# Human Dignity

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17.1 INTRODUCTION

Section 10 of the interim Constitution (IC) entrenched the right to human dignity. The section provided:

**Human Dignity**

Every person shall have the right to respect for and protection of his or her dignity.'

Section 10 of the final Constitution (FC), on the other hand, contains the following provisions:

**Human Dignity**

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

The manner in which the right to dignity is entrenched in IC Chapter 3 and FC Chapter 2 differs from the protection afforded to dignity in international instruments and foreign Constitutions. Dignity is explicitly protected by art 1 of the Universal Declaration of Human Rights, and by art 5 of the African Charter on Human and Peoples’ Rights.

The Constitutions of the United States, India and Canada make no express provision for the right to dignity at all. Instead, the facets of this right have come to be protected in those countries under the rubric of other specifically enumerated rights.

Thus in the United States the conception of personal liberty in the Fourteenth Amendment has formed the basis upon which US courts have derived a right to privacy under which many aspects of personhood, which might otherwise form part of a right to dignity, find protection. Furthermore, recognition of human dignity lies at the heart of the Eighth Amendment’s prohibition against cruel and unusual punishment. In Canada aspects of dignity are protected under other specifically enumerated rights, for example s 7 of the Canadian Charter, which

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1 The drafting changes from the interim to the final Constitution appear to reflect the stylistic preferences of the drafters, which are apparent throughout FC Chapter 2, rather than any substantive amendment to the dignity right originally entrenched in the interim Constitution. Consequently, the commentary which follows is to be read as applying equally to IC s 10 and FC s 10.

2 IC s 35(1) provides, in pertinent part: ‘In interpreting the provisions of this Chapter a court 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.’ A similar provision, in peremptory terms, is contained in FC s 39(1)(b).

3 ‘All human beings are born free and equal in dignity and rights . . .’

4 ‘Every individual shall have the right to the respect of the dignity inherent in a human being . . .’

5 See, for example, *Meyer v Nebraska* 262 US 390, 43 SCt 625 (1923) (liberty denotes not merely freedom from bodily restraint but also the right of the individual to contract, engage in the common occupations of life, acquire knowledge, marry, establish a home, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness); *Griswold v Connecticut* 381 US 479, 85 SCt 1678 (1965) (holding unconstitutional, on the grounds that it violated the rights to privacy, a statute which permitted the prosecution and imprisonment of married persons who used contraception); *Roe v Wade* 410 US 113, 93 SCt 705 (1973) (holding that a woman’s right to privacy is a fundamental right under the Fourteenth Amendment, with the consequence that the legislature may not completely proscribe abortions); *Skinner v Oklahoma* 316 US 535, 62 SCt 1110 (1942) (the right to procreate); *Rochin v California* 342 US 165, 72 SCt 205 (1952) (the right to be free of certain bodily intrusions).

protects life, liberty and security of the person.\(^1\) In India art 23, which prohibits traffic in human beings and forced labour, has provided a basis for the protection of human dignity.\(^2\) In Germany and Namibia, by contrast, the right to dignity is not only expressly enumerated but is stated to be ‘inviolable’. Article 1(1) of Chapter Seven of the German Basic Law provides that ‘[t]he dignity of man is inviolable. To respect and protect it is the duty of all state authority.’\(^3\) Article 8(1) of the Namibian Constitution provides that ‘[t]he dignity of all persons shall be inviolable’.\(^4\)

17.2 **APPLICATION OF SECTION 10**

(a) **Juristic persons**

While natural persons clearly enjoy the protection of s 10, it is an open question whether this protection will also be extended to juristic persons.\(^5\) Erasmus suggests that the courts will

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1. See, for example, *Rodriguez v British Columbia* (1993) 107 DLR (4th) 342, [1993] 3 SCR 519. The case concerned a statutory prohibition against assisted suicide. Since the Charter does not specifically enumerate a right to dignity, a disabled person who desired to commit suicide, but was unable to do so unassisted, was forced to frame her challenge to the statute prohibiting assisted suicide on the basis that it deprived her of the security of the person guaranteed by s 7 of the Charter. Were a similar question to arise under our Constitution it would most appropriately be considered under s 10.

2. See, for example, *Bandhua Mukti v India* AIR 1984 SC 802 (the court held that the state, by virtue of its obligation to enforce legislation preventing exploitation, is required to secure for workers the right to live with human dignity enshrined in art 23).

3. See, for example, the *Microcensus Case* 27 BVerfGE 1 (the state violates human dignity when it treats persons as mere objects; nevertheless, and because the official census at issue did not intrude upon personal privacy, the court held that a statutory obligation to reply to a census questionnaire did not violate the right to human dignity contained in art 1); the *Mephisto Case* 173 BVerfGE 173 (question before the court was whether a book could be banned because it dishonoured the name of its main character, who was identifiable as a non-fictional individual; in having to balance artistic freedom with human dignity, the court held that the inviolability of human dignity as the foundation for all basic rights meant that a person could not be degraded or debased in this way, even after his death); the *Life Imprisonment Case* 187 BVerfGE 1 (statute imposing a life sentence in respect of prescribed crimes does not violate art 1(1), provided that it does not turn the offender into an object of crime prevention to the detriment of his rights to social worth and respect; the prisoner must be afforded an opportunity to develop his personality by being given a concrete prospect of regaining his or her freedom at some later point in time; the existence of parole boards and other review mechanisms was therefore constitutionally required); the *War Criminal Case* 105 BVerfGE (court, faced with the question of the continued imprisonment of an elderly Nazi war criminal, held that, in balancing the gravity of the crime against the dignity of the individual, too heavy an emphasis should not be placed on the former).

4. See, for example, *Ex parte Attorney General, Namibia: In re Corporal Punishment by Organs of State* 91 (3) SA 76 (NmS) at 86B–F (although the court acknowledged that the right to human dignity in art 8(1) was inviolable, it determined that statutorily imposed corporal punishment was unconstitutional as an infringement of art 8(2)(b), which expressly prohibits cruel and inhuman or degrading treatment or punishment); *Kau sei Minister of Home Affairs & others* 1995 (1) SA 51 (NmS) at 69A–B, 1994 (3) BCLR 1 (NmS) (the Constitution of Namibia does not elevate freedom of speech and expression above the other fundamental freedoms provided for in art 21(1) and even less so above any of the other fundamental rights, particularly those rights of all people to dignity, equality and non-discrimination contained in arts 8 and 10 respectively).

5. IC s 7(3) provided that ‘[j]uristic persons shall be entitled to the rights contained in this chapter where, and to the extent that, the nature of the right permits’; FC s 8(4) provides that ‘[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person’. In the Canadian case of *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321, [1985] 1 SCR 295 the court held that, although the right in question, namely the right to religious freedom, was not a right afforded to juristic persons, it could [continued on page 17–3]
have to decide whether the right in question is capable of exercise or enjoyment by juristic persons. He concludes that the right to respect for and protection of human dignity cannot be exercised by juristic persons and that the protection of s 10 should be confined to natural persons. A number of arguments support this conclusion.

Most obviously, to hold otherwise would require our courts to ignore the word ‘human’ in the title of the s 10 right, thereby doing violence to the language of the written instrument. Secondly, juristic persons have no feelings to hurt and no bodily integrity to infringe. If this is correct, then it is only if the constitutional entrenchment of the right to dignity includes the protection of public reputation that the applicability of s 10 to juristic persons will arise for determination. Thirdly, a purposive approach to s 10 favours limiting the protection of the right to natural persons. The common law reflects some ambivalence as to the personality rights of juristic persons. On the one hand, there is case law holding that juristic persons have no personality rights. On the other hand, it is clear that trading corporations may sue for defamation on the grounds of injury to their reputation in the form of goodwill. Non-trading corporations are permitted to sue for defamation under the *actio injuriarum* where the defamatory statement concerns the way the non-trading corporation conducts its affairs and is calculated to cause it financial loss.

The Constitutional Court has held that a purposive interpretation of any particular right must have regard to the legal history, traditions and usages of our country. This injunction provides no warrant for cutting down constitutional rights so as to bring them into line with the common law. Nevertheless, the inclusion of the word ‘human’ in the heading of s 10 must be interpreted in light of the differences of common-law judicial opinion regarding the personality rights of juristic persons. A purposive interpretation reflects a preference for the approach to personality rights articulated in the *Tommie Meyer* case, at least where the question of the constitutional application of s 10 to juristic persons is concerned.

nevertheless be invoked by a company as a defence to a charge under a statute which offended against a natural person’s right to religious freedom. Because nobody can be convicted under an unconstitutional statute, the company was permitted to raise the invalidity of the statute even though that invalidity resulted from the statute’s infringement of a right not belonging to juristic persons.

1 Erasmus *Superior Court Practice* (1994) at A2-9.
2 *Universiteit van Pretoria v Tommie Meyer Films (Edms)* Bpk 1979 (1) SA 441 (A) at 453.
3 See, for example, *Universiteit van Pretoria v Tommie Meyer Films (Edms)* Bpk 1977 (4) SA 376 (T) at 385 (the protection of rights of privacy is reserved for natural persons only; corporations are entitled to sue for damage to reputation in the form of goodwill, but must do so under the Aquilian action and not under the *actio injuriarum*). Although the question was not decided, *dicta* in *Universiteit van Pretoria v Tommie Meyer Films (Edms)* Bpk 1979 (1) SA 441 (A) at 453–4 support the view that juristic persons have neither corpus nor feelings of dignity. See also *Church of Scientology in SA (Incorporated Association not for Gain) v Readers Digest Association (Pty)* Ltd 1980 (4) SA 313 (C) at 317 (“a corporation cannot sue for defamation but may well be able to recover damages should it suffer patrimonial loss as the result of an unlawful attack upon its reputation as an integral part of its patrimony”).
4 See, for example, *G A Fichart Ltd v The Friend Newspaper Ltd* 1916 AD 1 at 5–6; confirmed in *Dhlomo NO v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A); *Argus Printing & Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A). See also *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) (recognizing that juristic persons have rights of privacy).
5 *Dhlomo NO v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A) at 953–4. 
6 *S v Zuma & others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (SA) at para 15.
7 *S v Zuma & others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (SA) at para 15.
8 *Universiteit van Pretoria v Tommie Meyer Films (Edms)* Bpk 1979 (1) SA 441 (A).
IC s 35(3) and FC s 39(2) may, in appropriate circumstances, require the reconsideration of the common-law rules extending personality rights to trading and non-trading corporations under the *actio injuriarum*. It would be open, for example, to a defendant in a defamation action where the plaintiff was a corporation, to argue that the common-law attribution to such a juristic person of a reputation, protected under the *actio injuriarum*, infringes the right to freedom of expression protected by IC s 15(1) and FC s 16.

(b) Affirmative obligations of the state

The manner in which s 10 has been worded affects the meaning of ‘an infringement of or threat to any right’ as provided by IC s 7(4)(a) and FC s 38. Section 10 entitles every person to ‘respect for and protection of’ his or her dignity (emphasis added). It is arguable that this distinction between ‘respect for’ and ‘protection of’ dignity works to impose affirmative obligations upon the state. These affirmative obligations to secure the protection of human dignity may be justiciable under IC s 7(4)(a) and FC s 38.

17.3 **Prima Facie Infringement of Section 10**

The analysis of alleged infringements of the right to human dignity will generally be divided into two stages. The first stage will require demonstration that the conduct complained of infringes the s 10 right. This will necessitate defining the scope or specifying the content of the right to human dignity. Only if the party seeking to establish the *prima facie* infringement

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1 IC s 35(3) provided: ‘In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.’

2 IC s 39(2) provides: ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’ For further consideration of the impact of these sections upon constitutional interpretation, see above, Kentridge & Spitz ‘Interpretation’ § 11.3(c).

3 IC s 7(4)(a) provided: ‘When an infringement of or threat to any right entrenched in this chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court for appropriate relief, which may include a declaration of rights.’ FC s 38 provides: ‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.’

4 See, for example, Cachalia, Cheadle, Davis, Haysom, Maduna & Marcus *Fundamental Rights in the New Constitution* (1994) at 33.

5 One theme emerging from the early judgments of the Constitutional Court concerns the exemplary and educative role which the court ascribes to the state in entrenching a culture of human rights. See, for example, *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 125 (referring to the role of the state as a role model: ‘In the long run more lives may be saved through the inculcation of a rights culture than through the execution of murderers’); *S v Williams & others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at paras 52 and 77 (‘government has a particular responsibility to sustain and promote the values of the Constitution’; the Constitution ‘sets the state up as a model for society as it endeavours to move away from a violent past’).

6 See *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 100 (approving a two-stage approach to constitutional analysis); *S v Williams & others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 54. For more detailed consideration of the two stages of constitutional analysis, see above, Kentridge & Spitz ‘Interpretation’ § 11.10.
or limitation successfully does so, will it become necessary for the party seeking to uphold the limitation to justify its reasonableness by satisfying the requirements of the limitation clause.\(^1\)

At common law the general test for an infringement of the right to dignity contains two elements: (1) the plaintiff’s self-esteem must actually have been impaired; (2) a person of ordinary sensibilities would have regarded the conduct complained of as offensive.\(^2\) The latter element introduces an objective dimension to the cause of action in order to balance the need to recognize individual injury with the requirement that the law cannot always grant consolation to hypersensitive individuals. Although the objective element is indispensable, the need to prove the subjective element has occasionally been dispensed with so that it is possible to recover damages for ‘contumelia objectively assessed’ even in the absence of evidence to prove actual injury to feelings or actual humiliation.\(^3\)

Under s 10 the objective element of the analysis is provided by applying the value-based injunctions set out in IC s 35(1) and FC s 39(1) to defining the scope of the right.\(^4\) Concerns about the extent of appropriate protection for the feelings of hypersensitive people may be appropriately balanced and resolved at the second stage of analysis under the limitation clause. At the first stage, however, the objective element is necessary because the protection of human dignity should arguably not be extended in instances where the humiliation or insult allegedly suffered is based upon values, priorities or feelings which cannot be reconciled with those of an ‘open and democratic society based on [human dignity,] freedom and equality’.\(^5\) Thus, for example, the subjective injury to racist feelings and beliefs actually suffered as a result of statutory prohibitions upon racial segregation in schools ought not to receive constitutional recognition as a *prima facie* infringement of s 10. Here the subjective injury does not comport with the values entrenched by IC s 35(1) and FC s 39(1).

17.4 CONTENT OF THE RIGHT

Section 10 provides no definition of ‘dignity’.\(^6\) It is in the demarcation of the boundaries of the concept of dignity, and not solely in the manner in which the right to its protection is specifically phrased, that the true extent of that protection is to be identified. It is neither

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\(^1\) See, for example, *Qceleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 640F–641C, 1994 (1) BCLR 75 (E); *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) at 228D–I, 1994 (2) BCLR 89 (W); *Park Ross & another v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) at 162B–C, 1995 (2) BCLR 198 (C).

\(^2\) *De Lange v Costa* 1989 (2) SA 857 (A).

\(^3\) *Bennet v Minister of Police* 1980 (3) SA 24 (C).

\(^4\) IC s 35(1) provides: ‘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 . . .’ FC s 39(1)(a) provides, more explicitly, the following: ‘When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom . . .’

\(^5\) See IC ss 33(1) and 35(1) and FC ss 36(1) and 39(1). On the significance of this repetition of the same value-based phrase in both the limitation clause and the interpretation clause, see above, Kentridge & Spitz ‘Interpretation’ § 11.3(a).

\(^6\) Nevertheless, our common law provides a starting point. With its roots in Roman law, our common law founds the protection of human dignity upon one of the pillars of the law of delict, the *actio injuriarum*. For a discussion of the dynamism of the *actio injuriarum* and its capacity to extend the protection of human dignity, see J Burchell ‘Beyond the Glass Bead Game: Human Dignity in the Law of Delict’ (1988) 4 *SAJHR* 1.
possible nor desirable at this stage to predict the precise boundaries which the Constitutional Court will draw around the concept of dignity. Nevertheless, our courts have provided early indications as to the importance which they attach to s 10.

Alongside the right to life entrenched in IC s 9 and FC s 11, the right to human dignity has been described by the Constitutional Court as the most important of all human rights, and the source of all other personal rights in the Bill of Rights.1 In her concurring opinion in S v Makwanyane & another2 O’Regan J has stated that:

‘The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in chap 3 . . . [H]uman dignity is important to all democracies. In an aphorism coined by Ronald Dworkin, because we honour dignity, we demand democracy.’

Likewise, in Prinsloo v Van der Linde & another3 the Constitutional Court defined the content of the discrimination proscribed by IC s 8(2) as being that discrimination which is constituted by ‘treat[ing] persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity’.

In National Coalition for Gay and Lesbian Equality v Minister of Justice4 Ackermann J referred to several decisions of the Constitutional Court5 which emphasized that the right to dignity is ‘a cornerstone of our Constitution’. The learned judge recognized the difficulty of defining ‘dignity’ with precision but said:

‘At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.’6

Sachs J, in his concurring judgment, highlighted dignity as ‘the motif which links and unites equality and privacy, and which, indeed, runs right through the protections offered by the Bill of Rights.7

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1 S v Makwanyane & another 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 144 (per Chaskalson P): ‘By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights [life and dignity] above all others . . .’
3 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 31.
4 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 28.
5 S v Makwanyane & another 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) at paras 328–30; President of the Republic of South Africa & another v Hugo 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41; Prinsloo v Van der Linde & another 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at paras 31–3; Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC).
6 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 28.
7 National Coalition for Gay & Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC), 1998 (12) BCLR 665 (CC) at para 120 and at para 124 (on the distinction between the violation of dignity and self-worth under the equality provisions and the violation of dignity under s 10). In Burchell Personality Rights and Freedom of Expression: The Modern Actio Inuriarum (1999) at 329 the author points out: ‘The Constitutional Court has correctly recognized the pivotal nature of the right to dignity in any human rights ideology. The rights to equality and privacy, like so many other human rights, are rooted in respect for human dignity. Infringements of the right to equal treatment of persons who may form part of historically vulnerable groups or other persons, and invasions of their privacy, are particular manifestations of group or individual dignity.’
The implications of the privileged status accorded to the protection of human dignity will become clearer through judicial development.\footnote{See, for example, \textit{Coetzee v Government of the Republic of South Africa & others; Matiso & others v Commanding Officers, Port Elizabeth Prison, & others} 1995 (4) SA 631 (CC). The constitutional validity of ss 65A-65M of the Magistrates’ Courts Act 32 of 1944 was challenged on the basis, inter alia, that the statutory provisions permitting civil imprisonment of debtors violate the protection of human dignity under s 10. The Constitutional Court decided that the impugned sections constituted an unjustifiable infringement of the rights guaranteed in IC s 11(1). Consequently, the question of whether or not those provisions also constituted an unjustifiable limitation of the right contained in s 10 was left open. In \textit{National Coalition for Gay & Lesbian Equality v Minister of Justice} 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) the Constitutional Court held that the common-law offence of sodomy infringed the right to dignity and that the infringement could not be justified under the limitation clause. The decision is considered further below, §§ 17.4(e) and 17.5. In \textit{S v M} 1999 (1) SACR 664(C) at 673i–j Donen AJ (Davis J concurring) said that the protection of the dignity of a rape victim raises an area of reasonable and justifiable limits to an accused’s right of silence. In appropriate factual circumstances it would not amount to an unjustifiable limitation on an accused’s right to a fair trial (including the right to silence) to require investigation into the relevance of certain offending questions put to a rape victim on cross-examination. Where this kind of questioning is irrelevant to the issues in the trial, the court held that it need not be tolerated.} It may be important, however, to distinguish between the value accorded the right and its proper content. The broadest possible conception of human dignity would view it as a function of the protection of all fundamental rights enumerated in the Bill of Rights. According to this interpretation, an infringement of any of the other specifically enumerated rights would simultaneously constitute an infringement of human dignity. Such an approach might comport with the injunction that constitutional interpretation must give to individuals the full measure of the fundamental rights and freedoms referred to.\footnote{\textit{Minister of Home Affairs (Bermuda) v Fisher} [1980] AC 319 (PC) at 328E, cited with approval in \textit{S v Zuma & others} 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (SA) at para 14.} However, it is submitted that a proper interpretation of the scope of s 10 would distinguish between a purposive approach, on the one hand, and a liberal and generous approach, on the other.\footnote{See \textit{S v Mbolanye & another} 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 325 (O’Regan J concurring, and making the point that a purposive approach may not always coincide with a generous approach).} In short, the importance of the right must not be confused with its proper scope.
There are compelling reasons for suggesting that a purposive approach to the scope of human dignity is not coextensive with the most generous approach conceivable. First, and by virtue of IC s 33(1), the right to dignity was afforded the highest possible level of protection. Any infringement of that right had to be justified not just on the ground of reasonableness but also on the additional ground of necessity. It is interesting to note that a similar approach is not evidenced in FC s 36. Under the interim Constitution the consequence of the broadest interpretation of the concept of dignity outlined above would consequently have been to import the necessity requirement into the limitation clause justification of every infringement of a right. If an infringement of any fundamental right would, by definition, also constitute an infringement of the right to dignity, the highest level of protection would apply to every infringement. This result would of course do violence to the bifurcated levels of scrutiny established by the language of IC s 33(1), place far too great an onus on the state with regard to the limitation of all fundamental rights, and, in so doing, would constitute an unjustifiable incursion into the legislative prerogative. Secondly, such an interpretation would blur the distinction between different rights and negate the effect of enumerating specific rights separately. It would therefore conflict with the linguistic unity of the document. The broadest interpretation of the scope of the right would therefore overshoot the purpose to be served by its protection.

(a) Capital punishment

In *S v Makwanyane & another* the Constitutional Court ruled that s 277(1)(a) of the Criminal Procedure Act 51 of 1977, which permitted the sentence of death on conviction for murder, was unconstitutional. Chaskalson P wrote the judgment of the court. The other ten members all filed concurring opinions. Chaskalson P held that the death penalty for murder constituted an unconstitutional infringement of IC s 11(2), which prohibited ‘cruel, inhuman or degrading . . . punishment’. The judge had regard to the associated rights to life (IC s 9) and dignity (IC s 10) in order to give meaning to IC s 11(2). He held that punishment must conform to the requirements of those rights (as well as those of IC s 8) if it is not to be found to be cruel, inhuman or degrading. The protection of human dignity therefore informed the process of interpreting the meaning of the more specific prohibition in s 11(2).

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1 IC s 33(1) states that any limitation of the right entrenched in, inter alia, s 10, shall ‘in addition to being reasonable as required in paragraph (a)(ii), also be necessary’. See in this regard above, Woolman ‘Limitations’ § 12.6.

2 See, for example, *Nortje & another v Attorney-General of the Cape & another* 1995 (2) SA 460 (C) at 472A–C, 1995 (2) BCLR 236 (C) (on the need to avoid an interpretation which overshoots the purpose which the protection of the right is designed to serve).

3 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).

4 Aspects of the decision relating to punishment are considered below, Van Zyl Smit ‘Sentencing and Punishment’ ch 28. For the purposes of this chapter only the discussion of human dignity in relation to the death penalty is considered.

5 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 95.


7 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 95: ‘The carrying out of the death sentence destroys life, which is protected without reservation under s 9 of our Constitution, it annihilates human dignity, which is protected under s 10 . . . Taking these factors into account . . . and giving the words of s 11(2) the broader meaning to which they are entitled at this stage of the enquiry, rather than a narrow meaning, I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.’
Four members of the court\(^1\) considered the death penalty also to be a violation of the right to human dignity. In this regard Mahomed J suggested that imposing the death penalty for murder erodes the dignity not merely of the person condemned to death but also of the members of the society which tolerates this form of punishment.\(^2\)

In view of the fundamental violation of human dignity associated with imposing the death penalty for murder, the approach of the four members of the court referred to above is to be welcomed. Nevertheless, we submit that the interpretive approach of Chaskalson P is particularly effective where the conduct complained of raises issues both under s 10 and under another, more specific, fundamental right. Where a more specific right speaks with greater direction to the issue raised, it is submitted that s 10 will add interpretive flesh to the bones of the more specific right, assisting in the definition of the latter’s scope. This approach accords due importance to the protection of human dignity as a founding constitutional value, and utilizes its entrenchment as a tool for affording a purposive interpretation to the content of the right more directly implicated by the conduct at issue. Nevertheless, this approach avoids the potential pitfalls of the most expansive available interpretation of the scope of s 10.\(^3\)

(b) Corporal punishment

Section 294 of the Criminal Procedure Act 51 of 1977 permitted the administration of corporal punishment to juvenile males under certain circumstances.\(^4\) Juvenile whipping may be inflicted at the instance of the state, up to a maximum of seven strokes, administered over the buttocks, which may be covered with normal attire. A parent or guardian may be present.\(^5\)

The constitutionality of s 294 was challenged in the Constitutional Court in *S v Williams & others*\(^6\) on the grounds, *inter alia*, that juvenile whipping violated s 10.\(^7\) The applicants argued that the circumstances under which juvenile whipping was administered, including the intentional infliction of physical pain by a stranger at the instance of the state, violated the dignity of both the juvenile and the person administering the whipping.\(^8\) Langa J, writing

\(^{1}\) 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC): Langa J at para 216; Mahomed J at paras 271–2; Mokgoro J at para 317; O'Regan J at paras 327–37.

\(^{2}\) *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 272: ‘Very arguably the dignity of all of us, in a caring civilization, must be compromised by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the conduct of the offender in the first place . . .’

\(^{3}\) It reflects, in our view, the approach adopted by the majority of the Constitutional Court in *Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC).

\(^{4}\) Section 294(1)(a) provides: ‘If a male person under the age of twenty-one years is convicted of any offence . . . the court convicting him may, in lieu of any other punishment, sentence him to receive in private a moderate correction of a whipping not exceeding seven strokes, which shall be administered by such person and in such place and with such instrument as the court may determine.’

\(^{5}\) Section 294(1)–(3).

\(^{6}\) 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC).

\(^{7}\) The applicants also alleged that s 294 of the Criminal Procedure Act 51 of 1977 violated IC ss 8, 11 and 30. *S v Williams* is discussed further in this volume above, Kentridge ‘Equality’ ch 14; below, Van Zyl Slab ‘Sentencing and Punishment’ ch 28; below, Pantazis ‘Children’s Rights’ ch 33.

\(^{8}\) 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 17.
for a unanimous court, held, *inter alia*, that s 294 infringes the right to human dignity.\(^1\) The judge also noted the growing international consensus that judicial whipping offends notions of decency and human dignity, and that corporal punishment has been abolished in many democratic societies.\(^2\) Nevertheless, Langa J specifically avoided dealing definitively with the subject of corporal punishment in schools.\(^3\) In finding that s 294 also violated IC s 11(2), which prohibits cruel, inhuman or degrading treatment or punishment, Langa J referred with approval to US case law which bases the prohibition against cruel and unusual punishment, contained in the Eighth Amendment to the US Constitution, upon the importance of human dignity.\(^4\) The judge then made explicit the connections between juvenile whipping, cruel, inhuman or degrading punishment, and violation of human dignity.\(^5\)

**HUMAN DIGNITY**

\(^{(c)}\) **Imprisonment and detention**

The constitutional validity of s 276(1), as read with s 283(1), of the Criminal Procedure Act 51 of 1977, permitting the imposition of a sentence of life imprisonment, was considered by the Namibian Supreme Court in *S v Tcoeib*.\(^6\) The court noted that the sentence of life imprisonment was not a mandatory, but rather a discretionary, sentence. Nevertheless, the court held that a sentence of life imprisonment implicates the constitutional right to dignity entrenched in art 8(1) of the Namibian Constitution. In order for such a sentence to be demonstrably justifiable the court required that there be a ‘realizable expectation of release, adequate to protect the prisoner’s right to dignity, which must include belief in, and hope for, an acceptable future for himself’.\(^7\) Irreversible and permanent confinement, irrespective of future circumstances, would not be constitutionally sustainable.

The relevant sections of the Criminal Procedure Act, read together with the provisions of the Prisons Act of 1959 relating to the treatment of prisoners, the system of release on parole and the granting of executive pardons, were held to constitute ‘a sufficiently concrete and fundamentally realizable expectation of release’. Consequently the court concluded that life

\(^{1}\) 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 53. Langa J went on to conclude at para 92 that s 294 could not be saved by IC s 33(1).
\(^{2}\) 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at paras 39–40.
\(^{3}\) Note that s 23 of the Gauteng School Education Act 1995 abolishes corporal punishment in all state schools in the province. The constitutionality of that Act was upheld by the Constitutional Court in *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the School Education Bill 1995 (Gauteng)* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC).
\(^{4}\) 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at paras 28–9. See also *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 57 (Chaskalson P).
\(^{5}\) 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 89: ‘Corporal punishment involves the intentional infliction of physical pain on a human being by another human being at the instigation of the State. This is a key feature distinguishing it from other punishments … The objective must be to penetrate the levels of tolerance to pain; the result must be a cringing fear, a terror of expectation before the whipping and acute distress which often draws involuntary screams during the infliction. There is no dignity in the act itself, the recipient must struggle against himself to maintain a semblance of dignified suffering or even unconcern; there is no dignity even in the person delivering the punishment. It is a practice which debases everyone involved in it.’
\(^{6}\) 1996 (1) SACR 390 (NsS), 1996 (7) BCLR 996 (NsS).
\(^{7}\) *Per* Mahomed CJ at 399h.
imprisonment as a sentence was not per se unconstitutional, nor was its imposition unconstitutional in this particular case because it was not grossly disproportionate to the severity of the crime committed.¹

In Johnson v Minister of Home Affairs & another² the court held the detention, without charge, of an alleged illegal immigrant for over a year was an unlawful infringement of the dignity right.

(d) Public reputation

At its most basic the concept of dignity embraces subjective feelings of self-worth or self-respect, the freedom from contempt, ill-will or ridicule, and the protection of bodily integrity.³ Our common law recognizes actions for insulting words,⁴ contemptuous behaviour,⁵ wrongful deprivations of liberty,⁶ including wrongful arrest,⁷ and invasions of privacy.⁸ Depending upon the circumstances, these harms may fall within the scope of the constitutional right to protection of human dignity.

The scope of s 10 may also be wide enough to incorporate the protection of public reputation. Whether or not reputation falls within the scope of the right has an important bearing on the continuing validity of the principles motivating the common law of defamation. Roman and Roman-Dutch law drew a distinction between the separate concepts of dignitas (dignity) and fama (reputation). The former was protected by the law governing actions for injuria, while the latter was protected by the law governing actions for defamation.⁹ This distinction suggests that the protection of public reputation might not be encompassed by a right to dignity. Indeed, this was the conclusion reached by McLaren J in Potgieter en ‘n ander v Killian.¹⁰ In Gardener v Whitaker, on the other hand, Froneman J was of the view that the

¹ S v Tcoeib (supra) at 402d–i (SACR).
² 1997 (2) SA 432 (C) at 437C–D.
³ See, for example, Mabuso v Felix 1981 (3) SA 865 (A) at 875–6.
⁴ See, for example, Minister van Polisie v Mbilini 1983 (3) SA 705 (A) at 715–16; Bester v Calitz 1982 (3) SA 864 (O) at 871–4.
⁵ See, for example, Roswell v Union Club of SA (Durban) 1985 (2) SA 162 (D).
⁶ See, for example, Birch v Johannesburg City Council 1949 (1) SA 231 (T).
⁷ See, for example, Tsose v Minister of Justice 1951 (3) SA 10 (A) at 17; Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 820.
⁸ O’Keefe v Argus Printing and Publishing Co Ltd 1954 (3) SA 244 (C).
⁹ In the recent case of Argus Printing & Publishing Ltd v Esselen’s Estate 1994 (2) SA 1 (A), in which the Appellate Division was concerned with an action for defamation, Corbett CJ pointed to this distinction at 23D–H:

‘The classic statement of the law on this topic appears in Melius de Villiers’s The Roman and Roman-Dutch Law of Injuries (1899) at 24, and reads as follows: “The specific interests that are detrimentally affected by the acts of aggression that are comprised under the name of injuries are those which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation. By a person’s reputation is here meant that character or moral or social worth to which he is entitled amongst his fellow-men; by dignity that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is so exposed to ill-will, ridicule, disesteem or contempt.”’

¹⁰ See also in this regard Minister of Police v Mbilini 1983 (3) SA 705 (A) at 715G–16A; Jacobs en ‘n ander v Waks en andere 1992 (1) SA 521 (A) at 542C–E; Argus Printing & Publishing Company Ltd v Inkatha Freedom Party 1992 (3) SA 579 (A) at 585E–G.

1996 (2) SA 276 (N), 1995 (11) BCLR 1498 (N) at 3131–316C.
right to human dignity in s 10 was broader than the Roman-Dutch concept of *dignitas*. As Froneman J points out, correctly in our view, there is no reason why rights of reputation should not be included within the right to dignity. Consequently the protection of reputational interests falls within the scope of s 10. This accords with the injunction of Kentridge AJ that `[c]onstitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law'. Several cases have considered how public reputation is to be protected by s 10 in the context of the law of defamation. Here the issue is how to balance protection for dignity against the competing fundamental right to freedom of expression. The direction in which the common law of defamation will ultimately develop is not yet clear. A fundamental and welcome restatement of the common law in this area was made by the Supreme Court of Appeal in its landmark judgment in *National Media Limited & others v Bogoshi*. A unanimous court affirmed the view that the right to reputation forms part of the dignity of the individual. Nevertheless, the court overruled previous authority which held the media strictly liable for the publication of defamatory matter. It held that media defendants could raise as a defence to defamation actions the reasonableness of the publication and the absence of negligence, and the court emphasized that dignity was not to be viewed as more important than freedom of expression. The latter was an ‘equally important’ right. This decision and others exploring the interaction between the right to reputation and the right of freedom of expression in the context of the common law of defamation are considered elsewhere in this volume.

1 1995 (2) SA 672 (E) at 690G-H, 1994 (5) BCLR 19 (E): ‘The right to respect for and protection of human dignity in s 10 of the Constitution is one that also appears in international human rights instruments and seems to encompass something broader than the Roman-Dutch concept of *dignitas* . . . As has been seen, the right to one’s good name and reputation has been interpreted in Germany as forming part of the right to human dignity. Having regard to the venerable ancestry of the right to a good name and reputation, I can see little reason why the same approach should not be adopted in South Africa . . .’. The judgment by Froneman J was criticized in *Potgieter en ’n ander v Kilian* 1996 (2) SA 276 (N), 1995 (11) BCLR 1498 (N). At 313F–J McLaren J based his conclusion regarding the exclusion of reputation from the scope of s 10, at least in part, on the view that if words used in legislation were unclear, but had a clear meaning in the common law, the common-law meaning had to be given to those words. This approach conflicts with that adopted by Kentridge AJ in *S v Zuma & others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (SA) at para 15. Later McLaren J concluded, at 316B–E, that protection did not need to be extended to reputation under s 10 because, although the state had in the past violated the dignity of people in the application of government policy, its organs did not defame people in the ordinary course. In our view, this perspective of our history is open to question. Cf the judgment of Cameron J in *Holomisa v Argus Newspaper Limited* 1996 (2) SA 588 (W) at 598E–F, where the judge appears to assume that the protection of reputation is part of the s 10 right to dignity.

2 The approach of Froneman J in this respect has been confirmed in a number of subsequent judgments. See for example *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W), 1996 (6) BCLR 836 (W); *Bogoshi v National Media Ltd & others* 1996 (3) SA 78 (W), McNally v M and G Media (Pty) Ltd & others 1997 (4) SA 267 (W), 1997 (6) BCLR 818 (W); *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C), 1997 (4) BCLR 80 (C).


4 In addition to *Gardener v Whitaker*, see *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W), 1996 (6) BCLR 836 (W); *Bogoshi v National Media Ltd & others* 1996 (3) SA 78 (W), McNally v M and G Media (Pty) Ltd & others 1997 (4) SA 267 (W), 1997 (6) BCLR 818 (W); *Mangope v Asmal & another* 1997 (4) SA 277 (T); *Afrika v Metzler & another* 1997 (4) SA 531 (Nm); *Hall v Welt & others* 1996 (4) SA 1070 (C); *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C), 1997 (4) BCLR 80 (C).


6 *Pakendorf en andere v De Flamingh* 1982 (3) SA 146 (A).


8 See below, Marcus & Spitz ‘Freedom of Expression’ § 20.8/6.
(e) Criminalization of sodomy

The common-law offence of sodomy was defined as ‘unlawful and intentional sexual intercourse per anum between human males’. Consent did not deprive the act of unlawfulness and so both parties could be guilty of committing the crime.\(^1\) In *National Coalition for Gay & Lesbian Equality v Minister of Justice*\(^2\) the Constitutional Court declared the common-law offence to constitute an infringement of the right to human dignity. Given the extent of the injury and damage caused to individuals, communities and society as a whole by the criminalization of sodomy, the court’s declaration that the common-law offence of sodomy is constitutionally invalid and its affirmation of sexual difference warrant full quotation:

‘The common-law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of s 10 of the Constitution.’\(^3\)

17.5 LIMITATIONS ON SECTION 10

The most obvious implication of the application of IC s 33(1) and FC s 36 to the right of dignity is that this right will now have to compete for protection with all of the other rights enumerated in the Bill of Rights. Clashes between fundamental rights will require resolution not at the first stage of defining the scope of the right, but as part of the balancing of interests contemplated by the limitation clause. Except for the limited hierarchy of levels of justification established by the limitation clause in the interim Constitution, neither the interim nor the final Constitution contains an express hierarchy of individual rights.\(^4\)

In *S v Makwanyane & another* the Constitutional Court held that s 277(1)(a) of the Criminal Procedure Act 51 of 1977 could not be saved by IC s 33(1).\(^5\) Chaskalson P balanced the destruction of life and dignity, the elements of arbitrariness, the possibility of error and

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2 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC).
3 Section 33(1)(a)(ii). The right to dignity is afforded greater protection than certain of the other rights in IC Chapter 3 because *prima facie* infringements of s 10 will only be constitutional where they are shown not merely to be reasonable but also to be necessary.
4 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 146. For a discussion of the court’s analysis under s 33(1), see above, Woolman ‘Limitation’ ch 12.
the existence of severe alternative punishments to capital punishment, on the one hand, with
the argument for deterrence and the public demands for retributive justice, on the other. He
concluded that the requirements of the limitation clause had not been satisfied. Accordingly,
the statutory provision was an unconstitutional violation of IC s 11(2).¹

In its efforts to justify juvenile whipping under the limitation clause the state put forward
two arguments in S v Williams & others.² First, that the punishment made good practical
sense, particularly in view of the shortage of resources available for the implementation of
other sentencing options. Secondly, that juvenile whipping was a powerful deterrent. Before
rejecting both justifications the court emphasized the stringent requirements that would have
to be satisfied before the rights in question could be limited.³ Langa J was unwilling to accept
that the price to be paid for the absence of adequate mechanisms to deal with juveniles could
justify subjecting them to juvenile whipping. In his view the fact that the process enabled
juvenile offenders to get the punishment ‘over and done with’ was insufficient justification
for a practice that involved such serious violations of human dignity. In any event, the judge
held that appropriate sentencing alternatives were indeed available and should be further
developed by the state.⁴ With respect to the second argument, deterrence was held to be a
legitimate objective which aimed to address pressing and substantial concerns. However, the
means employed to further this objective were not justifiable. Whatever the capacity of
juvenile whipping to deter crime, it did not appear to be any greater than the deterrent effect
of other punishments and its brutalizing effect was unjustifiable.⁵ Consequently the practice
of juvenile whipping could not be shown to be reasonable, necessary and justifiable.⁶

In measuring the criminalization of consensual sodomy against the requirements of the
limitation clause in National Coalition for Gay & Lesbian Equality v Minister of Justice
the Constitutional Court emphasized the severe limitation imposed by the sodomy offence
on a gay man’s privacy, dignity and freedom. It noted that no valid purpose for the
common-law crime had been suggested. The court concluded that ‘[t]he enforcement of
the private moral views of a section of the community, which are based to a large extent on
nothing more than prejudice, cannot qualify as such a legitimate purpose’ and that there was
no justification for the limitation.⁷

¹ S v Makwanyane at paras 145–6.
² 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 61.
³ At para 76.
⁴ At paras 62–3, 78–9 and 73–5.
⁵ At para 84.
⁶ At para 91.
⁷ 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 37.