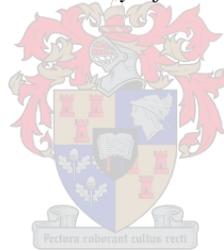


Consenting to objectifying treatment? Human dignity and individual freedom

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of Laws at the University of Stellenbosch*



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Abstract

The purpose of this study was to determine whether an individual can and/or should be allowed to consent to objectifying treatment. This necessitated the determination of the meaning of dignity, the meaning of freedom and the relationship between dignity and freedom. It was found that both the right not to be objectified and the right to consent to objectification could be found within human dignity. This is due to the broad definition of dignity in terms of which dignity has two, sometimes contradicting, components. One component safeguards autonomy and the right to choose, which supports consent to objectification, whereas the other promotes individual self-worth by prohibiting objectifying treatment.

By investigating the meaning of freedom it was found that freedom as a constitutional value, and possibly also a free-standing constitutional right, could incorporate the right to consent to objectifying treatment.

Three possible solutions to this tension between human dignity and freedom were identified and critically analysed. The first was that an individual cannot and should not be allowed to consent to objectification. This solution is primarily based on the notion that dignity is supreme to freedom and that freedom should yield to communitarian dignity. Furthermore, it is contended that consent to objectification is often invalid due to economic coercion and undue influence.

The second possible solution was that, although an individual might not be able to validly consent to objectifying treatment, such consent should still be allowed under certain circumstances. The example of invalid consent due to economic coercion introduced in the previous solution was examined in relation to prostitution. The contention regarding this approach is that, since our government is unable to fulfil the socio-economic needs of those who consent due to economic coercion, such consent should be allowed and strictly regulated.

The third possible approach was that circumstances do exist in which individuals can give valid consent to objectification and that in these circumstances they should be allowed to do so. In this solution the grounds of the first approach is criticised by contending, for example, that dignity is not supreme to freedom, that a plural society should allow these type of choices and that consent to objectification is already allowed in some instances.

The results of this study were that, although there are situations in which genuine consent is not possible, it can be given under certain circumstances. An individual who cannot give genuine consent to objectification should not be allowed to do so, unless transitional measures dictate otherwise. However, an individual who is capable of giving valid consent to objectification should be allowed to do so. Finally, regardless of whether such consent is genuine or not, strict regulation thereof is required.

Opsomming

Die doel van hierdie studie was om vas te stel of 'n individu kan toestem en/of toegelaat behoort te word om toe te stem tot objektiverende behandeling. Dit genoodsaak dat die betekenis van menswaardigheid en vryheid, asook verhouding tussen hierdie twee begrippe vasgestel word. Daar is bevind dat beide die reg om nie te geobjektifeer te word nie en die reg om toe te stem tot objektivering gevind kan word binne die begrip van menswaardigheid. Hierdie is te danke aan die breë definisie van menswaardigheid in terme waarvan menswaardigheid uit twee, soms weersprekende, komponente bestaan. Een komponent beskerm outonomie en die reg om te kies, wat toestemming tot objektivering ondersteun, terwyl die ander komponent individuele waarde bevorder deurdat dit objektiverende behandeling verbied.

Tydens die ondersoek aangaande die betekenis van vryheid is bevind dat vryheid as 'n grondwetlike waarde, en moontlik ook 'n vrystaande grondwetlike reg, die reg om toe te stem tot objektiverende behandeling kan inkorporeer.

Drie moontlike oplossings vir hierdie spanning tussen menswaardigheid en vryheid is geïdentifiseer en krities ontleed. Die eerste is dat 'n individu nie kan toestem en ook nie toegelaat behoort te word om toe te stem tot objektivering nie. Hierdie oplossing is hoofsaaklik gebaseer op die veronderstelling dat vryheid onderworpe is aan menswaardigheid en dat individuele vryheid moet toegee tot die menswaardigheid van die gemeenskap. Verder word dit beweer dat toestemming tot objektivering dikwels ongeldig is as gevolg van die ekonomiese dwang en onbehoorlike beïnvloeding.

Die tweede moontlike oplossing was dat, alhoewel 'n individu nie noodwendig instaat is om geldige toestemming tot objektiverende behandeling te verskaf nie, sodanige toestemming onder sekere omstandighede steeds toegelaat behoort te word. Die voorbeeld van ongeldig toestemming as gevolg van ekonomiese dwang wat in die vorige oplossing bekendgestel is, is ondersoek aan die hand van prostitusie. Die bewering ingevolge hierdie benadering is dat, aangesien ons regering nie in staat is om die sosio-ekonomiese behoeftes van diegene wat toestem tot objektivering as gevolg van ekonomiese dwang te vervul nie, sodanige toestemming toegelaat en streng gereguleer behoort te word.

Die derde moontlike benadering is dat daar wel omstandighede bestaan waar individue geldige toestemming kan gee tot objektivering en dat hulle in hierdie omstandighede

toegelaat behoort te word om dit te gee. In terme van hierdie oplossing word die gronde waarop die eerste benadering gebaseer is gekritiseer, deur byvoorbeeld te argumenteer dat menswaardigheid nie verhewe is bo vryheid nie, dat in ons huidige diverse samelewing sulke soort keuses aanvaar behoort te word en dat toestemming tot objektivering reeds in sommige geval toegelaat word.

Die resultate van hierdie studie was dat, alhoewel daar omstandighede bestaan waaronder geldige toestemming nie moontlik is nie, dit wel onder sekere omstandighede gegee kan word. 'n Individu wat nie daartoe instaat is om geldige toestemming tot objektivering te gee nie, behoort nie toegelaat word om dit te doen nie, tensy oorgangsmatreëls anders bepaal. Waar 'n individu egter in staat is om geldige toestemming tot die objektivering te gee, behoort dit toegelaat word. Ten slotte is streng regulering van toestemming tot objektiverende behandeling nodig ongeag of sodanige toestemming geldig is of nie.

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CHAPTER 1

INTRODUCTION

1 1 Background

In the past human dignity was largely confined to philosophical and religious thought. It was only in the 1940s that systematic reference started to be made to human dignity in constitutional and human rights texts.¹ There was a growing need to develop this concept in the legal context, due to the evils perpetrated against humanity during the Second World War, as well as during the Apartheid regime in South Africa.² Human dignity has been gradually incorporated into human rights texts across the globe. Today human dignity is central to many countries' constitutions.³ South Africa's own constitution boasts dignity as a founding value.⁴

Although human dignity is now part of our legal structures, the analysis of dignity as a legal and constitutional concept is in its "relative infancy".⁵ South Africa's dignity jurisprudence is one of the most developed in the world, but courts and academic writers still struggle to give meaning to the concept of human dignity. This gives rise to numerous difficulties and

¹ Dicke K "The Founding Function of Human Dignity in the Universal Declaration of Human Rights" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 111 111-120.

² On how Germany and South Africa adopted a "never again" approach, see O'Regan C "From Form to Substance: The Constitutional Jurisprudence of Laurie Ackermann" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 6; Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-4, 36-7. Eckert describes how the French Revolution led to the idea of inherent dignity and how the concept of human dignity was strengthened as a result of World War II. Eckert J "Legal Roots of Human Dignity in German Law" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 45, 52. See also Du Plessis L "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 Law Journal* 376 138, 139; Barnard-Naude AJ, Cornell D & Du Bois F (eds) "Introduction" in *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) vii vii, viii.

³ See McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 664-675; Eckert J "Legal Roots of Human Dignity in German Law" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 52,53; Frowein JA "Human Dignity in International Law" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 121 122-124, Starck C "The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 179,180, for examples of human dignity in human rights texts.

⁴ S 1 of the Constitution of the Republic of South Africa, 1996; hereinafter referred to as 'the Constitution', 'our Constitution', 'the Final Constitution' or 'the South African Constitution'.

⁵ McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" 19 (2008) *The European Journal of International Law* 655 711; Eckert J "Legal Roots of Human Dignity in German Law" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 42.

inconsistencies.⁶ Human dignity has been manipulated into a variety of meanings and has often been employed on both sides of a dispute.⁷ This is perhaps not surprising, as dignity has come to be regarded as a supreme value and an objective legal norm.⁸

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.⁹

As a result, human dignity is often seen 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.¹⁰ On the other hand, it has been argued that individual freedom may be constrained to protect the human dignity of others.¹¹ This raises a fundamental question, namely whether one has the freedom to consent to objectifying treatment which infringes one's dignity. Conversely, does the state have a legitimate interest

⁶ Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-1. For discussions on the idea of dignity as seemingly meaningless, see Eckert J "Legal Roots of Human Dignity in German Law" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 42; Starck C "The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 185; Waldron J "Dignity of Groups" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 66 66,67; Liebenberg S "The Value of Human Dignity in Interpreting Socio-economic Rights" (2005) *SAJHR* 1 2,3; McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 655, 661, 697, 698, 702, 713.

⁷ Davis D "Equality: The Majesty of Logoland Jurisprudence" (1999) *SALJ* 398 413; McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 655, 698, 702. McCrudden provides the example of the assisted suicide case *Pretty v UK* (2002) 35 EHRR 1. See also Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 112 130.

⁸ Chaskalson A "Human Dignity as a Constitutional Value" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 133 136; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 28, hereinafter referred to as 'NCGLE'.

⁹ Eckert demonstrates how dignity can be a tool in the hands of the state. Eckert J "Legal Roots of Human Dignity in German Law" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 69. See also Starck C "The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 189, 192 for more on the role of the state.

¹⁰ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) para 49; hereinafter referred to as "Ferreira". See also Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-67.

¹¹ Starck C "The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 189.

in banning activities such as prostitution or dwarf tossing that arguably infringe the dignity of participants?¹² These questions have not been answered satisfactorily in the literature.

Three possible approaches 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 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.¹³ These three approaches will be critically analyzed in Chapters 4 to 6, with a view of determining whether consent to objectification should be allowed. These chapters will be preceded by a more general discussion of the foundations, meaning and status of human dignity (Chapter 2) and freedom, as well as the relationship between the two values (Chapter 3).

1 2 Methodology

An academic literature study will be used in Chapters 2 and 3 to try to define human dignity and freedom. The actual manner in which the courts have engaged with these concepts will also be considered. It will be necessary to use a comparative study in order to interpret human dignity and freedom and their relationship with one another. Various countries will be analyzed, but I will concentrate on German and United States law. A religious, philosophical and historical inquiry will also be required to fully understand these two concepts, especially with regard to human dignity. The philosophical study will mainly focus on the ideas of the philosopher, Immanuel Kant, as he is seen as “the father of the modern

¹² For dwarf-tossing as example, see McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 656; Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 145-159; Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 194. For the example of prostitution, see Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 230-248.

¹³ 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 thesis is that in the thesis the second and third approaches are combined. Another difference is that in this thesis 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 thesis recommend the regulation of objectifying treatment, unlike the SALRC project, where legalisation does not necessarily involve regulation. South African Law Reform *Commission Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) xii 173 186.

concept of human dignity”.¹⁴ Case law will be considered when determining whether a residual right to freedom exists.

I will make use of a comparative analysis to examine the three possible approaches pertaining to consent to objectification in Chapters 4 to 6. German law in particular will be examined in connection with whether human dignity is a supreme value. The key focus will be on Dutch law in support of the contention that South Africa should allow consent to objectifying treatment. I will also use a philosophical study throughout these chapters, the focal point again being on the views of the philosopher, Immanuel Kant. An academic literature analysis as well as a study of case law will be undertaken.

1 3 Outline

1 3 1 Chapter 2: Human dignity

In this chapter I will try to give meaning to the concept of human dignity. This will require an enquiry into whether it is possible to define human dignity. Dignity has repeatedly been criticised as being void of any specific meaning.¹⁵ As a result it has been said that dignity is open to manipulation and therefore has no practical value.¹⁶ The use of a functional interpretation of dignity will be examined and put forward as the best solution to this impediment.

The possibility of using foreign law to help define and interpret the concept of human dignity will be considered. Arguments for and against looking at other jurisdictions will be assessed.¹⁷ I will briefly discuss the idea of a universal definition of human dignity and the merits of this idea. My argument in this regard will be that foreign jurisdictions should be used to assist in the definition and interpretation of human dignity but that one must be wary of the potential perils involved.

From dignity jurisprudence three strategies for defining human dignity transpire. These strategies are religion based, philosophical and historical.¹⁸ Each of these strategies will be

¹⁴ McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 659. McCrudden quotes from Boggetti G “The Concept of Human Dignity in European and U.S. Constitutionalism” in Nolte G (ed) *European and US Constitutionalism, Science and Technique of Democracy* 37 (2005) 75 79.

¹⁵ 661.

¹⁶ 655.

¹⁷ 724. McCrudden criticises the reliance on foreign jurisdictions for defining dignity.

¹⁸ 658.

explained. I will show how these strategies do not necessarily contradict each other, but should rather be seen to complement one another.

The two basic components of human dignity, autonomy and inherent worth, will be examined. It will be demonstrated that the right not to be objectified can be allocated within the *inherent worth* component of human dignity, whereas the right to choose or consent to different things, can be perceived as part of autonomy. I will assess the different arguments pertaining to whether human dignity should be interpreted as being communitarian or individualistic by nature. The idea of group dignity will briefly be referred to.

As mentioned above, dignity can be defined in terms of its functions.¹⁹ In the remainder of the chapter these functions will be illustrated.

1 3 2 Chapter 3: Freedom in relation to human dignity

This chapter will commence with an attempt at defining the concept of freedom. This will entail a study of the religious, philosophical and historical foundations of freedom. The manifestation of freedom in South African common law, in terms of Classical Liberal theory, will be examined. Subsequently, this manifestation will be compared with the current manifestation of freedom in the South African Constitution. Freedom is specifically entrenched in the Constitution as a value. In addition, there is also a possibility that freedom may be recognised as a freestanding right in itself or as part of human dignity.²⁰ Important South African case law will be consulted in order to determine whether there is space for such a freestanding residual right to freedom in South Africa.²¹ The idea of a residual freedom right that is located within the ‘autonomy’ part of human dignity will also be considered.

Similar to dignity, freedom can also perform a number of different functions. These functions will be examined. The fact that these two concepts perform such similar functions often results in a desire to use them either to enhance or limit one another. I will look at whether rights and values are commensurable and whether one of these concepts is superior to the other. Three different perspectives: that human dignity can limit freedom, enhance freedom or be enhanced by freedom, will be explored.

¹⁹ Dicke K “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 111 118.

²⁰ Ss1, 7, 36, 39, 165, 181 and 196.

²¹ The fundamental case in this regard being *Ferreira*.

1 3 3 Chapter 4: Individuals should not consent to objectifying treatment

In the following three chapters I will examine three radically different approaches to objectifying treatment. The idea is firstly to provide a full independent analysis of each radical approach and then attempt to integrate them in the concluding chapter.

The first approach will be explored in Chapter 4. The focus here will be on the *inherent worth* component of human dignity. In terms of this approach dignity is often considered to be a supreme value that cannot be lost.²² The effect of this understanding is that dignity always triumphs over freedom.

Communitarian notions of human dignity support the perception that dignity can be used to limit individual autonomy. These understandings of dignity will also be used to illustrate the conviction that freedom should yield to the public policy and the popular moral views of society. The idea that consent to objectification in certain seemingly inconsequential cases should not be allowed because it will cause a slippery slope and open the flood gates to worse violations of human dignity, will briefly be referred to.

An essential consideration is whether freedom itself would in fact allow consent to objectification, were it to trump dignity. The argument that no residual right to freedom exists and that constitutional freedom, unlike Classical Liberal freedom, does not allow for such consent will be examined. Furthermore, the popular contention will be introduced that, regardless of whether a freedom right broad enough to allow such consent can be found within the Constitution, such consent is often invalid due to factors such as coercion or undue influence.

1 3 4 Chapter 5: Objectifying treatment should be allowed despite invalid consent

The argument that will be put forth in this chapter links up with the final idea in the previous chapter, namely that there are circumstances in which people cannot give substantive consent. I will develop this approach within the context of prostitution. The factors that constrain substantive consent will be identified, but the main focus will be on economic duress. It will be asserted that some people only agree to objectification because they need the money.

²² On dignity as a supreme value, see Wood AW “Human Dignity, Right and the Realm of Ends” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 49. For the Kantian idea that dignity cannot be lost, see Wood AW “Humanity as an End in Itself” in Guyer P (ed) *Critical Essays on Kant’s Groundwork of the Metaphysics of Morals* (1998) 165 165, 170. See also NCGLE para 28.

On the one hand, I will introduce the idea that such coercion should not be allowed and that the only way to prevent this coercion is to address the cause thereof. This requires the state to fulfil its duty of providing basic socio-economic necessities to its citizens.²³ I will elaborate on the fact that fulfilling these needs forms part of the state's duty to protect human dignity. On the other hand, the argument that people only turn to objectification in order to fulfil their own needs because our government does not have the resources to satisfy these needs, will be examined. I will then present the contention that people cannot be prohibited from consenting to objectification for purely economic purposes, if the state cannot serve their needs.

The idea of applying transitional measures until such time as the state may be able to fulfil this duty will be explained. This includes allowing and regulating consent to objectifying treatment.²⁴ I will subsequently look at how this alternative to prohibiting invalid consent might even be considered to enhance constitutional freedom.

1 3 5 Chapter 6: Valid consent to objectifying treatment should be allowed

In this chapter the third approach will be outlined, in terms of which individuals can in some situations give substantive consent to objectifying treatment and should not in these circumstances be proscribed from doing so.

Firstly, the counterarguments to the notion of a supreme dignity will be considered in an attempt at demonstrating that dignity should not automatically trump freedom, but may be limited and waived to the same extent that freedom can. Thereafter I will refer to the plurality of society and the fact that each person's morals and preferences differ. In view of this, it could be argued that some people may not regard treatment that is viewed as objectifying as inconsistent with their human dignity and may in fact prefer such treatment. The assertion that dignity should not be informed by the moral convictions of the majority will also be explored in this regard.

For consent to be allowed it should be valid. The requirements for valid consent will be identified and discussed in the context of privacy, the common law consent defence, contractual autonomy and the idea that one's choices should not harm others. I will also consider the theory that allowing consent to objectification might be beneficial. The related

²³ This constitutional duty is entrenched in ss26 and 27 of the Constitution.

²⁴ The transitional measures of allowing and regulating objectification are discussed in South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 13-14.

concepts of responsibility, property and a broad definition of freedom will briefly be referred to.

There are numerous circumstances in which consent to objectification is allowed in our society. These circumstances will be identified and integrated into the argument that consent should be allowed.

1 3 6 Chapter 7: Can and/or should a person be allowed to consent to objectifying treatment?

In conclusion I will attempt to answer the question of whether the individual can and/or should be allowed to consent to objectifying treatment. The three approaches that will be evaluated in Chapters 4 to 6 signify three distinctive viewpoints. It is important to integrate them in order to provide an answer.

Two contrasting situations will be identified. The first occurs when a person gives invalid consent to objectification. An example of such consent is where a prostitute consents to prostitution due to economic coercion. The second situation occurs when a person gives valid consent and truly desires the treatment.

CHAPTER 2

HUMAN DIGNITY

2.1 Can dignity be defined?

The term dignity is found in several human rights texts.²⁵ It has become a standard procedure to include it in international and regional human rights conventions, as well as national and sub-national constitutions. It is therefore crucial to determine the meaning of the concept. Understanding dignity will assist in clarifying the relationship between the state and individual, as well as influence the way people understand and practise civil liberties.²⁶

Unfortunately, there is widespread disagreement over the definition of human dignity.²⁷ As explained in Chapter 1, this is due in part to the fact that the constitutional protection of dignity and the analysis thereof in a judicial context are still in its “relative infancy”.²⁸

Some writers claim that it is too difficult to determine the meaning of human dignity due to the lack of common understanding as to what the term entails.²⁹ They argue that a concept can have no practical value if its content is contested to such an extent. Indeed some even

²⁵ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 172; Waldron J “Dignity of Groups” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 66 66. For examples of human dignity in human rights texts, see McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 664-672; Eckert J “Legal Roots of Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 41-42, 51-52; Frowein JA “Human Dignity in International Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 121 122-124; Starck C “The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions” in Kretzmer D & Klein E (eds) *The concept of Human Dignity in Human Rights Discourse* (2002) 179 179-180.

²⁶ Starck C “The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 179-180.

²⁷ See Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 171, 179, 182, 217; Waldron J “Dignity of Groups” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 66 67-68; Liebenberg S “The Value of Human Dignity in Interpreting Socio-economic Rights” (2005) *SAJHR* 1 2-3; Eckert J “Legal Roots of Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 42.

²⁸ See 1.1. See also McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 711-712; Eckert J “Legal Roots of Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41.

²⁹ McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 655; Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 112-130. See also *NCGLE* para 28.

claim that dignity has no real meaning.³⁰ In their view, instruments incorporating human dignity refrain from defining it, since it is merely a decorative concept.³¹

Due to its contested and open-textured meaning, dignity has occasionally been invoked on both sides of a dispute. As discussed in Chapter 1, this results in the idea that dignity can be manipulated into a variety of meanings.³² The complaint that dignity is used like a ‘magic wand’ to get the upper hand in ideological and political battles has also been raised.³³

In order to transform this perception it is necessary to find a way of defining human dignity. Three solutions have been suggested. The first one is to define dignity negatively, by way of examples. This solution identifies violations of human dignity by referring to instances in the past where it was deemed to have been violated, such as the death penalty and the criminalisation of sodomy.³⁴ The problem with this approach is that new or more subtle incursions of human dignity will be excluded.³⁵

The second solution suggests determining a minimum core for human dignity, regardless of whether some specifics are still contested.³⁶ One can attempt to determine such a minimum

³⁰ McCrudden writes about Arthur Schopenhauer’s 1837 critique of Kant in which Schopenhauer condemns the use of ‘human dignity’ as contentless. McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 661. Similarly, Wood concedes that dignity, as spoken of today, is often regarded as an “empty” concept. Wood AW “Human Dignity, Right and the Realm of Ends” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 48.

³¹ Dicke indicates that instruments refrain from giving a substantial definition for human dignity. Dicke K “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 111 118. See also Waldron J “Dignity of Groups” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 66 66.

³² 1 1. On the idea that dignity is used on both sides of an argument, see McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 698, 702. For discussions on how dignity is open to manipulation, see Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 171-172, 213. Kretzmer argues that if dignity means everything it may also mean nothing. Kretzmer D “Human Dignity in Israeli Jurisprudence” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 161 174. See also Davis D “Equality: The Majesty of Legoland Jurisprudence” (1999) *SALJ* 398 413.

³³ See Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 195. Kretzmer contends that dignity should not be used as a magic wand or catchall right. Kretzmer D “Human Dignity in Israeli Jurisprudence” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 161 174.

³⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 26; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 26.

³⁵ Botha refers to Dreier H *Grundgesetz Kommentar Bd I* 2ed (2004) 166-167. Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 182. For examples from the Bavarian Constitutional Court of what is generally recognised as violations of dignity, see Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 151.

³⁶ Eckert J “Legal Roots of Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 42; McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 679.

core by examining the religious, philosophical and historical foundations of dignity. However critics have argued that it is impossible to establish a minimum core definition of human dignity.

The third proposition is to give what Dicke calls a “functional interpretation” to the concept of human dignity.³⁷ This interpretation requires agreement on the effect or function of applying the concept in practice, despite a lack of agreement on the theory. McCrudden refers to these kinds of agreements as ‘incompletely theorized’ agreements.³⁸ The functions of human dignity are discussed later in this chapter.³⁹

It seems that a combination of the three suggestions would be the optimum solution. This will include an attempt at determining a minimum core definition of human dignity, while keeping in mind past instances of its violation and, where theory is inadequate, to at least try to establish the effect or function of human dignity.

2 2 The use of foreign jurisdictions and a universal definition of dignity

This poses the question, how do we establish the minimum core and the functions of human dignity?

Foreign case law and academic literature can assist in defining and interpreting human dignity. In South Africa German judicial decisions can be especially valuable. Ackermann J acknowledges this in *Du Plessis v De Klerk*.⁴⁰ There are several reasons for this assertion.⁴¹

The German Basic Law and the South African Constitution were both drafted with a “never again” attitude, following gross violations of human dignity.⁴² Both of these countries have a

³⁷ Dicke K “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 111 118.

³⁸ McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 697. McCrudden introduces this idea of “incompletely theorized” agreements, but then goes on to criticise it.

³⁹ See 2 5.

⁴⁰ 1996 3 SA 850 (CC) para 92; hereinafter referred to as ‘*Du Plessis v De Klerk*’.

⁴¹ Botha and O’Regan list some of these reasons. Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 173; O’Regan C “From Form to Substance: The Constitutional Jurisprudence of Laurie Ackermann” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 6.

⁴² Botha states this with reference to *Du Plessis v De Klerk* para 92. Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 173. O’Regan notes this “never again” attitude of both these countries. O’Regan C “From Form to Substance: The Constitutional Jurisprudence of Laurie Ackermann” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 6. The German Constitution of 1949 is called the *Grundgesetz* (translated as the German Basic Law and hereinafter

constitutional normative value system and have adopted the idea that law cannot be understood separate from values and morals.⁴³ The dignity jurisprudence of Germany is more developed than that of other countries, which makes it a very authoritative source when interpreting human dignity.⁴⁴

Section 39(1)(c) of the South African Constitution determines that a court may consider foreign law when interpreting the bill of rights. There have, however, been a number of debates regarding whether courts should refer to other jurisdictions when dealing with human dignity. There are valid arguments for both sides of the debate. Botha lists a number of advantages for the use of foreign case law. He refers to the fact that, similar to the South African and German Constitutions, many countries have incorporated human dignity as a central part of their constitutions following severe violations to human dignity, for example discrimination, dictatorship and fascism. As a result the constitutional provisions that entrench human dignity in these countries' constitutions resemble one another.⁴⁵ Considering the similarities between these provisions, one might benefit greatly from consulting other jurisdictions on their interpretation of the concept.

Another argument in favour of referring to foreign law is based on the theory that the South African Constitutional Court's understanding of human dignity has been influenced to some extent by foreign case law and literature. This is especially asserted in the context of dignity as the most fundamental norm; which some consider a German idea.⁴⁶ Where a country's understanding of a certain concept is influenced by another country, it cannot be prejudicial to consult that country when further interpreting and developing the idea.

Another advantage, which is attributed to the use of foreign jurisdictions in defining and interpreting human dignity, is that it shows the similarities that South African dignity jurisprudence share with that of other countries. This serves as a confirmation of our convictions.⁴⁷ Moreover it highlights the differences in the dignity jurisprudence of different countries, identifying other interpretive possibilities. It can also give an indication of whether

referred to as such). Art 1 of the Basic Law entrenches human dignity as follows: "The dignity of man is inviolable. To respect and protect it is the duty of all state authority."

⁴³ O'Regan C "From Form to Substance: The Constitutional Jurisprudence of Laurie Ackermann" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 6.

⁴⁴ Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 173.

⁴⁵ 172.

⁴⁶ 172. This will be discussed in 2.5 in greater detail. The idea is also mentioned that this is first and foremost a Kantian idea, rather than one derived from German constitutional jurisprudence.

⁴⁷ 172-173.

any problems encountered in the interpretation of dignity are due to formulation and interpretation, or whether they are inherent to the concept of human dignity.⁴⁸

Another popular argument in favour of consulting the jurisprudence of foreign jurisdictions relates to the theory of a universal definition of human dignity. It was developed from the understanding that the idea of inherent human dignity is derived from natural law.⁴⁹ Natural law is deemed to be a higher law and therefore more enduring.⁵⁰ This corresponds with the legitimising function ascribed to human dignity.⁵¹ It is put forth that natural law transcends national boundaries, resulting in one universal conception of human dignity. The idea that human dignity is an ethical conception also enhances the idea of a universal definition of thereof.⁵²

This approach is nevertheless criticised extensively. McCrudden addresses this criticism.⁵³ The main critique against a universal idea of human dignity is that a common conception of human dignity is impossible, since foreign jurisdictions differ too much.⁵⁴ The individual characteristics of each country play an undeniable role in defining and interpreting dignity. These characteristics relate to the ideology, religion, culture and language of each country.⁵⁵ McCrudden concludes that any commonality between countries regarding the concept of human dignity dissolves under closer examination.⁵⁶ He ascribes the courts' unwillingness to admit that they apply a customised interpretation of dignity, to their fear of detracting from dignity's legitimising function.⁵⁷ It has however been argued that even though interpretation

⁴⁸ 173.

⁴⁹ McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 696. For the notion that inherent dignity transcends national boundaries, see Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 200.

⁵⁰ For the idea that dignity is part of a more enduring higher law, see Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 177.

⁵¹ McCrudden writes that if it is acknowledged that dignity is applied differently in different countries dignity will lose its legitimising function. McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 710.

⁵² Barrett J "Dignatio and the Human Body" (2005) *SAJHR* 525 529, 533.

⁵³ McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 694-710.

⁵⁴ 697-710. McCrudden provides an extensive explanation of all the "differences in the conceptions of dignity in judicial interpretation".

⁵⁵ 710, 712.

⁵⁶ 710.

⁵⁷ 710. McCrudden however refers to a case in which a court has acknowledged that dignity is interpreted differently in different jurisdictions. In the *Omega*-case the ECJ implies that Germany attaches more weight to human dignity than the US; *Omega Spielhallen und Automatenaufstellungs- GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9 609 paras 34-37.

and actualisation occur within a certain jurisdiction, it does not undermine the universality of human dignity.⁵⁸

It is therefore evident that consulting the jurisprudence of foreign jurisdictions when defining and interpreting human dignity can be highly advantageous. At the same time it is necessary to acknowledge the tension between upholding a universal notion of human dignity and respecting the plurality of different jurisdictions.⁵⁹ In order to ensure the independence of a court, the jurisprudence of other jurisdictions should not dictate its decisions, but merely assist therein.⁶⁰ Courts should refer to other jurisdictions while keeping in mind the possible perilous consequences.

2 3 The foundations of human dignity

Another important step in the effort to define human dignity is to explore its foundations and roots. Only when one understands where dignity comes from, can one get a better idea of its contemporary meaning(s).

Dignity has three integrated foundations namely religion, history and philosophy.⁶¹ It is stated that they are integrated, for, while three distinct foundations can be identified, they all form part of each other. Just as religion and philosophy are part of the history and background of human dignity, religious influences⁶² are incorporated into its philosophy.

The idea of human dignity can be traced back to ancient times and was originally regarded strictly as a religious and philosophical ideal. Despite the absence of a substantive link

⁵⁸ See Barrett J “*Dignatio and the Human Body*” (2005) *SAJHR* 525 532. See also, South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 226, on the obligation to take into account South Africa’s “particular socio-economic circumstances and its cultural, moral and religious diversity”.

⁵⁹ McCrudden refers to this inherent tension. McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 694. See also, South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 110.

⁶⁰ 695. McCrudden acknowledges this possible consequence. He refers to the US Supreme Court case of *Roper v Simmons* 543 US 511 (2005), para 1216. In this case O’Connor J finds that a court will keep its independence when consulting other jurisdictions, as long as it does not allow the foreign jurisdictions to dictate its decision.

⁶¹ McCrudden identifies these three foundations as strategies to interpret human dignity. McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 658-663. Botha also refers to the philosophical and religious roots of human dignity. Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 179.

⁶² See Starck C “The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 180.

between human dignity and human rights until the modern era, human dignity was mentioned in ancient Roman law.⁶³

We find this ancient idea of human dignity in the Roman law concept of *dignitas hominis*. This notion of human dignity was not inherent to all people, but was awarded according to rank.⁶⁴ Both states and institutions could attain *dignitas hominis*, as the concept was not limited to human beings.⁶⁵ Roman Dutch law adopted this idea of *dignitas* and the idea was consequently incorporated into South African private law. South African private law still contains this concept, yet it is rarely equated with the dignity that is entrenched in the Constitution.⁶⁶

Although there are some scattered Roman law writings on a kind of inherent human dignity, the first substantive reference to it can be found in religious writings.⁶⁷ In both the Christian and Jewish faith people are considered to have equal inherent worth because they are created in the image of God.⁶⁸ Inherent worth implies inherent human dignity. According to these religions human dignity is only inherent in human beings. The beliefs that only human beings were created in the image of God and that God granted only people the ability to reason, were support for this claim that human dignity is only inherent in people.⁶⁹

⁶³ See Dicke K “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 111 112; Eckert J “Legal Roots of Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 43.

⁶⁴ McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 656-657. Eckert J “Legal Roots of Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 44.

⁶⁵ McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 657.

⁶⁶ For the idea that constitutional dignity encompasses *dignitas*, see *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) paras 27-28. See also, McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 657. For an extensive explanation of the common law *dignitas*, see Barrett J “*Dignatio* and the Human Body” (2005) *SAJHR* 525 528-529.

⁶⁷ McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 657.

⁶⁸ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 189; Eckert J “Legal Roots of Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 43. Starck refers to Bible verses which confirm this, i.e.: Gen. 1:26-27, Eph. 4:24. Starck C “The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 180. For the notion that Humanists adopted this belief, see McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 658.

⁶⁹ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 189; Eckert J “Legal Roots of Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 44.

The Christian and Jewish concepts of inherent human dignity formed the basis of the philosophical ideas that followed.⁷⁰ This is evident from natural law writings.⁷¹ Natural law writers endorse the perception of inherent human dignity. It has however been argued that the natural law definition of human dignity is a bit more restricted than the theological concept.⁷²

Philosophers from the Renaissance, like the Humanists, tried to reconcile classical ideas and theological tradition.⁷³ They too believed that people derive their inner worth from the fact that they are created in the image of God.⁷⁴ These Humanists also regarded *reason* as a gift from God. This gift, that gives man the ability to choose who he wants to be, was considered to be the foundation of human dignity.⁷⁵

During the Enlightenment philosophers focused on the Christian idea that all human beings have equal inherent human dignity because they have the ability to reason and make autonomous decisions.⁷⁶ Immanuel Kant was the most prominent philosopher of the Enlightenment and, as stated above, is often regarded as the “father of the modern concept of human dignity”.⁷⁷ According to one of his formulations of the Categorical Imperative, people are not mere means to an end but are ends in themselves and should be treated accordingly.⁷⁸ The basis for the categorical imperative is that people have inner worth and

⁷⁰ Starck C “The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 180-181.

⁷¹ Dicke K “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 111 113.

⁷² For more on this subject, see Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 189.

⁷³ See McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 658.

⁷⁴ Eckert J “Legal Roots of Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 44; McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 658.

⁷⁵ See McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 659.

⁷⁶ 659.

⁷⁷ See 1 2. This quote is taken from McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 659. McCrudden quotes from Boggetti G “The Concept of Human Dignity in European and U.S. Constitutionalism” in Nolte G (ed) *European and US Constitutionalism, Science and Technique of Democracy* 37 (2005) 75 79. See also Liebenberg S “The Value of Human Dignity in Interpreting Socio-economic Rights” (2005) *SAJHR* 1 2; Wood AW “Human Dignity, Right and the Realm of Ends” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 48. Cornell explains how Ackermann J uses Kantian language to define human dignity. Cornell D “Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 18 30.

⁷⁸ Wood AW “What is Kantian Ethics?” in Wood AW (trans&ed) *Kant I: Groundwork for the Metaphysics of Morals* (2002) 157 163. Wood defines an end as “anything we act for the sake of”, in Wood AW “Human

should be free to make autonomous decisions.⁷⁹ The idea that people have inner worth implies that they should not be used as mere means to an end. Similarly, the notion that people should be free to choose their own ends, support the philosophy that they are ends in themselves. Socio-economic rights are often linked to the Categorical Imperative, given the argument that a person who lacks the basic necessities to live, is unable to freely choose his own ends. It is also held that such a person is more at risk of being reduced to a mere object (or end).⁸⁰

At first glance Kant's Categorical Imperative seems very individualistic.⁸¹ A closer examination reveals a much more communitarian quality to Kant's philosophy, which can be explained by the fact that Kant was influenced by the ideas of Jean Jacques Rousseau.⁸² Kant describes a Kingdom of Ends where people are all legislative members in a realm of ends and are required to harmonise their ends. This kingdom is subject to moral and practical reason.⁸³

Although other influential philosophies and outlooks ensued from the Kantian philosophy, Kant's ideas are considered the basic philosophical orientation.⁸⁴ A philosophical outlook that should nonetheless be mentioned, due to its particular significance in South African tradition, is that of *ubuntu*. *Ubuntu* is an ideal that is part of the living customary law of South Africa and has made a substantial contribution to South African jurisprudence.⁸⁵ It

Dignity, Right and the Realm of Ends" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 52.

⁷⁹ See Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 207.

⁸⁰ Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 209. Botha points out that this approach has been criticised because it seems to imply that people who lack basic socio-economic conditions do not have human dignity.

⁸¹ Eckert J "Legal Roots of Human Dignity in German Law" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 46; Cornell D "Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 18 30.

⁸² Cornell indicates this connection to Jean Jacques Rousseau. Cornell D "Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 18 30.

⁸³ For a further explanation of the Kingdom of Ends, see Wood AW "Human Dignity, Right and the Realm of Ends" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47-65; Cornell D "Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 18 30; Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 133. On the idea that the Kingdom of Ends relates to Kant's notion of moral autonomy in which people are free, but are at the same time bound to the duties of moral law, see Starck C "The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 182.

⁸⁴ Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 207.

⁸⁵ Cornell D "Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid*

essentially means that a person is a person through other people.⁸⁶ In a dignity context this can be interpreted as support for communitarian dignity, i.e. that a person can only have human dignity within a society that recognises it.⁸⁷

As explained in Chapter 1, it was only during the 1940s that these above mentioned religious and philosophical ideas of dignity were translated into legal language.⁸⁸ The total disregard for human dignity in the past led to a refusal to turn away from the suffering of humanity and prompted authorities all over the world to formulate a concept of law that is inseparable from morals and values, with human dignity at its core.⁸⁹ The philosophical and religious idea of human dignity was incorporated into constitutions and conventions worldwide.⁹⁰ South Africa likewise incorporated the idea of human dignity into its latest constitution after the violations against humanity during the Apartheid regime.⁹¹

The concept of human dignity has since developed into one of the main building blocks of modern constitutionalism. What started out as merely a confirmation of the inherent self-worth of each human being and a refusal to turn away from suffering developed into a rich

Legal Order (2008) 18 19, 22. For criticism against *ubuntu*, see Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 205.

⁸⁶ Wood formulates this definition with reference to the Constitutional Court judgment of *S v Makwanyane* 1995 (3) SA 391 (CC) paras 225-227, 263, 308 & 311 (hereinafter referred to as “*Makwanyane*”). Wood AW “Human Dignity, Right and the Realm of Ends” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 60.

⁸⁷ See 2 4 4 for more on *ubuntu* and the interpretation of dignity as communitarian concept.

⁸⁸ See 1 1. See also Dicke K “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 111 112.

⁸⁹ Woolman writes about this refusal in Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa 2ed* (2005) 36-1 – 36-2. O’Regan refers to law that is inseparable from morals and values. O’Regan C “From Form to Substance: The Constitutional Jurisprudence of Laurie Ackermann” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 6-16.

⁹⁰ See the literature referred to n3. Examples of conventions and other international texts that have incorporated dignity are: The Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 at 71 (1948); the International Convention on the Elimination of All Forms of Racial Discrimination GA Res 2106 (XX), Annex, 20 UN GAOR Supp (No 14) at 47, UN Doc A/6014 (1966), 660 UNTS 195; the Convention against torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, GA Res 39/46, Annex, 39 UN GAOR Supp (No 51), at 197, UN Doc A/39/51 (1984).

⁹¹ This is emphasised in *Makwanyane* paras 144, 329. These paragraphs are referred to in Chaskalson A “Human Dignity as a Constitutional Value” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 133 137; Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 197; Barnard-Naude AJ, Cornell D & Du Bois F Barnard-Naude AJ, Cornell D & Du Bois F (eds) “Introduction” *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) vii viii. Cornell writes that our constitution is “emblematic to the very revolution that took place”. Cornell D “Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 18 20. See also Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa 2ed* (2005) 36-1 – 36-4.

complex concept that protects each person while at the same time giving them the freedom to live autonomous lives.⁹²

2 4 The minimum core of dignity

2 4 1 Introduction

From the historical, religious and philosophical roots emerge the components and characteristics of human dignity that constitute its minimum core. The two main components that become evident from the foundations of human dignity are: inherent worth and autonomy. This means that every single person has inborn human dignity, which in turn entails that all people have equal self-worth and the freedom to make their own choices.

To begin with, it is important to determine what is meant by *inherent* human dignity. It essentially means that nothing can add or subtract from it.⁹³ This implies two things. Firstly, nothing can add to human dignity because it exists regardless of its recognition.⁹⁴ Dignity is not awarded through legal operation; each person possesses it from birth, irrespective of their ability or potential.⁹⁵

Secondly, the fact that nothing can subtract from human dignity means that dignity can never be lost. It is not lost by undignified behaviour and is even said to be inalienable, irreducible, unwaivable and inviolable.⁹⁶

⁹² See Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 – 36-2.

⁹³ Wood AW “Human Dignity, Right and the Realm of Ends” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 49.

⁹⁴ See Dicke K “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 111 114.

⁹⁵ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 189. See also Barrett J “*Dignatio* and the Human Body” (2005) *SAJHR* 525 531. Barrett explains that the philosopher, Pufendorf, created the idea of human rights by birth.

⁹⁶ O’Regan J determines that dignity is not lost through undignified behaviour in *Makwanyane* paras 137, 142-143. See also Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 194 197 209; Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 148. Barrett concludes from the above that the court in *Jordan and Others v S* 2002 (6) SA 642 (CC) (hereinafter referred to as “*Jordan*”) erred in deciding that prostitutes lose their dignity due to their undignified behaviour. Barrett J “*Dignatio* and the Human Body” (2005) *SAJHR* 525, 538-539. Various writers have written about dignity as inalienable, irreducible, inviolable and/or unwaivable; they primarily rely on Kantian ideas. See for example Barrett J “*Dignatio* and the Human Body” (2005) *SAJHR* 525 530; Wood AW “Human Dignity, Right and the Realm of Ends” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 49; Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 194, 197; Waldron J “Dignity of Groups” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 66 69; and Starck C “The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions” in

Whether dignity is in fact inviolable is much debated. The German Basic Law states that human dignity is inviolable, whereas the South African Constitution has no similar provision.⁹⁷ It is argued that dignity can be violated under the South African Constitution, as it is subject to the limitation clause.⁹⁸ For this discussion it will be sufficient to say that regardless of whether dignity can be violated, it can never be taken away.⁹⁹

Kant provides a useful description of the inherent nature of human dignity. He contrasts dignity with price by saying that everything has either dignity or value. Something that has value can be replaced by or exchanged for something with an equal value. However, something that is above value and therefore does not admit to an equivalent has dignity.¹⁰⁰

The two main parts of this inherent human dignity are interlinked and therefore overlap in many regards. It is nevertheless necessary to analyse them separately, in order to determine their differences and similarities.

2 4 2 Inherent worth

If all people have inherent worth regardless of their actions, capabilities or potential, then it is logical to assume that all people have equal worth.¹⁰¹ Equal worth means that, regardless of our differences, everyone is equally important. This imposes the duty on all people to avoid discrimination and instead acknowledge and respect differences.¹⁰²

Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 180. Whether human dignity can in reality be waived is discussed later in 4 1 2 and 6 1 2.

⁹⁷ German Basic Law article 1(1).

⁹⁸ S36 of the Constitution. McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 699. McCrudden refers to the judgment of Kriegler J in *Makwanyane* para 214. There is however support for the argument that the South African idea of human dignity is as inviolable as Germany’s, see Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 197-198.

⁹⁹ Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 148; Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 194, 197.

¹⁰⁰ Kant I *Groundwork of the metaphysics of morals* as explained in Barrett J “*Dignatio* and the Human Body” (2005) *SAJHR* 525 530. See also Wood AW “Human Dignity, Right and the Realm of Ends” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 49.

¹⁰¹ On the idea that persons have equal worth, see Davis D “Equality: The Majesty of Legoland Jurisprudence” (1999) *SALJ* 398 398.

¹⁰² Liebenberg S “The Value of Human Dignity in Interpreting Socio-economic Rights” (2005) *SAJHR* 1 5. See also McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 685-686.

To treat people as though they have equal worth means to refrain from degrading, inhuman and humiliating treatment by protecting the bodily and psychological integrity of each person.¹⁰³

This imposes both a command and a prohibition. There is a command to ensure that people are not degraded, humiliated or treated inhumanly; a command to ensure the protection of each person's bodily and psychological integrity. This command therefore simultaneously places a prohibition on each person from degrading, humiliating or treating another person inhumanly.

The fulfilment of socio-economic rights plays a significant role in complying with the alleged command. In other words, human dignity demands the fulfilment of the socio-economic needs of everyone. A number of writers have criticised this theory. Their primary concern is that it might imply that people who lack certain basic conditions lack human dignity.¹⁰⁴ A counterargument for this criticism is that, while no person can ever lack dignity, they can lack the opportunity to live in dignity and in conditions that enable them to develop their talents and capabilities.¹⁰⁵ Unfulfilled socio-economic needs deprive them of this opportunity.

The socio-economic necessities, which dignity demands, therefore include all the essentials necessary to ensure that each person can live a dignified life.¹⁰⁶ Not only does this involve fulfilling the basic needs for survival, but also ensuring conditions that enable a person to develop his abilities and potential.¹⁰⁷ Take for example the socio-economic right to engage in

¹⁰³ McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 686-688; Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 188; Chaskalson A "Human Dignity as a Constitutional Value" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 133 134; Wood AW "Human Dignity, Right and the Realm of Ends" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 52; Kretzmer D "Human Dignity in Israeli Jurisprudence" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 161 165.

¹⁰⁴ Botha addresses this criticism. Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 209.

¹⁰⁵ Liebenberg discusses both the criticism and the counterargument. Liebenberg S "The Value of Human Dignity in Interpreting Socio-economic Rights" (2005) *SAJHR* 1 2-3.

¹⁰⁶ Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 180 189. Woolman calls this the ability to "live as ends". Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa 2ed* (2005) 36-1 36-18.

¹⁰⁷ For the idea that dignity requires basic needs for survival, see *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) para 44 (hereinafter referred to as "Grootboom"); McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 686 692-694; Eckert J "Legal Roots of Human Dignity in German Law" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 52. For the notion that people require socio-economic rights for development, see Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 180, 209. See also Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa 2ed* (2005) 36-1 36-12 n3.

productive work. The fulfilment of this right is often associated with the dignity of each person, irrespective of whether it is required to survive. Productive work gives a person a sense of self-worth since it causes society to regard him as useful.¹⁰⁸ It also gives him the money needed to develop his skills and realise his preferred way of being.¹⁰⁹

Human dignity therefore places a duty on the state to fulfil the socio-economic needs of citizens.¹¹⁰ In South Africa this duty is recognised in the Constitution and Constitutional Court regards human dignity as the central value informing the interpretation of socio-economic rights.¹¹¹ There is however criticism that the socio-economic rights jurisprudence of South African courts is nonetheless insufficient in promoting human dignity.¹¹²

What is often overlooked is that it is not just the state that has this duty to ensure the fulfilment of socio-economic rights for citizens. Each and every individual has a moral duty to assist each other in realising these needs.¹¹³ Liebenberg writes that when one person in a community lacks basic socio-economic needs it reflects the failure of that society to value human dignity and demeans the society as a whole.¹¹⁴

The command to provide people with socio-economic goods is however not enough to prevent degrading, humiliating and inhuman treatment. A prohibition from treating a person

Woolman refers to the Kantian philosophy that people need the material means necessary to pursue their own ends.

¹⁰⁸ See Liebenberg S “The Value of Human Dignity in Interpreting Socio-economic Rights” (2005) *SAJHR* 1 4. Liebenberg refers to *Minister of Home Affairs and Others v Watchenuka and Another 2004 (4) SA 326 (SCA)* para 27.

¹⁰⁹ For the importance of people realising their preferred way of being, see Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-2.

¹¹⁰ See Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 174, 189.

¹¹¹ Liebenberg S “The Value of Human Dignity in Interpreting Socio-economic Rights” (2005) *SAJHR* 1 1, 2-5, 7. Liebenberg also refers to *Grootboom* in which the court uses dignity to interpret socio-economic rights. (See also, *Khosa v Minister of social development 2004 (6) SA 505 (CC)* para 74.) Liebenberg discusses the criticism regarding the use of dignity as central value in informing the interpretation of socio-economic rights.

¹¹² Liebenberg S “The Value of Human Dignity in Interpreting Socio-economic Rights” (2005) *SAJHR* 1 11. Liebenberg explains this statement and suggests solutions for the problem.

¹¹³ See Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-2; Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 180, 209.

¹¹⁴ See Liebenberg S “The Value of Human Dignity in Interpreting Socio-economic Rights” (2005) *SAJHR* 1 5. Botha refers to *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)* para 18 (hereinafter referred to as “*Port Elizabeth Municipality*”) when he writes about the demeanour of society as whole. Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 210.

in such a manner is also necessary. This is where the so-called “object formula” comes into play.¹¹⁵

The object formula is regarded as one of the most influential and appealing definitions of human dignity to date.¹¹⁶ Dürig relies on the Kantian Categorical Imperative when defining this formula.¹¹⁷ He defines objectification as reducing a person to an object or a mere means to an end. This includes degrading someone to a thing “which can, in its entirety, be grasped, disposed of, registered, brainwashed, replaced, used and expelled.”¹¹⁸ The result of this kind of treatment is a violation of the self-worth of a person, since it calls his worth into question.¹¹⁹ People are denied the ability to choose their way of life and their environment.¹²⁰ This is at odds with what dignity requires, which is the treatment of individuals as subjects capable of self-determination.¹²¹

There are various case law examples of objectification. The bizarre pub sport of dwarf tossing is identified as objectifying treatment in the *Wackenheim* case.¹²² Here the United Nations Human Rights Committee found that the fact that dwarfs were thrown around like objects violated their human dignity. In *Coetzee v Comitis*¹²³ it was decided that a sports player is treated as an object if, even after the termination of his contract, he is forced to pay a transfer fee when he transfers to another club.¹²⁴ Capital punishment is yet another example. In *Makwanyane* capital punishment was held to objectify offenders.¹²⁵ Offenders were used as a mechanism of crime control without the possibility of rehabilitation.¹²⁶ Sexual exploitation can also be seen as objectifying treatment.¹²⁷ Women (and sometimes men) who

¹¹⁵ In my explanation of the object formula I rely primarily on the writings of Botha and Klein in Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 183-186; Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 149-152.

¹¹⁶ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 183, 184.

¹¹⁷ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 183. I refer to Dürig purely as referred to, translated and quoted in Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 183-186. Botha explains and analyses Dürig G’s “Der Grundrechtssatz von der Menschenwürde” (1956) *AöR* 117 124-127.

¹¹⁸ Dürig G “Der Grundrechtssatz von der Menschenwürde” (1956) *AöR* 117 127.

¹¹⁹ Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 150.

¹²⁰ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 183.

¹²¹ 184.

¹²² *Manual Wackenheim v France* Communication No 854/1999, UN Doc CCPR/C/75/D/854/1999 (2002); hereinafter referred to as “*Wackenheim*”.

¹²³ 2001 (1) SA 1254 (C).

¹²⁴ Para 34.

¹²⁵ Para 316.

¹²⁶ Para 313.

¹²⁷ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 202.

participate in prostitution, peepshows, pornography or prostitution are said to be objectified by viewers and clients.¹²⁸

There has however been much criticism against this definition of human dignity. Critics doubt the capacity of the object formula to constrain judicial decision-making. Some critics argue that the formula is too vague, which causes it to be over-inclusive, identifying some situations as violations of human dignity that simply cannot constitute a violation. Another critique is that this formulation of dignity does not respect autonomy. It focuses only on one aspect of human dignity and does not provide for the fact that a person may choose his objectifying situation.¹²⁹ The difficulty with this is that autonomy can also be regarded as part of the concept of human dignity.

One possible solution is to dilute the formula; this can however be very problematic.¹³⁰ In the German case of *BVerf GE 30, 1* (1970) the court rationalised that people are often treated as mere objects and that all instances of objectification cannot possibly constitute violations.¹³¹ The court therefore tried to create a solution for the problem by adding a condition to the object formula. The condition provides that an instance of objectification will only constitute a violation of human dignity if the treatment is contemptuous.¹³² This condition therefore requires a subjective intention to devalue. The problem with this dilution is that the prerequisite of a subjective intention is a completely arbitrary diminution of human dignity. Human dignity is effectively reduced to utterly degrading treatment.¹³³

Regardless of how the object formula has been applied in the past and the criticism it has received, it remains a significant component of the definition of human dignity.

¹²⁸ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 178,179. 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 S & Woods L *German Constitutional Law: the Protection of Civil Liberties* (1999) 105.

¹²⁹ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 184-185.

¹³⁰ See Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 185-186; Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 150-151.

¹³¹ Botha analyses this case. Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 185-186. See also Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 150.

¹³² Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 186; Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 151.

¹³³ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 186.

2 4 3 Autonomy

As mentioned above, the other core component of human dignity is autonomy. This part of human dignity is most associated with Kantian philosophy.¹³⁴ Kant's Categorical Imperative establishes autonomy as a part of human dignity. According to Kant each person is an end in himself with his own unique set of ends that should be respected. This idea of autonomy as a component of dignity was adopted in modern dignity jurisprudence all over the world; the landmark South African judgment in this regard being that of Ackermann J in *Ferreira*.¹³⁵

Autonomy is a form of freedom. It means that people have control over their own lives. They are free to live according to their own ideas of what is important and what will make them happy.¹³⁶ People are free to develop their own potential, talents and abilities.¹³⁷ It allows people to choose their own aspirations and decide how to fulfil them.¹³⁸ They can forge their own identities and personalities.¹³⁹

Autonomy, as guaranteed by dignity, is therefore equated with the freedom of choice.¹⁴⁰ It ultimately means to be able to make choices over one's own life, body, education, work,

¹³⁴ McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 659-660.

¹³⁵ For examples of this concept as incorporated in dignity jurisprudence, see McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 659, 685, 700; Eckert J "Legal Roots of Human Dignity in German Law" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 51; Chaskalson A "Human Dignity as a Constitutional Value" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 133 134; Kretzmer D "Human Dignity in Israeli Jurisprudence" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 161 167; Wood AW "Human Dignity, Right and the Realm of Ends" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 52; Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 131; Barrett J "Dignatio and the Human Body" (2005) *SAJHR* 525 537.

¹³⁶ See Barrett J "Dignatio and the Human Body" (2005) *SAJHR* 525 530; McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 689. See also Klein E "Human Dignity in German Law" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 149.

¹³⁷ See O'Regan C "From form to substance: The Constitutional Jurisprudence of Laurie Ackermann" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 6 15. O'Regan J refers to para 49 of Ackermann J's landmark decision in *Ferreira*. See also Barrett J "Dignatio and the Human Body" (2005) *SAJHR* 525 535; Eckert J "Legal Roots of Human Dignity in German Law" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41 52; Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-2.

¹³⁸ Kretzmer D "Human Dignity in Israeli Jurisprudence" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 161 167.

¹³⁹ Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 203-204, 208.

¹⁴⁰ Bhana D & Pieterse M "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) *SALJ* 865 880-881. See also Barrett J "Dignatio and the Human Body" (2005) *SAJHR* 525 535.

health and sexuality.¹⁴¹ That people should be able to decide over their personal and intimate affairs is not often contested, it is only when their choices start affecting the public that controversy on whether the choices should be allowed arises.¹⁴² This controversy will be discussed later.¹⁴³

This kind of autonomy, that dignity incorporates, does however hold certain responsibilities and limitations.¹⁴⁴ There will always be some amount of power and compulsion over people's lives and no person will ever be allowed total freedom.¹⁴⁵ The Kantian philosophy that an individual can only truly be free if he lives according to moral law is often regarded as an example of such responsibilities and limitations.

2 4 4 Communitarian vs. individual dignity

One of the limits to a person's autonomy is that of other people's autonomy. This has sparked a heated debate on whether dignity should be interpreted as a communitarian or individualistic concept. Some writers have argued in favour of a more individualist idea of human dignity and even the courts have been criticised for being overly individualistic.¹⁴⁶ These writers contend that human rights become nonsensical when given a communitarian interpretation.¹⁴⁷ They find support for their views in the Kantian Categorical Imperative.¹⁴⁸

¹⁴¹ Barrett views these as crucial matters over which each person should be able to decide himself. Barrett J "Dignatio and the Human Body" (2005) *SAJHR* 525 535, 536.

¹⁴² See McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 688-689. It seems from McCrudden's writings and references to American case law, that intimate and personal decisions are more readily allowed. Botha refers to Häberle P "Menchenwürde als Grundlage der Staatlicher Gemeinschaft" in Inesee J & Kirchhof P *Handbuch des Staatsrechts der Bundesrepublik Deutschland* 3ed (2004) 317 351-352. He explains Häberle's view that dignity is not exclusively concerned with private autonomy but also with public autonomy. Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 193. On bodily autonomy in the context of prostitution, see South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 192.

¹⁴³ See, 4 2, where individual freedom is balanced against the dignity of the community.

¹⁴⁴ Barrett acknowledges this responsibility with regard to autonomy over one's body. Barrett J "Dignatio and the Human Body" (2005) *SAJHR* 525 536.

¹⁴⁵ This inevitable power over people's lives is acknowledged in Barrett J "Dignatio and the Human Body" (2005) *SAJHR* 525 536; *BVerfGE* 30, 1 (1970) as discussed in Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 185-186. For the idea that people will never be allowed to do whatever they want see 2 4 4. Kretzmer quotes former president of the Israeli court, Shamgar J, as saying that a person should not be enslaved by arbitrary compulsion. This suggests that even though there may exist some sort of inevitable compulsion over a person's life, it may never be arbitrary. Kretzmer D "Human Dignity in Israeli Jurisprudence" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 161 167.

¹⁴⁶ Botha refers to this criticism. Botha H "Equality, Dignity, and the Politics of Interpretation" (2004) *SAPR/PL* 724 725.

¹⁴⁷ See Waldron J "Dignity of Groups" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 66 82. Waldron quotes from Ignatieff M *Human Rights as Politics and Idolatry* (2001) 67.

According to Kant dignity is vested in each individual. From this they deduce that no person may be reduced to a mere means to an end; not even for the ends of his community.¹⁴⁹

The counterargument is that this individualist concept of human dignity, ignores the context in which Kant's philosophy was written. Although in Kantian thought dignity vests in each individual person, this school of thought has a communitarian background. As mentioned above it is often overlooked that Kant writes about dignity within a realm or Kingdom of Ends.¹⁵⁰ This Kingdom signifies the community within which a person finds himself. In this Kingdom each person has his own ends, yet he is forbidden to adopt an end that is in conflict with the ends of another.¹⁵¹ The catch is that no one can be forced to choose an end that is in harmony with the rest of the Kingdom, because the key attribute of an end is that it is an act of freedom.¹⁵² This concept does however limit autonomy and furnishes the Kantian philosophy with a communitarian backdrop.

The followers of the communitarian approach to dignity view dignity as a relational value.¹⁵³ People are interdependent and bound to a community.¹⁵⁴ Within this community everyone has equal worth and no person's end is therefore more important than another.¹⁵⁵ Their rights and freedoms are limited by the rights and freedoms of others, as well as the right of future generations to a dignified living.¹⁵⁶ Communitarian dignity is therefore more concerned with

¹⁴⁸ Wood acknowledges that Kantian philosophy is often regarded as individualistic. Wood AW "Human Dignity, Right and the Realm of Ends" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 60.

¹⁴⁹ Starck C "The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 186; Starck calls this a humanistic approach.

¹⁵⁰ See 2 3. See also Wood AW "Human Dignity, Right and the Realm of Ends" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 60. Wood identifies this misunderstanding. He also gives an in depth explanation of the realm of ends.

¹⁵¹ 58.

¹⁵² 59. Wood provides a more extensive explanation of this idea.

¹⁵³ Liebenberg S "The Value of Human Dignity in Interpreting Socio-economic Rights" (2005) *SAJHR* 1 3.

¹⁵⁴ Liebenberg S "The Value of Human Dignity in Interpreting Socio-economic Rights" (2005) *SAJHR* 1 3; Starck C "The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 180; Klein E "Human Dignity in German Law" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 150. Klein refers to the German Federal Constitutional Court's judgment of *BVerfGE* 4, 7, 15 (1954) in which the image of man is developed. This image of man has the above-mentioned characteristics.

¹⁵⁵ Starck C "The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 181. Starck ascribes the idea that people have equal worth to the belief that they are all created in the image of God "in equal measure".

¹⁵⁶ See Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 187.

equality and community than freedom and autonomy.¹⁵⁷ The dignity interests of the individual are trumped by those of the community and people are only free to develop themselves within the societal framework.¹⁵⁸ Woolman refers to two High Court judgments in support of this statement, *S v Dube*¹⁵⁹ and *MEC for Health, Mpumalanga v M-Net*,¹⁶⁰ in which the community's right to receive information trumped the individuals' right to withhold it.¹⁶¹

It has even been put forth that dignity is grounded on social recognition.¹⁶² Some believe that a person is only a person through other people and that a person derives self-worth from how he is treated and from how he treats others.¹⁶³ These ideas have however been widely criticised and can only be accepted insofar as they are consistent with the notion of inherent dignity.¹⁶⁴

Botha observes that South Africa's Constitutional Court is presumably attempting to create a midway between the two extremities by "avoiding the radical individualist conception of a self that is unencumbered by social ties and relations, and a thick, essentialist view of a self that is incapable of escaping the strictures imposed by culture and religion".¹⁶⁵

¹⁵⁷ McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 660.

¹⁵⁸ This has been decided in various countries. Woolman writes about South African cases in which the dignity interests of the community have trumped those of individuals. Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-15. Two Israeli cases are quoted by Kretzmer to show that freedom is encouraged within a societal framework. Kretzmer D "Human Dignity in Israeli Jurisprudence" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 161 167, 170. These cases are: *Vickselbaum v Minister of Defence* (1992) 47 PD (2) 812 para 827; *Bank ha-Mizrahi v Migdal Kfar Shituḥi* (1993) 49 PD (4) 221. McCrudden and Starck discuss the fact that even the strictly inviolable German concept of dignity can be limited for the sake of society, see McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 700; Starck C "The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 188.

¹⁵⁹ 2000 (2) SA 583 (N).

¹⁶⁰ 2002 (6) SA 714 (T).

¹⁶¹ Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-15 n4.

¹⁶² For a discussion on this approach, see Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 189-191.

¹⁶³ This is the definition of *ubuntu*. Wood formulates this definition with reference to *Makwanyane* paras 225-227, 263, 308 & 311. Wood AW "Human Dignity, Right and the Realm of Ends" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 60. See also Liebenberg S "The Value of Human Dignity in Interpreting Socio-economic Rights" (2005) *SAJHR* 1 3.

¹⁶⁴ For criticism of *ubuntu*, see Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 205.

¹⁶⁵ 206.

2 4 5 Group dignity

Each person has inherent human dignity whether it is interpreted as individualistic or communitarian. The question is then, assuming that the individual possesses dignity, what about the group that he belongs to? Does a kind of ‘group dignity’ exist? In an article on group dignity Waldron writes that dignity is not necessarily inherent to groups, but vests in the groups because of the inherent dignity of each individual member.¹⁶⁶ This leads to the argument that it is not necessary to assert group dignity because each member is able to assert individual inherent dignity. However it does become necessary to assert group dignity when a person’s dignity is violated by others due to contempt for the group he belongs to.¹⁶⁷ Violations of this kind usually include stigmatisation or demeaning stereotyping.¹⁶⁸

When dignity is attributed to a group it affects the way other people view the members of that group.¹⁶⁹ This is evident from the decriminalisation of sodomy. When sodomy was seen as a sin and a crime members of that group, i.e. homosexuals, were stigmatised.¹⁷⁰ After the ban on sodomy was lifted people stopped discriminating against the group and started respecting its members.

However, there are risks involved in attributing dignity to groups. Talk of inherent group dignity can be abused.¹⁷¹ It can be used to dismiss claims for individual dignity. The American case of *Alden v Maine*¹⁷² is a good example. Here the applicant’s complaint was dismissed in favour of the group dignity of the state government. Another risk lies in the fact that some structured groups have internal hierarchies. Attributing dignity to such a group might endorse these internal ranks, counteracting the constitutional concept of inherent and

¹⁶⁶ Waldron J “Dignity of Groups” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 66 75.

¹⁶⁷ 82.

¹⁶⁸ Botha identifies these types of dignity violations of social groups. Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 207.

¹⁶⁹ Waldron J “Dignity of Groups” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 66 79.

¹⁷⁰ *NCGL* paras 28, 109. For the criminalisation of sodomy as a violation of the dignity of a particular social group, see Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 207.

¹⁷¹ Waldron J “Dignity of Groups” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 66 83.

¹⁷² 527 US 706 (1999). This case is used as an example of the above mentioned risk in Waldron J “Dignity of Groups” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 66 78.

equal dignity to all persons.¹⁷³ When referring to group dignity it is therefore crucial to acknowledge and avoid these risks.

2.5 Functions of human dignity

By establishing the components and characteristics of human dignity a minimum core emerges. This is the first step in defining human dignity. The next step, as identified above, is to determine the functions of human dignity, which can be used to inform dignity in the absence of agreement as to its theoretical aspects.¹⁷⁴

It is often said that the South African Constitution, like the German Basic Law, represents an objective, normative value system.¹⁷⁵ This means that human dignity does not merely represent a subjective individual right, but also embodies an objective norm or an objective normative value.¹⁷⁶ Dignity is entrenched as a right in section 10 of the Bill of Rights:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”¹⁷⁷

The first reference to dignity as a value is found in section 1 of the Constitution:

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

Thereafter various sections refer to dignity as a value.¹⁷⁸ However, the South African Constitution is not the only instrument in which dignity is portrayed as both a right and a

¹⁷³ Waldron J “Dignity of Groups” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 66 86-90. Waldron gives an extensive explanation of how this risk can be avoided.

¹⁷⁴ See 2.1.

¹⁷⁵ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 54; hereinafter referred to as ‘*Carmichele*’.

¹⁷⁶ Para 53.

¹⁷⁷ The Bill of Rights is entrenched in Chapter 2 of the Constitution.

¹⁷⁸ Ss 7, 36, 39, 165, 181 and 196. These sections are identified in Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-1.

value. National constitutions and international documents worldwide have similarly entrenched dignity.¹⁷⁹

Dignity as a subjective individual right can function independently.¹⁸⁰ It is however seldom applied this way.¹⁸¹ In *Dawood* it was decided that a court should not employ dignity as a first order right where the “primary constitutional breach occasioned may be of a more specific right”.¹⁸² There have nevertheless been times where the courts did not follow this approach.¹⁸³ In these cases the right to dignity was found to be violated along with other fundamental rights.¹⁸⁴

Dignity is more often applied as an objective norm or an objective normative value.¹⁸⁵ As a value, it provides a basis for human rights.¹⁸⁶ Dignity is deemed to be the source of all human rights and the main argument in favour thereof.¹⁸⁷ It gives weight and content to other

¹⁷⁹ In some more expressly than others. The German Basic Law, for example, does not expressly refer to dignity as a right, however the majority assumes that dignity also constitutes an individual right. See Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 180.

¹⁸⁰ Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-21.

¹⁸¹ Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-19; Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 198.

¹⁸² *Dawood; Shalabi; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35. Woolman analyses this case. Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-19 – 36-20. See also Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 198. Botha remarks that the result of this judgment is that dignity becomes a residual right.

¹⁸³ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 198-199.

¹⁸⁴ Botha refers to such cases in Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 199. He writes that this particularly happens in cases where there has been an equality violation. He also provides the following examples: *NCGLE; Bhe v Magistrate of Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2005 (1) SA 563 (CC); *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC).

¹⁸⁵ Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-22 – 36-24. Woolman lists reasons for the courts’ preference for employing dignity as a value instead of a right. It is open to debate whether dignity as an objective norm is synonymous to dignity as a value. Followers of the idea that dignity alone can be regarded as an objective norm, advocate that this description of dignity makes it supreme to other values. See Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 180. On the contrary it can be argued that all values are objective norms, since they are all equal.

¹⁸⁶ S7 of the Constitution; McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 680; Waldron J “Dignity of Groups” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 66 66. See also Chaskalson A “Human Dignity as a Constitutional Value” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 133 136.

¹⁸⁷ McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 680; *Makwanyane* para 144 as referred to in Chaskalson A “Human Dignity as a Constitutional Value” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 133 136. See also Dicke K “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 111 119.

rights and assists in their interpretation.¹⁸⁸ Common law is also interpreted and developed in relation to human dignity.¹⁸⁹ Limits to rights and values are set by dignity.¹⁹⁰ Due to its objective normative element dignity is often used to mediate value conflicts and conflicts between fundamental human rights.¹⁹¹

This raises the question of whether dignity is supreme and/or absolute.¹⁹² From the above-mentioned functions of human dignity this would seem to be the case. However there has not been agreement on this subject and each country's views on the matter differ substantially. Their divergence is primarily attributed to the fact that the formulation of the dignity guarantee, as well as the way it is entrenched, differs in each individual constitution.

For example, art 1(1) of the German Basic Law reads that “[h]uman dignity shall be inviolable.” In addition, art 1(1) cannot be limited by legislation and is shielded from constitutional amendment.¹⁹³ This formulation and entrenchment have resulted in the idea that the German concept of human dignity is absolute.¹⁹⁴

Considering the extent to which the formulation and entrenchment of human dignity in the constitutions of other countries differ from the German Basic Law, a different interpretation as to the status thereof seems in order. Take, for example, the South African Constitution. Unlike the German Basic Law the South African Constitution allows for the limitation and amendment of human dignity. All the sections, in which dignity is entrenched, may be amended. As a right, dignity is also subject to limitation.¹⁹⁵ This suggests that neither as a right nor as a value can human dignity be interpreted as absolute. The fact that human dignity, both as a right and as a value, is entrenched no different to any other rights or values

¹⁸⁸ S39 of the Constitution; McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 716 681. McCrudden refers to *Dawood* para 35. For a more extensive explanation, see Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 199-200.

¹⁸⁹ S39; Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 200.

¹⁹⁰ S36 of the Constitution; *Dawood* para 35 as referred to in Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-19. See also McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 680.

¹⁹¹ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 215-216. Botha also lists the criticism against doing this. See also, Ackermann LWH “Equality and the South African Constitution: The Role of Dignity” (2000) *Heidelberg Journal of International Law* 537 551-552.

¹⁹² I.e. whether dignity can be subject to balancing or limitation.

¹⁹³ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 178; Art 79(3) of the Basic Law.

¹⁹⁴ Despite this strong entrenchment of dignity, Botha explores a number of situations in which German courts have allowed the balancing of dignity against other rights or values, i.e. when it is necessary to infringe on someone's dignity in order to protect innocent victims. For more examples, see Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 194-196.

¹⁹⁵ Ss36 & 74 of the Constitution.

in the South African Constitution also suggests that the South African Constitution does not provide for a supreme reading of human dignity.

There are however objections to this standpoint.¹⁹⁶ First of all it is contended that the textual and structural features of the South African Constitution do not allow for this interpretation.¹⁹⁷ Secondly, it is indicated that the South African courts do not interpret dignity as equal to other rights or values.¹⁹⁸ Thirdly, the fact that our constitution entrenches *inherent* dignity conveys the idea that dignity is inviolable.¹⁹⁹ Lastly, since it features prominently throughout the Constitution, more importance is often conferred upon dignity.²⁰⁰

The strongest of these arguments is that, despite any logic to the contrary, South African courts do for some reason interpret dignity as a supreme right and value. As a result dignity is used to interpret constitutional provisions and to mediate right or value conflicts, thereby limiting such rights and values.²⁰¹ South African courts are renowned for their dignity-based jurisprudence and have proclaimed the centrality of human dignity to the Constitution.²⁰² A reason for this might be that, to some extent, courts often rely on foreign jurisprudence where universally acknowledged concepts are concerned.²⁰³ This suggests that countries may quite possibly adopt the German interpretation of human dignity as an inviolable concept, despite the varying formulations of dignity in their constitutions. This is because the German dignity jurisprudence is far more developed than that of other countries, which makes it a very authoritative source when interpreting human dignity.²⁰⁴

Another possible explanation for the fact that so many countries seem to adopt the German interpretation is that this German concept of inviolable human dignity is consistent with the Kantian idea of an inalienable human dignity.²⁰⁵ This suggests that the similarities between,

¹⁹⁶ Botha lists and explains these arguments. For a more extensive explanation, see Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 196-198.

¹⁹⁷ 196.

¹⁹⁸ 197.

¹⁹⁹ 197-198.

²⁰⁰ 198.

²⁰¹ 172; McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 718.

²⁰² 172.

²⁰³ See for example, McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 695.

²⁰⁴ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 173. See also *Du Plessis v De Klerk* para 106.

²⁰⁵ Roux T “The Dignity of Comparative Constitutional Law” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 185. For this Kantian idea see Kant I *Groundwork for the metaphysics of morals* as discussed in Barrett J “*Dignatio* and the Human Body” (2005)

for example, the interpretation of human dignity of South Africa and Germany might be purely coincidental.

South Africa was initially criticised for its dignity-based jurisprudence, yet the criticisms have mostly subsided due to the beneficial results of this approach.²⁰⁶

From the above it is evident that various countries do to some extent regard human dignity as supreme and/or absolute. This means that dignity cannot easily be limited or balanced against other rights or values.²⁰⁷

2 6 Conclusion

Despite the considerable amount of criticism it is possible to define dignity to some extent. Understanding the foundation and history of the concept and consulting the jurisprudence of foreign jurisdictions can help with piecing together a minimum core. It can also reveal the functions of dignity and provide examples of confirmed past violations. The two main components of human dignity are inherent worth and autonomy. In this chapter it has been demonstrated how the right not to be objectified can be located within the inherent worth component of human dignity, whereas the right to choose or consent to different situations, relates to its autonomy component.

SAJHR 525 530; Wood AW “Human Dignity, Right and the Realm of Ends” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 49.

²⁰⁶ See Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 213-214.

²⁰⁷ The method of balancing is explained in *Makwanyane* para 104. In *NCGLE* para 33 Ackermann J selectively quotes from this paragraph to summarises the method as follows “the ‘ . . . weighing up of competing values, and ultimately an assessment based on proportionality . . . which calls for the balancing of different interests.’”

CHAPTER 3

FREEDOM IN RELATION TO HUMAN DIGNITY

3 1 Defining freedom

3 1 1 How to define freedom

Freedom is notoriously difficult to define, much like human dignity.²⁰⁸ In his landmark decision on freedom Ackermann J concedes that the only way to genuinely define freedom is on an *ad hoc* basis.²⁰⁹ For purposes of this analysis it is however compulsory to assign some sort of general definition to the concept.

As with human dignity, this can only be achieved when the foundations and background of freedom are explored, as well as the interpretation thereof in foreign jurisprudence. In his own attempt to define freedom, Ackermann J acknowledges the importance of foreign jurisprudence. He emphasises that section 35(1) of the Interim Constitution encourages this.²¹⁰ The same principles that apply when defining dignity also apply here. Ackermann J recognises these principles when he pronounces that, regardless of whether the formulation of freedom varies in different constitutions, the fundamental legal norms are becoming quite universal. It is not necessary to rely directly on foreign jurisdictions, “but to identify the underlying reasoning with a view to establish the norms that apply in other open and democratic societies based on freedom...”²¹¹

3 1 2 The foundations of freedom

The three integrated foundations of human dignity: religion, history and philosophy also support freedom. However, in the case of freedom, philosophy is particularly influential, as it overshadows, yet simultaneously incorporates the other two foundations.

As mentioned before, in both the Christian and Jewish faiths it is believed that God created people in His image and granted them the ability to reason.²¹² This ability to reason is

²⁰⁸ Barnard-Naude AJ “Beyond the Brother: Radical Freedom” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 273 273.

²⁰⁹ *Ferreira* para 45.

²¹⁰ Act 200 of 1993; hereinafter referred to as “the Interim Constitution”. Now s39(1) of the Final Constitution.

²¹¹ *Ferreira* para 72.

²¹² See n27. According to Starck the belief that people are created in the image of God “provides the basis for their freedom”. Starck C “The Religious and Philosophical Background of Human Dignity and its Place in

therefore inherent to all people and confers upon them the capacity to choose who they want to be.²¹³

These beliefs are used in support of both freedom and dignity and indicate the connection between the two concepts. Philosophies based on these religious ideas confirm this connection.²¹⁴ It was mentioned earlier that the Humanists of the Renaissance deemed this ability to choose, which seems to resemble ideas of autonomy and freedom, to be the foundation of human dignity.²¹⁵

It has also been mentioned that philosophers from the Enlightenment era focused on the idea that all human beings have equal inherent human dignity because they have the ability to reason and make autonomous decisions.²¹⁶ While this once more emphasises the connection between freedom and human dignity, it also explains why one of the most prominent philosophers from that era, Immanuel Kant, focused considerably on autonomy and freedom.²¹⁷

In fact, Immanuel Kant and Isaiah Berlin are two of the most cited philosophers in legal freedom discourse. Kantian philosophy is of critical importance when defining freedom, whereas Berlin is especially renowned for his concepts of negative and positive liberty. While these philosophers often complement each other, they also differ in some respects. To avoid unnecessary detail or repetition I will explain their alternate perspectives when and where they are applicable throughout this chapter.

It is important to explore how these religious and philosophical ideas were incorporated into South African law. Before the end of Apartheid freedom was mainly found in the South African common law. The common law conception of freedom was heavily influenced by

Modern Constitutions” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 181.

²¹³ See McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 659. On inherent freedom, see Davis D “Equality: The Majesty of Legoland Jurisprudence” (1999) *SALJ* 398 398.

²¹⁴ Starck refers to the fact that various philosophies were based on these religious ideas. Starck C “The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 180-181.

²¹⁵ See McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 659.

²¹⁶ 659. This idea also has religious roots, e.g. Christian theology.

²¹⁷ 659-650.

Classical Liberal theory.²¹⁸ However, the state's denial of freedom to black people called for the constitutional entrenchment of freedom.²¹⁹ When defining constitutional freedom it should therefore be taken into account that freedom was incorporated into the Constitution in aspiration to a post-Apartheid order. According to Barnard-Naude this indicates that "the success of [South Africa's] future will be determined (measured) by its ability to overcome its history, [i.e.] by the extent to which it is able to realise the freedom of its citizens..."²²⁰

3 2 The manifestations of freedom

3 2 1 The manifestation of freedom in South African common law

The Classical Liberal theory can be traced back to the eighteenth and nineteenth centuries.²²¹ In the common law of South Africa this theory is particularly associated with the rules of property and contract. It denotes a private sphere of freedom, in which autonomous choices are entirely free from public interference.²²² This theory is founded upon natural law and natural liberty. One of its primary functions is the endorsement of the sanctity of contract and the strict enforcement of all transactions.²²³

It has been conceded that, to some extent, all concepts of freedom draw from this classical theory, yet in legal jurisprudence it receives remarkably more criticism than praise.²²⁴ Most of the criticism is directed at the potentially catastrophic results of its application. The most renowned example of this is the 1905 United States Supreme Court judgment of *Lochner v New York*.²²⁵ The Supreme Court struck down laws that provided maximum work hours,

²¹⁸ Liebenberg S "The Value of Freedom in Interpreting Socio-economic Rights" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 174. Liebenberg confirms that the Classical Liberal theory is found in common law.

²¹⁹ In *Makwanyane* para 156, Ackermann J explains that the constitutional values, such as freedom, were entrenched in the Constitution "in reaction to our past". In *Ferreira* para 51, Ackermann J refers back to this decision of O'Regan J. He emphasises the fact that Apartheid caused a denial of freedom and that this denial should be eradicated.

²²⁰ Barnard-Naude AJ "Beyond the Brother: Radical Freedom" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 273 275.

²²¹ Bhana D & Pieterse M "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) *SALJ* 865 866.

²²² Liebenberg S "The Value of Freedom in Interpreting Socio-economic Rights" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 161, 174. See also, South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 192.

²²³ Liebenberg S "The Value of Freedom in Interpreting Socio-economic Rights" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 174.

²²⁴ Bhana argues that all concepts of freedom draw on this theory. Bhana D & Pieterse M "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) *SALJ* 865 877.

²²⁵ 198 US 45 (1905); hereinafter referred to as "*Lochner*".

because it allegedly violated contractual autonomy.²²⁶ The outcome of such an implementation of the theory, as Liebenberg puts it, is “the relative insulation of private law relationships from scrutiny and evaluation in terms of their impact on people’s freedom to avoid oppressive and demeaning relationships”.²²⁷ According to critics the theory therefore endorses oppressive and demeaning relationships and contracts, since it ignores the realities of unequal relationships.

Hence, it is suggested that this theory be replaced by constitutional freedom. The South African concept of constitutional freedom is held to be “significantly narrower” than the Classical Liberal theory.²²⁸ This might be because it is restricted by its interaction with the other constitutional values and rights.²²⁹ Consequently the manifestation of freedom in the South African Constitution has a significant impact on the definition of freedom.

3 2 2 The manifestation of freedom in the South African Constitution

3 2 2 1 *Freedom in itself vs. Freedom within human dignity*

For this reason, when attempting to define freedom it is important to determine how it is incorporated into the Constitution. As Ackermann J points out, the language employed to formulate the concept and its context within the Constitution are vital interpretive tools.²³⁰ In the previous chapter the idea of freedom as a component of human dignity was explored.²³¹ This implies that, wherever dignity is found in the Constitution, freedom is automatically incorporated. Freedom is nevertheless also expressly mentioned in several constitutional provisions, where it performs similar functions to that of human dignity.²³²

3 2 2 2 *Functions of freedom in itself*

Dignity is not the only value upon which the South African Constitution is founded. Freedom and equality represent the other two constitutional values.²³³ As values, freedom

²²⁶ Ackermann J provides this case summary in *Ferreira* para 65.

²²⁷ Liebenberg S “The Value of Freedom in Interpreting Socio-economic Rights” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 162.

²²⁸ Bhana D & Pieterse M “Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited” (2005) *SALJ* 865 878-879.

²²⁹ 879.

²³⁰ He refers to instances in which Constitutional Court judges have endorsed the use of these interpretive tools, in *Ferreira* para 46.

²³¹ See 2 4 1 above.

²³² These sections are: ss1, 7, 12, 15, 16, 18, 21, 22, 36, 39, 165, 181 and 196.

²³³ The following sections of the Constitution entrench freedom and equality as values: ss1, 7, 36, 39, 165, 181 and 196. These sections are identified in Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-1.

and dignity perform roughly the same functions. Freedom also provides a basis for human rights.²³⁴ It gives weight and content to other rights and assists in their interpretation.²³⁵ Freedom can likewise set limits to these rights.²³⁶ Furthermore, the common law is interpreted and developed with reference to the value of freedom.²³⁷

The only function solely attributed to dignity is its role as mediator in value conflicts.²³⁸ By ascribing this function to it dignity appears superior in any value conflicts. The merits of this idea that dignity is supreme to freedom and of the court's dignity-based jurisprudence will be explored later in this chapter.²³⁹

Unlike dignity, freedom is not entrenched as a freestanding constitutional right in the Bill of Rights. There are however seven freedom rights:

- Section 12: The right to freedom & security of the person
- Section 15: The right to freedom of religion, belief & opinion
- Section 16: The right to freedom of expression
- Section 17: Freedom of assembly, demonstration, picketing and petition.
- Section 18: The right to freedom of association
- Section 21: The right to freedom of movement & residence
- Section 22: The right to freedom of trade, occupation & profession

There have been numerous debates over whether a freestanding right to freedom can be read into the Constitution. This issue was the subject of extensive judicial debate in *Ferreira*.

²³⁴ S7 of the Constitution. Liebenberg supports this notion when she refers to Sen's idea that freedom lies at the heart of the Bill of Rights. Liebenberg S "The Value of Freedom in Interpreting Socio-economic Rights" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 163. See also Sen A "Elements of a Theory of Human Rights" *Philosophy and Public Affairs* 32 (2004) 315 328-329; Waldron J "Dignity of Groups" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 66 66.

²³⁵ S39 of the Constitution.

²³⁶ S36.

²³⁷ S39.

²³⁸ McCrudden explains this use of dignity as an objective principle against which conflicting values are measured. He refers to *Port Elizabeth Municipality*, as an example of where this has been done by South African courts. McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 718. See also, Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 215.

²³⁹ See 3 4 2 1.

3 2 2 3 *Residual right to freedom*

Ackermann J provides six arguments in favour of a freestanding right to freedom. I will not necessarily discuss them in the same order in which he does, but in the order I deem fit for purposes of this chapter.

Firstly, Ackermann J relies on section 11(1) of the Interim Constitution.²⁴⁰ This subsection reads:

“(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.”²⁴¹

He uses this subsection as the basis of his contention for a freestanding freedom right, by reading “the right to freedom” disjunctively from the right to “security of the person”. He relies on the legislative history of section 11(1) to justify this. Prior to the Sixth Report of the Technical Committee on Fundamental Rights During the Transition these rights did exist separately and were only combined in this report.²⁴² According to Ackermann J, this suggests that the right to freedom should be read as independent from, but related to, the rest of the section.²⁴³

Secondly, Ackermann J regards the other sections in the Bill of Rights.²⁴⁴ He does this because, in his majority judgment, Chaskalson P asserts that section 11(1) must be read in the context of the Bill of Rights as a whole.²⁴⁵ Ackermann J contends that since certain freedom rights are specifically and separately protected in the Constitution, section 11(1) evidently refers to a residual right to freedom.²⁴⁶ This right should be interpreted broadly to cover limitations of freedom that cannot be challenged under the other specific freedom rights in the Constitution.²⁴⁷ In his interpretation of this paragraph in Ackermann J’s judgment, Du

²⁴⁰ S12(1) of the Constitution of the Republic of South Africa, 1996 (the final Constitution).

²⁴¹ S11(1) of the Interim Constitution. Hereinafter any reference to s11(1) will be in terms of the Interim Constitution, which is now s12 of the Final Constitution, unless otherwise stated.

²⁴² 1993. These reports paved the way for the Interim Constitution.

²⁴³ *Ferreira* para 46.

²⁴⁴ Paras 56 and 57.

²⁴⁵ Para 170.

²⁴⁶ Para 57.

²⁴⁷ Para 67.

Bois construes Ackermann J's reasoning as a claim in favour of a general right to freedom of action or a "right to the mundane".²⁴⁸

The third, fourth and fifth arguments, which Ackermann J raises, provide justification for the broad interpretation of this residual right and the application of the "generous" and "full benefit" interpretive approach used in *S v Zuma and Others*.²⁴⁹ In his third argument Ackermann J links freedom to human dignity, stating that they serve the same goal.²⁵⁰ This goal is the development of each person's unique talents. Freedom is therefore part of dignity and indispensable to the protection thereof. Du Bois suggests that Ackermann J connects these two concepts because human dignity has been acknowledged as a prominent constitutional right, which is defined quite broadly. By saying that these two concepts serve roughly the same goal and are dependent upon one another, Ackermann J implies that freedom is just as important as dignity.²⁵¹ Freedom should therefore also be defined "as widely as possible".²⁵²

In Ackermann J's fourth argument he turns to section 35(1) of the Interim Constitution.²⁵³ This section deals with the interpretation of the Bill of Rights. It reads:

"(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."

Ackermann J addresses the notion of an "open" society that is based on "freedom". He proposes that in such an open society individual freedom should be defined broadly. The support for his argument lies in his definition of an open society. According to Ackermann J:

²⁴⁸ Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 131-132. Du Bois states that the examples that Ackermann J provides in para 67 of *Ferreira* support this idea.

²⁴⁹ 1995 (2) SA 642 (CC) paras 14-15; hereinafter referred to as '*Zuma*'. Ackermann J refers to this case in *Ferreira* para 58.

²⁵⁰ Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 127. This is Du Bois' interpretation of Ackermann J's words in *Ferreira* para 49.

²⁵¹ Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 127.

²⁵² *Ferreira* para 49. Ackermann J continues to say that the right should be "consonant with a similar breadth of freedom for others".

²⁵³ Now s39(1) of the Final Constitution.

“[An open society is] a society in which persons are free to seek out their own ultimate fulfilment, to fulfill their own humanness and to question all received wisdom without limitations placed on them by the State. The ‘open society’ suggests that individuals are free, individually and in association with others, to pursue broadly their own personal development and fulfilment and their own conception of the ‘good life’.”²⁵⁴

It is clear that this definition of an open society corresponds greatly with his ideas of freedom, as set out in the previous argument. By employing these corresponding definitions Ackermann J indicates that a broad definition of freedom is indispensable to the concept of an open society.

The fifth critical argument Ackermann J raises in favour of a broad residual right to freedom is that our Constitution does not warrant the internal limitation of section 11(1). He employs a teleological approach when he considers the purpose of the Constitution as a whole, in order to interpret section 11(1). Part of this purpose, he contends, is to eradicate the limitations on personal freedom during Apartheid.²⁵⁵ During this time the majority of South Africans, especially black people, were denied the freedom to choose and develop their own identities, which amounted to a “denial of the freedom to be fully human.”²⁵⁶ Due to this, courts should be very stringent with regard to the limitation of freedom.²⁵⁷

This does not mean that Ackermann J endorses an unlimited right to freedom.²⁵⁸ As Sachs J correctly observes, that would be entirely unrealistic.²⁵⁹ The paradox of unlimited freedom suggests that unlimited freedom defeats itself. People are allowed to infringe upon each other’s freedom if their freedom is not protected and limited by the state.²⁶⁰ This idea, that freedom cannot exist where people may infringe upon each other’s freedom, corresponds with the Kantian Doctrine of Right, as well as the Kantian Kingdom of Ends. The Doctrine of Right asserts that a person has freedom “insofar as it is compatible with the freedom of everyone else in accordance with a universal law”.²⁶¹ Therefore, rules that secure peace and

²⁵⁴ *Ferreira* para 50.

²⁵⁵ Para 51. Ackermann J applies O’Regan J’s findings regarding human dignity in *Makwanyane* para 329, to personal freedom.

²⁵⁶ *Ferreira* para 51.

²⁵⁷ Para 51.

²⁵⁸ Ackermann J emphasises this in para 59.

²⁵⁹ Para 250.

²⁶⁰ Ackermann J provides this explanation by quoting Popper in n56 of *Ferreira* para 52. See Popper K *The Open Society and its Enemies* 2 4ed (1962) 124-125.

²⁶¹ Per Ackermann J’s quotation of Kant in *Ferreira* para 52. Du Bois identifies this idea of freedom as the Kantian Doctrine of Right. Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 133, 135, 141. He also

regulate human interaction are necessary for the enjoyment of freedom and are accordingly not considered an infringement thereon.²⁶²

For this reason, Ackermann J clearly states that he does not propose that the state should never limit freedom, but merely demands that such limitation always be in line with the limitation clause.²⁶³ This clause forces the state to justify any limitation to freedom by proving that it is “reasonable and justifiable in an open and democratic society based on freedom and equality”, which in turn mitigates the risk of arbitrary limitation to personal freedom.²⁶⁴

This corresponds with Ackermann J’s submission that when a constitution contains a limitation clause all rights subject thereto should be interpreted broadly. It is only in the absence of such a clause that the court is forced to internally limit the right.²⁶⁵

In terms of the above three arguments a narrow interpretation of the right to freedom would therefore be unfounded, as it is not demanded by the text, context or object of the right or any neutral principle.²⁶⁶ Furthermore, a broad freedom right will not give rise to decisions analogous to *Lochner*, as the limitation clause would justify reasonable limitations, thus preventing courts from falling into the *Lochner* trap.²⁶⁷

Section 36 of the Constitution therefore recognises that freedom can be limited by way of balancing. Berlin writes that where two rights are in conflict, a person’s ability to reason is applied in order to rationally choose the least obstructive solution. Freedom may therefore be limited in favour of another constitutional right.²⁶⁸

explains that choices or ‘ends’ comply with universal law when they comply with moral law. Kant’s Kingdom of Ends is explained and discussed in 2 3 & 4 2 2.

²⁶² In Cornell D “Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 18 28, Cornell argues this by quoting Sachs J in his decision in *Ferreira* para 250. Du Bois also identifies this idea of freedom as the Kantian Doctrine of Right. Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 136-140.

²⁶³ *Ferreira* para 52. This limitation clause, which Ackermann J refers to, is found within s33 of the Interim Constitution and s36 of the Final Constitution.

²⁶⁴ The Final Constitution adds “human dignity” as an additional value to freedom and equality. I will not provide a detailed analysis of the “necessary” condition in s33 of the Interim constitution, as it is not applicable anymore.

²⁶⁵ Ackermann J refers to *Zuma* para 21, where the Court called this “single” and “two-stage” limitation is described. *Ferreira* para 82; see also para 58.

²⁶⁶ *Ferreira* para 68.

²⁶⁷ Paras 20-21. In addition to this, Ackermann J gives two other reasons for his contention that *Lochner* will not be repeated.

²⁶⁸ Para 53. Ackermann J quotes from Berlin I “Introduction” in *Four Essays on Liberty* (1969) i ii.

In Ackermann J's final argument he consults foreign law.²⁶⁹ He specifically selects three countries that have all recognised a freestanding right to freedom, albeit in different ways. The most important of these is Canada.²⁷⁰ The Canadian Supreme Court has read a residual right to freedom into their Constitution by reading it disjunctively from the rest of a section, in a similar fashion Ackermann J himself does with section 11(1).²⁷¹

Despite these six contentions the majority in *Ferreira* rejects Ackermann J's appeal for a freestanding residual right to freedom. They offer several reasons.²⁷² This includes that 'creating' an individual right to freedom is the duty of the legislative authority and it is therefore against the doctrine of the separation of powers for courts to perform this function.²⁷³ Chaskalson P further argues that a broad definition of the right would open the floodgates of litigation.²⁷⁴

He also considers the context of the section. The limitation clause in the Interim Constitution differs from the one in the Final Constitution. According to Chaskalson P, the formulation of the limitation clause in the Interim Constitution is inconsistent with the idea of a residual freedom right. In terms of this clause the limitation of some rights had to be reasonable, whereas the limitation of other rights had to be necessary as well. Rights in the latter category were therefore deemed to be of a higher order. From this he infers that, since section 11(1) fell within this category, it indicates that section 11(1) should have a strict interpretation.²⁷⁵ He explains that:

"It would in my view be highly anomalous to give to unenumerated rights forming a 'residue' in section 11(1) a higher status, subject to closer scrutiny, than a right so important to freedom as privacy, which is subject only to the 'reasonable' test."²⁷⁶

²⁶⁹ He consults foreign law in *Ferreira* paras 73-87.

²⁷⁰ The other two countries are USA (the Fifth Amendment of the United States Constitution, 1791) and Germany (art 2 of the Basic Law).

²⁷¹ Canadian Charter of Rights and Freedoms, Part I Of The Constitution Act, 1982; *Thompson Newspapers Ltd et al v Director of Investigation and Research et al* (1990) 67 DLR (4th) 161.

²⁷² Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 114.

²⁷³ *Ferreira* paras 182-183.

²⁷⁴ Paras 182-183.

²⁷⁵ Para 173.

²⁷⁶ Para 174.

Another objection to Ackermann J's judgment is that it would lead to a repeat of the *Lochner* decision.²⁷⁷ This is because Ackermann J supports a far more Classical Libertarian interpretation of constitutional freedom than the "significantly narrower" interpretation that is supposedly prescribed.²⁷⁸

As Michelman points out, this rejection of a freestanding right to freedom has become settled law.²⁷⁹ What is the verdict on a separate freedom right then? Those in favour of such a right take two different standpoints.

The one school of thought believes that the court should revise its position on the matter. Du Bois follows this school of thought. He lists the above objections and then continues to illustrate their invalidity within the framework of the Final Constitution. He rejects the objection regarding the separation of powers as "secondary" and denounces the concern over opening the floodgates, saying that the enforcement of a constitutional right cannot be denied simply because it is too burdensome. The textual changes in the Final Constitution invalidate the objection concerning the limitation clause of the Interim Constitution.²⁸⁰

Du Bois calls the last objection the "key misgiving of the majority".²⁸¹ The majority rejects Ackermann J's concept of a separate and broad right to freedom for fear that it will result in a repeat of the *Lochner* decision. They fear a kind of isolated, individual, general right to freedom of action that would be inconsistent with the Constitution's redistributive aspirations and message of socio-economic solidarity. This will however not be the case. Ackermann J specifically states that the freedom he proposes is not "premised on the concept of the individual as being in heroic and atomistic isolation from the rest of humanity, or the environment".²⁸² He continues by saying that, despite the recognition of a broad residual

²⁷⁷ Para 182.

²⁷⁸ Davis D & Woolman S "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* 361 383.

²⁷⁹ Michelman F "Freedom by any Other Name? A Comparative Note on Losing Battles While Winning Wars" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 91 91.

²⁸⁰ Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 114-115. S36 of the Final Constitution does not distinguish between certain categories of rights. Any limitation on fundamental rights should be reasonable and justifiable.

²⁸¹ Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 113.

²⁸² *Ferreira* para 52. For Du Bois' discussion hereof, see Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 113-114.

freedom right in the Constitution, the state will still be allowed to intervene in terms of the limitation clause.²⁸³

Another argument in favor of the court revisiting its stance toward a separate right to freedom concerns Chaskalson P's concession in *Ferreira*:

“If despite the detailed provisions of Chapter 3 a freedom of a fundamental nature which calls for protection is identified, and if it cannot find adequate protection under any of the other provisions in Chapter 3, there may be a reason to look to section 11(1) to protect such a right.”²⁸⁴

This may be interpreted to imply that in the future a separate, residual right to freedom might be recognised under section 11(1). Chaskalson P's hesitance to recognise this right prior to the commencement of the final Constitution is understandable. It can be argued that the textual changes brought about by the final Constitution, call for the court to revise its position and acknowledge such a broad right to freedom.

The court's continued hesitance in this regard is nonetheless evident from O'Regan J and Sachs J's decision in *Jordan*:

“[W]e do not believe that it is useful for the purposes of constitutional analysis to posit an independent right to autonomy. [It is not] appropriate to base our constitutional analysis on a right not expressly included within the Constitution.”²⁸⁵

Nevertheless, they continue to find something similar to an “independent right to autonomy” within the right to human dignity.²⁸⁶ This constitutes the second standpoint of those in favour of a residual right to freedom. According to this school of thought, even though a separate right to freedom cannot be founded within section 11(1) it can be derived from the right to human dignity.

²⁸³ *Ferreira* para 66.

²⁸⁴ Para 184.

²⁸⁵ *Jordan* para 53 as referred to in Michelman F “Freedom by any Other Name? A Comparative Note on Losing Battles While Winning Wars” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 91 107.

²⁸⁶ In association with the right to privacy.

3 2 2 4 Freedom within human dignity

Michelman calls the above the Constitutional Court's "freedom-serving gloss on dignity".²⁸⁷ This approach has led to the court's application of the right to human dignity, in matters where other countries would more likely draw on a right to freedom.²⁸⁸ Michelman furthermore refers to the tendency of the court to involve the right to privacy in matters where freedom is found within human dignity. The rationale behind this is that freedom is more readily tolerated within the private sphere. Privacy therefore includes and endorses a right to make private or personal decisions.²⁸⁹

The problem, it seems, with finding freedom within dignity and privacy, rather than within the right to freedom itself, is that the ensuing right seems more limited. Autonomy is only awarded for choices that are personal and life shaping.²⁹⁰ Cornell explains that dignity is not associated with freedom as such, but with the free choices that are in line with moral and ethical law and adds value to our society.²⁹¹

In conclusion, there are various ways in which freedom manifests in the Constitution. Freedom as a right and a value is found within human dignity, yet is also a value in itself. Furthermore, freedom features in numerous specific rights, one of which might be interpreted to include a residual right to freedom. After identifying the manifestation of freedom in the Constitution, it becomes crucial to define this constitutional freedom.

²⁸⁷ Michelman F "Freedom by any Other Name? A Comparative Note on Losing Battles While Winning Wars" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 91-92.

²⁸⁸ 100. Michelman discusses *Dawood* as an example of how the right to freedom is found within human dignity. He also explains that, were this case heard in the US, the matter would have been decided in terms of the right to freedom.

²⁸⁹ See Michelman F "Freedom by any Other Name? A Comparative Note on Losing Battles While Winning Wars" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 91-101-104. See also the two cases Michelman uses as examples, i.e. *NCGLE* and *Jordan*.

²⁹⁰ Michelman F "Freedom by any Other Name? A Comparative Note on Losing Battles While Winning Wars" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 91-105-106.

²⁹¹ Cornell D "A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity and Reconciliation" (2004) 19 *SAPR/PL* 666-667.

3 3 The definition of constitutional freedom

It is important to keep in mind that constitutional freedom is not synonymous with common law freedom. It has been stressed that constitutional freedom is significantly narrower than freedom within the Classical Liberal theory.²⁹²

Ackermann J's definition of freedom can be used as a starting point for defining freedom, since it is often consulted during attempts at defining the concept. He refers to the two freedom philosophers, Kant and Berlin, who were identified above.²⁹³ Both of these philosophers write about freedom in a negative and a positive sense. However, their interpretations of these conceptions differ somewhat.²⁹⁴

Berlin defines negative freedom as freedom from the external interference of other persons.²⁹⁵ Positive freedom, to him, is more complex. It is the freedom from the control or interference of anyone or anything. This is much wider than freedom in the negative sense, as it also includes freedom from the interference or control of, for example, nature or one's own "unbridled passions". To be free from oneself suggests that a person has two levels of being. The first level represents the more carnal self; the self which cannot refrain from acting on its own desires or passions. The higher level, in turn, represents a higher self. This higher self aims at becoming the best version of itself and has the ability to control the lower self in order to achieve this. One can, therefore, only be free in the positive sense if the higher self is in control.

This complete freedom and control over one's own life may also contain socio-economic elements. When a person's basic needs are not fulfilled he cannot be truly in control of his life and have positive freedom. However, the criticism against this conception of positive freedom is that whatever resources are provided to those in need, will necessarily have to be taken from others. This 'confiscation' from others can be perceived as an external

²⁹² Bhana D & Pieterse M "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) *SALJ* 865 878-879.

²⁹³ See 3 1 2.

²⁹⁴ Cornell D "Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 18 24.

²⁹⁵ Berlin I "Two Concepts of Liberty" in Harris H (ed) *Liberty: Incorporating Four Essays on Liberty* (2002) 166 169.

interference by another person. As a result, ensuring the positive freedom of one person can cause infringement upon the negative freedom of another.²⁹⁶

Kant's negative freedom is essentially equivalent to Berlin's positive freedom.²⁹⁷ He calls his idea of positive freedom "causality through norms". This concept of freedom is quite complex. A person is positively free when there is no constraints upon him and he is capable of acting in accordance with what he 'ought to do', i.e. free to act according to moral law. This is achieved when persons live according to the Categorical Imperative, in terms of which their freedom is internally limited by the freedom of others. Although they are not forced to limit their own freedom in favour of others, they choose to do so because they freely adhere to moral law and ethical duties.²⁹⁸

This positive idea of freedom can be read into Berlin's conception of freedom, as it implies that one can only be truly free from all persons and things if one's higher self is in control and chooses to adhere to moral law and ethical duties.

In *Ferreira*, Ackermann J claims to rely on Berlin's negative concept of freedom.²⁹⁹ However, he refers to the Kantian notion of freedom which, as stated above, does not entirely correspond with Berlin's negative freedom. Several writers have in fact criticised this reliance on Berlin, saying that it is inconsistent with his subsequent comprehensive explanation of freedom.³⁰⁰ Ackermann J follows the broad and general approach when interpreting freedom and supports state intervention.³⁰¹ His idea of freedom includes the right to self-determination, which supports the positive idea of self-control.³⁰² The question is: why would Ackermann J claim to rely on Berlin's negative freedom and should this be understood as the ultimate definition of constitutional freedom?

²⁹⁶ 179.

²⁹⁷ Cornell explains Kant's negative freedom, in Cornell D "Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 18 24-25.

²⁹⁸ 25.

²⁹⁹ *Ferreira* paras 52-54.

³⁰⁰ See for example, Liebenberg S "The Value of Freedom in Interpreting Socio-economic Rights" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 159. Barnard-Naude AJ "Beyond the Brother: Radical Freedom" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 273 274.

³⁰¹ *Ferreira* para 52. Barnard-Naude points this out in Barnard-Naude AJ "Beyond the Brother: Radical Freedom" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 273 274.

³⁰² Or Berlin's positive freedom. Liebenberg uses paras 49-50 of Ackermann J's decision in *Ferreira* to indicate that this right to self-determination is found within Ackermann J's right to freedom. Liebenberg S "The Value of Freedom in Interpreting Socio-economic Rights" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 158.

There are two possible explanations for Ackermann J's reliance on Berlin's negative freedom. The first is that he chooses this definition based on the timing of the case.³⁰³ Support for this argument is found in Ackermann J's words: "I would *at this stage* define freedom negatively".³⁰⁴ It implies that at a later stage it might be justified to define freedom positively. His hesitance to define freedom positively can be attributed to the fact that the case was decided under the Interim Constitution. At that stage the scope of the Bill of Rights and the state's positive duty to provide for the material needs of individuals were still fairly uncertain.³⁰⁵

The second possible explanation for preferring Berlin's negative freedom relates to his fear of paternalism.³⁰⁶ He refers to Berlin's idea that freedom should not be confused with the conditions of its exercise, subsequently saying that a right to negative freedom does not guarantee a right to the conditions which allow for its exercise.³⁰⁷ A right to the conditions for the exercise of freedom creates tension between the individual and the collective.³⁰⁸ The provision of material needs (i.e. the conditions for the exercise of freedom) requires a redistribution of resources through which the state intervenes in the lives of individuals.³⁰⁹ This could have paternalistic consequences, wherein the conditions for freedom are provided yet freedom itself is withheld.³¹⁰

It has been argued several times that constitutional freedom should comprise of more than simply negative freedom. Freedom needs to be defined positively; or more in line with Kantian freedom. For freedom to have substantive meaning it needs to include the conditions for its exercise.³¹¹ As Liebenberg notes:

³⁰³ Du Bois raises this argument in Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 115.

³⁰⁴ *Ferreira* para 54; emphasis added.

³⁰⁵ Du Bois raises this argument in Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 115.

³⁰⁶ Liebenberg argues this in Liebenberg S "The Value of Freedom in Interpreting Socio-economic Rights" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 160-161.

³⁰⁷ *Ferreira* para 52.

³⁰⁸ Liebenberg S "The Value of Freedom in Interpreting Socio-economic Rights" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 161.

³⁰⁹ On the contention that a large-scale redistribution is necessary, see Radin MJ "Market-inalienability" (1987) *Harvard Law Review* 1849 1910, 1911; South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 26, 31, 150, 161.

³¹⁰ *Ferreira* para 52. Ackermann J quotes from Berlin I "Introduction" in *Four Essays on Liberty* (1969) i iii-iv, to support this argument.

³¹¹ Liebenberg S "The Value of Freedom in Interpreting Socio-economic Rights" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 159, 160, 164. Liebenberg states that "a lack of access to the particular economic or social resources... [might] restrict the

“We don’t need rights that falsely presuppose our autonomy and independence, but rights that frankly acknowledge our ... reality.”³¹²

The inclusion of socio-economic rights in the Constitution supports this idea of positive constitutional freedom.³¹³

A problem with defining freedom positively, especially with regard to its Kantian interpretation, is that the state can only go so far to protect and ensure this kind of freedom. It is hardly possible, for instance, for the state to ensure that people have control over their own passions and desires. Even more complex is the fact that the Kantian idea of ultimate freedom, where all persons harmonise their ends and live according to the moral law and ethical duties, is only possible if persons do so freely.

Subsequently, this definition of positive freedom will always remain a mere ideal. However, laws can ensure external freedom and can indicate the morally correct choices.³¹⁴ Cornell focuses on this idea of ensuring external freedom to allow morally correct choices. She refers to an ideal society, similar to the Kingdom of Ends, to which each individual should aspire. In order to aspire to such a society external freedom to self-legislate is crucial. Yet it is dignity that points us towards this ideal society, since dignity ties together this external freedom and the “ideal realm of self-legislation” in which choices are made in accordance with moral law.³¹⁵ According to this idea it could be said that within constitutional freedom external freedom is limited by dignity.³¹⁶

In conclusion it might therefore “at this stage” be necessary to define constitutional freedom positively.

development of people’s capacity for self-determination [forcing’ them into unequal and oppressive relationships because of economic need.” Substantive freedom can even justify that the disadvantaged are provided with more resources in order to afford them equal opportunities. See also Barnard-Naude AJ “Beyond the Brother: Radical Freedom” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 273 274.

³¹² Liebenberg S “The Value of Freedom in Interpreting Socio-economic Rights” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 160.

³¹³ Liebenberg S “The Value of Freedom in Interpreting Socio-economic Rights” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 162. Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 118.

³¹⁴ Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 129.

³¹⁵ Cornell D “Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 18 21.

³¹⁶ Cornell D “A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity and Reconciliation” (2004) 19 *SAPR/PL* 666 668.

3 4 Freedom in relation to human dignity

3 4 1 Are rights and values commensurable?

In order to explore the relationship between freedom and human dignity it is crucial to determine whether rights and values are commensurable. This is because the question of whether these concepts can limit one another or whether one is supreme to the other plays a significant role in determining their relationship. The answer to this question depends on the commensurability of rights and values in general.³¹⁷

The act of balancing rights and values requires an objective principle against which the conflicting rights and values can be measured. When rights are balanced, values constitute these objective principles, since a value is considered to have more weight than a right.³¹⁸ However, such a principle is lacking in case of a conflict of values.³¹⁹

McCrudden identifies three approaches that courts have followed when confronted with conflicting values.³²⁰ The first approach is simply to decide that courts cannot balance these values and to refer any such conflicts to the legislature. He calls the second approach “utilitarian balancing” which amounts to choosing an outcome that affords the “greatest good for the greatest number”. The third approach is to employ a proportionality test in situations where one value is to be limited in favour of another value.³²¹

Despite these approaches, various countries still opt for the use of an objective principle against which conflicting values can be measured. The most popular principle in this regard is that of human dignity.³²² It is of no surprise then that South African courts, with their commitment to dignity-based jurisprudence, have followed suit.³²³

³¹⁷ According to McCrudden, the idea of incommensurability was first popularised by Berlin. McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 714.

³¹⁸ See Chaskalson A “Human Dignity as a Constitutional Value” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 133 135. Kretzmer D “Human Dignity in Israeli Jurisprudence” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 161 169.

³¹⁹ McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 714

³²⁰ 715-716.

³²¹ 715. McCrudden explains the proportionality test.

³²² 716. Botha criticises the use of dignity as an objective principle in value conflicts. Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 201. See also Ackermann LWH “Equality and the South African Constitution: The role of dignity” 2000 *Heidelberg Journal of International Law* 537 551-552.

³²³ McCrudden refers to *Port Elizabeth Municipality*, in order to illustrate this point. McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655

Regardless of whether rights or values should be balanced against each other, it is evident from the above that in practice courts do in fact engage in this kind of balancing.

3 4 2 Two perspectives on the relationship between freedom and dignity

3 4 2 1 *One limits the other*

If dignity is used as an objective principle against which values are measured, then it follows from this that dignity can be used to limit freedom. This corresponds with the idea discussed in the previous chapter that dignity is sometimes regarded as a supreme right and value.³²⁴ Dignity as a supreme value cannot be limited by, or balanced against, other values.³²⁵

Due to our dignity-based jurisprudence dignity does actually enjoy more prominence than freedom in South Africa.³²⁶ As a matter of fact, various countries rely on dignity to limit individual freedom.³²⁷ South African courts do not perceive freedom as absolute. Therefore, unlike dignity it is more acceptable to limit freedom in favor of other values.³²⁸

There are various examples of how dignity might limit freedom. Paternalism plays a role in this regard. People are prohibited from exercising their freedom as a protection of their own dignity or the dignity of others. This is the case with the prohibition of prostitution, dwarf tossing and sadomasochism; even contractual autonomy is limited to ensure that no one contracts against dignity.³²⁹

718. See also Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 201; Chaskalson A “Human Dignity as a Constitutional Value” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 133 137.

³²⁴ 2 5.

³²⁵ This resonates with the Kantian philosophy in Kant I *Grundwork for the Metaphysics of Morals* Wood AW (trans&ed) (2002) 4:434, as referred to in Wood AW “Human Dignity, Right and the Realm of Ends” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 49.

³²⁶ Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 112.

³²⁷ Botha explains how Germany has used dignity to constrain freedom. Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 182. See also Bhana D & Pieterse M “Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited” (2005) *SALJ* 865 881.

³²⁸ See for example, how readily Ackermann J concedes that freedom is subject to limitation in *Ferreira* para 59.

³²⁹ The term ‘sodomasochism’ entails a combination of the words ‘sadism’ and ‘masochism’. Sadism “is the obtaining of pleasure, especially sexual pleasure, from making people suffer pain and humiliation”, whereas a masochist “is someone who gets pleasure from their own suffering”. See “sadism” and “masochism” in Makins M (ed) *Collins Pocket School Dictionary* (1995) 331, 465. Sadomasochism therefore refers to “sexual behaviour where the interaction between partners is concentrated on inflicting and receiving physical and psychic pain”. Spengler A “Manifest Sadomasochism of Males: Results of an Empirical Study” (1977) 6:6 *Archives of Sexual Behaviour* 441 442.

There is however criticism against only viewing dignity as inviolable and using dignity as an objective principle against which other values can be balanced. The most significant argument against dignity as such an objective principle is that dignity can be manipulated into a variety of meanings. Dignity can therefore be used as a tool in order to get one's way.³³⁰

Another objection relates to the idea that freedom is inherent to human dignity. Since freedom is part of dignity, it will inevitably always be the value that "best comport[s] with human dignity".³³¹ Consequently freedom as an independent value will never be limited in a balance of values where dignity is the objective principle against which the conflicting values are measured. A similar argument is that if dignity is regarded as an absolute value, freedom should receive a similar status, since freedom is part of dignity.

The second contention regarding freedom within dignity relates to situations where the value of human dignity is found on either side of a dispute.³³² On the one side of the dispute the self-worth aspect of dignity is relied on and on the other side the autonomy component is raised. A dispute concerning the permissibility of consent to objectification is of course a perfect example.³³³ In such a situation the balancing of dignity is inevitable.³³⁴ Here the superior value of dignity is not balanced against the inferior value of freedom. Where freedom within dignity is balanced against dignity itself, the effect is dignity vs. dignity, which is a very complicated situation.

Botha provides a number of solutions for this predicament, the most relevant one being that dignity should not be seen as absolute.³³⁵ He suggests that courts distinguish between a core of absolute dignity and peripheral areas of dignity that can be balanced and limited by other values. Courts should demand a compelling justification of limitations that touch upon core areas of dignity, while allowing the legislature greater latitude in relation to limitations of the more peripheral areas. This is however problematic in itself.³³⁶

³³⁰ See Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-69; Davis D "Equality: The Majesty of Legoland Jurisprudence" (1999) *SALJ* 398 413. Davis calls dignity "a jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer."

³³¹ McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 718, with reference to *Port Elizabeth Municipality*.

³³² Botha contends that this is more common than previously imagined. Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 195.

³³³ 194-195, 211-212.

³³⁴ 194.

³³⁵ 195-196.

³³⁶ 215-216. Botha explains the difficulty.

Writers in support of this solution argue that dignity should never have been interpreted as absolute or supreme. They contend that all values are entrenched alike and should receive equal prominence.³³⁷ With regard to freedom specifically, there are various arguments in favour of awarding freedom the same, if not more prominence than dignity.³³⁸ One is that the constitutional provisions in support of a supreme dignity confer similar weight upon freedom. In fact, freedom features more often and more prominently in our Bill of Rights. It is argued that the supreme status of human dignity simply reflects a choice of the court.³³⁹ Consequently the rule should either be that all values are incommensurable or that all values are subject to balancing.³⁴⁰ The latter would subsequently require a means of balancing which does not include the use of dignity as an objective, overriding principle.

3 4 2 2 *One enhances the other*

Values are however not always in conflict and can enhance or reinforce one another.³⁴¹ Freedom is often seen as the foundation of human dignity.³⁴² It is an essential part thereof. Accordingly human dignity is recognised and enhanced by the protection of freedom; without which it has little value.³⁴³

The converse is also true: that dignity enhances freedom. Just as freedom is sometimes seen as the basis of dignity, dignity is often considered the foundation of freedom.³⁴⁴ Human dignity is critical for the protection of freedom and since freedom is part of dignity, it

³³⁷ Woolman supports this school of thought. Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-29, n1. He contends that, since we have such a diverse and pluralistic society, rights and values should have equal prominence.

³³⁸ This is also in line with Kantian philosophy that requires freedom to be the basis of any Constitution. Woolman refers approvingly to this Kantian idea in Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-3, n2.

³³⁹ Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 112. The preference of the court is made clear in *NCGLE* para 28.

³⁴⁰ Even with regard to dignity, specific circumstances can be identified in which limitation might be beneficial. Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 216.

³⁴¹ *MEC for Education: Kwazulu-Natal and Others v Pillay and Others* 2008 (1) SA 474 (CC) para 63, as referenced in Du Plessis L “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 Law Journal* 376 399.

³⁴² Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 132.

³⁴³ *Ferreira* para 49. See also Bhana D & Pieterse M “Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited” (2005) *SALJ* 865 881.

³⁴⁴ Dicke K “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 111 114; Starck C “The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 182; Barrett J “*Dignatio* and the Human Body” (2005) *SAJHR* 525 530.

flourishes whenever dignity is recognised.³⁴⁵ Due to the court's dignity-based jurisprudence, additional protection is afforded to rights that are associated with dignity, such as freedom.

Although some of these ideas might seem mutually exclusive, this is not the case. It is asserted that dignity can simultaneously limit, enhance and be enhanced by freedom. The relationship between these two concepts is very intricate and complex due to their interdependence upon one another.

3 5 Conclusion

From the above it is clear that the definitions of freedom and dignity are quite interrelated. These two concepts share the same foundation and are often equated with one another. The common law Classical Liberal theory speaks of a more independent freedom, whereas constitutional freedom and dignity are regarded as interdependent.

³⁴⁵ Barrett J “*Dignatio* and the Human Body” (2005) *SAJHR* 525 530. See also Dicke K “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 111 115.

CHAPTER 4

INDIVIDUALS SHOULD NOT CONSENT TO OBJECTIFYING TREATMENT

4 1 Dignity is supreme

4 1 1 Dignity trumps freedom

As asserted in Chapter 1, there are three possible approaches to consenting to objectifying treatment. The first is that consent should not be allowed under any circumstances. The second is that where the state cannot fulfil the 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.³⁴⁶ In this chapter I will examine the reasoning behind the first approach.

The primary argument in favour of the first approach is based on the notion that dignity is absolute and supreme to other rights and values.³⁴⁷ Freedom is not regarded as such.³⁴⁸ Consequently, dignity is considered supreme to freedom. As a supreme value dignity can inform freedom and determine its limits.³⁴⁹ Subsequently, dignity always trumps freedom whenever these two rights or values are balanced.³⁵⁰

³⁴⁶ 1 1.

³⁴⁷ De Schutter endorses the idea that some values are more prominent than others. De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 486-488.

³⁴⁸ See Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and The Post-Apartheid Legal Order* (2008) 112 112.

³⁴⁹ The fact that dignity informs freedom is demonstrated in the context of contractual freedom in Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-46; Bhana D & Pieterse M “Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited” (2005) *SALJ* 865 868. De Schutter explains that dignity can limit freedom. De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 496-497. He also refers to specific cases in Germany where dignity has limited the freedom to consent, i.e. in the peepshow case of *BVerfGE* 30, 1 (1970). With regard to dignity limiting the freedom to consent, see Liebenberg S “The Value of Human Dignity in Interpreting Socio-economic Rights” (2005) *SAJHR* 1 3. For support that dignity can limit freedom within contract law, see Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-21; Bhana D & Pieterse M “Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited” (2005) *SALJ* 865 868. McCrudden shows that different countries have in fact used dignity to limit freedom.

³⁵⁰ See Ackermann LWH “Equality and the South African Constitution: The Role of Dignity” (2000) *Heidelberg Journal of International Law* 537 552. See also, the very recent case of *Print Media South Africa*

Therefore, whenever tension between dignity and freedom exists due to the individual's consent to objectification, dignity will prevail; thereby invalidating such consent. There are two objections to this argument. The first is that freedom is part of dignity and dignity can therefore not be supreme to it. In answer to this objection, De Schutter writes that freedom shall not be protected as part of an absolute dignity if "public authorities have good reason to limit [it]".³⁵¹

The second objection is that there exists a sphere of personal privacy in which an individual should be allowed to do as he wishes.³⁵² The counterargument to this objection is that an individual's privacy should be respected as a protection of his dignity.³⁵³ Dignity violated in private can therefore not be justified under private autonomy.³⁵⁴

4 1 2 Dignity cannot be lost

Barrett states that dignity is "inviolable, irreducible, unalienable [sic], [it] cannot be valued or exchanged."³⁵⁵ Dignity may therefore not be violated or limited by the individual himself or anyone else.³⁵⁶ As a result a person cannot consent to the violation of his own dignity by another, for that would constitute a violation by both the individual himself and the other person.³⁵⁷ This was decided in the German peepshow case in which women consented to objectifying treatment.³⁵⁸ Cases involving sadomasochism have followed suit.³⁵⁹

and Another v Minister of Home Affairs and Another ZAGPJHC 26-10-2011 case no 14343/2010 (unreported) where the right to human dignity trumped the right to freedom of expression.

³⁵¹ De Schutter O "Waiver of Rights and State Paternalism under the European Convention on Human Rights" (2000) *Northern Ireland Legal Quarterly* 481 497.

³⁵² This is argued in *Jordan* para 27.

³⁵³ *Laskey, Jaggard and Brown v UK* (1997) 24 EHRR paras 39, 51; hereinafter referred to as "*Laskey*".

³⁵⁴ Paras 36, 51.

³⁵⁵ Barrett J "*Dignatio and the Human Body*" (2005) *SAJHR* 525 530.

³⁵⁶ For support that a person may not violate his own dignity, see Malby S "Human Dignity and Human Reproductive Cloning" (2000) 6:1 *Health and Human Rights* 103 107. With regard to the prohibition of violations by others, see McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 702-703.

³⁵⁷ This links to the fact that dignity is not lost through undignified behaviour as discussed later on in this section. The idea that a person cannot consent to prostitution, since it violates human rights is mentioned in South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 88.

³⁵⁸ *BVerfGE* 64, 274 (1981) 277-279, as translated in Michalowski S & Woods L *German Constitutional Law: the Protection of Civil Liberties* (1999) 105.

³⁵⁹ *KA & AD v Belgium* (Application Nos 42758/98 and 45558/99) (unreported 17 February 2005) 23. Two relevant cases are quoted in *Laskey* paras 20, 28; namely, *R v Donovan* [1934] 2 KB 498 and *R v Brown* [1993] 2 All ER 75 (hereinafter referred to as '*Brown*').

Sadomasochism is regarded as a violation of human dignity and can be seen as a form of objectification.³⁶⁰

There is however one exception to this rule. A person may consent to the violation of his dignity “if such a violation is based only on the lack of consent”.³⁶¹ Rape is an example of this exception. Although seen as a violation of human dignity, it is not the *sex per se* that violates the victim's dignity, but the fact that it was never consented to. The violation is therefore solely based on the lack of consent.

The next question is whether dignity can be waived. De Schutter defines a waiver as the disposal of a right.³⁶² It could be argued that waiving one's right is synonymous to consenting to its violation. In this regard the above principles apply. However, some writers do not equate a waiver of a right with its violation.³⁶³ They reason that where a right is waived there can be no violation of thereof. When a person therefore waives his right, he does not consent to its violation, but consents to its disposal altogether.

Yet dignity can never be lost, even when violated. One cannot lose one's dignity when others violate it, through one's “own undignified behaviour” or when one lacks the basic needs for a dignified existence.³⁶⁴ Consequently, in terms of this definition of waiver an individual can never validly waive the right to human dignity, because the waiving of a right will result in the loss thereof, which is impossible.³⁶⁵

³⁶⁰ The harm that is inflicted is against the inherent worth of the individual; the individual is used as an object of someone's (sexual) desires.

³⁶¹ *BVerfGE* 64, 274 (1981) 277-279, as translated in Michalowski S & Woods L *German Constitutional Law: the Protection of Civil Liberties* (1999) 105.

³⁶² De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 481; Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 148.

³⁶³ Klein provides a distinction between the two ideas. Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 148.

³⁶⁴ The fact that dignity is not lost when violated by others is explained in the context of the German Basic Law in Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 148; Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 194. With regard to the fact that a person doesn't lose his dignity through undignified behaviour, see Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 194, 197, 209; Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 148. Barrett concludes from this that the decision in *Makwanyane* is therefore correct and that of *Jordan* incorrect. Barrett J “*Dignatio* and the Human Body” (2005) *SAJHR* 525 539. Liebenberg explains that dignity is not lost due to a lack of basic needs. Liebenberg S “The Value of Human Dignity in Interpreting Socio-economic Rights” (2005) *SAJHR* 1 2.

³⁶⁵ See *BVerfGE* 64, 274 (1981) 277-279, as translated in Michalowski S & Woods L *German Constitutional Law: the Protection of Civil Liberties* (1999) 105; Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 194, 197; Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-8; Klein E “Human Dignity in

When the concept of commodification is introduced in this context, the situation becomes even more complicated. Commodification according to Marxist political theory occurs “when economic value is assigned to something that traditionally would not be considered in economic terms.”³⁶⁶ In certain instances commodification has been considered a violation of human dignity.

The commodification of one’s human dignity is an excellent example in this regard. When a person ‘sells’ his human dignity by consenting to objectifying treatment in exchange for money, his dignity becomes a commodity. Examples of this are prostitution and dwarf tossing. It is evident that the same reasoning pertaining to consent to objectification, where no monetary reward is involved, shall apply to this situation. The argument is therefore that a person is neither allowed to consent to the violation nor the disposal of his dignity, regardless of whether he is compensated.³⁶⁷ Dignity cannot be lost, whether it is given away *gratis* or sold. It is therefore not the commodification or the selling *per se* that is prohibited in this instance, but the waiving of the right. This is support for the contention that dignity cannot be sold.

There are other instances in which commodification leads to objectification and hence the violation of human dignity. These instances do not involve the waiving or commodification of human dignity as such, yet human dignity is violated due to the nature of the commodified thing. In these instances it is the commodification or the selling itself that violates the individual’s human dignity. Unlike the aforementioned example, the *gratis* giving of the things in this category does not constitute a violation of dignity. Only when a monetary value is assigned to something, when that thing is sold, does it amount to a violation of human dignity.³⁶⁸ Radin depicts the items in this category as “inalienable”. Inalienable possessions are those things that are internal or inherent to all human beings, for example personal

German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 148, 158. On the idea that even if some rights can be waived, fundamental rights cannot be waived, See De Schutter O “Waiver of Rights and State Paternalism Under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 481.

³⁶⁶ Gillies I “Real World Toys and Currency Turn the Legal World Upside Down: A Cross-sectional Update on Virtual World Legalities” (2008) 12 *Int’l J Comm L & Pol’y* 120 128 n52.

³⁶⁷ See also Wood AW “Human Dignity, Right and the Realm of Ends” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 49. Wood refers to the Kantian contrast of dignity with price. Kant writes that dignity cannot be valued or exchanged. This supports the idea that dignity cannot be commodified.

³⁶⁸ A person is objectified, dehumanised and degraded; their individual and social potential is stifled. Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1871, 1849 1877, 1881. See also Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 203.

attributes or sexual intimacy.³⁶⁹ When these things are sold they become “fungible objects”.³⁷⁰ She consequently avers that “valuing my bodily integrity in money is not far removed from valuing me in money” therefore alleging that through the objectification of the individual’s personal attributes, the individual himself is objectified.³⁷¹

Practical examples are prostitution and surrogacy.³⁷² The theory is that neither having sexual intercourse with someone, nor carrying someone's baby, is objectifying. Yet, as soon as money is involved the sexual encounter loses its private intimacy and the prostitute becomes an object, a means to an end.³⁷³ Similarly, paying someone to carry one’s baby is said to erase the altruistic element, transforming a loving, selfless act into a womb for rent.³⁷⁴ These instances of commodification, although irrelevant to the topic of whether dignity can be sold, serve as another example of consent to objectification.

I return now to the primary focus of this section - the argument that dignity cannot be violated, waived, lost or sold. This type of reasoning suggests that the state has a duty to protect human dignity even against the wishes of the individual.³⁷⁵ The state should accordingly prohibit individuals from violating, waiving, disposing of or selling their own dignity.

4 2 Freedom should yield to communitarian dignity

4 2 1 Freedom of the individual vs. dignity of the community

When two individual rights are in conflict it is easy to argue that one right should not carry more weight than the other. It is, however, more complicated if the right of one individual is

³⁶⁹ On how Kant and Hegel identify inalienable things as internal and inherent, see Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1880, 1891-1892, 1921. Radin uses “personal attributes” and sexuality as examples.

³⁷⁰ Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1881.

³⁷¹ 1881.

³⁷² 1921.

³⁷³ For a discussion on how sex for money reinforces the separateness between two people, see Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1908. See also Adler L “The Dignity of Sex” (2008) 17:1 *UCLA Women's LJ* 1 26; Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 203.

³⁷⁴ Radin calls this the “Domino effect”. Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1913-1914.

³⁷⁵ See De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 496-467; Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 158. De Schutter and Klein both discuss the fact that even in Germany, with its explicit right to freedom, the state has a duty to protect dignity against the wishes of the individual. See also Starck C “The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 189; *Lochner* 53.

balanced against the rights of a group, such as where the freedom of the individual is in conflict with the dignity of the community he is part of.

This is the case when the individual consents to objectifying treatment. It is argued that the dignity violation reaches beyond the individual's own interests and affects the dignity of his community.³⁷⁶ For example, when a dwarf participates in dwarf tossing, it undermines the dignity of the dwarf-community, as its other members might not approve thereof.³⁷⁷

One solution to this conflict is that of utilitarian balancing. As explained in Chapter 2, utilitarian balancing requires that the greatest good for the greatest number be attained, the result being that the rights of the individual always yield to those of the community.³⁷⁸ Utilitarian balancing is often criticised on the grounds that freedom and dignity are individual rights, inherent to each individual and should therefore not have to yield to the rights of a group.³⁷⁹

4 2 2 The individual's notion of dignity vs. the community's notion of dignity

The reason for choosing to act contrary to the dignity of one's community, by consenting to objectifying treatment, might be that one does not perceive such treatment to be a violation of one's dignity. The response to this rationale has most often been that human dignity is an objective idea that is violated irrespective of the subjective ideas of the individual.³⁸⁰

However, this argument is only feasible if this objective human dignity can be defined. Who decides what constitutes a violation of human dignity and what sort of treatment a person

³⁷⁶ This was said in *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC) para 146 (hereinafter referred to as '*Prince*') with regard to the right to freedom of religion but also applies here. In the context of prostitution it is argued that the dignity violation of the individual "undermines the dignity of humanity"; it lowers the moral standards of the community, downgrades neighbourhoods and breaks up family structures. South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 178, 179. See also McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 705; Radin MJ "Market-inalienability" (1987) *Harvard Law Review* 1849 1864-1866; Weait M "Harm, Consent and the Limits of Privacy" (2005) 13 *Feminist Legal Studies* 97 101-102.

³⁷⁷ See *Wackenheim* 3. It is explained in this dwarf-tossing case, that "human dignity is a part of public order".

³⁷⁸ 3 4 1. See McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 715. See also Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-9.

³⁷⁹ McCrudden criticises utilitarian balancing in McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 715-718. See also Starck C "The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions" in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 186. Starck identifies this kind of criticism as humanistic. See also *Carmichele* para 56.

³⁸⁰ De Schutter O "Waiver of Rights and State Paternalism under the European Convention on Human Rights" (2000) *Northern Ireland Legal Quarterly* 481 497.

may consent to? Since dignity is closely associated with moral law, popular moral perception has often been consulted to determine these uncertainties.³⁸¹ The idea of a shared public morality is presented as justification for defining moral law in terms of popular moral ideas.³⁸²

Yet, due to the plurality of society, no such shared public morality exists. Furthermore, since people are ends in themselves and should be allowed to form their own ideas on what constitutes ‘a good life’, this pluralism should be tolerated, if not celebrated.³⁸³ However, it is asserted that this does not mean that anything goes and every person can rely on his own moral convictions in order to determine what sort of treatment constitutes a violation of his own subjective human dignity.

In order to govern a community effectively the state has to regulate its citizens.³⁸⁴ No state can have neutral values.³⁸⁵ A state needs to govern from a specific moral point of view, i.e. a policy.³⁸⁶ One argument is that this is influenced by the morality of the majority of its citizens.³⁸⁷ It is the duty of the state to harmonise the autonomy of the individual with the solidarity of society he is bound to and the public interest of his community.³⁸⁸ As a result some actions that are in conflict with the morality of the majority and its conception of what constitutes a violation of human dignity will be excluded.³⁸⁹ This corresponds to the idea that

³⁸¹ For the idea that dignity is closely related to moral law, see *BVerfGE* 64, 274 (1981) 277-279, as translated in Michalowski S & Woods L *German Constitutional Law: the Protection of Civil Liberties* (1999) 105; Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 112 133-134, 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.

³⁸² Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 229.

³⁸³ *Jordan* para 104.

³⁸⁴ Ackermann LWH “Equality and the South African Constitution: The Role of Dignity” (2000) *Heidelberg Journal of International Law* 537 545. See also Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 112 138.

³⁸⁵ *Jordan* para 104.

³⁸⁶ See *Jordan* paras 104, 106; *NCGL* para 119. See also *Lochner* 66; Wait M “Harm, Consent and the Limits of Privacy” (2005) 13 *Feminist Legal Studies* 97 102; *Laskey* para 40. The other argument, which is discussed in 6 2 1, is that morality should be based on constitutional values.

³⁸⁷ Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 229; Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-14. See also Wait M “Harm, Consent and the Limits of Privacy” (2005) 13 *Feminist Legal Studies* 97 97, 102.

³⁸⁸ Botha explains this in Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 178. On the idea that freedom should be in line with public interest is mentioned, see Wait M “Harm, Consent and the Limits of Privacy” (2005) 13 *Feminist Legal Studies* 97 102; *Laskey* para 29.

³⁸⁹ Du Plessis L “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 Law Journal* 376 389; Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 229. These actions are excluded even if they are performed in private, *Laskey* summary, para 29.

a person is free as long as he complies with moral law; which might be seen as the definition of freedom found within human dignity.³⁹⁰

The reality is therefore that each person is a member of society.³⁹¹ In order to protect that social framework, freedom may be limited.³⁹² This corresponds with the Kantian notion of a Kingdom of Ends in which a person is only allowed to set ends which are in harmony with the ends of everyone else.

4.3 Opening the floodgates

Due to the differing and changing morals of society, some forms of objectifying treatment might seem acceptable. It is not that society does not view the treatment as objectifying; the harm caused by the violation just does not seem that serious.

This sort of reasoning is raised in the sadomasochism case of *Laskey*. In this case counsel for the accused argues that no real harm ensued from the “genital torture” the accused performed on each other and the acts should therefore not be punished.³⁹³ In other words, the triviality of the violation does not warrant prohibition.

Contrary to this, it can be argued that the state cannot allow some forms of objectifying treatment or specific cases and degrees of objectification without the risk of an ‘opening of the floodgates’ effect.³⁹⁴ Such an allowance would suggest that the state condones objectifying treatment, which will in turn lead to a gradual moral decline in society. Dignity would lose its supreme status and its inviolability.

Once the courts allow one form of objectification, a precedent is set. Those accused of objectification, sometimes more harmful than already allowed, will rely on this precedent.

³⁹⁰ Starck C “The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 188.

³⁹¹ Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 150.

³⁹² This idea is formulated in Kretzmer D “Human Dignity in Israeli Jurisprudence” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 161 170. See also Klein E “Human Dignity in German Law” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 145 150; Davis D & Woolman S “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* 361 363, 391, 396.

³⁹³ The term “genital torture” is used in para 40. The argument that there was no real harm appears in para 38. *Laskey* involved a group of homosexual men who performed genital torture on one another for sexual pleasure.

³⁹⁴ Du Plessis calls this a “slippery slope”. Du Plessis L “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 Law Journal* 376 399.

The permissible degree of harm will become relative and the boundaries blurred. It is for this reason that the judge in *Laskey* looks at the potential harm of the objectifying treatment and not just the actual harm that ensued from it.³⁹⁵ Well aware of the risk of ‘opening of the floodgates’ he states, “[t]his House must therefore consider the possibility that these activities are practised by others and by others who are not so controlled or responsible as the appellants are claiming to be.”³⁹⁶

Allowing certain forms of commodification can also have this ‘floodgate’ effect. Radin calls this the domino effect. The domino effect “assumes that the commodified and non-commodified versions of some interactions cannot coexist”.³⁹⁷ She uses the examples of surrogacy and blood donation that are referred to above.³⁹⁸ The elements of solidarity and interdependence of the altruistic action disappear when money comes into play because this ‘gift’ of surrogacy or blood is now merely the equivalent of giving a sum of money.³⁹⁹ Likewise commercialising sex through prostitution and peepshows can detract from the intimate and social nature of sex within a loving relationship.⁴⁰⁰

The counterargument to this caution against ‘opening the floodgates’ is that some forms of objectification have in fact already been allowed; such as labour. The employee is used purely as a means to an end, i.e. to earn money. Yet, although labour has been recognised as a form of objectification, it is nevertheless allowed.⁴⁰¹

The flaws in the “domino effect”-theory are clear from the example of childcare. The fact that au pairing commodifies caring for a child does not detract from the intimate and loving nature of caring between a mother and a child.⁴⁰²

4 4 Does freedom itself allow consent?

4 4 1 There is no residual right to freedom

Regardless of the three abovementioned grounds in favour of prohibiting consent to objectification, a person will only be permitted to consent if freedom itself allows it. Yet, before asking whether the right to freedom allows consent to objectifying treatment, it is

³⁹⁵ *Laskey* summary, para 21.

³⁹⁶ This quote is taken from para 20. See also para 21.

³⁹⁷ Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1913.

³⁹⁸ 1913. Radin uses this example of blood donation. The example of surrogacy is used in 4 1 2.

³⁹⁹ 1914.

⁴⁰⁰ 1913.

⁴⁰¹ Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) i 230 244.

⁴⁰² 244. Fritz uses the examples of cooking, sewing and painting.

critical to determine whether such a right does in fact exist. As explained in the previous chapter, the majority in *Ferreira* decided against such a right and this is now regarded as settled law.⁴⁰³

However, another contention that has already been discussed is that a residual freedom right can in fact be found within human dignity. It can also be argued that although individual freedom does not exist as a constitutional right, the right to consent can be found within the value of freedom. As values, both dignity and freedom assist in developing the common law and, as has already been explained, consent to objectification can be regarded as a contract.⁴⁰⁴ Since the law of contract is governed by the common law, which is in turn developed by freedom as a value, contractual autonomy might be regarded as a manifestation of this value as a kind of residual right to choose.

4 4 2 Freedom does not allow it

If it is accepted that a right to freedom does in fact exist; either as a residual freedom right manifesting section 11(1) of the Constitution, a quasi-right found within the value of freedom or the right to human dignity; it still needs to be established whether this right would allow consent to objectifying treatment. As concluded in Chapter 3, it is at this stage necessary to define freedom positively.⁴⁰⁵ Positive freedom is not simply freedom from outside intervention by other people.⁴⁰⁶ To be truly free a person has to live freely according to moral law and ethical duties.⁴⁰⁷ It is this kind of freedom that should be guaranteed by our Constitution. Granted that in the Kantian Kingdom of Ends the individual cannot be forced to live in accordance with moral law, it should be kept in mind that this Kingdom is merely an ideal.⁴⁰⁸ As explained, the realities of our modern world force the state to implement rules

⁴⁰³ See 3 2 2 3; Michelman F “Freedom by any Other Name? A Comparative Note on Losing Battles While Winning Wars” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 91 91.

⁴⁰⁴ S39(2) of the Constitution.

⁴⁰⁵ See 3 3.

⁴⁰⁶ This is negative freedom as defined in Berlin I “Two Concepts of Liberty” in Harris H (ed) *Liberty: Incorporating Four Essays on Liberty* (2002) 166 169.

⁴⁰⁷ See the discussion on this in 3 3. Starck calls this “moral autonomy”. Starck C “The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179 182, 183. See also Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 112 120.

⁴⁰⁸ This idea is first mentioned in 2 4 4.

in order to ensure that the choices people make are in accordance with moral law and in this way secure freedom.⁴⁰⁹

People have to live according to moral law, because they are part of society. This realm of ends, in which Kant describes dignity and freedom, is nothing more than an ideal society.⁴¹⁰ Ackermann J adopts this idea when he writes that the residual right to freedom “must therefore not be thought to be premised on a concept of the individual as being in heroic and atomistic isolation from the rest of humanity, or the environment, for that matter.”⁴¹¹ This positive freedom emphasises the idea that the right to freedom should not simply be a right to do whatever one likes, but should incorporate this reality that all individuals are part of society and interdependent.⁴¹²

Contrary to this, the idea that moral law is now found within constitutional values is explained in Chapter 6.⁴¹³ Accordingly, actions that comply with the Constitution, comply with moral law and consent may only be limited in terms of the limitation clause.⁴¹⁴

It is nevertheless argued that the right to freedom, as recognised within the rights to human dignity and privacy, is given a very specific and restricted meaning. It is therefore necessary to examine these cases in order to determine whether constitutional freedom does in fact allow consent to objectification. Freedom within human dignity has been defined as the freedom of self-development.⁴¹⁵ This is the freedom to develop one’s personality and skills, to fulfil one’s own humanness.⁴¹⁶ In *Dawood* it is referred to as the freedom to make choices

⁴⁰⁹ For more on rules to ensure freedom, see 3.3. See also Cornell D “Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 18 28; Liebenberg S “The Value of Freedom in Interpreting Socio-economic Rights” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 160.

⁴¹⁰ Communitarian dignity is examined in greater detail 2.4.4.

⁴¹¹ *Ferreira* para 52.

⁴¹² Liebenberg notes that individuals are at times even dependent upon one another and that freedom is a capacity that is developed in a social context. Liebenberg S “The Value of Freedom in Interpreting Socio-economic Rights” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 149 159, 160. Cornell D “Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 18 28. Du Bois discusses the idea that no law can ensure full individual autonomy. Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 112 129.

⁴¹³ See 6.2.1.

⁴¹⁴ S36 of the Constitution. *NCGLE* para 136.

⁴¹⁵ Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1899.

⁴¹⁶ *Ferreira* paras 49 & 50. This includes the freedom to develop one’s talents.

that are “defining, central, life-shaping, [and] significant”.⁴¹⁷ These definitions incorporate human dignity and are therefore in harmony with the purpose of the Constitution. In the past the absence of freedom for black people was a denial of their right to be fully human.⁴¹⁸ It is therefore illogical to assume that choices that are in conflict with the inherent human worth of the individual will be authorised by a constitutional right to freedom, since a principal objective of our Constitution is to remedy these wrongs of the past.

This is the fear in *Ferreira*; that by allowing a residual right to freedom such choices will be allowed. The court refers specifically to the *Lochner*-case in which people were permitted to make choices to their own disadvantage. Ackermann J assures the court that a residual right to freedom will not lead to a repeat of the *Lochner* situation.⁴¹⁹ He reasons that any limitations to freedom that might be necessary to prevent a similar outcome will be justified by the limitation clause.⁴²⁰ Surely the prohibition of consent to objectifying treatment can be seen as an attempt to prevent an outcome similar to that of *Lochner*, especially where unequal bargaining power exists.

On the contrary, even consent to objectifying treatment can be in pursuit of personal development and the fulfillment of humanness. Where a monetary reward is given in exchange for consent, the argument is that the money might be necessary in order to achieve self-development and fulfillment. The counter-argument is however that in such cases the monetary reward might indicate economic coercion, which leads to invalid consent.

4 5 Invalid consent

De Schutter claims, “the fact that [someone] exercised a choice does not indicate a lack of compulsion”.⁴²¹ Even if dignity is not regarded as supreme to freedom and freedom does allow consent to objectification, consent thereto should still be genuine for it to constitute an act of freedom. This emphasis on the fact that consent should be given freely is quite

⁴¹⁷ Michelman refers to *Dawood* in Michelman F “Freedom by any Other Name? A Comparative Note on Losing Battles While Winning Wars” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 91 105.

⁴¹⁸ *Ferreira* para 51.

⁴¹⁹ Para 65.

⁴²⁰ Para 66.

⁴²¹ De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 493.

common in this context, as it is often hard to believe that a person would really desire a violation of his dignity.⁴²²

De Schutter identifies four conditions for the valid waiver of a right. These conditions can also be applied in this context and resemble the conditions for consensus in the South African contract law.⁴²³ As mentioned above, contract law is referred to in this regard since consent to objectifying treatment is often likened to a contract between two parties. The notion of contractual freedom is therefore used as a defence in favour of consenting.⁴²⁴ The four conditions are: consent should be given freely; consent should be unequivocal;⁴²⁵ the consenting individual should be sufficiently well informed; and consent should not be counter to an important public interest. The first three conditions are essential to establishing genuine consent.

In respect of the first condition, consent cannot be given freely where factors such as unequal bargaining power, coercion, duress or undue influence are present.⁴²⁶ The classic model of a contract found in South African common law, is based on the notion of equal bargaining power.⁴²⁷ However, in South Africa unequal bargaining power often exists.⁴²⁸ When the constitutional values are applied to the common law, the value of human dignity demands that the common law be developed in opposition to unequal bargaining power.⁴²⁹ The fact that people have power over each other's lives can therefore not be ignored because when this power is abused it leads to undue influence and coercion, which is in conflict with human dignity.⁴³⁰ Dwarf-tossing and prostitution are examples of situations where unequal

⁴²² See for example Thompson SE "Prostitution – A Choice Ignored" (2000) *Women's Rights Law Reporter* 217 232. See also South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 192.

⁴²³ These conditions are set out and explained in De Schutter O "Waiver of Rights and State Paternalism under the European Convention on Human Rights" (2000) *Northern Ireland Legal Quarterly* 481 491.

⁴²⁴ Freedom of contract is discussed in further detail in 6 3 4.

⁴²⁵ Be it express or tacit.

⁴²⁶ Gavison R "Feminism and the Public/Private Distinction" (1992) 45:1 *Stanford Law Review* 1 8-9, 17.

⁴²⁷ Bhana D & Pieterse M "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) *SALJ* 865 883.

⁴²⁸ 884. See also Wood AW "Human Dignity, Right and the Realm of Ends" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 63.

⁴²⁹ Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa 2ed* (2005) 36-1 36-48. Woolman states that the common law should also be developed on behalf of those who lack the capacity to understand. It is in fact wrong not to develop the common law in such a way. Bhana D & Pieterse M "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) *SALJ* 865 883.

⁴³⁰ For the idea that some people have power over others' lives, see Barrett J "Dignatio and the Human Body" (2005) *SAJHR* 525 535. Bhana and Pieterse discuss the fact that this leads to coercion in Bhana D & Pieterse M "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) *SALJ* 865 884.

bargaining power might exist, since the consentor is usually in a weaker financial position in such situations.⁴³¹

The Kantian Kingdom of Ends also prohibits coercion due to unequal bargaining power.⁴³² When the setting of an end is coerced it undermines the idea of freedom.⁴³³ Economic coercion is probably the most prominent form of coercion with respect to consenting to objectifying treatment.⁴³⁴ The contention is that prostitutes and dwarfs consent to objectification for financial support and that no one would consent to prostitution or dwarf-tossing without monetary compensation.⁴³⁵ It is therefore easier for someone who lacks financial support to be objectified.⁴³⁶ This confirms the notion that permission to such consent is at odds with the idea of inherent dignity and worth, regardless of class or socio-economic status.

Undue influence, as the other possible consequence of unequal bargaining power, equally undermines the first condition of genuine consent; that consent should be given freely. In such cases people are not forced to consent to objectifying treatment, yet they make certain choices due to some or other influence. Again the offer of a monetary reward comes into play. Sometimes a monetary incentive causes someone, who does not need the money for survival, to consent to objectification. In these instances the incentive is considered to unduly influence, rather than coerce. An example of this can be found in *Laskey*, where adolescents were not forced to participate in sadomasochism but were unduly influenced by the older men and the monetary reward they offered.⁴³⁷ A person might often be unaware of the outside influences on their choices.⁴³⁸

⁴³¹ With prostitution the unequal power might also be due to the unequal social positions of men and women in society. Prostitution is therefore regarded as an exercise of male power. See Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 233.

⁴³² Wood AW “Human Dignity, Right and the Realm of Ends” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 59, 64.

⁴³³ Bhana D & Pieterse M “Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited” (2005) *SALJ* 865 884, 885.

⁴³⁴ For more on economic coercion and its effects see, South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 27, 192, 220; Bhana D & Pieterse M “Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited” (2005) *SALJ* 865 884 885; Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 232; Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1910.

⁴³⁵ Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 232.

⁴³⁶ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 209.

⁴³⁷ *Laskey* para 51.

⁴³⁸ These hidden influences are discussed in Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217.

The condition that consent should be unequivocal in order to be genuine requires absolute certainty that the individual consented to the objectifying treatment.⁴³⁹

The last condition, which is relevant to this discussion, is that the consent should be informed.⁴⁴⁰ The individual should be informed about his right not to be subjected to objectifying treatment and about the long term consequences of his consent.⁴⁴¹ This may require the presence of a lawyer to explain everything to him before he makes a decision.⁴⁴² Furthermore, the individual should have the capacity to understand his choice.⁴⁴³ In *Laskey* the court expressed doubt as to whether an adolescent has the capacity to make and understand the choice to participate in sadomasochism.⁴⁴⁴

Radin introduces what she calls the “best possible coercion-avoidance mechanism” in order to ensure genuine consent.⁴⁴⁵ Her principal focus is on economic coercion, yet her theory can be reformulated to apply to all factors that hinder genuine consent. The theory is that when a person consents to objectifying treatment under circumstances that raise suspicion as to whether the consent was coerced, such consent should be banned. The banning is justified by the contention that one can never really be certain whether the consent was coerced. The risk of harm to the person who consents and the difficulty of scrutinising every case of consent to objectification outweigh the possible harm to those whose consent was in fact not coerced.⁴⁴⁶

4 6 Conclusion

The grounds for the approach that the individual cannot and should not consent to objectifying treatment have been set out in this chapter. It has been contended that dignity is supreme to freedom and would therefore trump freedom whenever they are in conflict. As an

⁴³⁹ De Schutter states that the consent can be express or tacit. He explains further, that the test for tacit consent is reasonableness. De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 491.

⁴⁴⁰ Wood explains that this is often not the case in Wood AW “Human Dignity, Right and the Realm of Ends” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 63.

⁴⁴¹ *Mohamed* para 63.

⁴⁴² This example is provided in De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 491.

⁴⁴³ Capacity can be influenced by age, see Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-41, 36-48. It is also influenced by physical and mental integrity, see Dicke K “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer D & Klein E (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 111 119.

⁴⁴⁴ *Laskey* para 51.

⁴⁴⁵ Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1910.

⁴⁴⁶ 1910.

absolute right, dignity cannot be violated, waived, lost or sold. Even if dignity and freedom were equal the dignity of the community would trump the freedom of the individual.

It has also been argued that all forms of objectification should be prohibited, as the allowance of some, less harmful forms might result in an opening of the floodgates effect. The idea that constitutional freedom itself might not allow objectification and that even if it does, the consent might not be genuine has also been introduced.

CHAPTER 5

OBJECTIFYING TREATMENT SHOULD BE ALLOWED DESPITE INVALID CONSENT

5 1 Allowing objectification despite invalid consent

The second perspective on the tension between dignity and freedom, in terms of consent to objectifying treatment, will be considered in this chapter. Followers of this perspective believe that although consent to objectification might not always be valid, circumstances often demand that it be allowed nonetheless.

5 2 Reasons for invalid consent

In the previous chapter the requirements for valid consent were discussed.⁴⁴⁷ Consequently, the grounds for invalid consent, as inferred from these requirements, will be discussed. Two requirements for valid consent are of particular importance here. They are, consent can only be given by an informed individual and consent should be given freely. The converse of these two requirements as grounds for invalid consent should therefore be considered.

The requirement that consent be given by an informed individual implies that consent will be invalid if the individual is uninformed about the consequences of consenting or does not have the capacity to understand it. Consent under such circumstances cannot be valid, since the individual might not have consented to the treatment had he been aware of and understood the true nature and consequences of such consent.

Furthermore, while the consenting individual may be informed he might nevertheless be coerced or unduly influenced. The requirement that consent be given freely implies, undoubtedly, that coerced or unduly influenced consent will be invalid. As mentioned in the previous chapter, the promise of some kind of reward is a very common type of coercion or undue influence in this context.⁴⁴⁸ This includes inconspicuous examples such as the mere promise of acceptance in the form of adolescent peer pressure or what is called in modern

⁴⁴⁷ See 4 5.

⁴⁴⁸ See 4 5.

slang, ‘to put out’. Putting out describes the sexual favours a woman often feels obligated to perform when a man buys her dinner or expensive gifts.⁴⁴⁹

Such rewards in kind are often overlooked, due to the difficulty in discerning whether or not the choices were coerced. Monetary rewards, on the other hand, are more readily disapproved of. As explained in Chapter 4, prostitution, peepshows and dwarf-tossing are prominent examples of coercion or undue influence for monetary reward.⁴⁵⁰

I deal with coercion and undue influence together because their repercussions are similar. There is however one big difference between the two concepts, which can be deduced from their brief definition in Chapter 4.⁴⁵¹ The individual is coerced when he has no other choice but to consent.⁴⁵² Prostitution is often used as an example in this regard.⁴⁵³ Thomson explains, “unemployment, discrimination and low-paying jobs force women to turn to prostitution to escape poverty”.⁴⁵⁴ The individual, therefore, consents to the objectifying treatment in order to survive.⁴⁵⁵ Capitalism and patriarchy are often blamed for the fact that poor women turn to prostitution. These systems discriminate against women by ensuring that vocations designated as “women’s work” are habitually unrecognised and underpaid. Consequently, prostitution is the only vocation in which women as a group are paid more than men.⁴⁵⁶ The same arguments apply to other forms of economic coercion. In *Wackenheim* the appellant argued that dwarf-tossing is the only job he was able to secure for himself, since dwarfs are not readily employed elsewhere.⁴⁵⁷

⁴⁴⁹ Similar rewards in kind in exchange for sexual favours are discussed in *S v Jordan and Others* 2002 (1) SA 797 (T) para 800H-I. In the Constitutional Court judgment judges O’Regan J and Sachs J support this idea that rewards in kind is considered less objectionable when they find that the prohibition on prostitution should not be applied where the payment was made in kind; *Jordan* para 48. This topic is also discussed in 6 4 3.

⁴⁵⁰ See 4 5. Only the examples of dwarf tossing and prostitution are mentioned here.

⁴⁵¹ See 4 5.

⁴⁵² This idea that prostitution is the only available option available to some people and that they ‘choose’ the vocation due to economic coercion is referred to in South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 220.

⁴⁵³ See South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 134, 169, 172, 179, 197.

⁴⁵⁴ Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 235.

⁴⁵⁵ 222-223.

⁴⁵⁶ 234-235. This idea that a woman’s choices are dictated by her “gender position in society” is also addressed in South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 28 192.

⁴⁵⁷ *Wackenheim* 3.

A person who succumbs to undue influence, unlike one who is coerced, has other alternatives but is influenced to make a certain decision.⁴⁵⁸ They consider the monetary reward to be of more value than the protection of their human dignity.⁴⁵⁹ The prospect of a sizeable income prompts women to choose prostitution over low-paying, monotonous labour.⁴⁶⁰ Prostitution also offers several other benefits, which might not be available in low-paying jobs.⁴⁶¹ These benefits include immediate financial relief and flexible working-hours.⁴⁶²

Undue influence as an alternative to coercion is examined in a Discussion Paper by the South African Law Reform Commission (SALRC). In this discussion paper it is contended that although prostitutes may have been influenced by socio-economic circumstances, their individual autonomy still plays a part. Their choices reflect their individual characteristics and personalities, for “[n]ot all persons who are poor or who seek to increase their income make the decision to work as prostitutes.”⁴⁶³

The focus of this chapter will be on instances of consent to objectifying treatment due to economic necessity, i.e. the promise of a monetary reward as a means of coercion.

5 3 Addressing the cause instead of the consequence

A crucial question, in this context, is whether the protection against coercion would really be more beneficial to the individual, than the freedom to consent to the violation of his dignity in exchange for something that he deems more important.⁴⁶⁴ In an ideal world no form of coercion or undue influence would be allowed. This is evident from the Kantian Kingdom of Ends, an example of such a world. In this Kingdom no end can be coerced.⁴⁶⁵ As a matter of

⁴⁵⁸ On undue influence in respect of prostitution, see South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 167.

⁴⁵⁹ This is explained in Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 240-241, 246; De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 494.

⁴⁶⁰ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 32, 167, 168; Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 232.

⁴⁶¹ Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 238.

⁴⁶² South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 27, 32, 185, 168; Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 226. For further benefits, see the discussion of the potential benefits of allowing objectification, in 6 3 6.

⁴⁶³ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 28, 192.

⁴⁶⁴ This question is raised in De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 494.

⁴⁶⁵ See Wood AW “Human Dignity, Right and the Realm of Ends” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 47 59, 64.

fact, it has been asserted that in an ideal world objectifying treatment would be against human flourishing, whether coerced or not, and the prohibition thereof freedom enhancing.⁴⁶⁶

However, the reality remains that we live in a non-ideal world.⁴⁶⁷ In South Africa people do consent to objectifying treatment out of necessity or the belief that it is the “least worst alternative”.⁴⁶⁸ The only way of preventing this coerced consent is to address the circumstances that foster it, as would be the case in an ideal world.⁴⁶⁹

Economic coercion due to necessity would not occur in such a world, as the socio-economic needs of each individual would be fulfilled. The lack of such fulfilment is a primary reason for economic coercion in South Africa. A large-scale redistribution of wealth would be necessary in order to fulfil these needs in our world.⁴⁷⁰ Although dignity and freedom oblige the state to grant socio-economic rights and provide the necessary conditions for its exercise, this is impossible to achieve in our non-ideal world.⁴⁷¹

Therefore, the current solution to the problem cannot be the prohibition of consent. To simply prohibit the individual from consenting, without providing her with the monetary compensation she would have received and so desperately needs, would just be hypocritical.⁴⁷²

⁴⁶⁶ For the idea limitations on freedom might be freedom enhancing, see Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 24. Radin discusses the fact that the prohibition of such consent may be against human flourishing. Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1903.

⁴⁶⁷ Fritz explains that South Africa has a “non-ideal circumstances”. Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 241.

⁴⁶⁸ 230. For the notion that people consent due to economic necessity, see Bhana D & Pieterse M “Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited” (2005) *SALJ* 865 885.

⁴⁶⁹ See Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1917.

⁴⁷⁰ Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1910, 1911; South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 26, 31, 150, 161. The fact that a redistribution of wealth will be necessary is mention in 3 3.

⁴⁷¹ With reference to the duty dignity places on the state, see 2 4 2. McCrudden explains this duty with specific reference to unemployment. McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 700. See also Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 247. For the idea that the right to freedom places a duty on the state to assist with socio-economic needs, see Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 112 118. Radin explains that the fulfilment of each individual’s socio-economic rights is unachievable. Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1911. See also South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 26, 31, 226. The SALRC refers to a Statistics South Africa Labour Force survey that records the staggering unemployment rate in South Africa.

⁴⁷² Radin introduces this concept of “transitional measures” in Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1877, 1911, 1917. See below for a comprehensive explanation of her example of the transitional measures with regard to monetary damages in tort law. For criticism of prohibition in non-ideal

Radin provides an example to illustrate this. She refers to a mother who works as a prostitute in order to feed her children. It cannot be reasonable to prohibit her from commodifying her sexuality without providing her with the means to support her children. This would force the mother “to endure a devastating loss in her primary relationship (with her children) rather than in the secondary one (with the personal thing) she is willing to sacrifice to protect the primary one.”⁴⁷³

At the moment the state cannot fulfil the socio-economic needs of each individual. The state is, therefore, not in the position to address the root of the coercion.⁴⁷⁴ The ideal measures that would have been taken in an ideal world to avoid coercion cannot be implemented in our current non-ideal circumstances. Until such time as the ideal measures can be implemented, transitional measures are necessary. These transitional measures might be regarded as harmful in an ideal world, but it is the best alternative for the moment.⁴⁷⁵

A popular example of how non-ideal transitional measures are already implemented in law is the granting of monetary compensation in the law of delict. This structure is often criticised for its inability to actually compensate for the loss of the victim. It is however necessary to apply these measures during the transition to an improved system, since denying money damages in the absence of an alternative system would compound the injury of the victim.⁴⁷⁶

5 4 Transitional measures

Transitional measures in this regard would include permitting economically coerced consent to objectifying treatment. I will explain this measure and the suggested implementation thereof in the context of prostitution.⁴⁷⁷ The example of prostitution is used, because some countries have already implemented this non-ideal transitional measure in terms of

circumstances, see in Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 240-241.

⁴⁷³ Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1911.

⁴⁷⁴ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 26, 31.

⁴⁷⁵ Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1915.

⁴⁷⁶ 1877.

⁴⁷⁷ The SALRC refers to two forms of prostitution: Indoor and Outdoor prostitution. These two forms of prostitution will not be discussed separately, since this section serves merely as a broad overview of suggested transitional measures to be applied in general. Furthermore it is not necessary to provide such a detailed analysis of the different forms of prostitution as this is not a thesis on prostitution as such. For the difference between these two forms, see South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 45-78.

prostitution. Valuable insight can therefore be gained from their experience. The Netherlands is most renowned for its tolerance and consequent acceptance of prostitution.⁴⁷⁸

Paramount to the implementation of transitional measures is the concession that people will consent to objectification regardless of whether it is allowed. This has often been stressed in terms of prostitution.⁴⁷⁹ Prostitution is dubbed the world's oldest profession and, despite its illegality, remains accessible to, and practised by, many.⁴⁸⁰ This is evident from a Dutch statistical analysis performed in 1999 indicating that an estimated one in four men occasionally or regularly visits prostitutes.⁴⁸¹

However, the transitional measures regarding prostitution do not merely involve the decriminalisation thereof, but also include some critical regulatory measures.⁴⁸² The purpose of these basic measures is to set certain perimeters for allowing coerced consent.⁴⁸³ In this way the prostitute can receive the money she needs and still be protected by strict regulations from further harm or infringement. Regulations therefore serve to restrict the extent of the violation.⁴⁸⁴

As established in *Makwanyane*, a person does not lose his right to human dignity when he consents to the violation thereof.⁴⁸⁵ A mother desperate to feed her family should not be condemned for her subsequent consent to objectification. Instead, her rights should be

⁴⁷⁸ Prostitution was legalised in terms of art 250a of the Dutch Penal code as amended in 2000. Another country which has applied this concept of regulated tolerance is Germany, see South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 125-126, 176.

⁴⁷⁹ Brants argues that prostitution should be accepted as a social fact and regulated. Brants C "The Fine Art of Regulated Tolerance: Prostitution in Amsterdam" (1998) *Journal of Law and Society* 621 622.

⁴⁸⁰ This idea is reflected in the Dutch policy as set out in the Penal Code as amended in 2000, see South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 125.

⁴⁸¹ This statistic is quoted by Dutch politician, Halsema, as referred to in Pakes F "Tolerance and Pragmatism in the Netherlands: Euthanasia, Coffeeshops and Prostitution in the 'Purple Years', 1994-2002" (2003) *International Journal of Police Science & Management* 217 225.

⁴⁸² Interestingly, various human rights groups support this decriminalisation and regulation of prostitution, i.e. the Centre for Applied legal Studies (CALs), Sex Worker Education & Advocacy Taskforce (SWEAT), the Women's Legal Centre (WLC), People opposing Women Abuse (POWA), the Legal Resources Centre (LRC), Tshwaranang Legal Advocacy Centre to End Violence Against Women (TLAC), the Commission on Gender Equality (CGE), the Gay and Lesbian Coalition and Sexual Harassment Education Project (SHEP); see South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 188.

⁴⁸³ Fritz calls this "incomplete commodification", in Fritz N "Crossing Jordan: Constitutional Space for (UN) Civil Sex?" (2004) *SAJHR* 230 241.

⁴⁸⁴ For the idea that legalisation and regulation will protect the prostitute from degradation and danger, see Radin MJ "Market-inalienability" (1987) *Harvard Law Review* 1849 1924. This will limit exploitation, see Fritz N "Crossing Jordan: Constitutional Space for (UN) Civil Sex?" (2004) *SAJHR* 230 245. See also South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 192.

⁴⁸⁵ Paras 137, 142-143.

respected nonetheless and the extent of the violation limited in such non-ideal circumstances, where the prohibition of the violation itself does not constitute a solution.⁴⁸⁶

Through the regulation of prostitution the state gains more control over it and is able to better address the dangers thereof.⁴⁸⁷ Regulation can also ensure the safety of prostitutes. In The Netherlands brothels are monitored by the police, as well as the building authority and fire service. Brothels are regularly inspected to ensure that they comply with various building and safety regulations.⁴⁸⁸ Street prostitutes, on the other hand, are protected by police in plainclothes, as well as fellow prostitutes. These policemen keep watch in the streets where the prostitutes are stationed. As soon as a prostitute gets into the car of a potential client a fellow prostitute takes down the car's registration number. If the prostitute stays away for too long, she hands the number over to the authorities.⁴⁸⁹ These and other safety regulations ensure a low crime incidence committed against prostitutes.⁴⁹⁰

By allowing prostitution the fear of stigmatisation and prosecution is removed.⁴⁹¹ This provides prostitutes with the prerogative to report violence and corruption.⁴⁹² In countries where prostitution is a criminal offence prostitutes have no such opportunity. When a client refuses to pay, they are exploited or molested on the job.⁴⁹³ As explained in *Jordan*, even the actions of policemen are sometimes reprehensible: “[b]eing a so-called victimless crime,

⁴⁸⁶ See *Jordan* para 74.

⁴⁸⁷ Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 231. For the idea of control through legalisation, see Brants C “The Fine Art of Regulated Tolerance: Prostitution in Amsterdam” (1998) *Journal of Law and Society* 621 629. In *Jordan* para 87 the appellants argued that legalisation helps identify dangers. See also South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 196, 198, 205.

⁴⁸⁸ See, Brants C “The Fine Art of Regulated Tolerance: Prostitution in Amsterdam” (1998) *Journal of Law and Society* 621 631.

⁴⁸⁹ This is explained in Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 245.

⁴⁹⁰ This is true for Nevada, see Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 242. Thompson refers to the Nevada Revised Statutes (1997) and the Nevada Administrative Code (1998). Brothel owners might also be held liable if a client is infected with HIV after a prostitute has tested positive for the virus.

⁴⁹¹ This is said with regard to the decriminalisation of sodomy in *NCGLE* 28, 109. The justice system will also be relieved of policing and penalising all these prostitutes. South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 179, 188, 194. Those who criticise this opinion are of the view that the stigma against prostitution is not dependent on the criminalisation thereof, see the discussion in 6 3 6.

⁴⁹² South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 22.

⁴⁹³ *Jordan* para 32; Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 240. This increases the abuse and violation toward prostitutes, see South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 21-22, 26, 192.

evidence can usually only be obtained by egregious forms of entrapment, which fosters corruption.”⁴⁹⁴

By eliminating this fear for prosecution and stigmatisation prostitutes can work in safer areas, since they are not forced to work in remote and dangerous places in order to avoid the authorities.⁴⁹⁵ They also have better access to rights and services as they do not fear the disclosure of their identities.⁴⁹⁶

Regulations could also ensure safety in terms of health. Health regulations in Nevada include regular mandatory testing for HIV and other Sexually Transmitted Diseases (STD's). A person may not continue working as a prostitute if she tests positive for HIV; a disregard of this rule may result in a \$10 000 fine or a ten year imprisonment. The customer must always use a condom and brothel owners are required to put up health notices and report any diseases to the health authorities. These regulations have ensured a zero percent HIV or STD infection rate for legal prostitutes in Nevada.⁴⁹⁷

Regulations can protect vulnerable children and illegal immigrants by demanding that brothel owners check the prostitutes' ID papers and working permits.⁴⁹⁸ A brothel owner who employs an illegal immigrant or a minor would be forced to close down.⁴⁹⁹ The SALRC explains that the allowance of prostitution does not involve the decriminalisation of other

⁴⁹⁴ On these dire circumstances that prostitutes have to endure, see *Jordan* para 87. Thomson explains the many ways in which criminalisation ensures exploitation. Thompson SE “Prostitution – A Choice Ignored” (2000) *Women's Rights Law Reporter* 217 240-241. Thompson explains that due to the nature of the prostitution the prosecution thereof is very expensive. These funds could rather be spent more productively. See also South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 21-22, 179, 205; Brants C “The Fine Art of Regulated Tolerance: Prostitution in Amsterdam” (1998) *Journal of Law and Society* 621 630.

⁴⁹⁵ The fact that prostitutes are forced underground increases the risk of abuse, violence and corruption by the police, clients, pimps etc. Allowing prostitution will therefore lower the crime incidence against prostitutes. South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 20, 21-22, 132, 179, 193, 196.

⁴⁹⁶ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 20, 130, 179, 188, 189, 194, 214. The SALRC provides a number of examples in this regard, i.e. the right to health care, “the right to legal protection against crimes” and social services.

⁴⁹⁷ See Thomson SE “Prostitution – A Choice Ignored” (2000) *Women's Rights Law Reporter* 217 242. See also South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 81, 116, 127, 135, 198, 199, 205. Thomson refers to the Nevada Revised Statutes (1997) and the Nevada Administrative Code (1998). Brothel owners might also be held liable if a client is infected with HIV after a prostitute has tested positive for the virus.

⁴⁹⁸ These examples are provided in Brants C “The Fine Art of Regulated Tolerance: Prostitution in Amsterdam” (1998) *Journal of Law and Society* 621, 631.

⁴⁹⁹ 631-632. This would be the case if the employment was intentional. See also South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 127, 194.

related crimes such as abuse, forced prostitution, human trafficking and under-aged employment.⁵⁰⁰

Regulations may also serve to protect public safety, by specifying designated areas where prostitutes may operate. These areas may, for example, not be within 400 yards of any schools or churches.⁵⁰¹ It is however contended that such zoning would violate a prostitute's freedom of movement and induce stigma and social rejection. The counterargument is that if prostitution is regarded as a vocation or a business, zoning would not constitute an unusual measure.⁵⁰² An additional means of protecting the public might be to monitor or ban the advertisement thereof.⁵⁰³

Another possible regulation is to criminalise the actions of the subsidiary role-players involved in prostitution, such as the clients, pimps, brothel owners and human traffickers. This suggestion is founded upon the notion that persons would only consent to prostitution as a result of force, coercion or undue influence and can therefore not be held accountable for their actions. Subsequently, prostitution itself cannot be criminalised. Instead, those who force, coerce or unduly influence the prostitutes are held responsible. This kind of criminalisation also indicates an attempt to minimise demand for prostitution and reduce the said force, coercion or undue influence.⁵⁰⁴

A different approach to the regulation of prostitution might be to regard it as an ordinary job and regulate it accordingly.⁵⁰⁵ This would require that prostitutes receive certain rights, for

⁵⁰⁰ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 155, 186. This argument is confirmed in the context of sodomy, where it is said that under-aged and non-consensual sodomy would still be criminalised. *NCGL* para 66.

⁵⁰¹ See Brants C "The Fine Art of Regulated Tolerance: Prostitution in Amsterdam" (1998) *Journal of Law and Society* 621 630; Thompson SE "Prostitution – A Choice Ignored" (2000) *Women's Rights Law Reporter* 217 242. According to the SALRC other conditions may also be stipulated, such as the number, size and type of the brothels in the area. South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 127, 198, 199, 203, 208.

⁵⁰² The fact that businesses are subject to zoning regulations is mentioned in South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 221. It is also referred to later in this section.

⁵⁰³ Fritz N "Crossing Jordan: Constitutional Space for (UN) Civil Sex?" (2004) *SAJHR* 230 241; South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 189.

⁵⁰⁴ The SALRC suggests this regulation as a separate possible approach to the legalisation of prostitution. Sweden (The Act Prohibiting the Purchase of Sexual Services (1998:408)) and Canada (Criminal Code, RSC 1985, c C-46 ss210-213) follow this approach. South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) xii, 13, 22-23, 120, 174-175, 176-186, 234-237. This decriminalisation of prostitution would also make it easier to leave the profession, since they would not have a criminal record hindering their prospects of securing alternative employment.

⁵⁰⁵ Fritz compares prostitution with regulated legalised labour. Fritz N "Crossing Jordan: Constitutional Space for (UN) Civil Sex?" (2004) *SAJHR* 230 245. This is the situation in The Netherlands, see Brants C "The Fine Art of Regulated Tolerance: Prostitution in Amsterdam" (1998) *Journal of Law and Society* 621 629, 630. The

example the right to belong to a union and the right to collective bargaining. These rights would afford them the bargaining power that they presently lack. The right to protection from sexual harassment would also apply to prostitution, as well as the right to fair labour practices.⁵⁰⁶ Labour legislation such as the Basic Conditions of Employment Act would prescribe basic conditions such as maximum hours, paid sick leave and paid maternity leave.⁵⁰⁷ While prostitution is prohibited this Act does not apply and prostitutes have no legal protection against unfair employment conditions.⁵⁰⁸

If prostitution were treated akin to other vocations, all prostitutes would be able to obtain private health, disability and unemployment insurance. They might also claim tax relief.⁵⁰⁹ Specialised training courses could teach them money management and self-defence.⁵¹⁰ Another advantage would be that employment contracts, as well as legal contracts with clients, would be acknowledged.⁵¹¹

Similarly, prostitution-related businesses, such as brothels, would be regulated like all other businesses.⁵¹² Areas of regulation would include planning and zoning, occupational health and safety and advertising.⁵¹³

Prostitutes and brothel owners may also be respectively required to register and apply for licenses.⁵¹⁴ Circumstances in which brothel owners may be prohibited from applying for or

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.” South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 84, 131, 171, 189. See also Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 244.

⁵⁰⁶ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 189.

⁵⁰⁷ 75 of 1997. Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 244-245. Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 245.

⁵⁰⁸ Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 245.

⁵⁰⁹ These examples are mentioned in Thomson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 127 217, 245; Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 245. See also South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 155, 205; Brants C “The Fine Art of Regulated Tolerance: Prostitution in Amsterdam” (1998) *Journal of Law and Society* 621 629.

⁵¹⁰ See Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 245. Prostitutes in The Netherlands, for example, have a financial consultancy organisation called Prosex, see Brants C “The Fine Art of Regulated Tolerance: Prostitution in Amsterdam” (1998) *Journal of Law and Society* 621 629.

⁵¹¹ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 155.

⁵¹² 126.

⁵¹³ 189-190, 194, 221.

⁵¹⁴ 132, 198.

retaining a license may also be determined.⁵¹⁵ Registration and licensing fees may be charged, as well as income tax.⁵¹⁶ One objection to the registration of prostitutes is that it strips them of their anonymity, making them more prone to stigmatisation.⁵¹⁷ The confidentiality of information regarding registered members is therefore crucial. A counterargument to this objection, as referred to by the SALRC, is that “if a prostitute can enjoy the same advantages and disadvantages of a normal job by law and prostitution is recognised as a legal profession or job then there is no need to protect their privacy.”⁵¹⁸

This proposal that prostitution be regulated like any other job, suggests that simple vocational regulation constitutes a sufficient transitional system. Every trade or industry has rules and regulations that are unique to its demands; this is referred to as self-regulation.⁵¹⁹

In The Netherlands, this decriminalisation of an action, in conjunction with the implementation of transitional measures, is called “regulated tolerance”. Such tolerance is applied to matters in which dignity and freedom are in conflict and no consensus as to the solution to the problem can be reached.⁵²⁰ Brants explains that when the principle of “regulated tolerance” is applied to a situation, legalisation often follows since the moral attitude of the public is influenced by the non-intervention of the state.⁵²¹ The legalisation of prostitution in The Netherlands could be attributed to this tendency. However, this does not mean that the tolerance of something necessarily represents its legalisation. Nonetheless, whether a tolerated action is legalised or not, the regulation thereof remains crucial.⁵²²

There is of course much criticism against the regulation approach and its effectiveness in realising the anticipated benefits. One objection is that the stigma relating to prostitution is

⁵¹⁵ 127, 203, 204. Such as when a brothel owner has a criminal record or if a certain number of prostitutes in his employ are found to be on illegal substances.

⁵¹⁶ 132, 135, 142, 167, 205. Countries can benefit from the tax received, as well as the money generated for the economy. It is suggested that Thailand is so dependent on the money generated from prostitution that they tolerate its practise despite its illegality.

⁵¹⁷ 221.

⁵¹⁸ 206. Ackermann J confirms this idea that personal space and the application of the right to privacy shrinks in a working environment. *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 para 67.

⁵¹⁹ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 186.

⁵²⁰ See Brants C “The Fine Art of Regulated Tolerance: Prostitution in Amsterdam” (1998) *Journal of Law and Society* 621 624, 625. See also Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 244.

⁵²¹ Brants C “The Fine Art of Regulated Tolerance: Prostitution in Amsterdam” (1998) *Journal of Law and Society* 621 625.

⁵²² 629-630. Brants remarks that the distinction between these two situations has become academic. Tolerance without legalisation is merely a “symbol of moral disapproval”. The terms legalisation and decriminalisation are also distinguished on that ground.

not diminished in countries where it is decriminalised and regulated.⁵²³ Another is that, in such countries many prostitutes still operate outside the regulations.⁵²⁴ There are three explanations for the latter occurrence. The first is that prostitutes want to escape the controls that regulation imposes. The second is that they do not want to be known as prostitutes and therefore prefer to stay underground and unregistered.⁵²⁵ Thirdly, they operate outside the regulations as the regulations are “incompatible with the coercive and abusive nature of prostitution”.⁵²⁶ The counterargument to these objections regards the notion of transitional measures. Although imperfect, these measures beat the alternative, which is to simply prohibit prostitution, since there is no evidence that any law criminalising prostitution has ever deterred anyone from entering the profession.⁵²⁷ The New Zealand Government Report of the Prostitution Review Committee concluded:

“[A]lthough many prostitutes are still vulnerable to exploitative employment practices, during the period of operation of the Act prostitution did not increase in size and many of the social evils predicted by those opposed to the decriminalisation of prostitution have not been experienced. On the whole the Act has been effective in achieving its purpose, and the Committee is confident that the vast majority of people involved in the sex industry are better off under the PRA than they were previously.”⁵²⁸

As mentioned above, similar regulatory measures can be applied to other forms of economically coerced consent to objectification. Often the most demeaning aspects of objectification can be addressed by way of tolerance and regulation, especially where the criminalisation thereof causes stigmatisation. Dwarf-tossing can be used as an example of how these measures can be applied to other situations. This pub sport is often played by drunken men. Without regulation the sport will continue in private, unrestricted. By allowing and regulating it safety measures can be implemented regarding, for example, protective wear, landing surfaces and the manner in which the dwarves are thrown.

⁵²³ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 166, 170, 222. This is said in connection with the regulated tolerance in the Netherlands and the Cote d’Ivoire.

⁵²⁴ 133-134, 206, 214.

⁵²⁵ 206.

⁵²⁶ 196.

⁵²⁷ The Western Cape Network on Violence Against Women supports this notion. South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 26, 189.

⁵²⁸ New Zealand Government *Report of the Prostitution Review Committee* (2008) 168. The opinions of this Committee are discussed in South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 159. Prostitution was decriminalised in New Zealand by the Prostitution Reform Act of 2003.

5 5 Constitutional freedom

When economically coerced consent to objectification is regulated properly, it might even be regarded as an act of freedom.⁵²⁹ Although her consent is coerced, a prostitute still makes a choice.⁵³⁰ She chooses the money. She chooses to survive. She chooses the higher salary above the low-paying monotonous job. This is an act of freedom. The individual is free when she can develop her own personality and skills. However, development often requires money. Skills are developed through education and training, which can be very expensive. Even books and equipment cost a fortune. This makes it nearly impossible for a person to develop without choosing to earn money.

Money can also offer independence and autonomy.⁵³¹ A person who is able to fulfil his own socio-economic needs is not bound to others for support. To have money opens up a world of possibilities, because with money comes choice and power. It is for this reason that receiving monetary reward for consent to objectification might be seen as a step toward freedom; the setting of an end.

5 6 Conclusion

In this chapter the tension between dignity and freedom has been approached from the perspective of socio-economic need. The argument has been advanced that consent to objectifying treatment should be allowed in certain instances in which the requirements for valid consent have not been met. It has been contended that invalid consent cannot be prevented without addressing the rationale behind it. This is unachievable in our non-ideal world. Transitional measures are therefore necessary. This involves allowing and regulating invalid consent. Moreover, when invalid consent is allowed and regulated as such it might even be regarded as a form of freedom.

⁵²⁹ This section merely examines the correlation between economic coercion and freedom. Consent to objectifying treatment might also be seen as freedom enhancing and beneficial on other grounds, especially where genuine consent is given. This is examined in 6 3 6.

⁵³⁰ De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 493; *Jordan* para 17; South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 28, 192.

⁵³¹ Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 217, 223, 238.

CHAPTER 6

VALID CONSENT TO OBJECTIFYING TREATMENT SHOULD BE ALLOWED

6 1 Dignity should not be regarded as supreme

6 1 1 Counterarguments to the idea of a supreme dignity

The third approach to the tension between dignity and freedom holds that individuals should be allowed to consent to objectifying treatment. Since this approach stands in direct opposition to the approach examined in Chapter 4, it can be explained by reviewing the arguments in favour of the Chapter 4 approach and elaborating on its counterarguments.

First of all, the perspective in this chapter supports a more expansive understanding of freedom and rejects the idea of a supreme dignity, as advocated in Chapter 4.⁵³² In order to explain the grounds for this rejection, it is therefore necessary to review the arguments and counterarguments regarding a supreme 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.⁵³³ Dignity is also used to interpret these human rights.⁵³⁴ These functions are often cited to illustrate the supremacy of dignity over other rights. However, from a different 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.⁵³⁵ 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. As explained in Chapter 2, dignity can easily be

⁵³² See 4 1.

⁵³³ Ss7, 39, 36 of the Constitution.

⁵³⁴ S39.

⁵³⁵ See ss7, 36 & 39. See also, the discussion on this topic in 3 4 2 1.

manipulated into a variety of meanings.⁵³⁶ This creates the risk that the state may use dignity as a paternalistic tool in pursuit of its own idea of dignity; consequently restricting freedom.⁵³⁷ 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.

Such cases where dignity is found on both sides of a dispute point to another deficiency in using dignity in the mediation of value conflicts.⁵³⁸ In such circumstances dignity is in conflict with itself and can therefore not be used as 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.⁵³⁹

Another reason provided for the supreme status of dignity is that the Constitutional Court has conferred great value onto it by adopting a dignity-based jurisprudence. There have been numerous attempts at explaining the Court's 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 is submitted in Chapter 2 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. Dignity does not receive any special treatment, since its entrenchment is identical to that of the other rights and values.⁵⁴⁰

The second explanation for the court's dignity based jurisprudence, 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

⁵³⁶ See 2 1.

⁵³⁷ Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-69.

⁵³⁸ See the discussion in 3 4 2 1.

⁵³⁹ *Ferreira* para 49.

⁵⁴⁰ See 2 2 & 2 5.

philosophy. Although Kant supports dignity, his notion thereof is largely libertarian.⁵⁴¹ Kant suggests that freedom should be laid at the basis of any Constitution and all laws.⁵⁴² 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”.⁵⁴³ 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.⁵⁴⁴

The fourth explanation for the court’s dignity-based jurisprudence is that it simply reflects a choice. The decision in *Harksen v Lane NO and Others*⁵⁴⁵ 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 meant two.”⁵⁴⁶ 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. As mentioned in Chapter 3, so does freedom.⁵⁴⁷ In fact, in the

⁵⁴¹ See the discussion hereof in 3 1 2. See also McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 669.

⁵⁴² Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-3.

⁵⁴³ Ackermann J quotes Kant in *Ferreira* para 49.

⁵⁴⁴ *Ferreira* para 51.

⁵⁴⁵ 1998 (1) SA 300.

⁵⁴⁶ Davis D “Equality: The Majesty of Legoland Jurisprudence” (1999) *SALJ* 398 412.

⁵⁴⁷ See 3 4 2 1. Freedom is given equal prominence in all the general provisions in support of dignity. Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 112 112.

Bill of Rights, freedom appears more frequently than dignity.⁵⁴⁸ It has however been contended that freedom should not “play a prominent role [simply] because of its formalistic presence in the Constitution”.⁵⁴⁹ 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.⁵⁵⁰

As noted numerous times throughout this thesis, freedom can be found within human dignity. This is another critical counterargument against a supreme dignity. Part of the definition of dignity reflects the definition of freedom. In *Ferreira Ackermann J* states:

“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.”⁵⁵¹

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.

6 1 2 Dignity can be waived

In Chapter 4 the term ‘waiver’ was defined as consent to the disposal of a right.⁵⁵² In terms of this definition dignity cannot be waived. The disposal of something suggests that it is lost altogether and fundamental rights cannot be lost, even when violated. Yet, waiver might also be defined as merely: consent to the violation of a right.⁵⁵³ If dignity is not considered

⁵⁴⁸ See Chapter 2 of the Constitution. See also Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 112 112.

⁵⁴⁹ Du Bois F “Freedom and the Dignity of Citizens” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 112 125.

⁵⁵⁰ See 3 1 2.

⁵⁵¹ Para 49.

⁵⁵² See 4 1 2.

⁵⁵³ Currie & De Waal Define a waiver of a right as an agreement not to claim the benefits thereof, in Currie I & De Waal J “Application of the Bill of Rights” in *The Bill of Rights Handbook* 5ed (2005) 39 39-40. They furthermore distinguish a waiver from the decision not to exercise a right. The distinction between these two

supreme and therefore inviolable, a person might actually be capable of waiving his 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.⁵⁵⁴

These two alternative definitions of waiver correspond with De Schutter’s reasoning that if a person has the right to be protected against the violation of his right, then he should also be free from the paternalistic imposition of its unwanted benefits.⁵⁵⁵ 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.⁵⁵⁶

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 he may do as he wishes.⁵⁵⁷ The second sphere in which the right to waiver may be situated is in the exercise of another right. Here a person may waive his right “if the exercise of right x comes down to a renunciation of right y”.⁵⁵⁸ In this regard a person’s exercise of his right to freedom might come down to a renunciation of his right to human dignity. This relates to the third possibility that the principle of freedom accommodates such a right to waiver.⁵⁵⁹

The European Court of Human Rights has already acknowledged the fact that rights can be waived.⁵⁶⁰ 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.

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 his 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. This decision to participate could be seen as a decision not to exercise a right.

⁵⁵⁴ Currie I & De Waal J “Application of the Bill of Rights” in *The Bill of Rights Handbook* 5ed (2005) 39 40.

⁵⁵⁵ De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 494.

⁵⁵⁶ 495.

⁵⁵⁷ 481.

⁵⁵⁸ 495.

⁵⁵⁹ 495. See also *Du Plessis v De Klerk* para 99.

⁵⁶⁰ De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 483.

The counterargument is that, even though some rights are waived without objection, other rights are too fundamental to waive.⁵⁶¹ 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.⁵⁶² 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.”⁵⁶³ In fact, one of the only rights that they do regard as ‘fundamental enough’ to prohibit its waiver is dignity.⁵⁶⁴ 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.

6 2 Society is plural

6 2 1 Plurality of morals

In opposition to the argument in Chapter 4 that freedom should yield to communitarian dignity, it is contended that society is plural. In Chapter 4 it is asserted that the individual’s notion of dignity should succumb to the community’s notion thereof.⁵⁶⁵ In this section it is however argued that where a person does not subjectively regard treatment as a violation of his human dignity, the treatment should not constitute a violation thereof.⁵⁶⁶ Consequently, the concerns surrounding the balancing of dignity and freedom or the waiving of rights disappear. The question is, can each person decide for himself what constitutes a violation of his own dignity? If so a person's dignity would not be violated if he did not experience it as such. The answer to this question depends primarily on whether dignity is interpreted objectively or subjectively.⁵⁶⁷

⁵⁶¹ 486. See also Currie I & De Waal J “Application of the Bill of Rights” in *The Bill of Rights Handbook* 5ed (2005) 39 41. Currie & 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.

⁵⁶² De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 496.

⁵⁶³ Currie & De Waal “Application of the Bill of Rights” in *The Bill of Rights Handbook* 5ed (2005) 39 41. Emphasis added.

⁵⁶⁴ 41.

⁵⁶⁵ See 4 2 2.

⁵⁶⁶ In respect of peepshows, see Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 185; Michalowski S & Woods L *German Constitutional Law: the Protection of Civil Liberties* (1999) 106.

⁵⁶⁷ For more on this debate regarding objective and subjective interpretation, see *Makwanyane* paras 132-133, 167, 194, 298, 309, 353.

It is discussed in Chapter 4 that since moral law is associated with dignity, the popular moral views of society are often used to determine the content of human dignity.⁵⁶⁸ This is justified by the idea of a shared public morality.⁵⁶⁹ Such a notion is, however, contrary to the plurality of worldviews in modern societies.⁵⁷⁰ 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. 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.⁵⁷¹ 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.

It is however argued that, despite its relation to moral law, 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.⁵⁷² Although decisions were therefore previously based on the moral views of the majority it should now be based on constitutional values.⁵⁷³ Other interpretations of dignity advocate that, contrary to the idea of a shared public morality, dignity itself has been interpreted to demand tolerance of differences.⁵⁷⁴ Such an interpretation suggests 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

⁵⁶⁸ See 4 2 2.

⁵⁶⁹ Thompson refers to this idea of a shared public morality and submits that it is not widely accepted and ignores the needs of individuals. Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 229, 232, 239. That fact that courts support this idea is evident from Sachs J’s words in *NCGLE* para 118. This paragraph is referred to in Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa 2ed* (2005) 36-1 36-14 n2.

⁵⁷⁰ 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. Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 187, 189, 203, 205.

⁵⁷¹ This is mentioned in 4 2 2 with reference to *Jordan* para 104.

⁵⁷² *Jordan* para 104.

⁵⁷³ Para 105.

⁵⁷⁴ Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 213. This is discussed in the context of sodomy in *NCGLE* paras 134, 135; Barnard-Naude AJ “Beyond the Brother: Radical Freedom” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 273 279. On the notion that dignity should be tolerated, see Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 187, 208, 215 (in the context of sodomy); Du Plessis L “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 Law Journal* 376 289; Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 237 (in the context of prostitution); Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa 2ed* (2005) 36-1 36-14; Wait M “Harm, Consent and the Limits of Privacy” (2005) 13 *Feminist Legal Studies* 97 105 (Wait mentions the fact that some forms of treatment might be repulsed by some, yet desired by others); Davis D & Woolman S “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* 361 396.

laws which foster morality, but that morality must be one which is founded on our constitutional values".⁵⁷⁵ This contradicts the argument in Chapter 4 that morality should be founded on dominant societal convictions.⁵⁷⁶ Accordingly, should dignity be interpreted as tolerant of difference, the individual's definition of his own dignity should only be limited by the fact that it cannot interfere with the dignity of others.⁵⁷⁷ Those who do in fact consider a certain treatment to be against their subjective idea of morality and dignity have an equal right not to consent thereto.⁵⁷⁸

When the content of dignity is solely determined by the moral ideas of the majority, it causes stigmatisation of the practices of the minority.⁵⁷⁹ This is evident from prostitution.⁵⁸⁰ It is said that prostitutes are stigmatised because of the criminalization of their vocation, in line with 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.⁵⁸¹

Moreover, the practice of prostitution was only regarded as immoral long after it came into existence.⁵⁸² This indicates the ever-changing morals of society.⁵⁸³ Another example in this

⁵⁷⁵ *Jordan* para 105. See also *Carmichele* para 56; *Du Plessis v De Klerk* paras 103, 110.

⁵⁷⁶ See 4 2 2.

⁵⁷⁷ This is discussed earlier in 6 1 1. This idea that a person can do as he likes as long as the interests of others are not influenced is also mentioned in *Lochner* 57.

⁵⁷⁸ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 189. This is said in the context of sodomy in *NCGLE* para 137. See also *Jordan* para 113.

⁵⁷⁹ Du Plessis L "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 Law Journal* 376 389. Therefore, allowing consent can assist in erasing such stigma. (Thompson SE "Prostitution – A Choice Ignored" (2000) *Women's Rights Law Reporter* 217 217, 238.) Du Plessis discusses the idea that stigmatisation, marginalisation and devaluation of especially minority groups violate dignity. See also *NCGLE* 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. Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 215.

⁵⁸⁰ This is referred to in Thompson SE "Prostitution – A Choice Ignored" (2000) *Women's Rights Law Reporter* 217 217; Fritz N "Crossing Jordan: Constitutional Space for (UN) Civil Sex?" (2004) *SAJHR* 230 238; Radin MJ "Market-inalienability" (1987) *Harvard Law Review* 1849 1923.

⁵⁸¹ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 19-20, 221. Davis examines the dissenting judgment of Kriegler J in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 80. Kriegler explains that stigmatisation is inconsistent with the purpose of the Constitution. See Davis D "Equality: The Majesty of Legoland Jurisprudence" (1999) *SALJ* 398 405.

⁵⁸² Thompson SE "Prostitution – A Choice Ignored" (2000) *Women's Rights Law Reporter* 217 211, 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

regard is that of sodomy.⁵⁸⁴ 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.⁵⁸⁵ To base the interpretation of a constitutional right on the morals of the majority at a given time therefore seems quite absurd.

In order to prevent a situation in which the minority is disadvantaged, the right to dignity should subsequently not be influenced by the ever-changing 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.⁵⁸⁶ 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 himself does not regard as such, the state is able to regulate the practice.⁵⁸⁷

This conception, which the Dutch call regulated tolerance, is introduced in the previous chapter.⁵⁸⁸ This kind of tolerance does not necessarily indicate an acceptance of the practice,

Code of 1886) and in the USA it was accepted until the end of the 19th century (the White-slave Traffic Act of 1910). South African Law Reform *Commission Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 113, 125, 142.

⁵⁸³ See Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-47; Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 117; Cornell D “Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 18 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 *NGCLE* para 42. Ackermann J acknowledges this changing morals of society in the context of sodomy.

⁵⁸⁴ Woolman discusses how our ideas regarding sodomy have changed. Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-49.

⁵⁸⁵ *NGCLE* paras 26, 28, 107.

⁵⁸⁶ See *Makwanyane* 329.

⁵⁸⁷ 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-aged prostitutes and human trafficking.

⁵⁸⁸ Brants specifically uses the term “regulated tolerance” in this regard, in Brants C “The Fine Art of Regulated Tolerance: Prostitution in Amsterdam” (1998) *Journal of Law and Society* 621 625. For more on this concept, see Pakes F “Tolerance and Pragmatism in the Netherlands: Euthanasia, Coffeeshops and Prostitution in the ‘Purple Years’, 1994-2002” (2003) *International Journal of Police Science & Management* 217 226; Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 226.

but merely a tolerance of differences.⁵⁸⁹ Although the reasons for tolerating consent to objectification in this regard differ from those in Chapter 5, regulation is still crucial.⁵⁹⁰ Similar 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. The benefits of such regulation likewise coincide with the benefits of regulating coerced consent to objectification.

6 2 2 Plurality of preference

Another matter, which relates to the plurality of modern societies, is that dignity allows each individual to choose his way of living and how he is treated.⁵⁹¹ This contradicts the averment in Chapter 4 that the freedom of the individual should yield to the dignity of the community.⁵⁹² Similar to the previous argument this element of dignity, which allows the individual to make his 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. The present topic relates more to the application of dignity to everyday situations, by demanding that an individual's different choices be tolerated.⁵⁹³ The difference between these two concepts is that the previous argument results in a subjective interpretation of dignity, whereas the present argument requires an objective interpretation. One solution to these two conflicting interpretations of dignity lies in the idea that individuals have subjective rights, whereas values are interpreted objectively.⁵⁹⁴ This justifies a subjective interpretation of the right to dignity and an objective interpretation of human dignity as a value.

An objective interpretation of dignity is impervious to the moral convictions of society or personal preference. This is crucial, since decisions on whether certain actions should be

⁵⁸⁹ Regulated tolerance can be regarded as a compromise, see Pakes F "Tolerance and Pragmatism in the Netherlands: Euthanasia, Coffeeshops and Prostitution in the 'Purple Years', 1994-2002" (2003) *International Journal of Police Science & Management* 217 226. In *Jordan* para 125 it is discussed that tolerating prostitution does not necessarily make the practice normal. See also South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 154.

⁵⁹⁰ The main reason for tolerating consent in Chapter 5 (5 3) is that the state cannot fulfil the socio-economic needs of the consentor, whereas the reason for allowing consent in this regard relates to the belief that the morals of each individual should be tolerated.

⁵⁹¹ This argument presupposes that some people do in fact choose objectifying treatment. South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 28, 167, 185.

⁵⁹² See 4 2 1.

⁵⁹³ This argument suggests that some might in fact desire objectifying treatment. South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 167.

⁵⁹⁴ On the notion of subjective rights and objective norms, see Kleyn D & Viljoen F "Aspekte van Privaatreg" *Beginners Gids vir Regstudente* 3ed (2002) 111 112-113.

allowed or not were previously and are often still based on moral ideas and personal preference.⁵⁹⁵ Our new Constitution aims to change this, by demanding that such decisions be based on constitutional values.⁵⁹⁶

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 moral 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.⁵⁹⁷ 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."⁵⁹⁸

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

⁵⁹⁵ Woolman supports the idea that decisions were and are still made based on the notion of a shared public morality. He refers specifically to Sachs J's decision on prostitution in *NCGLE* para 228. Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-14 n2. 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. Thompson SE "Prostitution – A Choice Ignored" (2000) *Women's Rights Law Reporter* 217 229. For more on the courts' narrow ideas on sexual conduct, see Fritz N "Crossing Jordan: Constitutional Space for (UN) Civil Sex?" (2004) *SAJHR* 230 234-235; Wait M "Harm, Consent and the Limits of Privacy" (2005) 13 *Feminist Legal Studies* 97 111, 113, 117. This is also discussed in *Laskey* para 40; Adler L "The Dignity of Sex" (2008) 17:1 *UCLA Women's LJ* 1 17. See also Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 213-214.

⁵⁹⁶ Ackermann LWH "Equality and the South African Constitution: The Role of Dignity" (2000) *Heidelberg Journal of International Law* 537 554. See also Bhana D & Pieterse M "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) *SALJ* 865 875. Botha refers to the idea that basing decisions on the constitutional value of dignity allows plurality. Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 208, 213, 214. On the argument that decisions should not be based on the moral majority, see Thompson SE "Prostitution – A Choice Ignored" (2000) *Women's Rights Law Reporter* 217 237. Radin shows the dangers of basing decisions on the moral majority. Radin MJ "Market-inalienability" (1987) *Harvard Law Review* 1849 1864-1866. For more on this idea see *Jordan* para 102.

⁵⁹⁷ Michalowski S & Woods L *German Constitutional Law: the Protection of Civil Liberties* (1999) 106; *Jordan* 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. South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 174, 177, 178, 182, 191-192, 196. See also Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-49.

⁵⁹⁸ O'Regan C "From Form to Substance: The Constitutional Jurisprudence of Laurie Ackermann" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 6 16.

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.⁵⁹⁹ It supports a plurality of morals and the idea that each individual should be free to act as he deems fit, in accordance with his own morals. The fact that each person has inherent, individual dignity suggests that the individual's dignity and right to his own point of view cannot succumb to that of the group.⁶⁰⁰ 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".⁶⁰¹ People are free to act as they wish, as long as others enjoy an equal breadth of freedom.⁶⁰² 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.⁶⁰³ 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.⁶⁰⁴ People should enjoy equal dignity and freedom and their moral views on dignity and freedom should carry equal weight.

⁵⁹⁹ See n541 on dignity and tolerance. For the idea of a sphere in which to create personal identity, see Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 205. See also South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 228.

⁶⁰⁰ For the contention that each person has individual dignity, see *Makwanyane* para 20 (per Chaskalson J).

⁶⁰¹ Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-13 n4. Woolman quotes from *Volks NO and Others v Robinson and Another* 2004 (6) SA 288 (CC) paras 154 and 156.

⁶⁰² *Ferreira* para 49.

⁶⁰³ See Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 112 129.

⁶⁰⁴ For the idea that it does not suggest eliminating differences, see *NCGLE* paras 22, 132. Ackermann J quotes from *Vriend v Alberta* [1998] 1 SCR 493 para 69. See also Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-29. The fact that equality supports public recognition of differences is mentioned in Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 208; Barnard-Naude AJ "Beyond the Brother: Radical Freedom" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 273 280.

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.⁶⁰⁵ 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.”⁶⁰⁶

6 3 Requirements for valid consent

6 3 1 Four elements

In Chapter 4 it is argued that consent to objectification should not be allowed, since the consent was not valid.⁶⁰⁷ 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 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.⁶⁰⁸ 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 of an equal breadth of freedom (and dignity) for each individual.

⁶⁰⁵ See for example Davis D “Equality: The Majesty of Legoland Jurisprudence” (1999) *SALJ* 398 399. See also *Jordan* para 104.

⁶⁰⁶ Para 135.

⁶⁰⁷ See 4 5.

⁶⁰⁸ *NCGLE* para 26 as referred to in Ackermann LWH “Equality and the South African Constitution: The Role of Dignity” (2000) *Heidelberg Journal of International Law* 537 548. See also Michelman F “Freedom by any Other Name? A Comparative Note on Losing Battles While Winning Wars” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 91 104; Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 238; *Laskey* para 23. This view is supported by the German government in respect of prostitution, see South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 131.

6 3 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.⁶⁰⁹ 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 De Schutter argues that it is “[t]oo restrictive to limit ‘private life’ to the inner circle in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle”.⁶¹⁰ This indicates a broader interpretation of privacy, which incorporates a right to autonomy.⁶¹¹ Such an interpretation of the right to privacy is discussed in Chapter 3 and is referred to as “decisional privacy”.⁶¹² In terms of decisional privacy the individual is entitled to make choices concerning significant matters and to have control over his own affairs.⁶¹³ Sodomasochism, peepshows, prostitution and dwarf-tossing can all be regarded as significant matters as they relate to sexual preference and/or vocation.⁶¹⁴

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

⁶⁰⁹ See Davis D & Woolman S “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* 361 382-383; South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 108, 194.

⁶¹⁰ De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 494. Michelman refers to this idea of a right to “private intimacy”, in Michelman F “Freedom by any Other Name? A Comparative Note on Losing Battles While Winning Wars” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 91 104.

⁶¹¹ See Michelman F “Freedom by any Other Name? A Comparative Note on Losing Battles While Winning Wars” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 91 104.

⁶¹² Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 231.

⁶¹³ This is discussed in Michelman F “Freedom by any Other Name? A Comparative Note on Losing Battles While Winning Wars” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 91 104. See also South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 192.

⁶¹⁴ For the idea that one should be able to decide over matters regarding sexual preference, see Weait M “Harm, Consent and the Limits of Privacy” (2005) 13 *Feminist Legal Studies* 97 101; *Laskey* paras 8, 30; Adler L “The Dignity of Sex” (2008) 17:1 *UCLA Women’s LJ* 1 17.

action, which should be hidden from the public. It also “assumes a dual structure – public and private”⁶¹⁵.

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.⁶¹⁶ 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.”⁶¹⁷

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.⁶¹⁸ 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.⁶¹⁹

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’.⁶²⁰ 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.⁶²¹ The distinction should therefore not be invoked to justify different treatment.⁶²²

According to Gavison this distinction should however not be abolished completely as it may have some advantages if used appropriately.⁶²³ Even feminists concede that some acts should

⁶¹⁵ *NCGLE* para 110.

⁶¹⁶ Wait M “Harm, Consent and the Limits of Privacy” (2005) 13 *Feminist Legal Studies* 97 99; Gavison R “Feminism and the Public/Private Distinction” (1992) 45:1 *Stanford Law Review* 1 9, 11. For an in-depth discussion of the public/private divide, see Boyd SB *Challenging the Public/Private Divide: Feminism, Law & Public Policy* (1997).

⁶¹⁷ *NCGLE* 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 *Wackenheim* 4.

⁶¹⁸ Gavison R “Feminism and the Public/Private Distinction” (1992) 45:1 *Stanford Law Review* 1 14.

⁶¹⁹ 15.

⁶²⁰ 10.

⁶²¹ 1-3, 8. See also the domestic violence case of *S v Baloyi and Others* 2000 (2) SA 425 (CC) para 16.

⁶²² Gavison R “Feminism and the Public/Private Distinction” (1992) 45:1 *Stanford Law Review* 1 10.

⁶²³ 3.

be free from interference due to their intimate nature.⁶²⁴ Although the protection of privacy might aid oppression some private acts 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.”⁶²⁵

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”.⁶²⁶

6 3 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.⁶²⁷

The defence of consent requires genuine consent, hence the following six requirements. First of all, consent should be given freely.⁶²⁸ This requirement excludes coerced consent, but not consent to undesired treatment.⁶²⁹ The rationale behind this is that consent does not necessarily imply desire but merely willingness.⁶³⁰ Prostitutes may therefore consent to prostitution, regardless of whether they desire the treatment, as long as they are willing to endure it.

⁶²⁴ 33-34, 42.

⁶²⁵ 37.

⁶²⁶ *NCGLE* paras 116-117.

⁶²⁷ Neethling J, Potgieter JM & Visser PJ *Deliktereg* 5ed (2006) 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.

⁶²⁸ For this requirement, see Neethling J, Potgieter JM & Visser PJ *Deliktereg* 5ed (2006) 95 98; Harrison KM “Law, Order, and the Consent Defense” 12 (1993) *St Louis U Pub L Rev* 477 478.

⁶²⁹ The idea that coerced consent is excluded is apparent from Neethling J, Potgieter JM & Visser PJ *Deliktereg* 5ed (2006) 98.

⁶³⁰ 101.

Secondly, consent should be given by a capable person.⁶³¹ Capability entails the capacity to appreciate the implications of the said consent.⁶³² 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.⁶³³

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.⁶³⁴ It is asserted that should these requirements to valid consent be adhered to the treatment would be lawful, since the consenter waived or restricted his own rights to the extent to which he consented.⁶³⁵

By applying these requirements to sadomasochism, as an example of objectifying treatment, it seems as though such treatment should be allowed. This defence was raised in the case of *Laskey*.⁶³⁶ Here it was argued that consent to genital torture was given freely and that the said treatment was in fact desired.⁶³⁷ The persons consenting were mainly adult males who were capable of giving such consent.⁶³⁸ 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.⁶³⁹

The only hindrance in this context is that lawful consent is more readily regarded as a defence in delict than in criminal law.⁶⁴⁰ Consent is usually not considered a defence in criminal law, unless non-consent is an element to the crime.⁶⁴¹ This is because the state is deemed to be the victim in criminal cases and the harmed person merely an important witness.⁶⁴² There are

⁶³¹ 95, 98, 101. Harrison also refers to the requirement of legal capacity. Harrison KM “Law, Order, and the Consent Defense” 12 (1993) *St Louis U Pub L Rev* 477 478.

⁶³² See Neethling J, Potgieter JM & Visser PJ *Deliktereg* 5ed (2006) 100.

⁶³³ 96, 98, 99. See also Harrison KM “Law, Order, and the Consent Defense” 12 (1993) *St Louis U Pub L Rev* 477 478.

⁶³⁴ For the requirement that subjective consent be given to the full extent of the harm, see Neethling J, Potgieter JM & Visser PJ *Deliktereg* 5ed (2006) 100, 101.

⁶³⁵ 95.

⁶³⁶ *Laskey* para 20.

⁶³⁷ 22 23. Para 40 defines the sadomasochistic actions as “genital torture”.

⁶³⁸ 23 35.

⁶³⁹ This idea is conveyed through para 38, which states that the actions were restricted and controlled and no serious harm was inflicted.

⁶⁴⁰ This is evident from Harrison’s comparison between the two concepts. Harrison KM “Law, Order, and the Consent Defense” 12 (1993) *St Louis U Pub L Rev* 477 478, 479. For a similar discussion, see also Coetzee LC “Onregmatigheid in die Afwesigheid van Belange-aantasting” (2004) 67 *THRHR* 661 664.

⁶⁴¹ Harrison KM “Law, Order, and the Consent Defense” 12 (1993) *St Louis U Pub L Rev* 477 478, 479. Harrison lists circumstances in which consent would be irrelevant.

⁶⁴² 478.

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.⁶⁴³

Professor Fitzgerald consults the English tax law in order to formulate a general principle for the availability of the consent defence in criminal law.⁶⁴⁴ He gathers there from that consent should be allowed as 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:

“[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.”⁶⁴⁵

This does not, however, explain the allowance of cosmetic surgery or surgery which only affords temporary relief.⁶⁴⁶ 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.⁶⁴⁷ 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.⁶⁴⁸ An example of such prohibition is the historical prohibition of consent

⁶⁴³ Neethling J, Potgieter JM & Visser PJ *Deliktereg 5ed* (2006) 101. Harrison specifically refers to instances where the harm is less dangerous. Harrison KM “Law, Order, and the Consent Defense” 12 (1993) *St Louis U Pub L Rev* 477 479, 480.

⁶⁴⁴ Fitzgerald's theory is explained in Harrison KM “Law, Order, and the Consent Defense” 12 (1993) *St Louis U Pub L Rev* 477 482-483. See also Fitzgerald P “Consent, Crime and Rationality” in Bayefsky A (ed) *Legal Theory Meets Legal Practice* (1988) 209, 220-221.

⁶⁴⁵ Harrison KM “Law, Order, and the Consent Defense” 12 (1993) *St Louis U Pub L Rev* 477 482 n25.

⁶⁴⁶ 494, 495. More will be said on cosmetic surgery later on in this section.

⁶⁴⁷ 488.

⁶⁴⁸ 489.

to sex by unmarried women.⁶⁴⁹ The protection of a woman's chastity was presented as justification for the prohibition, but the real reason was more likely to control them.⁶⁵⁰

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.⁶⁵¹ In this context the oppressed group would therefore be allowed to consent to certain treatment to which others may not.⁶⁵² Again the idea of cosmetic surgery, as a form of physical harm that is not designed to extend life or ease pain, surfaces.⁶⁵³ Harrison asserts that consent to this type of surgery is allowed in order to fulfil the wants of the dominant group, i.e. men's desire for more attractive women.⁶⁵⁴

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 medical authorities have called for a ban of boxing events because of health risks".⁶⁵⁵ Harrison argues that the dominant group allows consent to this type of bodily harm due to its significant financial benefits.⁶⁵⁶

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.⁶⁵⁷ This is clear from the fact that circumcision is allowed, whereas other forms of religious mutilation is not. Similarly, although tattooing is allowed, decorative scarring does not receive the same approval.⁶⁵⁸

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.⁶⁵⁹ 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.

⁶⁴⁹ 490, 496.

⁶⁵⁰ 490.

⁶⁵¹ 493.

⁶⁵² 496.

⁶⁵³ 495.

⁶⁵⁴ 496.

⁶⁵⁵ 498.

⁶⁵⁶ 498.

⁶⁵⁷ 498.

⁶⁵⁸ 498-501.

⁶⁵⁹ In *NCGLE* paras 26, 76, 108 it is stated that sodomy was criminalised due to moral and religious views.

6 3 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;⁶⁶⁰ there should be consideration, such as money; the parties should have the capacity to enter into a contract, i.e. be able to understand the consequences thereof;⁶⁶¹ the parties should genuinely consent to the contract and its terms; the contract should have a lawful purpose;⁶⁶² and the contract should comply with any prescribed formalities.⁶⁶³

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.

The effect of unlawfulness is that the contract is either void or unenforceable.⁶⁶⁴ A contract that is void is not a contract whatsoever and has no legal consequences. The State may therefore interfere with contracts which 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, therefore, genuinely agrees to objectification and does not wish to withdraw from the agreement, unenforceability would have no effect on the contract. Should a contract therefore be void, the state may prevent a person from performing in terms thereof. Should the contract merely be 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.⁶⁶⁵ Contractual autonomy essentially means that parties can choose whether,

⁶⁶⁰ For an in depth discussion of this requirement, see Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF “Aanbod en Aanname” in *Kontraktereg Algemene Beginsels* (2007) 57-107.

⁶⁶¹ 24-25.

⁶⁶² 25-26.

⁶⁶³ 8-9. Another requirement is that the performance in terms of the contract be possible.

⁶⁶⁴ 215-219.

⁶⁶⁵ 11 20. See also Bhana D & Pieterse M “Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited” (2005) *SALJ* 865 886; Jordaan DW “The Constitution’s Impact on the Law of Contract in Perspective” (2004) 37:1 *De Jure* 58 59.

with whom and on what terms to enter into a contract.⁶⁶⁶ This concept has been bolstered immensely in the past.⁶⁶⁷ At first it was expected that the new Constitution would limit contractual autonomy, yet it has had quite the opposite effect.⁶⁶⁸

In two Constitutional Court cases, *Brisley*⁶⁶⁹ and *Afrox*,⁶⁷⁰ contractual freedom is seen as part of both freedom and human dignity.⁶⁷¹ These cases were decided with reference to Kantian philosophy. Kant was of the opinion that “to disregard contractual autonomy is to disregard dignity”.⁶⁷² It is also due to contractual autonomy that *Sasfin*⁶⁷³ and *Shifren*⁶⁷⁴ endorse the principle of *pacta sunt servanda*.⁶⁷⁵ This principle stipulates that the terms of a contract should be enforced precisely.⁶⁷⁶

Nonetheless, contractual freedom is not applied absolutely.⁶⁷⁷ A contract is entered into within an interdependent society and its specific law system; it is therefore not “allowed to function within its own juridical sphere”.⁶⁷⁸ The state may interfere with a contract, but not unduly so.⁶⁷⁹ Due to this supreme position of contractual autonomy in contract law, state intervention does not often occur in practice.⁶⁸⁰ 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.

⁶⁶⁶ This universal meaning is mentioned in Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Kontraktereg Algemene Beginsels* (2007) 11; Bhana D & Pieterse M “Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited” (2005) *SALJ* 865 867; Grové NJ “Die Kontraktereg, Altruïsme, Keusevryheid en die Grondwet” (2003) 36:1 *De Jure* 134 134; Jordaan DW “The Constitution’s Impact on the Law of Contract in Perspective” (2004) 37:1 *De Jure* 58 59.

⁶⁶⁷ See Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 211.

⁶⁶⁸ 212. Botha explains this result.

⁶⁶⁹ *Brisley v Drotzky* 2002 (4) SA 1 (SCA); hereinafter referred to as ‘*Brisley*’.

⁶⁷⁰ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); hereinafter referred to as ‘*Afrox*’.

⁶⁷¹ See, *Brisley* para35E, *Afrox* para38B as referred to in Grové NJ “Die Kontraktereg, Altruïsme, Keusevryheid en die Grondwet” (2003) 36:1 *De Jure* 134 138.

⁶⁷² Kant is quoted in Jordaan DW “The Constitution’s Impact on the Law of Contract in Perspective” (2004) 37:1 *De Jure* 58 59-60.

⁶⁷³ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); hereinafter referred to as ‘*Sasfin*’.

⁶⁷⁴ *SA Ko-op Graanmaatskappy BPK v Shifren en Andere* 1964 SA 760 (A).

⁶⁷⁵ Jordaan DW “The Constitution’s Impact on the Law of Contract in Perspective” (2004) 37:1 *De Jure* 58 60, 61.

⁶⁷⁶ Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Kontraktereg Algemene Beginsels* (2007) 11.

⁶⁷⁷ Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Kontraktereg Algemene Beginsels* (2007) 11; Grové NJ “Die Kontraktereg, Altruïsme, Keusevryheid en die Grondwet” (2003) 36:1 *De Jure* 134 134.

⁶⁷⁸ This quote can be found in Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Kontraktereg Algemene Beginsels* (2007) 11 15. For the idea that people are all interdependent, see Grové NJ “Die Kontraktereg, Altruïsme, Keusevryheid en die Grondwet” (2003) 36:1 *De Jure* 134 136.

⁶⁷⁹ The notion that the court may interfere with a contract is found in *Lochner* 53, 54. Bhana discusses the idea that this interference cannot be unduly. Bhana D & Pieterse M “Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited” (2005) *SALJ* 865 873.

⁶⁸⁰ Botha makes this point in Botha H “Human Dignity in Comparative Perspective” (2009) *Stell LR* 171 212.

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.⁶⁸¹ It should however be kept in mind that this chapter focuses on situations where no such unequal bargaining power exists.

For a contract to be unlawful and therefore invalid or unenforceable, its purpose must be against public policy or *contra bonos mores*.⁶⁸² 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.⁶⁸³

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.⁶⁸⁴ 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 society⁶⁸⁵ and whether the contract violates any statutory or constitutional provisions.⁶⁸⁶ 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.

⁶⁸¹ Bhana D & Pieterse M "Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited" (2005) *SALJ* 865 884.

⁶⁸² This effect is discussed in Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Kontraktereg Algemene Beginsels* (2007) 206; Grové NJ "Die Kontraktereg, Altruïsme, Keusevryheid en die Grondwet" (2003) 36:1 *De Jure* 134 134. Contracts against the common law, any statutory provisions or the Constitution might also result in its invalidity or unenforceability.

⁶⁸³ For a discussion on the differences between these two concepts, see Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Kontraktereg Algemene Beginsels* (2007) 207-208.

⁶⁸⁴ *Carmichele* paras 36, 56. *Du Plessis v De Klerk* para 110.

⁶⁸⁵ Public policy and *boni mores* are compared in Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Kontraktereg Algemene Beginsels* (2007) 213. Van der Merwe refers to *Sasfin* para 9 in this regard.

⁶⁸⁶ Van der Merwe illustrates the connection between public policy and the Constitution. Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Kontraktereg Algemene Beginsels* (2007) 206. See also, Grové NJ "Die Kontraktereg, Altruïsme, Keusevryheid en die Grondwet" (2003) 36:1 *De Jure* 134 134.

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.⁶⁸⁷ 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.”⁶⁸⁸

A contract which is allegedly against human dignity because it allows for objectifying treatment might be regarded as an example of the second abovementioned 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 discussed in other chapters 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.⁶⁸⁹

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

⁶⁸⁷ See Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Kontraktereg Algemene Beginsels* (2007) 218.

⁶⁸⁸ Jordaan DW “The Constitution’s Impact on the Law of Contract in Perspective” (2004) 37:1 *De Jure* 58 61. See also *NCGLE* para 37. In *NCGLE* it is decided that moral reprehension and prejudice does not constitute a “legitimate purpose” in terms of s36 of the Constitution.

⁶⁸⁹ Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Kontraktereg Algemene Beginsels* (2007) 218 217-218.

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 public policy as fickle, it is contended that agreements that are considered against public policy should be unenforceable rather than void.⁶⁹⁰

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.

6 3 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.⁶⁹¹ This idea of allowing actions because they do not affect others features prominently throughout this whole thesis 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 his 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 he 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.⁶⁹² Similarly, actions that are against the public interest might also be harmful to others.⁶⁹³ In *Brown* 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.⁶⁹⁴ This logic is of particular

⁶⁹⁰ The quotes in this paragraph are taken from Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Kontraktereg Algemene Beginsels* (2007) 217. Although mention is only made to public policy in this regard, the same principles could be applied to the *boni mores* of society.

⁶⁹¹ Ackermann quotes from para 26 of this case. Ackermann LWH “Equality and the South African Constitution: The Role of Dignity” (2000) *Heidelberg Journal of International Law* 537 584.

⁶⁹² For the idea that one’s actions cannot interfere with another’s right to do the same, see *Lochner* 75. On the notion that our actions cannot interfere with the rights of others, see De Schutter O “Waiver of Rights and State Paternalism under the European Convention on Human Rights” (2000) *Northern Ireland Legal Quarterly* 481 494.

⁶⁹³ Such treatment may be against public safety, morals or welfare, see *Lochner* 57.

⁶⁹⁴ As referred to in *Laskey* para 21.

relevance where the objectification is performed in 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.⁶⁹⁵

6 4 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. 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.⁶⁹⁶ Jobs that involve objectification, like prostitution, often allow for more flexible hours and free time.⁶⁹⁷ 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 vocations and lead very restricted lives. Individuals might, for example, be forced to work in a brothel as a result of human trafficking. These situations are however not relevant to this discussion, as the focus of this chapter is on objectification that has been freely and genuinely consented to.

Jobs involving objectification also provide for empowerment by way of economic freedom.⁶⁹⁸ 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

⁶⁹⁵ 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 *NCGLE* it is emphasised that no physical harm is caused by consensual sodomy. See *NCGLE* paras 32, 108, 118. The question is however, what constitutes harm? For two consenting sadomasochists the ‘torture’ they inflict is not in the least perceived as harmful. See also 6 4 on harmful practices that are in fact allowed, such as sport and surgery.

⁶⁹⁶ This is mentioned several times in Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 217, 224, 228, 236, 237; South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 28, 192, 193, 194, 195, 196, 220. The SALRC explains that objectification, such as prostitution, could enhance self-determination, self-esteem, self-care and choice.

⁶⁹⁷ Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 228, 229, 237; South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 32, 168, 185.

⁶⁹⁸ Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 217, 224, 228.

compensation.⁶⁹⁹ Thompson notes that: “[w]omen choose prostitution as an economic alternative to low-paying, monotonous labour”.⁷⁰⁰ 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.⁷⁰¹ Similarly, jobs like prostitution and dwarf tossing help to alleviate unemployment. In *Wackenheim* it was argued that dwarf tossing was the only job that the appellant could secure.⁷⁰²

It is asserted, with respect to prostitution specifically, that it affords sexual autonomy.⁷⁰³ A free space is provided in which women are able to act on their desires.⁷⁰⁴ 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.⁷⁰⁵

The permission to consent to objectification and the legalisation thereof could furthermore aid in the erasure of social stigma.⁷⁰⁶ As discussed in Chapter 5, the tolerance of objectionable conduct often results in the acceptance and legalisation thereof. The ever-changing moral perceptions of the majority might be responsible for this occurrence. Social stigma is a barrier that restricts freedom.⁷⁰⁷ 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. 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.⁷⁰⁸ Allowing prostitution and sadomasochism as forms of

⁶⁹⁹ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 32, 167, 168.

⁷⁰⁰ Thompson SE “Prostitution – A choice ignored” 2000 *Women’s Rights Law Reporter* 217 232.

⁷⁰¹ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 27. In addition to the higher earning potential, earnings are paid immediately with these kinds of jobs and one can therefore earn everyday.

⁷⁰² *Wackenheim* 4. I refer to Mr Wackenheim as the appellant to avoid confusion. In this case he is actually referred to as the “author”.

⁷⁰³ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 28 167.

⁷⁰⁴ For the idea of a free space in which to act on desires, see Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 239. See also Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 217, 224, 228, 237.

⁷⁰⁵ Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 240, 247.

⁷⁰⁶ This is said with regard to the decriminalisation of sodomy in *NCGLE* para 28. See also Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 217, 238.

⁷⁰⁷ 237.

⁷⁰⁸ This preference in South African laws and jurisprudence for ‘civil’ sex is mentioned in South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 15, 182.

“uncivil” sex might therefore aid in the recognition of feminine desire and the erasure of social stigma.⁷⁰⁹

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 Cote d’Ivoire, regardless of the decriminalisation of the profession.⁷¹⁰

The final benefit of permitting consent is that the dangers of objectifying treatment might be addressed more effectively. The theory that the dangers of objectification are primarily functions of its criminalisation is discussed in Chapter 5; another discussion thereof would therefore result in unnecessary duplication.⁷¹¹

6 5 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.⁷¹² 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 in Chapter 4 that the commodification of one's personal attributes amounts to a violation of dignity, the second abovementioned concept contends that

⁷⁰⁹ Fritz discusses these effects of stigmatisation and refers to the term “uncivil sex” in Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 238-239. See also *NCGLE* para 28.

⁷¹⁰ See South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 19-20, 166, 196, 221, 222

⁷¹¹ This discussion in 5 4 refers to Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 231. In Chapter 5 (5 4 & 5 5) this benefit is discussed in relation to the regulation of objectifying treatment. It is however also relevant in this regard, as objectification may still be regulated where it is allowed due to genuine consent.

⁷¹² The idea that people are responsible for their actions are mentioned in McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) *The European Journal of International Law* 655 716; Woolman S “Dignity” in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-50. This idea that allowing objectification fosters responsibility is mentioned in connection with prostitution in South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 194.

such commodification could actually be beneficial.⁷¹³ John Locke introduced the theory that an individual has property rights in her own person.⁷¹⁴ 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.

Finally, freedom, as portrayed in this chapter, is only possible if it is interpreted as widely as possible.⁷¹⁵ In Chapter 3 this is discussed in the context of Ackermann J's decision in *Ferreira*. This kind of freedom is not limited to actions that are morally acceptable by society, but includes the freedom to do wrong.⁷¹⁶ 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.⁷¹⁷

6 6 Objectification is allowed

6 6 1 Individuals are objectified

Human interaction is instrumental, despite the purest of intentions.⁷¹⁸ Individuals regularly objectify one another and in turn allow such treatment. It can therefore not be the objectification *per se* that is objectionable.⁷¹⁹

⁷¹³ See 4 1 2.

⁷¹⁴ This discussion on property rights is based on Fritz's explanation thereof. Fritz N "Crossing Jordan: Constitutional Space for (UN) Civil Sex?" (2004) *SAJHR* 230 242, 239-245.

⁷¹⁵ Ackermann J decides that freedom should be defined this way in *Ferreira* para 49.

⁷¹⁶ Du Bois F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 112 119, 120. See also *Jordan* para 102, O'Regan J & Sachs J quote from the *Report of the Committee on Homosexual Offences and Prostitution (Wolfenden)*, Cmnd No 247 (1957) London: HMSO para 61. This committee was appointed in 1954 to look into the law and practice regarding homosexuality and prostitution.

⁷¹⁷ 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 F "Freedom and the Dignity of Citizens" in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 112 120.

⁷¹⁸ Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-8. See also Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 184.

⁷¹⁹ Woolman makes this observation in Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-49.

In the remainder of this chapter a few key examples of accepted objectifying treatment will be discussed. This discussion opposes the claim in Chapter 4 that no forms of objectification may be allowed, since that would have an 'opening of the floodgates' effect.⁷²⁰ The aim of this discussion will be to determine the rationale behind permitting these specific examples while prohibiting others.

6 6 2 Sexual objectification

6 6 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. 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.⁷²¹

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 there from. The only difference is that the one performer cannot see the audience whereas the other 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, all 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?

⁷²⁰ See 4 3.

⁷²¹ This paragraph refers to and quotes from the German peepshow case, *BVerfGE* 27, 1, 6 (1969), as translated in Michalowski S & Woods L *German Constitutional Law: the Protection of Civil Liberties* (1999) 105.

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.

6 6 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.⁷²² 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.

So why is pornography and stripping allowed, whereas peepshows and prostitution are not?⁷²³ 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?⁷²⁴ 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 and seduce their man by installing a pole in the bedroom?

6 6 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

⁷²² I.e. other pornographic actors or models.

⁷²³ This question is asked by the SALRC in South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper I, Project 107* (2009). The aim of this paper is to determine whether prostitution should be legalised in South Africa.

⁷²⁴ Anonymous “Jenna’s American Sex Star” (11-08-2011) *Wikipedia* <http://en.wikipedia.org/wiki/Jenna%27s_American_Sex_Star> (accessed 06-11-2011). This television show will also be discussed in 6 4 4.

cases regarding sadomasochism. Where the participants were heterosexual married couples, as was the case in *Wilson*, 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.⁷²⁵

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.⁷²⁶

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.”⁷²⁷

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.⁷²⁸

6 6 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

⁷²⁵ *R. v Wilson* [1996] Cr App R 241 (CA); hereinafter referred to as ‘*Wilson*’. In this case a woman asked a man to carve his initials into her buttocks with a hot knife.

⁷²⁶ Weait discusses the facts and outcome of *R v Emmet* [1999] All ER (D) 641. Weait M “Harm, Consent and the Limits of Privacy” (2005) 13 *Feminist Legal Studies* 97 112, 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.

⁷²⁷ Weait M “Harm, Consent and the Limits of Privacy” (2005) 13 *Feminist Legal Studies* 97 117. Weait refers to *R v Dica* [2004] All ER (D) 45.

⁷²⁸ See Thompson SE “Prostitution – A Choice Ignored” (2000) *Women’s Rights Law Reporter* 217 246.

reward”.⁷²⁹ This is a very wide definition and was cause for speculation in *Jordan*. 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*.”¹³

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.⁷³⁰ 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 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?⁷³¹

⁷²⁹ 23 of 1957.

¹³ *S v Jordan and Others* 2002 (1) SA 797 (T) para 800H-I.

⁷³⁰ *Jordan* para 49.

⁷³¹ It is important to note that the SALRC supports this line of reasoning and defines prostitution as sex for payment in kind or money. South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) (x).

6 6 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.⁷³² Shows such as Fear Factor, Survivor and I Bet You Will thrive on coercing people to do humiliating and degrading deeds.⁷³³ This includes eating live bugs or dog faeces. The coercion is economic by nature, for participants are promised potential 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 he accepts. This is blatant coercion.

In the Jackass television series and movies 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 abovementioned 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 merely because they are different and look ridiculous. These circus performers are degraded and objectified, since the audience pays to ridicule their disabilities and deformities.

⁷³² For information on the Jerry Springer Show, see Anonymous “The Jerry Springer Show” (20-10-2011) *Wikipedia* <http://en.wikipedia.org/wiki/The_Jerry_Springer_Show> (accessed 06-11-2011).

⁷³³ For information on these shows see the following websites: Anonymous “Fear Factor” (31-10-2011) *Wikipedia* <http://en.wikipedia.org/wiki/Fear_Factor> (accessed 06-11-2011); Anonymous “Survivor” (TV Series) (06-11-2011) *Wikipedia* <[http://en.wikipedia.org/wiki/Survivor_\(TV_series\)](http://en.wikipedia.org/wiki/Survivor_(TV_series))> (accessed 06-11-2011); Anonymous “I Bet You Will” (31-08-2011) <http://en.wikipedia.org/wiki/I_Bet_You_Will> (accessed 06-11-2011).

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

6 6 5 Sport

Although sport could be addressed under the heading of entertainment, it justifies 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 there from. Such ‘consent’ is recognised as a legal defence.⁷³⁴

Nevertheless, athletes are only assumed to waive their rights to a certain extent. They are not simply stripped of their rights and reduced to objects.⁷³⁵ 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 his right to human dignity when he 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 his 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”.⁷³⁶ Surely the same applies to sadomasochism? If participants were to evaluate the dangerousness of each action it would detract from their sexual gratification.

⁷³⁴ Labuschagne quotes McCutcheon in Labuschagne JMT “Fundamentele Regte van Sportlui en die Vraagstuk van Noodweer by Kontak sportsoorte” (2004) 37:1 *De Jure* 41 44. See McCutcheon JP “Sports violence, consent and the criminal law” (1994) *Northern Ireland LQ* 267 267.

⁷³⁵ Labuschagne JMT “Fundamentele Regte van Sportlui en die Vraagstuk van Noodweer by Kontak sportsoorte” (2004) 37:1 *De Jure* 41 44.

⁷³⁶ 49. Labuschagne includes this English quote from Gardiner S “The law and the sports field” (1994) *Crim LR* 513 515.

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.⁷³⁷ Yet in the former case it is allowed and in the latter it is not.

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.⁷³⁸ How is this different from dwarf tossing?

6 6 6 Punishment

Punishment is the best example of holding someone responsible for his choices, despite the undesirable consequences.⁷³⁹ Botha observes that punishment does not *per se* indicate a violation of human dignity. Rather than reducing someone to an object, he is treated as an autonomous person who must take responsibility for his actions.⁷⁴⁰ This emphasises the aforementioned notion that denying someone the freedom of choice might be just as objectifying as the treatment he is choosing.⁷⁴¹

6 6 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.⁷⁴² Employees are compensated for being objectified. They are instrumental to the achievement of certain ends, which includes

⁷³⁷ Labuschagne JMT "Fundamentele Regte van Sportlui en die Vraagstuk van Noodweer by Kontaksportsoorte" (2004) 37:1 *De Jure* 41 54.

⁷³⁸ Harrison KM "Law, Order, and the Consent Defense" 12 (1993) *St Louis U Pub L Rev* 477 498. According to Harrison most major medical authorities have called for the ban thereof.

⁷³⁹ This idea that people are responsible for their actions is mentioned in McCrudden C "Human Dignity and Judicial Interpretation of Human Rights" (2008) *The European Journal of International Law* 655 716; Woolman S "Dignity" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M & Bishop M (eds) *Constitutional Law of South Africa* 2ed (2005) 36-1 36-50.

⁷⁴⁰ See Botha H "Human Dignity in Comparative Perspective" (2009) *Stell LR* 171 185.

⁷⁴¹ For this idea that the denial of freedom leads to objectification, see Michalowski S & Woods L *German Constitutional Law: the Protection of Civil Liberties* (1999) 106.

⁷⁴² See Thompson SE "Prostitution – A Choice Ignored" (2000) *Women's Rights Law Reporter* 217 233.

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.⁷⁴³

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 degradation often pay more than similar, less dangerous or degrading, jobs. When someone is paid for allowing doctors to test unapproved medicine on him, his 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.⁷⁴⁴ 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.⁷⁴⁵ This approach has been adopted by other countries, as well as the European Court of Justice, especially with regard to prostitution.⁷⁴⁶

6 6 8 Acts that were prohibited

The above examples illustrate how two 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.⁷⁴⁷

⁷⁴³ For the idea that work is sometimes valued solely in terms of its monetary compensation, see Fritz N "Crossing Jordan: Constitutional Space for (UN) Civil Sex?" (2004) *SAJHR* 230 244. See also *Wackenheim* 5 in which it is argued that employment is part of the right to human dignity.

⁷⁴⁴ This is discussed in detail in 5 4.

⁷⁴⁵ On the idea that such employees deserve similar rights and protections to other employees, see Thompson SE "Prostitution – A Choice Ignored" (2000) *Women's Rights Law Reporter* 217 238. See also South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 186 189.

⁷⁴⁶ South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 171.

⁷⁴⁷ Laws are often changed because they are regarded as "out-dated". See South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 188 193.

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.⁷⁴⁸ This is an astounding illustration of how dignity can be used on either side of a dispute. First the self-worth aspect of dignity was used to prohibit sodomy and then the freedom component was used to prohibit its criminalisation.

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 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.”⁷⁴⁹

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.⁷⁵⁰ In Germany specifically it was contended that prostitution “should not be considered to be immoral anymore”.⁷⁵¹ 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 2009.⁷⁵²

6 7 Conclusion

The various reasons why objectifying treatment should be permitted have been addressed in this chapter. 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 does not regard as contrary to his dignity or which he desires.

⁷⁴⁸ Barnard-Naude AJ “Beyond the Brother: Radical Freedom” in Barnard-Naude AJ, Cornell D & Du Bois F (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 273 279.

⁷⁴⁹ *Wackenheim* 5.

⁷⁵⁰ 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 South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009) 125, 131, 140-141.

⁷⁵¹ 131.

⁷⁵² South African Law Reform Commission *Sexual offences: Adult Prostitution Discussion Paper 1, Project 107* (2009).

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 consentor.

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.

CHAPTER 7

CAN AND/OR SHOULD A PERSON BE ALLOWED TO CONSENT TO OBJECTIFYING TREATMENT?

7 1 Three approaches

7 1 1 Defining dignity and freedom

The research question posed in this thesis is whether a person can and/or should be allowed to consent to objectifying treatment. This raises questions over the meaning of dignity, the meaning of freedom and the relationship between dignity and freedom.

In Chapter 2 I attempted to define dignity. Though notoriously difficult to define, it was found that dignity could be defined to a certain extent. This is achieved by determining a minimum core definition of human dignity, while keeping in mind past instances of its violation and, where theory is inadequate, establishing the effect or function of human dignity. Through the identification of dignity's functions, its unique function as an objective normative value was highlighted. The two main components that form dignity's minimum core were also identified, namely that of 'inherent worth' and 'autonomy'. The tension between these components were explained, in that the right not to be objectified can be found within the 'inherent worth' component, whereas the right to consent to such objectification can be found within the 'autonomy' part.

Freedom is defined in relation to dignity in Chapter 3. In South African law freedom can take on various different forms. The common law embraces a classical libertarian freedom, which is almost idealistic in its breadth. This form of freedom is often criticised for failing to take account of deeply entrenched inequality and disadvantage. In the Constitution freedom is first and foremost entrenched as a value. Unlike the broad right to human dignity, no residual right to freedom is expressly entrenched in the Constitution. It might however be found within one of the specific freedom rights, such as the right to freedom and bodily integrity, or within the 'autonomy' part of the right to human dignity.

Although both freedom and dignity are entrenched as values, dignity is ascribed the unique function of mediator in value conflicts. Dignity is thus interpreted as superior to freedom. On the contrary, should freedom be seen as part of dignity it would hold equal status. It could accordingly be argued that freedom, as incorporated within the 'autonomy' part of human

dignity, would not disregard dignity's 'inherent worth' component, but would accommodate it, and *vice versa*.

7 1 2 Integrating the approaches

7 1 2 1 *Is dignity supreme?*

Three different approaches to consent to objectifying treatment are examined in Chapters 4 to 6. This is done to provide a complete and detailed illustration of each approach. In order to analyse the arguments that are formulated within these approaches a complete integration of these chapters is however necessary.

In Chapter 4 it is argued that consent to objectification should be prohibited, because dignity is a supreme right and value that cannot be violated or waived. This claim is based on four grounds. Firstly, it is asserted that dignity derives its supreme status from its functions. The critique against this assertion is that all constitutional values share the same functions. Although courts have assigned dignity with the unique function of mediator in value conflicts, this practice has been criticised on the basis that dignity is too manipulable and can be used as a tool in the hands of the state. Another objection to assigning this function to dignity is that dignity often appears on both sides of a dispute.

The second justification for dignity's supreme status is attributed to the dignity-based jurisprudence of the Constitutional Court. One possible explanation for this preference for dignity is that the court adopted its interpretation of dignity from foreign jurisdictions. Yet our constitutional entrenchment of dignity differs from those countries that confer supreme status upon dignity. Our constitution does not present dignity with supreme status but provides for its limitation where justified. Another explanation for the dignity-jurisprudence relates to the understanding that the Constitutional Court's interpretation of dignity was influenced by Kantian philosophy. This justification is challenged on the basis that Kant's definition of dignity is largely libertarian and would therefore not justify an interpretation of dignity that dominates freedom. A further averment is that the court's dignity jurisprudence was implemented to prevent a recurrence of the past. In opposition hereto it is contended that this does not justify the court's favouring of dignity, since freedom should also be advanced for the same reason. The final explanation for the court's dignity jurisprudence is that it simply reflects a choice. A mere choice is however insufficient to warrant dignity's supreme status.

The third rationale behind granting dignity supreme status relates to the fact that dignity features prominently throughout the Constitution. However, the same can be said for freedom, which features more frequently in the Constitution.

The final contention in favour of a supreme dignity is that dignity is inherent to all persons. This contention cannot explain dignity's supremacy to freedom, as freedom is similarly inherent to all.

Another objection to a supreme dignity is that freedom can be found within human dignity. It has been maintained that although freedom is part of dignity it cannot receive the same absolute status. This argument is however unsubstantiated.

7.1.2.2 Can dignity be waived?

The question whether or not consent to objectification can be justified on the ground that it amounts to a waiver of human dignity is controversial. Arguments in support of the contention that dignity cannot be waived are set out in Chapter 4, while counter-arguments are formulated in Chapter 6. The main dispute lies in the definition of a waiver. The term 'waiver' in this context can have at least three different meanings.

The first meaning is formulated in Chapter 4. In terms of this meaning the term 'waiver' indicates consent to the disposal of a right. Since dignity can never be lost, the right thereto cannot be disposed of. The right to human dignity can therefore not be waived in terms of the first definition of 'waiver'.

The second meaning of 'waiver' is found in Chapter 6. In terms of this meaning the term 'waiver' indicates consent to the violation of a right. Unlike the previous definition of waiver, the waived right is not lost in terms of this definition. Should dignity be considered a supreme and inviolable right, such consent to its violation would be impermissible. The right to human dignity can therefore only be waived in terms of the second definition of 'waiver' if a supreme status is not conferred upon dignity.

Similarly, should the term 'waiver' merely refer to a waiver of the *right to exercise* the particular right this definition of waiver would also not result in the loss of the right altogether.

Criticism against allowing any form of waiver is that some rights are too fundamental to waive. Yet, this protest is unconvincing if dignity does not hold a supreme status. It could

also be argued that the fundamental status of a right should only be one factor in deciding whether a waiver should be allowed. Other factors might include the severity and the extent of the infringement. From this perspective the permissibility of each waiver should be decided *ad hoc*.

7.1.2.3 *The individual vs. the community*

Another argument in favour of prohibiting consent to objectifying treatment is that individual freedom should yield to communitarian dignity. From this point of view, the single right of the individual is balanced against numerous rights of the community's members. A utilitarian balancing process would favour the rights of the majority. This type of balancing is however inconsistent with our new constitutional order, since both freedom and dignity are inherent to each and every individual and should not simply be overridden by the greater good of the majority.

A corresponding assertion is that the individual's notion of dignity should yield to that of the community. This dismisses the claim that a person should be allowed to consent to treatment that he does not perceive to be a violation of his dignity. In addressing these conflicting opinions one should determine whether dignity should be interpreted objectively or subjectively.

In chapter 4 the argument is put forth that dignity should be interpreted objectively and is therefore violated irrespective of the individual's own perceptions. Dignity can nevertheless only be interpreted objectively if an objective definition of dignity exists. In practice the popular moral perceptions are often used to interpret dignity. This might be due to the fact that decisions regarding the permissibility of certain actions were previously based on moral law. The idea of a shared public morality is presented as justification for consulting such moral perceptions. The critique against this is that, due to the plurality of society, no such shared public morality exists. Subsequently, these popular moral perceptions do not represent a shared public opinion, but the moral ideas of the majority. Yet, the practice of interpreting dignity in terms of the moral ideas of the majority is inconsistent with other qualities that have been attributed to dignity. This includes the understanding that dignity presupposes the right of every individual to choose his own ends, and is therefore tolerant of differences. Furthermore, by supporting the morality of the majority the minority will be suppressed and stigmatised, results that are directly in conflict with the Constitution.

This indicates that dignity should not be informed by the moral views of society. It is argued that the Constitution is founded upon moral law. This means that moral law 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 they should now be based on constitutional values.

This suggests new ways of interpreting dignity, by which, instead of supporting the morality of the majority, differences are tolerated. Such an interpretation might acknowledge different subjective understandings of dignity.

It is further contended that, since dignity tolerates difference, it allows each person to choose his way of living and how he is to be treated. This does not however imply that anything goes. Each person is still a member of society and the state is still permitted to govern from a specific moral point of view. Yet, this point of view should be dictated and limited by the Constitution which in a sense 'codified' moral law. Accordingly, a state may limit these different choices provided that such limitation can be justified in terms of the limitation clause.

Since the moral ideas of the majority should not inform dignity, dignity cannot be used as a guise to base decisions thereon. Unfortunately this often occurs in practice.

7 1 2 4 Some forms of objectification are acceptable

Dignity is often regarded as fickle and ever changing. This might be attributed to the fact that it is sometimes informed by the moral opinions of the majority. Due to its ever-changing nature some forms of objectifying treatment might start to seem acceptable. It is insisted that despite this occurrence no forms of objectification should be allowed, since this would have an 'opening the floodgates' effect. The counterargument is that numerous forms of objectification are already allowed, examples of which are listed in Chapter 6.

7 1 2 5 Does constitutional freedom allow objectification?

In Chapter 4 it is averred that constitutional freedom itself does not allow consent to objectification. The first ground for this averment is that no specific residual right to freedom can be found within the Constitution. This is countered by the claim that such a right to freedom can be found within dignity. Freedom as a constitutional value may also provide a

space for such consent by developing the common law principles of the consent defence and contractual autonomy.

Despite the above entrenchment of freedom, it is alleged that constitutional freedom would not allow consent to objectifying treatment. If constitutional freedom is to be interpreted positively, as is suggested it should, then one would have to live according to moral law and ethics to be truly free. Yet, according to Kantian philosophy one cannot be forced to live in accordance with moral law. Kantian philosophy is however based on an ideal world, referred to as the Kingdom of Ends. The reality is that in a non-ideal world where people have to function as part of a society the state needs to enforce moral law in order to at least ensure external freedom. This is supported by the idea that moral law is now found within the Constitution and people should act in accordance therewith.

Regardless of whether an individual's choices comply with moral law, it is contended that the type of choices that are in conflict with human dignity, such as consent to objectification, would similarly conflict with constitutional freedom. This is based on the idea that dignity and freedom share the same goal, namely the development of one's talents and personality. This contention is opposed on the grounds that when a person consents to objectifying treatment, such consent might actually be in pursuit of personal development and therefore in line with constitutional freedom. Even when the individual is remunerated for such consent it might still allow self-development, since money is often needed for such development. Although money might therefore be regarded as a form of undue influence, it could still be an act of freedom. This corresponds with the insistence that despite any undue influence an element of autonomy is still present in such choices.

7 1 2 6 Invalid consent

This reference to remuneration relates to the conviction that consent cannot be allowed if it is invalid. It is averred that consent cannot be an act of freedom if not given freely. In the context of prostitution, for example, people consent due to economic coercion or undue influence. Radin argues that, as precaution consent should always be prohibited if the surrounding circumstances cause suspicion as to the validity of such consent.

Chapter 5 is a response to this notion that invalid consent cannot be allowed. It is averred that in an ideal world such consent would not be given, let alone be allowed. Nevertheless, in reality invalid consent is given due to necessity or the belief that it would be the "least worst

alternative”.⁷⁵³ In an ideal world people would be provided with the necessary socio-economic needs in order to eliminate the cause of such consent. Since this is impossible in our world, it is argued that people cannot be prohibited to consent. Furthermore, in a non-ideal world people will give such invalid consent, despite the prohibition thereof.

Transitional measures are therefore necessary. This includes allowing the consent and regulating it appropriately. The critique against allowing and regulating economically coerced consent is that the stigmatisation of the activities consented to is not erased thereby and that people still operate outside the regulations. The best response to this critique is that, although these measures are imperfect, they still surpass the alternative.

7.1.2.7 Genuine consent

It is maintained that valid consent to objectification should be allowed. From the Constitutional Court’s decision in *NCGLE* certain conditions for such consent have transpired. These conditions are: that the treatment in question is performed in private, is freely consented to by informed adults and is not harmful to others.

The idea that treatment performed in private should be free from public interference is criticised on several grounds. Firstly, by only allowing such consent in private the stigma would not be erased, since the impression is endorsed that these activities are shameful and should be kept hidden. Secondly, the reliance on the public/private divide is criticised for being unstable. Finally it is alleged that although such a divide exists it should not be awarded any legal credence as it promotes oppression. These allegations are disputed on the premises that although unstable, this divide does exist and can in fact be beneficial in some instances. In this context, for example, privacy creates a space in which the individual may consent to treatment which the majority finds morally reprehensible.

Two common law principles, the consent defence and contractual autonomy, are offered as justification for consent to objectification. In opposition to applying the consent defence in this regard it is put forth that this defence is not available in criminal matters. Contrary to this, instances where the consent defence has been available in criminal law are examined in Chapter 6.

One of the conditions for a valid contract is that the purpose thereof should be lawful. This causes difficulty in justifying consent to objectification on the basis of contractual autonomy.

⁷⁵³ Fritz N “Crossing Jordan: Constitutional Space for (UN) Civil Sex?” (2004) *SAJHR* 230 230.

The purpose of a contract is unlawful when it is against public policy or *contra bonos mores*. Although previously informed by moral law, these norms are now interpreted in terms of constitutional values. Two of the factors that should be considered when determining whether a contract is against public policy or *contra bonos mores* are of particular relevance in this context.

The first requires a balance of the interest of the individual and the interest of society. It is contended that, where a contract deals with treatment which is performed in private and does not hurt others, societal interests would be minimal. Societal interests would only be affected in so far as the knowledge thereof offends the moral views of the majority and as mentioned before, the moral views of the majority should not dictate the acceptability of choices.

The second factor is that a contract should not be in conflict with either legislation or the Constitution. This implies that contracts that are contrary to human dignity are unlawful. Again the argument is raised that freedom is part of dignity. Freedom as a value might even develop contract law to enforce contractual autonomy. In light of the Constitutional Court's preference for contractual freedom it could be argued that contract law is one of the only areas where freedom has trumped dignity or at least where the 'autonomy' element of dignity has trumped the 'self-worth' part.

As mentioned in Chapter 6, the Court's preference for an almost classical liberal contractual autonomy is severely criticised on the basis that it ignores the possibility of unequal bargaining power.

Should it however be decided that, contrary to this preference, a contract that allows for objectifying treatment is against public policy and therefore unlawful, it should be determined whether the effect thereof would be that the contract is void or merely unenforceable. Public policy has frequently been described as fickle, since it used to be interpreted in terms of moral opinion. Although public policy should now be interpreted in terms of constitutional values, its fickle nature will remain as long as the court implements a dignity-based jurisprudence informed by popular moral convictions. Based on this understanding of public policy as an ever-changing concept, it could be contended that unlawful contracts should rather be unenforceable than void.

The final condition for valid consent is that the consent should not harm others. Contrary to the claim that consent to objectification causes no harm to others, it can be contended that the

moral offence of some members of society could constitute 'harm' in this sense. Again the counter-argument is raised that decisions should not be based on the moral views of the majority.

7 1 2 8 Responsibility and property

Similar to the common law consent defence and contractual autonomy, the principles of responsibility and property are also offered as justification for allowing consent to objectifying treatment. In terms of responsibility it is asserted that each person should be held responsible for his own choices. In practice this principle is already applied to justify the punishment of criminals in the sphere of criminal law.

The principle of property justifies consent to objectification by insisting that each person has property rights in their own human dignity or personal attributes and may therefore deal with them as they please. This is criticised on the ground that viewing one's personal attributes in such a way leads to commodification and the violation of dignity.

7 2 Should consent be allowed?

7 2 1 Two situations

Throughout this thesis two situations have unfolded. One situation involves consent that does not comply with all the requirements for valid consent. The other situation involves genuine consent, where the person consenting genuinely desires the treatment that is consented to. Due to the disparity between these two situations they should be dealt with separately.

7 2 2 Invalid consent

The starting point is that invalid consent to objectifying treatment should not be allowed. Yet, in our non-ideal world instances exist where prohibition is unwarranted and transitional measures are needed to allow and regulate invalid consent. Nevertheless such measures should only be implemented where absolutely necessary. Even in a non-ideal world, allowing forced consent or consent which is given by someone incapable of understanding the nature and extent thereof will be unjustifiable. However, when a person is economically coerced or unduly influenced to consent because the state has not yet succeeded in fulfilling his basic needs, transitional measures might be merited.

Similar to objectification, the denial of basic necessities is a violation of human dignity. A government can therefore not prohibit a person's only means of fulfilling these needs without providing an acceptable alternative or fulfilling the needs itself. A desperate person might prefer the dignity violation of objectification to the dignity violation emanating from a lack of basic necessities.

Until such time that our socio-economic situation enables us to fulfil these needs it would be hypocritical to prohibit economically coerced or unduly influenced consent. Governments should rather regulate the situation in order to mitigate the damage.

7 2 3 Genuine consent

Contrary to the previous situation, genuine consent creates undeniable tension between dignity and freedom. Although it might be argued that freedom is advanced since the consent to objectification is allowed, the previous situation actually places dignity on either side of the dispute. In fact it does not even involve the balancing of dignity's seemingly contradicting elements of 'autonomy' and 'self-worth'. It is simply a 'self-worth' versus 'self-worth' scenario; the right not to be objectified versus the right to have one's basic needs fulfilled. In terms of the previous situation it is therefore unnecessary to determine whether dignity should trump freedom.

Genuine consent to objectification does however raise this question, since it involves the balance of dignity and freedom, or 'self-worth' and 'autonomy'. Genuine consent is given when a person, capable of understanding the nature and extent of the objectifying treatment, freely consents thereto. In such situations the person consenting might not experience the treatment as a violation of his dignity and might even desire it.

This leads to the discussion on whether dignity should be interpreted objectively or subjectively. If defined subjectively, a person will be allowed to consent to treatment that he does not consider being a violation of his dignity. The complication lies in defining dignity objectively, since dignity is notoriously difficult to define. Although it may be justified to define the right to human dignity subjectively, dignity as a value is generally described as an objective legal norm to be used in the mediation of value conflicts. The unwarranted use of popular moral ideas in defining the concept discredits this objectivity, due to the fickle nature of these moral perceptions. Consequently, dignity is deprived of the one function that separates it from other values; which could really afford it supreme status.

Should a supreme status not be conferred upon dignity, the court needs to consider all values to an equal extent when deciding whether a person may consent to objectification. As discussed the constitutional values of equality and freedom could be interpreted to permit consent to objectification. Therefore, regardless of whether such consent conflicts with the value of dignity, the consent may be allowed. This is because equality and freedom may trump dignity in a balance of values if dignity is not regarded as supreme. This balancing procedure would have to be administered on a case-by case basis and would presumably favour freedom where a person genuinely consents to the violation of his dignity.

On the other hand, should dignity reserve its supreme status it might nevertheless allow consent to treatment that is currently prohibited due to its objectifying nature. There are two reasons for this assertion. The first is that if it is not informed by the moral opinions of the majority, dignity could be interpreted as a concept that is tolerant of different choices. The second reason, which relates to this understanding that dignity tolerates different choices, is founded upon the theory that dignity incorporates freedom. Within dignity these two concepts would therefore receive equal status. It would then be unfounded to allege that one facet of dignity would always trump the other without having regard to the surrounding circumstances of each matter.

Consent would however only be permitted if it does not harm others and affords them the same breadth to exercise their rights. As discussed earlier, the fact that someone is morally affronted by the decisions of another or that the tolerance of different moral perspectives might lead to an over-all change in the morals of the majority, cannot be regarded as ‘harm’ in this sense, as the moral opinions of the majority should not dictate decisions.

While theoretically sound, the approach of allowing genuine consent might 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 dignity by the majority of society.⁷⁵⁴ 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.

As argued in Chapter 5, by allowing genuine consent the risk of invalid consent might increase. Moral opinions tend to conform to changing laws, which could slacken the scrutiny of the consent given. The difficulty in determining whether consent was genuine before the

⁷⁵⁴ Radin MJ “Market-inalienability” (1987) *Harvard Law Review* 1849 1910.

treatment occurs is illustrated in the *McDowell* case.⁷⁵⁵ This case involves the latest trend of advertising one's desire for sadomasochistic treatment on the internet. In 2009 McDowell was convicted of rape after responding to an advertisement from a woman who desired to be raped and physically assaulted. He was unaware that she had not posted the advertisement herself and was under the impression that he was acting with her consent. Only by sufficiently regulating consent to objectification can such occurrences be prevented.

7 3 Conclusion

This thesis revolves around the question of whether a person can and/or should be allowed to consent to objectification. The answer to whether a person can give genuine consent to objectification is positive. Although there are situations in which genuine consent is not possible, it can be given under certain circumstances.

On whether a person should be allowed to consent the following conclusion can be made. An individual who cannot give genuine consent to objectification should not be allowed to do so, unless transitional measures dictate otherwise. Furthermore, an individual who is capable of giving valid consent to objectification should be allowed to do so. Finally, regardless of whether such consent is genuine or not, strict regulation thereof is required.

⁷⁵⁵ *Misogynistic Cyber Hate Speech* Inter-Parliamentary Coalition for Combating Anti-Semitism (2011) (unpaginated).

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