Valid consent to objectifying treatment should be allowed

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1 Introduction

In South Africa, as in various other countries, human dignity has come to be regarded as a supreme value and an objective legal norm.[1] This understanding of dignity is not, however, always commended. One of the dangers of viewing dignity as a supreme value is that it can be used to support a paternalistic role for the state. The state has the power to make any laws as long as it can argue that it serves to protect human dignity. This kind of paternalism often inhibits the individual and personal freedom of citizens.[2]

As a result, human dignity is often seen as being in opposition to freedom. In the view of some writers this is problematic, since human dignity and freedom are interrelated and freedom should be enhanced by human dignity.[3] On the other

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[1]Chaskalson 'Human dignity as a constitutional value' in Kretzmer and Klein (eds) *The concept of human dignity in human rights discourse* (2002) 133 at 136; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28 (hereafter referred as '*NCLGE*'). As an objective legal norm, dignity is used to mediate value conflicts and conflicts between fundamental human rights. See Botha 'Human dignity in comparative perspective' (2009) *Stell LR* 171 at 215-216. See McCrudden 'Human dignity and judicial interpretation of human rights' 2008 *The European JIL* 655 at 664-675; Eckert 'Legal roots of human dignity in German law' in Kretzmer and Klein (eds) *The concept of human dignity in human rights discourse* (2002) 41 at 52,53; Starck 'The religious and philosophical background of human dignity and its place in modern constitutions' in Kretzmer and Klein (eds) *The concept of human dignity in human rights discourse* (2002) 179 at 179,180, for examples of human dignity in the human rights texts of other countries.

[2]Eckert demonstrates how dignity can be a tool in the hands of the state (n 1) 69. See also Starck (n 1) 189, 192 for more on the role of the state.

[3]*Ferreira v Levin NO; Vryenhoek v Powell NO v Levin NO; Vryenhoek v Powell NO* 1996 2 SA 621 (CC) para 49 (hereafter referred to in the main text as '*Ferreira*'). See also Woolman 'Dignity' in Woolman *et al* (eds) *Constitutional law of South Africa* (2005) (2nd ed) 36-1 at 36-67.

hand, it has been argued that individual freedom may be constrained to protect the human dignity of others.[4] This raises a fundamental question, namely whether one has the freedom to consent to the infringement of one's dignity. Conversely, does the state have a legitimate interest in banning activities that arguably infringe the dignity of participants? These questions have not been answered satisfactorily in the literature.

These questions will be considered in the context of objectifying treatment as an infringement of dignity. Objectifying treatment infringes dignity, since dignity is said to promote inherent worth.[5] Inherent worth essentially means that nothing can add or subtract from a person's worth.[6] This implies two things. Firstly, nothing can add to a person's worth, because it exists regardless of its recognition.[7] A person's worth is not awarded through legal operation; people possess it from birth, irrespective of their ability or potential.[8] Secondly, the fact that nothing can subtract from a person's worth means that it can never be lost. It is not lost by undignified behaviour and is even said to be inalienable, irreducible, unwaivable and inviolable.[9]

Furthermore, the fact that an individual has inherent worth means, in Kantian language, that she is an end in herself and cannot be used as a means to an end.[10] Using someone as a means to an end objectifies such a person and therefore infringes human dignity.

Three possible approaches to these questions have transpired from legal writing. The first is that consent to objectifying treatment should not be allowed under any circumstances. The second is that where the state cannot fulfil the

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[4]Starck (n 1) 189.

[5]The idea that dignity promotes inherent worth relates to the religious and philosophical roots of human dignity. For a discussion on the religious and philosophical roots of human dignity, see Starck (n 1).

[6]Wood 'Human dignity, right and the realm of ends' in Barnard-Naude, Cornell and Du Bois (eds) *Dignity, freedom and the post-apartheid legal order* (2008) 47 at 49.

[7]See Dicke 'The founding function of human dignity in the Universal Declaration of Human Rights' in Kretzmer and Klein (eds) *The concept of human dignity in human rights discourse* (2002) 111 at 114.

[8]Botha (n 1) 189. See also Barrett '*Dignatio* and the human body' (2005) *SAJHR* 525 at 531. Barrett explains that the philosopher, Pufendorf, created the idea of human rights by birth.

[9]O'Regan J determines that dignity is not lost through undignified behaviour in *S v Makwanyane* 1995 3 SA 391 (CC) paras 137, 142-143. See also Botha (n 1) 194, 197, 209; Klein 'Human dignity in German law' in Kretzmer and Klein (eds) *The concept of human dignity in human rights discourse* (2002) 145 at 148. Barrett concludes from the above that the court in *Jordan v S* 2002 6 SA 642 (CC) erred in deciding that prostitutes lose their dignity due to their undignified behaviour. Barrett (n 8) 530, 538-539. Similar to various writers, Barrett also writes about dignity as inalienable, irreducible, inviolable and/or unwaivable; he primarily relies on Kantian ideas. As mentioned below, the consent to the infringement of one's dignity could be regarded as a waiver thereof and might therefore be at odds with this idea of an unwaivable dignity.

[10]Wood 'What is Kantian ethics?' in Wood (trans and ed) *Kant I: Groundwork for the metaphysics of morals* (2002) 157 at 163. Wood defines an end as 'anything we act for the sake of' (n 6) 52.

economic needs of the poor, the latter cannot be prohibited from consenting to objectifying treatment in exchange for remuneration to fulfil those needs themselves. The third approach is that people can and should be allowed to consent to objectifying treatment.[11] The purpose of this article is to demonstrate the key aspects of this last approach.

Three practices where consent to objectification is currenlty prohibited will be considered, namely prostitution, dwarf tossing and sadomasochism.[12] Although argument could be made that participation in these activities is not always voluntary, this article is aimed at those situations where valid consent has been given.[13]

2 Dignity should not be regarded as supreme

2.1 Counterarguments to the idea of a supreme dignity

As stated above, the question of whether one has the freedom to consent to objectifying treatment which infringes one's dignity creates a tension between human dignity and freedom. A conflict between constitutional values is usually resolved by way of balancing. This solution is however problematic where dignity is concerned. If, as mentioned above, dignity is regarded as the supreme value, it can be argued that it should automatically trump any value conflict.

To argue that one should have the freedom to consent to the infringement of one's dignity, however, supports an expansive understanding of freedom and

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[11]The South African Law Reform Commission (hereafter referred to as 'the SALRC') suggests similar approaches to prostitution, namely: criminalisation, partial criminalisation, regulation and non-criminalisation. The foremost difference between these approaches and the approaches discussed in this article is that in the article the second and third approaches are combined. Another difference is that in this article no definite distinction is made between legalisation and decriminalisation. The focus is rather on whether something should be allowed at all. For this reason both the second and third approach in this article recommend the regulation of objectifying treatment, unlike the SALRC project, where legalisation does not necessarily involve regulation. See SALRC (n 11) xii, 173, 186.

[12]For dwarf-tossing as an example, see McCrudden (n 1) 656; Klein (n 9) 145-159; Botha (n 1) 194. In *Manual Wackenheim v France* Communication no 854/1999, UN Doc CCPR/C/75/D/854/1999 (2002) para 2.1 (hereafter referred to in the main text as '*Wackenheim*'), dwarf-tossing is described as an event where a person suffering from dwarfism, 'wearing suitable protective gear', allows 'himself to be thrown short distances onto an air bed by clients of the establishment staging the event (a discotheque)'. For the example of prostitution, see Fritz 'Crossing Jordan: Constitutional space for (UN) civil sex?' (2004) *SAJHR* 230 at 230-248.

[13]De Schutter provides four conditions for a valid waiver of a right in 'Waiver of rights and state paternalism under the European Convention on Human Rights' (2000) *Northern Ireland Legal Quarterly* 481 at 491. They are applicable in this context since consent to the infringement of one's dignity can be equated with the waiver thereof. Whether one could waiver fundamental rights, especially dignity, is often debated. For interpretations of the term 'waiver', which allows for the waiver of fundamental rights, see Currie and De Waal 'Application of the Bill of Rights' in *The Bill of Rights handbook* (2005) (5th ed) 39 at 39-40.

rejects the idea of a supreme dignity. In order to explain the grounds for this rejection, it is necessary to review the arguments and counterarguments regarding the supremacy of dignity.

One of these grounds is that human dignity's supremacy is partly based on its functions as a constitutional value. As a value dignity is said to be the basis for all human rights, giving them weight and content and stipulating their limits.[14] Dignity is also used to interpret these human rights.[15] These functions are often cited to illustrate the supremacy of dignity over other rights. However, from a different point of view they simply demonstrate the relationship between all constitutional values and human rights. This is because these functions are not unique to the value of dignity; they are inherent to constitutional values in general. They not only apply to human dignity in the Constitution but to all the constitutional values.[16] This view thus emphasises the equality of all constitutional values.

One function that has nonetheless been solely ascribed to dignity, and is referred to in support of a supreme dignity, is that it is applied as an objective normative value in the mediation of value conflicts. The criticism of attributing this role to human dignity relates to the risks in giving dignity too much content. It is often contended that dignity can easily be manipulated into a variety of meanings.[17] This creates the risk that the state may use dignity as a paternalistic tool in pursuit of its own idea of dignity, as already mentioned; consequently restricting freedom.[18] The mere fact that dignity can be found on both sides of a dispute, in conflict with itself, is a clear indication of its manipulability.[19]

Such cases where dignity is found on both sides of a dispute point to another deficiency in using dignity as an objective norm in the mediation of value conflicts.[20] In such circumstances dignity is in conflict with itself and can therefore not be used as the mediator. A more objective standard is needed to resolve the conflict.

Should this unique function accordingly not be accredited to dignity, its functions would be identical to those of the other constitutional values. As a result, freedom as a value cannot be subordinate to human dignity.[21]

Another reason provided for the supreme status of dignity is that the Constitutional Court has conferred great value on it by adopting a dignity-based jurisprudence. There have been numerous attempts to explain the Court's

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[14] Ss 7, 39 and 36 of the Constitution of the Republic of South Africa, 1996.
[15] *Id* s 39.
[16] *Id* ss 7, 36 and 39.
[17] Davis 'Equality: The majesty of Legoland jurisprudence' (1999) *SALJ* 398 at 413; McCrudden (n 1) 655, 698, 702. McCrudden provides the example of the assisted suicide case *Pretty v UK* (2002) 35 EHRR 1. See also Du Bois 'Freedom and the dignity of citizens' in Barnard-Naude, Cornell and Du Bois (eds) *Dignity, freedom and the post-apartheid legal order* (2008) 112 at 130.
[18] Woolman (n 3) 36-69.
[19] See text accompanying n 17.
[20] See text accompanying n 1.
[21] *Ferreira v Levin NO; Vryenhoek v Powell NO* (n 3) para 49.

preference for human dignity. These explanations include: firstly, that the Court borrowed its interpretation from one or more foreign countries. Secondly, that the court based its interpretation on philosophical notions such as those of Kant. Thirdly, that dignity is advanced due to its denial in the past. The final explanation is that the Court's preference reflects nothing more than a choice. Closer examination suggests that only this final explanation holds water.

With regard to the first explanation it has been submitted that South African courts cannot simply adopt foreign interpretations of dignity, as each country has a unique manner of entrenching dignity. Our Constitution, for example, allows for the limitation of dignity as a right.[22] Dignity does not receive any special treatment, since its entrenchment is identical to that of the other rights and values.

The second explanation for the court's dignity-based jurisprudence, namely, that the court based its interpretation on philosophical notions, does not necessarily place dignity on a higher level than freedom either. The supreme status of dignity is largely derived from Kantian philosophy. Although Kant supports dignity, his notion thereof is largely libertarian.[23] Kant suggests that freedom should be laid at the basis of any Constitution and all laws.[24] It might even be argued that Kant supports the limitation of dignity rather than that of freedom. He does describe an inviolable dignity, while limiting the idea of freedom by saying that it should be 'consonant with a similar breadth of freedom to others'.[25] However, when this 'limitation' is considered logically it is evident that all rights are granted consonant with a similar breadth thereof for others. This 'limitation', if at all regarded as such, therefore applies to all rights; including the right to human dignity.

If dignity is advanced because of its past denial, as suggested by the third explanation, then freedom should likewise be advanced. Ackermann J supports this idea, when he points out that a denial of dignity by the Apartheid state inevitably led to a similar denial of freedom.[26]

The fourth explanation for the court's dignity-based jurisprudence is that it simply reflects a choice. The decision in *Harksen v Lane NO*[27] is a clear example of this choice. In his criticism of this case, Davis argues that due to this 'choice' dignity is used to determine the content of other values, instead of assigning to those values the substantive interpretation they demand. Such an interpretation effectively renders these other constitutional values empty and redundant. Davis points out that had this been the intention of the legislature, there would only have been one constitutional value. In the context of equality he asks whether we are 'now to conclude that when the Constitution spoke of three values it actually

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[22]The Constitution (n 14) s36.
[23]McCrudden (n 1) 669.
[24]Woolman (n 3) 36-3.
[25]Ackermann J quotes Kant in *Ferreira v Levin NO; Vryenhoek v Powell NO* para 49.
[26]*Ferreira v Levin NO; Vryenhoek v Powell NO* (n 3) para 51.
[27]1998 1 SA 300.

meant two'.[28] Accordingly this 'choice' is not only unsubstantiated, it is also inconsistent with the Constitution. The Constitutional Court's emphasis on dignity can therefore not justify its supreme status.

Another contention in support of a supreme dignity is that dignity features prominently throughout the Constitution. This argument is inadequate, since freedom also features prominently throughout the Constitution.[29] In fact, in the Bill of Rights, freedom appears more frequently than dignity.[30] It has however been contended that freedom should not 'play a prominent role [simply] because of its formalistic presence in the Constitution'.[31] If this reasoning were to be applied, it should likewise apply to dignity. Therefore, dignity should not gain prominence due to its abundant presence in the Constitution.

The notion that dignity is inherent to all persons cannot be used in support of a supreme dignity either, as the same is said with regard to freedom.[32]

Furthermore, freedom can be found within human dignity. This is evident from Kant's libertarian definition of dignity. This concept of dignity, which has been widely accepted by scholars, therefore adds a freedom component to the inherent worth component already established as part of dignity.[33] This is confirmed by Ackermann J in *Ferreira*:

> Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.[34]

Finding freedom within human dignity is another critical counterargument against a supreme dignity. If freedom plays such a prominent role within dignity, it is improbable that dignity would play a more prominent role than freedom in the Constitution.

Based on the above arguments, it could be contended that dignity is best seen as one important constitutional value amongst others, which should not be regarded as supreme in relation to other values like equality and freedom.

2.2 Dignity can be waived

Another argument in support of the notion that a person should not be able to

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[28]Davis (n 17) 412.
[29]Freedom is given equal prominence in all the general provisions in support of dignity. Du Bois (n 17) 112.
[30]See ch 2 of the Constitution. See also Du Bois (n 17) 112.
[31]Du Bois (n 17) 125.
[32]Davis (n 17) 398.
[33]Kant's libertarian notion of human dignity is explained and supported in Woolman (n 3) 36-3, n 2. See also McCrudden (n 1) 669. These two possibly contradicting components of dignity also explain why it could be used on both sides of a dispute.
[34]*Ferreira v Levin NO; Vryenhoek v Powell NO* (n 3) para 49.

consent to the infringement of her dignity is that dignity cannot be waived. This is based on a specific definition of the term 'waiver', namely, consent to the disposal of a right.[35] The disposal of something suggests that it is lost altogether and fundamental rights cannot be lost, even when violated.[36] Yet, waiver might also be defined as merely: consent to the violation of a right.[37] If dignity is not considered supreme and therefore inviolable, a person might actually be capable of waiving her own right to dignity in terms of this alternative definition.

Another definition of waiver that would not result in the loss of the right altogether involves the idea that it is merely the 'right to exercise the fundamental right' which is waived.[38]

These two latter definitions of waiver correspond with De Schutter's reasoning that, if a person has the right to be protected against the violation of her right, she should also be free from the paternalistic imposition of its unwanted benefits.[39] He nonetheless acknowledges the fact that no such specific right to waiver exists, but suggests three possible areas in which such a right might be found.[40]

The first area is that of property law. In this field a human right could be deemed the property of the right holder, with which she may do as she wishes.[41] The second sphere in which the right to waiver may be situated is in the exercise of another right. Here a person may waive her right 'if the exercise of right x comes down to a renunciation of right y'.[42] In this regard a person's exercise of her right to freedom might come down to a renunciation of her right to human dignity. This relates to the third possibility that the principle of freedom accommodates such a right to waiver.[43]

The European Court of Human Rights has already acknowledged the fact that rights can be waived.[44] This acknowledgement is made in reference to the right to have one's case heard in public. If one considers this decision, it becomes clear that some rights are in fact waived without any objection.

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[35] See text accompanying n 9.
[36] *S v Makwanyane* (n 9) paras 137, 142-143.
[37] Currie and De Waal define a waiver of a right as an agreement not to claim the benefits thereof (n 13) 39-40. They furthermore distinguish a waiver from the decision not to exercise a right. The distinction between these two concepts seems to lie in the fact that the former impacts upon the future exercise of a right, whereas the latter refers to action taken which negates the exercise of a right. An example of the latter would be where an accused confesses to a crime, negating her right to remain silent. Consent to objectification would more readily fall within the scope of a waiver. One might however willingly participate in sadomasochism, subsequently negating one's right to exercise one's right to dignity. The decision to participate could be seen as a decision not to exercise the right.
[38] *Ibid*.
[39] De Schutter (n 13) 494.
[40] *Id* 495.
[41] *Id* 481.
[42] *Id* 495.
[43] *Id* 495. See also *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 99.
[44] De Schutter (n 13) 483.

The counterargument is that, even though some rights are waived without objection, other rights are too fundamental to waive.[45] This is confirmed in the German peepshow case in which it was decided that, despite their broad right to act, persons cannot act contrary to their own fundamental right to dignity.[46] This argument is clearly based on the idea of a supreme human dignity. Currie and De Waal confirm this contention by averring that 'many of the *freedom* rights may be waived as long as the subject does so clearly and freely and without being placed under duress or labouring under a misapprehension.'[47] In fact, one of the only rights that they do regard as 'fundamental enough' to prohibit its waiver is dignity.[48] Such an argument, based solely on the idea of a supreme dignity, cannot hold water in a milieu where dignity and freedom are considered equal.

3 Society is plural

3.1 Plurality of morals

Another argument against consent to the infringement of one's dignity is that freedom should yield to communitarian dignity. It is asserted that the individual's notion of dignity should succumb to her community's notion thereof.[49] Contrary to this assertion is the understanding that a community cannot have a unanimous notion of dignity, since society is plural.[50] An acknowledgement of a plural society alludes to the approach that the manner in which a person is treated should not constitute a violation of dignity if the person being treated in that manner does not subjectively regard it as such.[51] Consequently, the concerns surrounding the balancing of dignity and freedom or the waiving of rights disappear. The question is: can each person decide for herself what constitutes a violation of her own dignity? If so, a person's dignity would not be violated if she did not experience it as such.

In opposition to this notion of an individualistic definition of dignity is the view that, since moral law is associated with dignity, the popular moral views of society

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[45] *Id* 486. See also Currie and De Waal (n 13) 41. Currie and De Waal submit that 'the length of the period of the waiver, the danger of abuse and the position of the beneficiary' might also be decisive in terms of whether a waiver will be allowed.

[46] De Schutter (n 13) 496. A peepshow refers to the situation in which 'a woman exposes her naked body to spectators sitting in one-person cabins placed around the stage [which only] become[s] visible after payment'. See, *BVerfGE* 64, 274 (1981) 277-279, as translated in Michalowski and Woods *German constitutional law: The protection of civil liberties* (1999) 105.

[47] Currie and De Waal (n 13) 41, emphasis added.

[48] *Ibid*.

[49] Botha explains this in (n 1) 178; Du Plessis 'Affirmation and celebration of the "religious other" in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?' (2008) *African Human Rights LJ* 376 at 389; Thompson 'Prostitution – a choice ignored' (2000) *Women's Rights Law Reporter* 217 at 229.

[50] Botha claims that society is plural and that the notion of a shared public morality is in conflict with pluralism (n 1) 187, 189, 203 and 205.

[51] In respect of peepshows, see Botha (n 1) 185; Michalowski and Woods (n 46) 106.

can be, and often are, used to determine the content of human dignity.[52] This is justified by the idea of a shared public morality.[53] Such a notion is, however, contrary to the plurality of worldviews in modern societies.[54] If a shared public morality does not exist, then the popular moral views, which are used to inform dignity, in fact only represent the convictions of the majority. Such a blatant disregard of minority convictions would certainly not be in line with dignity.[55]

Nonetheless, it is asserted that dignity may still be informed by these moral perceptions, since a state needs to govern from a specific moral point of view.[56] The effect of applying this concept is that certain treatment might amount to a violation of dignity, regardless of whether the individual experiences it as such.

However, despite its relation to moral law, it is argued that the morals of the majority cannot be used to interpret dignity. Since the Constitution is founded upon moral law, public morality is now found within and limited to the constitutional text and spirit. Although decisions were therefore previously based on the moral views of the majority it should now be based on constitutional values.[57] This suggests that treatment should not be classified as a violation of a person's human dignity, purely because the majority of society regards it as objectifying. Instead, it should be interpreted in relation to other constitutional values.

In fact, when interpreted within this constitutional milieu of freedom and equality, contrary to the idea of a shared public morality, dignity has been understood to demand tolerance of differences.[58] Such an interpretation suggests

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[52]For the idea that dignity is closely related to moral law, see *BVerfGE* 64, 274 (1981) 277-279, as translated in Michalowski and Woods (n 46) 105; Du Bois (n 17) 133-134, 137. Du Bois refers to a Kantian idea, which he calls the universability test. This test can be applied in situations where the freedom of the individual is in conflict with the dignity of the community. The individual's choices are tested against moral law to determine whether it complies with 'universal legislation'. This test confirms this strong connection between dignity and morality.

[53]Thompson refers to this idea of a shared public morality and submits that it is not widely accepted and ignores the needs of individuals (n 49) 229, 232, 239. That fact that courts support this idea is evident from Sachs J's words in *NCLGE* (n 1) para 118. This paragraph is referred to in Woolman (n 3) 36-14 n 2.

[54]Botha discusses the suggestion that the image of man should be flexible to accommodate plurality. He claims that society is plural and that the notion of a shared public morality is in conflict with pluralism (n 1) 187, 189, 203 and 205.

[55]Botha explains that minority viewpoints should be accommodated (n 1) 215.

[56]*Jordan v S* (n 9) para 104.

[57]*Id* para 105.

[58]Botha (n 1) 213. This is discussed in the context of sodomy in *NCLGE* (n 1) paras 134, 135; Barnard-Naude 'Beyond the brother: Radical freedom' in Barnard-Naude, Cornell and Du Bois (eds) *Dignity, freedom and the post-apartheid legal order* (2008) 273 at 279. On the notion that dignity should be tolerated, see Botha (n 1) 187, 208 and 215 (in the context of sodomy); Du Plessis (n 49) 289; Thompson (n 49) 237 (in the context of prostitution); Woolman (n 3) 36-14; Weait 'Harm, consent and the limits of privacy' (2005) *Feminist Legal Studies* 97 at 105 (Weait mentions the fact that some forms of treatment might be repulsed by some, yet desired by others); Davis and Woolman 'The last laugh: *Du Plessis v De Klerk*, classical liberalism, Creole liberalism and the application of fundamental rights under the Interim and Final Constitution' (1996) *SAJHR* 361 at 396.

an obligation to allow or at the very least tolerate different ideas or moral views on human dignity, regardless of whether the state governs from that same moral point of view. In fact the legislature is encouraged 'to enact laws which foster morality, but that morality must be one which is founded on our constitutional values'.[59] This contradicts the idea mentioned above that morality can be founded on dominant societal convictions.

Accordingly, should dignity be interpreted as tolerance of difference, the individual's definition of her own dignity should only be limited by the fact that it cannot interfere with the dignity of others.[60] This indicates that she should be allowed to consent to treatment which she does not consider to be objectifying. Those who do in fact consider that same treatment to be against their subjective idea of human dignity have an equal right not to consent thereto.[61]

When the content of dignity is solely determined by the moral ideas of the majority, it causes stigmatisation of the practices of the minority.[62] This is evident in the case of prostitution.[63] It is said that prostitutes, a minority group, are stigmatised because of the criminalisation of their occupation and that this represents the moral views of the majority. Stigmatisation is in itself a violation of human dignity, as it results in marginalisation and degradation. Accordingly, the prohibition of consent to sex work itself, which is believed to protect human dignity by outlawing objectifying treatment, violates the dignity of prostitutes.[64]

Moreover, the practice of prostitution was only regarded as immoral long after it came into existence.[65] This indicates the ever-evolving morals of society.[66]

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[59] *Jordan v S* (n 9) para 105. See also *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 56; *Du Plessis v De Klerk* (n 43) paras 103, 110.

[60] This idea that a person can do as she likes as long as the interests of others are not influenced is also mentioned in *Lochner v New York* 198 US 45 (1905) 57.

[61] SALRC (n 11) 189. This is said in the context of sodomy in *NCLGE* (n 1) para 137. See also *Jordan v S* (n 9) para 113.

[62] Du Plessis (n 49) 389. Therefore, allowing consent can assist in erasing such stigma. (Thompson (n 49) 217, 238.) Du Plessis discusses the idea that stigmatisation, marginalisation and devaluation of minority groups, especially, violate dignity. See also *NCLGE* (n 1) para 22, Ackermann quotes from *Vriend v Alberta* [1998] 1 SCR 493 para 69. Furthermore in para 25 Ackermann explains that the stigmatisation of minorities through discriminating legislation is all the more unacceptable, since a minority group would never be in the position to change such laws. They can only rely on the Constitution for protection. Botha explains that minority viewpoints should be accommodated (n 1) 215.

[63] This is referred to in Thompson (n 49) 217; Fritz (n 12) 238; Radin 'Market-inalienability' (1987) *Harvard LR* 1849 at 1923.

[64] SALRC (n 11) 19-20, 221. Davis examines the dissenting judgment of Kriegler J in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 80. Kriegler J explains that stigmatisation is inconsistent with the purpose of the Constitution. See Davis (n 17) 405.

[65] Thompson (n 49) 211, 229. Thompson discusses the history of prostitution and how prostitutes were regarded as sacred. The SALRC refers to the criminalisation of prostitution in several countries, showing that in many countries prostitution was only criminalised very recently. In Holland prostitution was only criminalised in 1911 (art 250bis of the Dutch Penal Code of 1886) and in the USA it was accepted until the end of the 19th century (the White-slave Traffic Act of 1910). SALRC (n 11) 113, 125

Another example in this regard is that of sodomy.[67] Within a few years the attitude toward the prohibition of sodomy changed radically. Where at first it was considered a protection of human dignity, it is now seen as a violation thereof.[68] To base the interpretation of a constitutional right on the morals of the majority at a given time therefore seems risky.

In order to prevent a situation in which the minority is disadvantaged, the right to dignity should subsequently not be influenced by the ever-evolving morals of the society. This is of particular importance in South Africa, since our Constitution requires an interpretation that prevents a recurrence of the past and its gross violations of human rights.[69] During Apartheid the morals of the white community dominated; stigmatising and suppressing black people. Stigmatisation and marginalisation of the minority should therefore be avoided in pursuit of human dignity.

Tolerating different ideas on human dignity might even be beneficial to the state, as well as the person consenting and the society as a whole. One of the benefits is that, by allowing an objectionable practice that the individual herself does not regard as such, the state is able to regulate the practice.[70]

The Dutch call this conception regulated tolerance.[71] This kind of tolerance does not necessarily indicate an acceptance of the practice, but merely a tolerance of differences.[72] Regulations are required in order to protect the person consenting, as well as those who might be affected and/or do not morally approve of such objectification.

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and 142.

[66]See Woolman (n 3) 36-47; Botha (n 1) 117; Cornell 'Bridging the span toward justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence' in Barnard-Naude, Cornell and Du Bois (eds) *Dignity, freedom and the post-apartheid legal order* (2008) 18 at 19. This idea that morals are ever changing is evident from the Dutch practice where as soon as something is tolerated, it does not take long before it is accepted and completely legalised. See also *NCLGE* (n 1) para 42. Ackermann J acknowledges the evolving morals of society in the context of sodomy.

[67]Woolman discusses how our ideas regarding sodomy have changed (n 3) 36-49.

[68]*NCLGE* (n 1) paras 26, 28, 107.

[69]See *S v Makwanyane* (n 9) 329.

[70]By prohibiting an objectionable practice all control is lost. Precedence shows that certain practices do not cease merely because they are prohibited. Prohibiting dwarf tossing and prostitution merely results in its practice outside of the rules and fosters foul play, such as under-age prostitutes and human trafficking.

[71]Brants specifically uses the term 'regulated tolerance' in this regard, in Brants 'The fine art of regulated tolerance: Prostitution in Amsterdam' (1998) *Journal of Law and Society* 621 at 625. For more on this concept, see Pakes 'Tolerance and pragmatism in the Netherlands: Euthanasia, coffeeshops and prostitution in the "Purple Years", 1994-2002' (2003) *International Journal of Police Science and Management* 217 at 226; Thompson (n 49) 226.

[72]Regulated tolerance can be regarded as a compromise, see Pakes (n 71) 226. In *Jordan* para 125 it is discussed that tolerating prostitution does not necessarily make the practice normal. See also SALRC (n 11) 154.

3.2 Plurality of preference

Another matter, which relates to the plurality of modern societies, is that dignity allows each individual to choose her way of living and how she is treated.[73] This contradicts the averment that the freedom of the individual should yield to the dignity of the community.[74] Similar to the previous argument this element of dignity, which allows the individual to make her own choices, encompasses the idea that dignity demands tolerance of differences. In the previous argument this idea was applied to the interpretation of dignity, by demanding that an individual's different interpretation of dignity be tolerated. That is, she should be allowed to consent to treatment which she does not consider to be objectifying. The present topic relates more to the application of dignity to everyday situations, by demanding that an individual's different choices be tolerated (regardless of whether she deems the treatment her choices allow to be objectifying).[75] The difference between these two concepts is that the previous argument results in a subjective interpretation of dignity, whereas the present argument deals with the application of an objectively interpreted human dignity. The former argument suggested that, if subjectively and individually interpreted, dignity should *support* consent to objectifying treatment. It is therefore necessary to examine whether the same would be true should dignity be interpreted objectively.

An objective interpretation of dignity is impervious to the moral convictions of society or of personal preference. This is crucial, since, as mentioned above, decisions on whether certain actions should be allowed or not were previously and often still are based on moral ideas and personal preference.[76] Our new Constitution aims to change this by demanding that such decisions be based on constitutional values.[77]

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[73]This argument presupposes that some people do in fact choose objectifying treatment. SALRC (n 11) 28, 167 and 185.

[74]This averment is justified throught the notion of utilitarian balancing, which requires that the greatest good for the greatest number be attained. See McCrudden (n 1) 715. See also Woolman (n 3) 36-9.

[75]This argument suggests that some might in fact desire objectifying treatment. SALRC (n 11) 167.

[76]Woolman supports the idea that decisions were and still are based on the notion of a shared public morality. He refers specifically to Sachs J's decision on prostitution in *NCLGE* (n 1) para 228 (n 3) 36-14 n 2. Thompson indicates that decisions are based on morals and personal preference, especially where homosexuality or sex out of wedlock is concerned. He argues that often judges give preference to actions performed within heterosexual matrimony (n 49) 229. For more on the courts' narrow ideas on sexual conduct, see Fritz (n 12) 234-235; Weait (n 58) 111, 113, 117. This is also discussed in *Laskey, Jaggard and Brown v UK* (1997) 24 EHRR 39 para 40 (hereafter referred to in the main text as '*Laskey*'); Adler 'The dignity of sex' (2008) *University of California, Los Angeles Women's LJ* 1 at 17. See also Botha (n 1) 213-214.

[77]Ackermann 'Equality and the South African Constitution: The role of dignity' (2000) *Heidelberg JIL* 537 at 554. See also Bhana and Pieterse 'Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited' (2005) *SALJ* 865 at 875. Botha refers to the idea that basing decisions on the constitutional value of dignity allows plurality (n 1) 208, 213, 214. On

Due to this contention that dignity cannot be informed by the moral opinions of the majority, it is demanded that dignity not be used as a guise to base decisions on these very opinions. The situation where courts base their decisions on their own moral perceptions or personal subjective preference and then reinforce their decisions by claiming that they are based on dignity has occurred in the past and still occurs today. This type of decision-making is criticised in the context of sadomasochism, where it is asserted that a decision based on subjective moral ideas cannot be palmed off as one based on human dignity simply to add strength thereto.[78] As a result, precedent cannot always be relied upon. As O'Regan J observes, '[a] Constitutional democracy that is based on objective express values needs to find other forms of reasoning (not rely on precedent) which might introduce ideas that are controversial and criticised'.[79]

When applied to the present dispute, these objective express values do not necessarily proscribe consent to objectification. This can be demonstrated by examining each value separately. Accordingly, the components in favour of allowing such consent can be identified.

Human dignity, as an objective express value, demands tolerance of difference and a sphere in which individuals are free to create their own identities.[80] It supports a plurality of morals and the idea that each individual should be free to act as she deems fit, in accordance with her own morals. The fact that each person has inherent, individual dignity suggests that the individual's dignity and right to her own point of view cannot succumb to that of the group.[81] This objective interpretation of dignity implies that individuals should be allowed to make their own choices, regardless of whether the decision is to authorise objectifying treatment.

The value of freedom, likewise, gives 'legal credence to the choices other people make about alternate lifestyles'.[82] People are free to act as they wish, as

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the argument that decisions should not be based on the moral majority, see Thompson (n 49) 237. Radin shows the dangers of basing decisions on the moral majority (n 63) 1864-1866. For more on this idea see *Jordan v S* (n 9) para 102.

[78]Michalowski and Woods (n 46) 106; *Jordan v S* (n 9) paras 87, 107. The SALRC indicates that South Africans who oppose prostitution do so mainly because they find the practice immoral. They support the criminalisation thereof for fear that, should this moral opinion not be entrenched in law, it might change, resulting in the moral decay of society. SALRC (n 11) 174, 177, 178, 182, 191-192 and 196. See also Woolman (n 3) 36-49.

[79]O'Regan 'From form to substance: The constitutional jurisprudence of Laurie Ackermann' in Barnard-Naude, Cornell and Du Bois (eds) *Dignity, freedom and the post-apartheid legal order* (2008) 6 at 16.

[80]Botha 'Human dignity in comparative perspective' (2009) *Stell LR* 171, 213. For the idea of a sphere in which to create personal identity, see Botha (n 1) 205. See also SALRC (n 11) 228.

[81]For the contention that each person has individual dignity, see *S v Makwanyane* (n 9) para 20 (per Chaskalson J).

[82]Woolman (n 3) 36-13 n 4. Woolman quotes from *Volks NO v Robinson* 2004 6 SA 288 (CC) paras 154 and 156.

long as others enjoy an equal breadth of freedom.[83] This idea corresponds with Kant's definition of freedom and his Kingdom of Ends. According to his philosophy, no person can be forced to act in accordance with this moral Kingdom.[84] Subsequently, a person cannot be prohibited from acting contrary to the Kingdom and the moral ideas of the majority. An individual is therefore free to consent to any treatment, regardless of whether such consent would be deemed immoral by others.

Consenting to treatment that might be deemed immoral or objectifying by the majority is not necessarily prohibited by the value of equality either. It is maintained that equality does not demand the elimination of differences; in fact it supports equal public recognition thereof.[85] People should enjoy equal dignity and freedom and their moral views on dignity and freedom should carry equal weight.

Therefore, by applying these objective express values to this dispute, it seems as though all three values could support the idea of deviating viewpoints and consent to treatment based on personal choice, not fear of prosecution. The fact that our Constitution celebrates difference and condemns decisions based on morality has often been emphasised in constitutional jurisprudence.[86] As stated in *NCGLE*:

> [O]ur future as a nation depends in large measure on how we manage difference. In the past difference has been experienced as a curse, today it can be seen as a source of interactive vitality. The Constitution acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.[87]

4 Requirements for valid consent

4.1 Four elements

It has been argued that consent to objectification should not be allowed, since the consent is not valid.[88] This is often due to economic coercion, especially in respect of prostitution.[89] Accordingly, it can be argued that valid consent to objectifying treatment should be allowed. From the Constitutional Court's decision in *NCGLE* certain conditions for such consent have transpired. These conditions

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[83] *Ferreira v Levin NO; Vryenhoek v Powell NO* (n 3) para 49.
[84] See Du Bois (n 17) 129.
[85] For the idea that it does not suggest eliminating differences, see *NCLGE* (n 1) paras 22, 132. Ackermann J quotes from *Vriend v Alberta* (n 62) para 69. See also Woolman (n 3) 36-29. The fact that equality supports public recognition of differences is mentioned in Botha (n 1) 208; Barnard-Naude (n 58) 280.
[86] See, eg, Davis (n 17) 399. See also *Jordan v S* (n 9) para 104.
[87] *NCLGE* (n 1) para 135.
[88] For the idea of prohibiting any consent to objectification due to the great possibility that it was coerced, see Radin (n 63) 1910.
[89] Thompson (n 49) 232.

are: that the objectification is done in private, that it is genuinely and unequivocally consented to by informed adults and that it does not harm others or interfere with their right to do the same.[90]

Four legal concepts relate to these conditions. Firstly, the condition that the treatment should be done in private relates to the right to privacy. Secondly, the condition that the treatment should be genuinely and unequivocally consented to by informed adults relates to, and can be substantiated by, the common law principles of the consent defence and contractual autonomy. Finally, the condition that the treatment should not harm others or interfere with their right to do the same relates to the Kantian philosophy, mentioned above, of an equal breadth of freedom (and dignity) for each individual.

4.2 Privacy

Privacy is presented as a requirement for the consent to objectification due to the idea of a private sphere in which the outside world, including the state, should not interfere. This private sphere, in turn, should not interfere with the outside world.[91] Consequently, the idea evolved that practices within such a sphere should be tolerated as long as they do not harm the outside world, or interfere with the rights of others to do the same.

This private sphere is often referred to in connection with sexual practices and private intimacy, yet as decided by the European Court of Human Rights it is 'too restrictive to limit the notion [of private life] to an "inner circle" in which the individual may live his own personal life as he chooses and exclude therefore entirely the outside world encompassed within that circle'.[92] This indicates a broader interpretation of privacy, which incorporates a right to autonomy.[93] Such an interpretation of the right to privacy is referred to as 'decisional privacy'.[94] In terms of decisional privacy the individual is entitled to make choices concerning significant matters and to have control over her own affairs.[95] Sadomasochism, prostitution and dwarf tossing can all be regarded as significant matters as they relate to sexual preference and/or employment.[96]

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[90] *NCLGE* (n 1) para 26 as referred to in Ackermann (n 77) 548. See also Michelman 'Freedom by any other name? A comparative note on losing battles while winning wars' in Barnard-Naude, Cornell and Du Bois (eds) *Dignity, freedom and the post-apartheid legal order* (2008) 91 at 104; Thompson (n 49) 238; *Laskey, Jaggard and Brown v UK* (n 76) para 23. This view is supported by the German government in respect of prostitution, see SALRC (n 11) 131.

[91] See Davis and Woolman (n 58) 382-383; SALRC (n 11) 108, 194.

[92] *Niemietz v Germany* (1992) 16 EHRR 97. Michelman refers to this idea of a right to 'private intimacy' (n 90) 104.

[93] See Michelman (n 90) 104.

[94] Fritz (n 12) 231.

[95] This is discussed in Michelman (n 90) 104. See also SALRC (n 11) 192.

[96] For the idea that one should be able to decide over matters regarding sexual preference, see Weait (n 58) 101; *Laskey, Jaggard and Brown v UK* (n 76) paras 8, 30; Adler (n 76) 17.

Criticism against allowing consent to objectification within privacy is that this would not erase the stigma attached to such treatment. Instead it portrays the treatment as a shameful action, which should be hidden from the public. It also 'assumes a dual structure – public and private'.[97]

This public/private divide has been the subject of much debate, especially among feminist theorists. Firstly, it is unclear whether such a distinction is at all possible.[98] As Sachs J points out, these two spheres seem quite inseparable:

> [It] does not capture the complexity of lived life, in which public and private lives determine each other, with the mobile lines between them being constantly amenable to repressive definition.[99]

The effect of such inseparability in the context of objectification is that one cannot justify non-interference on the basis that the actions are performed in private and are therefore self-regarding.[100] Gavison discusses this contention in the context of pornography. By allowing someone to watch pornography in private the permissibility and availability, as well as society's tolerance thereof, is presupposed. The fact that an activity causes controversy also indicates that the act is not self-regarding. Accordingly, the violation of social norms in private leads to their eventual demise.[101]

Although unstable it cannot be argued that this distinction is nonexistent. There are too many fundamental differences between activities deemed to be 'private' and those deemed to be 'public'.[102] Hence, it is sometimes contended that despite the existence of such a distinction no legal significance should be afforded thereto. This stems from the notion that privacy harbours oppression, such as domestic violence.[103] The distinction should therefore not be invoked to justify different treatment.[104]

According to Gavison this distinction should however not be abolished completely as it may have some advantages if used appropriately.[105] Even feminists concede that some acts should be free from interference due to their intimate nature.[106] Although the protection of privacy might aid oppression, some private acts

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[97] *NCLGE* (n 1) para 110.
[98] Weait (n 58) 99; Gavison 'Feminism and the public/private distinction' (1992) *Stanford LR* 1 at 9, 11. For an in-depth discussion of the public/private divide, see Boyd *Challenging the public/private divide: Feminism, law and public policy* (1997).
[99] *NCLGE* (n 1) para 110. This interrelatedness and instability is also evident from the argument that actions that violate public norms, such as dignity, cannot be considered 'private'. See *Manual Wackenheim v France* (n 12) para 4.2.
[100] Gavison (n 98) 14.
[101] *Id* 15.
[102] *Id* 10.
[103] *Id* 1-3, 8. See also the domestic violence case of *S v Baloyi* 2000 2 SA 425 (CC) para 16.
[104] Gavison (n 98) 10.
[105] *Id* 3.
[106] *Id* 33-34, 42.

are consented to freely. In such cases 'privacy is necessary to limit interference without requiring that we publicly judge all behaviour on its moral merits'.[107]

Another argument in favour of this distinction lies within the definition of privacy. It is contended that the definition of privacy is often too restricted. Privacy protects people and not places. It is therefore not the actions that are performed behind closed doors that are protected, but actions that are private in *nature*, whether performed in private or public. This suggests a more positive definition of privacy that supports personal identity and autonomous decision-making and demand that the state 'promote conditions in which personal self-realisation can take place'.[108]

4.3 The consent defence

The conditions, that consent to objectifying treatment should be genuine, unequivocal, informed and given by adult participants, coincide with the requirements for both contractual consensus and the consent defence. The main difference between these two concepts is that consent in terms of the consent defence might be given unilaterally. Boberg however argues that there is essentially no difference between the two ideas in this context.[109]

The defence of consent requires genuine consent, hence the following six requirements. First of all, consent should be given freely.[110] This requirement excludes coerced consent, but not consent to undesired treatment.[111] The rationale behind this is that consent does not necessarily imply desire but merely willingness.[112] Prostitutes may therefore consent to prostitution, regardless of whether they desire the treatment, as long as they are willing to endure it.

Secondly, consent should be given by a capable person.[113] Capability entails the capacity to appreciate the implications of the said consent.[114] This relates to the third requirement, that the consent should be informed. In addition to having full knowledge of the nature and the extent of the possible harm and risks, the person consenting should also appreciate and understand it.[115]

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[107] *Id* 37.
[108] *NCLGE* (n 1) paras 116-117.
[109] Neethling, Potgieter and Visser *Deliktereg* (2006) (5th ed) 96-97. His contention is based upon the fact that a contract can be terminated unilaterally, even though such termination would result in a breach of contract.
[110] For this requirement, see Neethling, Potgieter and Visser (n 109) 95 98; Harrison 'Law, order, and the consent defense' (1993) *Saint Louis University Public LR* 477 at 478.
[111] The idea that coerced consent is excluded is apparent from Neethling, Potgieter and Visser (n 109) 98.
[112] *Id* 101.
[113] *Id* 95, 98, 101. Harrison also refers to the requirement of legal capacity. Harrison 'Law, order, and the consent defense' (1993) 12 *St Louis Univ Pub LR* 477 478.
[114] See Neethling, Potgieter and Visser (n 109) 100.
[115] *Id* 96, 98, 99. See also Harrison (n 113) 478.

The fourth and fifth requirements for valid consent are that subjective consent should be given to the full extent of the treatment and that the harm should stay within the limits of the consent.[116] It is asserted that should these requirements to valid consent be adhered to the treatment would be lawful, since the consenter waived or restricted her own rights to the extent to which she consented.[117]

When these requirements are applied to sadomasochism, it seems as though such treatment should be allowed. This defence was raised in the case of *Laskey*.[118] Here it was argued that consent to genital torture was given freely and that the said treatment was in fact desired.[119] The persons consenting were mainly adult males who were capable of giving such consent.[120] They were informed about the risks and understood the consequences of their consent. The consent was subjective, for the full extent of the harm and the treatment stayed within the predetermined limits.[121]

The only hindrance in this context is that lawful consent is more readily regarded as a defence in delict than in criminal law.[122] Consent is usually not considered a defence in criminal law, unless non-consent is an element to the crime.[123] This is because the state is deemed to be the victim in criminal cases and the harmed person merely an important witness.[124] There are nonetheless exceptions to this rule, for example where consent to bodily harm is allowed because the harm is less dangerous, inflicted during sport or due to surgery.[125]

Professor Fitzgerald consults the English tax law in order to formulate a general principle for the availability of the consent defence in criminal law.[126] He gathers therefrom that consent should be allowed as a defence if it is reversible, done for the victim's greater interest or the welfare of others. He reasons that this set of principles explains why sadomasochism is prohibited whereas surgery is allowed:

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[116]For the requirement that subjective consent be given to the full extent of the harm, see Neethling, Potgieter and Visser (n 109) 100, 101.
[117]*Id* 95.
[118]*Laskey, Jaggard and Brown v UK* (n 76) para 20.
[119]*Id* 22, 23. Paragraph 40 defines the sadomasochistic actions as 'genital torture'.
[120]*Id* 23, 35.
[121]*Id* 38. This idea is conveyed in this paragraph, which states that the actions were restricted and controlled and no serious harm was inflicted.
[122]This is evident from Harrison's comparison between the two concepts. Harrison (n 113) 478, 479. For a similar discussion, see also Coetzee 'Onregmatigheid in die afwesigheid van belange-aantasting' (2004) *THRHR* 661 at 664.
[123]Harrison (n 113) 478, 479. Harrison lists circumstances in which consent would be irrelevant.
[124]*Id* 478.
[125]Neethling, Potgieter and Visser (n 109) 101. Harrison specifically refers to instances where the harm is less dangerous (n 113) 479, 480.
[126]Fitzgerald's theory is explained in Harrison (n 113) 482-483. See also Fitzgerald 'Consent, crime and rationality' in Bayefsky (ed) *Legal theory meets legal practice* (1988) at 209, 220-221.

> [W]hile the pain of medical treatment may equal that of non-medical torture and while both treatments may produce ends desired by the victim – freedom from illness in the one case and freedom from psychological tension in the other – the former provides a cure and so a more enduring liberation from the victim's condition, whereas the latter seems to afford no remedy but only temporary relief.[127]

This does not, however, explain the allowance of certain forms of cosmetic surgery, such as breast enlargements, or surgery which only affords temporary relief.[128] Fitzgerald's comparison between sadomasochism and surgery rather confirms than rejects the idea that consent to objectifying treatment, such as sadomasochism, should be lawful.

Harrison explores a more likely explanation for the criminalisation of consent to some forms of objectification and not others. She argues that the consent defence is available only if it does not interfere with the 'ownership, utility or paternal interests' of the dominant group.[129] This relates to the previous idea regarding the enforcement of dominant moral perceptions in a plural society.

The idea that consent cannot interfere with the 'ownership interests of the dominant group' suggests that the dominant group seeks to control the oppressed group by prohibiting consent to certain matters.[130] An example of such prohibition is the historical prohibition of consent to sex by unmarried women.[131] The protection of a woman's chastity was presented as justification for the prohibition, but the real reason was more likely to control them.[132]

Alleging that consent cannot be in conflict with the 'utility interests of the dominant group' means that the consent defence will only be available in circumstances where it can be used to the benefit of the dominant group.[133] In this context the oppressed group would therefore be allowed to consent to certain treatment to which others may not.[134] Again the idea of certain forms of cosmetic surgery, such as breast enlargements, as a form of physical harm that is not designed to extend life or ease physical pain, surfaces.[135] Harrison asserts that consent to this type of surgery is allowed in order to fulfil the wants of the dominant group, ie, men's desire for stereotypically attractive women.[136]

Boxing is advanced as another example in which the utility interests of the dominant group prevail. This dangerous contact sport is allowed although it has 'few virtues typically associated with competitive athletics' and 'most major

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[127] Harrison (n 113) 482 at n 25.
[128] *Id* 494, 495. More will be said on cosmetic surgery later on in this section.
[129] *Id* 488.
[130] *Id* 489.
[131] *Id* 490, 496.
[132] *Id* 490.
[133] *Id* 493.
[134] *Id* 496.
[135] *Id* 495.
[136] *Id* 496.

medical authorities have called for a ban of boxing events because of health risks'.[137] Harrison argues that the dominant group allows consent to this type of bodily harm due to its significant financial benefits.[138]

The understanding that the consent defence is only available if it is not against the 'paternal interest of the dominant group' suggests that the dominant group enforces its interests and norms on society.[139] This is clear from the fact that circumcision is allowed, whereas other forms of religious mutilation are not. Similarly, although tattooing is allowed, decorative scarring does not receive the same acceptance.[140]

Again the conclusion surfaces that legal principles such as the common law consent defence are not informed by constitutional values, but by the moral ideas of the majority.[141] It is therefore asserted that if the constitutional values of dignity, freedom and equality, instead of the moral ideas of the dominant group, were used to determine the availability of this defence, it would be allowed in cases regarding sadomasochism or similar forms of objectification.

4.4 Contractual autonomy

The alternative to the unilateral consent defence, as previously noted, is mutual agreement in terms of a contract. As stated above, the requirements of a valid contract are similar to that of the consent defence. There are six basic requirements: there should be *consensus* between the parties in the form of an offer and an acceptance;[142] there should be consideration, such as money; the parties should have the capacity to enter into a contract, ie, be able to understand the consequences thereof;[143] the parties should genuinely consent to the contract and its terms; the contract should have a lawful purpose;[144] and the contract should comply with any prescribed formalities.[145]

As most of the requirements resemble that of the consent defence, it will not be necessary to explain them all in detail. The requirement that the contract should have a lawful purpose is however unique to the law of contract, since the sole purpose of the consent defence is to allow an otherwise unlawful action. This requirement is clearly problematic in respect of consent to objectification.

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[137] *Id* 498.
[138] *Ibid*.
[139] *Ibid*.
[140] *Id* 498-501.
[141] In *NCLGE* (n 1) paras 26, 76 and 108 it is stated that sodomy was criminalised due to moral and religious views.
[142] For an in-depth discussion of this requirement, see Van der Merwe *et al* 'Aanbod en aanname' in *Kontraktereg algemene beginsels* (2007) at 57-107.
[143] *Id* 24-25.
[144] *Id* 25-26.
[145] *Id* 8-9. Another requirement is that the performance in terms of the contract be possible.

The effect of unlawfulness is that the contract is either void or unenforceable.[146] A contract that is void is not a contract whatsoever and has no legal consequences. The State may interfere with contracts that are void. An unenforceable contract, on the other hand, is binding between the two parties; yet one party cannot legally force the other to perform. Where a person genuinely agrees to objectification and does not wish to withdraw from the agreement, unenforceability would have no effect on the contract. Should the effect of some unlawfulness therefore be that the contract is void, the state may prevent a person from performing in terms thereof; whereas if the effect is that the contract is merely unenforceable, the state would not be allowed to intervene with such performance.

When deciding whether a contract is unlawful, particularly whether the state should be able to intervene or not, it should be kept in mind that contractual autonomy is the starting point of contract law.[147] Contractual autonomy essentially means that parties can choose whether, with whom and on what terms to enter into a contract.[148] This concept has been bolstered immensely in the past.[149] At first it was expected that the new Constitution would limit contractual autonomy, yet it has had quite the opposite effect.[150]

In two Constitutional Court cases, *Brisley v Drotsky*[151] and *Afrox Healthcare Bpk v Strydom*,[152] contractual freedom is seen as part of both freedom and human dignity.[153] These cases were decided with reference to Kantian philosophy. Kant was of the opinion that 'to disregard contractual autonomy is to disregard dignity'.[154] It is also due to contractual autonomy that *Sasfin (Pty) Ltd v Beukes*[155] and *Shifren SA Ko-op Graanmaatskappy BPK v Shifren*[156] endorse the principle of *pacta sunt servanda*.[157] This principle stipulates that the terms of a contract should be enforced precisely.[158]

Nonetheless, contractual freedom is not applied absolutely.[159] A contract is entered into within an interdependent society and its specific law system; it is

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[146] *Id* 215-219.
[147] *Id* 11, 20. See also Bhana and Pieterse (n 77) 886; Jordaan 'The Constitution's impact on the law of contract in perspective' (2004) *De Jure* 58 at 59.
[148] This universal meaning is mentioned in Van der Merwe *et al* (n 142) 11; Bhana and Pieterse (n 77) 867; Grové 'Die kontraktereg, altruïsme, keusevryheid en die Grondwet' (2003) *De Jure* 134 at 134; Jordaan (n 147) 59.
[149] See Botha (n 1) 211.
[150] *Id* 212. Botha explains this result.
[151] 2002 4 SA 1 (SCA). Hereafter referred to as '*Brisley*'.
[152] 2002 6 SA 21 (SCA). Hereafter referred to as '*Afrox*'.
[153] See *Brisley* (n 151) para 35E, *Afrox* (n 152) para 38B as referred to in Grové (n 148) 138.
[154] Kant is quoted in Jordaan (n 147) 59-60.
[155] 1989 1 SA 1 (A).
[156] 1964 4 SA 760 (A).
[157] Jordaan (n 147) 60, 61.
[158] Van der Merwe *et al* (n 142) 11.
[159] *Ibid*; Grové (n 148) 134.

therefore not 'allowed to function within its own juridical sphere'.[160] The state may interfere with a contract, but not unduly so.[161] Due to this supreme position of contractual autonomy in contract law, state intervention does not often occur in practice.[162] This is of particular importance, as it indicates that freedom is regarded as the supreme value within the field of contract law. This is probably one of the only spheres of law in which this is the case.

It is important to note that this idea of supreme contractual autonomy, as illustrated in Supreme Court of Appeal cases such as *Afrox* and *Brisley*, has been severely criticised by academics. They argue that the court's libertarian interpretation of contractual autonomy is based on the classic model of contract law, which ignores the reality of unequal bargaining power in South Africa.[163] It should however be kept in mind that this article focuses on situations where no such unequal bargaining power exists.[164]

For a contract to be unlawful and therefore invalid or unenforceable, its purpose must be against public policy or *contra bonos mores*.[165] There is uncertainty over the difference between public policy and boni mores. It has been said that public policy relates more to the welfare of the state or the protection of freedom, whereas boni mores is associated with morality.[166]

It is at this stage necessary to explain the relationship between these common law norms and constitutional values. Previously these common law norms reflected the moral wishes of society. These norms have however not been abolished by the new constitutional values but are developed by them in order to now reflect the spirit, purport and objects of the Bill of Rights.[167] When examining the law of contract these common law norms should therefore still be applied.

There are numerous factors that could be considered when determining whether a contract is in fact against public policy. Two critical factors should be emphasised, namely the balance of the interest of the individual against that of

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[160]This quote can be found in Van der Merwe *et al* (n 142) 11, 15. For the idea that people are all interdependent, see Grové (n 148) 136.

[161]The notion that the court may interfere with a contract is found in *Lochner v New York* (n 60) 53, 54. Bhana discusses the idea that this interference cannot be made unduly. Bhana and Pieterse (n 77) 873.

[162]Botha makes this point (n 1) 212.

[163]Bhana and Pieterse (n 77) 884.

[164]Or rather, when one acknowledges that all contracts involve a degree of unequal bargaining power, no less equal than the bargaining power involved in any everyday contract.

[165]This effect is discussed in Van der Merwe *et al* (n 142) 206; Grové (n 148) 134. Contracts against the common law, any statutory provisions or the Constitution might also result in its invalidity or unenforceability.

[166]For a discussion on the differences between these two concepts, see Van der Merwe *et al* (n 142) 207-208.

[167]*Carmichele v Minister of Safety and Security* (n 59) paras 36, 56. *Du Plessis v De Klerk* (n 43) para 110.

society[168] and whether the contract violates any statutory or constitutional provisions.[169] It could however be argued that the former factor forms part of the pre-constitutional definition of public policy and that the latter factor is more in line with its post-constitutional definition.

The effect of balancing the interest of the individual against that of society is that the more the interest of the individual is at stake and the less the interests of the society are compromised, the less likely it is that such a contract would be unlawful.[170] In terms of this factor a contract in favour of sadomasochism would probably be lawful since it does not affect the interests of the public. For, although such a contract might be against the moral ideas of some individuals in the society, Jordaan notes that 'one must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness'.[171]

A contract which is allegedly against human dignity because it allows for objectifying treatment might be regarded as an example of the second above-mentioned factor; a violation of a statutory or constitutional provision. However, since contractual autonomy forms part of dignity, the ever-present predicament of dignity on both sides of the scale surfaces yet again. The contract violates dignity by allowing for objectification, while simultaneously promoting it by endorsing the contractual freedom found within dignity.

Human dignity is not only balanced against the freedom found within itself but also against freedom as a value in its own right. This balance of dignity and freedom occurs on a different playing field than usual for, as mentioned above, this is one area in which freedom does in fact enjoy more prominence than dignity.

Should a contract in favour of objectifying treatment however be found unlawful despite the above reasoning, it is necessary to examine the effect of such unlawfulness. It is difficult to determine whether an unlawful contract is to be void or merely unenforceable. Where a statute specifically prohibits a certain contract, the act might stipulate whether such contracts would be void or unenforceable. It is also suggested that one could consider the degree to which society disapproves thereof or to which degree it is in conflict with the interests of society.[172]

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[168]Public policy and *boni mores* are compared in Van der Merwe *et al* (n 142) 213. Van der Merwe refers to *Sasfin (Pty) Ltd v Beukes* (n 155) para 9 in this regard.

[169]Van der Merwe illustrates the connection between public policy and the Constitution. Van der Merwe *et al* (n 142) 206. See also, Grové (n 148) 134.

[170]See Van der Merwe *et al* (n 142) 218.

[171]Jordaan (n 147) 61. See also *NCLGE* (n 1) para 37. In this case it is decided that moral reprehension and prejudice does not constitute a 'legitimate purpose' in terms of the Constitution (n 14) s 36.

[172]Van der Merwe *et al* (n 142) 218 217-218.

Since the interests of society and its degree of disapproval is associated with public policy, it has been argued that public policy is simply 'an expression of changing values' and that in order to determine whether a contract is against public policy, one has to 'look at the moment it was attempted to enforce the contract'. Due to this portrayal of a fickle public policy, it is contended that agreements that are considered against public policy should be unenforceable rather than void.[173]

It might however be asserted that public policy should be less fickle now that it is based on constitutional values, such as human dignity. This assertion is however negated by the allegation that dignity is also informed by the changing moral perceptions of society. Furthermore, it could be argued that should dignity not be informed by the moral attitude of the majority, but rather be interpreted as a value which demands tolerance for difference, such a dignity would also favour the unenforceability of invalid contracts.

4.5 Equal breadth to others

In *NCGLE* it was decided that 'the private conduct of consenting adults which causes no harm to anyone else' should not be criminalised.[174] This idea of allowing actions because they do not affect others features prominently throughout this whole article and is one of the conditions for allowing consent to objectification. It was first introduced in Ackermann's reference to the Kantian theory that a person should be free insofar as her freedom is consistent with a similar degree of freedom for others.

The question is: when is objectifying treatment between two people considered harmful to anyone else? A reasonable answer might be that a third party is harmed if she did not consent to the said treatment, yet is similarly objectified. Furthermore, if the objectification of one person interferes with the rights of a third party to do the same, or with any other rights of a third party, it might also be considered harmful.[175] Similarly, actions that are against the public interest might also be harmful to others.[176] In *Laskey* it was however submitted that consent to sadomasochism, as an example of objectification, would not *per se* be injurious to public interest and would therefore not be harmful to others.[177] This logic is of particular relevance where the objectification is performed in

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[173] The quotes in this paragraph are taken from Van der Merwe *et al* (n 142) 217. Although mention is only made to public policy in this regard, the same principles could be applied to the *boni mores* of society.

[174] Ackermann quotes from *NCLGE* (n 1) para 26, in Ackermann (n 77) 584.

[175] For the idea that one's actions cannot interfere with another's right to do the same, see *Lochner v New York* (n 60) 75. On the notion that our actions cannot interfere with the rights of others, see De Schutter (n 13) 494.

[176] Such treatment may be against public safety, morals or welfare, see *Lochner v New York* (n 60) 57.

[177] As referred to in *Laskey, Jaggard and Brown v UK* (n 76) para 21.

private, beyond the knowledge of the public. Similarly, activities that offend the moral convictions of the majority cannot be perceived as 'harm' in this sense. This relates to the theory that decisions should not be based on the moral views of the majority. According to the above reasoning objectification between two consenting parties would not harm anyone else.[178]

5 Allowing objectifying treatment could be beneficial

Not only would some forms of objectifying treatment not harm others, they might actually be beneficial to the objectified person. From a literature study on the subject three main benefits transpire. Allowing consent to objectifying treatment could lead to empowerment, erase social stigma and address the dangers of the said treatment.

Prostitution can be used to illustrate how permitting consent to objectification might be empowering. Being allowed to decide for oneself and control one's own life is personally liberating.[179] Jobs that involve objectification, like prostitution, can be said to offer more flexible hours and free time.[180] This type of control over one's life can be beneficial, especially where the individual has family obligations. The opposite might, nonetheless, also be true. Especially with prostitution, individuals are often forced into objectifying jobs and lead very restricted lives. Individuals might, for example, be forced to work in a brothel as a result of human trafficking.[181] These situations are however not relevant to this discussion, as the focus of this article is on objectification to which free and genuine consent has been given.

Jobs involving objectification also provide for empowerment by way of economic freedom.[182] Due to the fact that these jobs are stigmatised and the treatment is regarded as humiliating and degrading, people who do consent thereto often receive generous compensation.[183] Thompson notes that: '[w]omen

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[178]One objection in this regard is that although treatment may not harm others, those consenting to the treatment are often harmed. Sadomasochism and dwarf tossing presuppose physical injury. In *NCLGE* (n 1) it is emphasised that no physical harm is caused by consensual sodomy, see (n 1) paras 32, 108 and 118. The question, however, is what constitutes harm? For two consenting sadomasochists the 'torture' they inflict is not in the least perceived as harmful. See also heading 7 on harmful practices that are in fact allowed, such as surgery and sport.

[179]This is mentioned several times in Thompson (n 49) 217, 224, 228, 236 and 237; SALRC (n 11) 28, 192, 193, 194, 195, 196 and 220. The SALRC explains that objectification, such as prostitution, could enhance self-determination, self-esteem, self-care and choice.

[180]Thompson (n 49) 228, 229 and 237; SALRC (n 11) 32, 168 and 185.

[181]See Leidholdt 'Prostitution: A violation of women's human rights' (1993-1994) *Cardozo Women's LJ* 133 at 135.

[182]Thompson (n 49) 217, 224 and 228.

[183]SALRC (n 11) 32, 167 and 168.

choose prostitution as an economic alternative to low-paying, monotonous labour'.[184] Usually these kinds of jobs do not require a certain level of education. Uneducated people are therefore afforded the chance to earn much more than they would have been able to earn anywhere else.[185] Similarly, jobs like prostitution and dwarf tossing may be seen as helping to alleviate the plight of the unemployed. In *Wackenheim*, for example, it was argued that dwarf tossing was the only job that the appellant could secure.[186]

It is asserted, with respect to prostitution specifically, that it affords sexual autonomy.[187] A free space is provided in which women are able to act on their desires.[188] By acknowledging that women have property rights to their own sexuality, women are given the power to set the terms and demand payment for their time and skills.[189]

The permission to consent to objectification and the legalisation thereof could furthermore aid in the erasure of social stigma.[190] It is also said that the tolerance of objectionable conduct often results in the acceptance and legalisation thereof.[191] The ever-changing moral perceptions of the majority might be responsible for this occurrence.[192] Social stigma is a barrier that restricts freedom.[193] Individuals are unable to express their freedom for fear of social rejection. The stigmatisation of prostitution prevents women from acting on their sexual desires. This stigma affects the way all sexual interaction is seen. Sexual interaction that does not conform to society's idea of morally acceptable sex is likened to prostitution.[194] As a matter of fact, it seems as though the only sexual interaction that is not morally apprehended by society is sex within a long-term heterosexual relationship, preferably not out of wedlock.[195] Allowing prostitution and sadomasochism as forms of 'uncivil' sex might therefore aid in the recognition of feminine desire and the erasure of social stigma.[196]

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[184]Thompson (n 49) 232.
[185]SALRC (n 11) 27. In addition to the higher earning potential, earnings are paid immediately with these kinds of jobs and one can therefore earn everyday.
[186]*Manual Wackenheim v France* (n 12) para 3. I refer to Mr Wackenheim as the appellant to avoid confusion. In this case he is actually referred to as the 'author'.
[187]SALRC (n 11) 28 167.
[188]For the idea of a free space in which to act on desires, see Fritz (n 12) 239. See also Thompson (n 49) 217, 224, 228 and 237.
[189]Fritz (n 12) 240, 247.
[190]This is said with regard to the decriminalisation of sodomy in *NCLGE* (n 1) para 28. See also Thompson (n 49) 217, 238.
[191]Brants explains this with regard to the tolerance of prostitution in (n 71) 625.
[192]See Woolman (n 3) 36-47; Botha (n 1) 117; Cornell (n 66) 19. See also *NCLGE* (n 1) para 42. Ackermann J acknowledges the changing morals of society in the context of sodomy.
[193]Fritz (n 12) 237.
[194]That is, such women are called 'whores'.
[195]The preference in South African laws and jurisprudence for 'civil' sex is mentioned in SALRC (n 11) 15, 182.
[196]Fritz discusses these effects of stigmatisation and refers to the term 'uncivil sex' in (n 12) 238-239. See also *NCLGE* (n 1) para 28.

It is however contended that the moral attitude of society does not always conform to the current legal position, as is suggested above. According to the SALRC, prostitutes remain stigmatised in the Netherlands and the Côte d'Ivoire, regardless of the decriminalisation of the profession.[197]

The final benefit of permitting consent is that the dangers of objectifying treatment might be addressed more effectively. This is based on the theory that the dangers of objectification are primarily functions of its criminalisation.[198]

6 Responsibility, property and a broad definition of freedom

Responsibility, property and a broad definition of freedom are often offered as justification for allowing consent to objectification. Although these are complex ideas, a brief overview of each concept would be sufficient for present purposes.

In the context of freedom of choice, responsibility is a key concept. Valid choices, contractual terms and the consent defence are recognised by law due to the principle that people, who are capable of making and understanding their own choices, should be held responsible for the consequences thereof.[199] This is evident from a criminal law perspective, where individuals are obliged to take responsibility for their wrong choices and bear the punishment.

In opposition to the argument that the commodification of one's body and personal attributes amounts to a violation of dignity, the second above-mentioned concept contends that such commodification could actually be beneficial.[200] John Locke introduced the theory that an individual has property rights in her own person.[201] This theory can be applied to prostitution and peepshows. A property right denotes control. The individual is able to control herself and can alienate or commodify aspects of her own person, such as her own sexuality. The owner can use this property to her own benefit, as she would any other property. As personal property, sexuality can therefore serve either as a tool in nurturing a relationship or in running a successful business.

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[197] See SALRC (n 11) 19-20, 166, 196, 221 and 222

[198] Fritz (n 12) 231. For the idea of control through legalisation, see Brants (n 71) 629. In *Jordan v S* (n 9) para 87 the appellants argued that legalisation helps identify dangers. See also SALRC (n 11) 196, 198 and 205.

[199] The idea that people are responsible for their actions is mentioned in McCrudden (n 1) 716; Woolman (n 3) 36-50. This idea that allowing objectification fosters responsibility is mentioned in connection with prostitution in SALRC (n 11) 194.

[200] Commodification of one's personal attributes and sexuality is equated with objectification in Radin (n 63) 1880, 1891-1892 and 1921.

[201] This discussion on property rights is based on Fritz's explanation thereof (n 12) 242, 239-245.

Finally, freedom, as portrayed in this article, is only possible if it is interpreted as widely as possible.[202] This kind of freedom is not limited to actions that are morally acceptable by society, but includes the freedom to do wrong.[203] It corresponds with the Kantian idea that a person cannot be forced to comply with the Kingdom of Ends or the morals of the majority.[204]

7 Objectification is allowed

7.1 Individuals are objectified

Human interaction is instrumental, despite the purest of intentions.[205] Individuals regularly objectify one another and in turn allow such treatment. It can therefore not be the objectification *per se* that is objectionable.[206]

In the remainder of this article a few key examples of accepted objectifying treatment will be discussed. This discussion opposes the claim that no forms of objectification may be allowed, since that would have the effect of 'opening of the floodgates'.[207] The aim of this discussion will be to determine the rationale behind permitting these specific examples while prohibiting others.

7.2 Sexual objectification

7.2.1 Strip shows

There are three instances where sexual objectification is currently accepted. The use of the word ‘currently’ is deliberate, as it emphasises the fact that what is and is not allowed changes so frequently that examples thereof have to be captured within a specific time frame.

Firstly, in some countries, such as Germany, strip shows are allowed whereas peepshows are prohibited. The difference between these two shows is discussed in the German peepshow case and is basically that peepshow performers strip in

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[202]Ackermann J decides that freedom should be defined this way in *Ferreira v Levin NO; Vryenhoek v Powell NO* (n 3) para 49.

[203]Du Bois (n 17) 119, 120. See also *Jordan v S* (n 9) para 102, where O’Regan and Sachs quote from the *Report of the Committee on Homosexual Offences and Prostitution* (Wolfenden)*,* Cmnd no 247 (1957) para 61. This Committee was appointed in 1954 to look into the law and practice regarding homosexuality and prostitution.

[204]The Kingdom of Ends is an ethical ideal where each person is free to make their own choices, yet their choices do not conflict with those of others. Du Bois therefore argues that such freedom can only truly be achieved if everyone lives according to ethics. This suggests that a Kingdom of Ends, in which each person is free to make the choices they desire, is only attainable if everyone truly desires to make ‘acceptable’ choices; which corresponds with the idea of a shared morality. Yet since there is no such thing as shared morality the closest we can get to a Kingdom of Ends is if all choices are made in accordance with the morals of the majority. See Du Bois (n 17) 120.

[205]Woolman (n 3) 36-8. See also Botha (n 1) 184.

[206]Woolman makes this observation in Woolman (n 3) 36-49.

[207]Du Plessis calls this a ‘slippery slope’ (n 49) 399.

an enclosed space and strippers strip on an open stage. It is decided that 'the mere display of naked bodies does not violate dignity'; performers are objectified in peepshows, whereas they are not during strip shows. The court's justification for this decision is that strip shows resemble stage and dance shows since dancers strip in front of a live audience. Due to this resemblance the show does not detract from the personal individuality of the stripper.[208]

This conclusion seems quite absurd. These two types of shows are essentially the same. In both instances the performers expose their naked bodies to strangers who derive sexual pleasure therefrom. The only difference is that the peepshow performer cannot always see the audience whereas the strippers can. The fact that a performer witnesses the objectification should rationally enhance its objectifying effect, rather than diminish it. Asserting that a strip show is akin to a stage and dance show merely because the stripping is done on a stage is in any case not feasible. Often strip shows are not done on stage, in front of a large audience. As a matter of fact, strip shows do not necessarily involve dancing. Take for example a bachelor's party. Here a stripper takes off her clothes in a living room in front of a few men. Can the fact that she shakes her derriere, while exposing herself, be the only reason why the stripping is not prohibited? Why then do peepshow performers not just add a bit more rhythm to their routine?

Another difference between these two shows is that stripping sometimes involves more than merely exposing naked bodies to an audience. Due to the absence of a barrier between the stripper and the audience touching regularly occurs. Surely this would worsen the objectification? What is more, strippers can be 'bought' for a private lap dance. This emphasises the notion that a physical barrier between the performer and the audience, as is the case with peepshows, would actually diminish any objectifying effect.

7.2.2 Pornography

This idea, that the objectifying effect might be diminished because the performer cannot experience the live reaction of audience, corresponds to pornography. Similar to peepshows, porn stars expose themselves and the audience can react as they please in private. The only difference is that pornographic actors or models are often expected to do a lot 'more' than peepshow performers. Pornographic actors or models are paid to have sex with strangers.[209] Although similar to prostitution, the objectification is enhanced by the fact that third parties can watch them in the act. Pornography is recorded, whether on camera or film; the objectification therefore occurs every time someone opens a pornographic magazine or turns on a blue film.

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[208] This paragraph refers to and quotes from the German peepshow case, *BVerfGE* 27, 1, 6 (1969), as translated in Michalowski and Woods (n 46) 105.

[209] That is, other pornographic actors or models.

So why is pornography and stripping allowed, whereas peepshows and prostitution are not?[210] Is it because stripping and pornography seem more glamorous? To be a porn 'star' or a hot topless girl at a bachelor's party just seems more acceptable. What is the rationale behind this perception? Might it have something to do with the fact that Jenna Jameson hosts a TV show called 'Jenna's American Sex Star', making porn seem exciting?[211] Or is it because of the new exercise craze called 'pole dancing', which convinces women that it is desirable to wrap themselves around a pole derived from the milieu of stripping and seduce their man by installing a pole in the bedroom?

7.2.3 Long-term heterosexual relationships

The final instance in which sexual objectification is currently accepted is within heterosexual, monogamous, long-term relationships; preferably within wedlock. This is apparent from cases regarding sadomasochism. Where the participants were heterosexual married couples, as was the case in *R v Wilson*,[212] the treatment was permitted under the pretext of private autonomy. The court's excuse for not relying on precedent regarding (homosexual) sadomasochism was that, in *Wilson*, the wife instigated the said treatment.[213]

Where sadomasochism was performed within a long-term, monogamous, heterosexual relationship, out of wedlock, the treatment was prohibited. However, the sentence itself was suspended which was not the case with homosexual and/or polygamous instances of sadomasochism.[214] Weait provides an apt conclusion:

> The analysis provided here indicates – unsurprisingly perhaps – that where injury is sustained in the context of heterosexual marriage, behind closed doors in the matrimonial home, and where the injury itself manifests traditional gender relations (as in *Wilson*), the courts may be prepared to treat it as private unless it is the consequence of infidelity (which, as suggested by *Dica*, renders the relationship public). But where the injury is sustained in the context of non-institutionalised relationships, whether hetero- or homosexual, pursued for the principal purpose of sexual gratification, the courts will treat such injury as a harm justifying punishment – unless, that is, both parties to the relationship can properly be said to have consented to risks incidental (rather than integral) to such gratification.[215]

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[210]This question is asked in SALRC (n 11). The aim of this paper is to determine whether prostitution should be legalised in South Africa.

[211]Anonymous 'Jenna's American sex star' *Wikipedia* (2011-08-11) available at http://en.wikipedia.org/wiki/Jenna%27s_American_Sex_Star (accessed 2011-11-06).

[212][1996] Cr App R 241 (CA). Hereafter referred to in the main text as '*Wilson*'.

[213]In this case a woman asked a man to carve his initials into her buttocks with a hot knife.

[214]Weait discusses the facts and outcome of *R v Emmet* [1999] All ER (D) 641. Weait (n 58) 112, 113. The facts of this case involved the asphyxiation of a woman by her boyfriend. He then poured lighter fuel over her breasts and set fire to it.

[215]Weait (n 58) 117. Weait refers to *R v Dica* [2004] All ER (D) 45.

Another instance where married couples alone are permitted to objectify one another is where the participant is compensated for her consent to objectification. It would be perfectly acceptable for a husband to pay his wife for sexual favours, especially where payment is made in kind, whereas similar acts out of wedlock, such as prostitution, are proscribed.[216]

7.3 Payment in kind

Section 20(1)(aA) of the Sexual Offences Act defines a prostitute as '[a]ny person who … has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward'.[217] This is a very wide definition and was cause for speculation in the *Jordan* cases.[218] The court *a quo* invalidated the criminalisation of prostitution for a number of reasons, including that the definition thereof was too wide and therefore uncertain. Defining prostitution as sex for reward includes not only sex for money, but also payment in kind:

> In principle there is no difference between a prostitute who receives money for her favours and her sister who receives, for rendering a similar service, a benefit or reward of a different kind, such as a paid-for weekend, a free holiday, board and lodging for a shorter or longer period, a night at the opera, or any other form of *quid pro quo*.[219]

By ruling invalid a provision that criminalises sex for payment in kind, the court suggests that such actions are acceptable. As quoted above, the High Court equates sex for payment in kind with sex for money. Hence, this acceptance of sex for payment in kind, signifies the tolerance of sex for money.

The Constitutional Court rejects this reasoning. It considers the heading of section 20 and decides that the provision should have a narrow interpretation and not include the criminalisation of sex for payment in kind.[220] Yet, by excluding sex for payment in kind, this court also suggests that such actions are acceptable.

The courts have therefore concurred that sex for payment in kind is acceptable. A woman who feels obliged to have sex with a man because he buys her dinner or an expensive necklace will not be prosecuted. Yet, if he offers her the value of the dinner or the jewellery in cash she becomes a criminal. However, the outcome is essentially the same, the woman feels obliged to perform in terms of the reward. So how can her reaction to the reward be condemned based solely on the type of reward she receives? It cannot be due to the romantic idea that sex with someone other than a prostitute is somehow more special, as even sex within marriage is often loveless. Men have repeatedly showered women with

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[216] See Thompson (n 49) 246.
[217] 23 of 1957.
[218] *S v Jordan* 2002 1 SA 797 (T) and *Jordan v S* (n 9).
[219] *S v Jordan* (n 218) para 800H-I.
[220] *Jordan v S* (n 9) para 49.

gifts in order to sleep with them and women in turn have made a living off such gifts. How can this be different from high-class prostitution?[221]

7.4 Entertainment

Individuals are also objectified for entertainment purposes. This is evident from various popular TV shows. These shows involve the degradation of individuals. Such degradation would normally be prohibited. It is nonetheless permitted in circumstances where individuals are used as objects for the purpose of entertainment.

No one considers the feelings of the poor mother who finds out her husband is sleeping with her teenage daughter on the *Jerry Springer show.*[222] Shows such as *Fear factor*, *Survivor* and *I bet you will* thrive on coercing people to do humiliating and degrading deeds.[223] This includes eating live bugs or dog faeces. The coercion is economic by nature, for participants are promised the chance to compete for large monetary rewards. How is this more acceptable than the humiliation of dwarf tossing, where the reward is at least guaranteed? The main aim of *I bet you will* is to demonstrate how everyone has a price. People are asked to do humiliating things for a certain amount of money. If a participant refuses, the amount is increased until she accepts. This is blatant coercion.

In the Jackass television series and films, individuals consent to treatment that is in direct conflict with their right to human dignity. They are allowed to hurt, degrade and humiliate each other.

All the above-mentioned examples indicate the infringement of dignity for the purpose of entertainment, due to the deliberate degradation and humiliation of individuals. People are not treated as means in themselves, but as objects; as means to an end. That end is entertainment.

The *Jenna Jameson show* is no exception and neither is the employment of circus 'freaks', people who perform in a circus because they are different and look 'ridiculous'. These circus performers are degraded and objectified, since the audience pays to ridicule their disabilities.

Why are people allowed to consent to objectification in the name of entertainment? Is it because show business is glamorous? Do these people want

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[221] It is important to note that the SALRC supports this line of reasoning and defines prostitution as sex for payment in kind or money. SALRC (n 11) (x).

[222] For information on the *Jerry Springer show*, see Anonymous *The Jerry Springer show Wikipedia* (2011-10-20) available at http://en.wikipedia.org/wiki/The_Jerry_Springer_Show (accessed 2011-11-06).

[223] For information on these shows see the following websites: Anonymous *Fear factor Wikipedia* (2011-10-31) available at http://en.wikipedia.org/wiki/Fear_Factor (accessed 2011-11-06); Anonymous 'Survivor' (TV Series) *Wikipedia* (2011-11-06) available at http://en.wikipedia.org/wiki/Survivor_(TV_series) (accessed 2011-11-06); Anonymous *I bet you will* (2011-08-31) available at http://en.wikipedia.org/wiki/I_Bet_You_Will (accessed 2011-11-06).

to be objectified on television or on stage simply to have their fifteen minutes of fame? Does this mean that objectification is acceptable if people really want to be objectified; if the consent is real? Or is it allowed whenever the individual does not subjectively experience the treatment as objectifying?

7.5 Sport

Although sport could be addressed under the heading of entertainment, it justifies as a separate category. Labuschagne analyses the role of the consent defence in competitive athletics and sport. By participating in sport, athletes are deemed to consent to the possible harm ensuing therefrom. Such 'consent' is recognised as a legal defence.[224]

Nevertheless, athletes are only assumed to waive their rights to a certain extent. It is argued that they are not simply stripped of their rights and reduced to objects.[225] This is a significant development as it recognises that the objectifying effect of the consent might be mitigated or avoided altogether. It also confirms that a person does not lose her right to human dignity when she consents to its violation.

The reasons for the criminalisation of sadomasochism include the risk that someone might be injured (or objectified) beyond the scope of her consent. The effect of such a risk might be that, regardless of whether consent to objectification is accepted in theory, it is too dangerous to allow it in practice. This resembles the logic behind Radin's 'best possible coercion-avoidance mechanism', where consent to objectification is wholly prohibited due to the risk of inadvertently allowing coerced consent.

The risk of injury beyond consent does not, however, interfere with the practise of sport. This is because requiring a player to constantly evaluate the dangerousness of each action 'would drastically alter the manner in which the game is played'.[226] Surely the same applies to sadomasochism? If participants were to evaluate the dangerousness of each action it would detract from their sexual gratification.

Furthermore, Labuschagne argues that consent can only be given sensibly in respect of a specific injury or a certain type of injury. Neither in the context of sport nor in that of sadomasochism can this be predetermined.[227] Yet in the former case it is allowed and in the latter it is not.

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[224]Labuschagne quotes McCutcheon in Labuschagne 'Fundamentele regte van sportlui en die vraagstuk van noodweer by kontaksportsoorte' (2004) *De Jure* 41 at 44. See McCutcheon 'Sports violence, consent and the criminal law' (1994) *Northern Ireland Legal Quarterly* 267 at 267.

[225]Labuschagne (n 224) 44.

[226]*Id* 49. Labuschagne includes this English quote from Gardiner 'The law and the sports field' (1994) *Criminal LR* 513 at 515.

[227]Labuschagne (n 224) 54.

One of the reasons provided for the approval of consent to sport is that the advantages thereof outweigh the harm. Can this not suffice as a reason for allowing prostitution, where the benefits include the ability to provide for one's family?

Moreover, sport's main benefit is that it promotes physical health. However, this is not always the case. Take for instance boxing or cage fighting. The object of these sports is physical violence. Contrary to other sports, these sports pose a major health risk. Their only benefit is financial.[228] How is this different from dwarf tossing?

7.6 Punishment

Punishment is the best example of holding someone responsible for her choices, despite the undesirable consequences.[229] Botha observes that punishment does not *per se* indicate a violation of human dignity. Rather than reducing someone to an object, she is treated as an autonomous person who must take responsibility for her actions.[230] This emphasises the aforementioned notion that denying someone the freedom of choice might be just as objectifying as the treatment she is choosing.[231]

7.7 Labour

Dwarf tossing, prostitution and peepshows all share one attribute, namely, that individuals are paid to be objectified. Although regarded as implicit coercion due to financial desperation, this feature nevertheless applies to most jobs.[232] Employees are compensated for being objectified. They are instrumental to the achievement of certain ends, which includes generating money for the employer. Nonetheless, individuals have the right to employment, regardless of whether they only value their jobs in terms of the monetary compensation it affords them.[233]

Some jobs are extremely degrading, such as cleaning vomit off the floor of a nightclub or cleaning up after a murder scene. Such jobs are usually done by people who are desperate for money. Indeed, jobs involving high risk or

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[228]Harrison (n 113) 498. According to Harrison most major medical authorities have called for the ban thereof.

[229]The idea that people are responsible for their actions is mentioned in McCrudden (n 1) 716; Woolman (n 3) 36-50.

[230]See Botha (n 1) 185.

[231]For this idea that the denial of freedom leads to objectification, see Michalowski and Woods (n 46) 106.

[232]See Thompson (n 49) 233.

[233]For the idea that work is sometimes valued solely in terms of its monetary compensation, see Fritz (n 12) 244. See also *Manual Wackenheim v France* (n 12) para 3, in which it is argued that employment is part of the right to human dignity.

degradation often pay more than similar, less dangerous or degrading, jobs. When someone is paid for allowing doctors to test unapproved medicine on her, her human worth is ignored completely. Such products are not allowed on the market because they are not ready for human consumption, yet someone who willingly takes the risk in order to receive compensation, is allowed to consent thereto. This corresponds with Harrison's theory that individuals are allowed to consent to objectification provided that the objectification serves the utility interests of the dominant group.

As with other jobs, it is better to allow and regulate objectifying treatment, than to prohibit it.[234] Affording prostitutes, peepshow performers and dwarf tossing participants with the same rights and protections as other workers, would be in line with their right to human dignity and perhaps offer some protection from the risk of exploitation.[235] This approach has been adopted by other countries, as well as the European Court of Justice, especially with regard to prostitution.[236]

7.8 Acts that were prohibited

The above examples illustrate how various similar types of treatment might be approached entirely differently. One might be considered objectifying and the other not. This could be due to the fickleness of the moral convictions of society. The fact that actions that were once prohibited, are currently acceptable also points to the fickle and ever-changing moral ideas of the majority.[237]

Sodomy is an excellent example in this regard. As explained above, sodomy was at first considered a violation of human dignity. However, with the enactment of the new Constitution the attitude toward sodomy changed to such an extent, that the *prohibition* thereof is now regarded as the violation.[238] This is an astounding illustration of how dignity can be used on either side of a dispute. First the inherent worth aspect of dignity was used to prohibit sodomy and then the freedom component was used to prohibit its criminalisation.[239]

This change of approach suggests that it is just a matter of time before the dominant moral attitude changes toward other, currently prohibited acts. Sooner or later prostitution and dwarf tossing might not seem so inhumane. This outlook

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[234] Fritz compares prostitution with regulated legalised labour (n 12) 245. This is the situation in The Netherlands, see Brants (n 71) 629, 630. The SALRC refers to a number of countries that have in fact adopted this stance, such as Germany. Reference is also made to an ECJ ruling that determines that 'prostitution is labour in the full juridical sense' SALRC (n 11) 84, 131, 171 and 189. See also Thompson (n 49) 244.

[235] On the idea that such employees deserve similar rights and protections to other employees, see Thompson (n 49) 238. See also SALRC (n 11) 186, 189.

[236] SALRC (n 11) 171.

[237] Laws are often changed because they are regarded as 'out-dated'. See SALRC (n 11) 188, 193.

[238] Barnard-Naude (n 58) 279.

[239] This 'freedom component' of human dignity relates to the above assertion that freedom can be found within human dignity.

that an action should be allowed merely because similar actions are not banned is however disputed in *Wackenheim*. Here the committee ruled that 'the mere fact that there may be other activities liable to be banned is not in itself sufficient to confer a discriminatory character on the ban on dwarf tossing'.[240]

The objection to this reasoning is that some countries have already started allowing some of these seemingly immoral forms of consent to objectification that are currently prohibited in South Africa. The moral attitude toward prostitution, for example, has been changing worldwide.[241] In Germany, specifically, it was contended that prostitution 'should not be considered to be immoral anymore'.[242] The legal position and moral attitude toward prostitution have even been questioned in South Africa. The SALRC has been investigating the possibility of legalising prostitution in South Africa since 2009.[243]

8 Conclusion

The various justifcations for permitting objectifying treatment have been addressed in this article. It is contended that dignity should not be regarded as supreme to freedom; resulting in the idea that dignity can be waived in favour of the freedom to consent. The plurality of society's moral perceptions and preferences also supports the freedom to consent to treatment which the consenter desires or does not regard as contrary to her dignity.

With reference to *NCGLE* it has further been argued that consent to objectifying treatment should be allowed; provided that it is private, genuine, unequivocal, given by capable and informed adults, and does not harm others or interfere with their rights to do the same. This corresponds with the consent defence, as well as contractual autonomy. Such consent might even be beneficial to the consenter.

The principles of responsibility, property and a broad definition of freedom have also been examined as part of the argument in favour of consenting to objectification. Furthermore the notion that consent should be allowed on the basis that there are instances in which it is already permitted, has been explained by way of various examples.

While theoretically sound, the approach of allowing genuine consent might, however, be less acceptable in practice. As Radin remarks, it is often difficult to believe that anyone would consent to treatment that is regarded as a violation of

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[240] *Manual Wackenheim v France* (n 12) para 7.5.
[241] Prostitution is legalised in several countries, including Germany and The Netherlands. In other countries, such as Thailand, prostitution is not regarded as immoral regardless of its illegality. See SALRC (n 11) 125, 131 and 140-141.
[242] SALRC (n 11) 131.
[243] SALRC (n 11).

dignity by the majority of society.[244] This theory, together with the fact that so many people are coerced or forced to consent to objectification, makes it difficult to determine whether a person has in fact provided genuine consent.

[244]Radin (n 63) 1910.