1 Human dignity in Constitutions

Unlike the Irish Constitution, the Bill of Rights in the South African Constitution contains explicit recognition of the entitlement of individuals to respect for human dignity and to rights with significant socio-economic implications. In the latter category are rights to housing, health care, food, water and social security. It also has entrenched environmental rights and recognises people’s entitlement to an environment that is not harmful to health or well-being.

The only specific reference to “dignity” in the Irish Constitution is in the Preamble:

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations ...
2 Philosophy

A dictionary definition of “dignity” is “the quality or state of being worthy, honoured, or esteemed”. The dignity of the person refers to the special status given to all individuals by virtue of being human. Since everybody has equal worth, it is inextricably linked with equality. It has diverse ancient historical strands. In the Jewish tradition and early Christianity it was bound up with the biblical notion of humankind created in the divine image—the idea of *Imago Dei* is to be found in Mesopotamia.¹ Immanuel Kant and other Enlightenment thinkers shaped the modern concept of dignity. Kant saw that the capacity to be rational and self-governing set us apart from the lower animals and gave us dignity.

Dignity was transformed from being predominantly a symbol of superior social status to applying to all human beings equally. It is inherent in each person. With the ability to choose one’s course in life comes responsibility for the consequences of our choices and actions. Each individual is unique, but does not live in isolation and develops relationships with others in the community. Classical and Christian concepts of human dignity and freedom recognised an important social aspect, where human beings were interdependent, as evidenced by the enshrinement of fraternity and solidarity in the early political structures.² In sub-Saharan Africa, the mutually supportive relationship between human dignity and equality has spawned the social concept of *ubuntu*. Langa CJ of South Africa, having translated it from Zulu as “a person is a person through another person”, said it described the essence of humanity and what it means to be a human being.³

The concept of dignity has a long tradition in non-Western societies. However, there the emphasis is on duties owed to others. The focus is frequently on the community rather than on the individual. Human dignity is the foundation of society and civilisation in Islam and

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² Christian Starck “The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions” in Kretzmer and Klein (n1), at 180.
originated in the creation of man, when, according to the Koran, God “bestowed dignity on the progeny of Adam” by breathing His Own Spirit into him.⁴

Cardinal Manning viewed dignity as the achievement of the individual’s potential in life. Each life has value in its own right irrespective of comparisons with others. In 1874 he described the dignity in physical labour aimed at helping others as well as oneself:

... in the mere labour of the body there is a true dignity. The man who puts forth the powers of the body, and that honestly, for his own good and the good of his neighbour, is living a high and worthy life, and that because it is his state in the world. It is the lot in which we are placed, and any man who fulfils the lot of his existence is in a state of dignity.⁵

Humility, being the absence of jealousy and envy, is a feature of dignity. Cardinal Manning expressed it as follows:

I know nothing that is more undignified than for a man to think there is nobody of higher stature, morally or intellectually, than himself. The smallest man on earth is the man who thinks there is nobody greater than himself.⁶

He considered that the four cardinal virtues of prudence (guiding the intellect), justice (guiding the will), temperance (governing the passions) and fortitude (sustaining the whole person) “underlie all the dignity of man, and they justify all his rights.”⁷

Because of our mutual dependence in society, dignity invokes duties and responsibilities towards others as well as respect for oneself and others. There is a common interest in protecting or enhancing the dignity of all members of society provided that all reciprocate.

Democracy provides an environment where people have the freedom to make rational choices for themselves. Dworkin makes a link from dignity through freedom to democracy:

Because we cherish dignity, we insist on freedom, and we place the right of conscience at its center... Because we honor dignity, we demand democracy.⁸

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⁵ Henry Edward Manning, The Dignity and Rights of Labour, and Other Writings on Social Questions (Burns, Oates & Washbourne, London 1934), at 6.
⁶ Ibid, at 15.
⁷ Ibid, at 33-34.
3 Law

Dignity is not endowed by states or by the international order. It is innate in each human being. The role of dignity in law developed during the course of the 20th century. Its appearance as a term in constitutions in the first half of the century can be attributed to a variety of influences such as the emphasis on dignity in the Catholic religion, the Enlightenment and socialism. The Catholic influence was evident in Portugal, Ireland and Spain, the socialist in Finland, and both Catholic and social democratic/socialist in Central and South American countries.

After the atrocities and wholesale assault on dignity during the Second World War, dignity was incorporated in international agreements attempting to prevent a recurrence of such appalling treatment of human beings. It was mentioned in the United Nations Charter and in the Universal Declaration of Human Rights (UDHR). One of the main aims of the UN Charter as set out in its preamble was “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”

UNESCO’s 1947 enquiry into the theoretical basis of human rights concluded that human dignity underlies the philosophy of freedom and democracy in human rights. It emphasised the necessity of continually fostering dignity:

The United Nations cannot succeed in the great purposes to which it is committed unless it so acts that this dignity is given increasing recognition,

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9 Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *EJIL* 655, at 664.
10 ibid.
11 ibid.
12 Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 59 Stat 1031, UNTS 993, 3 Bevans 1153 (UN Charter) preamble.
13 Universal Declaration of Human Rights (adopted 10 December 1948) UN General Assembly (UNGA) Res 217 A(iii) (UDHR) preamble, arts 1, 22 and 23.
14 UN Charter (n12) preamble, first para, second point.
and unless steps are taken to create the conditions under which this dignity may be achieved more fully and at constantly higher levels.\textsuperscript{16} Mahatma Gandhi in a letter to UNESCO in 1947 pointed out that all rights “came from duty well done.”\textsuperscript{17} Even the right to live “accrues to us only when we do the duty of citizenship of the world.”\textsuperscript{18}

The term dignity is not used explicitly in the European Convention on Human Rights (ECHR).\textsuperscript{19} As it is expressly based on the UDHR, it is implicitly based on the latter’s assertion of human dignity.\textsuperscript{20} In any event, the European Court of Human Rights has made it clear in its jurisprudence that dignity is a foundation value of democracy.\textsuperscript{21} This can be seen in \textit{Gündüz v Turkey}:

\begin{quote}
[T]he Court would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society.\textsuperscript{22}
\end{quote}

It is interesting to note that countries where there has been wholesale abuse of people have protected human dignity in post-atrocity laws. These include Germany and South Africa. Germany’s Basic Law adopted in 1949 gave dignity the most predominant place.\textsuperscript{23} The foundational values in the South African Constitution are dignity, equality and freedom;\textsuperscript{24} it also recognises dignity as a self-standing right.\textsuperscript{25} The incorporation of dignity into national constitutions in Europe was popular in the 1970s following the collapse of dictatorships in Greece, Spain and Portugal, and in the 1990s after the fall of the Berlin Wall, which signalled the turn to democracy in Central and Eastern Europe.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{16} Ibid.
\item \textsuperscript{17} In UNESCO (n15), at 18.
\item \textsuperscript{18} Ibid.
\item \textsuperscript{19} Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (ECHR).
\item \textsuperscript{21} Ibid.
\item \textsuperscript{22} (App no 35071/97) (2005) 41 EHRR 5, at [40].
\item \textsuperscript{23} McCrudden (n9), at 665; Basic Law for the Federal Republic of Germany 1949.
\item \textsuperscript{24} Constitution of the Republic of South Africa 1996, Section 1.a.
\item \textsuperscript{25} Ibid Section 10.
\item \textsuperscript{26} McCrudden (n9), at 673.
\end{itemize}
There is no reference to dignity in the Constitution of the United States, but it has related concepts including a ban on cruel and unusual punishment and a due process clause.\textsuperscript{27} The US Supreme Court has invoked the concept of dignity sporadically. Individual states have references to dignity in their constitutions. Montana is unique among the states in the US in having an explicit and wide guarantee of individual dignity in its 1972 Constitution.\textsuperscript{28} The dignity clause in the Puerto Rican Constitution has been significant in the case law of its Supreme Court, which has asserted that the inviolability of human dignity is the foundational concept at the base of the Commonwealth’s commitments to democracy and human rights.\textsuperscript{29}

African culture is less individualistic and the common good has been emphasised more. The African concept of \textit{ubuntu} marries the individual and the community. It binds the interests of the individual with those of the society within which the individual lives. While the dignity of the individual is recognised, the common good is the primary target. It may be that this was essential in order to ensure survival in a difficult natural environment and in an even more challenging social and political arena when the European settlers arrived. Social solidarity has been the principal aim of traditional communities. \textit{Ubuntu} recognises the dignity of the individual in the context of the common good. The idea is that it is in the interests of each individual to look after their neighbours and to work for the welfare of other members of the community. A giver can turn into a beneficiary if circumstances change. It has resonances of the Christian ethos of doing unto others as you would want done unto you.

Dignity played a primary role in the South African case \textit{Makwanyane} where the death penalty was held to be unconstitutional.\textsuperscript{30} Other African countries also place a value in their constitutions and jurisprudence on the dignity of the individual. Zimbabwe invoked the concept of dignity when it too declared the death penalty unconstitutional.\textsuperscript{31} In \textit{Jumbe v AG} the High Court of Malawi struck down legislation reversing the onus of proof in corruption charges, as it breached the constitutional right to a fair trial, which included the presumption of innocence and the right to silence, and was not justified under the limitation clause in the Constitution; Katsala J invoked democratic principles when he stressed that the accused should

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{28} Ibid, at 21.
\item \textsuperscript{29} Ibid, at 33.
\item \textsuperscript{30} \textit{S v Makwanyane} 1995 (6) BCLR 665 (CC); McCrudden (n9), at 688.
\end{itemize}
\end{footnotesize}
be treated with dignity as fellow human beings, notwithstanding the odious and contemptible nature of corruption:

Admittedly corruption is bad. It is evil and it has to be rooted out of our society. It is counter productive and it seriously retards development. Those that engage in corruption in a way violate the citizens’ right to development as enshrined in section 30 of the Constitution. They, among other things, divert for their own use public resources thereby depriving the general public the benefit from such resources. Such people are selfish and greedy at the expense of everyone else. Surely, if caught, they must be dealt with firmly.

However, inasmuch as we may harbour hatred for such people, we can only show and prove to the whole world and indeed to ourselves that we are an open and democratic society and that we cherish and promote the values that underlie such a society if we treat those we suspect of committing heinous crimes with dignity as fellow human beings and afford them all the protection that accused persons enjoy under the Constitution.\(^{32}\)

### 4 Equality

The dignity of the individual is inextricably linked with equality. According to Jo Pasqualucci, the Inter-American Court of Human Rights relies on natural law to hold that equality arises directly from the unity of the human family and is inextricably linked to the dignity of the individual.\(^{33}\) The Court explained that the principle of non-discrimination cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.\(^{34}\)

In South Africa dignity is the springboard for substantive equality. Sachs J explained the effect of a dignity analysis in *National Coalition for Gay and Lesbian Equality v Minister of Justice* (*Sodomy case*):

\(^{32}\) [2005] MWHC 15, at 47.


\(^{34}\) Ibid.
The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality.\textsuperscript{35}

The treatment of some groups in society as inferior to others is prohibited as being contrary to the equality of all human beings. In the Sodomy case, where legislation criminalising sexual intimacy between gay men was found unconstitutional, Sachs J condemned as inequality the criminalisation of people because of their humanity:

At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. The indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream; they may also be derived from the location of difference as a problematic form of deviance in the disadvantaged group itself, as happens in the case of the disabled. In the case of gays it comes from compulsion to deny a closely held personal characteristic. To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality.\textsuperscript{36}

The South African judiciary does not have unfettered discretion to find a lack of equality based on the judges’ own views, but has a structured method for assessing the merits and legal import of each situation.

Gay Moon and Robin Allen promote dignity as an element that can help achieve substantive equality:

... respect for human dignity operates in a number of important ways in giving greater meaning to the desire to secure equality. As a cornerstone of human rights, it requires that individuals be respected for their innate humanity, and that they should not be used as objects, as means to an end, but as ends in themselves. This imperative has very important consequences for enriching the equality discourse. In particular it counters stigma, stereotyping, prejudice and the exclusion from benefits or opportunities which are some of the minimum conditions for a life with dignity.\textsuperscript{37}

They consider that the Aristotelian concept of equality is insufficient to address historical disadvantage.\textsuperscript{38} Dignity attacks discrimination based on class or social status.\textsuperscript{39} The use of

\textsuperscript{35} 1998 (12) BCLR 1517 (CC), at [126].
\textsuperscript{36} Ibid, at [129].
\textsuperscript{37} Moon and Allen (n20), at 645.
\textsuperscript{38} Ibid, at 643.
\textsuperscript{39} Ibid.
dignity by the judiciary as an aid to achieve equality can entrench social solidarity. Dignity requires that people be treated well, whereas equality simply puts all in the same (not necessarily good) position.

5 Freedom of expression

Communication is an aspect of dignity. Because of this, freedom of expression is an important right. Dickson CJ of the Canadian Supreme Court in \( R \ v \ Keegstra \) [1990], a prosecution for hate speech, considered that freedom of expression was essential in a participative democratic society based on dignity and equality:

“Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.”

It often comes into conflict with other values. In \( Keegstra \) Dickson CJ found that the dignity of the targets of the speech took precedence over free speech:

“Given the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal…”

Guy Carmi has pointed out the difference between the values underlying free speech in the US and other Western democracies. In the US the guiding value is liberty, whereas in Germany and many other Western democracies the value of human dignity is supreme.


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\footnote{\textit{Ibid}, at 649.}
\footnote{[1990] 3 SCR 697, at 70.}
\footnote{\textit{Ibid}, at 72.}
or in public places. Tsesis sums up the benefits of this step, “[s]uch an extension of current American jurisprudence would indicate a greater respect for human dignity than for degrading expression.” He instances France as a country which has banned hate speech while holding freedom of expression in high regard. There the emphasis is on the promotion of democracy rather than on “the naive libertarian belief” common in the US that “truth will emerge even when inflammatory statements are made about vulnerable groups.” Another example is Sweden where the free expression of ideas is regarded as central to a democracy, but the Swedish Supreme Court has restricted free speech on occasion including incitement to hatred against a protected group. According to Tsesis, “[t]he Court thereby acknowledged that hate speech stifles victims from participating in democracy while it increases bigoted individuals' right to self-determination.”

6 Social, economic and cultural rights

Individuals cannot realise their full potential, if they do not have the basic resources to enable them to achieve it and to respect their dignity. Dignity could be the foundation for requiring states to provide social, economic and cultural support to individuals and groups. In an appeal for global assistance to relieve poverty in Africa and the enforcement of socio-economic rights, Nsongurua Udombana described the effect of poverty, “[e]xtreme or abject poverty—the ‘poverty that kills’—violates the sacred right to life, and the supreme value of human dignity.”

Oscar Schachter as far back as 1983 evoked Kant in finding that the dignity of the person required at least the recognition of a minimal concept of distributive justice to satisfy the essential needs of everyone. A person cannot foster dignity if in abject poverty.

The right to life has been interpreted as meaning more than just existence. The Indian Supreme Court has held that the constitutional right to life and personal liberty includes

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45 Ibid.
46 Ibid, at 525.
48 Ibid.
the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.\textsuperscript{51}

Pasqualucci records that the Inter-American Court of Human Rights has stated that the fundamental right to life is broader than freedom from the arbitrary deprivation of life.\textsuperscript{52} It includes the right to live a “\textit{vida digna}” or a dignified existence.\textsuperscript{53} The Inter-American Court held that the state, pursuant to its duty to guarantee life, has the obligation to generate living conditions that are at least “minimally compatible with the dignity of the human person”.\textsuperscript{54} The state “has the duty to adopt positive concrete measures oriented to satisfy the right to a ‘\textit{vida digna},’ especially when dealing with persons in a situation of vulnerability and risk”.\textsuperscript{55}

The issue of housing for destitute people was addressed by the South African Constitutional Court in \textit{Government of the Republic of South Africa v Grootboom} when it found that the State was obliged to devise and implement a programme to progressively realise the right of access to adequate housing and that it must provide for relief to those living in crisis situations.\textsuperscript{56} The obligation on the State was to have a reasonable programme reasonably implemented and kept under continuous review.\textsuperscript{57} The State could not ignore a significant segment of society.\textsuperscript{58} Yacoob J adverted to the importance of assessing the situation in the light of the fundamental value of dignity:

\begin{quote}

The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity.\textsuperscript{59}

\end{quote}

\begin{footnotes}
\textsuperscript{51} McCrudden (n9), at 693, citing \textit{Mullin v The Administrator, Union Territory of Delhi}, AIR 1981 SCR (2) 516, at 518.
\textsuperscript{52} Pasqualucci (n33), at 310, citing \textit{Yakye Axa Indigenous Community v Paraguay} IACtHR Series C 125 (2005), at [161].
\textsuperscript{53} \textit{Ibid}, at [161], citing “\textit{Instituto de Reeducacion del Menor} v Paraguay” IACtHR Series C 112 (2004), at [156].
\textsuperscript{54} \textit{Yakye Axa Indigenous Community} (n52), at [162].
\textsuperscript{55} Pasqualucci (n33), at 310, citing \textit{Yakye Axa Indigenous Community} (n52), at [162].
\textsuperscript{56} 2001 (1) SA 46.
\textsuperscript{57} \textit{Ibid}, at [42]-[43].
\textsuperscript{58} \textit{Ibid}, at [43].
\textsuperscript{59} \textit{Ibid}, at [83].
\end{footnotes}
The interaction of constitutional rights and foundational values such as dignity can form the basis of socio-economic and cultural rights.

The tension between the judiciary and the other arms of government in an effort to preserve the separation of powers is evident worldwide. Yacoob J in Grootboom said the question of how to enforce socio-economic rights was “a very difficult issue which must be carefully explored on a case-by-case basis.”\textsuperscript{60}

Bearing this in mind, Chaskalson CJ (now retired) described the challenge:

A balance must be struck between the role of the court as interpreter and upholder of the Constitution, and the role of government in a democratic society as policymaker and lawmaker. That is not easily done. Inevitably, claims for the enforcement of socio-economic rights are hard cases. They are hard, not only because they draw courts into policy matters, including possibly the budget itself, but because of the abject living conditions of many people in our country and their legitimate demands that this be addressed now that apartheid is over.\textsuperscript{61}

Social and economic rights may be pursued by relying on the dignity of the person. While the primary instigator is the legislature, the judiciary needs to step in when the legislator has failed to protect dignity. In some societies, those in power can become the new elite to the exclusion of the poor and uneducated. In a democracy, the best solution is a dialogue between the judiciary and the legislature. This preserves the separation of powers doctrine, while ensuring that the constitution is a living instrument of practical benefit to individuals.

7 Groups

Dignity applies in relationships and in the wider community. The dignity of groups is protected. It has a collective aspect and seeps into the national psyche and into the international realm. David Feldman identified three levels on which human dignity operates: “the dignity attaching to the whole human species; the dignity of groups within the human species; and the dignity of individuals.”\textsuperscript{62}

Iacobucci J of the Canadian Supreme Court in \textit{Law v Canada} described human dignity of individuals and groups and how it is harmed by marginalisation:

\textsuperscript{60} Ibid, at [20].
\textsuperscript{61} Arthur Chaskalson, “Dignity and Justice for All” (2009) 24 Maryland J Intl L 24, at 32.
Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.\textsuperscript{63}

South Africa goes beyond the mere prohibition of discrimination against members of disadvantaged groups to a more positive recognition of the value of all in society, as expressed by Goldstone J in \textit{President of the Republic of South Africa v Hugo}:

\begin{quote}
[T]he purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.\textsuperscript{64}
\end{quote}

\section{8 Human rights}

Human dignity is the basis of human rights. The idea of human rights originated in the west. Eastern cultures valued dignity, but were more concerned about the common good than with the position of the individual. When the UDHR was being formulated, human dignity was the primary value that was attractive to virtually all nations. Human rights and human dignity are central to democracy. Dignity as the foundation of human rights is reflected in international conventions and constitutional orders.

There is much academic debate over whether human rights can be enforced horizontally between private parties or whether the onus is solely on the state to respect and protect human rights. Andrew Clapham considers that it is not possible to confine protection to the public sphere.\textsuperscript{65} An individual’s dignity should not be violated from any source, whether public or private. Clapham concludes:

\begin{quote}
This examination of contemporary applications of the values of dignity and democracy points to their evolving nature and new considerations which
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\begin{footnotes}
\item[63] \textit{Law v Canada (Minister of Employment and Immigration)} [1999] 1 SCR 497, at [53].
\item[64] 1997 (4) SA 1 (CC), at [41].
\item[65] Andrew Clapham, \textit{Human Rights Obligations of Non-State Actors} (OUP, Oxford 2006), at 553.
\end{footnotes}
demand that human beings can enjoy dignity and democracy even where the threats to these values come from non-state actors.\textsuperscript{66}

Prudent judicial intervention is necessary when those in power baulk at protecting dignity due to self-interest or a fear of antagonising a section of the electorate. The judiciary is entrusted with upholding dignity, while not usurping the legislature’s role entirely. Clapham has faith in the capacity of the judiciary to do this even when the violator of dignity is from the private sphere:

[W]e have to trust the judges to juggle commitments to dignity and democracy in the context of individual complaints. Where the legislature has failed to address the best way to properly protect either dignity or democracy from assaults by private actors, human rights law may demand judicial intervention. Judges will usually be careful not to cause a constitutional crisis by usurping the legislature. Judges can ... usually find interpretative devices to ensure that the enjoyment of human rights is protected from the actions of non-state actors.\textsuperscript{67}

He instances Ireland\textsuperscript{68} and South Africa\textsuperscript{69} as countries that have applied human rights obligations in the private sector.

9  Democracy

Respect for dignity is not enough. Democracy requires active protection, and even promotion, of dignity. Participation by individuals in the democratic process enhances the dignity of all in society. It also is an overt manifestation of the equality of all individuals.

In \textit{Doctors for Life International v Speaker of the National Assembly} Sachs J highlighted the benefit of participation in democracy for marginalised groups:

Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy. Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to.\textsuperscript{70}

\textsuperscript{66} \textit{Ibid.}
\textsuperscript{67} \textit{Ibid,} at 558.
\textsuperscript{68} \textit{Ibid,} at 554, fn 74, citing Rodgers \textit{v} ITGWU [1978] ILRM 51, which held that a trade union cannot deny a right to disassociate and must comply with fair procedures.
\textsuperscript{69} \textit{Ibid,} at 555-558, citing \textit{Christian Education South Africa \textit{v} Minister for Education} 2000 (10) BCLR 1051 (CC), where the issue was essentially the human rights of children versus the human rights of parents.
\textsuperscript{70} 2006 (12) BCLR 1399 (SA CC), at 234.
Sachs J returned to the theme of the importance of being heard for dignity and self-respect, when he dissented in *Merafong Demarcation Forum v President of the Republic of South Africa*:

[I]t is important to remember that the value of participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect. 71

Susan Marks considers that democracy invokes social and economic rights in addition to the commonly accepted civil and political rights. 72 She sees risks to democracy by ignoring some categories of human rights and points out the tension between the proclaimed indivisibility of civil, political, economic, social, and cultural rights and the priority accorded to some of those rights. This affects the prospects for deepening democracy within nation-states, for, if equality is to be secured in the opportunities for political participation, all categories of human rights need protection. 73

Humane governance, as defined by Richard Falk is “the effective realization of human rights, including economic and social rights, and the extension of participatory mechanisms and accountability procedures”. 74

Political marginalisation reinforces subordinate socio-economic status. Clapham points out that the protection of dignity can have an impact on other values such as freedom. 75 The equality necessary to protect an individual’s dignity may curtail another’s freedom. Participation in democracy by acceptance of the democratic will in the common interest might dilute an individual’s autonomy. He advocates resolving conflicts, not by establishing a hierarchy of rights, but by examining the context in each case.

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71 2008 (5) SA 171 (CC), at 298.
73 *Ibid*.
75 Clapham (n65), at 533.
10 Conclusion

In the 14 years since adoption of the South African Constitution there have been some interesting judicial decisions on fundamental rights. In South Africa human dignity has had a significant impact on human rights, particularly in the areas of equality, criminal law, autonomy, privacy and freedom of expression. It has been instrumental in upholding the democratic principles of transparency, participation and accountability. The South African courts have held the government accountable for its decisions. In contrast, the Irish courts have taken a restrained view of their role and have shown a marked reluctance to intervene to advance substantive equality — particularly in the realm of socio-economic rights.

The imposition of positive obligations on the state to respect and protect human rights is more evident in South Africa—and, indeed, under the European Convention on Human Rights. The disparity is notable in the approaches taken to holding the police accountable. The United Kingdom has followed a somewhat similar line as Ireland and the police there owe a duty of care in their investigative role only in exceptional circumstances. The Court of Appeal in *Desmond v Chief Constable of Nottinghamshire Police* set out the core principle currently applying and the public policy rationale. The police do not have (and cannot be given) a blanket immunity. In establishing whether or not a duty of care exists, it is relevant to see if

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80 Contrast *Lockwood v Ireland* [2010] IEHC 430 and *M v Commissioner of an Garda Síochána* [2011] IEHC 14 with *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464 (CA). Note that on the facts in the last-mentioned case the police authority was found not to have been negligent: *Swinney v Chief Constable of Northumbria Police (No 2)* 25 May 1999 Times Law Reports (QB).

the aggrieved person has other remedies, such as those available under statute, judicial review, for misfeasance in public office, for maladministration to an ombudsman, or under the Police Conduct Complaints Procedure. Other relevant factors are whether the claimant relied on the police in the event of economic rather than physical loss, and if the police assumed responsibility to the claimant to guard against the damage for which compensation is claimed.

It is an established requirement in the UK that the courts consider carefully the individual circumstances in each case before coming to a decision on whether the police owe a duty of care. There have been some exceptions to the general rule, such as in Swinney where it was held that the police owed an informant a duty to take reasonable care to avoid unnecessary disclosure to the general public of information given to the police in confidence.82

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82 Swinney v Chief Constable of Northumbria Police (No 2) 25 May 1999 Times Law Reports (QB). The Court of Appeal had refused to strike out the claim on the grounds that it disclosed no reasonable cause of action and held that the immunity generally conferred on police officers from actions in negligence in relation to the investigation or suppression of crime had to be weighed against the need to protect the confidentiality of informants and to encourage them to come forward without fear of disclosure of their identity; it is necessary to make a balanced assessment of all the public policy considerations in order to determine the question of immunity: Swinney v Chief Constable of Northumbria Police Force [1997] QB 464 (CA).