) 16 Potchefstroom Electronic LJ 370–422.

acceptable to both groups. The first six acts, which according to him are immoral to both Westerners and African communities are: to kill innocent people for money; to have sex with someone without her consent; to deceive people, at least when not done in self-defence; to steal unnecessary goods; to violate trust for marginal personal gain; and to discriminate on a racial basis. The following six immoral acts are, according to Metz, more prevalent in African communities: to make policy decisions without seeking consensus; to seek retribution rather than reconciliation in criminal justice; to create wealth on a competitive rather than a cooperative basis; to distribute wealth on the grounds of individual rights, rather than need; to violate communal norms, as opposed to upholding traditions; and to fail to marry and procreate.[93] The viewpoint of Metz is open to criticism insofar as it might be disputed that ubuntu is a mere moral concept based on common (and not so common) moral values. In addition, his interpretation of the content of some of the six predominantly African values is debatable.[94]

Ntsebeza[95] is of the opinion that ubuntu entails more than mere humaneness. According to him it includes all those attributes that give meaning to the saying that a person is a person *through other* persons. He lists some of these attributes as the following: kindness, nobleness, considerateness, humility, humbleness, forgiveness, understanding, empathy, sympathy, sharing, brotherhood, sisterhood, and compassion. What seems to be a particular characteristic of ubuntu is the constant interplay between the individual and the community. In this regard, Cornell and Van Marle[96] emphasise the dynamic and interactive nature of ubuntu, which means that our humaneness is shaped in our interactions with one another. This implies that our humaneness can be diminished by the violent actions of others (including the state), but also by our own violent actions towards others.[97] Mokgoro and Woolman[98] refer in this regard to the 'profound and unique communitarian thought embedded in uBuntu.'

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93 Thaddeus Metz, 'Toward and African Moral Theory' (2007) 15 The J of Political Philosophy 324–328.

94 See in this regard Sibusiso Radebe and Moses Phooko, '*Ubuntu* and the Law in South Africa: Exploring and Understanding the Substantive Content of *Ubuntu*' (2017) 36 South African J of Philosophy 7.

95 Dumisa Ntsebeza, 'Can Truth Commissions in Africa Deliver Justice?' in Anton Bösl and Joseph Diesco (eds)*, Human Rights in Africa: Legal Perspectives on Their Protection and Promotion* (Macmillan Education Namibia 2009) 384.

96 Drucilla Cornell and Karin van Marle, 'Exploring *Ubuntu*: Tentative Reflections' (2005) 5 African Human Rights LJ 206.

97 Nelson Mandela, *Long Walk to Freedom* (Little, Brown and Company 1994) 617, wrote that the oppressed and the oppressor alike are robbed of their humanity.

98 Yvonne Mokgoro and Stu Woolman, 'Where Dignity Ends and *Ubuntu* Begins: An Amplification of, as well as an Identification of a Tension in Drucilla Cornell's Thoughts' (2010) 25 South African Public L 407.

What then is the relation between dignity and ubuntu? Commentators differ in their viewpoints. Drucilla Cornell,[99] for example, emphasises the difference between the two concepts insofar as dignity is usually associated with the fundamental human rights of the individual, with emphasis on his or her autonomy and personhood. Conversely, ubuntu is associated with communalism and such virtues as loyalty and generosity. She simultaneously points out that the two concepts are nevertheless not totally divorced from one another:

> [W]hat they have in common is that neither seems easily reconcilable with reigning notions of legal positivism. That said, uBuntu has been more persistently attacked as supposedly untranslatable into a judicial principle of constitutional law. This is in part because dignity is clearly more familiar to Westerners ... For modern legal systems such as those of Germany and Israel, dignity is a foundational principle.

However, she further emphasises that ubuntu, being part of the rich intellectual heritage of African humanism, could be interpreted to form the basis of the constitutional value of dignity (or as she refers to it as the 'constitutional *Grundnorm* of dignity'). It is thus not dignity that implies the recognition of ubuntu.[100] Whether ubuntu could at all be translated into a concrete legal (constitutional) concept is still an open question. Some commentators argue in favour of the recognition of ubuntu, together with dignity, as a founding principle of the South African constitutional dispensation. Cornell and Van Marle[101] support this viewpoint and articulate their position as follows:

> What would it mean if both dignity and *ubuntu* were configured together as operational principles as well as founding principles? We want to at least raise the suggestion here that *ubuntu* would not be translated as dignity has into an individual right because it goes beyond the notion of individual entitlement. The legal system of South Africa does not give standing only to individuals who have been harmed, but also to those individuals and communities who want to promote the public good.

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99 Drucilla Cornell, 'Is There a Difference that makes a Difference between *Ubuntu* and Dignity?' (2010) 25 South African Public L 382–383.

100 ibid 384.

101 Cornell and Van Marle (n 96) 219. See in this regard also Jacqueline Church, 'Sustainable Development and the Culture of *uBuntu*' (2012) De Jure 526: '[I]t is argued that the culture of *ubuntu* forms part of South African legal culture. To my mind *ubuntu* has already become a justiciable principle.'

It is interesting to note that ubuntu in its communal context is linked to the public good or the common good. Kealotswe[102] states that ubuntu is the highest requirement a chief in Botswana must fulfil. This means that the chief must care for his or her people. He or she must always be generous and sympathetic towards his or her people, and assist them in times of need. It is suggested that in this sense ubuntu implies that the chief must always act in the interest of his or her people. Because ubuntu is in the first instance viewed as a cultural concept[103] it is fair to say that its communal aspect is limited to the community in which it operates. If one wishes ubuntu to be utilised as a legal concept in the broader context of the relationship between state authorities and individuals (the so-called broad public law relationship), it could then probably be said that ubuntu must serve not only the interest of a particular cultural community, but rather the interest of the entire state population, generally referred to as the public interest. In this regard, Radebe and Phooko[104] point out that the 'people first' (*Batho Pele*) component of ubuntu is (theoretically) part of government policies relating to service delivery, as the 'commitment to deliver basic public services to all South African citizens and others in the country.' Although the application of ubuntu as a legal concept might be foreign to the courts, they are not unfamiliar with the application of the concept of the public interest. It should be apparent that there is a similarity between the concepts of the common interest and the public interest. For purposes of this contribution it is accepted that the former is mainly employed on the international level, and the latter on the domestic level.

Like all the concepts linked to human dignity, ubuntu places the individual as individual and as part of a society or community at the centre. Ubuntu as a notion clearly displays a moral and ethical dimension[105] and in its application requires value judgements to be made. Some commentators would argue that this aspect renders the application of ubuntu as a legal concept impossible because courts are not equipped to decide on moral and ethical questions. Yet, in the relationship between individuals (the so-called private law relationship) the concept of the *boni mores* is employed by the courts. In certain areas of the law the courts are fully prepared to

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[102] Obed Kealotswe, 'The Dilemma between what is Law and what is Religion in Africa: The Botswana Case' in Pieter Coertzen, M Christian Green and Len Hansen (eds), *Law and Religion in Africa: The Quest for the Common Good in Pluralistic Societies* (SUN Media 2015) 183.

[103] Church (n 101) 529, refers to the 'indigenous culture of *ubuntu*' and argues that 'this culture may well assist in environmental governance'.

[104] Radebe and Phooko (n 94) 3.

[105] Ubuntu wears many hats. Cornell (n 99) describes ubuntu as 'a principle of trancendence' (at 392), as a notion that 'has an aspirational and ideal edge' (at 396), as 'the law of the social bond' (at 392), as an 'ethical, as well as a politico-ideological concept' (at 396), as 'a philosophical concept' (at 396), as an embodiment of 'the virtues of mutuality, inclusiveness and acceptance' (at 391).

make a judgment on the state of the morals and ethics reflected within the community. In *African Dawn Property Finance 2 (Pty) Limited v Dreams Travel and Tours CC*[106] the Supreme Court of Appeal pointed out that under the current constitutional dispensation the common law derives its force from the Constitution and that as a consequence 'public policy and the *boni mores* are now deeply rooted in the Constitution and its underlying values.' In *Wingaardt v Grobler*[107] the High Court reiterated that 'society's *boni mores* are not static, but evolve over time to accommodate "changing values and new needs"', and that 'in a heterogeneous society such as ours, the *boni mores* of society may also change from community to community.'

The convergence of ubuntu and the public interest can be illustrated by the following examples: Koyana[108] argues that customary law, of which ubuntu forms an integral part, embraces the doctrine of human rights, particularly regarding the treatment of children, married women and the elderly and disabled. It is ubuntu that formed the basis of the black majority's commitment to reconciliation after the demise of apartheid and it is ubuntu that provided the motivation for the abolishment of the death penalty in *S v Makwanyane*.[109] According to Kealotswe[110] racism and xenophobia are a complete denial of the philosophy of ubuntu. Appiagyei-Atua[111] illustrates that African philosophy, as expressed for example in a number of proverbs of the Akan (an indigenous African tribe), implicitly recognises human rights such as the right to freedom (of expression), the right to equality, the right to life, as well as the duty of individuals towards the welfare of the elderly in a community. It is important for Appiagyei-Atua to show that African philosophy adheres to human rights, because a culture of respect for human rights is a precondition for development. In this respect he refers to the example of Western Europe.[112] Although he does not in his exposition make mention of the concept of ubuntu, it is abundantly clear that the aspects of Akan philosophy he refers to is very similar to the concept of ubuntu as employed in the South African context. Rodny-Gumede[113] investigates the role of ubuntu in the sense of human dignity in journalism that serves the public interest. The author's interviews of individual journalists showed uncertainty amongst them with regard to the meaning of ubuntu and

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106 [2011] ZASCA 45 para 22.

107 Case no CA 57/2009 para 51. Eastern Cape High Court's judgment delivered on 20 April 2010.

108 Digby Koyana, 'Seeking the Common Good in Pluralistic South Africa: With Special Reference to Customary Law' in Coertzen, Green and Hansen (eds) (n 101) 207–208.

109 1995 3 SA 391 (CC).

110 Kealotswe (n 102) 182.

111 Kwadwo Appiagyei-Atua, 'A Rights-centred Critique of African Philosophy in the Context of Development' (2005) 5 African Human Rights LJ 347.

112 ibid 341.

113 Ylva Rodny-Gumede, 'An Assessment of the Public Interest in South Africa and the Adoption of *Ubuntu* Journalism' (2015) 30 J of Media Ethics 122–123.

the community in whose interest they are supposed to act. According to Jacqueline Church[114] ubuntu should be linked to sustainable development. She comes to the conclusion that 'interaction with and respect for the environment in the process of sustainable development would be in line with *ubuntu* as would community participation in development projects which, managed intelligently, could serve to alleviate poverty.'[115] All the aims, purposes, and achievements of ubuntu as set out in the examples referred to above is generally nothing more than aims, purposes, and achievements that are directed at serving the public interest. In this regard it is noteworthy that Christa Rautenbach[116] comes to the following conclusion after discussing the link between ubuntu, restorative justice and therapeutic jurisprudence:[117]

> [I]t should be evident that *ubuntu* is here to stay. It can be applied to virtually any area of law, in all stages of the criminal justice process, and it is envisaged that it will continue to evolve as a unique African guiding principle in all matters of law.

This broad application of ubuntu to both criminal and civil law is the result of ubuntu being described in broad and vague terms. A content-specific notion of ubuntu would not be suitable for such a broad application. Eventually ubuntu seems to imply nothing more than that all conduct of the authorities and of individuals towards one another must serve the interest of a particular community or depending on the circumstances, the community in general, the so-called public interest. And the public interest in turn is dependent upon the values operating within a particular community at a specific time, as contained in the notion of the *boni mores* employed by the courts. And all these values must eventually serve the constitutionally protected value of human dignity of the individual. It would thus seem that the function of values is not only to give content to fundamental rights, but also to other values. In this regard, it is clear that ubuntu as an external value

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[114] Church (n 101) 520–529.
[115] ibid 530.
[116] Christa Rautenbach, 'Legal Reform of Traditional Courts in South Africa; Exploring the Links Between *Ubuntu,* Restorative Justice and Therapeutic Jurisprudence' (2015) 2 African J of Intl and Comparative L 294.
[117] ibid 298.

(meaning a value not explicitly contained in the Constitution) is employed by the courts to inform the constitutional value of human dignity.[118]

A clear distinction must be drawn between the public interest and the public opinion. It was explicitly stated in *Makwanyane* that the public opinion has no role to play in the interpretation of the Bill of Rights. With reference to the abolishment of the death penalty, the Constitutional Court pointed out that it is the duty of the courts to give effect to the provisions of the Constitution without being influenced by the public opinion. In that case the Constitutional Court accepted that the public opinion would in all probability be in favour of a retention of the death penalty, but found that the Constitution, in terms of the right to life and the right to dignity, clearly necessitated the abolishment of the death penalty. An interplay between the public interest and the public opinion can nevertheless be discerned. It is the opinion of the public that to a certain extent determines the values operating within society and the courts would give effect to those values on condition that they can be reconciled with the provisions of the Constitution as the supreme law of South Africa.

A discussion of ubuntu as the embodiment of human dignity is not complete without reference to the recent *Afriforum* case[119] on the constitutionality of the street name changes in Pretoria. The court was clearly divided among cultural (or if you wish, racial) lines, a majority of nine black judges and a minority of two white judges. The majority unequivocally required that all people *must* adhere to the value of ubuntu:[120]

> All peace and reconciliation-loving South Africans whose world-view is inspired by our constitutional vision must embrace the African philosophy of 'ubuntu'. 'Motho ke motho ka batho ba bangwe' or 'umuntu ngumuntu ngabantu' (literally translated it means that a person is a person because of others). The African world-outlook that one only becomes complete when others are appreciated, accommodated and respected, must also enjoy prominence in our approach and attitudes to all matters of importance in this country, including name-changing. White South Africans must enjoy a sense of belonging. But unlike before, that cannot and should never again

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[118] In this regard we differ from the viewpoint of Radebe and Phooko (n 94) who tend to refer to ubuntu as a constitutional value, creating the impression that the current Constitution explicitly recognises ubuntu as such. Ilze Keevy, '*Ubuntu* Versus the Core Values of the South African Constitution' (2009) 34 Journal of Juridical Science 52–53, even goes so far as to state that '*Ubuntu* is not in consonance with the values of the Constitution in general and the Bill of Rights in particular. *Ubuntu's* shared traditional African values and beliefs trump and erode the core values of the South African Constitution.' However, as pointed out in this contribution, it is clear that the Constitutional Court has finally accepted ubuntu as reconcilable with the core values of the South African Constitution.

[119] *City of Tshwane Metropolitan Municipality v Afriforum* CCT 157/15. Judgment delivered by the Chief Justice on 21 July 2016.

[120] Paragraph 11.

> be allowed to override all other people's interests. South Africa no longer 'belongs' to white people only. It belongs to all of us who live in it, united in our diversity. Any indirect or even inadvertent display of an attitude of racial intolerance, racial marginalisation and insensitivity, by white or black people, must be resoundingly rejected by all South Africans in line with the Preamble and our values, if our constitutional aspirations are to be realised.

The minority is critical of the majority's approach. They reacted as follows:[121]

> Again, we agree that it would be beneficial if all South Africans approached matters with appreciation and respect for others. But the Constitution does not impose that as an obligation on citizens, either by enjoining the adoption of the ubuntu world-view, or otherwise. And, again, the Constitution does not allow the Judiciary to impose that obligation generally, least in the naming of streets, which falls within local authorities' constitutional competence.

The decision of the Constitutional Court raises a number of issues. It seems as if the court attempted to impose a particular content of human dignity on all people in South Africa, irrespective of their cultural and religious beliefs. If so, it could at best be construed as an attempt to identify a generic idea of human dignity that will more or less fit all people at all times, a kind of common denominator that characterises all cultures and religions. However, it could also at worst be construed as a kind of cultural imperialism which leaves very little space for the recognition of the cultural beliefs of others.

A value such as reasonableness could also be linked to human dignity and its related concepts, which illustrates the latter's boundless flexibility. In the case of *Prince v President Cape Law Society*[122] Justice Sachs in a minority judgment employed the principle of reasonable accommodation which involves the balancing of the right to freedom of religion, in this particular instance the use of cannabis as a religious practice, with the public interest and found that 'the right to be different has emerged as one of the most treasured aspects of our new constitutional order.'[123] He nevertheless cautioned that

> no amount of formal constitutional analysis can in itself resolve the problem of balancing matters of faith against matters of public interest ... [F]aith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a constitutional principle. Religious tolerance is accordingly not only important to those individuals who are saved from having to make excruciating choices between

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121 Paragraph 137.
122 2002 2 SA 794 (CC).
123 Paragraph 170.

> their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.[124]

According to Justice Sachs, the test of tolerance as envisaged by the Bill of Rights does not simply amount to accepting what is familiar and easily accommodated, but to giving reasonable space to what is 'unusual, bizarre or even threatening'.[125] Justice Ngcobo accepts that the statutory prohibition on the use of cannabis constitutes a palpable invasion of the dignity of the followers of the Rastafari religion.[126] From this perspective one could say that human dignity embodies reasonableness. Tom Bennett's[127] observation with regard to culture is relevant in this context. He indicates that

> [t]he right to culture imposes, by implication, several duties on the state. First, it must tolerate different cultural practices. Hence, although the customs and habits of a group may seem unusual and even threatening to the wider society, the state must permit divergence from the norm. Secondly, the state is obliged to preserve the existence and identity of the group: it may not compel its citizens to assimilate to a national norm. Thirdly, the state may not ... discriminate against any particular cultural group. Finally, the state must allow the group to foster its separate identity through means such as speaking its own language, worshipping according to certain religious tenets or organising itself according to its own distinctive system of personal law.

The role of the state in the protection of human dignity is linked to practical reasonableness by Patrick Capps[128] insofar as the reasonable (in the sense of rational) actions of the state authorities serve human dignity as a moral value.[129] Human dignity empowers individuals to exercise autonomy and to claim those rights that accrue to them as a result of their humaneness. Simultaneously, human dignity acts as a constraint on state authority.[130]

As have already been alluded to, the content of concepts such as ubuntu, public interest and *boni mores* are inherently uncertain because they are all underpinned by ever-changing legal, moral and ethical values. Giving content to these concepts in a specific set of circumstances, requires from the court to make certain value judgements, that is to interpret values that

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124 ibid.

125 *Prince* case (n 122) para 172. See in this regard also *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 25.

126 *Prince* case (n 122) para 51.

127 Tom Bennett, 'Access to Justice and Human Rights in the Traditional Courts of Sub-Saharan Africa' in Tom Bennett, Eva Brems, Giselle Corradi and others (eds), *African Perspectives on Tradition and Justice* (Intersentia 2012) 39.

128 Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing 2009) 102–103.

129 ibid 103–104.

130 ibid 108.

in themselves have no hard and fast content. In addition, these judgements are made by human beings (judges) whose own views on inherently uncertain legal, moral and ethical issues unavoidably find their way into the judgments of the courts. The idea of a totally objective judge is only a fiction.[131] As a result, a generally accepted interpretation of these notions is not possible. The interpretation of these notions must conform to the values of the Constitution. One of these values is human dignity which, as an all-encompassing value, can be linked to all these notions and, in itself, has no fixed meaning. Some would regard the inherent uncertainty as to the meaning of dignity as a problem with regard to its usefulness as a legal concept, while others would view it as an advantage. Dina Lupin Townsend falls into the last category. She argues as follows with reference to the role of human dignity in environmental issues:[132]

> While human dignity is a concept that emerges from a long historical association with the superiority of humanity over the natural world, it is a concept that, in its legal articulations, is open to a number of different accounts of our humanness. Most importantly, it is a concept that has evolved, and continues to evolve, in response to our experience of indignity and to the emergence of new threats. Rather than importing into law's framework an anti-environmental understanding of humanness, dignity is a tool through which courts might reconsider the human/environment relationship as they face divergent environmental threats. Dignity is a concept that can accommodate a conception of humanness that is emplaced and constituted in the world in which we find ourselves ... While a topographical understanding of humanness does not offer easy answers to questions about how, when and why we ought to change the world we live in, it does offer courts an opportunity to consider how our emplacement shapes who we are, and to recognise the ways in which stripping our relationship to the world (through displacement and through degradation) threatens our dignity.

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131 In *Wingaardt v Grobler* case no CA 57/2009 para 53, the Eastern Cape High Court explicitly stated that the test for wrongfulness (involving an interpretation of the *boni mores* of society) is an objective one which 'means that the whims and personal preferences of the Judge or Presiding Officer hearing the case are irrelevant and play no role in the adjudication process.' This remark applies especially to those instances where a presiding officer would explicitly and deliberately try to force his or her own (unacceptable) opinions and viewpoints on society. However, in most instances the preferences of a judge find their way into society in a much subtler way as part of a particular world view that underpins and informs all his or her judicial activities.

132 Dina Lupin Townsend, 'The Place of Human Dignity in Environmental Adjudication' (2016) Oslo LR 50.

CONCLUSION

The development of human rights over decades has resulted in the identification of a large variety of individual human rights. One commentator observed that 'human rights are a conglomerate of more than sixty rights, which are not comparable to each other.'[133] However, as we have attempted to illustrate in the preceding analysis, the common denominator of all human rights is the fact that they all protect some aspect of the dignity of a person. One could say that dignity lies at the core of all human rights. For precisely that reason one might be tempted to reduce the various rights in a bill of rights to a right to human dignity, even more so if that bill of rights contains an independent, separate right to human dignity. Such an approach would not be conducive to a well-balanced, well-structured, systematic development and application of a particular bill of rights. Because (the protection of) dignity is both the origin and final destination (both the beginning and the end) of all human rights, it seems logical to rather employ dignity as only a constitutional value and not an independent, separate fundamental right in a bill of rights.

Being a value, the content of dignity varies from community to community and society to society. This raises the question as to whether dignity could be employed as a generic term in plural communities and societies. In other words, would it be possible to formulate a 'one-size-fits-all' definition of dignity? It is suggested that religious and cultural differences as embodied in the right to religious freedom and the right to practise one's culture, would render such an exercise virtually impossible. In this regard one gets the impression that in order to mould dignity into a more manageable concept, it is often equated with concepts that are easier defined and more readily acceptable to the broader society or community. The clear danger inherent in such a trend is that human dignity could be stripped of much of its particular nature as reflected in the various human rights and reduced to a broad concept such as the *boni mores* and the public interest. The courts are probably more comfortable in applying the latter concepts as legal concepts than is the case with human dignity. Eventually human dignity may denote nothing more than a vague form of humanism.

It has been determined by the Constitutional Court in the *Makwanyane* case that the interpretation of the South African Bill of Rights may not be influenced by public opinion. Effect must be given to the wording of the particular provision before the court by taking into account the constitutional values. However, insofar as religious and cultural considerations determine a particular society's or community's idea of human dignity, one may surely refer to the (public) opinion of the members of such a group of people as to the meaning of dignity within their ranks.

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[133] Wieteke Beernink and Harry Derksen, 'Searching for the Right(s) Approach' in Goldewijk, Baspineiro and Carbonari (eds), (n 66) 94.

It would seem that the final conclusion is inescapable: that human dignity as a concept is notoriously fluid, vague, ever-changing, non-specific, confusing and varied and, therefore, in principle not an appropriate legal yardstick. However, the value of and right to human dignity has established themselves to such an extent in international, regional and domestic law that any attempt to remove them from the legal realm would be an exercise in futility. In fact, it could be argued that international law has elevated the concept of human dignity to the status of *jus cogens* and that an obligation *erga omnes* therefore rests on states to regard the right to dignity as a non-derogable right. The best that can be done is to limit human dignity's application to that of a constitutional value and not to elevate it into an all-encompassing right that functions in practice independent from all other fundamental rights. The latter would result in an attenuation of the human rights regime in international, regional and domestic law. It must in the final instance also be noted that the rendering of value judgements is not foreign to the courts. The fact that the courts daily employ and interpret value-laden concepts such as *jus cogens*, obligations *erga omnes*, non-derogable rights, ubuntu, reasonableness, public opinion, public interest and *boni mores* (all in one way or another related to human dignity) should provide an assurance that the interpretation and application of human dignity are in safe hands.